

Your Ref:
Our Ref: 703

02 February 2018

Kristy Bourne
Deputy Secretary
Office of the Secretary
Department of Justice
GPO Box 825
HOBART TAS 7001

By email to: legislation.development@justice.tas.gov.au

Dear Ms Bourne

Re: Bail Reform Position Paper

Thank you for the opportunity to provide comment on the Bail Reform Position Paper (the Paper) which outlines a number of proposals to reform Tasmania's bail law.

Consistent with my statutory functions, my comments (which are not intended to be exhaustive) are limited to those matters which in my view will affect, or which have the potential to affect, children and young people who are in conflict with the law and who have not yet attained the age of 18 years.

In performing my functions I am required to:

- a) do so according to the principle that the wellbeing and best interests of children and young people are paramount; and
- b) observe any relevant provisions of the United Nations *Convention on the Rights of the Child*.¹

Furthermore, in addition to my general advocacy function in relation to all children and young people in Tasmania, I am required to assist in ensuring the State satisfies its national and international obligations in respect of children and young people generally.²

¹ Section 3 of the *Commissioner for Children and Young People Act 2016*.

² Section 8(1)(f) of the *Commissioner for Children and Young People Act 2016*.



Comment

As the Paper does not appear to exclude children and young people in conflict with the law from the application of the proposals for bail reform discussed, there is a need to consider:

- a) whether these proposals for reform are consistent with well-established and widely accepted principles applicable to this cohort of children and young people; and, if not
- b) whether a further consultation process focusing specifically on the application of these proposals for reform to children and young people in conflict with the law is warranted.

Principles of Youth Justice

Our law recognises that children and young people aged less than 18 years in conflict with the law are different from adult offenders due to their inexperience and immaturity.

The United Nations Committee on the Rights of the Child in its *General Comment on Children's Rights in Juvenile Justice* says³:

In all decisions taken within the context of the administration of juvenile justice, the best interests of the child should be a primary consideration. Children differ from adults in their physical and psychological development and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law. These and other differences are the reasons for a separate juvenile justice system and require a different treatment for children. The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety.

Accordingly, our youth justice system is based on fundamental principles, particularly:

- An emphasis on diversionary measures and processes, as a way of encouraging responsibility for one's actions but also to avoid the criminogenic effects of contact with the court system;
- Resort to custodial detention (including pre-trial detention) only as a last resort and only for the shortest time necessary; and

³ Committee on the Rights of the Child, *General Comment No. 10 (2007) Children's Rights in Juvenile Justice*, para 10.



- A focus on promoting a child or young person's wellbeing and ensuring that any sanction imposed is proportionate - the response to young offenders (including alleged offenders) should be based on the consideration not only of the gravity of the offence, but also of personal circumstances.

These and other principles are expressed in international instruments such as the United Nations *Convention on the Rights of the Child* (CRC) and the United Nations' *Standard Minimum Rules for the Administration of Juvenile Justice* (the 'Beijing Rules').

The following articles under the CRC are of particular relevance:

- Article 37(b) requires that no child should be deprived of his or her liberty arbitrarily, and that arrest and detention of a child should be used only as a measure of last resort and for the shortest possible period of time.
- Article 40(1) requires that children are treated in a manner consistent with promoting their sense of dignity and worth, which reinforces their respect for human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and their assuming a constructive role in society.
- Article 40(3)(b) requires that whenever appropriate and desirable, measures are promoted for dealing with children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.
- Article 40(4) requires that a variety of dispositions shall be available to ensure that children are dealt with in a manner appropriate to their wellbeing, and proportionate to both their circumstances and the offence.
- Article 9(1) requires that children not be separated from their parents against their will, except when competent authorities subject to judicial review determine that such separation is necessary for the best interests of the child. Article 9(4) includes reference to detention or imprisonment of a child as examples of such separation.

The Committee on the Rights of the Child has said the following in its *General Comment on Children's Rights in Juvenile Justice*:

The Committee notes with concern that, in many countries, children languish in pre-trial detention for months or even years, which constitutes a grave violation of article 37(b) of CRC. An effective package of alternatives must be available ... for the States parties to realise their obligation under article 37(b) of CRC to use deprivation of liberty only as a measure of last resort. The use of these alternatives must be carefully structured to reduce the use of pre-trial detention as well, rather than "widening the net" of sanctioned children. In addition, the States parties should take adequate legislative and other measures to reduce the use of pre-trial detention. Use of pre-trial detention as a punishment violates the presumption of innocence. The law should clearly state the conditions that are



required to determine whether to place or keep a child in pre-trial detention, in particular to ensure his/her appearance at the court proceedings, and whether he/she is an immediate danger to himself/herself or others. The duration of pre-trial detention should be limited by law and be subject to regular review.⁴

Rule 13 of *Standard Minimum Rules for the Administration of Juvenile Justice*⁵ ('the Beijing Rules') provides clear guidance on the use of detention pending trial.

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.

Tasmania's *Youth Justice Act 1997* ('the YJA') applies to young people aged 10 or more years old but less than 18 years at the time the offence the person has committed, or is suspected of having committed, occurred.⁶ The object of the YJA is not merely to sanction young offenders but also to ensure they receive appropriate treatment and rehabilitation.⁷ Accordingly, the YJA provides for a variety of diversionary processes including police cautioning and community conferencing, as well as for a range of minimal intervention court orders, such as community-based supervision orders. Limits are placed on the power of arrest and the YJA modifies some aspects of the general law regarding bail, as that law applies to children and young people.

The YJA provides that a youth should be detained in custody for an offence only as a last resort and for the shortest appropriate period of time.⁸ This provision reflects our obligations under the CRC, as mentioned previously.

⁴ UN Committee on the Rights of the Child (CRC), *General Comment No. 10 (2007): Children's Rights in Juvenile Justice*, 25 April 2007, CRC/C/GC/10, page 22.

⁵ 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.

⁶ Section 3, *Youth Justice Act 1997*.

⁷ Section 4 (e) *Youth Justice Act 1997*.

⁸ Section 5(1) (g) *Youth Justice Act 1997*.



Determining bail in relation to a child or young person

Section 23 of the YJA is as follows:

Subject to this Act, the law of the State relating to investigation, interrogation, arrest, bail, remand and custody applies to youths, with necessary adaptations and any further adaptations that are set out in this Act or the regulations.

I note that section 24B of the YJA requires a court or a police officer who intends to admit a youth to bail to have regard to the principles set out in section 5 of the YJA when deciding whether to impose any conditions and if so, which conditions to impose. Breach of a condition of bail is not dealt with as an offence unless the breach relates to a failure to appear in court (section 24C YJA).

If it is intended to extend proposed bail reforms to children and young people, it would, in my respectful opinion, be necessary to include in legislation provisions to ensure consistency with the well-established principles of youth justice I have referred to above, and to align bail decisions relating to children and young people with the general principles contained in section 5 of the YJA.

I note section 3B of Victoria's *Bail Act* 1977, introduced as part of 2016 amendments to Victoria's bail law, sets out a number of matters a court must take into account when making a decision about bail in relation to a child. Section 3B received widespread support from stakeholders in the context of the Victorian Bail Review completed by the Hon Paul Coghlan QC in April 2017⁹. Section 3B 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

⁹ The Hon Paul Coghlan QC, *Bail Review - First Advice to the Victorian Government*, 3 April 2017, p55 <https://engage.vic.gov.au/application/files/9814/9419/7926/Coghlan-report-1.pdf>



- (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.

A further example explicitly incorporating reference to youth justice principles in the context of bail decisions relating to children can be found in section 23 of the *Bail Act 1992* (ACT). I have set out that provision below for your convenience:

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.

Conclusion

It is my opinion that proposals to modify the presumption in favour of bail as described in the Paper would, if applied to children and young people, be in conflict with the well-established principles and considerations that I have described above.

Should a decision be made to apply the proposals in the Paper to children and young people in conflict with the law, I recommend that a further discussion paper be prepared focusing specifically on the particular considerations applicable to children and young people; and that this discussion paper canvass options to ensure consistency with the well-established principles I have referred to. Issues canvassed could include: examples of how other jurisdictions have addressed this matter; alternative means of addressing any actual increase in offending by children and young people while on bail; and the appropriateness of providing intensive bail support, which might include accommodation.



I would welcome the opportunity to discuss the matters I have raised above in more detail and to be provided with the opportunity to comment on any relevant draft Bills.

Yours sincerely

David Clements
Interim Commissioner for Children and Young People

cc: Minister for Justice

cc: Minister for Human Services

cc: Secretary, DHHS

cc: Deputy Secretary Children, Children and Young Services, DHHS