# Black Letter Law[1]

by Justice Lucy McCallum and Erica Timmins[2]

> *If a dominant society denies recognition to the very things on which an individual's identity is built, it will not be surprising if that individual becomes a delinquent from the point of view of that society. Yet that is what the European society that took power in Australia has been doing to Aboriginals for two hundred years. As a result there has developed a complex and difficult situation which cannot be simply unravelled, or washed away by better social services for Aboriginals. If Australia is going to deal with it in some way other than locking Aboriginals up in large numbers, it will have to learn to recognise Aboriginals as a people, to listen to them, and patiently build understanding and move to a genuine reconciliation between peoples.*[3]

Those words were written over 30 years ago by the Honourable JH ('Hal') Wootten AC QC, one of the five Commissioners of the Royal Commission into Aboriginal Deaths in Custody.[4] The reckoning of the experience of the 30 years that have passed since the presentation of the Royal Commission's final report ('the Final Report') has been sobering and demoralising. On the 30th anniversary of the tabling of that report, the Honourable Adam Searle MLC expressed extreme disappointment that many of the recommendations of the Royal Commission have not been implemented and that governments have even 'given up' monitoring their implementation.[5]

But as Hal Wootten explained, unravelling the impact of European colonisation on First Nations people is going to require more than changes in government policy. What is required is a patient building of understanding. The purpose of this article is to foster critical thinking about the role of lawyers in that process with particular focus on the question of bail. A black letter application of the current bail legislation permits and requires courts to have regard to circumstances of disadvantage in First Nations communities and to consider culturally appropriate solutions; the challenge for lawyers is to bring forward applications in a way that emphasises those considerations so as to achieve fairer outcomes for First Nations bail applicants.

## Learnings from the Royal Commission's Report

The Final Report concluded that a major reason for the phenomenon of Aboriginal deaths in custody was 'the grossly disproportionate rates at which Aboriginal people are taken into custody,

of the order of more than twenty times the rate for non-Aboriginals.'[6] It found that First Nations people in custody do not die at a greater rate than non-Aboriginal people in custody: 'what is overwhelmingly different is the rate at which Aboriginal people come into custody, compared with the rate of the general community.'[7] A key recommendation (recommendation 92) was that governments 'legislate to enforce the principle that imprisonment should be a sanction of last resort'.

A significant contributing factor to incarceration rates is the number of persons on remand awaiting trial. As to that issue, Commissioner Wootten analysed 'unrealistic bail conditions':

> *'Bail conditions should not be set which obviously will not or cannot be complied with. Unrealistic conditions simply set the defendant up for failure, and produce the result that bail is at the discretion of the police, who can arrest the defendant for breach of conditions whenever they choose not to turn a blind eye to the breach.*
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> *The principal purpose of bail conditions should be to ensure that people attend at court to answer particular charges, although there may be other purposes in particular cases, e.g. the avoidance of further offences. However the conditions should not be used by police officers or magistrates to impose their views of an appropriate life style on offenders.*'[8]

Commissioner Wootten gave examples drawn from his investigations. One was a condition requiring total abstention from alcohol, a condition not sought by police but repeatedly added by magistrates. He referred to another 'very onerous condition which seems to be much too readily imposed', namely, 'one requiring the defendant to stay out of his own town, often the town in which he has lived his whole life'.

The Final Report found that 'the lack of flexibility of bail procedure and the difficulty Aboriginal people frequently face in meeting police bail criteria by virtue of their socioeconomic status or cultural difference contributes to their needless detention in

police custody' and that this was the case for both adults and juveniles.[9] The Final Report accordingly made recommendations that the entitlement to bail be recognised in practice and 'to revise any criteria which inappropriately restrict the granting of bail to Aboriginal people'.[10]

### Thirty years on – going backwards

Disturbingly, despite those findings and recommendations, incarceration rates of First Nations people have since risen to staggering levels. In 1989, First Nations people represented 14.3% of the prison population.[11] In December 2020, First Nations people represented 29% of adult prisoners in custody, despite accounting for only 3.4% of the Australian population.[12] In NSW in 2019, the number of First Nations prisoners increased by 7%.[13] Over one-third of First Nations people in custody are on remand.[14] Some are ultimately acquitted. Of those who are convicted, a large proportion do not receive a custodial sentence or are sentenced to 'time served', potentially resulting in a longer sentence than would have been imposed had bail been granted.[15]

### Early reform and the introduction of the 'show cause' requirement

Bail in New South Wales is currently governed by the *Bail Act 2013* (NSW), which came into force on 20 May 2014. One of the key goals of that Act was to simplify bail laws.[16] The Act provided for a simple, risk-based assessment and, as originally enacted, was well received. However, just five weeks after its commencement, a review was initiated following a series of decisions granting conditional bail to high-profile (alleged) crime figures. The reporting of those decisions saw the NSW Government and the court publicly criticised as being 'soft on [alleged] crime'.[17] The review resulted in the introduction of the *Bail Amendment Act 2014* (NSW) which commenced on 17 September 2014. The reforms introduced by the amending Act included the introduction of a 'show cause' requirement which in certain circumstances requires an applicant to show cause why his or her detention is not justified.

### The ongoing impact of bail decisions on disproportionate incarceration of First Nations people

The overall size of the remand population and the average length of time spent on remand have both increased at a faster rate since the introduction of that requirement.[18]

That development is more acute in the case of First Nations people, who are more likely to be refused bail than the general population. The NSW Bureau of Crime Statistics and Research (BOCSAR) released a study earlier this year confirming that First Nations people were 20.4% more likely to be refused bail by police, even after controlling for relevant case characteristics such as criminal history and offence severity.

Where bail is granted, the imposition of bail conditions continues to have a disproportionate impact on First Nations people. The Law Reform Commission report recognised that standard bail conditions can have a more detrimental impact on First Nations people due to cultural ties to particular locations.[19] That is particularly the case in regional and remote communities.

Recommendation 8 of the report of the Select Committee is: 'That the NSW Government amend the *Bail Act 2013* to include a standalone provision that stipulates a bail decision-maker must take into account any issues that arise due to the person's Aboriginality, similar to section 3A of the *Bail Act 1977* (Vic)'. The question of reform is of course a matter for Parliament. In the meantime, the law must be applied as it stands. Is that what we are doing?

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### Consideration of any 'special vulnerability' of a First Nations applicant is already a mandatory consideration

The Act expressly requires the bail authority to have regard to any special vulnerability or needs the applicant has 'because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment', as well as their 'community ties': ss 18(1)(a) and (k) of the Act.

The critical task imposed on the decision-maker is the assessment of risk. The Act requires the bail authority to assess any 'bail concerns' to determine whether there is an 'unacceptable risk' of a particular kind: s 17(2). If the bail authority concludes that there is no unacceptable risk, bail must be granted (arguably, leaving aside show cause offences): s 20. If there is an unacceptable risk, bail must be refused: s 19. The task of assessing whether a bail concern amounts to an 'unacceptable risk' requires the bail authority to undertake an evaluative assessment. A strict application of the Act not only permits but requires the bail authority, in forming that assessment, to have regard to any 'special vulnerability or needs' of a First Nations applicant: s 18(1)(k).

Many of the matters in the mandatory and exhaustive list in s 18 are capable of pointing in two directions. The assessment required to be made is broad and evaluative; only the conclusion that a concern amounts to a risk which is 'unacceptable' having regard to matters that include the needs of the applicant triggers the operation of a statutory requirement that bail be refused. That part of the Act makes sense and, provided it is properly applied, should not operate unfairly.

The 'show cause' requirement raises more difficult questions. The rule created by s 16A of the Act is that, in the case of a person charged with a 'show cause' offence, the court must refuse bail unless the accused person 'shows cause why his or her detention is not justified.' The language is opaque. Detention is not justified if it is not authorised. That is not a statement that appears in the Act; it is an incontestable statement of legal principle. The imposition of an unguided requirement to show 'cause' why detention is 'not justified' is apt to obscure the fact that the Act confers authority to deprive a person of the right to be at liberty for an offence of which the applicant has not been and may never be convicted.

### Conditional liberty

One welcome aspect of the amending Act was the inclusion of s 18(1)(p), which requires the bail authority to have regard to 'the bail conditions that could reasonably be imposed to address any bail concerns in accordance with section 20A.' Structured in that way, the process of evaluating risk compels attention to how any risk might be addressed other than by refusing bail.

The power to impose conditions is constrained by notions of proportionality. Any bail conditions to be imposed must be 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 relevant bail concern; reasonably practicable and likely to be complied with: s 20A. Refusal of bail is a decision of last resort.

Section 20A requires the bail authority to consider whether any proposed bail condition might give rise to increased interaction with police and the criminal justice system. In remarks which echo the concerns of the Royal Commission set out above, the Aboriginal Legal Service has expressed concern as to the extent to which the constraints imposed by s 20A are being complied with:

> *'… for example an offence occurs at night and so a curfew is imposed, an offence occurs at a particular location and so a geographical restriction covering that location is imposed, or an offence occurs with a young person so a non-association condition is imposed.'*[20]

The ALS has also expressed the concern that bail conditions are sometimes imposed for 'welfare reasons'. In *R v Connor Fontaine (a pseudonym)*[21], police attended the home of the 10-year-old applicant late at night on multiple occasions to enforce a curfew condition and had arrested him numerous times for breach of that condition. Hamill J deleted the curfew condition. Citing a decision of Fullerton J in relation to extended supervision orders,[22] his Honour said at [7]:

> *'Bail conditions are calculated to mitigate risk. Their imposition does not create an occasion for attempts at social engineering or paternalistic interventions in parenting decisions.'*

Curfew and associated enforcement conditions are more commonly imposed on First Nations people than non-Indigenous people.[23] These are onerous conditions, especially for young people, and can cause hardship for persons other than the accused, particularly where the condition prohibits an accused from leaving home except in the company of a particular person. It is not inappropriate for lawyers to remind the court that a curfew can only be imposed to address a bail concern, within the constraints of s 20A, and when justified by the nature and seriousness of the alleged offence.

Other common conditions such as frequent reporting to police, residency, non-association conditions and exclusion zones, which restrict movement and access to place, can have a disproportionate impact on First Nations people because of historical and cultural ties to particular locations, as well as family and kinship structures.[24] Such conditions may conflict with cultural and community obligations to attend funerals and care for family members.[25] Practical issues and economic disadvantage, particularly in regional and remote areas, may exacerbate that impact. First Nations people without a driver's license or access to other transport may have difficulty complying with such conditions.

The flow on effect of the imposition of onerous and unnecessary conditions is increased exposure to the risk of arrest for a technical breach without consideration of alternatives under s 77 of the Act.[26] Police are not specifically directed to consider an accused's aboriginality when taking enforcement action following a breach. That informs the proper consideration of s 18(1)(k). Breaches of bail, even where a detention application is dismissed, remain on an accused's bail record and increase the risk of the refusal of bail or the imposition of more stringent bail conditions in future bail applications. In this way, onerous and unnecessary conditions imposed without due regard to the matters discussed above perpetuate cycles of disadvantage in the criminal justice system.

Sections 18(1)(k), 18(1)(a) and 20A can be invoked to argue for more appropriate conditions for First Nations clients. When unduly strict conditions are imposed in the first instance, a further avenue is to apply to have the conditions varied under s 66(2) of the Act, as occurred in *R v Connor Fontaine.*

### Other relevant precedent

Before the introduction of the *Bail Act 2013*, the Court of Criminal Appeal had accepted that, in an application for bail by a First Nations person, particularly where the applicant was also a young person, 'alternative culturally appropriate supervision, where available, (with an emphasis on cultural awareness and overcoming the renowned antisocial effects of discrimination and/or an abused or disempowered upbringing), should be explored as a preferred option to remand in gaol': *R v Michael John Brown* [2013] NSWCCA 178 at [35]. That decision has been applied since the introduction of the *Bail Act 2013*.[27] In other decisions, the Supreme Court has emphasised the appropriateness of determining bail applications brought by First Nations people in the broader context of their overrepresentation in the prison population.[28]

### Conclusion

While recent calls for review of the implementation of the recommendations of the Royal Commission and reform of the bail laws warrant close consideration, there is in the meantime a need to give careful thought to the question of whether the ritual imposition of familiar bail conditions represents a departure from the requirements of the legislation as it currently stands. **BN**

## ENDNOTES

1 This is a revised version of an article first published in the *Judicial Officers' Bulletin*, reproduced here with the kind permission of the Judicial Commission.

2 Associate to Hamill J. The title of this article was provided by Justice McCallum's former tipstaff, Teela Reid, a proud Wiradjuri and Wailwan woman from Gilgandra.

3 Royal Commission into Aboriginal Deaths in Custody (RCIADIC), (Regional Report of Inquiry in New South Wales, Victoria and Tasmania 1991), 3.

4 RCIADIC (Final Report, 1991).

5 Select Committee, Parliament of NSW, *Inquiry on the high level of First Nations people in custody and oversight and review of deaths in custody* (Report No 1, 2021), ix.

6 RCIADIC, above n 3, Vol 1, preface.

7 Ibid, Vol 1, [1.3.2].

8 RCIADIC, above n 2, Ch 8.

9 *RCDIAC*, above n 3, Vol 3, [21.4.2].

10 Recommendations 89 and 91.

11 RCIADIC, above n 3, Vol 1, [6.2.3].

12 Australian Bureau of Statistics (ABS), *Prisoners in Australia 2020* (3 December 2020), https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release#aboriginal-and-torres-strait-islander-prisoners.

13 BOCSAR, NSW *Custody Statistics: Quarterly Update December 2020* (February 2021), https://www.bocsar.nsw.gov.au/Pages/bocsar_media_releases/2021/mr-custody-Dec-2020.aspx.

14 Ibid.

15 Don Weatherburn and Stephanie Ramsay, 'What's Causing the Growth in Indigenous Imprisonment in NSW?' (Issue Paper No 118, BOCSAR, 2016) at 8.

16 Second Reading Speech, Bail Bill 2013 (NSW) at 87-88.

17 David Brown and Julia Quilter, 'Speaking Too Soon: The Sabotage of Bail Reform in New South Wales' (October 2014) 3 *International Journal for Crime, Justice and Social Democracy 3.*

18 Steve Yeong and Susan Poynton, 'Did the 2013 Bail Act increase the risk of bail refusal?' (BOCSAR *Crime and Justice Bulletin* No 212, April 2018).

19 NSW Law Reform Commission (NSWLRC), Bail (Report No 133, 2012), [11.56].

20 Aboriginal Legal Service NSW, 'Short term remand: a snapshot', 29 September 2020, p 22 at <https://d3n8a8pro7vhmx.cloudfront.net/alsnswact/pages/464/attachments/original/1616406359/A_snapshot_of_short_term_remand_-_TFM_ALS.pdf?1616406359, accessed 10/5/2021.

21 [2021] NSWSC 177.

22 *State of New South Wales v Bugmy* [2017] NSWSC 855, [89].

23 Neil Donnelly and Lily Tromboli, 'The nature of bail breaches in NSW' (BOCSAR issue paper 133, 2018), 4-5.

24 NSWLRC, above n 22, 181 – 183.

25 Australian Law Reform Commission, *Pathways to Justice-Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report no 133, 2017), Ch 5.

26 See, for example, ALS, above n 23, 20ff and Legal Aid, Submission to Review of the *Bail Act 2013*(NSW)(2020), 17 https://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0019/41266/200817-LANSW-submission-to-DCJ-review-of-the-Bail-Act-2013.pdf.

27 See for example *R v Wright* [2015] NSWSC 2109 at [6]-[7] (Rothman J).

28 See for example *R v Greenup* [2020] NSWSC 1866 at [11] – [12] and [16] (Rothman J), *R v Ceissman* [2018] NSWSC 1244 at [12] (Rothman J) and *R v Alchin* [2015] NSWSC 2112 (McCallum J).