

Your Ref:
Our Ref:

3 March 2025

Ms Kristy Bourne
Secretary
Department of Justice
By email: haveyoursay@justice.tas.gov.au

Dear Secretary,

Re: Submission - Draft Bail Bill 2024

Thank you for the opportunity to provide feedback on the Tasmanian Government's draft Bail Bill 2024 (the Bill). I welcome the government's intention to improve the clarity and transparency of Tasmania's bail laws and strengthen safeguards for children and young people impacted by bail decisions.

I further welcome the incorporation of relevant recommendations of the Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings (Commission of Inquiry).

However, as this submission makes clear, some areas of the Bill warrant further consideration prior to finalisation.

Role of the Commissioner for Children and Young People

The *Commissioner for Children and Young People Act 2016* (CCYP Act) establishes the statutory office of the Commissioner for Children and Young People (Commissioner). The Commissioner's general functions include:

- advocating for all children and young people in the State generally;
- advocating for individual children and young people detained under the *Youth Justice Act 1997*;
- 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;



- assisting in ensuring the State satisfies its national and international obligations in respect of children and young people generally; and
- encouraging organisations to establish child-friendly mechanisms to assist children and young people to participate in matters that affect them.

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;
- observe any relevant provisions of the *United Nations Convention on the Rights of the Child* (UNCRC); and
- give special regard to the needs of children and young people who are vulnerable or disadvantaged for any reason.

Consistent with these functions, my analysis and comments on the Bill are limited to matters that affect, or have the potential to affect the rights, wellbeing and interests of children and young people.

My feedback has been informed by what I have heard from children and young people through my individual advocacy role for young people in detention¹, and through the *Voices of Young People in the Youth Justice System Project* (Voices Project).²

My comments are not necessarily intended to be exhaustive, and I reserve the right to make further comment on future iterations of the Bill.

Background

According to the accompanying information, some the key features of the Bill include:

- The introduction of a two-step ‘unacceptable risk’ test;
- Incorporating specific provisions for bail in relation to family violence from the *Family Violence Act 2004*;
- Replacing tests for bail under the *Justices Act 1959*;
- Maintaining a presumption in favour of granting bail;
- Providing a non-exhaustive list of bail conditions that may be imposed on a person.

With specific application to children and young people, the Bill further introduces:

- A range of factors that must be considered by a bail authority when making a bail decision in respect of a youth, modelled on the *Bail Act 1977* (Vic);
- a prohibition on the refusal of bail for a child or young person based solely on a lack of suitable or safe accommodation.

¹ See *Commissioner for Children and Young People Act 2016* (Tas), s 8(1)(b), s 10.

² Commissioner for Children and Young People Tasmania, *Voices of Young People in the Youth Justice System Project* <<https://childcomm.tas.gov.au/everyone/major-programs/youth-justice/the-voices-project/>>



Child-rights considerations

I have had the benefit of considering comprehensive submissions provided by former Commissioners regarding previous bail reform proposals³ and other work of this Office, including our submission in response to the Reforming Tasmania's Youth Justice System Discussion Paper,⁴ our submission in response to the Final Draft of the Youth Justice Blueprint,⁵ and our ongoing work and forthcoming publications of the Voices Project.⁶ These provide a comprehensive overview of the fundamental human rights principles applicable to children and young people in contact with the criminal justice system, including commentary on the UNCRC.⁷

I take this opportunity to highlight the following fundamental rights and principles relevant to children and young people subject to bail decisions:

- Article 37 of the UNCRC provides that children must be detained *only as a measure of last resort* and for the *shortest appropriate period of time* (the 'principle of last resort').
- Article 40(4) of the UNCRC requires state parties to make available a range of options and supports 'to ensure that children are dealt with in a manner appropriate to their wellbeing and proportionate both to their circumstances and the offence.'
- Rule 13 of the *Standard Minimum Rules for the Administration of Juvenile Justice*⁸ ('the Beijing Rules') provides clear guidance on the use of *pre-trial detention*, stating that it *must only be used as a measure of last resort and for the shortest possible period*. Rule 13 further provides that, wherever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive support, placement with a family or in an educational setting or home.

As former Commissioner McLean noted in her 2021 submission on the previous draft Bail Bill, that draft bill did not '*identify or explore the important and unique considerations relating to bail for children and young people*'. I am therefore pleased that the Bill incorporates several valuable suggestions made by the former Commissioner to better safeguard the rights and wellbeing of children and young people. These include the requirement that bail authorities consider a range of unique considerations when making a bail decision relating to children

³ Commissioner for Children and Young People Tasmania, *Submission in Response to the Reforms to the Tasmanian Bail System Position Paper* (2018) <<https://www.childcomm.tas.gov.au/wp-content/uploads/2018/06/DoJ-Bail-Reform.pdf>>; Commissioner for Children and Young People Tasmania, *Submission in Response to the Draft Bail Bill 2021* (2021) <<https://childcomm.tas.gov.au/wp-content/uploads/2022/07/2020-04-13-CCYP-FINAL-submission-on-Bail-Bill-2021.pdf>>.

⁴ Commissioner for Children and Young People Tasmania, *Submission in response to Reforming Tasmania's Youth Justice System Discussion Paper* (March 2022) <<https://childcomm.tas.gov.au/resource/reforming-tasmanias-youth-justice-system-discussion-paper/>>

⁵ Commissioner for Children and Young People Tasmania, *the Final Draft of the Youth Justice Blueprint* (November 2022) <<https://childcomm.tas.gov.au/resource/feedback-on-the-final-draft-youth-justice-system-blueprint-2022/>>

⁶ Commissioner for Children and Young People Tasmania, *Voices of Young People in the Youth Justice System Project* <<https://childcomm.tas.gov.au/everyone/major-programs/youth-justice/the-voices-project/>>

⁷ *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) <<https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>>.

⁸ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ('Beijing Rules'), GA Res 40/33, 40th sess, 96th plen mtg, Agenda Item 98, UN Doc A/ RES/40/30 (29 November 1985) <<https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/beijingrules.pdf>>.



and young people (cl.13), and the prohibition on refusing bail on the sole ground that a child or young person does not have safe or stable accommodation (cl.13(4)).

Broader context for bail reform

I take this opportunity to highlight that bail law reform must be considered in the context of the broader legislative and service system reforms identified as necessary by the Commission of Inquiry.

For instance, I fully support inclusion of cl.13(4) (which would prohibit the refusal of bail solely on the grounds that a child does not have safe or stable accommodation). However, accelerated and complementary implementation of cross-government and cross-sector initiatives committed to under the *Youth Justice Blueprint*, the *Youth Justice Reform Taskforce Action Plan 2024-2025*, and the *Youth Justice Model of Care* is necessary to fully realise the intent of this provision.⁹ These commitments include improved access to safe, stable and appropriate housing and accommodation for children and young people; appropriate, accessible and co-ordinated health, wellbeing and disability supports and services to children, young people and their families; and, importantly, delivery of a range of prevention, early intervention and diversionary initiatives implementing targeted support services (including a 24-hour bail support service¹⁰). Currently, my observation is that several children and young people in pre-trial custody are unable to or face delays in accessing accommodation and care options that meet their individual needs.

Cohesive whole of government commitment to and real action on achieving these and other reform initiatives, in partnership with the non-government sector, are critical to realising the intention of cl.13 of the Bill and reducing the number of children and young people on remand. I make these comments in the knowledge that almost all children and young people currently detained at the Ashley Youth Detention Centre are unsentenced.

Strategic alignment with other legislative reform initiatives including the introduction of non-criminalising responses to children (including by raising the minimum age of criminal responsibility and minimum age of detention), the review of the *Youth Justice Act 1997* (Youth Justice Act), and proposed changes to police powers and responsibilities,¹¹ is needed to create a cohesive legal framework that genuinely upholds the rights of children and young people across the youth justice continuum and improve community safety.

For example, as noted in the explanatory material, s.24B of the *Youth Justice Act 1997* requires that a bail authority (whether a court, justice of the peace or police officer) who intends to admit a youth to bail is required to have regard to the principles in s.5 of that Act in determining whether to add conditions to that bail, and if so, which conditions. However, these principles require updating to ensure they 'reflect contemporary understandings of child

⁹ Tasmanian Government, *Youth Justice Model of Care*, (December 2024) <https://assets.keepingchildrensafe.tas.gov.au/media/documents/Youth_Justice_Model_of_Care.pdf>.

¹⁰ Tasmanian Government, *Youth Justice Reform Taskforce Action Plan 2024-2025*, (October 2024), 10-11 <https://assets.keepingchildrensafe.tas.gov.au/media/documents/Youth_Justice_Reform_Taskforce_Action_Plan_2024-25.PDF>.

¹¹ See Commissioner for Children and Young People Tasmania, *Submission in Response to the Police Offences (Knives and Other Weapons) Amendment Bill 2025 – Consultation Draft* (February 2025) <<https://childcomm.tas.gov.au/wp-content/uploads/2025/02/2025-02-21-CCYP-Submission-Police-Offences-Amendment-Bill-2025.pdf>>; Commissioner for Children and Young People Tasmania, *Submission in Response to the Police Powers and Responsibilities Act – Proposal Paper* (February 2025) <<https://childcomm.tas.gov.au/wp-content/uploads/2025/02/2025-02-07-CCYP-Submission-PPRA-Proposal-Paper.pdf>>.



development, children's antisocial behaviour and children's needs' (see Commission of Inquiry, Recommendation 12.12). Contemporary principles of youth justice should also guide bail decision makers when making a bail decision (not just in determining conditions of bail).

Comment on the Bill

While the Bill represents a significant improvement on its previous iteration, there remain several opportunities for the reforms to better protect, respect and fulfill the rights of children and young people, and align with the government's commitment to ensuring children and young people have every opportunity to be bailed.¹²

In summary, I recommend consideration be given to the following:

- 1) Adjusting the operation of the 'unacceptable risk' test (cl.5) to better safeguard the rights and wellbeing of children and young people;
- 2) Ensuring a presumption in favour of bail for children and young people regardless of the offence with which they are charged (cl.8-9);
- 3) Elevating the factors in cl.13 as primary considerations in any decision related to bail for a child or young person;
- 4) Ensuring that the implementation of bail reforms is accompanied by dedicated resourcing and training for bail decision-makers.

Each of these matters is explored in more detail below. For ease of reference, I have organised the following comments to align with the structure of the Bill.

The 'Unacceptable Risk' test (clause 5)

The Bill provides that a person is to be granted bail by an authorised officer or a court unless the person poses an 'unacceptable risk'. Clause 5 sets out a two-step process to establish whether a person poses an 'unacceptable risk':

Firstly, consideration is given to whether there is a risk that the person, if released on bail –

- (i) would pose a danger to the safety or welfare of an individual, a class of individuals or the community generally; or
- (ii) is unlikely to attend the court, in respect of the bail matter, as required; or
- (iii) is likely to commit an offence; or
- (iv) is likely to interfere with witnesses or potential witnesses, or otherwise obstruct or impede justice, in respect of the bail matter or any other offence.

If the person does pose a risk of one or more of the above considerations, then the bail authority must assess whether such a risk is unacceptable. In considering what is deemed

¹² The Tasmanian Government's *Youth Justice Blueprint 2024-2034* states, '[t]he Government has accepted recommendations to ensure children and young people are provided with every opportunity to be bailed including: improved legislation around bail, funding additional bail support programs, the establishment of a 24-hour bail system and specific considerations around new assisted bail facilities. Implementation will be completed by July 2029,' (December 2023), 30. <<https://publicdocumentcentre.education.tas.gov.au/library/Shared%20Documents/Youth-Justice-Blueprint.pdf>>.



‘unacceptable’ a decision maker may take into account one or more of the matters factors outlined in cl.5(2).

In the absence of a provision to the contrary, the ‘unacceptable risk’ test would apply to children.

I am concerned that, in its current formulation, the ‘unacceptable risk’ test potentially runs contrary to the government’s commitment to ‘maximise opportunities for children and young people to be admitted to bail and minimise the number of children and young people on remand’,¹³ including through improved legislation that embodies a therapeutic approach.¹⁴ I am also concerned that the test may disproportionately affect Aboriginal children and young people, which conflicts with the government’s commitment to the National Agreement on Closing the Gap.¹⁵

If cl.5 is to apply to bail determinations for children and young people, consideration should be given to ensuring consistency with the last resort principle. Possible options include:

- explicitly preserving the common law approach to bail decisions whereby a court can assess all relevant risks and the presence of one risk alone is not usually sufficient to refuse bail;
- requiring a ‘real and substantial’ risk threshold, or similar wording (cl.5(1)(a));
- preserving the current test regarding the probability of a person attending court (cl.5(1)(a)(ii));
- preserving the current test that there is a real and substantial risk a person will commit an offence (cl.5(1)(a)(iii)), and/or limiting the application of cl.5(1)(a)(iii) to ‘serious’ offences only, so as to protect against bail refusals associated with a risk of low-level reoffending (e.g. minor stealing, traffic offences, trespass, or summary drug offences, etc.);
- including a provision that the child and young person specific factors listed in cl.13 are to be a primary consideration in any bail determination. Although this may be implied, it could be made clearer, in my view, that the bail authority is explicitly required to consider these factors. In its current form, the criteria for determining what constitutes an unacceptable risk remain ambiguous and if applied conservatively, pose a risk of more children and young people being denied bail.

I would also urge including a provision in line with s.3A of the *Bail Act 1997* (Vic) recognising the ongoing need to address historical and ongoing systemic discrimination resulting in the over-representation of Aboriginal children and young people remanded in custody:

¹³ Commission of Inquiry into the Tasmanian Government’s Responses to Child Sexual Abuse, *Who Was Looking After Me? Prioritising Safety of Tasmanian Children* (Report, Vol 1, Rec 12.14, August 2023), 121 <<https://www.commissionofinquiry.tas.gov.au/report>>.

¹⁴ Tasmanian Government, *Youth Justice Blueprint 2024-2034*, (December 2023), 30 <<https://publicdocumentcentre.education.tas.gov.au/library/Shared%20Documents/Youth-Justice-Blueprint.pdf>>.

¹⁵ Australian Government, *National Agreement on Closing the Gap* (July 2020), <<https://www.closingthegap.gov.au/national-agreement/targets>>.



Section 3A - Determination in relation to an Aboriginal person

- (1) In making a determination under this Act in relation to an [Aboriginal person](#), a [bail decision maker](#) must take into account (in addition to any other requirements of this Act) any issues that arise due to the person's Aboriginality, including the following—
- (a) the historical and ongoing discriminatory systemic factors that have resulted in Aboriginal people being over-represented in the criminal justice system, including in the remand population;
 - (b) the risk of harm and trauma that being in custody poses to Aboriginal people;
 - (c) the importance of maintaining and supporting the development of the person's connection to culture, kinship, family, Elders, country and community;
 - (d) any issues that arise in relation to the person's history, culture or circumstances, including the following—
 - (i) the impact of any experience of trauma and inter-generational trauma, including abuse, neglect, loss and [family violence](#);
 - (ii) any experience of out of home care, including foster care and residential care;
 - (iii) any experience of social or economic disadvantage, including homelessness and unstable housing;
 - (iv) any ill health the person experiences, including mental illness;
 - (v) any disability the person has, including physical disability, intellectual disability and cognitive impairment;
 - (vi) any caring responsibilities the person has, including as the sole or primary [parent](#) of an Aboriginal child;
 - (e) any other relevant cultural issue or obligation.

Reversal of presumption of bail and 'exceptional circumstances' (clause 8)

Clause 8(1) reverses the presumption of bail where a person has been charged with offences related to murder or treason, or when the person is believed, on reasonable grounds, to be a terrorism-linked person. Despite cl.8(1), bail may be granted by a court if the person charged can prove that 'exceptional circumstances' exist (cl.15(6)). What constitutes 'exceptional circumstances' is not defined in the Bill.

In its current form, there remains a risk that the operation of cl.8 may lead to disproportionate outcomes for children and young people and conflict with the last resort principle. Furthermore, it would run contrary to the government's commitment to removing detention as an option for children and young people under 16 years.¹⁶ While I, of course, appreciate the importance of ensuring community safety, particularly with respect to the commission of very serious crimes against the person, this must be balanced with the rights, interests and needs of children as young as 10 years.

If cl.8 is to continue to apply to children and young people, I strongly recommend that amendments be made to increase safeguards for children and young people. This could be done through including a provision that, when determining 'exceptional circumstances' for a

¹⁶ Tasmanian Government, *Youth Justice Blueprint 2024-2034*, (December 2023), 5
<<https://publicdocumentcentre.education.tas.gov.au/library/Shared%20Documents/Youth-Justice-Blueprint.pdf>>.



person under 18 years, that the bail authority must have regard to the factors listed in cl.13 as a primary consideration. For example, s.15AA of the *Crimes Act 1914* (Cth) (the Crimes Act), provides that the ‘best interests of the child’ (together with community safety) is the primary consideration when determining ‘exceptional circumstances’ for a person under 18 years.

Entitlement to bail if family violence is involved (clause 9)

In the case of bail decisions where family violence is involved, the Bill also reverses the presumption of bail. Bail cannot be granted unless the bail authority is satisfied that the release of the person is unlikely to adversely affect the safety, wellbeing and interests of an affected person or affected child. This reproduces s.12(1) of the *Family Violence Act 2004* which, as a consequence, will be repealed. A notable change is that the factors contained in s.12(2) of the *Family Violence Act 2004*, will not be included in the Bill.

As noted above, it is my view that the presumption of bail should apply to all children and young people regardless of the nature of their alleged offending. While it is of paramount importance to ensure the safety of persons, including children, affected by family violence, in the case of young people who perpetrate family violence, this must be considered in accordance with the principle of last resort and alternatives to detention.

If cl.9 is to apply to young people (which, by virtue of the *Family Violence Act 2004*, could apply to young people aged 16 or older who are in significant relationships) I strongly encourage that consideration be given to including an explicit provision that a bail decision maker must have regard to the factors listed in cl.13 as a primary consideration when determining bail for a young person under cl.9.

Similarly, in the case of cl.10, consideration should be given to including a provision that the factors listed in cl.13 be a primary consideration when the person is under 18 years.

Consistent with my comments above, I would also urge the government to invest in and expand family violence intervention programs for young people who use violence in the context of their intimate partner relationships. This is necessary in ensuring that appropriate alternatives to remand are at the court’s disposal when considering bail for young people. In this context, I refer to research conducted by Anglicare Tasmania highlighting the risks associated with criminalising the behaviour of young people who use violence in the context of intimate partner relationships.¹⁷ The report of that research recommended therapeutic, rehabilitative and restorative interventions for young people to reduce recidivism. Funding therapeutic interventions is also essential to upholding young people’s rights and achieving genuine community safety.

Grants of bail in respect of youths (clause 13)

Under cl.13 of the Bill, a range of factors are set out that must be taken into account when a bail authority is considering a grant of bail for a child or young person. This closely mirrors s.3B of the *Bail Act 1977* (Vic) and responds to recommendation 12.14(a) of the Commission of Inquiry. As noted above, I welcome the inclusion of cl.13 in the Bill. This was originally recommended in the former Commissioner’s 2021 submission on the previous Bail Bill.

¹⁷ Carmel Hobbs, ‘Young, In Love and In Danger: Teen Domestic Violence and Abuse in Tasmania’ (Research Report, Social Action and Research Centre, Anglicare Tasmania, November 2022), <<https://www.anglicare-tas.org.au/young-in-love-and-in-danger/>>



I nevertheless seek to highlight several matters that would further enhance this provision and strengthen protections for children and young people.

- *Age of criminal responsibility/doli incapax*: I am advised that cl.13(1)(c)(i) was included in error and will be deleted from the final version of the Bill. I further note that the cl.13(1)(c)(ii) will be adjusted to accurately reflect the presumption of *doli incapax*. Given the current law, I support these amendments but again take the opportunity to flag the importance of expediting reforms to raise the minimum age of criminal responsibility.
- *Child and Youth Safe Organisations Framework*: The Bill does not currently acknowledge the obligation of justice services to comply with the Tasmanian Child and Youth Safe Standards under the *Child and Youth Safe Organisations Act 2023*. Further consideration should be given to the relevance of the standards to bail decision making and related processes, particularly while children and young people continue to be routinely detained in police watchhouses and adult reception prisons pending bail decisions, court and transfers to youth detention.
- *Clause 13(1)(i)*: I note that the Bill does not contain an equivalent to s.3B(1)(i)(ii) of the *Bail Act 1977* (Vic), which provides that bail conditions 'do not constitute unfair management of the child.' I am advised that this clause was omitted from the Bill due to its legal meaning being unclear. A possible alternative would be to incorporate a similar provision to that contained in s.5(1)(b) of the *Youth Justice Act 1997* (Tas) that, when considering appropriate bail conditions, a youth is not to be treated more severely than an adult would be.
- *Clause 13(1)(j)*: this provision requires a bail authority to consider that some groups of children and young people experience discrimination resulting in over-representation in the criminal justice system. I support the inclusion of Aboriginal children, children subject to child safety orders, and children from culturally and linguistically diverse backgrounds as representing groups experiencing discrimination. I also recommend the addition of additional groups:
 - children and young people experiencing or at risk of homelessness;
 - children and young people experiencing psychological, emotional, cognitive or any other mental health condition or impairment.
 - Children and young people who have been, or are likely to be, diagnosed with an intellectual disability, developmental delay, or cognitive impairment.
- *Clause 13(4)*: As noted above, I welcome the inclusion of cl.13(4) in the Bill, which prohibits the refusal of bail for a child or young person solely on the basis that they do not have safe or suitable accommodation. I nevertheless query who, in practice, would assume responsibility for ensuring a child or young person has somewhere safe to go. It would be devastating if this clause had the unintended consequence of highly vulnerable children being released to the streets. To address this risk, I recommend consideration be given to placing an obligation on the state to facilitate suitable accommodation for a child or young person, if directed to do so by a court. A similar obligation could also be put in place regarding the arrangement of supports and other interventions. The former Commissioner's Memorandum of Advice on the Age of Criminal Responsibility in Tasmania provides pragmatic and considered



recommendations for responding to the needs of younger children in contact with the criminal justice system which may be instructive in this context.¹⁸

In addition to the above suggestions, to achieve the Bill's object of consistency (cl.4(d)) and to truly realise the use of detention as a last resort, the implementation of the considerations in cl.13 should be accompanied by capacity building and specialist education for bail decision-makers. This could include training and education on topics such as cultural awareness related to both Aboriginal people and those from culturally and linguistically diverse backgrounds, people living with a disability, mental health, the impact of trauma, and the unique developmental and other needs of young people in contact with the criminal justice system.

Grants of Bail (clauses 14 - 16)

Children and young people often report confusion regarding bail decisions and conditions. This is particularly apparent when complex legal terminology is used, and reliance is placed on the use of written notices and signatures (see cl.14(3)(a); cl.16(2)(b)). These requirements wrongly assume a level of competency in literacy, language and comprehension among children and young people in Tasmania.¹⁹ Further, children and young people in the criminal justice system are more likely to experience developmental delays, intellectual disability and speech and language disorders.²⁰

These practices can further exacerbate the disadvantage experienced by many children and young people. I therefore recommend including a provision that an authorised officer or bail authority must take steps to ensure that the child or young person, and their guardian, if present, understand the purpose and effect of the order and the consequences (if any) that may follow if they fail to comply with the requirements of the order. See s.50 of the *Youth Justice Act 1997*, which includes examples of the steps a court might take in explaining a sentencing order. A similar approach could be taken here.

Further, as noted above, it is critical that the government maintain its commitment to implementing intensive bail support services that assist young people to understand and comply with their bail conditions.

A further matter under cl.14 that I seek to raise relates to the requirement for an authorised officer to consider whether granting bail would be, on reasonable grounds, not desirable in the interests of justice (cl.14(2)(b)). This clause replicates existing provisions under s.34 of the *Justices Act 1959*. I query whether this clause is necessary, considering the application of the unacceptable risk test (noting my comments above). This language, to my mind, is unclear and outdated and represents an additional test as to whether a person should receive bail.

¹⁸ Commissioner for Children and Young People Tasmania, *Memorandum of Advice – The Age of Criminal Responsibility in Tasmania* (14 July 2023) <[2023-07-14-FINAL-for-public-release-CCYP-Memorandum-of-Advice-re-Age-of-Criminal-Responsibility-.pdf](https://www.cyp.tas.gov.au/2023-07-14-FINAL-for-public-release-CCYP-Memorandum-of-Advice-re-Age-of-Criminal-Responsibility-.pdf)>

¹⁹ Jordana Hunter, Anika Stobart, and Amy Haywood, 'The Reading Guarantee: How to give every child the best chance of success' (Report No 2024-01, Grattan Institute, February 2024) <<https://grattan.edu.au/wp-content/uploads/2024/02/The-Reading-Guarantee-Grattan-Institute-Report.pdf>>

²⁰ See for example, Keith McVilly, Molly McCarthy, Andrew Day, Astrid Birgden and Catia Malvaso (2023) 'Identifying and responding to young people with cognitive disability and neurodiversity in Australian and Aotearoa New Zealand youth justice systems' (2023), 30(6) *Psychiatry, Psychology and Law*, 789-811, DOI:10.1080/13218719.2022.2124548.



Administrative requirements (clause 16)

Clause 16(1)(b) provides that a person is granted bail if ‘...the person has complied with the administrative requirements of the court that is granting bail.’ This clause ensures that a court can require a person to remain in a form of de facto custody until their bail order is prepared, provided to them and signed.

While I appreciate the purpose of this clause, it should not operate in such a way as to legitimatise a situation where children and young people are detained longer than is reasonably necessary, and in circumstances that could pose a risk to their safety and privacy. I am aware, for instance, that children and young people have in the past been directed to wait in a ‘bail room’ also frequented by adults while they await their bail document at court.

Similarly, I am aware that children and young people at Ashley Youth Detention Centre are sometimes required to wait in their cells while their bail order is being prepared. While I acknowledge some of these practices are linked to internal policies and resourcing constraints that are outside the scope of this Bill, I would encourage consideration be given to placing an obligation on the bail authority to take all reasonable steps to facilitate the immediate release of a child or young person once a bail order has been made.

Bail Conditions (clause 19)

Clause 19 of the Bill contains a non-exhaustive list of common conditions that may be imposed as part of a bail order, such as curfew, reporting and residential conditions. All listed conditions may be imposed on a child or young person, except in the case of electronic monitoring and entering into a surety agreement. These exclusions reflect the feedback of the former Commissioner and other stakeholders which highlighted several concerns, including that it would contribute to further stigmatisation and disadvantage for children and young people. I therefore support these exclusions.

However, in the absence of a strong statement to the contrary, there is a risk that a child or young person could be unfairly disadvantaged due to these exclusions. This risk could translate into increased bail refusals or the imposition of more onerous alternative conditions. To mitigate against this risk, I recommend consideration be given to including a provision in the Bill that makes it clear that a child or young person is not to be treated more severely than an adult would be because of these conditions being unavailable.

I further recommend that a provision be included requiring bail authorities to consider the factors in proposed cl.13 when determining appropriate conditions for bail. While this may be implied, it is important that the unique needs of children and young people are considered when imposing conditions of bail.

This is particularly important considering what is frequently heard from children and young people with experience of the youth justice system that bail conditions:

- Are often difficult to comply with and may be perceived as ‘setting them up to fail’;
- Can operate in a discriminatory manner whereby young people with access to greater familial support and resources are perceived as being more likely to receive bail;



- Can have the unintended consequence of increasing offending behaviour, by causing them to feel 'powerless and hopeless'.²¹

Bail authorities should consider and take into account the unique experiences and challenges experienced by children and young people when determining the most appropriate bail conditions and, where possible, provide some flexibility in how those conditions must be observed.²² For example, in the absence of adequate family or community supports, children and young people may not have the capacity to immediately sever deep-rooted connections with others in order to comply with non-association requirements. As a young person (18 years) who participated in the Voices Project explained:

*'Because when you've been associating with all these people your whole life, then you reckon that you can't talk to them, you know what I mean? When they put a non-association on someone... You can't just stop someone from talking to someone and they have just been there your whole life, you can't do that.'*²³

Further, non-attendance provisions must not operate in a way which prevent access to essential services and material basics. As another young person (16 years) from the Voices Project described, this can be particularly challenging for a young person experiencing homelessness and limited support:

*'Some kids always are in town, they've got nowhere else to go and shit. Me, when I was homeless, I used to cross through the same school, but they kept giving me trespass notices. But it was the only fast way to get to the shops, so I could get my food and shit. Then I got a ban notice from the shops, so I'd nowhere to get food or nothing from. They just don't really think about how it affects us in the long run.'*²⁴

Young people also describe difficulty adhering to curfew and residential conditions when their home or living environment is 'triggering' and is not always a safe and stable environment. Placing such conditions on children and young people, who already experience several barriers and difficulties, without appropriate supports and acknowledgement of the differential power relationship between adults and children can quite simply 'set them up to fail'.²⁵

²¹ Australian Human Rights Commission, *'Help way earlier!': How Australia can transform child justice to improve safety and wellbeing* (Report, 2024)

<https://humanrights.gov.au/sites/default/files/document/publication/1807_help_way_earlier_-_accessible_0.pdf>; Commissioner for Children and Young People Tasmania, *'Setting Yourself Up to Fail': Voices of Young People in the Youth Justice System Project* (Report, 2025), (forthcoming) <<https://childcomm.tas.gov.au/everyone/major-programs/youth-justice/the-voices-project/>>.

²² See also Commissioner for Children and Young People Tasmania, *Submission in Response to the Draft Bail Bill* (Submission, 2021), 11 – 13 <<https://childcomm.tas.gov.au/wp-content/uploads/2022/07/2020-04-13-CCYP-FINAL-submission-on-Bail-Bill-2021.pdf>>.

²³ Commissioner for Children and Young People Tasmania, *'Setting Yourself Up to Fail': Voices of Young People in the Youth Justice System Project* (Report, 2025), (forthcoming) <<https://childcomm.tas.gov.au/everyone/major-programs/youth-justice/the-voices-project/>>.

²⁴ Commissioner for Children and Young People Tasmania, *'Setting Yourself Up to Fail': Voices of Young People in the Youth Justice System Project* (Report, 2025), (forthcoming) <<https://childcomm.tas.gov.au/everyone/major-programs/youth-justice/the-voices-project/>>.

²⁵ Commissioner for Children and Young People Tasmania, *'Setting Yourself Up to Fail': Voices of Young People in the Youth Justice System Project* (Report, 2025), (forthcoming) <<https://childcomm.tas.gov.au/everyone/major-programs/youth-justice/the-voices-project/>>.



It is also important that bail authorities receive appropriate education and training on how bail conditions uniquely affect children and young people and can unfairly disadvantage particular groups of young people. This echoes the recommendation made by Australia's National Children's Commissioner regarding the benefit of specific training for police and judicial officers on setting appropriate bail conditions. This would likely reduce subsequent remands for breaches of bail and better align with the principle of detention as a last resort.²⁶

Applications to vary bail (clause 21)

The Bill includes a provision permitting an authorised officer to vary 'police bail' (see cl.21). This is a positive step in providing greater flexibility, efficiency and responsiveness within the system, particularly for those children and young people who are itinerant, experiencing homelessness or lack stability in their lives. However, there is also a need to streamline the process for varying court-imposed bail conditions. While this is undoubtedly governed by rules and policies, further consideration could be given to enabling less cumbersome processes to modify bail conditions where appropriate. In the case of children and young people, this would allow for a more responsive approach to their changing circumstances and reduce the risk a young person is in technical breach of bail. As a young person (17 years) who participated in the Voices Project explained:

'For instance, if [a young person] had a house and he had a fight with his parents and they kicked him out, it's not like he can just ring the police station and say, change my curfew right now. It's going to be hard, obviously. You're going to be in breach of your bail'.²⁷

Other matters

In addition to the above points, I would like to highlight the following matters:

Contemporising language

A thorough review of the terminology used in the Bill is warranted to ensure it is contemporary, inclusive, and best reflects the Tasmanian context. This is especially important when referring to matters such as mental health, disability, and the rights of children and young people. The relevant officer may wish to contact the Advocate for Young People in Detention in the Office of the Commissioner to discuss this aspect of the Bill in further detail.

Primary care givers

Clause 5(2), which sets out matters that may be considered in determining whether a person poses an 'unacceptable risk', should include consideration as to whether the person is the primary carer of a child or young person. As was noted in the former Commissioner's 2021 submission, having a parent, particularly a primary carer, taken into custody can 'adversely

²⁶ Australian Human Rights Commission, *'Help way earlier!': How Australia can transform child justice to improve safety and wellbeing* (Report, 2024) <https://humanrights.gov.au/sites/default/files/document/publication/1807_help_way_earlier_-_accessible_0.pdf>.

²⁷ Commissioner for Children and Young People Tasmania, *'Setting Yourself Up to Fail': Voices of Young People in the Youth Justice System Project* (Report, 2025), (forthcoming) <<https://childcomm.tas.gov.au/everyone/major-programs/youth-justice/the-voices-project/>>.



affect a child or young person's wellbeing including their mental health, social behaviour, educational outcomes, and cause financial hardship'.²⁸

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

Through my advocacy for individual young people in detention, young people often report their experience of lengthy adjournments following an unsuccessful application for bail. This may be due to a range of factors, including awaiting completion of a bail support plan or pre-sentence report, to instruct a lawyer and/or possibly as a consequence of court backlog. Furthermore, the onus is often placed on the young person to seek a relisting to progress or renew an application for bail, which can be exceptionally difficult. While I appreciate that resourcing constraints are often the primary contributing factor for these delays, as with the accommodation provision in cl.13(4), the Bill could send a clear message to the bail authority that a young person must not be refused bail for the purpose of preparing a report or to allow for instructions. Additionally, as was highlighted in the former Commissioner's 2021 submission, 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. The latter should also extend to ensuring young people who appear on bail matters in out-of-hours courts receive timely access to legal advice and representation. I would welcome the opportunity to discuss these matters further.

Conclusion

While the Bill introduces some important protections for children and young people, I remain concerned that aspects of the Bill, such as the 'unacceptable risk' test and the reversal of the presumption of bail in certain cases, run contrary to the rights and best interests of children and young people. As I have outlined above, further consideration should be given to ensuring the Bill is consistent with children's rights and that it genuinely aligns with the government's commitments for youth justice reform and the implementation of the recommendations made by the Commission of Inquiry.

Thank you again for the opportunity to provide comment on the Bill. I would welcome a further opportunity to discuss my comments in more detail with you or your officers should this be of assistance.

Yours sincerely

Isabelle Crompton

Interim Commissioner for Children and Young People

cc: *The Hon Jeremy Rockliff, Premier*
The Hon. Guy Barnett, Minister for Justice
The Hon Roger Jaensch, MP, Minister for Children and Youth
The Hon. Felix Ellis, Minister for Police, Fire and Emergency Management
The Hon. Madeleine Ogilvie, Minister for Corrections and Rehabilitation

²⁸ Commissioner for Children and Young People Tasmania, *Submission in Response to the Draft Bail Bill* (Submission, 2021) <<https://childcomm.tas.gov.au/wp-content/uploads/2022/07/2020-04-13-CCYP-FINAL-submission-on-Bail-Bill-2021.pdf>>.