Your Ref:
Our Ref: 877

13 April 2021

Ginna Webster
Secretary
Department of Justice
Email: legislation.development@justice.tas.gov.au

Dear Secretary

Re: Submission in response to the draft Bail Bill 2021

I refer to Director Brooke Craven's letter of 3 February 2021 enclosing a draft copy of the Bail Bill 2021 ("the draft Bill") for my consideration and feedback. I am grateful for the opportunity to provide comment on the draft Bill and for the extension of time in which to provide my feedback.

In her letter, Ms Craven notes the following:

- During the 2018 election campaign, the Liberal Party released the policy document "Keeping Tasmanians Safe". This policy included a commitment to bail law reform.
- Tasmania's *Bail Act 1994* (the Bail Act) is largely procedural. The granting, or refusal, of bail within this State is decided largely on the basis of the common law. All other Australian jurisdictions have statutorily modified the common law on bail.
- A position paper was developed and released on 1 January 2018 for public consultation. Material for the position paper was gathered from a number of sources, particularly the Victorian Law Reform Commission - *Review of the Bail Act – Final Report*; the New South Wales Law Reform Commission - *Report 133 – Bail*; and the Hon Paul Coghlan QC's *Bail Review: First Advice to the Victorian Government* and *Bail Review: Second Advice to the Victorian Government*. The Position Paper contained fifteen proposals for reform of bail in the State and were, generally, supported by key stakeholders. These proposals form the basis of the draft Bill.
- The draft Bill seeks to be the primary and almost comprehensive reference on the law on bail in Tasmania. The draft Bill has incorporated much of the existing common law into statute and brings across bail provisions from other legislation to make the law around bail clearer and easier to navigate.

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- Some of the key features of the draft Bill include:
  - A general-purpose clause;
  - A reversal of the presumption for bail for specific offences and subject to specific criteria unless the accused can demonstrate "exceptional circumstances";
  - A non-exhaustive list of relevant considerations that a grantor of bail is to take into account when assessing whether a person poses an "unacceptable risk" and therefore should not be granted bail;
  - Clarification of the powers and responsibilities of police in relation to bail;
  - A non-exhaustive list of conditions that might be imposed on an accused who is admitted to bail; and
  - A provision that the imposition of conditions must not be more onerous than necessary and must be reasonable, having regard to the nature of the alleged offence and circumstances of the accused person.
- The necessary transitional and consequential provisions will be included in the Bill prior to finalisation.

Role of the Commissioner for Children and Young People

The statutory office of the Commissioner for Children and Young People is established under the *Commissioner for Children and Young People Act 2016* ("CCYP Act"). The Commissioner's functions, which are set out in s.8(1) of the CCYP Act, include:

- advocating for all children and young people in the State generally;
- researching, investigating and influencing policy development into matters relating to children and young people generally;
- promoting, monitoring and reviewing the wellbeing of children and young people generally;
- promoting and empowering the participation of children and young people in the making of decisions, or the expressing of opinions on matters, that may affect their lives; and
- assisting in ensuring the State satisfies its national and international obligations in respect of children and young people generally.

In performing these and other functions under the CCYP Act, the Commissioner is required to do so according to the principle that the wellbeing and best interests of children and young people are paramount and must observe any relevant provisions of the United Nations *Convention on the Rights of the Child*.[1] The Commissioner is also required to give special regard to the needs of children and young people who are vulnerable or disadvantaged for any reason.

Consistent with my statutory functions, the comments below (which are not intended to be exhaustive) focus on those matters which in my view would affect or have the potential to affect the rights and wellbeing of children and young people in Tasmania.

[1] CCYP Act, s.3(1)

Background

I have had the benefit of considering the submission provided by former Interim Commissioner for Children and Young People, David Clements, in response to the January 2018 *Reforms to the Tasmanian Bail System Position Paper* ("Position Paper"). The Interim Commissioner's submission provides a summary of the fundamental human rights principles applicable to children in conflict with the law, including a discussion of specific articles of the United Nations *Convention on the Rights of the Child* ("the CRC") and Tasmania's *Youth Justice Act 1997* ("the YJA"). The Interim Commissioner's submission is available on the CCYP website: https://www.childcomm.tas.gov.au/wp-content/uploads/2018/06/DoJ-Bail-Reform.pdf.

I wish to highlight the following fundamental human rights principles relevant to bail and pre-trial detention for children and young people:

- Article 3 of the CRC provides that 'in all actions concerning children, whether undertaken by … courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.
- Article 37 of the CRC provides that states parties are to ensure that 'the arrest, detention or imprisonment of a child … shall be used only as a measure of last resort and for the shortest appropriate period of time'. The "last resort" principle is reflected in the YJA (see for example, the general principles included in s.5, and the limit on the police power of arrest in s.24).
- Article 40(4) of the CRC requires states parties to make a variety of dispositions available, 'to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence'.
- Rule 13 of the *Standard Minimum Rules for the Administration of Juvenile Justice*[2] ('the Beijing Rules') provides clear guidance on the use of pre-trial detention.

> 13.1 Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.
>
> 13.2 Whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home.

In commentary relating to Rule 13, the Beijing Rules warn that:

> [t]he danger to juveniles of "criminal contamination" while in detention pending trial must not be underestimated. It is therefore important to stress the need for alternative measures. By doing so, rule 13.1 encourages the devising of new and innovative measures to avoid such detention in the interest of the well-being of the juvenile.

[2] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"). Adopted by General Assembly resolution 40/33 of 29 November 1985.

Furthermore, in 2019 the UN Committee on the Rights of the Child updated its General Comment on the rights of children in the child justice system.[3] The new General Comment emphasises the leading principles for the use of deprivation of liberty for children and young people which are clearly relevant to consideration of the draft Bill. I have set out the relevant paragraphs of the General Comment in full below:

Leading principles

85. The leading principles for the use of deprivation of liberty are: (a) the arrest, detention or imprisonment of a child is to be used only in conformity with the law, only as a measure of last resort and for the shortest appropriate period of time; and (b) no child is to be deprived of his or her liberty unlawfully or arbitrarily. Arrest is often the starting point of pretrial detention, and States should ensure that the law places clear obligations on law enforcement officers to apply article 37 in the context of arrest. States should further ensure that children are not held in transportation or in police cells, except as a measure of last resort and for the shortest period of time, and that they are not held with adults, except where that is in their best interests. Mechanisms for swift release to parents or appropriate adults should be prioritized.

86. The Committee notes with concern that, in many countries, children languish in pretrial detention for months or even years, which constitutes a grave violation of article 37(b) of the Convention. Pretrial detention should not be used except in the most serious cases, and even then only after community placement has been carefully considered. Diversion at the pretrial stage reduces the use of detention, but even where the child is to be tried in the child justice system, non-custodial measures should be carefully targeted to restrict the use of pretrial detention.

87. The law should clearly state the criteria for the use of pretrial detention, which should be primarily for ensuring appearance at the court proceedings and if the child poses an immediate danger to others. If the child is considered a danger (to himself or herself or others) child protection measures should be applied. Pretrial detention should be subject to regular review and its duration limited by law. All actors in the child justice system should prioritize cases of children in pretrial detention.

88. In application of the principle that deprivation of liberty should be imposed for the shortest appropriate period of time, States parties should provide regular opportunities to permit early release from custody, including police custody, into the care of parents or other appropriate adults. There should be discretion to release with or without conditions, such as reporting to an authorized person or place.

[3] Committee on the Rights of the Child, *General comment No. 24 (2019) on children's rights in the child justice system*

> The payment of monetary bail should not be a requirement, as most children cannot pay and because it discriminates against poor and marginalized families. Furthermore, where bail is set it means that there is a recognition in principle by the court that the child should be released, and other mechanisms can be used to secure attendance.

Comment

The Position Paper did not identify or explore the important and unique considerations relating to bail for children and young people. Furthermore, and despite the recommendation of former Interim Commissioner Clements, I am not aware of any discussion paper or other paper specifically focusing on considerations relevant to children and young people and bail in Tasmania. This is unfortunate given the draft Bill appears to modify aspects of the bail law for children and young people.

While the vast majority of children and young people will never come to the attention of police, evidence overwhelmingly shows us that it is our most vulnerable and disadvantaged children who come to the attention of our justice system at a young age. It is important that we give children the best opportunity to achieve their full potential, while also reducing the potential impact their anti-social or harmful behaviour might otherwise have on individuals and communities. Aboriginal children, children with a disability and children in care make up a disproportionate number of children detained in Tasmania.

I have advocated for the development and implementation of an integrated therapeutic approach to youth justice across the continuum of services, with detention as a last resort. Such a model would help inform legislative changes that would affect children and young people, such as those contemplated by the draft Bill. Despite work that has occurred or is underway in Tasmania, there continues to be a need for further investment in prevention, early intervention and diversionary services to address the often complex needs of children and young people who engage in anti-social or harmful behaviour.

I am generally supportive of the proposal to incorporate all laws relating to bail in Tasmania into one piece of legislation to make the law on bail clearer. However, in its apparent modification of aspects of the bail law for children and young people, the draft Bill does not uphold the fundamental human rights principles and YJA principles as discussed above. It is certainly not consistent with a therapeutic approach to youth justice in Tasmania, or with the National Agreement on Closing the Gap target to reduce the rate of Aboriginal and Torres Strait Islander young people in detention by at least 30 per cent by 2031.

It is my strong view that the draft Bill should be amended to provide greater safeguards for children and young people, and this could be achieved without compromising public safety.

Specifically, I recommend further consideration of the following matters:

1. As currently formulated, the ‘unacceptable risk’ test in proposed s.6 may result in more children and young people being detained in custody to appear before a court, and/or more children and young people being remanded to pre-trial detention. This would not be consistent with the principle of last resort discussed above.

2. Aspects of proposed s.8 (i.e. the reversal of the presumption of bail in certain circumstances) would apply to children and young people in certain circumstances, meaning that bail in those circumstances would only be available where the child or young person could prove 'exceptional circumstances'. This would not be consistent with the principle of last resort discussed above.
3. There are no specific provisions in the draft Bill regarding the very important and unique considerations relating to bail decisions or the imposition of bail conditions for children and young people.
4. While the use of electronic monitoring may provide opportunities for bail where it would otherwise be refused, its use on children and young people is untested in Tasmania. I am concerned that the use of monitoring devices on children and young people could lead to social stigma and interfere with their right to privacy. The use of electronic monitoring for children and young people on bail therefore warrants further consideration and discussion.

I explore each of the above matters in more detail below and conclude with some general observations regarding bail conditions for children and young people.

'Unacceptable Risk' (section 6)

Under the draft Bill, where police retain the power to release a person on bail they will be required to give bail unless, among other considerations, the authorised officer is satisfied on reasonable grounds that the person poses an 'unacceptable risk' (see proposed s.11). Leaving aside s.8 offences, a court must not grant bail where the court believes on reasonable grounds that the person poses an 'unacceptable risk' (see proposed s.12(3)(a)).

Proposed s.6(1) provides that a person will pose an 'unacceptable risk' if one or more criteria are met.

> **6. Unacceptable risk**
>
> (1) A person charged with an offence poses an unacceptable risk if the person meets one or more of the following criteria:
>
> (a) the person is a danger to the safety or welfare of one or more of the following:
>
> (i) any individual;
>
> (ii) a class of persons;
>
> (iii) members of the public generally;
>
> (b) the person is at risk of not attending the court, in respect of the offence, as required;
>
> (c) the person is likely to commit an offence while released on bail;
>
> (d) the person is likely to interfere with witnesses, or potential witnesses, in respect of the offence or any other offence;

(e) the person is likely to interfere with, or impede or otherwise obstruct, the course of justice in respect of the offence or any other offence;

(f) the person poses, on reasonable grounds, an unacceptable risk for any other reason.

In the absence of a provision to the contrary, it appears that the 'unacceptable risk' test set out in s.6 would apply to children and young people.

The operation of s.6 was discussed in detail by the Law Society of Tasmania in its submission on the draft Bill.[4] Issues raised by the Law Society and which are of concern to me as Commissioner include:

- While currently a court can look at all relevant matters in determining bail, none are usually in themselves enough to deny a person bail. However, the draft Bill proposes that 'one or more' of the criteria in s.6 will be enough to amount to an 'unacceptable risk'.
- Inclusion of the criteria that 'a person is at risk of not attending the court in respect of the offence, as required' has the potential to erode the current test of whether it is more probable than not that the accused will attend.
- Inclusion of the criteria that 'the person is likely to commit an offence whilst released on bail' differs from the current test that there is a real and substantial reason to fear the accused would be likely to commit an offence during the period of bail or there are substantial prospects they will.

If the 'unacceptable risk' test is to apply to children and young people, its current formulation will result in increased numbers of children and young people being refused bail and detained. I strongly recommend amendments are made to the provisions relevant to 'unacceptable risk' to mitigate against any erosion of the fundamental principles of youth justice.

Furthermore, s.6(2) sets out several matters that may be considered in determining whether a person poses an 'unacceptable risk'. Those matters should include consideration as to whether the person charged with the offence is the primary carer of a child or young person. Having a parent, particularly a primary carer, taken into custody can adversely affect a child or young person's wellbeing including their mental health, social behaviour, educational outcomes, and cause financial hardship.

Reversal of presumption of bail (section 8) and 'exceptional circumstances' test (section 12(3)(b))

The draft Bill would reverse the presumption of bail in the circumstances set out in proposed s.8(1):

[4] https://lst.org.au/wp-content/uploads/2021/03/DOJ-Bail-Bill-2021-23.3.2021.pdf

- s.8(1)(a) – where a person is taken into custody for a crime relating to treason or murder
- s.8(1)(b) – where a person is taken into custody for a serious indictable offence[5] in the circumstances set out in proposed s.8(1)(b)(i)-(iii)
- s.8(1)(c) – where a person is taken into custody for an indictable offence in the circumstances set out in proposed s.8(1)(c)(i)-(iii)
- s.8(1)(d) - where the bail authority believes the person is a terrorism-linked person.

Pursuant to proposed s.11(2)(d), police could not grant bail to a person in the circumstances covered by proposed s.8(1) and a court could only grant bail where the person proves 'exceptional circumstances' in respect of the person or the offence (see proposed s.12(3)(b) and s.12(4)). With the exception of the bail law relating to murder, I understand this to be a significant departure from the current law.

Relevantly, s.8(2) provides that s.8(1)(b) and s.8(1)(c) would not apply to a 'youth'. Accordingly, s.8(1)(a) and s.8(1)(d) would apply to children and young people aged less than 18 years.

The draft Bill provides that the term 'youth' has the same meaning as in the YJA:

> **youth** means a person who is 10 or more years old but less than 18 years old at the time when the offence the person has committed, or is suspected of having committed, occurred.

The term 'offence' is defined by s.3 of the YJA to exclude a 'prescribed offence' which is in turn defined to include serious offences, including several under the *Criminal Code Act 1924.*

Therefore, notwithstanding s.8(2), it appears that:

- s.8(1)(b) may apply to a child or young person charged with a 'prescribed offence' appearing in Schedule 1 of the draft Bill (i.e. armed robbery, aggravated armed robbery, rape or persistent sexual abuse of a child); and
- s.8(1)(c) may apply to a child or young person charged with a 'prescribed offence' that is an indictable offence.

The proposed operation of s.8(2) should therefore be clarified.

I acknowledge the importance of facilitating the appearance at court of those charged with serious offences and of addressing risks to community safety posed by the commission of very serious crimes, including risks to the safety of children and young people affected by such crimes. However, any reform to bail laws must be balanced with the rights of children and young people under the CRC and well-established principles of youth justice. A blanket reversal of the presumption of bail for children and young people in the circumstances contemplated by s.8, coupled with the 'exceptional circumstances' test, may lead to outcomes that are disproportionate to the circumstances of the individual child or young person or to the circumstances of the offence with which the child or young person is

[5] See s.5 and Schedule 1 of the draft Bill.

charged. Fundamental human rights principles require a decision maker to contemplate all other options before deciding to detain a child or young person in custody.

I therefore strongly recommend consideration is given to amending the draft Bill to exclude all children and young people aged less than 18 years from the operation of s.8.

If s.8 is to continue to apply to children and young people, then at the very least, specific considerations relating to bail decisions for children and young people charged with offences referred to in s.8 should be included in the draft Bill to better safeguard their rights when determining 'exceptional circumstances'. For example, s.15AA of the *Crimes Act 1914* (Cth) (the Crimes Act), which establishes a presumption against bail for persons charged with terrorism offences, includes a requirement that in determining exceptional circumstances for a person under 18 years of age, a decision maker must have regard to the best interests of the person as a primary consideration. I do acknowledge that under s.15AA(3AA), the protection of the community is the paramount consideration. (See also my comments below).

Specific provisions relating to children and young people

Section 24B of the YJA requires that a bail decision maker who intends to admit a youth to bail must have regard to the principles in s.5 of the YJA when deciding whether to impose bail conditions and in determining bail conditions. The draft Bill does not include a provision to guide decision makers as to whether to grant bail for a child or young person in the first place.

Given the very specific considerations relating to bail for children and young people, some Australian states and territories have included in their bail legislation specific reference to matters that decision makers must take into account when making a decision about bail for children and young people. For example, s.3B of Victoria's *Bail Act 1977* provides as follows:

> Section 3B - Determination in relation to a child
>
> (1) In making a determination under this Act in relation to a child, a court must take into account (in addition to any other requirements of this Act) -
>
> (a) the need to consider all other options before remanding the child in custody; and
>
> (b) the need to strengthen and preserve the relationship between the child and the child's family, guardians or carers; and
>
> (c) the desirability of allowing the living arrangements of the child to continue without interruption or disturbance; and
>
> (d) the desirability of allowing the education, training or employment of the child to continue without interruption or disturbance; and
>
> (e) the need to minimise the stigma to the child resulting from being remanded in custody; and

(f) the likely sentence should the child be found guilty of the offence charged; and

(g) the need to ensure that the conditions of bail are no more onerous than are necessary and do not constitute unfair management of the child.

(2) In making a determination under this Act in relation to a child, a court may take into account any recommendation or information contained in a report provided by a bail support service.

(3) Bail must not be refused to a child on the sole ground that the child does not have any, or any adequate, accommodation.

The ACT's *Bail Act 1992*, includes a similar provision in s.23, which specifically references the *Children and Young People Act 2008* (ACT):

Section 23 - Criteria for granting bail to children

(1) In making a decision about the grant of bail to a child in relation to an offence, a court or authorised officer must consider -

(a) the matters mentioned in section 22(1)(a) and (b), (2) and (3); and

(b) the principles in the *Children and Young People Act* 2008, section 94 (Youth Justice Principles); and

(c) if the decision is being made by a court and a report has been given to the court under the *Court Procedures Act* 2004, section 74D (court may order report about young person) in relation to the child - the report.

(2) In addition, the court or authorised officer must consider, as a primary consideration, the best interests of the child.

The draft Bill should be amended to include a non-exhaustive list of specific matters that a court or authorised officer must consider in making a decision about bail for a child or young person. I would welcome the opportunity to engage in discussions on what those matters might be. I would also strongly support inclusion of a prohibition on refusing bail to a child or young person on the sole ground that the child or young person does not have any, or any adequate, accommodation. I note Tasmania currently has no supported bail accommodation options for children and young people, a situation which is less than satisfactory, and which means detention is not always used as a last resort.

The proposed s.16(1)(h) and (i) would allow bail conditions relating to assessment for, and participation in, an intervention program with a rehabilitative focus to "address problem behaviours".[6] Bail can provide a valuable opportunity for a child or young person to be assessed for and participate in a rehabilitative program to address problem behaviours. Sections 56A and 56B of the YJA allow a court to defer sentence and grant bail to a child or young person for the purpose of assessment for and participation in an intervention plan.

[6] See also proposed s.4 of the draft Bill which defines "intervention program".

There are clear links between those provisions of the YJA and proposed s.16(1)(h) and (i) of the draft Bill. Participation in an intervention program as a condition of bail is also in accordance with the objective of the YJA to provide for appropriate treatment and rehabilitation.[7]

The draft Bill outlines the purposes of the proposed legislation at s.3. The value of treatment and rehabilitation is not included in these purposes notwithstanding its clear relevance to community safety. It is unclear how the provisions of the YJA relevant to assessment for and participation in intervention programs while on bail and the draft Bill would work together. This should be given further consideration. Also, it appears that specific transitional and consequential provisions related to the YJA should be included in the draft Bill.

Electronic Monitoring

Section 16(2) of the draft Bill contemplates the use of electronic monitoring as a condition of bail in certain circumstances. While the use of electronic monitoring may provide opportunities for bail where it would otherwise be refused, electronic monitoring of children is untested in Tasmania. I am also concerned that the use of monitoring devices on children and young people could lead to social stigma and interfere with their right to privacy. Arguably, wearing a tracking device may pose a risk to the safety of a child or young person who would be immediately identifiable by members of the public as a person on bail. In practice, given the large number of children and young people without stable accommodation, many would be precluded from electronic monitoring as a bail option.

The use of electronic monitoring for children and young people on bail therefore warrants further consideration and discussion.

Other considerations regarding bail conditions

I am pleased to note the inclusion in proposed s.15 of a requirement that a bail authority may only impose a condition on bail if the condition is reasonable given the nature of the offence and the circumstances of the person, and that the condition is no more onerous that necessary.

In this regard, I note Cox J's comments in *Levy v Strickland*[8]:

> One thing which I believe to be worthy of emphasis while dealing with the need for the judicial officer concerned to be satisfied of the necessity or desirability of imposing any particular condition is that the discretion must be exercised on an individual basis. Some conditions may be commonly made in certain types of offences (e.g. not to drive with alcohol in the blood or at all pending trial for an offence against the *Road Safety (Alcohol and Drugs) Act 1970,* but they must never be allowed to become standard conditions from which in any given case the defendant is required to persuade the court to exempt him. Such a condition must be imposed for a reason… It should not be imposed as a matter of course.

[7] S.4(e) of the *Youth Justice Act 1997.*
[8] [1983] Tas R 9 at 20, cited in Department of Justice. (2018). *Reforms to the Tasmanian Bail System - Position Paper*, pp. 39-40.

Although s.15 of the Bill appears to reflect the above, it would be preferable for the draft Bill to include a section which emphasises the importance of individualised rather than routine bail conditions for children and young people, given the significant adverse consequences that can result if a child or young person breaches bail and is taken into custody. I note also the important role that bail support programs play in assisting children and young people to meet the conditions of their bail, a matter I discuss in more detail below.

I make the following observations in relation to the types of bail conditions frequently imposed on children and young people:

Curfew conditions

I note that a residential condition is not among the types of bail conditions that may be imposed under proposed s.16. However, curfews are included. Compliance with curfew conditions can be particularly problematic for children and young people who are homeless or at risk of homelessness given the lack of suitable accommodation and other supports. These children and young people are often "couch surfing" or living in crisis shelters or unstable accommodation and invariably move address frequently. If a child does not pre-emptively apply to amend their bail, they are automatically in breach of bail and, if arrested, can be remanded in custody until they can appear in court to apply for a bail variation.

To reduce the disproportionate impact that a curfew condition can have on a homeless child or young person, consideration could be given to including in the draft Bill a mechanism which would enable a police officer of appropriate rank to vary any residential component of a court ordered curfew condition in certain circumstances.

Further, the lack of adequate accommodation and care options for unaccompanied homeless children in the community requires further action and response. Supported bail accommodation is needed for children and young people in Tasmania to avoid unnecessary remand in custody.

Reporting conditions

Reporting conditions (s.16(1)(a) of the draft Bill) can be difficult for children and young people to comply with. They can pose practical difficulties for children and young people due to access to transport, and timing issues, and can further criminalise children and young people through exposure to adult offenders when reporting to police stations.

Non-association conditions

Non-association conditions (s.16(1)(d) of the draft Bill) can be problematic for children and young people who have come into contact with the justice system, given the reality that many of their enduring friendships and supports in the community may involve other young offenders. These children and young people often lack prosocial and family supports as an alternative. Non-association provisions provide a very short-term solution to a very complex and long-term issue for children and young people involved in the justice system.

Non-attendance conditions

Non-attendance provisions can be highly problematic for children and young people if they restrict their access to essential areas (e.g. bus terminals, supermarkets, Centrelink offices, etc.). Although I accept the protection of victims and the community are important considerations in the granting of bail, it is also important that children and young people have the freedom to attend essential services without being in contravention of their bail.

The comments above highlight the need for an individualised approach to bail for children and young people. Appropriately resourced bail support programs, including with a residential component, can assist to reduce offending on bail, encourage attendance at court, and provide feasible community-based alternatives to detention.[9]

Remands for the purpose of providing instructions, preparation of a bail support plan or pre-sentence report

As the UN Committee on the Rights of the Child said in its General Comment on the child justice system, all actors in the child justice system should prioritise cases of children in pretrial detention. Unfortunately, children and young people often spend time in custody while they await the completion of a bail support plan or pre-sentence report or to instruct their lawyer. To minimise time spent in custody by children and young people, consideration should be given to enabling the prompt provision of reports and plans (perhaps by way of oral submissions on the day) and improving access to legal representation and opportunities to provide instructions on the day of court (including in the context of out-of-hours courts). I would welcome the opportunity to discuss these matters further.

Conclusion

The approach adopted by the draft Bill is not consistent with work underway to develop an integrated state-wide therapeutic model for youth justice in Tasmania or with the target to reduce the detention of Aboriginal and Torres Strait Islander children and young people under the National Agreement on Closing the Gap. As I have also outlined above, in my view the draft Bill is inconsistent with fundamental human rights principles applicable to children and young people in the justice system. It also appears to conflict with a fundamental principle contained in the YJA – which is that detaining a youth in custody should only be used as a last resort and as should only be used for as short a time as is necessary.

Thank you for the opportunity to comment on the draft Bill. I would be very pleased to discuss my comments in more detail with you or your officers should this be of assistance.

Yours sincerely

Leanne McLean
Commissioner for Children and Young People

cc Secretary, Department of Communities Tasmania

[9] Noetic Solutions (2016), *Custodial Youth Justice Options Paper - Report for the Tasmanian Government Department of Health and Human Services*, pp 38-39.