

'The More Things Change ...': Bail and the Incarceration of Homeless Young People

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Abstract

Homeless young people are being held in remand despite being granted bail because the Department of Community Services cannot or will not find the young person accommodation, and there is no legally enforceable obligation on the Department to do so. This practice is not new. Two rounds of amendments to the *Bail Act 1978* (NSW) sought to steer young homeless people away from remand yet they have failed to have their intended effect. By failing to provide young homeless people with an alternative to detention the NSW Government is in breach of a number of fundamental principles of the criminal law, juvenile justice and child protection, as recognised in the United Nations Convention on the Rights of the Child, and other international human rights instruments. In its much anticipated report, the Special Commission of Inquiry into Child Protection Services in NSW recommends the establishment of bail support schemes similar to those in Victoria and Queensland, but misses the opportunity to recommend law reform which would squarely place the obligation on the state to provide accommodation for these young people.

Introduction

The frustration and exasperation of the Children's Magistrate was palpable. The New South Wales Department of Community Services (DoCS) was again refusing to find accommodation for 'Raymond', a 14-year-old boy who had been granted bail but had nowhere to stay. The words of Children's Magistrate Flood to the Department's lawyers were as follows:

Well give Dr Shepherd [then Director-General of DoCS] my compliments please, indicate to him if you could that the *court will not allow the presumption of innocence to be overridden* by having a young person, fourteen years old, warehoused in a juvenile detention centre. The court will not countenance the mere *warehousing of a homeless youth in a juvenile detention centre*. It is a breach of the declaration of the United Nations Convention on the Rights of the Child; Australia is a signatory to the Convention or to the declaration and it ill behoves courts to ignore that children have rights as declared by the United Nations to which Australia has subscribed ... The fact is, *he has under the Bail Act an entitlement to bail* as recognised ... [by various magistrates on four previous occasions] ... and as recognised by me today. If the condition that he is to reside where directed by the Department of Community Services is ignored by them and

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if the result is that he is warehoused in a detention centre then that is a *breach of the Bail Act and in my view as well a breach of the United Nations Convention*. It is also a failure of the Department of Community Services to properly exercise the discretion imposed upon them to provide or arrange for residential accommodation for a homeless youth. It may be difficult, certainly I won't accept that it's impossible even if it results in expense. It's expensive keeping him at a detention centre but that is not the proper place for him (*Police v 'Raymond'* (2007) [author emphasis]).

Over-crowding in juvenile detention centres in NSW is now well-known, and is due to strict statutory restrictions on bail applications along with increased policing of conditional bail. But there is another group of lesser-known remandees: those who have been granted bail but continue to be remanded in custody because, like 'Raymond', DoCS will not assist them in meeting their bail condition that 'they reside as directed' by the Department. Detrimental to the well-being of young people, this situation is not uncommon, but the true extent of the problem is unknown.

This article explores whether the operation of the *Bail Act 1978* (NSW), the *Children and Young Persons (Care and Protection) Act 1998* and relevant case law place an obligation on DoCS to find accommodation for young people not in their care. However, the lack of appropriate accommodation and bail support services for young homeless people on conditional bail cannot be ignored, whatever the statutory obligations. The article also canvasses options for short-term and long-term accommodation for young people.

Also explored is whether remanding homeless young people in custody breaches the United Nations Convention on the Rights of the Child (as claimed by Children's Magistrate Flood), and other international human rights laws and juvenile justice principles. Focus will be on the following principles of the criminal law, juvenile justice and child protection: the presumption of innocence, the need for proportionate sanctions, the prohibition on arbitrary detention, the notion of detention as a last resort and the state's obligation to protect children. The practice of indefinitely incarcerating homeless young people charged with an offence which may not attract a custodial sentence (and for which they may not even be convicted) stands in stark contrast to the kind of juvenile justice system envisaged by these principles.

Indeed, the practice throws open the entire project of separating the criminal and child protection jurisdictions of the Children's Court. There is a view that DoCS has little or no role to play in the criminal jurisdiction of the Children's Court justified by well-established principles underpinning the separation of the criminal and care jurisdictions of the Children's Court. The principle of separation is derived from the view that children and young people in need of care and protection should not be criminalised, and yet this is exactly what is happening when young homeless people are housed in detention centres.

This article will conclude with a review of the various alternatives for reform to both bail accommodation services and the relevant legislation. Focus will be on the relevant and, it will be argued, limited recommendations contained in the Special Commission of Inquiry into Child Protection Services in NSW (hereafter 'the Wood Inquiry'), in particular its endorsement of the Victorian and Queensland bail schemes. Included in this discussion are relevant submissions to the Wood Inquiry which were not considered in its report. Potential problems with these approaches will be identified. Finally considered are options for reform not found in the submissions to the Inquiry, and how they might induce the NSW Government to provide comprehensive and appropriate bail support and accommodation to homeless young people in contact with the criminal justice system.

Young People in Detention: Is This a Problem?

Children's solicitors and others working with young homeless¹ people have frequently raised the issue of young people being held in detention despite being granted bail, yet the real extent of the problem is unknown (Dambach 2007; Wong 2008). What is known, and openly acknowledged by the NSW Government (ABC News 2009), is that juvenile detention centres in NSW are over-crowded. This is in large part due to the new s22A of the *Bail Act* introduced in late 2007 and to increased policing of breaches of bail conditions. General remand statistics reveal that the remand population is ballooning – a 23% increase since 2003 – while there is a simultaneous contraction in the number of young people in detention following conviction and sentencing (NSW Audit Office 2008). There is also an over-representation of detainees who come from a background of unstable accommodation (Salmelainen 1995:14).

Interestingly, the Department of Juvenile Justice (DJJ), in its latest *Annual Report*, has included for the first time detailed statistics on remandees.² They reveal that less than 20% of young people who spend time in remand go on to receive a custodial sentence (DJJ Annual Report 2007-2008:44). Further, 928 young people were remanded in custody after being granted conditional bail because they were unable to meet the conditions of their bail, a near 50% increase since 2003-04 (DJJ Annual Report 2007-2008: 44). The Annual Report does not mention the *type of bail condition* the young person was unable to meet. However, in its submission to the Wood Inquiry, DJJ advised that in a 'recent review of remand cases' over a period of three months, 95% of those held on remand had received the bail condition to 'reside as directed'. They also advised that in 90% of remand cases, the young person could not meet their bail conditions in the first instance and spent an average of eight days in custody (Special Commission of Inquiry in Child Protection Services in NSW 2008:15.12). According to the *Annual Report*, it is 10 days (Annual Report 2007-2008: 44). It is not clear from these statements whether the sole reason for a young person being remanded in custody was his or her failure to meet the 'reside as directed' bail condition or whether the young person had also failed to satisfy some other condition of bail.

Uncertainty about the extent of the problem prompted the Youth Justice Coalition (YJC) to design and carry out two surveys of bail outcomes for young people.³ Although limited in scope, the survey's findings, once extrapolated, suggest that Parramatta Children's Court might encounter upwards of 50 incidents per year of young homeless people being held in remand despite the magistrate granting them conditional bail (Public Interest Advocacy Centre & Youth Justice Coalition 2009).

¹ In the context of a bail determination the 'homelessness' of a young person may cover a range of different situations. In some cases, the young person has a 'home' but is unable to return to it because of the nature of the alleged offence and/or because of family conflict. In other cases the young person may have been literally living on the street or 'couch surfing' (living temporarily at the homes of friends) when charged with the offence. In all these situations, the children's magistrate will impose as a condition of bail that the young person 'reside as directed by DoCS' if satisfied there is nowhere suitable for the young person to reside whilst on bail.

² The sharp increase in the number of juvenile remandees in NSW is a sensitive topic for the NSW Government. A recent report by the Bureau of Crime Statistics and Research examining this issue has been classified as 'cabinet-in-confidence', the first time a BOCSAR report has not been released publicly. See Horin 2009.

³ The Youth Justice Coalition is a network of youth workers, children's lawyers, policy makers and academics working to promote the rights of children and young people in NSW.

Whatever the frequency and duration of this type of detention, numerous studies reveal that the effects of detention on young people have serious and lasting consequences for their emotional, intellectual and social development (Australian Law Reform Commission 1997: 20.1; Ogilvie & Lynch 2001:334), and their mental health (Holman & Ziedenberg 2006: 8). Moreover, incarceration may contribute to future re-offending. Over 70% of young people who appeared in court before the age of 21 later appeared in the adult courts (Hua et al. 2006:1). Detention is also an expensive option. The average daily cost per young person in detention in NSW is \$541, compared to an average daily cost for community-based orders of \$16 (NSW Audit Office 2008: 198).

Over-representation of Aboriginal and Torres Strait Islander people in juvenile detention continues. In 2008 the 38.8 percent of young people remanded in custody in NSW were Indigenous (NSW Audit Office 2008:198). This is of particular concern given the findings and recommendations of the Royal Commission into Aboriginal Deaths in Custody, the final report of which was published as long ago as 1991.

The Residential Condition of Bail

The *Bail Act* 1978 (NSW) applies to all people taken into custody, regardless of their age (s5). Prior to 1978, bail proceedings in the Children's Court were governed by the *Child Welfare Act* 1939 (Crawford 2005:14). If a young person is taken into police custody and not granted bail they must be held in a detention centre unless it is 'impracticable' (s42A(2) *Children (Detention Centres) Act* 1987 (NSW)). He or she must be brought before the Children's Court as 'soon as is practicable' (s9(1) of the *Children (Criminal Proceedings) Act* 1987 (NSW) (CCPA)). The Children's Court has jurisdiction to hear and determine matters in relation to criminal proceedings if the offence was committed by a person who was under the age of 18 years at the time the offence was allegedly committed and was under the age of 21 years when brought before the Children's Court for the offence (CCPA s28).⁴

The children's magistrate will look to s32 of the *Bail Act* for criteria on granting bail, which applies to both children and adults except where specified. The section sets out exhaustively the criteria to be considered by the court, including consideration of the interests of the accused person if he or she is under the age of 18 years: s32(1)(b)(v). Of particular significance is subs(4) which directs the court to ignore the fact that a young accused is not living with his or her parents when considering the likelihood of absconding. However, it will be a factor in determining what *conditions* to attach to a grant of bail.

Bail should be granted unconditionally, says the legislation, unless the court is of the opinion that one or more conditions should be imposed for the purpose, amongst other things, of reducing the likelihood of re-offending and promoting rehabilitation (s37(1)(d)), a factor which figures prominently in the deliberations of a children's magistrate. Section 36 exhaustively lists the types of bail conditions which may be imposed.

Although a young person's residential status is irrelevant to the determination of bail, this will be a fundamental consideration in the setting of bail conditions. When considering the release of a young person on bail, the children's magistrate will seek information about a

⁴ Despite the language of the relevant statutes, where appropriate the descriptor 'young people' or 'young person' is preferred by the author.

young person's place of residence whilst on bail. If it becomes apparent that the young person cannot return home, or has no home, and that there are no other family members or suitable adults with whom the young person can reside, the magistrate will almost invariably impose one of three types of 'residential condition' – that the young person:

- 'reside as directed by the Department of Juvenile Justice' (NSW Law Reform Commission 2005: 245); or
- 'reside as directed by the Department of Juvenile Justice in consultation with the Department of Community Services' (Cook & Prodigalidad 2004: 26); or
- 'reside as directed by the Department of Community Services' (see *Minister for Community Services v Children's Court of NSW* [2005] at [8]).

The rationale behind using one type of condition rather another is not clear, but it is likely to relate to the age of the young accused. In any case, where the accused is under the age of 16 years, DJJ will notify DoCS (NSW Law Reform Commission 2005: 245), and where DJJ cannot find accommodation they will seek assistance from DoCS. If accommodation is found, the young person is released and accompanied there by a DJJ officer. But where accommodation is not found, the young person will remain in detention until such time as a placement is found, the residential bail condition is removed (and the young person released), or until the hearing.

The power to impose a residential condition is found in s36(2)(a), whereby a magistrate may impose a condition that the accused enter into an agreement to reside in bail accommodation. The Supreme Court has held that the power to impose a residential condition is not subject to obtaining DoCS' consent under s74 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (hereafter the 'Care Act'): *Minister for Community Services v Children's Court of NSW* at [38]. However, the requirement in s 36(2B) that the Minister for Corrective Services 'ensure that adequate and appropriate accommodation for persons on bail is available for the purposes of the placement of persons on bail' is not extended to DJJ or DoCS. The history of amendments to the *Bail Act* aimed at steering young homeless people away from detention is discussed in more detail later in this article.

DoCS and Obligations

As we have seen, there is nothing in the *Bail Act* which obliges either DJJ or DoCS to find accommodation for a young person who has been granted bail. In this section, the power of the Children's Court to order DoCS to find accommodation and the obligation of DoCS under the Care Act are considered.

Under s15 of the *Children's Court Act 1987* (NSW), the court 'may, in relation to all matters in respect of which it has jurisdiction, make such orders, including interlocutory orders, as it thinks appropriate'. This section was considered in *George v Children's Court of NSW*, which held that:

[T]he Children and Young Persons (Care and Protection) Act 1998 provides exclusively and exhaustively for the relief the Children's Court may order arising out of obligations imposed on the Director-General (and the Minister) by that Act, and that Act imposes limitations on the power of the Children's Court to grant such relief (*George v Children's Court of New South Wales* [2003] at [138]).

This finding severely limits the power of the Children's Court to specifically direct DoCS in any of its actions, including directing it to find accommodation for a young person, and this was confirmed in the two Supreme Court cases concerning 'Nadya': *Minister for Community Services v Children's Court of NSW* [2004]; *Minister for Community Services v Children's Court of NSW* [2005]. Of particular significance was the finding that the imposition of a residential condition of bail did not place any obligation on DoCS to respond: *Minister for Community Services v Children's Court of NSW* [2005] at [40].

If the Children's Court, in its care jurisdiction, orders the Minister for Community Services to assume partial or total parental responsibility for a child, then DoCS has an obligation to assist him or her to find accommodation: see Care Act s9(e). The considerable overlap between clients of DoCS and clients of DJJ (Community Services Commission 1996; National Youth Commission 2008:287) prompted the creation of a Memorandum of Understanding between the two departments in 2004 (DoCS/DJJ MOU 2004). Although not legally enforceable, the MOU reflects DoCS' commitment and obligations to young people in its care, including the placement, 'within available resources', of a young accused if a placement breaks down or is lost due to criminal charges (DoCS/DJJ MOU 2004:7). However, even being in statutory care does not guarantee a young person of support, despite the clear lines of obligation (Mitchell 2005:4). The need for this MOU to be urgently updated was noted in the Report of the Wood Inquiry (The Wood Inquiry 2008:[15.53]).

The responsibility of DoCS to respond to the needs of young people not in its care is not clear cut. The Care Act grants the Director-General of DoCS a very wide discretion in relation to children and young people at risk, as defined in s23. Homelessness is not included in any of the definitions of 'at risk'. However, homeless children and young people and young people in conflict with their parents are the subject of other provisions of the Care Act.

Under s120, any person may report to the Director-General that a child is homeless, although such reporting is subject to the consent of a young person aged 16 to 18 years: see s121. The Director-General *must* investigate and assess the report of homelessness, but '*may* provide or arrange for the provision of services, including residential accommodation, where appropriate' (author emphasis). Section 113 provides that a young person, parent or other person may request assistance from DoCS in the case of 'serious and persistent conflict' between the young person and his or her parents. In this circumstance, the 'Director-General *may* provide or arrange for the provision of such advice or assistance as is necessary' (author emphasis). Section 74(1) gives the Children's Court the power to make an order directing a person or organisation (including DoCS) to provide support for a young person, but only if the person or organisation consents: s74(2).

As is clear from the language employed in these sections, DoCS has the discretion to decide *not* to find any accommodation for a young person. A decision of this nature is not reviewable by the Administrative Decisions Tribunal (ADT) because it is not listed as a reviewable decision under s245 of the Care Act. As will be discussed later, this has implications for the application of international laws.

Despite the latitude given in ss113 and 120, the wording of s9(e) of the Care Act appears to impose certain obligations on DoCS:

If a child or young person is temporarily or permanently deprived of his or her family environment, or cannot be allowed to remain in that environment in his or her own best interests, the child or young person is entitled to special protection and assistance from the State.

It is debatable whether this section applies to children and young people who are not in the care of the Minister, but who have nonetheless been deprived of their family environment and are therefore homeless. Mia Dambach, a former children's lawyer, argues that DoCS has an obligation to find accommodation for young people because ss9(e), 113, 120 and 74 create 'specific responsibilities to find accommodation' (Dambach 2007:170). On the other side, Rod Best, Director of Legal Services at DoCS, disagrees with Ms Dambach's reasoning, arguing that these sections create no such obligation (Best 2008:1).⁵

Best argues that s9 does not apply to young homeless people who have been granted bail because it is 'not an action of the State that is depriving the child of the child's family environment'. Rather, he says, it is the failure of the family 'to facilitate a child being bailed from detention' and this is not a circumstance to which the Care Act applies (Best 2008:4). He further argues that even if this were not the case, s7 states that the principles referred to in s9 'do not create, or confer on any person, any right or entitlement enforceable at law', so that 'it cannot be argued that the principle imposes any legally enforceable obligation upon the child welfare agency' (Best 2008:4).

But Best ignores Dambach's key point, which is that 'clearly DoCS are delegated as the Government's representative responsible for children in need of care and protection, which arguably includes those children who are homeless' (author emphasis) (Dambach 2007:170). Her argument is essentially a moral one which draws on the common sense proposition that addressing youth homelessness is the proper provenance of the child welfare agency and that a failure of that agency to respond constitutes an 'abdication' of its responsibility (Dambach 2007:170).

Accommodation Options

Arguments about DoCS' obligation to find accommodation are futile so long as there is nowhere to send a child or young person in need of accommodation. Over 20% of homeless people in Australia are lone teenagers aged 12 to 18 years (ABS 2006), and accommodation, both short- and long-term, is in short supply. DoCS has explicitly cited this as a reason why it cannot assist a young person (see *Minister for Community Services v Children's Court of NSW* [2004] at [8]; *Police v 'Raymond'* (2007) at 3).

In NSW, there are currently no accommodation services specifically targeting young people who are released on bail. Until 2006, DJJ funded the Ja-Biah Bail Support Programme which provided intensive support to young people of Aboriginal and Torres Strait Islander (ATSI) background, and accommodation to ATSI young men as an alternative to custody (DJJ Annual Report 1998-1999:28). Other bail support programs which appear to have now closed down include the Nardoola bail accommodation program in Moree (DJJ Annual Report 1998-99:28; DJJ Annual Report 1999-2000:34), the bail accommodation support program near Inverell (DJJ Annual Report 2001-2002:26; DJJ Annual Report 2004-2005:29), and a pilot in the 'Northern Region' of an 'innovative alternative Bail Accommodation and Support model' (DJJ Annual Report 2005-2006:37).

⁵ Mr Best points out that the views he expresses in his paper do not necessarily reflect the views of the Department, however similar views were expressed by DoCS to the NSW Ombudsman 2004 *Care Proceedings in the Children's Court: discussion paper* NSW Ombudsman, Sydney.

In 2007, DJJ announced it was in the process of implementing a statewide Intensive Bail Supervision Programme aimed at 'reducing the increasing numbers of young people that are being held on remand' (DJJ Annual Report 2006-2007:38). Its priority group for 'bail interventions' included 'those who are at significant risk of being remanded in custody due to a lack of stable accommodation' (DJJ Annual Report 2006-2007:38). According to the program, resources would be provided for community-based staff to arrange accommodation, material aid and specialist services not otherwise available to support the young person's compliance with their bail conditions. Yet there is no reference to a 'statewide' or an 'intensive supervision' program in the most recent Annual Report of DJJ, although the Department's Corporate unit appears to suggest that the programme is yet to be implemented (DJJ Annual Report 2007-2008:123). Mention is made of 'brokering short-term accommodation to help young people better comply with their conditions of bail' (DJJ Annual Report 2007-2008:35), but it appears the focus has shifted away from homeless young people who are held on remand due to an unmet 'reside as directed' bail condition, to those who have been refused bail on the basis of *Bail Act* s22A or because of breaches of bail conditions.

Other programs funded by DJJ include the Stay Safe program which is run in both Wagga Wagga and Albury (NSW). The program caters for clients of the Department, including young people on bail, aged 12 to 17 years who are in need of accommodation and support. The program itself does not provide accommodation, but can refer the young person to accommodation (YES Youth and Family Services 2005). DJJ's Corporate Plan refers to the implementation of 'Pilot Bail Supervision projects in partnership with the Two Ways Together Bail Working Group', but does not provide any details (DJJ Annual Report 2007-2008:123).

Another option for young people released on bail is to access crisis accommodation funded under the Supported Accommodation Assistance Programme (SAAP). Some SAAP services accept referrals of young people released on bail but many are reluctant because of the resources needed to monitor and assist young people. Many homeless young people charged with an offence have high and complex needs with which the service may not be equipped to deal. The Doorways Program run by UnitingCare Burnside, for example, has limited emergency accommodation and depends on young people attending voluntarily which means it cannot insist that a young person stay at their service or remain in touch with them (UnitingCare Burnside 2009:6). Overall, there is considerable unmet need for crisis accommodation. Twenty-seven per cent of people under the age of 25 years who approached a SAAP service for housing or accommodation did not have their need met and were not referred to another service (AIHWa 2008:65). Commissioner Wood has also made an observation about the dearth of accommodation services for adolescents (NSW Ombudsman 2008:3).

Other accommodation options such as out-of-home care (OOHC) and public housing may present solutions in the long term but are not a realistic or timely response to a young person requiring immediate accommodation. OOHC needs to be understood in the context of under-resourced and understaffed care and protection systems which have resulted in priority allocations which focus on younger children, thus creating major issues of access for adolescents (National Youth Commission 2008:9; NSW Ombudsman 2008:9).

Young people find it difficult to access public housing because NSW Housing needs to be satisfied that they will be able to maintain a tenancy successfully (Housing NSW 2007). The release in 2007 of the Housing and Human Services Accord aimed to address barriers to young people's access to public housing by encouraging formal agreements between

government agencies to assist public housing tenants with complex needs to maintain their tenancies (The Wood Inquiry 2008:[7.145]). DoCS is participating in a number of trials, including the Juniperina Shared Access Trial which provides housing and support to young women 16 to 21 years who are at risk of re-offending (NSW Department of Community Services 2008). The Report of the Wood Inquiry describes the intent and objectives of the Accord as 'laudable', but adds that 'whether they achieve any change for children and their families remains to be seen' (The Wood Inquiry 2008:[7.146]).

The Separation of Criminal and Care Proceedings

A proper understanding of the causes underlying the incarceration of homeless young people who have been granted bail must go beyond analysing existing laws and practices and surveying the limited accommodation options. Its significance must be grasped in terms of its historical context and its relationship to human rights. This section outlines the history of how reforms to the juvenile justice and child protection systems have worked to separate the care and criminal matters. Of particular interest are the parallel amendments to the *Bail Act*. The significance of international human rights obligations will be examined in the following section.

The practice of incarcerating children and young people due to homelessness or some other welfare concern is not new. Historically, children and young people who were abused, neglected or destitute were often drawn into the criminal justice system. For example, vagrancy type laws were often applied to homeless children. Misguided attempts to protect children who committed minor criminal offences often led to long spells in institutions, for periods far longer than any sentence an adult offender might have received (Commonwealth Senate Community Affairs Committee 2004:44). Nowhere is this more apparent than in the extreme intervention in the lives of Aboriginal and Torres Strait Islander children and young people (RCIADIC 1989: 10; RCIADIC 1990:5). While various statutes sought to make a clear distinction between offenders and non-offenders, the response was often 'blurred' (Seymour 1988:65).

In Australia, from the late 1970s, attempts have been made to separate criminal and care proceedings (Cunneen & White 2007:107). In NSW, there was a complete overhaul of juvenile justice and child protection legislation and practices in 1987.⁶ Manifest in this new legislative regime was the complete separation of care and criminal proceedings. Entirely separate statutes were enacted to deal with juvenile offenders and with children in need of care and protection. The later enactment of the *Children and Young Persons (Care and Protection) Act* 1998 further underscored the intent to ensure that criminal and care matters were not mixed. For example, s246 of the Act stipulates that a child or young person in the care of the Director-General or under the parental responsibility of the Minister of Community Services must not be accommodated with persons who have committed offences or who are being held on remand, unless he or she has committed an offence.

Included in the 1987 package of reforms was an amendment to the *Bail Act* which added to s32, the subsection referred to above, which made homelessness an irrelevant consideration in the determination of bail, thus making it easier for homeless young people to obtain bail: *Miscellaneous Act (Community Welfare) Repeal and Amendment Act* 1987

⁶ *Children's Court Act, Children (Criminal Proceedings) Act, Community Welfare Act, Children (Care and Protection) Act, Children (Community Service Orders) Act, Children (Detention Centres) Act.*

(NSW) (Blackmore 1989:58). At the time, the NSW Parliament was explicit in stating its reasons for why the amendment was required:

The reality is that a great percentage of young people who come up before a magistrate or judge are refused bail, not because of the nature of the crime they have committed or are alleged to have committed but because there is nowhere to send them. They are refused bail for welfare reasons, because they do not have adequate shelter (NSW Parliament *Parliamentary Debates* (Hansard) Legislative Assembly 7 May 1987:11,467).

However, the practice of remanding young people because they were homeless clearly continued, albeit in implicit form, prompting amendments to ss32 and 36, referred to above: *Bail Amendment (Repeat Offenders) Act 2002* (NSW). Inserted were ss32(1)(b)(v) (special needs of person under 18 years), 36(2)(a1) (agreement to reside in accommodation as a condition of bail), 36(2A) (magistrate to consider bail accommodation), and 36(2B) (requirement that Minister of Corrective Services provide bail accommodation).

The Attorney-General, in his Second Reading Speech, explained that the amendments were designed to 'provide the court with more options when granting bail in relation to the conditions that might be imposed upon the accused person'. He stated that:

[T]he literature on juvenile re-offending shows that once children are incarcerated in a detention centre, the probability of them committing further offences is very high. Gaol as a last resort for juveniles is, therefore, a particularly important concept ... Often the lack of employment or appropriate residence will be a debilitating factor in deciding whether to grant bail. The availability of supervised bail accommodation and the suitability of the accused person to be bailed to this type of accommodation allow the court to both strengthen existing requirements of bail and divert offenders who might otherwise be incarcerated. This is *particularly important for vulnerable accused persons such as juveniles, intellectually or mentally disabled persons, or persons of an Aboriginal or Torres Strait Islander background* (NSW Parliament *Parliamentary Debates* (Hansard) Legislative Assembly 20 March 2002: 819-820 [author emphasis]).

The 1987 and 2002 amendments to the *Bail Act* were part of the package of measures aimed at more clearly delineating between responses to a young person's offending behaviour and his or her welfare needs. In particular, these reforms sought to prevent detention centres from being used as accommodation for homeless young people. Yet it is plain such reforms have failed to stop the practice and this is, in part, due to the observed withdrawal of DoCS from the criminal proceedings of the Children's Court (Mitchell 2005:3; Best 2008:6).

Best argues that DoCS' lack of involvement is justified by the sound child protection and juvenile justice principles which underpinned the 1987 reforms (Best 2008:2, 6). However, an irony here must be appreciated. The amendments to the *Bail Act* sought to prevent welfare considerations leading to the incarceration of a young person; that is, they enacted the principle that care matters must be kept separate from criminal matters. Yet strict adherence to this principle by DoCS (at least in Best's view), is leading to the same result: the incarceration of young people on the basis of welfare considerations.

Legal Principles at Stake

Incarcerating young people because of the unavailability of accommodation potentially undermines five key legal principles of the criminal law, juvenile justice, and child protection: the presumption of innocence, proportionate sentencing, the right not to be arbitrarily detained, the notion of detention as a last resort for juveniles, and the entitlement of all children to special protection from the state. These principles are found in the

Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Rights of the Child (CRC) and its associated rules and guidelines: Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules'), Rules for the Protection of Juveniles Deprived of their Liberty ('Deprivation of Liberty Rules'), Guidelines for the Prevention of Juvenile Delinquency ('The Riyadh Guidelines'). As a signatory to the CRC, Australia has reporting requirements: refer to Art 44.1(a)-(b).

The CRC does not, of itself, constitute law in Australia unless it has been directly incorporated into legislation: *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) at 287 per Mason CJ and Deane J. It is nonetheless a politically and morally persuasive document, with the Federal Government acknowledging in a submission to the Human Rights and Equal Opportunity Commission (HREOC) that 'Australia has a duty to respect and apply its international human rights obligations to all individuals within its jurisdiction' (HREOC 2004:91). Despite not being a direct source of law, the CRC has nonetheless been incorporated into the common law. In the High Court case of *Teoh*, it was held that the ratification of an international human rights convention gives rise to a legitimate expectation for Australians that administrative discretionary powers will be exercised in conformity with the terms of the convention. The provenance and context of the five principles mentioned above are discussed below.

The first principle potentially violated is the *right to be presumed innocent until proven guilty*. An aspect of this right is that a penalty should not be imposed unless and until the accused is convicted. This presumption has been central to criminal law for centuries and has now been incorporated into international law via UDHR, the ICCPR, and the CRC and its associated rules: Art 11 UDHR; Art 15 ICCPR; Art 40 CRC; Rule 7 Beijing Rules. The connection between the presumption of innocence and the granting of bail is reflected by the general presumption in favour of granting bail in the NSW Bail Act: s9 (NSW Law Reform Commission 2005:238).

The high incarceration rates of unconvicted young people highlights the expendability of this principle. Where young people have been granted bail, but cannot meet the residential condition due to government inaction, it is clear that the right to be presumed innocent is not fully extended to homeless young people charged with an offence.

A long-standing principle of the criminal law is that any *penalty imposed should be proportionate to the gravity of the offence* of which the accused is convicted (*Hoare v The Queen* (1989)). The principle is implicit in s8 of the *Bail Act* which provides for a right of release for certain minor offences; and explicit in the s32 criteria for granting bail which requires a magistrate to bear in mind 'the circumstances of the offence (including its nature and seriousness)' and 'the severity of the offence or probable penalty': s32(1)(a)(iii).

The proportionate sanctions principle has specific relevance to international principles of juvenile justice which stipulate that the penalty imposed on a young offender must be proportionate to the circumstances of the offence and to the child's well-being: Art 40(4) CRC; Rule 5.1 Beijing Rules. The CCPA also recognises there should be parity in sentencing between children and adults: s6(e).

The grant of conditional bail to a homeless young person is in accordance with the principle of proportionate sanctions, yet the principle is undermined by the state's failure to meet the conditions which would lead to the young person's release. In light of the likely sentence, holding unconvicted young people in detention for weeks is a disproportionate

response to minor offences, and potentially subjects them to punishment out of all proportion to that which an adult in similar circumstances might expect.

The *right not to be arbitrarily detained* means that no person shall be deprived of his or her liberty where it is unjust and except in accordance with procedures established by law (United Nations 1964:6). Unlawful detention is plainly 'arbitrary' but arbitrariness has the broader meaning of 'unjust', 'unreasonable' or 'an abuse of power' (HREOC nd). One aspect of this right is that the period of detention 'must not be unduly prolonged' and should not 'last longer than strictly necessary' (United Nations 1964:43). This right is found in the UDHR (Art 9) and in the CRC (Art 37(b)). The very existence of arrest, bail, and sentencing laws presupposes a lawful basis for detaining people. However, it would be difficult to describe as anything but 'arbitrary' the practice of detaining an unconvicted young person for an unspecified but potentially long period of time and for a duration dependent on the unchecked discretion of a government agency.

To the general prohibition on arbitrary detention the CRC adds the principle that any arrest, detention or imprisonment of a child shall be used only as a *measure of last resort* and for the shortest period of time: Art 37(b), Rule 13.1 Beijing Rules, Rule 1 Deprivation of Liberty Rules. Alternative measures to detention are encouraged (Rules 13.2 & 28 Beijing Rules, Rule 1 Deprivation of Liberty Rules), and the appropriate authority should provide young people with accommodation during criminal proceedings: Rule 24.1 Beijing Rules. This principle is reflected in s33 of the CCPA.

The proportion of young people on remand indicates this principle is not being applied, suggesting bail determinations by the Children's Court and the impact of the recent amendments to the *Bail Act* need to be scrutinised. However, where the Children's Court does grant conditional bail to a juvenile, but he or she nonetheless remains in detention due to lack of accommodation, the spotlight must be on the commitment of the NSW Government to this principle.

In all the state's actions concerning children, the *best interests of the child* must be the primary consideration, a principle at the heart of the CRC: Art 3.1 The obligation extends the protection of children from 'all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation' (Art 19.1) and a child removed from his or her family will be entitled to special protection and assistance from the state: Art 20.1 CRC, Guideline 15 Riyadh Guidelines. The state should ensure alternative care for such a child (Art 20.2 CRC), and for homeless children: Guideline 13 Riyadh Guidelines. All of these principles find expression in the Care Act although, as already discussed, DoCS does not always act in accordance with them. Absent from both the Care Act and the *Bail Act* is the juvenile justice principle that the state should provide 'lodging' for juveniles at all stages of proceedings: Rule 24.1 Beijing Rules.

The state's special obligations to children are implicit in the *Bail Act*. For example, the 'special needs' of a person under 18 is a relevant consideration in the making of a bail determination: s32(1)(v). Implicit in the s32(4) prohibition, the s36(2)(a1) bail accommodation condition, plus the exhortation in s36(2A), is the view that the state has an obligation to redirect young homeless people away from detention. Yet these provisions – and the intention of the 2002 amendments – have been to little avail because of DoCS' failure to find accommodation for young people in detention.

Options for Reform

It has long been recognised that there is a need to develop alternative accommodation for young people held in detention due to their homelessness (NSWLRC 2005: 162-162; ALRC 1997: Recommendation 228; NSW JJAC 1993: [7.11], Recommendations 47, 99; NSW Legislative Council Standing Committee on Social Issues 2001: Recommendation 23). In this context, the Wood Inquiry recommended that:

An after hours bail placement service should be established by the Department of Juvenile Justice similar to the Victorian Central After Hours and Bail Placement Service, that is available to young people aged between 10 and 18 years, who are at risk of being remanded in custody, or who require bail accommodation; or similar to the Queensland Conditional Bail and Youth Program Accommodation Support Service (The Wood Inquiry 2008: Recommendation 15.1).

No recommendation is made in relation to law reform, as opposed to the provision of bail and accommodation services. This represents a missed opportunity. This section will outline the Victorian and Queensland bail schemes, and will also survey some of the submissions on law reform, including those which the Wood Inquiry considered but ultimately rejected. Also examined are recommendations contained in other submissions which were not addressed in the Report. Finally, other options for law reform, not apparently considered in the submissions or the Inquiry, are canvassed.

In Victoria, the Department of Human Services (the equivalent of DoCS) is responsible for the youth justice program. The State has adopted a strong diversionary approach to young people coming into contact with the juvenile justice system (AIHW 2008b:110). Bail for children and young people is governed by s346 of the *Children, Youth and Families Act* 2005 (Vic) which emphasises the release of the young person on unconditional bail: s346(2)(a). As in NSW, the court must not refuse bail on the basis of a young person's homelessness: s346(9). However, a notable difference with NSW is the pre-determined maximum of 21 days the young person may be held in remand before being either released, brought back before the court for reconsideration or having the proceedings finalised: s346(3)(b). In NSW, the new s22A of the *Bail Act* allows for subsequent applications for bail in only a very narrow set of circumstances.

The crucial difference with NSW is the early involvement of the Department of Human Services when a young person is taken into custody. A key component of this is the Central After Hours Assessment and Bail Placement Service (CAHABPS), which, as the name indicates, operates outside of business hours throughout the State and is the first point of contact for police or a bail justice making a bail determination for a young person. The CAHABPS worker will visit the police station where the young person is held and assess his or her suitability for a bail placement and, if required, will place the young person in appropriate accommodation. During business hours the police officer or bail justice contacts the regional Youth Justice Unit (Victorian Department of Human Services 2007b). This unit provides 'advocacy and support for young people in need of assistance to gain bail' and in accessing other services such as legal advice (Victorian Department of Human Services 2007a).

Victoria also has bail programs targeting Indigenous young people. The Koori Youth Bail Intensive Supervision Support program operates in three regions and is the 'only indigenous specific and culturally appropriate service for Indigenous young people on bail' in Australia (Denning-Cotter 2006:5).

The information available on Victoria's bail support programs suggests a comprehensive approach which aims to intervene as early as possible once a young person has been taken into custody. However, there does not appear to have been an assessment as to the effectiveness of either the Koori Youth Bail Intensive Supervision Support program or the Central After Hours and Bail Placement Program.

The high remand rates for young people in Queensland prompted the Department of Communities (equivalent to DoCS) to establish the Youth Bail Accommodation Support Service (YBASS), which operates within its Conditional Bail Programme (Queensland Department of Communities 2007:2). YBASS targets young people who are either in remand or whose bail may be revoked due to 'insufficient placement stability' (King & Hegarty 2000:7). It operates as a brokerage service which facilitates culturally appropriate placement and intervention for young people released on bail, and provides courts with a legitimate supported accommodation alternative to remand (AIHW 2008b:115).

The success or otherwise of YBASS in referring young people to accommodation is not known, although an evaluation of the Conditional Bail Programme found that it had significantly reduced the number of young people held in detention (Venables & Rutledge 2003:4). A recent study of remand in the Queensland juvenile justice system found a lack of accommodation services for young people on bail which is leading to continued high rates of remand for young people unable to secure accommodation (Mazerolle & Sanderson 2008:33).

Clearly NSW can learn from the schemes in place in Victoria and Queensland. Indeed, on the face of it, the NSW Government, in its response to the Wood Inquiry, has given in-principle support to this recommendation:

The Government will develop a model for a central after hours bail placement service, to assist in diverting young people from being remanded in custody while looking for safe and secure accommodation (NSW Government 2009:79).

Leaving aside the concern that a commitment to develop a model stops short of a commitment to actually establish a service, a key concern is that the response refers only to a 'central after hours placement service'. There is no reference to a core 'all-hours' service. This apparently weak commitment is especially concerning given the fact that the Wood Inquiry declined to recommend any reforms to the law which would otherwise pressure the NSW Government to better provide for this group of homeless young people.

A number of submissions to the Wood Inquiry asked that DoCS be mandated to assist in providing accommodation for all children and young people identified as homeless, not just those in the Department's care (CLCG 2008:17; YJC 2008:6). More specifically, the submissions call for DoCS to assist children and young people to meet their conditions of bail (CLCG 2008:17; YJC 2008:5).

Such a mandate could be achieved legislatively via a number of different routes. First, the power of the Children's Court to direct DoCS to provide services could be made explicit by appropriately amending s15 of the *Children's Court Act* so as to override the Supreme Court's decision in *George*. Secondly, by amending s36(2B) of the *Bail Act*, DoCS could be made responsible, along with the Department of Corrective Services, for ensuring 'adequate and appropriate accommodation for persons on bail is available'. Another method proposed has been to amend the MOU between DoCS and DJJ to include all young people in need of care and protection, not just those who have been subject to a court order allocating parental responsibility to the Minister for Community Services (PIAC 2008:6).

Unfortunately, none of these options were canvassed in the Report of the Wood Inquiry, thus hindering assessment of their relative merits. Nonetheless, a potential problem is apparent in granting courts the power to interfere with executive decision-making with regards to the allocation of scarce resources.

An alternative 'minimal proposal' (Mitchell 2005:18) is contained in the submission of the Children's Court. It calls for a power to be conferred on it to require DoCS to provide a report on the care needs of a child brought before the criminal jurisdiction of the Children's Court (The Wood Inquiry 2008:[15.760]; Children's Court of NSW 2008:[36]; PIAC 2008:5; Mitchell 2005). The NSW Ombudsman supports this approach but holds that it should be limited to cases where there is a high risk of harm (The Wood Inquiry 2008:[15.77]). The report would contain information about care and protection issues surrounding any young person before the court, along with an indication of what steps DoCS has taken or proposes to take, and if no steps are taken, the reasons for that decision (Mitchell 2005:19). The NSW Law Reform Commission had earlier made a similar recommendation that the *Bail Act* be amended so that the Children's Court, when considering a young person's bail application, could order DoCS to furnish a background report (NSWLRC 2005: Recommendation 10.5).

The Wood Inquiry adopts the submission of the Children's Court but only in relation to sentencing, pointing out that the court already has the power to request DoCS to provide it with relevant information under s248 of the Care Act (The Wood Inquiry 2008:[15.82]). In any case, furnishing the court with a report will not force DoCS to find accommodation for a young person not in its care, and may simply divert DoCS' very limited resources away from service provision to mere report writing.

So far considered are proposals contained in various submissions to the Wood Inquiry which have either been rejected or not referred to in the Report. There are, however, other possibilities for reform. One option is to amend s245 of the Care Act so that DoCS' discretionary powers could be scrutinised, rendering decision-making under ss74, 113 and 120 reviewable. The ADT would then be empowered to consider whether DoCS' exercise of its discretion conformed to the CRC, in line with the public's legitimate expectation that it should.

Other possibilities involve amendments to the *Bail Act*. For example, the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission have advocated for a blanket presumption in favour of bail (NSWLRC 2005:240). Queensland's *Juvenile Justice Act* 1992 contains such a presumption: s48(4). The desired outcome of reducing the overall number of young people held in remand is potentially achieved but such a reform may make no difference to the young people who have *already* been granted bail, but nonetheless remain in custody because they are unable to meet their bail conditions. Alternatively, if the *Bail Act* could be amended to include a 21-day limit on the period of remand, this would go some way to ensuring that remanded young people are regularly brought before the Children's Court to have their bail reconsidered. However, in the absence of viable accommodation for bailed young people, this may still not be able to effect serious change.

Conclusion

The reforms of 1987 sought to overturn laws and practices which, until that time, had unjustly intruded into the lives of the accused young persons by prejudging the outcome of trials and responding with a heavy hand to the alleged commission of minor offences. The

overhaul included amendments to the *Bail Act* which directed the courts to consider alternatives to detention for homeless young people. But the problem of ‘warehousing’ homeless young people remains, not because children’s magistrates are refusing bail, but because DoCS refuses to find these young people suitable accommodation. It is true that DoCS is not legally required to find accommodation for young people not in its care, but this is potentially an abuse of the wide discretion granted it under the Care Act. The combination of Supreme Court decisions and s245 of the Care Act mean the Children’s Court and the Administrative Decisions Tribunal have no power to reign DoCS in.

Inadequate accommodation options for young persons on bail are in large part responsible for young people being held in remand, and this has informed the recommendations contained in the Report of the Wood Inquiry. However, lasting change ultimately hangs on a political commitment to reform. This, in turn, depends upon raising public awareness that incarcerating young people because they are homeless has potentially dire repercussions not just for the individual, but also for the integrity of the criminal justice system and of our professed commitment to protect these vulnerable members of our community.

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