

Statutory Review of the *Bail Act 2013* (NSW)

Legal Aid NSW submission to
Department of Justice

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Legal Aid 
NEW SOUTH WALES

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About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 29 Women's Domestic Violence Court Advocacy Services.

The Criminal Law Division assists people charged with criminal offences appearing

before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority and the Drug Court.

The Children's Legal Service (CLS) of Legal Aid NSW advises and represents children and young people under 18 involved in criminal cases and Apprehended Violence Order applications in the Children's Courts.

Legal Aid NSW welcomes the opportunity to make a submission to the Department of Justice in relation to the statutory review of the *Bail Act 2013* (NSW). Should you require any further information, please contact

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Introduction

Legal Aid NSW welcomes the opportunity to contribute to the statutory review of the *Bail Act 2013* (NSW) (**Bail Act**). Legal Aid NSW considers that the statutory review should be guided by the fundamental principle that everyone has the right to liberty.¹ The *International Covenant on Civil and Political Rights* provides that ‘it shall not be the general rule that persons awaiting trial shall be detained in custody’² and everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law.³

The statutory review is taking place at a time when the number of people on remand in NSW is at a record high. The NSW adult prison population increased by 13 per cent in the two years to March 2017, with most (59 per cent) of the increase in the last 12 months relating to remand prisoners. All of the growth in the Indigenous prison population has been for remand prisoners.⁴ In contrast, recorded crime in most categories of violent and property crime are at their lowest rates for 25 years.⁵

Many people who are on remand are later found to be not guilty, or receive a non-custodial sentence. Galouzis and Corben examined a cohort of 976 inmates remanded to custody in March 2011. Of these, 10 per cent were acquitted and 26 per cent received a community-based sentence. Only 53 per cent received a custodial sentence.⁶

As the NSW Law Reform Commission (**NSW LRC**) said,

*It is a matter of concern that many people who are not found guilty of any offence are imprisoned for even a short period of time, let alone until the proceedings are finalised. While this is undoubtedly an inevitable feature of even the most fair and reasonable system of pre-trial detention, in individual cases it is hard to see it as anything other than unjust.*⁷

The NSW LRC also reported that in 2010, ‘more than 500 adults and almost 100 young people, who were on remand when the proceedings were finalised, were not found to be guilty of any offence’.⁸ In the same year, ‘more than 2000 adults and almost 200 young

¹ *International Covenant on Civil and Political Rights* article 9(1).

² *International Covenant on Civil and Political Rights* article 9(3).

³ *International Covenant on Civil and Political Rights* article 14(2).

⁴ Bureau of Crime Statistics and Research ‘NSW Custody Statistics: Quarterly update March 2017’ http://www.bocsar.nsw.gov.au/Pages/bocsar_media_releases/2017/mr-NSW-Custody-Statistics-Quarterly-update-March-2017.aspx Accessed 5 December 2017.

⁵ Derek Goh and Stephanie Ramsey, *An update of long-term trends in violent and property crime in New South Wales: 1990–2015* Bureau of Crime Statistics and Research Issues Paper 115.

⁶ Jennifer Galouzis and Simon Corben *Judicial outcomes of remand inmates in New South Wales* October 2016, Corrective Services NSW Research Bulletin No 34. Ten per cent received ‘other’ judicial outcomes.

⁷ New South Wales Law Reform Commission (**NSW LRC**) *Bail* [5.26].

⁸ NSW LRC *Bail* [5.24].

people who were found guilty and were on remand when the proceedings were finalised did not receive a custodial sentence'.⁹

The NSW LRC examined the potential consequences of imprisonment, including:

- assaults and deaths in custody
- financial implications
- loss of employment and the stigma of imprisonment which can compromise re-employment
- a risk of homelessness and loss of possessions
- the grief and trauma of parental incarceration on children
- criminogenic effects, that is, prisons as 'schools of crime'.¹⁰

For remandees, there are difficulties preparing for and participating in a trial.¹¹

Legal Aid NSW considers that the continued increase in the number of people on remand should be addressed as a matter of urgency. It is our submission that changes should be made to the Bail Act which would ensure that bail decisions are made based on the risk that the person will fail to appear, commit further offences or interfere with witnesses. Changes should also be made to avoid the imposition of unnecessary and onerous conditions on people granted bail. This would address two of the four drivers of the growth in the remand population identified by the Bureau of Crime Statics and Research (**BOCSAR**); that is, an increase in the likelihood of bail refusal and an increase in the number of persons proceeded against by police for breach of bail.¹² Our comments on specific provisions of the Bail Act follow.

Bail and Aboriginality

The Bail Act currently requires bail authorities to consider 'any special vulnerability or needs the person has including being an Aboriginal or Torres Strait Islander person'.¹³ In our experience, this section is generally not relied on by lower courts in NSW to grant

⁹ NSW LRC *Bail* [5.28].

¹⁰ NSW LRC *Bail* [5.7]-[5.22].

¹¹ NSW LRC *Bail* [5.38]-[5.41].

¹² Don Weatherburn et al 'Why is the NSW prison population still growing? Another look at prison trends between 2011 and 2015' (2016) Bureau of Crime Statistics and Research Issue Paper No 113.

¹³ Section 18(1)(k).

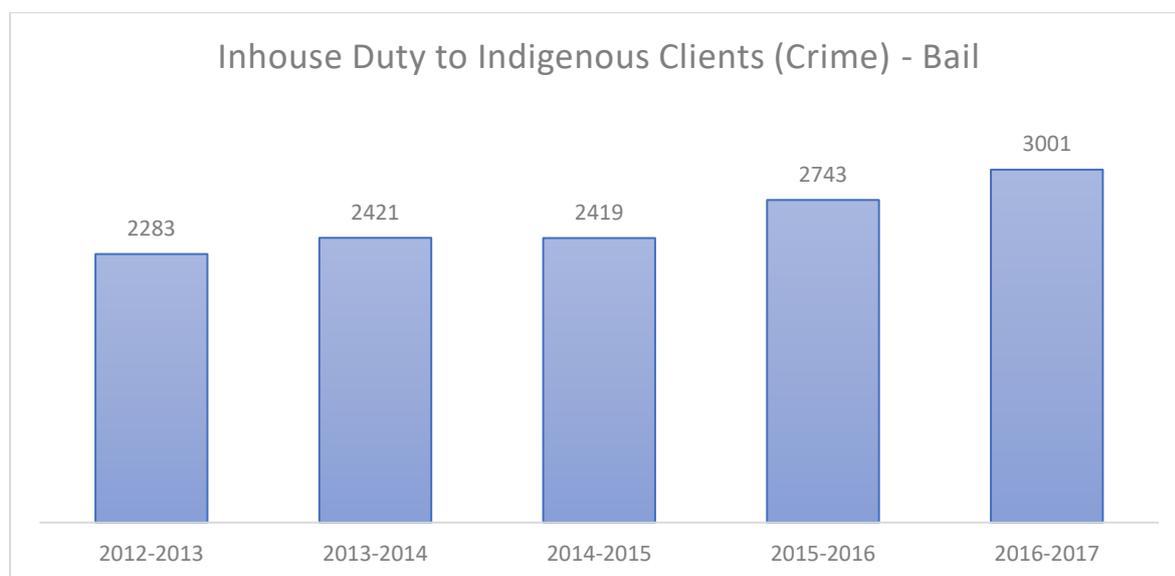
bail.¹⁴ The provision does not adequately ensure that a person’s cultural background, ties to family and place, and cultural obligations are taken into account when bail is determined.

Bail conditions that do not take into account such factors can mean that an Aboriginal person is unable to comply with both the bail conditions and their cultural obligations. For example, bail conditions often fail to take into account the mobility of Aboriginal people, who are likely to have family connections in more than one town.

Non-association orders can be especially problematic for Aboriginal people, because of the importance of extended family in Aboriginal culture. These orders can restrict contact with family networks, preventing Aboriginal people from maintaining relationships, performing responsibilities to family members, or attending funerals.¹⁵ Breach of conditions can lead to arrest and revocation of bail, and will be considered in any future consideration of bail.¹⁶

As indicated in Figure 1, services provided by Legal Aid NSW lawyers to Aboriginal clients in bail matters have increased in the last five years by 31 per cent.¹⁷

Figure 1: Legal Aid NSW service provision to Aboriginal and Torres Strait Islander clients



¹⁴ Note however two decisions of the Supreme Court of NSW where initial decisions to refuse bail have been overturned, including by reference to the defendant’s Aboriginality: *R v Alchin*, NSWSC, McCallum J, 16 February 2015 and *R v Wright*, NSWSC, Rothman J, 7 April 2015.

¹⁵ NSW Law Reform Commission Bail (2012) [11.54].

¹⁶ Bail Act 2013 (NSW) s 18(1)(f).

¹⁷ From 2,283 in 2012-13 to 3,001 in 2016-17.

In light of this trend and the concerns identified above, Legal Aid NSW supports the recent proposal of the Australian Law Reform Commission for the introduction of a standalone provision in the Bail Act to require 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.¹⁸ Such a provision should be placed in a separate section to give it more prominence. Rather than addressing 'vulnerability and needs', as the current section 18(1)(k) does, this proposed provision would prompt bail authorities to take into account other aspects of Aboriginality, which are potentially strengths.

Review of bail on first appearance

Legal Aid NSW considers that the Bail Act should provide that, on the first appearance by a person before a court in relation to proceedings, the court must hear any application for an order to release the person or to remove or vary any condition or conduct requirement, without requiring notice of the application to the prosecutor.

The NSW LRC recommended that the Bail Act should contain this provision, because 'the first appearance marks the commencement of the judicial process and provides the first opportunity for a judicial determination of such restrictions on freedom of action'.¹⁹

Legal Aid NSW has observed that police bail sometimes includes conditions that are excessively onerous and are not necessary to address risk. As the case study below demonstrates, some judicial officers require notice of an application to vary to be given to the police or the Director of Public Prosecutions (**DPP**). However, such notice is not practicable, as our solicitors usually meet the defendant for the first time on the day of first appearance. Giving notice on that day would mean that the defendant, their representative and the prosecution would have to make a further appearance in court, creating inconvenience and expense.

Case Study: Ivan

A Legal Aid NSW solicitor recently represented a man with a mental illness at his first appearance. He had been charged with a summary offence. His address was known to police and in his solicitor's view there was minimal risk of non-attendance. He had been diverted into treatment in the past. However, his police bail included a requirement for daily reporting, which was onerous, particularly in light of his disability, and did not appear to address an identified bail concern as required by section 20A of the Bail Act. The court refused to hear an application to vary the conditions as the police were not on notice of the application.

¹⁸ Reflecting section 3A of the Bail Act 1977 (Vic). See further, Legal Aid NSW submission to the Australian Law Reform Commission's Inquiry into Incarceration Rates of Aboriginal and Torres Strait Islander Peoples (September 2017).

¹⁹ NSWLRC *Bail* [18.76].

Legal Aid NSW has particular concerns about onerous and unnecessary conditions in police bail for children and people with mental illness and cognitive impairments. Such conditions can have a particularly harsh effect as they may be inadvertently breached, exposing the person to breach proceedings and the risk of detention even where the alleged offence is minor and does not warrant a custodial penalty. A history of non-compliance with bail conditions is also a consideration under section 18 of the Bail Act (matters to be considered as part of the bail assessment); it is therefore important that the court review police bail conditions and ensure that they are reasonable.

Show cause provisions

Legal Aid NSW considers that amendments should be made to the show cause provisions of the Bail Act. In our view, the show cause provisions in sections 16A and 16B of the Bail Act place unwarranted emphasis on the offence with which the person has been charged, rather than what may be more relevant factors listed in section 18 of the Bail Act. We consider that the unacceptable risk test is an appropriate mechanism to guide bail authorities in making bail decisions. However, the effectiveness of this test is undermined by shifting the focus of the bail decision from a comprehensive risk analysis in each case to a focus on particular categories of 'show cause' offences, which require the defendant to show cause why his or her detention is not justified.

Despite BOCSAR research indicating otherwise,²⁰ our solicitors have observed an increased rate of bail refusals since the show cause provisions commenced in January 2015, particularly in certain courts. In our experience, the show cause provisions of the Bail Act have reintroduced the complexity that was removed when the convoluted system of presumptions against bail was abolished in 2013.

Legal Aid NSW is particularly concerned about the inclusion of 'a serious indictable offence that is committed by an accused person while on bail or parole' in the list of show cause offences (section 16B(1)(h)). The definition of 'serious indictable offence' is very broad. It includes any offence punishable by five years or more, including larceny, damage property, stalk/intimidate and stealing a motor vehicle. This means that a person bailed for a minor offence, if subsequently charged with stealing from a shop, will be bail refused unless they can show that their detention is not justified.

Legal Aid NSW considers that judicial officers should be required to take a consistent approach in relation to all bail applications: there should be a presumption in favour of liberty, and an accused person should be released if, after an assessment of any bail concerns, there are no unacceptable risks of the person failing to appear, committing a

²⁰ A Bureau of Crime Statistics and Research study found that the new Bail Act and the show cause provisions (combined) did not have an effect on the proportion of all defendants refused bail: Thorburn, H. *A follow-up on the impact of the Bail Act 2013 (NSW) on trends in bail* (2016) Bureau Brief No. 116 Bureau of Crime Statistics and Research.

serious offence, endangering others or interfering with witnesses or evidence, or if those risks can be addressed by the imposition of bail conditions.

In the alternative, we consider that section 16B(1)(h) should be amended to refer to a person charged with a strictly indictable offence, rather than a serious indictable offence. The provision would then be less likely to inadvertently capture minor offending. If a person is charged with a serious indictable offence, this would still be a matter to be considered under section 18(1)(b) of the Bail Act (the nature and seriousness of the offence), but the rigidity of the show cause approach would be avoided.

The show cause requirements can create unjustifiable disparity in bail outcomes between alleged co-offenders. They can also create perverse incentives to plead guilty. Both of these consequences occurred in the case of Clayton, outlined below.

Case Study: Clayton

Clayton was charged with robbery in company, for being with the alleged principal offender when the principal assaulted and robbed one of his associates. Clayton was on parole for an unrelated matter and did not have any family support which could help address risk. He was not able to show cause and was refused bail. The principal offender was granted bail.

Clayton had an arguable defence and his solicitor advised him to take the matter to trial. However, because he had been refused bail and faced a significant delay before having his matter heard in the District Court, on being offered the opportunity to plead to a lesser charge, he took it. When the case came up for sentencing in the Local Court, the Court found that his role was marginal and sentenced him to a term of imprisonment, which had already expired due to his time spent on remand. Had he been on bail he may have received a non-custodial sentence. Alternatively, he may have taken the matter to trial and been found not guilty.

Legal Aid NSW acknowledges that robbery in company can be a serious offence. However, as with many 'serious indictable offences', a range of criminality can be included in the offence, and in a particular case, the criminality involved may be minor. However, the 'show cause' provisions require bail authorities to place potentially excessive weight on the offence charged.

Show cause when subject to a warrant

The show cause requirement in section 16B of the Bail Act applies when a person is charged with a serious indictable offence committed while being subject to an arrest warrant (section 16B(1)(l)). This provision was inserted in December 2016. It has had the unexpected consequence of extending the show cause test to a person who fails to attend court for an underlying offence for which they are not subject to bail. Given there may be a variety of sound reasons why an arrest warrant may be issued which do not give rise to any increased bail risk (such as where a defendant is too unwell to attend court), we

suggest that the relevance of a warrant would preferably be considered as part of the court's assessment of bail concerns under section 18 of the Bail Act rather than as part of the show cause test.

Repeat applications

In the experience of Legal Aid NSW solicitors, the prohibition on repeat applications for bail in section 74 of the Bail Act has resulted in bail applications becoming longer and more complex. Lawyers are aware that this may be their client's only opportunity to seek bail in the Local Court. They therefore make lengthy and detailed applications. Where the accused is charged with a strictly indictable offence, the parties are making submissions regarding the strength of the case with reference to large portions of the brief of evidence.

As bail applications become more detailed and time consuming, Legal Aid NSW solicitors are encountering listing delays as the courts are having increasing difficulty accommodating these applications. At times, the arguments regarding section 74, and whether the applicant has demonstrated that there are grounds for a further release application under section 74(3), can be just as time consuming as the actual bail application itself. When coupled with the listing delays in the District Court, a person may have to wait weeks to have a bail application heard, only to be refused on section 74 grounds. As the following case study demonstrates, the barrier to making a second or further bail application can result in an extended period of remand for a person who is unlikely to receive a custodial penalty.

Case Study: Stephanie

Stephanie was charged with ongoing supply of prohibited drug. It was the first time she had been charged with an offence, and she was the full time carer of a two year old child. She was refused bail on her first appearance (when she was not represented by Legal Aid NSW).

When the matter came to Legal Aid NSW, her solicitor reviewed the file and noted that while the offence was strictly indictable, it was unlikely that she would receive a full time custodial sentence. However, a further bail application was precluded by section 74. Her solicitor contacted the Office of the Director of Public Prosecutions (ODPP), who now had carriage of the matter. The ODPP lawyer conceded that Stephanie was unlikely to receive a full time gaol sentence. With his consent, the matter was relisted immediately, and the prosecution consented to bail.

Stephanie is now in a residential rehabilitation facility, which was easier to access while on bail rather than on remand. Without the cooperation of the ODPP she would have spent much longer waiting to be assessed for rehabilitation and for the hearing of the Supreme Court appeal.

Legal Aid NSW considers that Recommendation 19.1 of the NSW LRC should be implemented. That is, two applications to the court should be allowed before the prohibition applies.²¹ The courts should have discretion to refuse to hear frivolous or vexatious applications, and those that are ‘without substance or have no reasonable prospect of success’.²² The NSW LRC noted that there was ‘no evidence that the courts are in need of protection from what would otherwise be a burden of wasteful repeat applications’.²³

Implementation of the recommendation could reduce remand rates: in our experience, lawyers sometimes advise their clients to delay making a bail application until every bail consideration can be addressed. Allowing two applications could also save court time, as lawyers would not feel obliged to address every bail consideration, including the strength of the Crown case, in such detail. If the first application fails, the lawyer would have the opportunity to address the concerns identified by the court in a second application.

Repeat applications and children

The NSW LRC *Bail* report describes the special situation of young people when applying for bail. They have usually committed minor or property offences. They often do not fully comprehend the criminal justice system and their own situation. They may take time to develop trust and confidence in their lawyer. As the NSW LRC said,

This may compromise the young person’s ability to provide cogent instructions and to participate in the court process in an effective way. These factors may diminish over time, but would not necessarily resolve completely after one or two applications for release.

Apart from these practical considerations, the concern of the state for the welfare of young people is fundamental. A heavy burden accordingly rests on those who argue for a statutory provision which might prevent a case for release being put on behalf of a young person, especially in circumstances where the young person is entitled to the presumption of innocence.²⁴

Legal Aid NSW considers that young persons should be entirely exempt from the prohibition on repeat applications, as recommended by the NSW LRC.²⁵ The courts would retain their discretion to refuse to hear frivolous or vexatious applications.

²¹ NSW LRC *Bail* Recommendation 19.1.

²² NSW LRC *Bail* Recommendation 19.1.

²³ NSW LRC *Bail* [19.44].

²⁴ NSW LRC *Bail* [19.50]-[19.51].

²⁵ NSW LRC *Bail* Recommendation 19.1.

Inappropriate bail conditions

Legal Aid NSW considers that section 20A of the Bail Act is largely appropriate for securing its objectives, in that it requires a bail condition to be imposed only if the condition is:

- reasonably necessary to address a bail concern
- reasonable and proportionate to the offence for which bail is granted
- appropriate to the bail concern in relation to which it is imposed
- no more onerous than necessary to address the bail concern
- reasonably practicable for the accused person to comply with, and
- there are reasonable grounds to believe that the condition is likely to be complied with.

However, our solicitors observe that courts impose bail conditions such as curfews, place restrictions and daily reporting requirements in circumstances where the conditions do not appear to address specific bail concerns. Some magistrates impose sureties in the absence of demonstrated concerns that the defendant will fail to appear. Sometimes, the imposition of conditions can inhibit efforts to rehabilitate and reintegrate, as the case study of John demonstrates.

Case Study: John

John was charged with supply prohibited drug of over an indictable quantity. He had no criminal history. He was a socially isolated young man, who was enrolled in a master's degree in chemistry. He very rarely left his bedroom in his parent's home, except to attend university. He acquired the drugs over the internet accessed from his personal computer at home, and pleaded guilty to the supply charge on the basis that he was intending to share them with friends. The Crown, instructed by the police, requested a curfew condition which was added to his bail condition. The curfew was an obstacle to his attending evening classes. He had to discontinue studying as a result. It also prevented him from socialising, and put a strain on his family when police did curfew checks. This curfew condition was totally inappropriate, in that it did not address a bail concern and was not reasonably practicable for John to comply with.

Legal Aid NSW acknowledges that, in busy courts, errors will sometimes be made that result in the imposition of bail conditions that are not permitted by section 20A (for example, because they are not reasonably practicable for the accused person to comply with). These errors may be dealt with by way of an application for variation, which requires notice to the prosecutor under section 51. We consider that applications for variation

should be able to be made by the accused person at any subsequent appearance, without notice. The requirement for notice can create a barrier to having these applications heard when, for example, the client does not advise his or her solicitor that the conditions are impractical and onerous until the date of the appearance. Removing the requirement for notice would facilitate prompt correction of error and avoid the expense and inconvenience of scheduling a further hearing.

We also suggest that consideration be given to more judicial education in this area.

Bail enforcement conditions

As with section 20A, section 30 of the Bail Act (concerning enforcement conditions) appears to be appropriate for securing its objectives. Enforcement conditions must specify the kinds of directions that may be given, and the circumstances in which each kind of direction may be given 'in a manner that ensures that compliance with the condition is not unduly onerous'.²⁶ Enforcement conditions can only be imposed if a court considers it reasonable and necessary in the circumstances.²⁷

However, Legal Aid NSW continues to observe bail conditions being enforced in a way that is unduly onerous on both the person and their family, as was the case for Gavin.

Case Study: Gavin

Gavin is an 18 year old Aboriginal young person with an intellectual disability. Legal Aid NSW assisted Gavin's mother. Gavin's original bail included a curfew and a bail enforcement condition providing that his curfew could only be checked five times per week, with a maximum of one check every 24 hours. However, the police came every day, sometimes twice per day, and sometimes police from different police stations came 10 minutes apart. Sometimes they came at 11pm or 3am. This affected everyone in the house, and no-one was getting enough sleep. The police would not accept the mother's assurance that Gavin was in bed, but would go to his bedroom door and shine a light on him.

An application for a bail variation was made and the enforcement condition was removed in March 2017. However, the police continued to come to the house. Legal Aid NSW wrote to the police to remind them that the enforcement condition had been removed, but there was no change in the conduct of the police.

In May 2017 Legal Aid NSW wrote to the police and indicated that they had no licence to attend Gavin's home and that further attendance would amount to trespass. They stopped attending.

During this time, Gavin did not breach his curfew.

²⁶ Bail Act s 30(4)(b).

²⁷ Bail Act s 30(5).

In some cases, compliance with bail conditions can actually place a person at risk. Nevertheless, police do not always exercise appropriate discretion in these circumstances, as was the case for Donna.

Case Study: Donna

Legal Aid NSW received an inquiry from a worker at a support service whose client, Donna, was an Aboriginal woman whose bail condition required her to live at a particular address. Donna was experiencing domestic violence at this address and spoke to police about her intention to live elsewhere. The police officer she spoke to said she would be arrested if she breached her residence condition.

Accommodation and other concerns

Legal Aid NSW solicitors have observed that some young people and people with cognitive impairments are refused bail because of a lack of suitable accommodation.

We support the intention and policy behind section 28 of the Bail Act, regarding the grant of bail with a requirement that suitable arrangements be made for accommodation before the person is released. However, it is not clear that this provision has been working as intended. We have concerns about the way in which it has been applied, particularly in rural areas and by judicial officers who are unfamiliar with the intention behind section 28. A Legal Aid NSW solicitor recently acted for a young person who was granted bail with an accommodation requirement under section 28 by a Children's Court magistrate. When the young person was brought back before a Local Court magistrate two days later, as required by section 28(4), the Local Court magistrate marked the papers 'bail refused'. We consider that this should be dealt with by clarifying the provision, and also by judicial education.

In each of the recent examples below, the court indicated that it was willing to grant bail, but vulnerable individuals were detained because suitable accommodation was not available.

Case Study: Matthew

Legal Aid NSW assisted Matthew, a young man with a cognitive impairment under the care of the Public Guardian. He came to police attention for assaulting the carers and damaging property at his care home. The police facts stated that 'the accused's current [living] arrangementis not adequate and not in the best interests of the accused' and that 'the accused requires more appropriate care and treatment'. Matthew was not considered by Legal Aid NSW or the police to be a risk to the public.

In bail proceedings, the Magistrate indicated that he wanted to grant bail, but Legal Aid NSW was not able to provide a suitable address as we were repeatedly told that no suitable accommodation was available. He spent five months in custody, during which

time the police noted that he needed to have his teddy bear with him. His charges were ultimately dismissed under section 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW).

Case Study: Janet

Legal Aid NSW assisted Janet, a woman with a moderate intellectual disability. She was on bail for various charges, and was living in supported accommodation in the community. She then had an argument with the neighbours and was charged with stalk/intimidation, a show cause offence. She was arrested and refused bail by police. In court, the Magistrate held that cause was shown due to the intellectual disability, and indicated a willingness to grant bail, but only on the condition that the client did not live at the same address.

Because of no other suitable accommodation being available, Janet spent a week in custody waiting for her support workers to find her a new home.

Case Study: Mina

Legal Aid NSW assisted Mina, a 12 year old girl, who came to a regional town in NSW with her family from Iraq as refugees. She has significant trauma-related issues after witnessing family members being murdered by IS, and being sexually abused while in a refugee camp in Turkey.

She assaulted her parents a number of times, and eventually they said she couldn't stay at home. She had no other family or community network in the area, and has been in and out of juvenile detention because of a lack of suitable accommodation.

Legal Aid NSW is concerned that the problems identified in the above scenarios are likely to become more acute with the transition of disability services to the National Disability Insurance Scheme, in particular due to the lack of a provider of "last resort" in NSW. With the move away from the State providing or arranging disability services (including housing and supporting people with disabilities) to a private market approach, Legal Aid NSW is concerned that people with complex disabilities and difficult behaviours may not receive the services they need. They may have NDIS funding for supports and services, but disability service providers are not obliged to provide them.

We suggest that consideration of measures to address this issue should be prioritised by the statutory review and more broadly. As a first step, we recommend that records be maintained of any time when a person with a disability is refused bail due to a lack of suitable alternative accommodation, so that the prevalence of the problem can be accurately scoped.