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Bail and remand for young people in Australia: A national research project

Kelly Richards and Lauren Renshaw

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Foreword

For more than a decade, there has been significant interest in the extent to which young people have been remanded in custody in Australia, with the perception that the numbers experiencing remand are increasing—particularly in light of the steady increase since 1981 in the proportion of young people in detention on remand.

Funded and endorsed by the Australasian Juvenile Justice Administrators, this is one of the first pieces of research conducted on a national scale into the bail and remand practices for young people in Australia. A young person can be placed in custody on remand (ie refused bail) after being arrested by police in relation to a suspected criminal offence, before entering a plea, while awaiting trial, during trial or awaiting sentence.

Although custodial remand plays an important role in Western criminal justice systems, minimising the unnecessary use of remand is important given the obligations Australia has under several United Nations instruments to use youth detention of any kind as a last resort only. This research identifies trends in the use of custodial remand and explores the factors that influence its use for young people nationally and in each of Australia's jurisdictions. A key finding of this study is that while the rate of

young people in detention on remand has increased, the rate of sentenced young people in detention has decreased more substantially over the same period. This indicates that although there have been increases in the use of remand, the issue has been overstated to some extent. That said, there were very high levels of young people on custodial remand identified in some jurisdictions (the Northern Territory in particular). There were also substantial differences in the representation of Indigenous and non-Indigenous people on remand, with Indigenous young people 20 times more likely to be on remand and to spend longer on remand than their non-Indigenous counterparts.

Having assessed the nature of the use of remand and its drivers, the authors highlight the need for renewed debate on the purpose(s) of bail, the importance of implementing evidence-based policies and programs that prevent the onset of offending by young people, and the implementation and evaluation of appropriately targeted bail support services for young people, particularly those with multiple, complex needs.

Dr Adam Tomison
Director

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Please note that the views of participants contained herein do not necessarily reflect the views of the agencies they represent.

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Acronyms

AIC	Australian Institute of Criminology
CAHABPS	Central After Hours Assessment and Bail Placement Service
CHART	Changing Habits and Reaching Targets
DPP	Department of Public Prosecutions
KPIs	key performance indicators
MYBS	Metropolitan Youth Bail Service
OCYFS	Office for Children, Youth and Family Support

Executive summary

The custodial remand of young people has recently emerged as a key issue for youth justice in Australia, due primarily to concerns about perceived increases in young people on custodial remand. While a number of research studies and reviews on this topic have recently been published, this report provides the first detailed national consideration of the issue.

Although custodial remand plays an important role in Western criminal justice systems, minimising the unnecessary use of remand is important in youth justice, as Australia has obligations under several United Nations instruments to use detention of any kind only as a last resort for young people. Further, each of Australia's jurisdictions has legislation in place that provides that young people should only be detained as a last resort.

Custodial remand of young people in Australia

This exploratory study used qualitative and quantitative methods to explore trends in the use of custodial remand for young people and potential 'drivers' of these trends.

A key finding of this study is that while the rate of young people in detention who are on remand has increased, the rate of sentenced young people in detention has decreased more substantially over the same period of time. This indicates that although concerns about increases in young people on remand are supported by the available evidence, they have been overstated to some extent.

Analysis of quantitative data did indicate, however, very high levels of young people on custodial remand in some jurisdictions (in particular, the Northern Territory), as well as differences between

the length of time spent on remand by Indigenous and non-Indigenous young people, with Indigenous young people spending longer on remand than their non-Indigenous counterparts.

Drivers of custodial remand for young people

Given these findings, and Australia's international and legislative obligations, it is vital to consider the factors that influence rates of young people on custodial remand. Based on the existing literature, and qualitative interviews undertaken with a wide range of stakeholders in each jurisdiction, this study considers in detail the following 'drivers' of remand for young people:

- rates of offending by young people;
- increasingly complex needs of young alleged offenders;
- young people not applying for bail;
- lack of access to legal representation;
- judicial attitudes;
- punitive community attitudes;
- court delays;
- difficulties locating 'responsible adults' to support young people's bail applications;
- pre-court decisions;
- risk aversion;
- the influence of victims' rights;
- inappropriate and/or arbitrary use of bail conditions;
- breaches of bail;
- policing performance measures;
- policing practices;

- administrative errors;
- lack of access to services/programs; and
- the influence of therapeutic jurisprudence.

Bail support services and programs for young people

Given that supporting young people on bail can contribute towards minimising the unnecessary custodial remand of young people, this study also provides an overview of bail support services and programs for young people in each jurisdiction. This report argues, however, that the available bail support for young people is limited and in some instances problematic, for the following reasons:

- in some jurisdictions, only small numbers of young people participate in bail support programs;
 - there is a metropolitan bias and a lack of support for young people in regional, rural and remote areas;
 - there is a lack of clarity about the purpose of bail support services and programs;
 - there is a lack of engagement with young people with complex needs and/or offending histories, with some programs actively excluding these young people;
 - there are differences among programs as to whether young people must plead guilty in order to participate and therefore whether it is appropriate to address 'offending' behaviour; and
 - in some cases, bail support services and programs increase the monitoring and scrutiny of young people.
- there is a lack of consensus on what bail can achieve for young people by bail decision makers;
 - young people with complex needs and welfare issues (ie those with mental health, alcohol and other drug abuse problems, and/or a history of experiencing child maltreatment or other violence) are most vulnerable to receiving custodial remand—they are often excluded from mainstream and community-based services. This, combined with legislation that aims to 'protect' a young person from the outside world and/or because required services are only available in custody, contributes to situations where young people may be remanded in detention 'for their own good';
 - young people in out-of-home care in particular are highly vulnerable to being placed on custodial remand. They are frequently unable to obtain bail as they either 'fall through the cracks' of the youth justice system, or are placed on custodial remand as a result of coming under a high level of scrutiny in residential care facilities;
 - evidence-based early intervention and prevention of offending by young people plays an important role in minimising the rate of custodial remand of young people; and
 - a process of 'mesh-thinning' occurs for some young people—particularly for vulnerable groups of young people such as those in out-of-home care such that once they are 'caught up' in the youth justice system, young people's opportunities to exit the system diminish.

A key recommendation of this study is therefore that bail support services reconsider the aims and objectives of their service, as well as the international evidence about what works with young people on bail.

Key findings

The key findings from this review are:

- there is a need to look beyond legislative reform in minimising the custodial remand of young people;

Key recommendations

Numerous factors impact on the level of young people on custodial remand. If the unnecessary custodial remand of young people is to be minimised, a multifaceted approach is therefore required. This research highlights in particular the need for renewed debate about:

- the purpose(s) of bail;
- the importance of implementing evidence-based policies and programs that prevent the onset of offending by young people; and

- the implementation and evaluation of appropriately targeted bail support services for young people, particularly those with multiple, complex needs.

A set of recommendations is summarised in Table 18 that outlines both direct and indirect ways that may be used to minimise the inappropriate custodial remand of young people.

Impending changes to bail legislation

At the time of writing this report, changes to bail legislation in New South Wales and Tasmania that

may impact on the findings of this research were being enacted. The *NSW Bail Act 1978* as described in this report has since been replaced by *NSW Bail Act 2013*. At the time of writing, every effort was made to liaise with jurisdictional representatives to include information about any impending changes; however, readers should be aware that information relating to these jurisdictions may no longer be accurate.



Introduction

After being arrested by police in relation to a suspected criminal offence, a young person can be held on custodial remand (ie refused bail) before entering a plea, while awaiting trial, during trial or awaiting sentence.

In recent years, concern about the number of young people being held on custodial remand has emerged. This concern emerged partly in response to research by the Australian Institute of Criminology (AIC; Richards & Lyneham 2010), which found that nationally, the proportion of young people in detention who are on remand (ie unsentenced) has been steadily increasing since 1981. As Figure 1 shows, while approximately 20 percent of all young people in detention in 1981 were on custodial remand, this had increased to approximately 60 percent by 2008 (see further Richards 2011a).

Impacts of custodial remand

Custodial remand has been identified 'as one of the most taxing and unstable prison experiences' (Freeman & Seymour 2010: 138) and a wide range of negative outcomes have been shown to impact young people who are remanded in custody prior to being tried or sentenced for an offence. Goldson

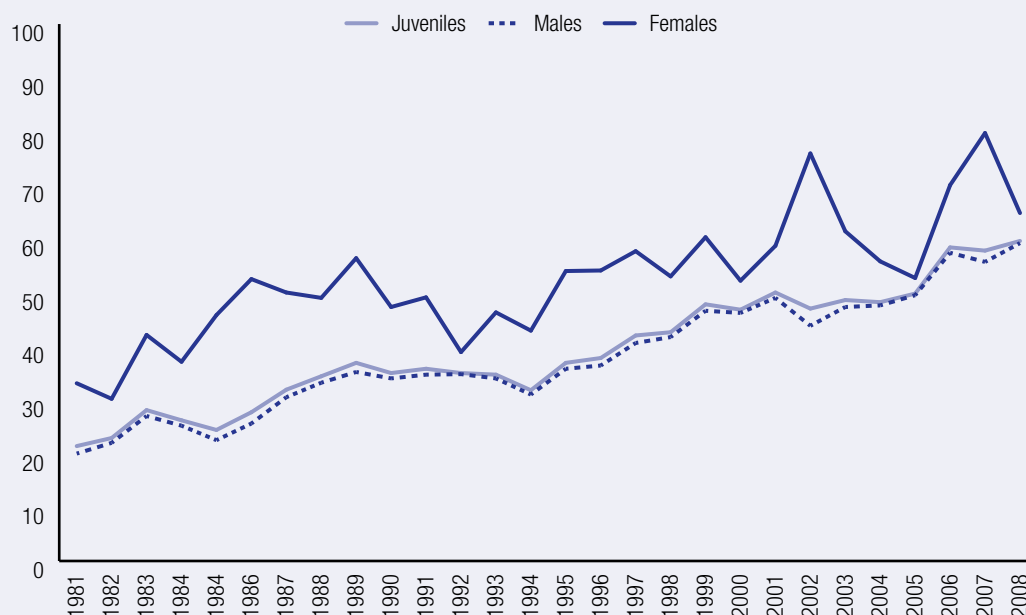
and Jamieson (2002: 69) describe custodial remand as 'ineffective (at best) and iatrogenic (at worst)' (see generally NSW LRC 2012).

Impacts of custodial remand on young people

Adverse effects for young people include:

- *Separation from family and community.* Youth detention centres are often far from young people's homes, limiting family and friends' capacity to regularly visit young remandees (NSW LRC 2012). Moreover, custodial remand involves removing the young person from their usual social support structures at a time of vulnerability, thereby increasing the risk of potential physical and psychological harm to the young person (Mazerolle & Sanderson 2008). For example, young people in remote areas of Western Australia face 'severe and potentially traumatic' impacts if they are remanded in custody, as they are often 'transported great distances to be held in adult facilities or placed in the Perth remand centre' (Clare et al. 2011: 31; see also Bailey 2009; Brignell 2002);
- *Disruption to education and employment* (Bailey 2009; NSW LRC 2012). Young people who are engaged in schooling and/or employment have these disrupted when placed on custodial

Figure 1 Proportion of all young people in detention who are on custodial remand, 1981–2008 (%)



Source: Richards & Lyneham 2010

remand. This is concerning given the strong protective role that engagement with school and employment can play in reducing young people's offending;

- *Association with sentenced young offenders* (Bailey 2009). This may have a criminogenic effect and result in young people creating delinquent peer groups, which in turn may result in offending in the future (Brignell 2002; Ericson & Vinson 2011). Gatti, Tremblay and Vitaro's (2009) longitudinal study of male young offenders in Montreal, Canada, demonstrates the criminogenic influence of youth justice interventions on criminal behaviour. This study compared the occurrences of further criminal activity into adulthood with the participation of young males in various levels of youth justice interventions. It was concluded that although contact with any intervention increased the likelihood of further criminal activity into adulthood, the negative impacts increased with the level of severity of the intervention. This issue is particularly concerning in very small jurisdictions in Australia, as sentenced and remanded young people are not always separated in detention due to the very small number of young people detained;

- *Being inappropriately held in police lockups or facilities that are not designed to meet the needs of young people* (Auditor General For Western Australia 2008; NT Government 2011; Stubbs 2010); this is particularly the case for young people who live in regional, rural or remote areas (Auditor General For Western Australia 2008);
- *Not being able to access therapeutic programs.* As the Queensland Commission for Children and Young People and Child Guardian's (2011) research found, therapeutic programs, which address young people's criminogenic needs and are an important corollary to educational and recreational programs, are usually only accessible to sentenced young people. Criminogenic needs are broadly recognised as risk factors for offending that are 'dynamic or amendable to change through intervention' (Day, Howells & Rickwood 2004: 2). Examples for young people include '...drug and alcohol use, anger and violence problems, and beliefs or attitudes that support offending' (Day, Howells & Rickwood 2004: 2). As Mazerolle and Sanderson (2008: 10) argue (see also NT Government 2011):

it is difficult to plan and provide appropriate programs for these [remanded] individuals, as detention centre staff do not know how long they will be detained or what the outcome of their charge will be;

- *Being more likely to receive a remand period following a future court appearance.* Mazerolle and Sanderson's (2008) Queensland study showed that past remand experiences strongly influenced the chance of receiving remand for subsequent court appearances. This is unsurprising as prior remand episodes are included in Queensland's bail legislation as an important consideration for evaluating the risk of reoffending; and
- *Being more likely to be given a sentence of incarceration than young people who received bail.* As Kellough and Wortley (2002: 187) claim (see also Allan et al. 2005):

even when type of charge and prior criminal record are controlled for, research shows that offenders who are remanded in custody before trial are more likely to be sentenced to a period of incarceration than their bailed counterparts.

This is particularly concerning given that research has shown that very poor people and people from ethnic minority groups are more likely to be remanded in custody than others (Ericson & Vinson 2011; Kellough & Wortley 2002). Kellough and Wortley (2002) argue that remandees may feel pressured to plead guilty for a variety of reasons (eg not wanting to serve 'dead time' or believing they will receive a discount for time already served) and that this may explain higher rates of incarceration among remandees. It could also be a result of the limited ability to prepare for court appearances that being remanded in custody places on young people (Bailey 2009). In addition

those on remand have fewer resources to prepare their defence, they may make a less favourable impression when they appear in court (they will probably be less well dressed and have experienced a loss of morale). They also miss the opportunity to impress the court by showing that they have met their bail conditions and appeared in court (Brignell 2002: np; see also NSW Law Reform Commission 2012).

Freeman and Seymour's (2010) interviews with young people (aged 16 to 21 years) on custodial remand in Ireland (n=62) found that most identified the sense of uncertainty that characterises remand as the worst aspect of their remand experience. Uncertainty took a variety of forms for the young people interviewed, who identified being concerned about:

- their release date;
- whether to become involved in prison activities such as work, education and leisure, and whether they were entitled to participate in such activities;
- relationships and personal safety (eg the young people felt establishing relationships with other inmates was futile given they or other inmates might be released with little notice and this impacted on feelings of safety and having support while on remand);
- maintenance of familial relationships (families often don't visit as they assume the young person will be released 'soon'); and
- outside life (eg maintaining jobs and housing while on remand; Freeman & Seymour 2010).

Freeman and Seymour (2010: 138) found that this sense of being 'in limbo' exacerbated existing vulnerabilities and difficulties the young people faced, and had negative psychological and social consequences, including

high levels of anxiety; withdrawal from social contact with others both within and outside the prison; a sense of having no control; feelings of apathy and hopelessness; disruption to social relationships; housing difficulties and unemployment.

Impacts of custodial remand on the community

A number of adverse consequences of placing young people on custodial remand on the community have also been identified in the literature.

Financial costs

Detention-based youth justice services cost governments more than community-based youth justice services (such as supervised bail). The Report

on Government Services calculated the real expenditure per child aged 10–17 years in Australia for detention-based services as \$170 compared with \$92 for community-based services (SCRGSP 2013).

One element of the financial cost of detention is the costs associated with the use of remand (Allan et al. 2005). For example, Snowball (2011) estimated that in New South Wales, the annual cost of keeping young people on custodial remand was approximately \$47.2m in 2008. These costs included keeping young people remanded and the costs associated education, health and other services provided. In 2008, there were nine NSW detention centres for young people, ranging from short-term accommodation with eight beds, to larger facilities holding up to 120 young people (DAGJ nd; NSW Department of Juvenile Justice 2008).

The Coalition Against Inappropriate Remand (2008) estimated that it costs over \$20m annually to keep young people (defined as 10 to 16 year olds in Queensland) on remand in Queensland. Queensland has two youth detention facilities for young people in custody, both with a capacity to hold over 100 young people (QCCYPCG 2012).

Importantly, if accused persons placed on remand are more likely to plead guilty to charges against them and to be incarcerated than their bailed counterparts (Kellough & Wortley 2002), costs may include not only the initial period of custodial remand, but subsequent periods of incarceration.

Community safety

Although a primary justification for remanding accused persons in custody rather than releasing them on bail is that doing so will increase community safety, it is important to consider whether this has been shown to be the case (Stubbs 2010).

Vignaendra et al.'s (2009) study on the remand of young people in New South Wales found no statistically significant relationship between rates of youth property crime and an increase in the use of custodial remand for young people. While this research suggests that remanding more young people will not translate into a reduction in property crime, it did not consider the relationship between custodial remand for young people and the

prevalence of violence in the community, which is likely to be of more concern to the community than property crime.

Snowball's (2011) research, which also focuses on New South Wales, found that while police rarely erroneously remand in custody young people who pose a low risk of offending, they do grant bail to a small proportion of high-risk young people. While this study appears to support the notion that the increased use of custodial remand (or at least the better targeting of custodial remand) will result in a decrease in crime, it is important to note that it considered only risk, not potential harm. That is, while those young people remanded in custody might pose a high risk of offending while on bail, it is not known whether the harm from this predicted offending is sufficiently serious to justify detaining the young person. In addition, although young people remanded in New South Wales may be at high risk of offending, research demonstrates that only a small proportion of young people remanded in custody are subsequently sentenced to a period of detention (see eg AIHW 2012a; Noetic Solutions 2010; NSW LRC 2012). It seems somewhat incongruous to claim that police only remand high-risk young people if it is the case that those young people do not subsequently serve a term of sentenced detention (although as discussed in more detail later in this report, it may be that in some instances, a process of 'backdating' occurs, whereby time spent by young people on remand is taken into account at sentencing (see NSW LRC 2012 for a discussion)).

Research in Victoria (JSSEC 2013) shows that of all young people for whom a custodial remand order was the first youth justice order made during 2010 (n=302, not including 43 cases for which an offence was not recorded), over a quarter were placed on remand for non-violent offences such as crimes against property (27%, n=94), driver licence offences (n=1) and disorderly conduct (n=1). While no indication of the criminal history of these young people is given, these figures suggest that it is not always the case that only high-risk young people are placed on custodial remand (or rather that young people are sometimes placed on custodial remand for offences that are not very harmful to the community).

The issue of custodial remand for young people has therefore been the subject of consideration for a number of reviews and inquiries in recent years (NSW LRC 2012; HRSCATSIA 2011; NT Government 2011; Noetic Solutions 2011, 2010).

Research aims

Broadly speaking, the primary purposes of the current research were:

- to identify trends in the use of custodial remand for young people nationally and in each of Australia's jurisdictions;
- to explore the factors that influence the use of custodial remand for young people nationally and in each of Australia's jurisdictions;
- to document differences among the jurisdictions as to the legislation, policy and practices that underpin the use of custodial remand for young people; and
- based on the above, and where appropriate, to make recommendations about limiting the inappropriate use of custodial remand for young people.

What is meant by the term *youth or young person*?

For the purposes of this report, a *youth or young person* is defined, in line with each jurisdiction's legislation, as a person aged 10 to 16 years (inclusive) in Queensland and 10 to 17 years (inclusive) in all other jurisdictions.

What is the meaning of *bail and remand*?

When police arrest and charge a suspect with one or more criminal offences, the suspect can either be granted bail or remanded in custody. The granting of bail enables the suspect to be released on the condition that he or she agrees to appear in court

at a later date (Roth 2010). Bail can be conditional or unconditional, supervised or unsupervised.

Conditional bail refers to a bail undertaking under which the suspect agrees to adhere to certain conditions until the court hearing (eg to report regularly to police, or adhere to a curfew).

Unconditional bail refers to a bail undertaking under which the suspect agrees to appear in court at a later date but does not have to adhere to any conditions prior to the court hearing.

Supervised bail refers to periods of bail that are undertaken under the supervision of a criminal justice agency (ie for young people, under the supervision of the relevant statutory youth justice agency). Unsupervised periods of bail are undertaken without an agency playing a supervisory role.

Accused persons who are refused bail are remanded in custody to await their court hearing at a later date. The decision to grant bail or refuse bail and remand a suspect in custody can occur at a number of points in the criminal justice process:

- when a suspect is arrested by police (as described above);
- at the accused person's first court hearing (by a Magistrate or Judge); and
- at subsequent court hearings (by a Magistrate or Judge).

Therefore, a person remanded in custody may be waiting for an initial court hearing, a subsequent court hearing (including a sentencing hearing), or the outcome of an appeal. It should also be noted that in New South Wales, Western Australia, the Northern Territory and the Australian Capital Territory, Judges and Magistrates can, depending on the seriousness of the criminal charge, dispense with the need for deciding on bail and release the accused unconditionally.

It is important to note, as Roth (2010) has, that bail/remand decisions are only relevant following an arrest by police. There are, however, other ways that police can apprehend suspects, including via a summons, or in the case of young people, via a diversionary measure such as a caution or youth justice conference (see generally Richards 2009).

Outline of this report

This report is divided into five main parts. The first provides an overview of quantitative data on young people on custodial remand in Australia, by Indigenous status, sex and jurisdiction.

The second outlines the current legislation that governs bail decisions for young people in each jurisdiction and describes who can grant bail to young people, when young people can apply for bail, the factors that bail decision makers must consider and the conditions that can be placed on young people granted bail.

The third section outlines the roles of the key figures in bail processes for young people, including police, youth justice staff, prosecution and defence lawyers, the courts and bail service providers.

The fourth section considers in detail the wide range of factors that influence rates of young people on custodial remand, based on the existing literature and qualitative interviews undertaken for this study.

Finally, section five provides information on current bail support services and programs for young people in each of Australia's jurisdictions.



Methodology

A number of methodologies were used to explore the research aims outlined in the *Introduction*.

Quantitative data analysis

Quantitative data on bail and remand for young people were sourced primarily from the Australian Institute of Health and Welfare's (AIHW) annual *Juvenile Justice in Australia and Juvenile Detention Population in Australia* reports (AIHW 2012a, 2012b). These reports present data from the Juvenile Justice National Minimum Data Set. As Western Australia and the Northern Territory have not supplied data on the average length of time young people spend on custodial remand to the AIHW's Juvenile Justice National Minimum Data Set, data on the average length of remand periods in were requested directly from the relevant Department in these jurisdictions. Data on the average length of time young people spend on custodial remand were received directly from the WA Department of Corrective Services; data were not able to be provided on this measure by the Northern Territory.

Qualitative data collection and analysis

Semi-structured interviews (n=42) were undertaken with a wide range of relevant stakeholders (n=58) in each state and territory. Stakeholders were nominated by the Australasian Juvenile Justice Administrators' Research Task Group for each jurisdiction. They included (see also *Appendix 2* for a list of participants):

- bail decision makers (ie Magistrates, Judges and senior police);
- children's lawyers;
- prosecution;
- youth justice policy representatives;
- bail support workers; and
- other relevant stakeholders (eg children's advocates, Indigenous legal services).

Interviews were not undertaken with all stakeholders who were nominated. In some cases, stakeholders declined to be interviewed and in other cases, stakeholders were unavailable or did not respond to requests within the project timeframe.

The primary purposes of the interviews were to obtain information on bail and remand processes in each jurisdiction that was not publicly available and to seek stakeholders' views about the main influences on the use of custodial remand for young people in their jurisdiction. The semi-structured interviews included questions on the:

- bail and remand procedures for young people, starting from when a young person comes to the attention of police;
- role of each stakeholder in the bail and remand process for young people;
- operational context of bail and remand for young people (ie underlying legislation, policy and formal procedures, key actors in the bail and remand processes for young people);
- decision-making process in granting or refusing bail for young people and the processes undertaken after a bail decision is made;
- decision-making process in imposing conditions on bail orders for young people, most common conditions imposed and the impacts of bail conditions on young people;
- processes in dealing with bail breaches by young people;
- stakeholder perspectives on the drivers of remanded detention rates, impacts of remanded detention on young people and the changes in the nature or extent of youth offending;
- key issues faced by Indigenous or female young people and young people from regional/rural areas in the bail and remand process;
- details of the use and nature of statutory and non-statutory bail support services and programs (including statutory supervised bail); and
- indirect influences on bail and remand procedures (ie use of diversion mechanisms by police, pressures on young people to plead guilty).

Every effort has been made to ensure interview material quoted in this report is accurate; however, readers should note that stakeholders' perspectives are subjective opinions rather than objective facts.



Custodial remand of young people in Australia

In this section, an overview is provided of the data on young people on custodial remand in Australia. Data have primarily been taken from the AIHW's (2012b) report *Juvenile Detention Population in Australia 2011*. Where possible, these data have been disaggregated by jurisdiction, sex and/or Indigenous status to provide a nuanced account of the custodial remand of young people in Australia. Data from the AIC's Juveniles in Detention in Australia dataset, which contains data on young people in detention in Australia from 1981 to 2008, are also reported below to highlight longer term trends.

As indicated in Table 1, as at June 2011, 505 young people were held on custodial remand across Australia on an 'average night'. The number of young people on custodial remand on an 'average night' is calculated by summing the number of nights of each period of custodial remand that a young person serves within a quarter and dividing the total by 91 (the number of nights in a standard year divided by the number of quarters in a year; see AIHW 2012b). Nearly half (48%) of all young people in detention at this time (total $n=1,055$) were therefore on remand rather than sentenced. Since 2007, approximately half of all young people in detention have been on custodial remand rather than sentenced (see Table 1).

Although nationally there has been little change in the proportion of detained young people who are on custodial remand recently (since 2007; see Table 2), there has been steady increase in the longer term. As Richards (2011a) shows, the proportion of young people in detention in Australia who are remanded, rather than sentenced, has increased substantially since 1981 (when the AIC began collecting data on young people in detention). At 30 June 1981, 21 percent of all detained young people were on remand, compared with 60 percent at 30 June 2008 (Richards 2011a; see Figure 1). Furthermore, Australian Bureau of Statistics (2008) data indicate that a far higher proportion of youth than adult detainees in Australia is remanded. At 30 June 2008, 23 percent of adult prisoners were on remand, compared with 60 percent of youth detainees. It should be noted, however, that an increase in the proportion of detainees who are on remand has occurred for both young people and adults (Richards 2011a).

Sex of young people on custodial remand

As can be seen in Table 3, since June 2007, a consistently higher proportion of female than male

Table 1 All young people in detention on an average night by jurisdiction and legal status, June Quarter 2007 to June Quarter 2011 (n)^a

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Aust ^a
June Quarter 2007									
Unsented	181	31	109	78	24	19	10	33	483
Sented	160	113	50	72	27	10	4	20	456
Total	341	144	158	150	51	29	13	53	939
June Quarter 2008									
Unsented	181	31	86	78	24	19	10	33	483
Sented	183	106	58	75	37	13	7	9	488
Total	430	155	144	163	68	34	15	31	1,040
June Quarter 2009									
Unsented	204	44	75	76	26	21	7	18	469
Sented	219	100	43	79	32	14	4	15	505
Total	423	143	118	155	58	34	11	33	974
June Quarter 2010									
Unsented	211	48	91	85	27	20	14	18	514
Sented	215	125	47	99	36	7	7	10	545
Total	426	173	138	183	63	27	21	28	1,059
June Quarter 2011									
Unsented	194	43	95	98	38	13	9	14	505
Sented	187	151	45	102	23	12	12	18	549
Total	381	194	140	200	61	25	21	32	1,055

a: Numbers may not sum to totals due to rounding

Source: AIHW 2012b

youth detainees has been remanded in custody. Approximately half of all male young people in detention have been on remand during this time, compared with approximately two-thirds of female young people in detention. As Richards' (2011a) work shows, this has also been the case in the longer term, with a higher proportion of female than male youth detainees having been remanded rather than sentenced since 1981. There has, however, been a greater increase in the proportion of male than female young people on remand during this time. At 30 June 1981, 33 percent of young females in detention were remanded. By 30 June 2008, this had nearly doubled to 65 percent. For young males, the proportion almost trebled during this same time period, from 20 percent at 30 June 1981, to 59 percent at 30 June 2008 (see Richards 2011a).

It should be noted in interpreting these percentage increases that the base number of young women in detention is much smaller than the number of young men (see Table 3).

Indigenous status of young people on custodial remand

Since 2007, the proportion of young people in detention who are remanded rather than sentenced has been similar for Indigenous and non-Indigenous young people (see Tables 2 and 4). For Indigenous young people, the proportion ranged from 49 percent to 57 percent over this period; for non-Indigenous young people, the proportion ranged from 46 percent to 53 percent (see Table 2).

Table 2 Proportion of young people in detention on an average night who are on remand by jurisdiction and Indigenous status, June Quarter 2007 to June Quarter 2011 (%)^a

Indigenous status	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Aust
June Quarter 2007									
Indigenous	54.49	28.57	69.61	52.25	40.00	58.33	60.00	64.58	56.57
Non-Indigenous	50.94	20.49	64.91	51.28	53.85	76.47	75.00	np	45.60
Total	53.08	21.53	68.99	52.00	47.06	65.52	76.92	62.26	51.44
June Quarter 2008									
Indigenous	52.09	28.00	65.85	52.46	45.16	62.50	57.14	67.86	54.08
Non-Indigenous	62.98	32.06	51.61	57.14	47.22	64.71	50.00	np	52.08
Total	57.44	31.61	59.72	53.99	45.59	61.76	60.00	70.97	53.08
June Quarter 2009									
Indigenous	49.51	29.17	61.33	45.22	42.31	63.64	np	56.67	49.49
Non-Indigenous	46.92	30.51	69.05	58.97	46.88	58.33	71.43	np	46.95
Total	48.23	30.77	63.56	49.03	44.83	61.76	63.64	54.55	48.15
June Quarter 2010									
Indigenous	46.19	23.08	67.06	44.88	41.18	75.00	60.00	68.00	49.43
Non-Indigenous	53.37	28.57	61.22	50.00	44.83	73.68	63.64	np	47.32
Total	49.53	27.75	65.94	46.45	42.86	74.07	66.67	64.29	48.54
June Quarter 2011									
Indigenous	52.43	19.05	66.22	44.85	64.00	60.00	40.00	41.94	50.92
Non-Indigenous	49.73	23.26	69.23	57.81	60.00	50.00	45.45	np	45.41
Total	50.92	22.16	67.86	49.00	62.30	52.00	42.86	43.75	47.87

a: Proportions were not calculated when the denominator totalled less than 5 for the lack of statistical validity. Such proportions are recorded as np

Source: Adapted from AIHW 2012b

No trend was apparent for either Indigenous or non-Indigenous young people during this period.

Richards (2011a) found that similar increases in the proportion of youth detainees who are remanded have occurred for both Indigenous and non-Indigenous young people in the longer term (since 1981). There was also little difference between the proportion of Indigenous and non-Indigenous female young people in detention who were on remand between June 2007 and June 2011. Similarly, there was little difference between the proportion of Indigenous and non-Indigenous male young people in detention who were on remand during this period.

Jurisdiction of young people on custodial remand

The proportion of all young people in detention who are remanded rather than sentenced also varies considerably by jurisdiction. As shown in Table 2, since 2007, Queensland has had a consistently higher proportion of young people on custodial remand (approximately two-thirds) than the other jurisdictions. During this time, approximately half of all detained young people in both New South Wales and Western Australia have been on remand compared with approximately one-quarter of detained young people in Victoria. Proportions fluctuated in South Australia, Tasmania, the Northern

Table 3 All young people in detention on an average night by jurisdiction, legal status and sex, June Quarter 2007 to June Quarter 2011 (n)^a

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Aust ^b
June Quarter 2007									
Male									
Unsentenced	166	28	94	69	21	17	8	30	433
Sentenced	153	106	47	67	27	9	4	20	432
Total	319	133	141	136	48	27	12	50	866
Female									
Unsentenced	13	3	15	9	3	2	2	2	49
Sentenced	7	7	3	5	-	1	0	0	24
Total	21	10	17	14	3	2	2	2	72
June Quarter 2008									
Male									
Unsentenced	221	43	77	78	26	19	7	19	489
Sentenced	176	102	54	69	35	12	6	9	462
Total	396	145	131	147	61	32	13	27	952
Female									
Unsentenced	25	6	9	10	5	2	1	3	61
Sentenced	7	4	4	6	2	-	1	-	26
Total	32	10	13	17	7	2	2	3	87
June Quarter 2009									
Male									
Unsentenced	186	40	70	68	21	18	6	17	425
Sentenced	202	95	42	75	29	13	2	13	470
Total	388	134	112	142	50	31	8	30	895
Female									
Unsentenced	18	4	6	8	5	2	1	1	45
Sentenced	14	5	1	4	2	1	2	2	31
Total	32	9	6	12	7	3	3	3	75
June Quarter 2010									
Male									
Unsentenced	192	45	84	77	24	19	10	17	467
Sentenced	204	118	45	94	35	7	6	9	518
Total	396	163	129	171	58	26	16	26	985
Female									
Unsentenced	19	4	7	8	3	1	4	1	47
Sentenced	10	6	3	5	1	0	1	-	26
Total	29	10	10	13	5	1	5	2	73

Table 3 (Continued)

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Aust ^b
June Quarter 2011									
Male									
Unsentenced	181	38	85	86	33	13	7	12	455
Sentenced	178	147	42	97	22	12	12	15	525
Total	360	185	127	183	55	25	18	27	979
Female									
Unsentenced	13	6	10	12	5	-	2	2	51
Sentenced	9	3	3	5	1	-	-	3	25
Total	22	9	13	17	6	-	3	5	75

a: Numbers may not sum to totals due to rounding

b: Totals include those with unknown sex

Source: AIHW 2012b

Territory and the Australian Capital Territory, as might be expected in jurisdictions with small populations.

As described in more detail below, an increase in the proportion of young people on custodial remand may reflect an increase in the rate of young people on custodial remand or a decrease in the rate of sentenced young people in detention. Rates per 100,000 population provide a better measure of trends in the use of custodial remand for young people. These are outlined in the following section.

Rates per 100,000 of young people on custodial remand

Calculating the rate of young people on custodial remand per 100,000 young people in the general population provides a clearer picture of the use of custodial remand for young people in Australia. This approach provides both a better indication of trends in the use of custodial remand over time, by controlling for increases in population over time, and accurate comparisons to be made among jurisdictions and between Indigenous and non-Indigenous young people (it should nonetheless be noted that data on crime and criminal justice are prone to inaccuracies and misinterpretation, and should be considered cautiously—see Weatherburn 2011).

There was a slight decrease in the national rate of Indigenous young people on custodial remand from June 2007 to June 2011 from 274 young people per 100,000 population to 222 young people per 100,000 population (see Table 5). Overall, however, Indigenous young people have remained more than 20 times more likely to be on custodial remand compared with the rate for non-Indigenous young people, which has remained steady at around 10 per 100,000. The rate of all young people on custodial remand on an average night also remained steady during this time at around 20 per 100,000 (see Table 5 and Figure 2).

Data from the AIC's Juveniles in Detention in Australia dataset indicate that the rate of young people on custodial remand in Australia remained fairly stable between 1981 and 2004, before a substantial increase or 'spike' between about 2004 and 2008 (see Figure 3). In 1981, the average rate of young people on custodial remand per night was 12 per 100,000; by 2008, the average rate was 23 per 100,000. Simultaneously, the rate per 100,000 young people in sentenced detention decreased from 44 to 15. This indicates that the steady increase in the proportion of all detained young people who are on custodial remand was largely the result of a decrease in the rate of young people in sentenced detention. This decrease may have resulted from fewer young people being sentenced to detention, young people being sentenced to shorter periods of detention, or a combination of these two factors.

Table 4 All young people in detention on an average night by jurisdiction, legal status and Indigenous status, June 2007 to June 2011 (n)^a

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Aust ^b
June Quarter 2007									
Indigenous									
Unsentenced	97	6	71	58	10	7	3	31	284
Sentenced	80	15	31	53	15	5	2	17	219
Total	178	21	102	111	25	12	5	48	502
Non-Indigenous									
Unsentenced	81	25	37	20	14	13	6	2	197
Sentenced	77	98	19	19	12	5	2	3	235
Total	159	122	57	39	26	17	8	4	432
June Quarter 2008									
Indigenous									
Unsentenced	112	7	54	64	14	10	4	19	285
Sentenced	103	18	28	57	17	7	3	9	242
Total	215	25	82	122	31	16	7	28	527
Non-Indigenous									
Unsentenced	131	42	32	24	17	11	4	2	263
Sentenced	77	89	30	18	19	6	4	-	242
Total	208	131	62	42	36	17	8	2	505
June Quarter 2009									
Indigenous									
Unsentenced	101	7	46	52	11	7	1	17	242
Sentenced	104	17	30	63	15	4	3	13	247
Total	204	24	75	115	26	11	4	30	489
Non-Indigenous									
Unsentenced	99	36	29	23	15	14	5	1	223
Sentenced	111	82	13	16	17	10	1	2	252
Total	211	118	42	39	32	24	7	3	475
June Quarter 2010									
Indigenous									
Unsentenced	97	6	57	57	14	6	6	17	260
Sentenced	113	20	29	70	20	2	3	9	266
Total	210	26	85	127	34	8	10	25	526
Non-Indigenous									
Unsentenced	111	42	30	28	13	14	7	2	247
Sentenced	98	105	19	28	16	4	4	1	274
Total	208	147	49	56	29	19	11	3	522

Table 4 (Continued)

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Aust ^b
June Quarter 2011									
Indigenous									
Unsentenced	97	4	49	61	16	3	4	13	248
Sentenced	88	17	25	74	9	2	6	17	239
Total	185	21	74	136	25	5	10	31	487
Non-Indigenous									
Unsentenced	93	40	45	37	21	10	5	1	252
Sentenced	94	133	20	27	13	10	6	-	303
Total	187	172	65	64	35	20	11	1	555

a: Numbers may not sum to totals due to rounding

b: Totals include those with unknown Indigenous status

Source: AIHW 2012b

As outlined above, data from the AIHW's Juvenile Justice National Minimum Data Set indicate that since 2007, the rate of young people on custodial remand on an average night in Australia has remained stable, at about 20 young people per 100,000 in the population. While these two datasets measure the rate of young people on remand in different ways and over different time periods, taken together they suggest that nationally, an increase in the rate of young people on remand occurred in the mid-2000s and that this rate has since stabilised. Although technically the rate of young people on custodial remand nearly doubled between 1981 and 2008, it is important to recognise that while the use of custodial remand has increased and needs to be assessed, custodial remand still affects but a small number of young people each year.

The rate per 100,000 population of young people on custodial remand on an average night varied by jurisdiction over the four year period from June Quarter 2007 to June Quarter 2011 (see Figure 4). Although fluctuating, over this four year period the Northern Territory consistently had the highest rate of young people on custodial remand and Victoria consistently had the lowest. Queensland and South Australia had similar trends, staying approximately equal with or below the national rate. The rate for Tasmania and the Australian Capital Territory fluctuate considerably during the four years, as would be expected given the very low numbers of young people in detention in these small

jurisdictions. The NSW rate has been fairly consistent during the four years, at slightly above the national rate. Despite some fluctuation, Western Australia's rate has also remained fairly stable and consistently above the national rate.

Figures 5 to 12 show young people per 100,000 population on custodial remand on an average night by Indigenous status, for each jurisdiction. These Figures indicate that the rate per 100,000 young people on custodial remand is much higher for Indigenous than non-Indigenous young people in all jurisdictions. Rates of Indigenous young people on custodial remand are, however, higher in some jurisdictions than others. Due to concerns about confidentiality, data are not reported by the AIHW when there are fewer than five individual young people on custodial remand. As a result, and as can be seen in Figure 11, data are not available for the Australian Capital Territory for all quarters. Further, the rate of non-Indigenous young people on custodial remand in the Northern Territory is so low that no data have been reported (see Figure 12).

Indigenous overrepresentation

As can be seen in Figures 5 to 12, the rate per 100,000 population of Indigenous young people on custodial remand is higher than the rate of non-Indigenous young people in every jurisdiction.

Table 5 Rate of young people on custodial remand on an average night by Indigenous status and jurisdiction, June Quarter 2007 to June Quarter 2011 (rate per 100,000 population)^{a,b}

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Aust
Indigenous									
Q2 2007	311	np	246	434	155	165	np	260	274
Q3	267	81	203	390	138	185	np	211	237
Q4	259	86	189	397	172	166	681	186	233
Q1 2008	321	88	230	600	225	186	784	204	297
Q2	351	106	182	460	236	253	np	154	270
Q3	321	102	128	346	157	214	658	102	220
Q4	324	98	146	412	250	np	682	158	242
Q1 2009	299	109	142	385	215	np	np	155	226
Q2	303	97	153	377	180	182	np	140	226
Q3	266	96	146	389	209	205	np	119	215
Q4	328	136	162	420	179	np	np	72	235
Q1 2010	306	160	207	500	256	157	np	107	265
Q2	293	92	188	391	212	163	640	145	239
Q3	284	np	170	415	241	np	np	172	233
Q4	226	144	181	415	159	np	752	212	224
Q1 2011	299	74	169	461	276	np	1,029	223	255
Q2	268	np	161	437	259	np	np	114	222
Non-Indigenous									
Q2 2007	10	4	9	9	9	23	15	np	8
Q3	11	4	9	7	9	17	np	np	8
Q4	12	5	8	9	12	17	27	np	9
Q1 2008	14	6	9	10	12	11	21	np	10
Q2	16	7	7	10	10	22	np	np	11
Q3	16	6	6	8	9	17	np	np	10
Q4	16	4	6	8	11	25	16	np	10
Q1 2009	14	6	5	8	10	23	15	np	9
Q2	12	6	6	10	8	25	15	np	9
Q3	12	6	8	13	12	26	22	np	10
Q4	12	6	8	8	9	19	17	np	9
Q1 2010	12	7	8	12	10	27	24	np	10
Q2	13	7	7	12	8	27	21	np	10
Q3	12	6	8	8	10	20	35	np	9
Q4	11	6	7	8	9	22	22	np	9
Q1 2011	14	7	9	13	12	15	20	np	11
Q2	12	7	9	15	12	20	np	np	11

Table 5 (Continued)

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Aust
Total									
Q2 2007	23	4	23	33	13	33	24	113	20
Q3	22	5	21	29	13	29	22	98	19
Q4	23	6	19	31	17	28	43	88	19
Q1 2008	27	7	23	44	19	23	39	94	23
Q2	31	8	18	36	17	38	24	74	23
Q3	30	7	13	28	14	31	25	48	20
Q4	30	5	15	31	19	32	32	73	21
Q1 2009	27	7	14	30	17	30	24	70	19
Q2	25	8	16	31	14	36	18	65	19
Q3	23	7	16	34	19	39	31	52	20
Q4	26	8	18	32	15	27	24	37	20
Q1 2010	25	9	21	40	19	36	37	52	22
Q2	26	8	19	34	15	36	36	68	21
Q3	23	7	19	32	18	25	46	76	20
Q4	21	7	19	32	15	22	39	94	19
Q1 2011	26	8	19	39	22	17	44	103	22
Q2	23	7	19	39	21	24	23	54	20

a: Rates calculated using ABS data (see AIHW 2012b)

b: Rates are not published where there were fewer than 5 people or due confidentiality or other concerns about the quality of the data (see AIHW 2012b). Such data are recorded as np

Source: Adapted from AIHW 2012b

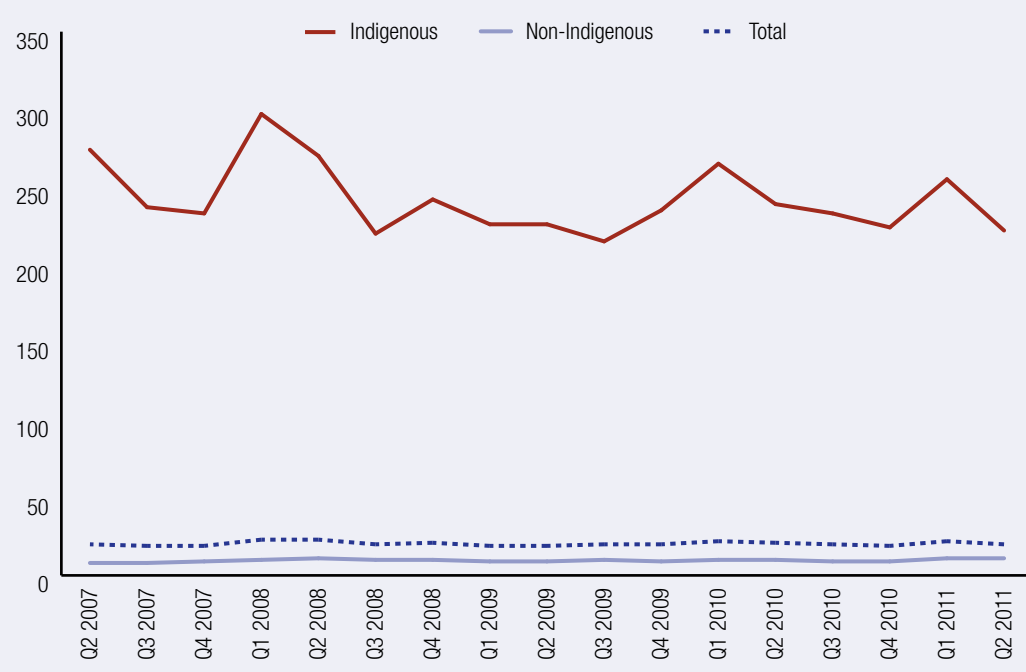
Nationally, as at June 2011, Indigenous young people were 20 times as likely to be on custodial remand as their non-Indigenous counterparts (see Table 6). This figure should be interpreted with caution as data were not available for all jurisdictions, and the overrepresentation of Indigenous young people has been more pronounced for every other quarter since June 2007 (see Table 6).

The overrepresentation of Indigenous young people on custodial remand also varies across jurisdictions. At June 2011, Indigenous young people were 29 times as likely as non-Indigenous young people to be on custodial remand as non-Indigenous young people in Western Australia, 22 times as likely in New South Wales and South Australia, and 18 times as likely in Queensland (see Table 6). Data on Indigenous overrepresentation were not available for June 2011 for the remaining jurisdictions (due

primarily to concerns about the quality of the data because of the small numbers of Indigenous young people on custodial remand in these jurisdictions).

It is important, however, to consider this overrepresentation of Indigenous young people on custodial remand in the context of their overrepresentation in the youth justice system generally. Research consistently shows, for example, that Indigenous young people are heavily overrepresented in detention generally (see AIHW 2012a; Richards & Lyneham 2010); further, Indigenous young people are more heavily overrepresented among sentenced young people in detention than those on custodial remand (see Figure 13). A study of young people on custodial remand in Queensland similarly found that Indigenous status was not an independent predictor of decisions to remand young people in custody

Figure 2 Young people (10 to 17 year olds) on custodial remand on an average night in Australia, by Indigenous status, June Quarter 2007 to June Quarter 2011 (rate per 100,000 population)



Source: Adapted from AIHW 2012b

and that the overrepresentation of Indigenous young people on custodial remand was not significant once current and prior offence details, case history, gender, the youth justice centre handling the case and child protection history were statistically controlled for (Mazerolle & Sanderson 2008).

A logical question to consider in this context is whether Indigenous young people are overrepresented among young people arrested by police (as decisions about whether a young person is to be granted bail or remanded in custody are only relevant following an arrest by police; Clare et al. 2011; King, Bamford & Sarre 2009; Noetic Solutions 2010; Roth 2010). Data on arrest decisions relating to young people are very limited in Australia, with few jurisdictions reporting these data (Richards 2009). The limited data available suggest, however, that Indigenous young people are overrepresented among young people arrested by police. In Western Australia in 2005 (the latest period for which data have been published), 50 percent of all young people arrested by police were

Indigenous, despite their comprising only five percent of young people in Western Australia at the time (see Richards 2009). Similarly, in South Australia during 2007 (the latest period for which data have been published), a higher proportion of Indigenous (68%) than non-Indigenous (49%) young people who came into contact with the police were arrested (OCSAR 2010).

Caveats about data on Indigenous young people

It should be noted that overrepresentation ratios reflect the rate of Indigenous young people in detention relative to the rate of non-Indigenous young people. Rate ratios are calculated by dividing the Indigenous rate of incarceration by the non-Indigenous rate. A high overrepresentation rate ratio may therefore be due to there being a high number of Indigenous young people on custodial remand relative to non-Indigenous young people, or a low number of non-Indigenous young people in unsentenced detention relative to Indigenous

Table 6 Rate ratio^a of Indigenous to non-Indigenous young people on custodial remand (10 to 17 years) on an average day by jurisdiction, June Quarter 2007 to June Quarter 2011^b

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Aust
Q2 2007	31.10	np	27.33	48.22	17.22	7.17	np	np	34.25
Q3	24.27	20.25	22.56	55.71	15.33	10.88	np	np	29.63
Q4	21.58	17.20	23.63	44.11	14.33	9.76	25.22	np	25.89
Q1 2008	22.93	14.67	25.56	60.00	18.75	16.91	37.33	np	29.70
Q2	21.94	15.14	26.00	46.00	23.60	11.50	np	np	24.55
Q3	20.06	17.00	21.33	43.25	17.44	12.59	np	np	22.00
Q4	20.25	24.50	24.33	51.50	22.73	np	42.63	np	24.20
Q1 2009	21.36	18.17	28.40	48.13	21.50	np	np	np	25.11
Q2	25.25	16.17	25.50	37.70	22.50	7.28	np	np	25.11
Q3	22.17	16.00	18.25	29.92	17.42	7.88	np	np	21.50
Q4	27.33	22.67	20.25	52.50	19.89	np	np	np	26.11
Q1 2010	25.50	22.86	25.88	41.67	25.60	5.81	np	np	26.50
Q2	22.54	13.14	26.86	32.58	26.50	6.04	30.48	np	23.90
Q3	23.67	np	21.25	51.88	24.10	np	np	np	25.89
Q4	20.55	24.00	25.86	51.88	17.67	np	34.18	np	24.89
Q1 2011	21.36	10.57	18.78	35.46	23.00	np	51.45	np	23.18
Q2	22.33	np	17.89	29.13	21.58	np	np	np	20.18

a: Rate ratio calculated by dividing the Indigenous rate by the non-Indigenous rate

b: Rates (and therefore rate ratio) are not published where there were fewer than 5 people or due confidentiality or other concerns about the quality of the data (see AIHW 2012b). Such data are recorded as np

Source: Adapted from AIHW 2012b

young people. It should be noted that overrepresentation rate ratios can be highly variable in jurisdictions with:

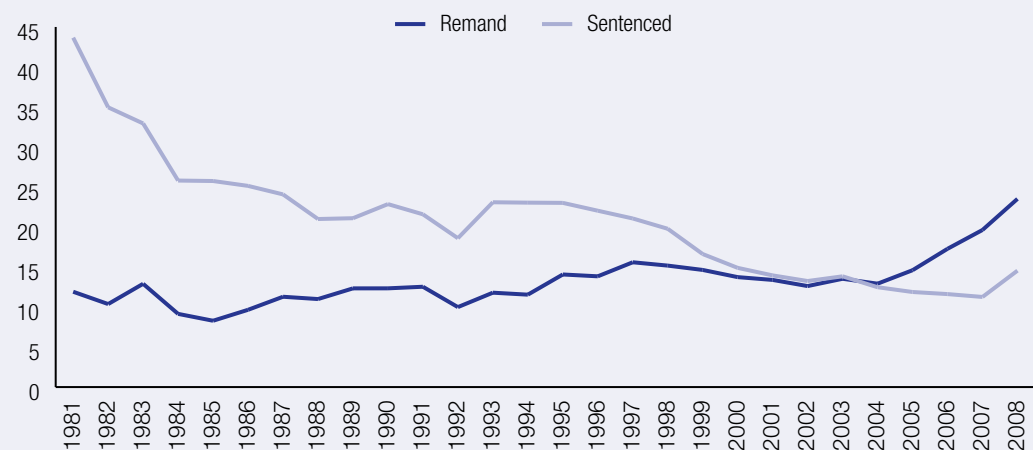
- small populations of Indigenous people;
- small numbers of young people in detention; and/or
- small numbers of Indigenous young people in detention.

Further, it should be noted that high numbers of young people with 'unknown' Indigenous status can affect calculations of rates of Indigenous and non-Indigenous young people in detention, including on custodial remand, and therefore overrepresentation rate ratios. Hunter and Ayyar's (2009) research highlights the importance of addressing data quality on the Indigenous status of those who come into contact with the youth

justice system (see also Hardman 2010 for a discussion of the limitations of data on Indigenous status in the criminal justice context). Hunter and Ayyar's (2009: 16) research into the quality of data where Indigenous status is provided in administrative data collections found that Indigenous involvement in the criminal justice system will be severely underestimated if no attempt is made to establish or estimate the true identity of the large number of people with unknown Aboriginal or Torres Strait Islander status within the criminal justice system.

The likelihood of an underestimation of the number of Indigenous young people is important to bear in mind when interpreting the data presented in this report (see further AIHW 2012c; Hunter & Ayyar 2011).

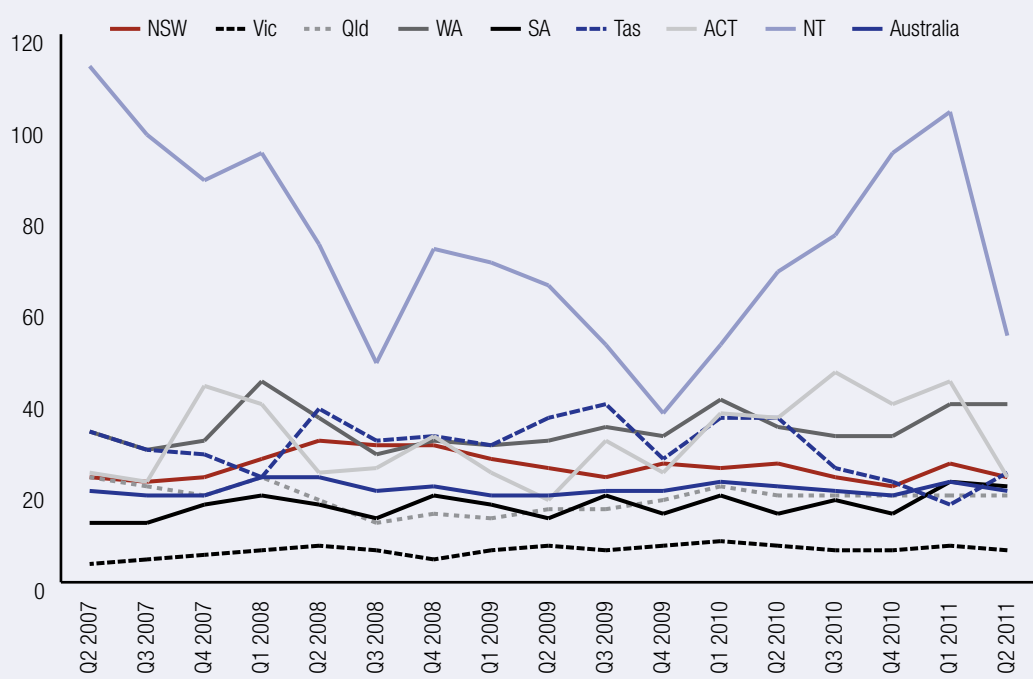
Figure 3 Young people aged 10–17 years in detention in Australia by legal status from 1981–2008 (rate per 100,000 population)



Note: Population statistics sourced from ABS 2010 for those aged 10 to 17 years in Australia. Numbers in detention are annual averages of quarterly counts. Remand numbers for 1991 may include young people awaiting matters for protection issues. Rates exclude the quarterly counts for Victoria for Q4 1991 and Q1 1992. Rates exclude quarterly counts for South Australia and Victoria for Q3 1992 and Q4 1992. Rates exclude quarterly counts for South Australia for Q1 1993 and Q2 1993. Therefore, averages for the years 1991, 1992 and 1993 only use quarters for which there are data for all jurisdictions to calculate the annual average

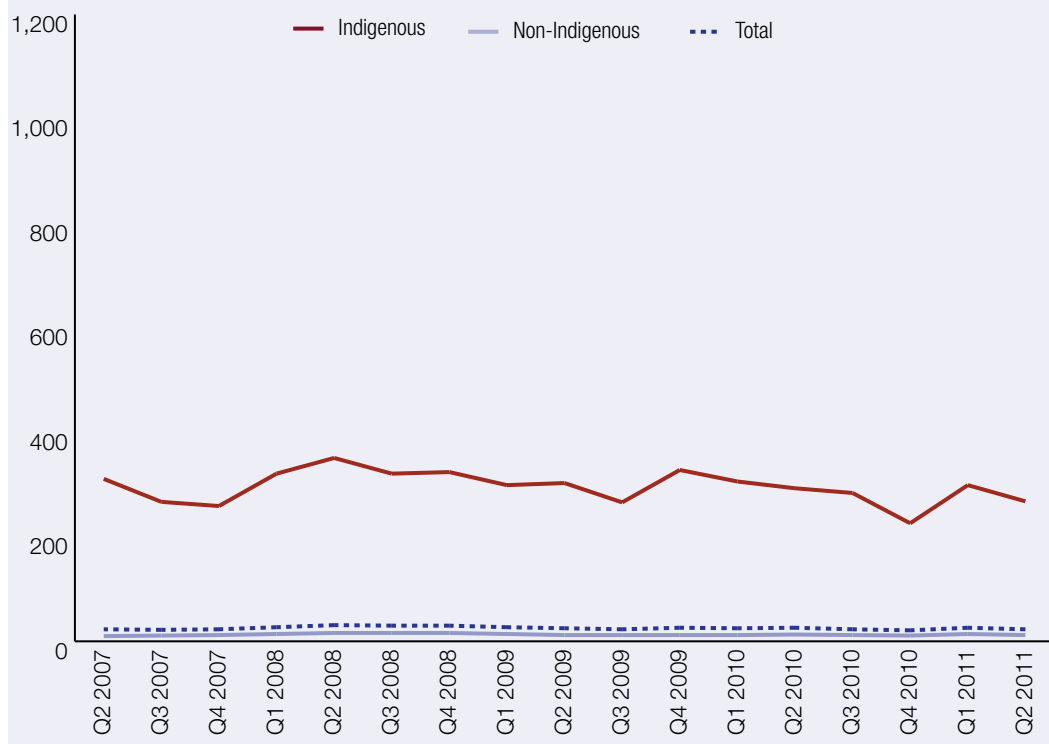
Source: AIC Juveniles in detention dataset [computer file]

Figure 4 Young people (10 to 17 year olds) on custodial remand on an average night by jurisdiction (rate per 100,000 population)



Source: Adapted from AIHW 2012b

Figure 5 Young people (10 to 17 year olds) on custodial remand on an average night in New South Wales by Indigenous status, June Quarter 2007 to June Quarter 2011 (rate per 100,000 population)



Source: Adapted from AIHW 2012b

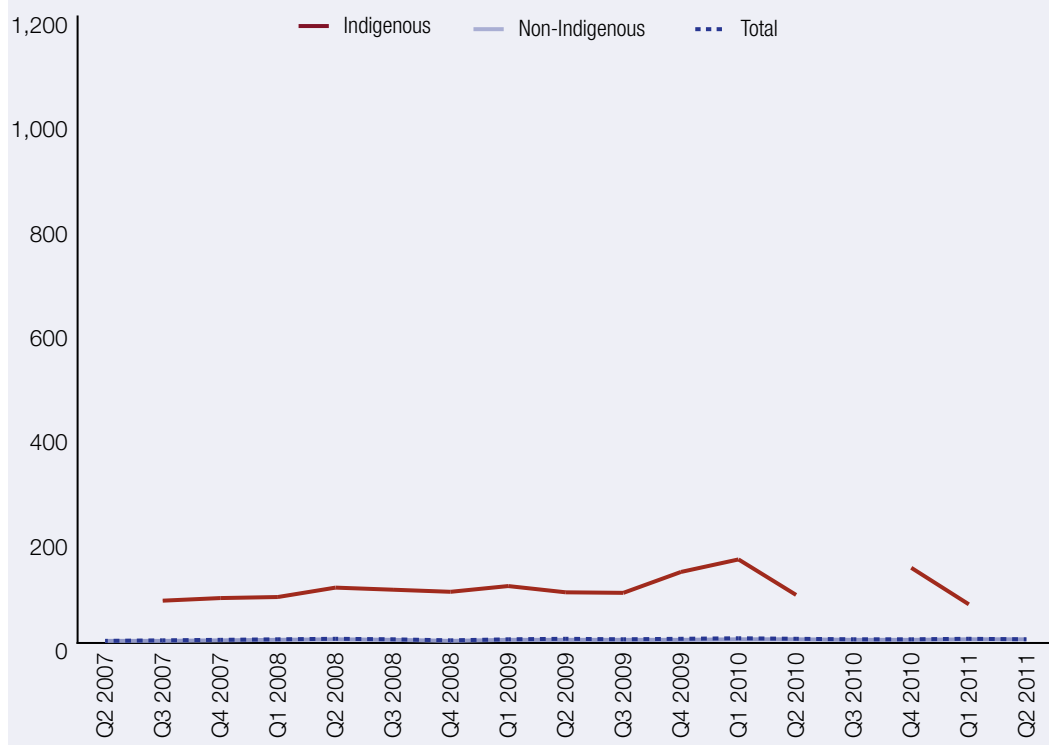
Length of time young people are remanded in custody

Both the total number of individual young people on custodial remand and the length of time each young person spends on custodial remand affect the average nightly number. Table 7 shows the average length of time young people spent on custodial remand from 2006–07 to 2010–11. Average length of time was calculated from the summed length of all periods of custodial remand that occurred within the financial year divided by the number of young people who spent time on custodial remand (AIHW 2011). As Western Australia and the Northern Territory did not supply data for 2008–09, 2009–10 and 2010–11, data are not available for these years, although some totals include aggregate data

provided by these jurisdictions (see Table 7). Although a national trend is therefore difficult to determine, the length of time for which young people are remanded in custody appears stable with an average of 36 days in 2006–07 and 35 days in 2010–11 with little variation in between. It is possible, however, that a different picture would emerge if all totals included data from Western Australia and the Northern Territory, particularly given that the NT's averages were much higher than the other jurisdictions' averages for 2006–07 and 2007–08.

There were no clear trends in the average length of time young people spent on remand in any of the jurisdictions for which data are consistently available, with the possible exception of Queensland, where the average length of time young people spent on remand decreased from 58 days in 2006–07 and 2007–08 to 47 days in 2010–11.

Figure 6 Young people (10 to 17 year olds) on custodial remand on an average night in Victoria by Indigenous status, June Quarter 2007 to June Quarter 2011 (rate per 100,000 population)



Note: Rates (and therefore rate ratio) are not published where there were fewer than five people or due confidentiality or other concerns about the quality of the data (see AIHW 2012b)

Source: Adapted from AIHW 2012b

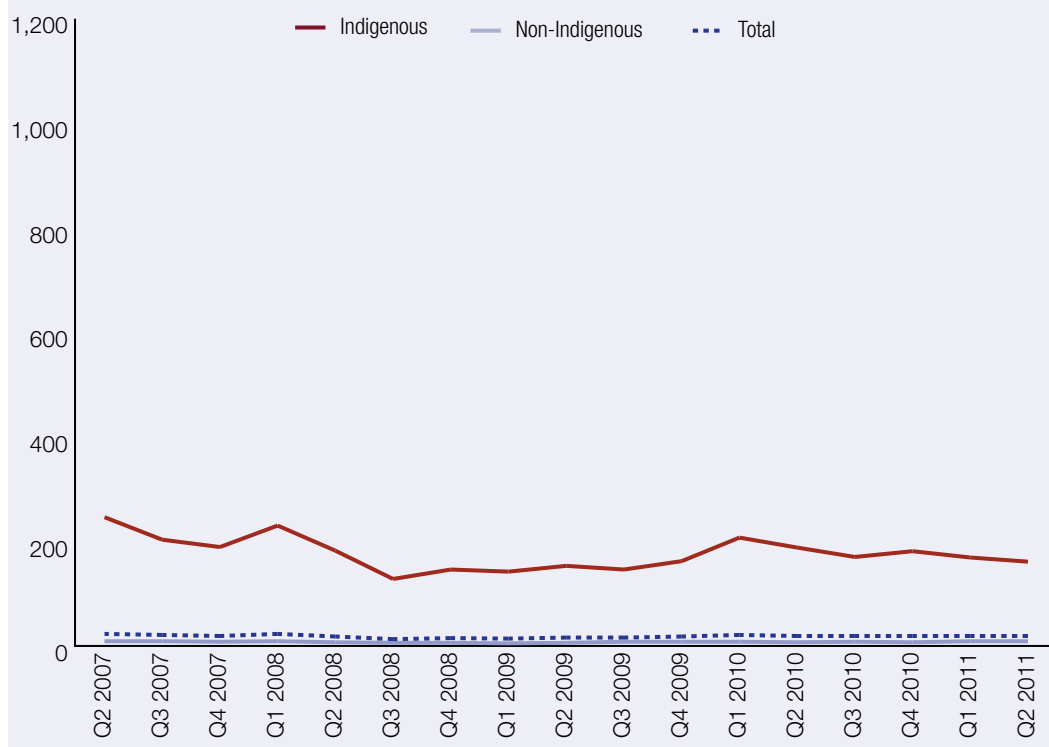
This finding appears to contrast with the findings of Vignaendra et al. (2009), who reported the average length of young people's stay on custodial remand in New South Wales from January 2006 to February 2009. They found that following changes to the NSW Bail Act in December 2007, the average length of time young people spent on custodial remand in New South Wales increased substantially, from approximately 15 days to 34 days. This was confirmed following a revision of the data in July 2012 (Department of Attorney-General and Justice personal communication 30 January 2013). These changes involved restricting the conditions in which bail can be reappplied for.

The distinction between counting rules used by AIHW and those in Vignaendra et al.'s report (2009) is important in explaining the contrasting findings.

The data used in Vignaendra et al.'s report (2009) reflect the average length of stay on remand (by remand period), while the AIHW data used in this report reflect the average length of stay by an individual during a financial year.

That is, while Vignaendra et al. (2009) calculated the average length of an individual period of custodial remand, AIHW data capture multiple periods of remand served during the year. The AIHW (2012a) reported that nearly half (44%) of all young people who completed at least one period of custodial remand during 2010–11 completed multiple periods and that 13 percent completed four or more periods. Therefore, although single remand periods may have lengthened significantly, it is unclear whether the total time young people spent in custodial remand during the year also significantly increased.

Figure 7 Young people (10 to 17 year olds) on custodial remand on an average night in Queensland by Indigenous status, June Quarter 2007 to June Quarter 2011 (rate per 100,000 population)



Source: Adapted from AIHW 2012b

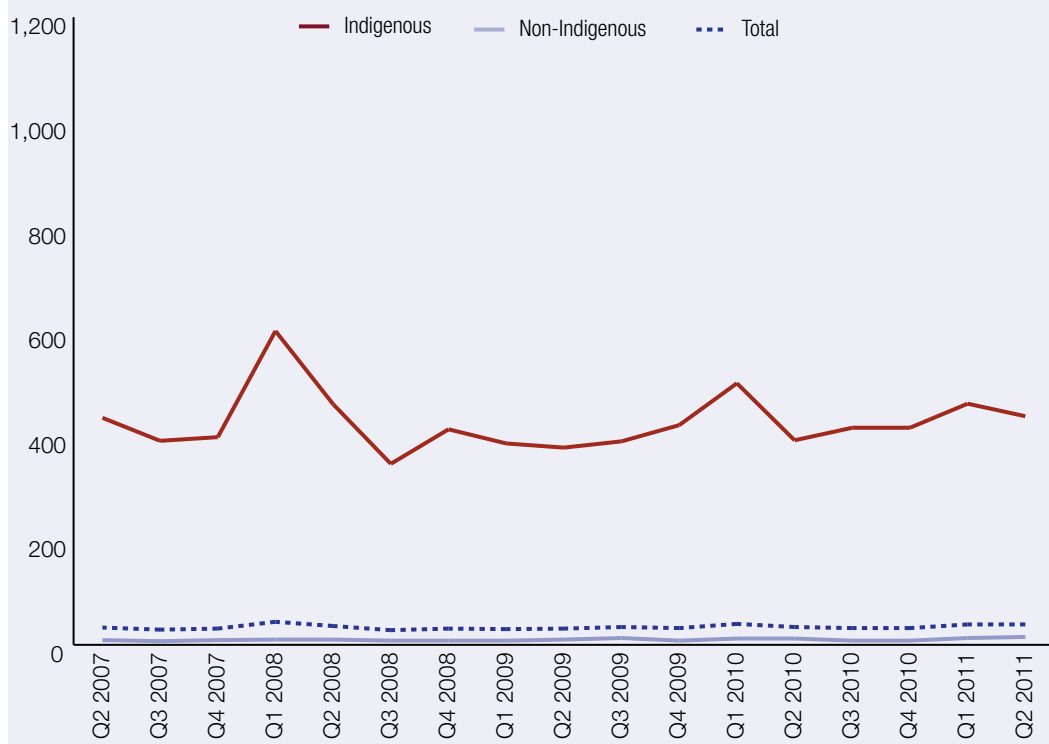
The average length of time young people spent on custodial remand did, however, vary across the jurisdictions, with South Australia having consistently shorter averages, and Tasmania and Queensland consistently longer averages. Data for Western Australia and the Northern Territory were not available for 2008–09, 2009–10 and 2010–11. Prior to this, however, the average length of time young people spent on remand in Western Australia was close to the national average. For the Northern Territory, the average length of time was much higher than the national average (see Table 7).

Table 8 shows the median length of young people's completed periods of custodial remand from 2007–08 to 2010–11. Nationally, the median length of time of young people's completed remand periods was three days for the 2010–11 period (see Table 8). The difference between the average and

median length of time that young people spend on custodial remand is due to young people being placed on custodial remand multiple times during the year. The difference is quite pronounced, suggesting that a small proportion of young people are placed on custodial remand repeatedly and/or that a small proportion of young people are placed on custodial remand for very long periods of time.

Nationally, Indigenous young people were held on remand, on average, longer than non-Indigenous young people. This was also the case in each jurisdiction and for each year, almost without exception, although this disparity was more pronounced in some jurisdictions (Queensland, Western Australia, Tasmania, the Australian Capital Territory and the Northern Territory; see Table 7).

Figure 8 Young people (10 to 17 year olds) on custodial remand on an average night in Western Australia by Indigenous status, June Quarter 2007 to June Quarter 2011 (rate per 100,000 population)



Source: Adapted from AIHW 2012b

Proportion of young people sentenced to detention following custodial remand

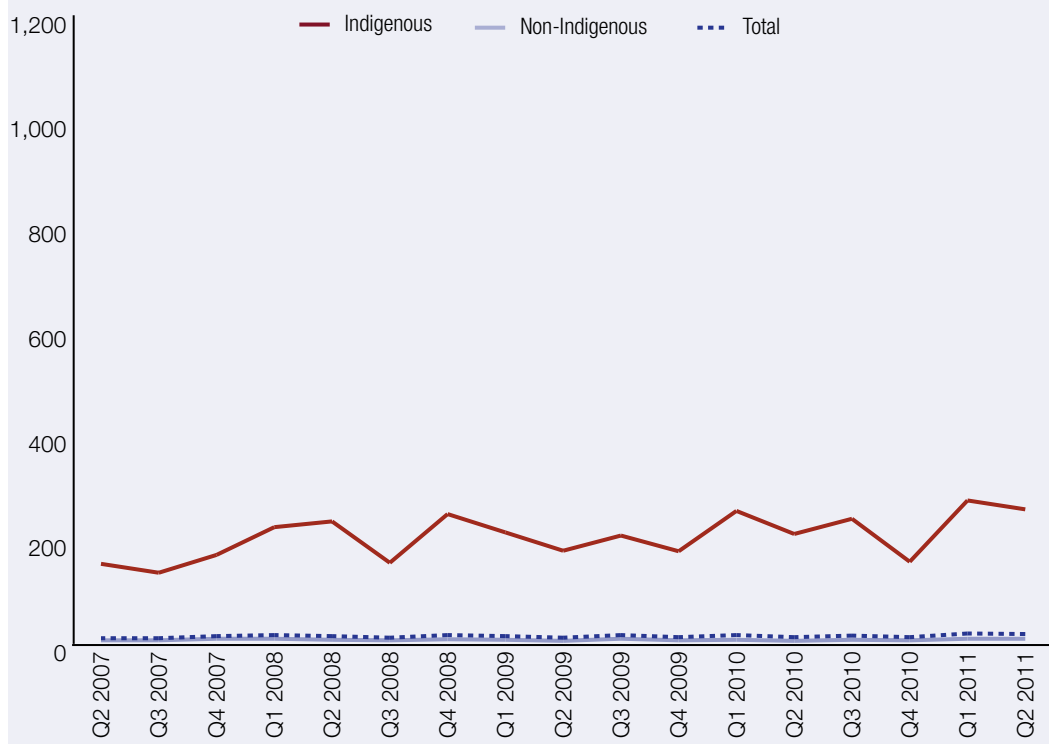
Concern has been raised that many young people who spend time on custodial remand do not go on to serve a period of sentenced detention (eg NSW LRC 2012). This is seen as problematic because if the young person's (alleged) offending is not serious enough to justify a sentence of detention, they should not be deemed risky enough to detain on custodial remand.

The AIHW (2012a) reports that nationally, in 2010–11, about one-third of all remand periods served by young people were followed by an order of sentenced detention. This varied substantially across the jurisdictions, from seven percent in Queensland to 67 percent in New South Wales (see AIHW 2012a). These figures relate to young

people whose period of custodial remand is followed immediately by a period of sentenced detention. Figures provided to the NSW Law Reform Commission (2012) show that in New South Wales during 2010–11, just 18 percent of young people who had been on remand at any stage during the proceedings received a sentence of detention.

The low proportion of young people on custodial remand who go on to spend time in sentenced detention is sometimes considered to be the result of Magistrates 'backdating' sentences (ie 'cases where the court believes a short custodial sentence is appropriate but does not impose such a sentence because of the time spent in custody on remand' (NSW LRC 2012: 72)). However, the NSW Law Reform Commission (2012: 72) argues that such cases are unlikely to comprise many of the large proportion of cases in which remand is not followed by a period of sentenced detention, as this is contrary to good sentencing practice:

Figure 9 Young people (10 to 17 year olds) on custodial remand on an average night in South Australia by Indigenous status, June Quarter 2007 to June Quarter 2011 (rate per 100,000 population)



Source: Adapted from AIHW 2012b

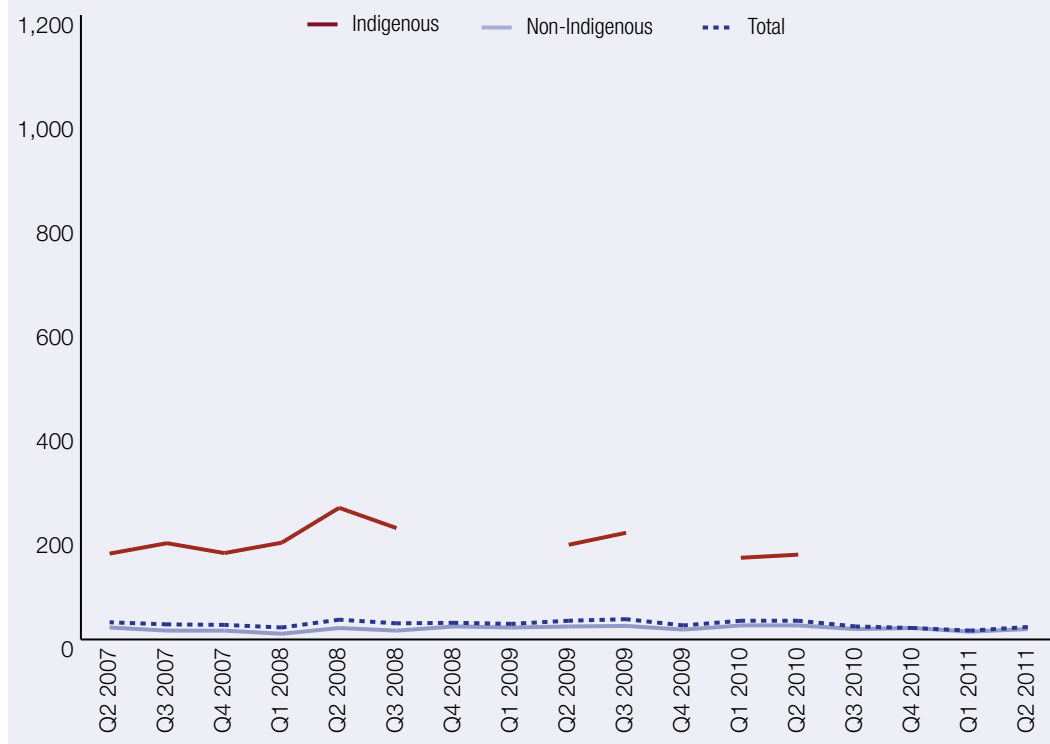
What should be done in such a case is to backdate an appropriate custodial sentence to take into account the time spent in custody on remand. It is reasonable to assume that this happens in most cases.

It was found, however, that in some jurisdictions at least, an informal process of backdating or 'discounting' occurs. To be clear, this does not mean that young people receive shorter custodial sentences, but that the time they have already spent in custody is taken into account at sentencing. There are no formal guidelines or formulae for calculating this as there are in some international jurisdictions (see Webster, Doob & Myers 2009 on the situation in Canada); one Magistrate described this process as an 'artificial mathematical exercise'.

As another Magistrate commented, however, it is 'inevitable' that the time a young person has spent

on custodial remand will be influential at sentencing. Lending support to the view of the NSW Law Reform Commission (2012), another Magistrate noted that although informal backdating occurs, it is rare for periods spent on custodial remand to equate exactly with an appropriate sentence. As a number of Magistrates interviewed for this study noted, an alternative explanation for the high proportion of remanded young people not subsequently sentenced to detention is that some of the young people's criminogenic needs are addressed while on remand, rendering detention unnecessary by the time sentencing takes place. This assumes that interventions to address criminogenic needs are available to young people on custodial remand, which as discussed later in this report, is not always the case.

Figure 10 Young people (10 to 17 year olds) on custodial remand on an average night in Tasmania by Indigenous status, June Quarter 2007 to June Quarter 2011 (rate per 1,000 population)



Note: Rates are not published where there were fewer than 5 people or due confidentiality or other concerns about the quality of the data (see AIHW 2012b)

Source: Adapted from AIHW 2012b

Summary

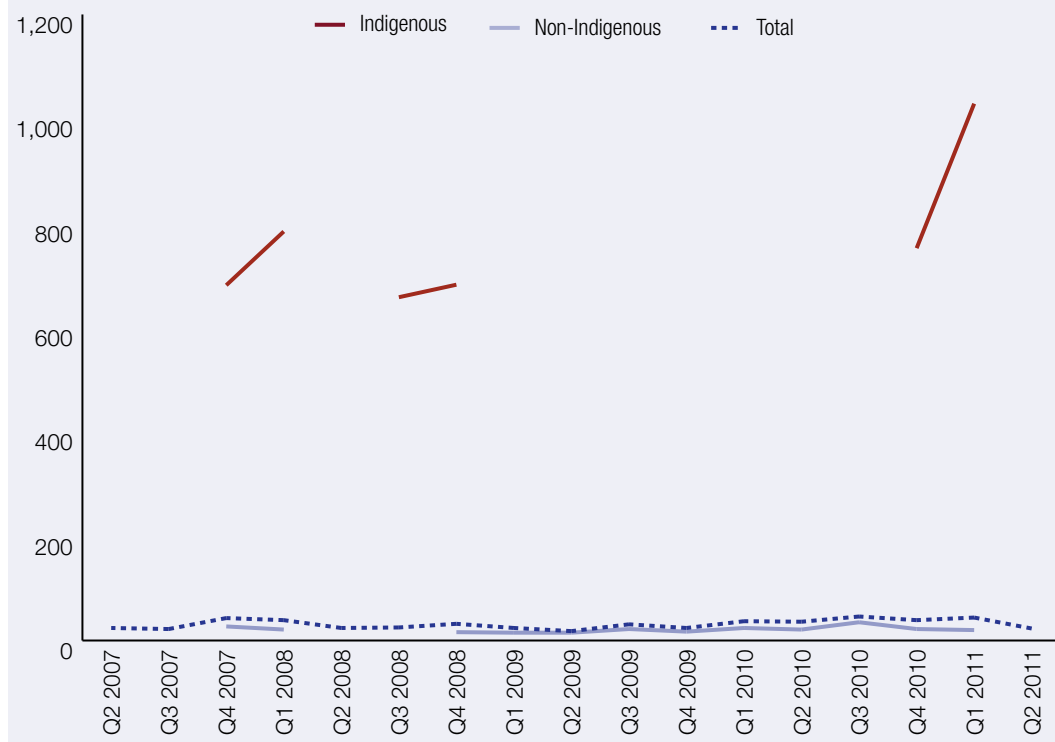
Approximately half of all young people in detention in Australia are on custodial remand rather than sentenced. Nationally, and in each jurisdiction, there has been no substantial recent increase in the proportion of detained young people who are on remand on an average night, and no recent increase in the length of time young people spend on custodial remand (see above the discussion about Vignaendra et al's (2009) findings in New South Wales). While there was an increase in the rate per 100,000 young people on custodial remand in the mid-2000s, the rate has been relatively stable since then.

Further, the proportion of all young people in detention who are on remand rather than sentenced has increased steadily in the longer term. The above analysis suggests that this long-term increase is largely the result of fewer young people being

sentenced to detention (or young people being sentenced to shorter periods of detention, or a combination of these two factors). In other words, while the rate of young people placed on custodial remand has increased, the rate of young people sentenced to detention has decreased more substantially, thereby increasing the proportion of all detained young people who are on custodial remand as a proportion of all young people in detention.

Although concerns have been raised about the number of Indigenous young people on custodial remand, there has been no apparent difference between the proportion of Indigenous and non-Indigenous young people on remand in recent years. That is, about half of all Indigenous young people in detention are on remand rather than sentenced and the same is true of non-Indigenous young people.

Figure 11 Young people (10 to 17 year olds) on custodial remand on an average night in Australian Capital Territory by Indigenous status, June Quarter 2007 to June Quarter 2011 (rate per 100,000 population)



Note: Rates are not published where there were fewer than five people or due confidentiality or other concerns about the quality of the data (see AIHW 2012b)

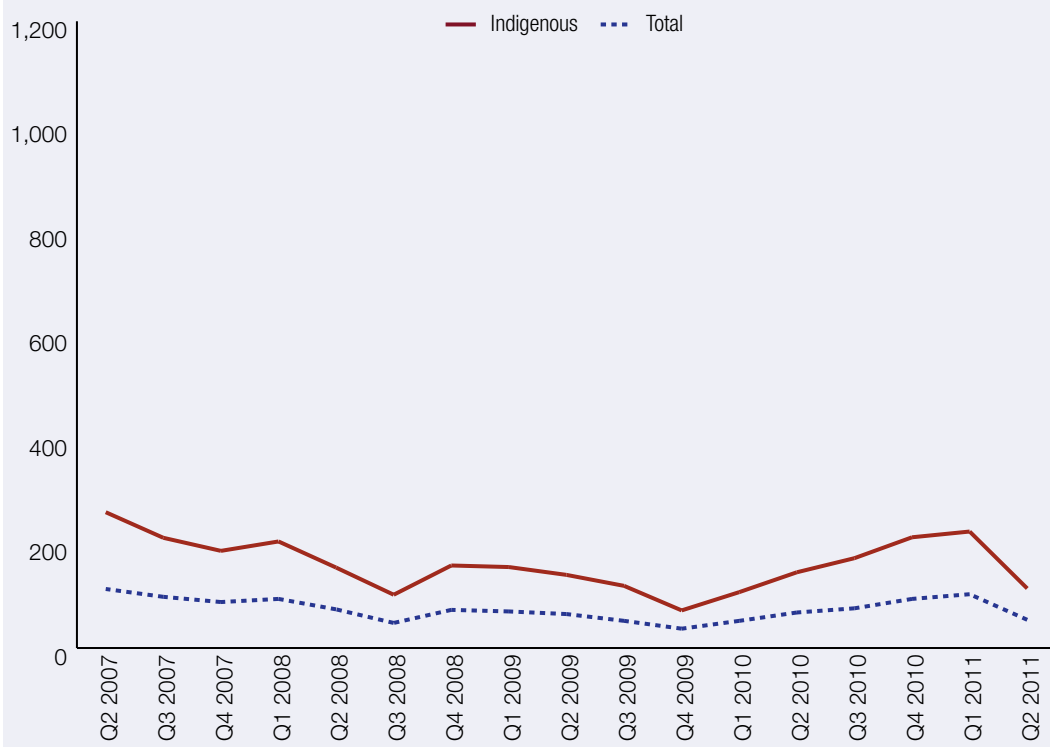
Source: Adapted from AIHW 2012b

Further, although Indigenous young people are overrepresented on custodial remand in every jurisdiction, the overrepresentation is much higher among sentenced young people in detention than those in custodial remand. That is, while the overrepresentation of Indigenous young people in the criminal justice system is a serious social problem in Australia, the use of custodial remand for Indigenous young people is not itself more problematic than other stages of the youth justice system. It is the case, however, that Indigenous young people spend, on average, substantially more time on custodial remand than non-Indigenous young people; this finding warrants further consideration.

Although the increasing use of custodial remand for young people appears less profound than originally

appeared to be the case, the number of young people on custodial remand remains a concern. As outlined above, each of Australia's jurisdictions has in place legislation that recognises that detention should be used as a last resort for young people and Australia is a signatory to a number of United Nations instruments (eg the Convention on the Rights of the Child (United Nations 1989)) that stipulate that detention is to be used as a last resort for young people (*Appendix 1* outlines the guidance provided by United Nations instruments on the use of custodial remand for young people). Further, as described above, the experience of custodial remand can result in a wide range of negative outcomes for young people, many of which are criminogenic (ie foster offending behaviour), and for the community.

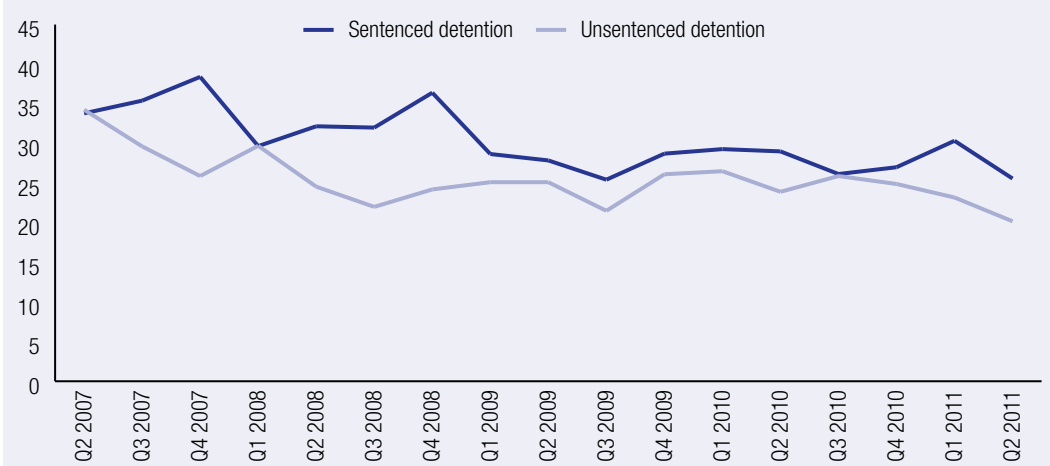
Figure 12 Young people (10 to 17 year olds) on custodial remand on an average night in the Northern Territory by Indigenous status, June Quarter 2007 to June Quarter 2011 (rate per 100,000 population)



Note: Rates are not published where there were fewer than 5 people or due confidentiality or other concerns about the quality of the data (see AIHW 2012b)

Source: Adapted from AIHW 2012b

Figure 13 Rate ratio of Indigenous to non-Indigenous young people (10 to 17 years) in detention on an average day by legal status, June Quarter 2007 to June Quarter 2011



Source: AIHW 2012b

Table 7 Average length^a of time young people spent on custodial remand by Indigenous status and jurisdiction, 2006–07 to 2010–11 (days)^b

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Aust excl WA & NT ^c
2006–07									
Indigenous	41	42	63	38	24	65	37	94	46
Non-Indigenous	25	38	52	26	20	75	31	76	31
Unknown	20	16	0	0	3	0	0	0	19
Total	31	38	58	34	21	71	32	92	36
2007–08									
Indigenous	42	39	64	40	26	84	55	79	47
Non-Indigenous	31	39	51	29	22	45	24	63	33
Unknown	19	0	6	0	10	0	3	0	18
Total	35	39	58	36	24	58	32	77	38
2008–09									
Indigenous	44	45	50	n/a	23	65	52	n/a	43
Non-Indigenous	33	38	33	n/a	21	51	18	n/a	32
Unknown	32	1	0	n/a	3	0	0	n/a	31
Total	37	39	42	n/a	22	55	25	n/a	36
2009–10									
Indigenous	43	47	54	n/a	26	59	49	n/a	45
Non-Indigenous	30	36	38	n/a	22	51	23	n/a	31
Unknown	16	0	34	n/a	4	0	1	n/a	16
Total	35	38	46	n/a	24	53	29	n/a	36
2010–11									
Indigenous	39	35	49	n/a	28	57	50	n/a	41
Non-Indigenous	28	37	43	n/a	26	56	27	n/a	32
Unknown	15	9	104	n/a	12	0	0	n/a	17
Total	32	37	47	n/a	26	56	34	n/a	35

a: Average duration calculated from the summed length of periods of unsentenced detention that occurred within the financial year

b: Western Australia and Northern Territory did not supply data for 2008–09 to 2010–11 (see AIHW 2012a). Reported as n/a

c: Totals for 2010–11 include aggregate data supplied by Western Australia and 2007–08 data for the Northern Territory, where available (see AIHW 2012a)

Source: AIHW 2012a (Data for years 2007–08 to 2010–11); AIHW 2011a (Data for year 2006–07)

Table 8 Median length^a of completed custodial remand periods of young people, by Indigenous status and jurisdiction, 2007–08 to 2010–11 (days)^b

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Aust ^c
2007–08									
Indigenous	n/a	16	20	14	6	36	9	19	14
Non-Indigenous	n/a	11	12	8	7	16	6	28	9
Unknown ^d	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Total	n/a	13	16	12	6	18	6	21	11
2008–09									
Indigenous	8	10	14	n/a	3	28	7	n/a	8
Non-Indigenous	3	12	7	n/a	3	11	2	n/a	3
Unknown	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Total	4	12	10	n/a	3	17	2	n/a	5
2009–10									
Indigenous	5	18	15	n/a	3	15	6	n/a	7
Non-Indigenous	2	12	6	n/a	3	15	2	n/a	3
Unknown	2	np	2	n/a	2	np	np	n/a	2
Total	3	13	11	n/a	3	15	3	n/a	4
2010–11									
Indigenous	3	9	12	n/a	3	19	3	n/a	6
Non-Indigenous	2	10	7	n/a	2	16	2	n/a	3
Unknown	2	np	14	n/a	3	np	np	n/a	2
Total	2	10	9	n/a	3	17	3	n/a	3

a: Median lengths were not calculated when there were fewer than five periods (see AIHW 2012a). Reported as np

b: The durations of periods of remand separated by a transfer to another remand or detention centre were summed (see AIHW 2012a)

c: Total Australia excludes NSW for 2007–08 and WA and NT for 2008–09, 2009–10, 2010–11 as these states did not supply data for these years (see AIHW 2012a). Missing data are reported as n/a

d: Unknown category was not reported by AIHW in reports covering 2007–08 and 2008/09, recorded as n/a

Source: AIHW 2012a (data for 2010–11); AIHW 2011a (data for 2009–10); AIHW 2011b (data for 2008–09); AIHW 2009 (data for 2007–08)

Legislative framework for bail for young people

As noted earlier in this report, when police arrest and charge a suspect with one or more criminal offences, the suspect can be either granted bail or remanded in custody. Subsequently, an accused person may either be granted bail or remanded in custody (ie refused bail) by the court. An understanding of the legislative framework under which these decisions are made is therefore critical to an understanding of the custodial remand of young people in Australia. This section describes the different models of bail legislation under which bail decisions are made about young people across Australia's jurisdictions and outlines in detail the current relevant legislation in each jurisdiction. Specifically, the section describes who can grant bail to young people, when young people can apply for bail, the factors that bail decision makers must consider and the conditions that can be placed on young people granted bail. The section highlights in particular the differences between 'generic' bail legislation, which relates to both young people and adults, and legislation specific to young people.

Historical context

Prior to and during the early 1970s, bail was granted or refused in Australian jurisdictions according to common law (case law) (Steel 2009). At this time, the major

consideration in bail decision making was ensuring an accused's attendance at court and conditions were restricted to a monetary payment on release (Steel 2009). This changed during the late 1970s due to a growing concern about accused persons being unnecessarily remanded (King, Bamford & Sarre 2009) and about bail being less achievable for those who could not afford the bail payment (Steel 2009). After a range of Inquiries in the 1970s, legislation was enacted in each jurisdiction that provided guidance to bail decision makers. Victoria was the first jurisdiction to enact such legislation in 1977, with New South Wales following in 1978. The last jurisdiction to enact bail legislation was Tasmania in 1994. Table 10 lists bail legislation in each jurisdiction.

Since the introduction of bail legislation in Australia, there has been a range of legislative amendments that reverse the general right to bail that existed under common law (Steel 2009). Over the last few decades, the list of exemptions to this right to bail has been extended (Steel 2009). Changes include adding drug trafficking, domestic violence, firearms offences, murder and other serious offences to the list of offences for which bail is restricted, restricting bail for repeat offenders and considering victims' fear and need for protection when determining bail (Steel 2009). Changes to bail legislation vary by jurisdiction (see Steel 2009); this summary provides a general overview only.

Table 9 Youth justice legislation, by jurisdiction

NSW	<i>Young Offenders Act 1997</i>
Vic	<i>Children, Youth and Families Act 2005</i>
Qld	<i>Youth Justice Act 1992</i>
WA	<i>Young Offenders Act 1994</i>
SA	<i>Young Offenders Act 1993</i>
NT	<i>Youth Justice Act</i>
Tas	<i>Youth Justice Act 1997</i>
ACT	<i>Children and Young People Act 2008</i>

Current legislative framework

As described above, each jurisdiction in Australia has bail legislation that ‘provide[s] the framework within which the police and courts make decisions on bail’ (Roth 2010: 1). Each jurisdiction also has legislation that provides a framework for the treatment of young people in the criminal justice system more broadly (see Table 9). Youth justice legislation in each of Australia’s jurisdictions emphasises the vulnerability, immaturity and inexperience of young people, and in light of this, provides a framework for dealing with young people separately from adults. For example, all jurisdictions have a commitment to minimising young people’s contact with the formal criminal justice system through the use of diversionary measures such as cautions and youth justice conferences.

The way in which youth justice legislation and bail legislation intersect with one another varies across Australia’s jurisdictions. There are three models of bail legislation relating to young people, described in turn below.

In the first model, young people are subject to the same legislation for bail as adults and bail legislation overrides anything contrary contained in youth justice legislation. This is the case in the Northern Territory, New South Wales and Tasmania. In the Northern Territory, the Youth Justice Act is subject to the Bail Act. In New South Wales, at the time of writing, the *Children (Criminal Proceedings) Act 1987* is subject to the *Bail Act 1978* (with the exception of decisions about Youth Conduct Orders, which are made according to the *Children (Criminal Proceedings) Act 1987*). In response to

the NSW Law Reform Commission’s (2012) review of bail legislation, the NSW Government (2012: 11) has committed to amending the *Bail Act 1978* to

require the bail authority to consider the special vulnerability or needs of the accused when determining bail, including because of youth, ATSI status or cognitive or mental health impairment.

Tasmania is unique in that bail processes, including which authorities have the power to grant or refuse bail and the specific circumstances in which this occurs, are governed by the *Justices Act 1959*, with bail legislation limited to outlining the procedural elements of granting or refusing bail and the penalties for breaching bail. Furthermore, Tasmania is the only jurisdiction not to provide legislative guidance on the factors the courts and authorised officers should take into consideration when making bail decisions. This guidance is instead provided by Tasmania’s common law. Tabled amendments to the *Youth Justice Act 1997* will, however, provide increased guidance to bail decision makers.

In the second model, although youth justice legislation does not override bail legislation, separate divisions relating to bail decisions for young people are contained either in bail legislation (as is the case in the Australian Capital Territory and Western Australia) or in youth justice legislation (as is the case in Queensland).

In the third model, bail legislation is subject to youth justice legislation. This means that the terms within youth justice legislation override anything contrary contained in bail legislation. In Victoria, young people are subject to the same considerations and conditions as adults according to the *Bail Act*

Table 10 Bail legislation for young people and whether legislation has separate or additional considerations for bail decisions compared with adults, by jurisdiction

	Bail legislation relating to young people	Separate section for considerations for bail decisions for young people
NSW	<i>Bail Act 1978</i> subject to s 4A of the <i>Children (Criminal Proceedings) Act 1987</i> regarding Youth Conduct orders	No
Vic	<i>Bail Act 1977</i> subject to Part 5.2 Division 1 of <i>Children, Youth and Families Act 2005</i> regarding custody and bail of children	No ^a
Qld	<i>The Bail Act 1980</i> subject to Part 5 of the <i>Youth Justice Act 1992</i> regarding bail and custody of children	Yes
WA	<i>Bail Act 1982</i>	Yes
SA	<i>Bail Act 1985</i> subject to <i>Young Offenders Act 1993</i> (see Pt 3 s 14)	No
NT	<i>Bail Act</i>	No
ACT	<i>Bail Act 1992</i>	Yes
Tas	<i>Justices Act 1959</i> subject to <i>Bail Act 1994</i>	No

a: However, the *Children, Youth and Families Act 2005* Part 5 states that young people cannot be remanded for longer than 21 days and bail must not be refused on the sole ground that the young person does not have any, or any adequate, accommodation

1977; however, the *Children, Youth and Families Act 2005* contains a number of protective mechanisms relating specifically to young people. For example, the length of time a young person can be remanded before having to appear before the Court is limited to 21 days. Further, a lack of accommodation alone cannot constitute a reason for refusing a young person's bail and young people must be proceeded against via summons rather than arrest except in exceptional circumstances.

South Australia's legislation is a hybrid of models two and three. Although under the *Bail Act 1985* young people are in the main subject to the same considerations and conditions for bail decisions as adults, special reference is made to children, providing limited guidance on bail decisions involving young people. For example, under s 4(a)(ii), young people need not be held in custody until the conclusion of an investigation. Further, the *Young Offenders Act 1993* contains some guidance on the circumstances under which young people are to be detained, which override bail legislation.

Table 10 lists the relevant legislation in each jurisdiction current at the time of writing.

Who can grant bail to young people?

As described above, bail decisions can occur at a number of points in the criminal justice process. In all jurisdictions, the following people have the power to grant or refuse bail:

- Judges and Magistrates; and
- authorised police officers (ie those ranked sergeant or above or in charge of a police station, watchhouse or lockup).

In addition, in Western Australia and Tasmania, Justices of the Peace (also known as Bench Magistrates in Tasmania) also have the power to grant or refuse bail to accused persons who are in police custody. In Victoria, Bail Justices also have this power. Bail Justices and Justices of the Peace are trained volunteers appointed to conduct bail hearings outside of business hours for adults and children in police custody. Victorian bail legislation limits authorised police officers to making bail decisions only when it is 'impractical' for an accused person to appear before a bail justice or court within 24 hours of being taken into custody. Tasmania's *Justices Act 1959* also gives jurisdiction for the clerk or deputy clerk of the petty sessions (ie administrator

Table 11 Authorities with the power to grant or refuse bail, by jurisdiction

NSW	Authorised police officer; Magistrates and authorised justices; District Court; Supreme Court; Court of Criminal Appeal; Land and Environmental Court; Industrial relations Commission
Vic	Police ^a ; Bail justice; Courts; Judges
Qld	Authorised police officer; Judge or Justice, whether sitting in court or acting in another way; A court exercising appellate jurisdiction; A justice or justices conducting an examination of witnesses in relation to an offence
WA	Authorised police officer; Authorised community officer; Magistrate's Court; Children's Court; Coroner's Court of Western Australia; District Court; Supreme Court; Court of Appeal
SA	Authorised police officer; Court before which the applicant has been charged with an offence; Court which the eligible person has appeared for trial or sentencing; Magistrates Court; Supreme Court; Court where a person is to appear in answer to summons or for allegedly failing to observe condition of recognisance; Court where person is appearing as witness; person authorised by the court or justice who has issued a warrant for arrest
NT	Authorised police officer; Local Court; Court of Summary Jurisdiction; Supreme Court; Youth Justice Court; Judge, magistrate or justice not sitting as a court
ACT	Authorised police officer; Magistrates Court; Supreme Court
Tas	Authorised police officer; Commissioned police officer; Approved officer under the <i>Marine Safety (Misuse of Alcohol) Act 2006</i> or <i>Road Safety (Alcohol and Drugs) Act 1970</i> ; Clerk of petty session or clerk working in the office of petty session as authorised by the Chief Magistrate; Justices as appointed by the Governor and commissioned by the Chief Magistrate to deal with bail and recognisances

a: Only if it is impractical to bring the person before a court or bail justice within 24 hours of being taken into custody

of the Magistrates Court) and clerks working within the office of the petty sessions who have been authorised by the Chief Magistrate to grant bail, but only with the permission of the prosecution.

When can an accused young person apply for bail?

As can be seen in Table 12, the point(s) at which an accused person can apply for bail varies across the jurisdictions. Each jurisdiction's bail legislation contains provisions outlining the point(s) in the criminal justice process at which an accused person can apply for bail. These provisions apply to both young people and adults.

What must bail decision makers take into consideration?

Decisions about whether to grant or refuse bail to an accused person are undoubtedly very difficult

to make. As Mulroney (2012: 1) states 'bail determinations are predictive exercises conducted by fallible humans with imperfect information available'. Bail decision makers must balance the community's wellbeing and right to safety against the rights of the accused person. It must be stressed that although an offender can apply for bail following a conviction or a plea of guilty but prior to sentencing, in most cases, such decisions are made prior to the accused person's trial. The alleged offender is therefore technically innocent at this time. That alleged offenders are 'innocent until proven guilty' is one of the most fundamental principles underpinning Australia's criminal justice system and is designed to ensure that innocent people are not punished. Decisions about bail are likely to be even more difficult when the accused person is a young person, given that young people, by definition, lack maturity and experience and must have their wellbeing taken into consideration.

Bail decision makers must take into account a range of factors when making decisions about granting or refusing bail to an accused person. These factors and considerations are outlined in the following subsections.

Table 12 Circumstances where an accused person can make a bail application (as specified in bail legislation), by jurisdiction

NSW	<p>The period between charge and first appearance at court;</p> <p>The period between committal for trial or sentence and being brought before the Supreme court or District court;</p> <p>The period of any adjournments;</p> <p>The period of a stay of execution of a conviction or sentence;</p> <p>The period between the lodging of an appeal and its determination;</p> <p>The period between the accused person entering into recognisance to prosecute proceedings and the person's appearance to abide by the decisions of the proceedings, or the persons appearance before the authorised justice to whom the matter is remitted;</p> <p>The period during which an application of revocation, extension or amendment of a community service order or a children's community service order is pending;</p> <p>The period between the determination of an appeal and the persons appearance before a court to abide the decision on the appeal or the commencement of a new trial ordered by the appeal;</p> <p>The period between a person being found guilty of an offence under the <i>Children (Community Service Orders) Act 1987</i> and the person appearing before court;</p> <p>The period between the making of, or a referral of an application to annul a conviction or sentence and the hearing of the application;</p> <p>The period between an annulment of a conviction or sentence and the rehearing of the matter;</p> <p>The period between an application for a review of a decision under the <i>Children (Criminal Proceedings) Act 1987</i> and the determination of the application;</p> <p>The period between the determination of an application for review and any further proceedings;</p> <p>The period between a person being referred to the Drug Court and being brought before the Drug Court;</p> <p>The period between being referred from a Drug Court to another court and the appearance at the referred court;</p> <p>Any other period prescribed by the regulations</p>
Vic	<p>When it is not practicable to be brought before a bail justice or Magistrates Court within 24 hours after being taken into custody;</p> <p>During any postponement of the hearing of a charge for the offence or whilst the accused person is awaiting trial;</p> <p>When a case is adjourned by a court for inquiries or a report, or whilst the accused person is awaiting sentence, except where the court is satisfied that it would not be desirable in the public interest to release the accused</p>
Qld	<p>When a person is arrested in relation to a charge for an offence, and is in the custody of an officer-in-charge or a police station or a watch-house manager, does not need to be held for questioning or investigative purposes, and the accused person cannot be taken promptly before the court;</p> <p>When a person is awaiting a criminal proceeding to be held by that court in relation that offence;</p> <p>When the court is a Magistrates court and the person is awaiting an appeal to be held in the District Court;</p> <p>When the court has adjourned criminal proceedings;</p> <p>When the court has committed or remanded the person in the course of or in connection with a criminal proceeding to be held in relation to that offence</p>
WA	<p>When a person is arrested and is not released unconditionally according to s 142 of the <i>Criminal Investigation Act 2006</i>;</p> <p>At an accused person's initial appearance in a court of summary jurisdiction (Magistrate or Children's Court);</p> <p>At an accused person's initial appearance in the District or Supreme Court;</p> <p>At an accused person's appearance in any Court after an adjournment of proceedings;</p> <p>At an accused person's appearance on committal to the Supreme Court or District Court;</p> <p>At an accused person's appearance in connection with appeal</p>

Table 12 (Continued)

SA	<p>When a person is taken into custody on a charge of an offence or, in the case of a child, on suspicion of having committed a crime;</p> <p>When a person has been convicted of an offence but has not been sentenced;</p> <p>When a person has been convicted of, and sentenced for, an offence but has not exhausted all rights of appeal against the conviction of sentence, or to have it reviewed;</p> <p>When a person appears before a court for allegedly failing to observe a condition of recognisance;</p> <p>When a person appears before a court in answer to a summons (including a person appearing as a witness);</p> <p>When a person has been arrested on a warrant and is appearing or is to appear before a court as a witness</p>
NT	<p>The period between an accused being charged with the offence and their first appearance before a court in connection with proceedings for the offence;</p> <p>The period between committal for trial or sentence and the appearance of the accused before the Supreme Court consequent upon the committal;</p> <p>The period of any adjournment or adjournments;</p> <p>The period between the finding of the Supreme Court that an accused is not capable of understanding the proceedings at his trial so as to be able to make a proper defence and his being dealt with according to law;</p> <p>The period between the institution of an appeal and its determination;</p> <p>The period between the determination of an appeal and: an accused person's appearance before a court to abide the result of the determination of the appeal; or the accused person's appearance between the committal of a person to appear before or be dealt with by a court and their appearance in accordance with that committal;</p> <p>Any other period prescribed by the Regulations</p>
ACT	Any period when the person is not required to attend court in relation to the offence with which the person has been charged
Tas	<p>Where a person has been taken into custody for a simple offence, or for a breach of duty pursuant to a warrant issued by a justice, or to facilitate making the application for a restraint order;</p> <p>Where a person who has been taken into custody for an offence or a breach of duty or failing to appear in court according to notice, is brought before a justice;</p> <p>Where a witness who has been summoned to give evidence by a justice fails to appear before a court;</p> <p>An accused person when a justice adjourns proceedings;</p> <p>An accused person after the Supreme Court has committed the defendant for sentence or trial hearing;</p> <p>An accused person after the Supreme Court has completed preliminary proceedings under a preliminary proceedings order;</p> <p>An accused person after adjournment of proceedings;</p> <p>An accused person at the adjournment of proceedings regarding a restraint order. The justice cannot remand the accused for longer than 28 days;</p> <p>An applicant for a motion of review to the Supreme Court;</p> <p>An appellant to the Magistrate's Court</p>

a: Under this provision, a police officer must release an accused unconditionally if they charge them with a simple offence or an indictable but not serious offence unless they reasonably suspect that if released unconditionally, the accused will: commit an offence; re-commit or continue to commit the original offence; endanger another person's safety or property; interfere with witnesses or otherwise obstruct the course of justice; if charged with a non-serious but indictable offence, will not obey summons to court. If charged with a serious offence a police officer can detain the accused until the Bail Act (1982) has been complied with). Police cannot grant bail to those charged with murder

Presumptions for and against bail

Each jurisdiction's bail legislation sets out the presumptions for and against the granting of bail. Most jurisdictions have a presumption in favour of bail for minor offences. Conversely, charges relating to very serious or violent offences such as stalking, domestic and family violence, assault, murder, drug trafficking or federal offences, usually have a presumption against bail. Some jurisdictions require

the court or other authorised officer to be satisfied that there are 'exceptional circumstances' that necessitate the release of an accused person, or require the accused to 'show cause' as to why bail should be granted. See Table 13 for circumstances where there is a presumption for or against bail. In some jurisdictions, police do not have power to grant bail for more serious charges such as murder.

Table 13 Presumptions for and against bail being granted

	Presumptions for bail	Presumptions against bail
NSW ^a	<p>The right to release on bail exists for all offences not punishable by a sentence of imprisonment, offences under the <i>Summary Offences Act 1988</i> that are punishable by a sentence of imprisonment and all offences punished summarily (s 8).</p> <p>Presumption for bail for all other offences exists other than for charges where right to release is not entitled, where presumption for bail is exempted, where there is a presumption against bail and where bail is to be granted only under exceptional circumstances (s 9)</p>	<p>The right for release for minor offences is not entitled if:</p> <ul style="list-style-type: none"> the person has previously failed to comply with bail undertakings and bail conditions; the person is incapacitated by intoxication, injury or use of a drug or is in need of physical protection; the person stands convicted of the offence or the conviction is stayed; bail is dispensed with; or the accused is already serving a sentence of imprisonment (s 8). <p>Presumption for bail is exempted for:</p> <ul style="list-style-type: none"> charges of certain domestic violence offences; charges for offences of contravening apprehended violence orders; if the accused was on bail when the alleged offence occurred; if the accused was on parole when the alleged offence occurred; if the accused was on a good behaviour bond or intervention program when the alleged offence occurred; or if the accused was in custody when the alleged offence occurred (ss 9A, 9B). <p>Presumption against bail includes charges for:</p> <ul style="list-style-type: none"> certain offences against the <i>Drug Misuse and Trafficking Act 1985</i>; certain federal offences (s 8A); serious firearms and weapons offences (s 8B); certain repeat property offences (accused is seeking bail for 2 or more property offences or has been convicted of 1 or more serious property offences within the last 2 years) (s 8C); offences committed in the course of riots or other civil disturbances (s 8D); offences carrying prison terms committed while on lifetime parole (s 8E); and breach of extended supervision orders or interim supervision orders (s 8F). <p>Bail is only to be granted under exceptional circumstances for charges of:</p> <ul style="list-style-type: none"> murder (s 9C) serious personal violence offences (where the accused person is a repeat offender) (s 9D)

Table 13 (Continued)

Vic	There is a presumption for bail with the exclusion of charges requiring 'exceptional circumstances' to be proven or for the accused to 'show cause' why detention is not justified (Part 2 s 4(1))	<p>Bail is to be refused for charges of murder, treason or certain offences under the <i>Drugs, Poison and Controlled Substances Act 1981</i> unless exceptional circumstances exist (Part 2 s 4(2)).</p> <p>Bail for a charge of treason can only be granted by the Supreme Court and for murder by the Supreme Court or the Magistrate that commits the accused for trial (s 13(2)).</p> <p>Bail shall be refused unless the accused can show cause for why detention in custody is not justified for charges of:</p> <ul style="list-style-type: none"> • an indictable offence that is alleged to have been committed while awaiting trial for another indictable offence; • a stalking offence (in addition previous convictions or found guilty of stalking or the presence of the use or threats of use of violence against alleged victim); • certain offences under the <i>Family Violence Protection Act 2008</i>; or • contravening s 32 of the <i>Stalking Intervention Order Act 2008</i> in addition previous convictions or found guilty of an offence involving use or threats of use of violence or the presence of the use or threats of use of violence against alleged victim; drug trafficking offences (Part 2 s 4(4))
Qld	There is a general presumption for the courts. Section 9 of the <i>Bail Act 1980</i> states that when an accused appears before the court for a charge not yet convicted, subject to the considerations outlined in the Act, the court must grant bail or vary or amend any existing bail orders	Nil (for adults there is a requirement to show cause for charges relating to certain offences, however this requirement is not applicable for young people)
SA	Section 10 of the <i>Bail Act 1985</i> provides a statutory presumption in favour of bail, deriving from the common law principle that a person is innocent until proven guilty	<p>Bail is not to be granted unless special circumstances can be established for charges of (s 10A):</p> <ul style="list-style-type: none"> • serious and organised crime • causing death or harm by motor vehicle, acts endangering life or creating risk of serious harm by motor vehicle • contravention of bail order • offence of contravening or failing to comply with control order or public safety order • blackmail • threats or reprisals to persons involved with a criminal investigation or proceedings • threats or reprisals against public officers • causing a bushfire
WA	Presumption for bail exists for a child accused who is in custody (ie on custodial remand) (Sch1 Part C cl 2) unless charged with an offence requiring exceptional circumstances to be proven	<p>Exceptional circumstances must be proven for bail to be granted when charged for a serious offence while on bail for another serious offence (Sch 1 Part C cl 3A).</p> <p>Exceptional circumstances must be proven for bail to be granted when charged with murder (Sch 1 Part C cl 3C)</p>
Tas	Nil	Nil

Table 13 (Continued)

NT	Presumption for bail exists for all charges except for offences where there is no presumption for bail or where the accused is required to satisfy the court that bail should not be refused	<p>The accused is required to satisfy the court/police/Justice of the Peace that bail should not be refused for charges of:</p> <ul style="list-style-type: none"> • murder, treason, an offence against the <i>Misuse of Drugs Act</i> punishable by a term of imprisonment for more than seven years; • an offence against the <i>Customs Act 1901</i> (Cth) in relation to narcotic goods punishable by a term of imprisonment for 10 years or more; • an offence against Division 307 of the Criminal Code (Cth) punishable by a term of imprisonment for 10 years or more; • an offence against ss 36, 37, 38 or 55 of the <i>Serious Crime Control Act</i>; • an offence against s 103A of the Criminal Code; • a serious violence offence alleged to have been committed within five years after being found guilty of an earlier serious violence offence; or • a serious sexual offence (s 7A). <p>No presumption of bail exists for charges of:</p> <ul style="list-style-type: none"> • an offence of serious harm, sexual intercourse and gross indecency without consent or in contravention of a Domestic Violence Order, if the charge is within a period of 10 years of being found guilty of murder, an offence of serious harm, harm, common assault or sexual intercourse or gross indecency without consent; • serious violence offence and being found guilty of a serious offence in the preceding 10 years; or • if in custody for another offence (s 8).
ACT	There is an entitlement for bail for certain minor offences and for the breach of sentence obligations for minor offences	<p>Presumption of bail is not to apply for charges of:</p> <ul style="list-style-type: none"> • a range of serious offences under the <i>Crimes Act 1900</i> including manslaughter, intentionally inflicting grievous bodily harm, sexual assault in the first and second degree, sexual intercourse without consent and various drug-related offences; • certain offences under the <i>Drugs of Dependence Act 1989</i>; • certain offences under the <i>Medicines, Poisons and Therapeutic Goods Act 2008</i>; • certain offences under the Customs Act (Cth); • an accused who has been charged with threat to kill, threat to inflict grievous bodily harm, stalking or a contravention of a protection order and who has been found guilty in the previous 10 years of an offence involving violence or the threat of violence; treason; and • or convicted of an indictable offence but not sentenced (s 9B)

a: The Department of Attorney-General and Justice has noted that a new, simpler Bail Act is being developed that aims to achieve greater consistency by removing complexities such as the presumptions scheme (personal communication 30 January 2013)

Bail considerations

Each jurisdiction's bail legislation (with the exception of Tasmania) outlines the factors that bail decision makers must consider (ie 'bail considerations') when deciding whether to grant or refuse an accused person bail. These factors are very similar across the jurisdictions. Generally, they consider whether there is an 'unacceptable risk' that the accused will do the following:

- fail to appear before court;
- reoffend while on bail;
- endanger the safety and/or welfare of the community; and/or
- obstruct the course of justice (eg by interfering with witnesses).

The interests of the accused person and the victim(s) are also outlined in each jurisdiction's bail legislation as important considerations.

The remainder of this section provides an overview of the specific bail considerations contained in each jurisdiction's bail legislation.

Jurisdictions without separate bail consideration for young people

New South Wales

New South Wales' *Bail Act 1978* (s 32) requires bail decision makers to take the following factors into consideration:

- the probability of whether the accused person will appear in court in respect of the offence, having regard only to:
 - the accused person's background and community ties, as indicated for a non-Indigenous person, by the history and details of the accused person's residence, employment and family situations and the accused person's prior criminal record and for an Indigenous person as indicated by the accused person's ties to extended family and kinship and other traditional ties to place and the accused person's prior criminal record;
 - previous failure to appear in court;
 - circumstances of offence including the nature and seriousness, the strength of the evidence against the accused person and the severity of the probable penalty;
 - any other specific evidence regarding their likelihood to appear in court (subsection 1(a));
- the interests of the accused person, having regard only to:
 - the period that the accused person may be obliged to spend in custody if bail is refused and the conditions under which the person would be held in custody;
 - need of the accused person to be free to prepare for court appearance or to obtain legal advice or both;
 - need for the accused person to be free for any lawful purpose;
 - whether the accused person is incapacitated by intoxication, injury or otherwise in danger of physical injury and in need of physical protection;
- if the accused person is a minor, an Aboriginal or Torres Strait Islander, has an intellectual disability or is mentally ill, any special needs arising from that fact;
- if the accused person is accused of an offence conducted while the accused person was at liberty on bail, on parole, was serving a sentence but was not in custody, was subject to a good behaviour bond or an intervention program order, or was in custody; then the nature of the person's criminal history, the seriousness of indictable offences the accused person was previously convicted of, the number of any such previous offences and the length of period between those offences (subsection 1(b));
- the protection of:
 - victim of the alleged crime;
 - close relatives of alleged victim;
 - any other person the authorised officer or court considers to be in need of protection due to the circumstances of the case (subsection 1(b1));
- the protection and welfare of the community, having regard only to:
 - the nature and severity of the offence (ie whether it is of a sexual or violent nature or involves the use of a weapon);
 - whether the accused person has previously failed, or been arrested for anticipated failure, to observe a reasonable bail condition previously imposed in respect of the offence;
 - the likelihood of the accused person interfering with evidence, witnesses or jurors;
 - whether or not it is likely that the accused person will commit any serious offence while at liberty on bail (this likelihood is to be considered together with the likely consequences and whether the likelihood outweighs the accused's right to liberty) (subsection 1(c)).

This legislation also provides that if an accused person under the age of 18 years does not reside with a parent or guardian, this shall be ignored (subsection 4).

As discussed in more detail below, the NSW Government (2012) has committed to a number of changes to the *Bail Act 1978* that relate to young people.

Victoria

Under Victoria's *Bail Act 1977* (s 4), bail can be refused:

- if the court is satisfied that there is unacceptable risk that the accused person, if released on bail, would:
 - fail to surrender himself into custody and answer bail;
 - commit an offence while on bail;
 - endanger the safety or welfare of member of the public; or
 - interfere with witnesses or otherwise obstruct the course of justice (subsection 2 d(i));

Furthermore, in assessing whether the circumstances constitute unacceptable risk, the court must consider the following:

- the nature and seriousness of the offence;
- the character, antecedents, association, home environment and background of the accused;
- the history of previous grants of bail to the accused;
- the strength of the evidence against the accused;
- the attitude, if expressed to court, of the alleged victim of the offence on the grant of bail;
- any conditions that may be imposed to address the circumstances which may constitute an unacceptable risk (subsection 3).

As described above, however, Victoria's *Children, Youth and Families Act 2005* takes precedence over the *Bail Act 1977* when bail decisions are being made about young people. Under the *Children, Youth and Families Act 2005*, a young person taken into custody must be:

- released unconditionally;
- released on bail; or
- brought before a court or bail justice (s 346(2)).

The *Children, Youth and Families Act 2005* also places restrictions on the time period for which young people can be remanded, with s 346(2) stating that if the court is not sitting, an accused young person must be brought before a Bail Justice no later than 24 hours after being taken into custody. If a Bail Justice refuses to grant an accused young person bail, the young person must appear before

a court on the next working day or in prescribed regional areas, within two working days (s 346(4)). A court is also restricted in relation to the length of time for which young people can be remanded in custody. Under the *Children, Youth and Families Act 2005*, a young person can only be remanded for a period not exceeding 21 days (s 346(3)(5)). As described below, however, in practice, young people are sometimes remanded for multiple consecutive 21 day periods (see also note to Table 10 above). It is also legislated that bail must not be refused on the sole ground that the young person does not have any, or adequate, accommodation (s 346(9)).

South Australia

In South Australia, bail authorities are legislated to release an accused person on bail (deriving from the common law principle that a person is innocent until proven guilty), unless, after considering the following they decide to refuse bail (*Bail Act 1985* s 10) due to:

- the gravity of the offence (subsection 1(a));
 - the likelihood the applicant would, if released:
 - abscond;
 - offend again;
 - interfere with evidence;
 - intimidate or suborn witnesses; or
 - hinder police inquiries (subsection 1(b)i,ii,iii);
 - any need that the applicant may have for physical protection (subsection 1(d));
 - any medical or other care that the applicant may require (subsection 1(e));
 - any previous occasion on which the applicant may have contravened or failed to comply with a term or condition of a bail agreement (subsection 1(f));
 - any other relevant matter (subsection 1(g)).
- South Australia's *Bail Act 1985* also contains the following guidance for bail decision makers:
- where the applicant has been convicted of the offence, the bail authority has, subject to the Act, unfettered discretion as to whether the applicant should be released on bail (subsection 2);
 - where the applicant is a person who is appearing or is to appear before a court as a witness in proceedings, the bail authority should, subject to

the Act, release the applicant on bail unless there is a likelihood that the applicant would abscond (subsection 3);

- despite the other provisions of this section, where there is a victim of the offence, the bail authority must, in determining whether the applicant should be released on bail, give primary consideration to the need that the victim may have, or perceive, for physical protection from the applicant (subsection 4).

Northern Territory

In the Northern Territory, bail authorities must consider the following matters only (s 24 *Bail Act*):

- the probability of whether or not the person will appear in court in respect of the offence for which bail is being considered, having regard only to the person's background and communities ties, as indicated by:
 - the accused person's background and community ties as indicated by the history and details of their residence, employment and family situation, and if known, person's prior criminal record;
 - any previous failure to appear in court pursuant to a recognisance or bail undertaking;
 - the circumstances of the offence (including its nature and seriousness), the strength of the evidence against the person and the severity of the penalty or probable penalty; and
 - any specific evidence indicating whether or not it is probable that the person will appear in court (subsection 1(a));
- the interests of the accused person, having regard only to:
 - the period that the person may be obliged to spend in custody if bail is refused and the conditions under which he would be held in custody;
 - the needs of the person to be free to prepare for his appearance in court or to obtain legal advice or both;
 - the needs of the person to be free for any other lawful purpose; and
 - whether or not the person is, in the opinion of the authorised member or court, incapacitated by intoxication, injury or the use of a drug or

otherwise in danger of physical injury or in need of physical protection (subsection 1(b)).

- the risk (if any) that the accused person would (if released on bail) interfere with evidence, witnesses or jurors ((1)(c));
- the risk (if any) that the accused person would (if released on bail) commit an offence, a breach of the peace, or a breach of the conditions of bail ((1)(d));
- the risk (if any) that would result from the accused person's release on bail to the safety and welfare of:
 - the alleged victim of the offence, or the close relatives of the alleged victim;
 - or if the alleged victim is a child, any person (other than a close relative) who has the care of the child; or
 - any other person whose safety or welfare could, in the circumstances of the case, be at risk if the accused person were to be release on bail (subsection 1(e)).

Tasmania

As stated previously, all presumptions and considerations for bail applications in Tasmania are contained within common law. Most notable is the decision in *R v Fisher* (1964) Tas SR 318, where Tasmanian courts adopted the reasoning in *R v Light* (1954) VLR 152 that there is a prima facie right to bail; therefore, the burden of proving that this should not be the case lies with the Crown (Devine 1989: 5). Tabled amendments to the *Youth Justice Act 1997* will introduce provisions for bail decision makers to consider when deciding a bail outcome for young people (Tasmania Department of Human Services personal communication 5 November 2012).

Jurisdictions with separate bail considerations for young people

Queensland, Western Australia and the Australian Capital Territory are the only jurisdictions that have separate considerations for bail applications by young people. These are generally very similar to bail considerations in other jurisdictions' bail legislation and typically focus on:

- the likelihood of the young person absconding;

- the likelihood of the young person reoffending while on bail; and
- any likely impacts on the young person or the community.

There are, however, a small number of key differences between the generic bail legislation used in other jurisdictions and these bail considerations that are unique to young people. These differences are discussed at the conclusion of this section.

Queensland

Under the *Youth Justice Act 1992*, bail decision makers in Queensland must consider the following in relation to bail applications by young people:

the nature and seriousness of the offence;

- the young person's character, criminal history and other relevant history, associations, home environment, employment and background;
- the history of previous grants of bail;
- the strength of evidence against the young person relating to the offence;
- for Aboriginal or Torres Strait Islander young people, submissions made by a representative of the community justice group about the young person's relationship to their community; any cultural considerations; any considerations relating to programs and services established for offenders in which the community justice group operates; and
- any other relevant matter (s 48(3)).

Also, if it is a court that is making the decision, the court must have regard to the sentence order or other order likely to be made for the young person if found guilty (s 48(3A) *Youth Justice Act 1992*).

The bail decision maker must not release the young person if they are satisfied there is an unacceptable risk relating to:

- the child surrendering into custody in accordance with bail conditions;
- while on release, committing an offence; endangering anyone's safety or welfare; or
- interfering with a witness or otherwise obstructing the course of justice, whether for the young person or anyone else (s 48 subsection 5).

Furthermore, the bail decision maker must not release the young person if they are satisfied that:

- the young person's safety would be endangered, because of the alleged offence, if they were released; and
- in the circumstances, there is no reasonably practicable way of ensuring the young person's safety other than by keeping them in custody (s 48(7)).

If the matter is before the court and the court has information indicating unacceptable risk but does not have enough information to properly consider the matter, the court must remand the young person in custody while the information is obtained (s 48(6)).

Although there is a separate section for bail considerations for young people in the *Youth Justice Act 1992*, factors to be considered in bail decisions relating to young people overlap substantially with those for adults. The only considerations specific to young people are those under s 48(7) and s 48(3A), outlined above. Specific considerations for adults include the 'show cause' element for charges relating to certain serious offences (see Table 13).

Western Australia

In Western Australia, a young person who is in custody awaiting an appearance in court before conviction for an offence has a right to be granted bail unless in the opinion of the bail decision maker, one or more of the following can be answered in the affirmative:

- that if the accused is not kept in custody they may: fail to appear in court in accordance with bail undertaking; commit an offence; endanger the safety, welfare, or property of any person; or interfere with witnesses or otherwise obstruct the course of justice (Sch 1 Part C cl 2 *Bail Act 1982*);
- In determining this, bail decision makers must have regard to: the nature and seriousness of the offence(s) and the probable method of dealing with the accused if convicted; the character, previous convictions, antecedents, associations, home environment, background, place of residence, financial position of the accused; the history of previous grants of bail; the strength of evidence against the accused;

any other matter deemed relevant (Sch 1 Part C cl 3).

- that the accused needs to be held in custody for their own protection;
- that there are grounds for believing that if the accused is released, regarding the period when the accused is on trial, the proper conduct of the trial may be prejudiced;
- whether there are any bail conditions that could reasonably be imposed which would sufficiently remove the possibility or the need for the provisions listed above;
- the alleged circumstances of the offence(s) amount to wrong-doing of such a serious nature as to make the grant of bail inappropriate; or
- that there is no responsible person willing to undertake in writing that the young person will comply with any requirements of bail undertaking (Sch 1 Part C cl 2).

As with Queensland's legislation, although there is a separate section outlining factors that must be considered in bail decisions for young people, these overlap substantially with those for adults. The only consideration specific to young people is that a responsible adult must be willing to enter into a bail undertaking. Considerations specific to adults include whether the prosecutor has put forward grounds for refusing bail.

Australian Capital Territory

In the Australian Capital Territory, bail decision makers must consider the following in relation to the grant of bail to a young person:

- the likelihood of the person appearing in court in relation to the offence;
- the likelihood of the person, while released on a bail:
 - committing an offence;
 - harassing or endangering the welfare of anyone; or
 - interfering with evidence, intimidating a witness, or otherwise obstructing the course of justice, in relation to the person or anyone else.

Further, if the person is convicted of an indictable offence, or the elements of an indictable offence are

proven in relation to the person, but the person has not been sentenced, a court must consider the likelihood of the person being given a sentence of imprisonment.

In considering the above matters, the bail decision maker may have regard to any relevant matter, including:

- the nature and seriousness of the offence;
- the person's character, background and community ties;
- the likely effect of a refusal of bail on the person's family or dependants;
- any previous grants of bail to the person; or
- the strength of the evidence against the person.

The Youth Justice Principles in s 94 of the *Children and Young People Act* (2008) should be considered, in addition to, as a primary consideration, the best interests of the child (s 23 *Bail Act* 1992).

The consideration of the Youth Justice Principles and any reports submitted on the young person are the only considerations specific to young people. The Youth Justice Principles are outlined below:

- if a child or young person does something that is contrary to law, he or she should be encouraged to accept responsibility for the behaviour and be held accountable;
- a child or young person should be dealt with in a way that acknowledges his or her needs and that will provide the opportunity to develop in socially responsible ways;
- a child or young person should be consulted about, and be given the opportunity to take part in making, decisions that affect the child or young person, to the maximum extent possible taking into consideration their age, maturity and developmental capacity;
- if practicable and appropriate, decisions about an Aboriginal and Torres Strait Islander child or young person should be made in a way that involves their community;
- if a child or young person is charged with an offence, he or she should have prompt access to legal assistance and any legal proceeding relating to the offence should begin as soon as possible;
- a child or young person may only be detained in custody for an offence (whether on arrest, on

remand or under sentence) as a last resort and for the minimum time necessary;

- children, young people and other young offenders should be dealt with in the criminal law system in a way consistent with their age, maturity and developmental capacity and have at least the same rights and protection before the law as would adults in similar circumstances;
- on and after conviction, it is a high priority to give a young offender the opportunity to re-enter the community; and
- it is a high priority that intervention with young offenders must promote their rehabilitation and must be balanced with the rights of any victim of the young offender's offence and the interests of the community.

Specific bail considerations for young people compared with generic considerations for both adult and young people—key differences

A number of key differences exist between bail considerations in jurisdictions with 'generic' bail legislation that applies to both young people and adults (New South Wales, Victoria, South Australia and the Northern Territory) and bail considerations in jurisdictions with legislated considerations that are unique to bail decisions involving young alleged offenders (Queensland, Western Australia and the Australian Capital Territory).

First, bail considerations unique to young people are generally subject to the principles of youth justice contained in a jurisdiction's youth justice legislation. In the Australian Capital Territory, for example, bail decision makers in cases involving young alleged offenders must take into consideration the principles of the *Children and Young People Act 2008*. This is also the case in both Queensland (as provisions for making bail decisions relating to young people are contained in the *Youth Justice Act 1992*) and Victoria (as Victoria's *Bail Act 1977* is subject to the *Children, Youth and Families Act 2005*). In these jurisdictions therefore, principles relating specifically to the wellbeing of young people must be taken into consideration in bail decisions. While New South Wales' bail legislation states that 'if the accused

person is a minor...any special needs arising from that fact' should be considered in relation to the interests of the accused person, it does not go as far as requiring bail decision makers to consider the principles of the *Young Offenders Act 1997*. In all other jurisdictions, bail decision makers are not required to consider the broader principles of youth justice outlined in the relevant legislation. Tasmania is another exception as their bail considerations are outlined in case law. However, tabled amendments to the *Youth Justice Act 1997* provide that 'a person who intends to admit a youth to bail must have regard for the Principles set out in s 5 of the Youth Justice Act'.

As described above, principles contained in youth justice legislation in each of Australia's jurisdictions highlight the inexperience and vulnerability of young people. Given that young people are still developing and maturing, youth justice principles stress the importance of having a discrete justice system for young people, minimising young people's adverse contact with the criminal justice system, and rehabilitating and reintegrating young people.

Second, although most jurisdictions' bail legislation requires bail decision makers to consider the protection of the accused person (as outlined above), it is noteworthy that in 'generic' bail legislation that applies to both adults and young people, this is designed to protect the accused from a period of custodial remand. In legislative provisions that relate specifically to young people, however, bail decision makers are not required to take this into account, but instead must consider whether it necessary to protect the young person if released on bail. Therefore, it would appear that these provisions protect adults from custody and young people from the outside world.

Under Western Australia's legislation, for example, bail decision makers must consider 'whether the accused needs to be held in custody for their own protection' (Sch 1 Part C). Similarly, under Queensland's legislation, bail decision makers

must not release the child if satisfied that: the child's safety would be endangered, because of the alleged offence, if the child were released; and in the circumstances, there is no reasonably practicable way of ensuring the child's safety other than by keeping the child in custody (s 48(6)).

Although legislative provisions designed to ensure the protection of young people are laudable, it is important to consider whether such provisions may inadvertently result in young people being remanded in custody when they might otherwise be granted bail.

Third, legislative provisions that relate specifically to young people appear to be somewhat broader in scope than those that apply irrespective of the age of the accused person. Both the ACT's and Queensland's legislative provisions for bail decisions involving young people allow bail decision makers to take 'any relevant matter' into consideration. While the ACT's legislation provides some guidance on what that might include, Queensland's does not, and in both cases this gives bail decision makers much wider scope than is the case in jurisdictions without specific provisions relating to young people. Although such provisions may be commendable on the grounds that they may enable decision makers to take into account the individual circumstances and characteristics of young people, they may also 'widen the net' by allowing factors to be considered that would not be considered in bail decisions relating to adults.

Two further unique factors influencing bail decisions for alleged young offenders should be noted here. The first is that in Western Australia, an alleged young offender has the right to be granted bail unless 'there is no responsible person willing to undertake in writing that the child will comply with any requirements of [a] bail undertaking' (Sch 1 Part C). This provision has been criticised at length in the literature (eg Auditor General for Western Australia 2008; Clare et al. 2011), as it is seen to disadvantage young people from remote and regional areas (Clare et al. 2011). It should also be noted that meeting this provision is outside of the control of the young alleged offender; such a provision may be a hurdle to being granted bail that applies only to young people. The second is that in Queensland, if the bail decision maker has information indicating that the young person poses an unacceptable risk but not sufficient information to consider the matter fully, 'the court must remand the child in custody while the information is obtained' (s 48(6)). Similar legislative provisions exist for young people in Victoria and Western Australia. It is obviously important that the court have at its

disposal all the necessary information to make an informed decision about whether to grant bail to a young person; however, research studies have cautioned that administrative delays can contribute to increased rates of young people on custodial remand (Tresidder & Putt 2005).

The number of bail applications that can be made

Some jurisdictions have restrictions on the number of times an accused person can apply for bail. Under s 22A of NSW *Bail Act 1978*, courts cannot entertain an application by an accused person when an application for bail has already been made and dealt with by the court, unless:

- the person was not legally represented when the previous application was dealt with and the accused person now has legal representation;
- information relevant to the granting of bail is to be presented in the application that was not presented to the court in the previous application; and/or
- circumstances relevant to the granting of bail have changed since the previous application was made.

In response to the NSW Law Reform Commission's (2012) review of bail legislation, the NSW Government (2012: 5) has committed to changes to the *Bail Act 1978* as follows:

The new Bail Act will...provide for a young person to apply for bail a second time, as of right, if the initial bail application was made on the day of first court appearance. This should remove any disincentive to practitioners making a bail application at the first possible opportunity, and if refused, will allow the practitioner a chance to receive more thorough instructions from the young person before making a second application. Existing provisions, allowing subsequent applications where there is new information or circumstances, will be retained in the new Act.

Victoria has similar restrictions in relation to accused persons reapplying for bail after an initial application for bail has been refused or an accused person's bail has been revoked. Under s 18AA of the *Bail Act 1977*, a court must not hear an application unless:

- the applicant satisfies the court that new facts or circumstances have arisen since the refusal or revocation of bail;
- the applicant was not represented by a legal practitioner when bail was refused or revoked; and/or
- the order refusing or revoking bail was made by a Bail Justice rather than a Magistrate.

However, these conditions do not limit applications to the Supreme Court for bail (*Bail Act 1977* s 18AA).

The Australian Capital Territory also has restrictions on the number of times an application for bail can be made. Under s 20A(b) of the *Bail Act 1992*, the Magistrates' Court may only consider a third or subsequent application for bail if:

- the court is satisfied that since the last application for bail there has been a change in circumstances relevant to the granting of bail; and/or
- there is fresh evidence or information of relevance to the granting of bail that was unavailable at the last application of bail.

In the ACT Supreme Court, the same conditions apply if the accused has already made two or more applications for bail in the Magistrates court or one application in the Supreme Court (s 20C).

There are no apparent restrictions on the number of bail applications an accused person can make within the bail legislation of South Australia, Tasmania, Queensland, Western Australia or the Northern Territory.

What conditions can be placed on young people granted bail?

As described earlier in this report, bail can be unconditional or conditional. Unconditional bail imposes no restrictions on the accused person's behaviour, other than that they must appear in court at a later date for a hearing. Conditional bail requires the accused person to adhere to certain conditions until the court hearing takes place. Bail legislation in each jurisdiction empowers bail decision makers to impose conditions on the granting of bail to an

accused person. There are, however, a number of key differences among the relevant pieces of legislation.

First, only some jurisdictions' legislative provisions make a clear statement that there should be a presumption in favour of unconditional bail. Under the NSW *Bail Act 1978*, for example, bail decision makers are instructed that 'bail shall be granted unconditionally unless the authorised officer or court is of the opinion that one or more conditions should be imposed [for specific purposes]' (s 37). Similarly, Queensland's provisions, which as discussed in more detail below relate specifically to young people, state that 'the court or officer must release the child on the child's own undertaking...unless the court or officer is satisfied it would be inappropriate' (*Youth Justice Act 1992* s 52). Under Victoria's *Bail Act 1977*, the court must consider the following options in order:

- release of the accused on his or her own undertaking without any other conditions;
- release of the accused on his or her own undertaking with conditions about the conduct of the accused;
- release of the accused with a surety of state value or a deposit of money, with or without conditions about the conduct of the accused (s 5).

In all other jurisdictions, no such statements are made about presumptions in favour of unconditional bail.

Second, jurisdictions' legislative provisions contain varying degrees of guidance about the nature and types of bail conditions that can be imposed on an accused person. For example, while the Northern Territory's legislation provides detailed guidance about the types of bail conditions that can be imposed on an accused person (see below), Victoria's legislation is far less prescriptive, stating only that 'conditions must be no more onerous than is required to achieve the purposes...[of conditional bail]...and be reasonable, having regard to the nature of the alleged offence and the circumstances of the accused' (s 5). It should be noted, however, that all jurisdictions' legislative provisions concerning bail contain very broad statements that empower bail decision makers to impose any condition not explicitly outlined in the legislation. For example, NSW legislation enables bail decision makers to

require an accused person to ‘observe specified requirements as to his or her conduct while at liberty’ (s 36(2)(a)). Similarly, under SA’s *Bail Act 1985*, bail decision makers can require an accused person ‘to comply with any other conditions as to the applicant’s conduct that the authority considers should apply while on bail’ (s 11).

Where legislative provisions provide guidance about specific bail conditions that can be imposed, these typically require the accused person to:

- reside as directed;
- not associate with specified persons;
- make a deposit of money;
- not frequent specified locations; and/or
- report regularly to the police.

Third, across Australia’s jurisdictions, only some legislative provisions relating to bail explicitly state the desired outcomes that bail conditions are designed to achieve. For example, Victoria’s *Bail Act 1977* states that bail conditions are only to be imposed to reduce the likelihood that the accused person:

- fail to attend a court hearing at a later date;
- commit an offence while on bail;
- compromise the safety and wellbeing of the public; or
- interfere with witnesses or obstruct the course of justice.

Similar guidance about the outcomes that bail conditions should be designed to support is contained in most other jurisdictions’ legislation. Queensland’s legislation even requires that any bail conditions imposed on young people must be supported by written reasons. Bail legislation in South Australia and Tasmania does not contain this explicit guidance about the purposes of bail conditions (although as stated above, tabled amendments to Tasmania’s *Youth Justice Act 1997* will provide increased guidance). This is important to consider in light of research literature that indicates that bail conditions placed on young people are often somewhat arbitrary and unrelated to the young person’s offending behaviour (Mulrone 2012; NSW LRC 2012). This issue is discussed in more detail later in this report.

Specific bail conditions for young people compared with generic bail conditions for both young people and adults—key differences

As highlighted below, only Queensland, Western Australia and the Australian Capital Territory have legislative provisions relating specifically to accused young people. These provisions vary considerably. As stated above, Queensland’s provisions offer little guidance about the types of bail conditions that can be imposed on young people, beyond having a presumption in favour of unconditional bail and stating that conditions must not be more onerous than necessary. Western Australia’s provisions are very similar to other jurisdictions’ provisions for dealing with adults and young people, with the exception of a reference to requiring ‘attendance by the child at a school or other educational institution’.

The ACT’s legislative provisions relating to bail conditions that can be imposed on young people are, however, quite unique in some respects. For example, they explicitly state that the ‘best interests of the child’ are to be a primary consideration and the principles of youth justice contained in the *Children and Young People Act 2008* are also to be considered (the latter is also the case in those jurisdictions in which youth justice legislation takes precedence over bail legislation). Furthermore, the ACT’s provisions are the only legislative provisions (except for South Australia) that can require a young person to be supervised while on bail. Finally, and perhaps most importantly, they are unique in that a young alleged offender can be required to ‘undergo psychiatric treatment or other medical treatment... [and/or]...participate in a program of personal development, training or rehabilitation’ (s 25(4)(c),(d) *Bail Act 1992*).

This is noteworthy as it raises a key tension about the purpose and limitations of bail, particularly for young alleged offenders—whether young people should be required to participate in ‘rehabilitation’ while on bail. As discussed in more detail later in this report, while it may be inconsistent with the principle of ‘innocent until proven guilty’ to require a young person who has not been convicted of an offence to participate in ‘rehabilitation’, not requiring such participation may not be in the best interests of

the young person and may represent a missed opportunity to intervene constructively in the young person's offending trajectory.

New South Wales

Bail is to be granted unconditionally or subject to conditions imposed by instrument in writing. One or more of the following conditions only may be imposed on the grant of bail:

- to observe specified requirements as to his or her conduct while at liberty;
- to reside in accommodation for persons on bail (the Minister for Corrective Services is to ensure that adequate and appropriate accommodation for persons on bail is available; in considering whether to impose this condition the authorised officer or court is to consider whether placement is available and suitable, although juveniles under the age of 16 years who have been granted bail with an accommodation condition imposed may also be the responsibility of the Department of Families and Communities under the *Children and Young Persons (Care and Protection) Act 1998* if they are considered to be at risk). In considering suitability, the authorised officer or court is to have regard to the background of the accused, particularly if they are of Torres Strait Islander or Aboriginal descent);
- that one or more acceptable person(s) acknowledge that they are acquainted with the accused and that they regard the accused as a responsible person who is likely to comply with their bail undertaking;
- that the accused, or one or more acceptable person, forfeit a specified amount of money, without security, if the accused person fails to comply with their bail undertaking;
- that the accused, or one or more acceptable person, deposit acceptable security, to forfeit a specified amount of money if the accused fails to comply with his or her bail undertaking;
- that the accused or one or more acceptable person, deposit with an authorised officer or court a specified amount of money in cash and enter into an agreement to forfeit the amount deposited if the accused fails to comply with his or her bail undertaking (s 36 *Bail Act 1978*);
- that the accused comply with the specified requirements prohibiting or restricting the person from associating with a specified person (the accused does not contravene this condition if the accused associates with the specified person in compliance with an order of a court; or if, having associated with the specified person unintentionally, the accused immediately terminates the association);
- that the accused comply with the specified requirements prohibiting or restricting the person from frequenting or visiting a specified place or district (the accused does not contravene this requirement if the accused does so in compliance with an order from the court);
- that the accused surrender to the authorised officer or court any passport held (s 36B).

Bail shall be granted unconditionally unless the authorised officer or court is of the opinion that one or more conditions should be imposed for the purpose of:

- promoting effective law enforcement, or
- the protection and welfare of any specially affected person, or
- the protection and welfare of the community, or
- reducing the likelihood of future offences being committed by promoting the treatment or rehabilitation of an accused person (s 37(1)).

Conditions shall not be imposed that are any more onerous for the accused person than appear to the authorised officer or court to be required:

- by the nature of the offence, or
- for the protection and welfare of any specially affected person, or
- by the circumstances of the accused person (s 37(2)).

There have been recent amendments to the *Bail Act 1978* which enables a court to:

- Impose an enforcement condition when granting bail.
- Defines an enforcement condition as a condition that requires an accused
 - person to comply, while on bail, with one or more specified kinds of directions that are given by police officers for the purpose of monitoring

or enforcing compliance with an underlying bail condition.

- Provides that an enforcement condition is to specify:
 - the kinds of directions that may be given to the accused person while at liberty on bail, and
 - the circumstances in which each kind of direction may be given (in a manner that ensures that compliance with the condition is not unduly onerous), and
 - the underlying condition(s) in connection with which each kind of direction may be given.
- Provides that an enforcement condition may be imposed only if the court considers it reasonable and necessary in the circumstances, having regard to:
 - the history of the accused person including their criminal history (particularly if the criminal history includes serious offences or a large number of offences),
 - the likelihood or risk of the accused person committing further offences while at liberty on bail,
 - the extent to which compliance with a direction of a kind specified in the condition may unreasonably affect persons other than the accused person.
- Provides that an enforcement condition can only be imposed at the request of the prosecution.
- Provides that a police officer may give a direction to an accused person in the circumstances specified in the enforcement condition, or at any other time the police officer has a reasonable suspicion that the accused person has contravened the underlying bail condition (s 37AA).

Victoria

A court considering the release of an accused on bail may only impose conditions in order to reduce the likelihood that the accused may:

- fail to attend in accordance with his or her bail and surrender into custody at the time and place of the hearing or trial;
- commit an offence while on bail, or endanger the safety or welfare of members of the public; or

- interfere with witnesses or otherwise obstruct the course of justice in any matter before the court (s 5 *Bail Act 1977*).

The conditions must be no more onerous than is required to achieve the purposes listed above, and be reasonable, having regard to the nature of the alleged offence and the circumstances of the accused (s 5 *Bail Act 1977*).

Queensland

The court or officer must release the young person on the young person's own undertaking, without sureties and without deposit of money or other security, unless the court or officer is satisfied it would be inappropriate in all the circumstances (s 52(2) *Youth Justice Act 1992*).

If the court or officer decides not to release the young person as described above, they must consider the conditions for the release of the young person on bail in the following sequence:

- the release of the young person on the young person's own undertaking with a deposit of money or other security of stated value;
- the release of the young person on the young person's own undertaking with a surety or sureties of stated value;
- the release of the young person on the young person's own undertaking with a deposit of money or other security of stated value and surety or sureties of stated value (s 52(3) *Youth Justice Act 1992*).

The court or officer may impose other conditions on the grant of bail including, for example, conditions necessary for ensuring the young person will surrender into custody in accordance with the bail or the conditions of the release, whichever is relevant; and while on release, the young person will not:

- commit an offence; or
- endanger anyone's safety or welfare; or
- interfere with a witness or otherwise obstruct the course of justice, whether for the young person or anyone else (s 52(4) *Youth Justice Act 1992*).

Any conditions imposed on the grant of bail must not be more onerous than the court or officer considers necessary in all the circumstances; and

must be supported by the court's or officer's written reasons (s 52(5)(a)(b) *Youth Justice Act 1992*).

As stated above, there is little guidance in the legislation in Queensland as to the conditions that might be imposed in a young person's bail undertaking. A number of legislative provisions for adults—such as preventing the accused from 'entering or remaining in licensed premises'—are not included in the provisions relating to young people (*Bail Act 1980* s 11(3)(7)).

Western Australia

Conditions imposed on a grant of bail shall not be any more onerous on the accused than the judicial officer or authorised officer considers is required in the public interest having regard to the nature of the offence for which the accused is in custody and the circumstances of the accused (s 17(2) *Bail Act 1982*).

- Possible conditions to be imposed include:
 - the accused or a surety/ies agree to forfeit a specified amount of money if he fails to comply with any requirement of his bail undertaking;
 - that the accused or surety/ies give security of a specified value, including the deposit of a specified amount of cash, for the performance of their respective obligations;
 - that the accused or a surety/ies deposit with a specified officer any specified passbook or document relating to the title to, or ownership of, any account or other asset offered as security for the performance of their respective obligations;
 - that the accused or surety/ies, at their own expense or otherwise, enter into such mortgage, charge, assignment or other transaction, or take such other step, as may be required, including completion of the necessary documents, to render any security effective and enforceable by the state (Sch 1 P 2 cl 1).
- Other conditions which may be imposed include:
 - conditions to be complied with before the accused is released on bail or while the accused is on bail;
 - conditions on the accused's conduct while on bail;

- conditions as to where the accused shall reside while on bail (cl 2(1)).

Western Australian legislation also sets out additional conditions applicable to young people, as follows:

- any period each day during which the young person is to remain at a particular place;
- any person with whom the young person is not to associate or communicate;
- any place that the young person is not to frequent;
- the attendance by the young person at a school or other educational institution; and/or
- any other matter (cl 2 (1a)).

These conditions must be imposed in order to ensure that the accused appears in court in accordance with their bail undertaking, does not while on bail commit an offence, does not endanger the safety, welfare or property of any person, does not interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself [or herself] or any other person, or as regards the period when the accused is on trial, does not prejudice the proper conduct of the trial (cl 2(2)).

The legislation also provides discretion for judicial officers to set as a condition (for both young people and adults) to participate in counselling, a prescribed programme (cl 2 2(b)), a medical examination (including an examination by a psychiatrist) (cl 2(3), (3a)) and or alcohol and other drug treatment (cl 2(4)). It also provides that if they are given a condition to reside in accommodation specifically for persons on bail, the condition shall be deemed to include the condition to obey the rules of that premises (cl 2(6)). Home detention bail is also available for those over the age of 17 years (cl 3).

South Australia

In South Australia bail authority may impose one or more of the following conditions.

- that the applicant agree:
 - to reside at a specified address;
 - to reside at a specified address and to remain at that place of residence while on bail, not leaving except for one of the following purposes—remunerated employment, necessary medical or dental treatment for

the applicant, or averting or minimising a serious risk of death or injury, or any other purpose approved by a community corrections officer;

- where there is a victim of the offence in respect of which the applicant has been charged—to comply with such conditions relating to the physical protection of the victim that the authority considers should apply to the applicant while on bail;
 - to report to the police at a specified place and at specified times;
 - to be under the supervision of a community corrections officer and to obey the lawful directions of the officer;
 - to surrender any passport that the applicant may possess; or
 - to comply with any other conditions as to the applicant's conduct that the authority considers should apply while on bail;
- that the applicant provide the bail authority with written assurances from a stipulated number of persons, who are acceptable to the bail authority, that they are acquainted with the applicant and are confident that the applicant will comply with the terms of the agreement;
 - that the applicant agree to forfeit to the Crown a sum of money if the applicant fails, without proper excuse, to comply with a term or condition of the of the bail agreement;
 - that the applicant or a guarantor provide security of a specified amount or value to secure payment of a monetary forfeiture agreed to; and
 - that the applicant obtain specified guarantees, or guarantees of a specified nature.

If the applicant is charged with a serious and organised crime offence, a grant of bail must be made with the following conditions:

- to reside at a specified address and to remain there except for to receive medical treatment, to avert or minimise risk of death or injury, or any other reason approved by the Chief Executive Officer;
- be fitted with a device to monitor compliance with the above condition;
- that the applicant not communicate with any persons other than those specified in the regulations; and

- that the applicant only possess and use communication devices (ie telephones and computers) that are specified.

In deciding on the conditions to be imposed in relation to a grant of bail, a bail authority should give special consideration to any submissions made by the Crown on behalf of a victim of the alleged offence.

A condition (other than a condition as to the conduct of the applicant while on bail) must not be imposed under this section unless the condition is, in the opinion of the bail authority, reasonably necessary to ensure that the applicant complies with the bail agreement.

A financial condition must not be imposed under this section unless the bail authority is of the opinion that the object of ensuring that the applicant complies with the bail agreement cannot be properly secured by a non-financial condition or combination of non-financial conditions.

Where a bail authority imposes a condition but the applicant remains in custody because the condition is not fulfilled, the applicant must (if he or she is not sooner released) be brought back before a bail authority for a review of the condition as soon as reasonably practicable and, in any event, within five working days after the condition is imposed (s 11 *Bail Act 1995*).

Northern Territory

One or more of the following conditions may be imposed on the grant of bail under this section:

- that the accused person enter into an agreement to observe specified requirements as to his conduct while on bail, other than financial requirements;
- that one or more acceptable person(s) acknowledge that they are acquainted with the accused person as a responsible person who is likely to comply with his bail conditions;
- that the accused person or one or more acceptable person(s) enter into an agreement, without security, to forfeit a specified amount of money if the accused person fails to comply with his bail undertakings;

- that the accused person or one or more acceptable person(s) enter into an agreement and deposit acceptable security, to forfeit a specified amount of money if the accused person fails to comply with his bail undertaking;
- that the accused person or one or more acceptable person(s) deposit with an authorised member or a court a specified amount of money in cash and enter into an agreement to forfeit the amount deposited if the accused person fails to comply with his bail undertaking; and
- where bail is granted by a court; and the offence is punishable by a term of imprisonment for two years or more, or, by payment of a maximum penalty of 85 penalty units, that the accused person surrender every passport, whether Australian or foreign, held by the accused person (s 27 Bail Act).

In addition, the following condition can be imposed within a ‘conduct agreement’. The legislation states that

a conduct agreement operates throughout the period for which the accused person is on bail. Contravention of a provision of a conduct agreement is to be regarded as a breach of a condition of bail. It may contain a combination of two or more of the following:

- prohibit an accused from associating, or being in company, with one or more specified person;
- require an accused person to keep away from one or more specified persons or from persons of a specified class;
- prohibit an accused from communicating in any way with one or more specified persons, or with a person of a specified class;
- prohibit an accused person from being within a particular locality or area;
- prohibit an accused person from being outside a particular place;
- require an accused to reside at a specified place;
- require the accused person to report at specified intervals at a police station or other place;
- prohibit an accused person from consuming alcoholic liquor or non-prescription drugs; and

- prohibit an accused person from engaging in conduct of any other specified kind (s 27A).

Although the Northern Territory doesn't have a separate section for the conditions that can be imposed on bail for young people, the legislation does outline that a device to monitor compliance with bail be fitted as a condition of a conduct agreement only for bail granted by courts other than the Youth Court (s 27A(ia)).

An authorised member or a court must, in granting bail, impose conditions that appear necessary to minimise risks to the safety or welfare of others, or to the proper administration of justice, that may result from releasing the accused person on bail. The conditions must be reasonably proportionate to the risks. In addition, a court may impose a condition that the accused person enters into a conduct agreement only if satisfied, after considering a report by the Director of Correctional Services, the accused person is a suitable person for the conditions (s 28).

Australian Capital Territory

The following conditions may be imposed on the grant of bail to a young person (*Bail Act 1992* s 26):

- conditions about the person's conduct while released on bail;
- a condition that the person, or an acceptable person(s)—pays to the Territory a stated amount if the person fails to appear in court in accordance with undertaking, or gives acceptable security for the payment to the Territory of a stated amount if the person fails to appear in court in accordance with his or her undertaking;
- a condition that the person, or an acceptable person(s)—deposits a stated amount with a court or authorised officer and forfeits the amount if the person fails to appear in court in accordance with undertaking;
- with the consent of a person who makes a deposit or gives security, it may be a condition of bail that the deposit or security continues to apply if bail is continued (it must not be a condition of bail that the person gives consent);
- without limiting the above requirements, other conditions may include those related to the accused's conduct, which may include:

- a requirement that the accused person report periodically, or at specified times, at a stated place;
- the accused reside at a stated place;
- the person undergo psychiatric treatment or other medical treatment; or
- the accused participate in a program of personal development, training or rehabilitation.
- any other conditions that the court or authorised officer considers appropriate, having regard to the Youth Justice Principles as set out in the *Children and Young People Act* (2008) and considering, as a primary consideration, the best interests of the young person;
- without limiting the above, the requirements that a young person may be required to comply with about their conduct while released on bail include the requirement that the young person: accept supervision by the director-general under the *Children and Young People Act* (2008); comply with any reasonable direction of the director-general;
- court or authorised officer may not impose a condition unless they are of the opinion that it is in accordance with the Youth Justice Principles and is necessary to ensure:
 - the attendance of the person before a court from time to time as required in relation to the office;
 - the protection from harm of the accused person or any other person;
 - the prevention of the accused person from committing an offence while at liberty on bail; or
 - the prevention of the accused person from interfering with evidence, intimidating witnesses or otherwise obstructing the course of justice.

For a person (the accused person) charged with a domestic violence offence, the following conditions may be imposed:

- a requirement that the accused person not contact, harass, threaten or intimidate, or cause someone else to contact, harass, threaten or intimidate, a stated person; or
- a requirement that the accused person not be on premises where a stated person lives or works; or
- a requirement that the accused person not be on

or near premises where a stated person is likely to be; or

- a requirement that the accused person not be in a stated place; or
- a requirement that the accused person not be within a stated distance of a stated person; or
- if the accused person lives with someone—a requirement that the accused person not enter or remain at the home if the accused person is under the influence of alcohol or another drug.

If a court or an authorised officer grants bail to an accused young person and the accused young person is unable to comply with that condition, the court or authorised officer must either refuse bail or grant the accused young person bail subject to the other conditions that the court or authorised officer believes the accused will be able to comply with.

The only conditions relating specifically to young people are the reference to the Youth Justice Principles and accepting supervision of the director-general of the *Children and Young People Act 2008*.

Tasmania

When an accused person is released on bail by police, it is legislated that the accused person must comply with any conditions that are imposed, including conditions involving the conduct of the person (s 5 *Bail Act 1994*), which may include one or more of the following:

- a condition requiring the person to report at a specified place at a specified time;
- a condition limiting the person's movements and social intercourse;
- a condition of a family violence order; or
- a restraint order (s 5(3A)).

For court bail, it is legislated that

an order for bail may be made subject to other conditions as the judicial officer thinks desirable in the interests of justice and any such other condition may be expressed or take effect either before or after the person admitted to bail is released from custody (s 7(4)).

An order for bail may be made on the condition that a person deposit a specified amount of money to be forfeited to the Crown if the person admitted to bail

fails to appear before a court or fails to comply with a condition of the order of the bail; or suitable person(s) must enter into a recognisance to forfeit a specified amount of money if the person admitted to bail fails to appear before the court or fails to comply with a condition of the order for bail (s 7).

Under tabled amendments to the *Youth Justice Act 1997*, greater guidance on imposing bail conditions on young people will be provided, specifically under the proposed s 24B 'Conditions of bail'.

Table 14 Whether young people have separate or additional bail conditions compared with adults and legislated reasons for imposing bail conditions, by jurisdiction

Separate section for bail conditions for young offenders		Legislative reasons for imposing bail conditions
NSW	No	Promoting effective law enforcement; or the protection and welfare of any specially affected person; or the protection and welfare of the community, or reducing the likelihood of future offences being committed by promoting the treatment or rehabilitation of an accused person ^a
Vic	No	To reduce the likelihood of failure to attend court and surrender into custody at time and place of trial or hearing, commit an offence while on bail, or endanger the safety or welfare of members of the public, or interfere with witnesses or otherwise distort the course of justice ^b
Qld	Yes	Ensuring the child will surrender into custody in accordance with the bail or the conditions of the release, whichever is relevant and while on release, the child will not commit an offence or endanger anyone's safety or welfare, or interfere with a witness or otherwise obstruct the course of justice, whether for the child or anyone else ^c
WA	Yes	To ensure that the accused appears at court in accordance with bail undertaking; does not commit an offence, does not endanger the welfare, safety or property of any persons, does not interfere with witnesses or otherwise obstruct the course of justice, does not prejudice the proper conduct of a trial ^d
SA	No	Ensure the applicant complies with their bail agreement ^e
NT	No	To minimise risks to the safety or welfare of other, or to the proper administration of justice, that may result from releasing the accused person on bail ^f
ACT	Yes	To ensure: the attendance of the person before a court as required, the protection from harm of the accused person or any other person, the prevention of the accused from committing an offence, the prevention of the accused from interfering with evidence, intimidating witnesses or otherwise obstructing the course of justice, is in accordance with the Youth Justice Principles ^g
Tas	No ⁱ	The interests of justice ^h

a: s 37 *Bail Act 1978* (NSW)

b: s 5 *Bail Act 1977* (Vic)

c: s 52 *Youth Justice Act (Qld) 1992*

d: Sch 1 Pt D cl (1a) *Bail Act 1982* (WA)


e: s 11 *Bail Act 1985* (SA)

f: s 28 *Bail Act* (NT)

g: s 26 *Bail Act 1992* (ACT)

h: s 7 *Bail Act 1994* (Tas)

i: Provisions for granting bail conditions to young people will be outlined under tabled amendments of the *Youth Justice Act 1997*



Operation of bail in the youth justice system

It is critical to understand the way in which bail processes operate in each of Australia's youth justice systems in order to enable comparisons to be made across jurisdictions and to illuminate the ways in which the operation of bail departs from legislative provisions that govern bail. This section outlines the roles of the key figures in bail processes for young people—police, youth justice staff, prosecution and defence lawyers, the courts and bail service providers. This information has been gathered from the literature on bail and remand for young people in Australia, as well as from consultations with key stakeholders and documentation provided to the AIC for the purposes of this research.

Police

Police in all jurisdictions have the following options available when they apprehend a young person who they suspect has committed a criminal offence:

- issue a formal or informal caution or warning;
- refer the young person to a youth justice conference;
- refer the young person to another available diversion program;
- issue a summons to appear in court; or
- arrest and charge the young person.

In general, a young person must admit guilt in order to be referred by police to a diversionary measure such as a caution, youth justice conference or diversionary program. Only the option of arresting and charging the young person involves a bail decision being made by police; bail is dispensed with in all other circumstances. Police decisions about whether to arrest young people therefore determine the number of young people about whom bail decisions must be made. As such, police play a critical gatekeeping role when they decide whether to arrest a young person. In most jurisdictions, legislative provisions are in place that limit the discretion of police in this regard and create a presumption in favour of summonses or a court attendance notice being issued for young people instead of arrest (see Table 15).

Bail decision making by police

The factors that must be considered by bail decision makers in making bail decisions were outlined in the previous section on bail legislation. The general considerations are based around the risk of failing to appear, 'further' offending and being a risk to the community. Decisions on bail conditions are

Table 15 Presumption for summons or court attendance notice over arrest for young people

Jurisdiction	Presumption for summons/court attendance notice
NSW	Yes
Vic	Yes
Qld	Yes
SA	Yes
WA	Yes
NT	Yes
Tas	Yes
ACT	Yes

Source: s 8 *Children (Criminal Proceedings) Act 1987* (NSW); s 345 *Children, Youth and Families Act 2005* (Vic); s 11 *Youth Justice Act 1992* (Qld); s 42 *Young Offenders Act 1994* (WA); s 22 *Youth Justice Act* (NT); s 24 *Youth Justice Act* (Tas); s 252J *Crimes Act 1900* (ACT)

generally designed to mitigate these risks. In Victoria and South Australia, the use of Bail Justices and Magistrates (respectively) over the telephone to review police refusal of bail is designed to ensure young people are not inappropriately remanded by police.

The evidence used to establish whether a young person displays these risks are usually:

- seriousness of charge (whether this relates to any presumptions for or against bail);
- criminal history of the young person;
- bail breach history;
- strength of evidence against the young person on the current charge(s); and
- the young person's personal circumstances.

According to bail decision makers interviewed for this research, a young person's personal circumstances include their residence/accommodation, the level of supervision they will have if granted bail, their ability to care for themselves and their ability to abide by bail conditions. These factors were considered as unique to decisions for young people compared with adults. More informal factors such as the attitude displayed by the young person and their presentation were also identified by one stakeholder.

A de-identified example of an objection to bail affidavit provided to the AIC by Queensland Police for the purposes of this research listed the nature and seriousness of the offence, the character, antecedents, associations, home environment, employment, background and place of residence

of the accused person, the history of previous grants of bail to the accused person and the evidence implicating the accused person, as facts to substantiate the risks considered for bail.

According to stakeholders in most jurisdictions, the most common bail conditions imposed by police include:

- a curfew;
- police reporting;
- residential (ie reside as directed or at specific address);
- non-contact; and
- non-association (with people and places).

Other conditions imposed by police raised by South Australian stakeholders, included:

- not to damage property;
- not to threaten, harass or harm (usually in relation to alleged victims, witnesses or co-offenders);
- attend school; and
- obey house rules (parent or staff at residential care have the discretion to establish what house rules are).

Many stakeholders had concerns about the use of conditions by police to facilitate the monitoring of a young person rather than to mitigate the risks considered in a bail application. No jurisdiction appears to have training mechanisms for bail decision making for young people other than what is included in the mainstream sergeant training. Police interviewed for this research considered bail

decision making for young people as a skill that comes with on-the-job experience. Police have discretion in all jurisdictions about which bail conditions to impose on young people's bail undertakings. Stakeholders raised the need for better training of police on the traditional notions on what bail is designed to achieve and how the process differs from that for adults. The influence of police bail compliance activity on custodial remand rates is further discussed in the next section on drivers of remand.

In all jurisdictions, a police bail order is not reviewed by a Magistrate unless an application is made by the young person to have bail conditions changed or until the young person's first court appearance. In some jurisdictions, a new bail order is automatically made by the courts at this time; in others, police bail is continued with varying levels of judicial scrutiny given to the conditions.

Bail Justices and Justices of the Peace

Justices of the Peace have the authority to grant bail under certain circumstances in Western Australia and Tasmania, and Bail Justices have the authority to grant bail under certain circumstances in Victoria. Generally, Justices of the Peace and Bail Justices are empowered by legislation to grant bail in situations in which the court is unavailable (eg on weekends and/or in non-metropolitan areas); their purpose is to enable an accused person to have a bail hearing and minimise the time an accused person spends on custodial remand waiting for a bail hearing in front of a Magistrate. Although every effort was made to consult with Justices of the Peace and Bail Justices for this research project, this was not possible. Nonetheless, stakeholders in Western Australia, Tasmania and Victoria were given the opportunity to discuss the role these bail decision makers play and how their considerations may differ from police and the courts.

In Western Australia, although Justices of the Peace grant bail in regional areas, stakeholders explained that there are no metropolitan-based Justices of the Peace who make bail decisions. That is, Justices of the Peace are not available to make bail decisions

relating to young people arrested in metropolitan areas outside of business hours. Justices of the Peace in Western Australia are no longer able to refuse bail and detain a young person; rather, the courts must refuse bail before a young person can be detained in a youth justice facility.

In Tasmania, Justices of the Peace grant or refuse bail outside of business hours. Some stakeholders suggested that the bail decisions of Justices of the Peace tend to be more punitive and risk averse in response to community attitudes towards youth crime. A need for educating Justices of the Peace on the role of bail in the criminal justice system and using detention as a last resort for young people was expressed. In contrast to the chain of events that occurs following a bail decision by police, a young person must appear before the court within a prescribed time period after a bail decision made by a Justice of the Peace.

In Victoria, Bail Justices handle a bail decision if police bail is refused after court hours. Bail Justices make their decision based on information from police and the Central After Hours Assessment and Bail Placement Service (CAHABPS; Vic DoJ 2012). If a young person is refused bail by a Bail Justice, they must appear before the next sitting of the Children's Court (Vic DoJ 2012). According to stakeholders, for some young people from regional, rural or remote areas, this will mean being transported to the Melbourne Children's Court. The role of Bail Justices was described by some Victorian stakeholders as making an independent review of a police decision to refuse bail and acting as an advocate for the young person. Although only a small proportion of bail decisions in Victoria are made by Bail Justices, the Victorian Law Reform Commission (2007: 80) describes the system of having Bail Justices available provides a disincentive for police to remand an accused person 'unless it is really necessary'.

As is the case in Tasmania, Bail Justices in Victoria were considered by some stakeholders to be more punitive and risk averse than the courts (see also Vic LRC 2007), with a substantial proportion of young people refused bail by Bail Justices later granted bail by the courts. As one stakeholder commented, however, Bail Justices must make a bail decision at a different point in the process than the courts.

A more detailed case is presented to a Magistrate, including legal representation and information about the young person and the alleged offence, than is the case for Bail Justices. Therefore, while decisions by Bail Justices may seem punitive, it could be the case that Magistrates are simply provided with more and better information with which to make decisions (see also Vic LRC 2007).

Prosecution

Stakeholders from all jurisdictions were interviewed about the role the prosecution plays in court bail decisions for young people. In Western Australia and Tasmania, stakeholders from prosecution bodies were themselves able to be interviewed.

Western Australia is unique in that the Department of Public Prosecutions (DPP) is the prosecuting body for the Children's Court in Perth. In all other jurisdictions, the prosecuting body in specialist Children and Youth courts is the police prosecution and it is only in the higher courts that the DPP prosecutes youth matters. This would only occur for a young person in relation to a very serious charge such as murder. This is also the case for young people before courts in regional and remote areas in Western Australia, where the WA Police undertake the prosecution role.

In relation to bail, at a court appearance, the prosecution respond to a young person's bail application (as provided by the young person's legal representative) by either putting forward to the presiding judicial officer grounds to oppose bail or to indicate that they do not oppose bail. As outlined below, there appears to be a great deal of variance in the detail in which the grounds are argued (whether in a formal written submission or verbally) and whether specific conditions are suggested by the prosecution.

The remit of the WA DPP as explained by a representative included:

- to protect the community;
- to assess risk of further offences; and
- to assess risk of non-appearance.

This remit, as detailed by the stakeholder, is different from the remit of the court and can result in the DPP

and the Magistrate supporting the imposition of different bail conditions for a young person, or supporting the imposition of the same bail conditions for a young person, but for different reasons. The DPP representative explained that the DPP propose conditions that they believe will reduce the risk of a young people offending while on bail, but Magistrates impose conditions that they believe will 'get the young person back on track' (ie meet the therapeutic needs of the young person). For example, the DPP will suggest as a bail condition that the young person attend school or another educational institution, as this is regarded as an opportunity for the young person to be monitored. Magistrates, however, will impose school attendance because they view it as an opportunity for the young person to re-engage with education. This again highlights the varied philosophies that inform bail decision making among key personnel in the youth justice system.

Stakeholders interviewed for this research described varied decision-making processes that inform their decisions about whether to oppose the granting of bail to a young person. For example, WA DPP described asking three key questions to enable them to determine whether to oppose a young person's bail application—*Why is the young person in custody? What are they in custody for?* and *What is the strength of the prosecution's case against the young person?* The stronger the case against a young person, the more likely it is that the DPP will oppose the granting of bail to the young person.

A stakeholder from police prosecution in Tasmania stated that they make a decision about whether to oppose a young person's bail application based on the test the courts use (ie the likelihood that the young person will fail to appear for the court hearing and public safety). It was also stated that this latter consideration can be interpreted quite generally by decision-making parties. One stakeholder explained that police prosecution will generally oppose bail for serious charges but may consider not opposing bail if they believe there are conditions that can be applied that would mitigate the risks of the young person failing to appear or jeopardising public safety.

In the Australian Capital Territory, stakeholders raised that the police prosecutors generally accept the police sergeant's advice on whether a young person's application for bail should be opposed.

This was attributed to the junior level of prosecution lawyers for youth matters.

Stakeholders' views about the punitiveness of the DPP by comparison with police prosecution were mixed. One stakeholder from Western Australia commented that the DPP are more stringent in their approach to opposing bail than police prosecution. Conversely, a stakeholder in New South Wales stated that DPP lawyers are more flexible than police prosecution, who are more likely to take a blanket 'we oppose bail' approach. Another stakeholder further explained that the DPP in the Children's Court in Western Australia take a more thorough approach in either opposing or supporting a bail application. They submit more detailed submissions and are more explicit in recommending outcomes for the young person; for example, they may request that specific bail conditions be imposed.

Young people's legal representatives

Young people's legal representatives in the criminal courts (ie children's defence lawyers) from New South Wales, South Australia, Queensland, Western Australia and the Northern Territory were interviewed for this study. While almost all stated that young people are always represented by a lawyer during a bail decision in court, stakeholders from Western Australia acknowledged that sometimes a young person's legal representative is not available and the judicial officer would adjourn proceedings until the young person was represented.

The steps taken to prepare a bail application did not differ markedly among the jurisdictions. A list of young people in police custody (those who have had bail refused by police or Bail Justice/Justice of the Peace) who are to appear in court is given to Legal Aid each working day. This is usually the first time a children's lawyer comes into contact with the young person unless they are an existing client or the young person contacted a private lawyer after they had been charged.

The following steps are usually taken by children's lawyers in constructing a bail application for a young person:

- determine that there is no conflict of interest in representing the young person;
- review the charge sheet and/or relevant documentation from police;
- meet with the young person and discuss the charge(s) and whether they want to be represented (most stakeholders concurred that it was rare for a young person to refuse representation); and
- contact the young person's family and/or youth justice to determine the young person's current living, health and education situation and previous youth justice contact.

Some children's lawyers interviewed for this study also explained that they may speak to police prosecution to determine their attitude to granting bail and whether the prosecutor would require certain conditions to be imposed in order for them to not oppose the granting of bail. Lawyers then apply for bail for the young person during the court bail hearing, usually verbally, with no formal submission of a written report required. Stakeholders reported that the time taken to prepare a bail application ranged from 20 minutes to a couple of hours.

Stakeholders from the Northern Territory explained that a bail application includes developing a 'bail plan'. This is an assessment of the young person's needs and circumstances regarding transportation, accommodation, supervision and support, and is similar to the 'bail report' provided to the court by youth justice in Western Australia. The development of a 'bail plan' involves children's lawyers contacting support services and programs in addition to the young person's family. They also try to pre-empt what bail conditions the court may impose and address the options for these conditions within the bail plan. Some legal stakeholders expressed frustration that there was no youth justice team or bail support officer in the Northern Territory to assist in this process, with the exception of officers from the Youth Justice Advocacy Project (run through the Central Australian Aboriginal Legal Aid Service). Although the court can order the Department of Justice to conduct a bail assessment, this requires an adjournment of some weeks and stakeholders considered these reports to sometimes be inaccurate and not always helpful.

Judicial officers and courts

Although all judicial administrators such as Magistrates and Judges have the authority to grant bail (see previous section on legislation), all jurisdictions have designated or specialist courts at the local level to deal with youth matters, including bail applications and breaches of bail. Specialist courts and Magistrates preside over care and protection matters in addition to criminal matters in all jurisdictions, with the exception of the Northern Territory, where care and protection matters are dealt with in the Family Matters Court.

- In New South Wales, there are specialist Children's Courts located in Sydney, Newcastle, Gosford and Wollongong. There is one specialist District Judge (President of the Children's Court) and 13 specialist Children's Magistrates who are based mainly in these specialist courts but also travel to other local courts for youth matters (Lawlink nd).
- In Victoria, there is only one specialist Children's Court, based in Melbourne, which hears youth criminal matters daily. Other courts have designated days where youth criminal matters are heard by non-specialist Magistrates (Children's Court of Victoria 2012).
- According to stakeholders, in Queensland, there is only one specialist Youth Magistrate, based in Brisbane. Queensland is unique in that they have a specialised Children's Court of Queensland at the District Court level, which has specially appointed judges from the District Court to preside over youth matters (Queensland Court nd).
- In Western Australia, there is one Children's Court in Perth in which a specialist District Court Judge (President of the Children's Court and with the sentencing jurisdiction of a Supreme Court judge), four full-time and one part-time specialist Youth Magistrates preside over youth criminal matters daily. They also preside over youth matters in metropolitan local courts. In other regions, non-specialist Magistrates reside over youth matters (Clare et al. 2011).
- In South Australia, there are two specialist Youth Magistrates and two specialist District Judges. The main Youth Court registry is based in Adelaide (SA Courts Administration Authority nd).
- In the Northern Territory, youth criminal matters are dealt with in the Youth Justice Court. According to stakeholders, there is a designated Magistrate in Alice Springs that hears only youth matters on specific days.
- According to stakeholders in Tasmania, under the Youth Justice Court Trial, there is one specialist Youth Magistrate who is based in Hobart and sees all youth matters in the Southern region.
- According to stakeholders in the Australian Capital Territory, there is a Children's Court and an appointed Children's Magistrate, although any Magistrate can hear youth criminal matters.

This information highlights that not all young people have their bail determined by a specialist Youth Magistrate; this is particularly unlikely for young people outside of metropolitan areas. While it is beyond the scope of this report to consider the ramifications of this in detail, it is worth noting that stakeholders interviewed for this research generally agreed that youth matters are more appropriately dealt with by specialist Magistrates, who work exclusively with young people, and have an understanding of the issues that young people in trouble with the law often face.

Statutory youth justice agencies

In relation to bail processes, the primary roles of statutory youth justice agencies in each of Australia's jurisdictions are to provide court support to young people facing bail determinations, provide information to the court to assist judicial decisions about young people's bail applications and to provide bail supervision and bail support services and programs to young people.

Court support and information

Statutory youth justice agencies also provide court support and information services relating to young people's bail applications. Information regarding a young person's bail application can be provided by youth justice via informal means (ie verbally) or through formal reports if requested by a Magistrate. Youth justice agencies also perform an important

liaison role among the relevant stakeholders in the bail application process (ie young person, police, prosecution and defence lawyers, Magistrate/Judge and the young person's family). In some jurisdictions, youth justice agencies also place staff in Children's Courts to provide on-site assistance to young people.

Bail supervision and support

Bail supervision, if imposed by the courts as a condition of bail, is usually provided by statutory youth justice agencies and includes the supervision, monitoring and support of the young person to ensure they comply with the conditions of their bail order. Supervised bail can also extend to assessing and providing the young person with referrals to appropriate programs and services. Statutory youth justice agencies often fund non-government organisations to deliver specific bail support services to young people. However, in some circumstances, youth justice agencies directly provide bail support services other than supervised bail to young people.

Supervised bail is available from youth justice in New South Wales, Victoria, Queensland, Western Australia, South Australia and the Australian Capital Territory, and from the Department of Corrective Services in the Northern Territory. Although supervised bail is not formally available in Tasmania at present, youth justice intervention for young people on bail will be introduced through new powers to defer sentence under tabled amendments to the *Youth Justice Act 1997*. Youth justice agencies in some jurisdictions only provide supervised bail if the young person has pleaded guilty to the current charge(s). Supervised bail models and bail support programs provided to young people in each jurisdiction are outlined in the section on *Bail Support Services and Programs* later in this report.



Drivers of custodial remand for young people

It is vital to understand the factors that influence rates of custodial remand if Australian jurisdictions are to meet their international obligation of using detention as a last resort for young people. Technically speaking, rates of custodial remand are a reflection of the number of individuals remanded ('stock') and the length of remand periods ('flow'; Ericson & Vinson 2011; Vignaendra et al. 2009; Webster, Doob & Myers 2009). These two factors are in turn determined by a complex web of philosophical and practical influences that 'drive' levels of custodial remand. These influences or 'drivers' are described in detail in this section.

Rates of offending by young people

One explanation for an increase in young people on custodial remand is that young people are committing more (or more serious) offences. While it is beyond the scope of this study to consider this question in detail, a preliminary examination of publicly available data indicates that in some cases, this may have occurred. The NSW Bureau of Crime Statistics and Research (2012) reports, for example, that the number of young people proceeded against

by police for violent offences in New South Wales increased 18 percent over the 10 year period ending in December 2011. Similarly, the Australian Institute of Criminology's (2012) annual snapshot of offending trends found that recorded offending by young people is currently at its highest rate since 1996–97. In particular, the recorded rate of assaults by young people rose by 67 percent during this time (AIC 2012). It must be considered, however, that these figures may reflect an increase in the reporting rate for this category of offences rather than an actual increase in the number of violent offences occurring in the community.

Many stakeholders interviewed for this research perceived that there had been an increase in offending by young people in recent years. Some voiced frustration with the small cohort of young people who persistently reoffend. One stakeholder described a 'ridiculously high' level of recidivism among this group. Others reported that for these young people, a 'vicious cycle' occurs, whereby their persistent offending results in increased monitoring and scrutiny by police, which in turn leads to more frequent breaches of bail being reported to the courts. In this way, the criminal justice system in general, and bail processes in particular, create a type of 'revolving door' for this small cohort of young people.

An increase in serious offences, including aggravated and sexual offences was also observed by stakeholders. Stakeholders also stated that the age of the young people charged with these serious offences appeared to be decreasing. For example, a stakeholder from Western Australia explained that during the last four to five years, at least one 10 or 11 year old has been charged with a very violent or sexual offence that demonstrates 'vicious and predatory behaviour'. Stakeholders acknowledged, however, that it was difficult to ascertain whether this perceived increase in serious and violent offending reflects a genuine increase in serious and violent behaviour or changes in police activity. It should also be noted that the nature of offences coming through the courts may have become more serious due to the introduction of diversionary measures for young people in the 1990s.

Domestic violence offences

In this study, domestic violence emerged as one offence in particular that may impact on rates of young people on custodial remand. Under some jurisdictions' legislation, police lack discretion in dealing with domestic violence offences and must refuse bail to any alleged domestic violence offender. Although these provisions are undoubtedly important to protect victims of domestic violence, stakeholders interviewed for this research had observed that in some cases, young people are inadvertently 'caught up' in these legislative responses to domestic violence. For example, stakeholders from the Australian Capital Territory noted that occasionally, the parents of young people who are acting out and/or being violent at home report them to the police to 'teach them a lesson', without realising (or desiring) that they will be charged with domestic violence and refused bail.

Further, some stakeholders interviewed for this research agreed that a lack of discretion in how police are able to respond to alleged domestic violence offences may be impacting rates of custodial remand of young people. For example, stakeholders from the Australian Capital Territory, Queensland and Victoria revealed that a lack of police discretion in responding to domestic violence offences is an issue for young people, who are being refused bail as a result. In Queensland, this was

thought to be the result of a legislative requirement that police must detain an accused offender for four hours. In the Australian Capital Territory, a legislative restriction on the use of summons in cases of alleged domestic violence was considered to be a contributing factor. By contrast, stakeholders from some other jurisdictions reported that young people are rarely charged with domestic violence offences (in some jurisdictions, the legislative definition of domestic violence excludes offences committed by young people against their parents).

Increasingly complex needs of young alleged offenders

In addition to a potential increase in offending by young people, a key influence on rates of young people on custodial remand may be the increasingly complex needs of young people in trouble with the law. In other words, the characteristics of both offences and offenders may influence remand rates.

Previous research has found the increasingly complex needs of offenders to have impacted bail decisions. In a study looking at the factors that influence court bail decisions young people in Queensland, consultations with Magistrates and government and non-government agencies involved in the youth justice system revealed an increase in defendants with complex social needs, with many revealing that they had observed an increase of young people presenting with substance abuse problems, as well as an increase in young women, homeless young people, and younger and more persistent offenders entering the system (Mazerolle & Sanderson 2008).

A study on bail decisions for adult defendants in South Australia and Victoria similarly found an increase in drug dependent defendants appearing before court (King, Bamford & Sarre 2009). Drug dependency appeared to increase the likelihood of an alleged offender being remanded in custody by both police and courts. Police bail was more likely to be refused to allow the defendant to 'come down' off drugs and court bail was more likely to be refused because although most drug-dependent accused offenders were charged with relatively minor offences, their drug dependency was

regarded as valid evidence of a risk of reoffending (King, Bamford & Sarre 2009). Similarly, stakeholders interviewed for this study commented that substance abuse problems are often considered to constitute an unacceptable risk that the young person will offend if granted bail. Young people with a history of petrol-sniffing or with (the appearance of) Foetal Alcohol Spectrum Disorder were considered to be particularly vulnerable to bail refusal on these grounds. Further, stakeholders believed that young people are often placed on custodial remand to 'dry out' or to participate in programs that are only available to young people in detention. This again highlights that young people are sometimes remanded in custody 'for their own good'.

Both 'criminogenic' (ie offending-related) and welfare needs of young people have been raised in the existing literature and by stakeholders interviewed for this study as potential influencers of rates of young people on custodial remand. An increase in young people presenting with mental health issues, substance abuse problems, unstable home environments, poor health and disengagement from school, and an increase in very young people (ie those aged under 15 years) coming into contact with the criminal justice system were all raised as examples of increasingly complex needs that may render young people vulnerable to bail refusal.

Homelessness and related accommodation issues

In particular, homelessness and a lack of suitable accommodation for young people are raised repeatedly in the literature as key factors underpinning rises in custodial remand rates (see eg ACCG 2010; AIHW 2012d; Denning-Cotter 2008; House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs 2011; NSW LRC 2012; NT Government 2011; Stubbs 2010; Wong, Bailey & Kenny 2010). There is a concern that young people who are homeless or in unstable or unsuitable accommodation are remanded due to a lack of accommodation options available at that point of contact with the youth justice system (UnitingCare Burnside 2009; Wong, Bailey & Kenny 2010). For example, a lack of appropriate accommodation was found to be a factor influencing remand decisions for young

people in Queensland (Mazerolle & Sanderson 2008).

As one police officer interviewed for Little et al.'s (2011: 42) study on diversion for Indigenous juveniles in Queensland stated:

Depending on the offence, if a young person is homeless then I might consider more so arresting them and objecting to their bail. There's a lot of factors involved—it's not just black and white. But I'd rather arrest them and object to their bail rather than issuing a notice to appear...at least that way I know they will be looked after.

Young people are therefore sometimes placed on custodial remand 'for their own good'.

Although legislation may require the fact that a young person does not live with his/her parents or guardians be ignored by bail decision makers, as is the case in New South Wales (NSW LRC 2012) according to stakeholders interviewed for this research, this does not always occur in practice. Similarly, although Victoria's legislation limits the length of time a young person can be held on custodial remand to 21 days, stakeholders revealed that this has little practical effect, as young people can be held on more than one consecutive 21 day period of remand.

As highlighted in the literature, young people are often granted bail but, due to a lack of suitable accommodation, are unable to meet the bail conditions imposed, which typically require a young person to 'reside as directed' (ie reside at a specified address; Bailey 2009). In other cases, a lack of stable accommodation can mean that young people will be unable to comply with other bail conditions (Baldry et al. cited in Ericson & Vinson 2011; NSW LRC 2012).

The literature also highlights that homelessness or a lack of suitable accommodation is an issue likely to impact more on particular groups of young people, including young people from regional, rural and remote areas (ACCG 2010; Clare et al. 2011; Ericson & Vinson 2011) and by extension, Indigenous young people (Clare et al. 2011; House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs 2011). As Wong, Bailey and Kenny (2010) argue, issues associated with homelessness may also impact

more heavily on young women applying for bail, as histories of physical and sexual abuse often make it less likely that young women will have a stable home environment to return to.

Young people in out-of-home care have also been identified as a group particularly vulnerable to bail refusal as a result of not having stable accommodation. It has been reported that child protection agencies are at times unable to provide young people facing remand with appropriate accommodation for a variety of reasons, including:

- parents not allowing the young person to return home;
- being unable to determine who the legal guardian is in order to release the young person into care;
- living arrangements with relatives and friends having broken down; and/or
- parents being too ill to care for the young person (Boyle 2009; Wong, Bailey & Kenny 2010).

Stakeholders interviewed for this research also identified young people with a history of violence and very young people (aged under 15 years) as vulnerable to bail refusal due to a lack of stable accommodation, as youth refuges often exclude these young people. Stakeholders also revealed that young people can be 'blacklisted' from refuges due to past behaviour while in residence there. This again highlights that there is a service gap for young people with very complex needs.

In addition to a lack of accommodation, the unsuitability of existing accommodation for young people on bail has also been raised as an issue. For example, concern has been raised about peer contagion occurring among at-risk young people and those already enmeshed in the criminal justice system at current accommodation facilities (Noetic Solutions 2011). Further, concerns have been raised about young people's safety in bail accommodation. As one stakeholder consulted as part of the development of the ACT's diversionary framework (cited in Noetic Solutions 2011: 20) claimed 'young people are breaching their bail conditions because it's not safe for them to stay where they're required'. As this suggests, a lack of appropriate accommodation can not only create a barrier to young people being granted bail, it can contribute towards young people breaching bail conditions,

therefore leading to a 'vicious cycle' of contact with the youth justice system.

Accommodation that is readily available, provides proper supervision, is gender appropriate and assists in re-engaging with families, schools and the community has therefore been highlighted as a critical area of need for young people (Noetic Solutions 2011).

Young people not applying for bail

The literature suggests that a potential driver of remand rates is young people not applying for bail. There is, however, little that has been documented about the proportion of young people who opt not to apply for bail. In Wong, Bailey and Kenny's (2010) analysis of a sample of bail hearings (n=142) in Parramatta Children's Court, New South Wales, 20 percent of young people did not apply for bail. Whether the young person applied for bail, however, varied according to the reason the young person was currently being held in custody. Nearly one-quarter of the 42 young people who appeared on new charges did not apply for bail (n=10), 10 percent of the 78 young people appearing for breaching bail did not apply for bail (n=8) and 100 percent of the 11 young people who had previously had their bail application refused did not re-apply for bail (n=11; Wong, Bailey & Kenny 2010).

Although the authors were unable to determine the reasons for young people not applying for bail, they suggest that the introduction of s 22 of New South Wales' *Bail Act 1978*, which limits the number of bail applications that can be made, was influential. Vignaendra et al.'s (2009) study, however, clearly demonstrates that the introduction of this legislative change increased the length of time young people spend on custodial remand in New South Wales and thus contributed towards the increase in rates of young people on remand. Vignaendra et al. (2009: 3) claim that following the introduction of limitations on the number of times an accused person can apply for bail 'the discontinuity is so abrupt it would be superfluous to test its statistical significance'. It must be noted that under proposed changes to the

NSW Bail Act, young people will be able to apply for bail a second time if the initial application was made on the day of their first court appearance. Existing provisions allowing subsequent applications where there is new evidence will be retained under the new Act (Department of Attorney-General and Justice personal communication 30 January 2013). Other literature suggests that young people do not apply for bail due to an anticipation of a backdated sentence (Mazerolle & Sanderson 2008; Tressider & Putt 2005) or because they anticipate the refusal of their application (Mazerolle & Sanderson 2005).

Legal stakeholders interviewed for this research were asked under what circumstances they would advise a young person not to apply for bail. There were three main reasons given and these are discussed in turn. First, legal representatives claimed they would be reluctant to apply for bail for a young person if it was believed that the young person would not be successful in obtaining bail. Situations in which legal representatives believe that a young person may not receive bail included if the young person had a:

- significant breach of bail history;
- significant criminal history;
- serious charge/if there is a presumption against bail;
- lack of appropriate accommodation; and/or
- issues with family and personal circumstances.

In most of these circumstances, a bail application would not be made by legal representatives in the first instance in order to give youth justice staff or themselves time to construct a stronger bail application (eg by organising accommodation for the young person). For example, legal stakeholders from the Northern Territory explained that they sometimes advise a young person not to apply for bail until a 'responsible adult' can be contacted to appear in court to support the young person's bail application.

In some jurisdictions, however, legislative restrictions on the number of applications for bail that can be made (see discussion above) also influence legal representatives' decisions about whether to apply for bail for young people. For example, stakeholders from New South Wales stated that restrictions on

reapplying for bail after an initial refusal mean that a legal representative would advise a young person not to apply for bail until they had a strong bail application considered likely to be accepted. Interestingly, stakeholders from South Australia interviewed for this research made similar claims, although there are not legislative limitations on the number of times young people in South Australia can apply for bail. Stakeholders claimed that although there are no legislative restrictions in South Australia, in practice, Magistrates sometimes refuse to hear a bail application for a second time unless there has been a change in circumstances.

Second, legal representatives from Queensland and the Northern Territory interviewed for this research reported that they may advise a young person not to apply for bail if the young person is likely to receive a sentence of detention and is close to reaching adulthood. The length of their sentence to detention would take into account the time spent in remand, so in this way a young person would at least spend part of their sentence remanded in a youth justice facility rather than imprisoned in an adult facility.

Third, some stakeholders from Queensland interviewed for this research stated that in some cases, they may advise a young person not to apply for bail as having a young person placed on custodial remand has an incapacitating effect. That is, placing a young person on custodial remand prevents the young person committing fresh offences while on bail and therefore prevents a build-up of charges and breaches of bail. Minimising the number of offences and breaches of bail committed by young people was therefore seen to be for young people's 'own good', as a history of consistent offending may worsen their sentencing outcome for the current charge(s) and in the future.

It was emphasised by most legal stakeholders that even in the situations outlined above, they would only *advise* a young person not to apply for bail. If a young person insisted on applying, then they would honour the young person's wishes. Of course, it is probable that given the empowered position of legal representatives, young people will usually accept their advice.

Lack of access to legal representation

The literature on bail and remand for young people in Australia identifies a lack of access to adequate legal representation as a factor that contributes to lengthy remand periods for young people and therefore as a potential driver of rates of young people on custodial remand (see eg Mazerolle & Sanderson 2008; Tresidder & Putt 2005; UnitingCare Burnside 2009).

Stakeholders interviewed for this research similarly perceived a lack of access to legal representation as a potential driver of remand rates for young people. In general, stakeholders raised concerns about a lack of children's lawyers and the under-resourcing of children's lawyers; these concerns were particularly profound for stakeholders from Queensland (see also Mazerolle & Sanderson 2008). Concerns were also raised that legal representation is generally of a poorer standard for young people than it is for adults, due to the complexities of young people's court matters. Stakeholders in a number of jurisdictions also commented that a lack of access to legal representation is a more profound problem for young people from regional, rural and remote areas.

The inexperience of prosecution lawyers was also raised by stakeholders in New South Wales. It was explained that often a young person charged with a serious offence will be prosecuted by a junior police prosecutor and represented by an inexperienced lawyer, whereas an adult facing the same charge(s) would be prosecuted by a senior DPP lawyer or a Crown Prosecutor and defended by a Public Defender or another experienced lawyer.

Judicial attitudes

A number of stakeholders interviewed for this research project raised judicial attitudes as a potential driver of rates of young people on custodial remand. Stakeholders commented that it is particularly noticeable in small jurisdictions that the numbers of young people on remand increases or decreases following the appointment of a new Children's Court Magistrate, due to the attitude of that individual Magistrate. In larger jurisdictions,

stakeholders noted that at times there are 'hot spot' courts, with large numbers of young people being refused bail following bail hearings at these courts compared with others, again due to the attitudes of individual Magistrates.

Stakeholders noted that there is great diversity in the attitudes of individual Magistrates, with some taking a very 'legalistic' approach to making bail decisions and others taking a welfare-oriented approach. Although all judicial officers make bail decisions according to the relevant jurisdictional legislation, there is obviously scope for discretion within this framework.

Pressures on Magistrates are also likely to vary according to a range of factors, including whether they preside over a court in a metropolitan or regional area. One stakeholder interviewed for this study commented that some regional communities place significant pressure on the judiciary, via the media, to 'act tough on crime'. Magistrates in regional areas or small jurisdictions are more likely than those in large cities to see the same young people repeatedly coming into contact with the criminal justice system; this may also influence the attitudes of these magistrates and in turn, their decision making regarding young people's applications for bail.

Judicial officers interviewed for this research expressed varying attitudes towards the use of custodial remand for young people. Although it is clear that in most cases Magistrates view detention as a last resort for young people, some Magistrates expressed the view that in cases of persistent offending, the 'short, sharp shock' of a short period of custodial remand may stop a young person's offending behaviour. Empirical research on whether this may be the case would therefore fill an important knowledge gap for bail decision makers.

Whether a Magistrate is a specialist Children's Court Magistrate or has a broader judicial role may also influence Magistrates' attitudes. For example, one stakeholder felt that Magistrates who make bail decision relating to both adults and young people may not accept that young people should be dealt with differently from adults.

Punitive community attitudes

Garland (2001) argues that it has become increasingly acceptable in recent years for politicians and policymakers to express punitive sentiments and to frame policies in terms of their retributive, rather than rehabilitative, ideals. A number of commentators have suggested that this renewed emphasis on punitive sanctions has impacted on bail and remand practices in Australia. A Western Australian study by Clare et al. (2011: 36) found that key stakeholders believed there had been a 'slippage of principles' and that police are consequently refusing bail to young people rather than diverting them according to the spirit of the *Young Offenders Act 1994* (WA). Further, Booth and Townsley (2009) argue that in New South Wales, increasingly punitive criminal justice policies have resulted in an erosion of the presumption in favour of bail. As Booth and Townsley (2009: 50) outline, changes to bail legislation in New South Wales were at least partly premised on punitive sentiments—'the [then] Attorney-General has expressed some pride in the increasing prison population and proudly speaks of plans to build more prisons to house the increasing population'.

This sentiment is reflected in the NSW Chief Magistrate of the Local Court's submission to the NSW Law Reform Commission's Review of the *Bail Act 1978*. He states:

The traditionally primary objects of a bail determination—ensuring the appearance of the accused person before the court and the protection of the community whilst also having regard to an accused person's interests in being at liberty—have been intermittently truncated or affected in response to artificially created political reaction to publicised concerns that have had more to do with media campaigning than the product of empirical evidence (Henson 2011: 1).

Furthermore, a key concern in the literature is that the boundaries between bail/remand and sentencing have become increasingly blurred (Stubbs 2010) and that custodial remand is being used as a form of 'summary punishment' (Booth & Townsley 2009; Edney 2007; Freiberg & Morgan 2004; NSW LRC 2012; Raine & Willson 1995; Victorian LRC 2007).

As the NSW Chief Justice of the Local Court has claimed:

It is of rising concern that prosecution agencies appear to view bail from a perspective alien to the original, and in my view enduring, philosophy of the Bail Act. Concerns articulated before the Court and elsewhere that bail is being used as a form of pre-emptive punishment are in my view grounded in legitimacy (Henson 2011: 1).

As discussed in more detail below, stakeholders interviewed for this research indicated that in some instances, custodial remand is used as an incapacitating strategy designed to reduce youth offending. Although this is not the same as using remand as 'summary' or 'pre-emptive' punishment, it demonstrates that remand is sometimes used to meet objectives other than those for which it is designed.

It is important to recognise, however, that while the above examples suggest that the re-emergence of punitivism may be influencing remand rates of young people in some Australian jurisdictions, its potential impact should not be overstated. As Webster, Doob and Myers (2009) highlight, increases in remand populations cannot be explained solely by an increase in punitive ideals, as this would be likely to result in overall increases in prison populations (not only increases in remand populations). This has not been the case for young people in Australia, however, where nationally, overall rates of young people in detention have decreased substantially during the past three decades (see Richards 2011a), while rates of young people on remand have increased (see analysis earlier in this report).

While Webster, Doob and Myers' (2009) argument has merit, it should also be recognised that the re-emergence of punitivism may manifest in policies and practices that can indeed increase rates of remand without increasing overall rates of incarceration. For example, if it is the case that changes to legislation in New South Wales that limit defendants' opportunities to apply for bail were premised on punitive ideals (as Booth & Townsley (2009) argue) and it is also the case that offenders receive 'discounted' sentences of incarceration if they have been in custodial remand, then it appears that this change may result in both increased remand rates and decreased rates of sentenced detention.

Community perceptions of youth offending was raised by stakeholders interviewed for this research as having a profound effect on police and court bail decisions, as well as policing strategies (as described in more detail below). According to stakeholders, the main factor that determines community perceptions of youth offending is the media. Stakeholders frequently raised the issue that the media's negative portrayal of youth offending can drive police and legislative responses to bail determinations for young people.

There was a general perception among stakeholders that police, Bail Justices and Justices of the Peace were more influenced by punitive community views fuelled by media reports of youth offending than Magistrates. Although some stakeholders suggested that Magistrates, particularly those in non-metropolitan areas, were also influenced by punitive community views, others suggested that Magistrates have a greater capacity to make bail decisions contrary to these views. For example, a South Australian stakeholder gave the example of public pressure to have certain accused young people detained in one small South Australian town. In this case, although police appeared to be influenced by this pressure and refused bail to the young people, the courts appeared to be less influenced by community views and ultimately granted bail to the young people in question.

Court delays

Processes that increase the length of court proceedings may increase the length of time young people spend on custodial remand and therefore increase remand rates of young people. Mazerolle and Sanderson (2008), and Tressider and Putt (2005) identify a number of factors that can contribute to delays in court proceedings:

- court being adjourned for investigation into welfare issues or to allow for adequate legal representation of the young person;
- inadequate access to or poor level of service by legal representation;
- defence lawyers waiting for information from prosecution lawyers;

- negotiations taking place between defence and prosecution lawyers;
- police needing to conduct further investigations, particularly if a not guilty plea is entered;
- investigation of other criminal matters and potential for further charges;
- delays in the preparation of pre-sentence reports (if the young person has been convicted and is on custodial remand awaiting sentencing); and
- lack of collaboration between child protection and youth justice agencies in addressing welfare and accommodation needs.

Delays in finalising young people's criminal matters was also identified as an issue by stakeholders interviewed for this research, particularly those in Queensland. In addition to those outlined above, stakeholders identified the following reasons for court delays:

- the complexity of youth cases. For example, stakeholders in the Northern Territory explained that youth matters are often allegedly committed in groups, thereby increasing the complexity of the matter for the prosecution;
- an increase in the number of reports requested by the court and the level of detail required in these reports. Youth justice stakeholders in both South Australia and Western Australia explained that courts were increasingly ordering court reports from youth justice agencies. Stakeholders explained that an increasing array of reports is being requested including social circumstances reports, pre-sentence reports and accommodation/placement reports. Youth justice stakeholders commented that they are not always convinced of the necessity of these reports, particularly given the time taken to prepare them and the delays that occur as a result.
- reluctance to deal with youth matters outside of business hours. In some jurisdictions where Bail Justices or Justices of the Peace are not available to make bail decisions, stakeholders raised concerns that young people are unnecessarily held on custodial remand during weekends. Stakeholders from New South Wales, for example, perceived a lack of emphasis on young people being able to appear in court on a Saturday to have their matter finalised that day. Stakeholders

noted more generally that there appears to be a lack of emphasis, particularly from legal representatives, on having minor matters finalised at the first court appearance.

Difficulties locating 'responsible adults' to support young people's bail applications

Western Australia is unique in its legislative requirement for a young person's bail undertaking to be signed by a 'responsible adult' (usually a parent or guardian) in order for bail to be granted. The research literature identifies difficulties locating responsible adults as a driver of increased remand rates (see Auditor General for Western Australia 2008; ACCG 2010; Clare et al. 2010; Denning-Cotter 2008). Stakeholders in Clare et al.'s (2010) Western Australian study, for example, expressed a desire to remove the requirement for a responsible adult to be located in order for a young person to be granted bail. This issue was considered to impact most heavily on young people from remote or regional areas (Clare et al. 2010).

According to the Auditor General for Western Australia (2008), even in cases in which they can be located, responsible adults sometimes refuse to assist a young person, resulting in the young person being remanded in custody. Reasons for them doing so, as indicated by police records, include:

- feeling unable to exercise control over the young person;
- feeling unable to accept bail conditions;
- feeling unable to ensure the young person would attend court or comply with bail conditions; and
- having already evicted the young person from their home (Auditor General for Western Australia 2008).

This issue was also identified in the Northern Territory, where s 27 of the Bail Act states that one of the conditions that may be imposed includes the presence of an acceptable person to acknowledge that the accused is likely to comply with their bail undertaking. Problems locating responsible adults

was an issue highlighted in the recent review of the Northern Territory youth justice system as driving the refusal of bail (NT Government 2011).

Multiple stakeholders interviewed for this research raised the attitude of parents as a potential driver of custodial remand for young people. Stakeholders from South Australia and New South Wales explained that there are a number of parents who refuse to take their child home because of the belief that detention will 'teach them a lesson' (ie using a period of custodial remand as a surrogate punishment).

Pre-court decisions

Bamford, King and Sarre (1999) suggest that pre-court decisions can impact court bail decisions. Magistrates rely heavily on the information they receive from police and prosecutors; therefore, decisions made by police and prosecutors become a critical factor in whether a young person receives court bail or is placed on custodial remand (Mazerolle & Sanderson 2008). For example, a study of young people on custodial remand in Tasmania revealed that the reasons recorded by Magistrates for remanding a young person in custody often present as a summary of the prosecution's reasons for refusing police bail (Tressider & Putt 2005). Further, research on bail practices in South Australia and Victoria found that police 'were sensitive to having their decision not to grant bail overturned by later remand decision makers' (King, Bamford & Sarre 2009: 36).

This suggests that where multiple players are involved (eg police, prosecution and Magistrates), a type of self-fulfilling prophecy sometimes occurs, whereby an expectation of bail refusal from the court encourages police to refuse bail (or prosecutors to oppose bail) in the first instance. Conversely, an expectation that bail will be granted by the court may result in police granting bail (or prosecutors not opposing it). As discussed in the following section, however, the reverse is sometimes the case, with police avoiding making bail decisions in favour of allowing a Magistrate to do so.

Police stakeholders interviewed for this research expressed some frustration with Magistrates overturning their decisions not to grant bail to

a young person; this was particularly the case in relation to those young people the police come into contact with repeatedly. Some police were critical of Magistrates' perceptions that police bail was too restrictive on young people and of Magistrates' tendency to remove conditions from police bail orders. Importantly, however, the frustration of these police appeared to be primarily about what they perceived as a lack of therapeutic programs comprising conditions of young people's bail, premised on the belief that this lack of programs contributes towards young people's reoffending. This could be taken to suggest that police and Magistrates have differing views about the purpose of bail. It could also suggest, however, that there may in fact be broad consensus between police and magistrates about the aims of bail, but that the views of these parties on the most appropriate and/or effective way of achieving these aims may vary.

Bail decisions, and the relationships among those who influence or make them, are highly complex. There is currently a paucity of research on the potential influence of these relationships on rates of custodial remand for young people. This issue should therefore be considered in future research on this topic.

Risk aversion

International research indicates that the newfound preoccupation with managing risk (Feeley & Simon 1992; Garland 2001; Hudson 2003; Shearing & Johnston 2005) has influenced bail decisions and may be a driver of rates of custodial remand. For example, Raine and Willson's (1997: 600) study found that in England and Wales, police officers felt ill-equipped to make bail decisions in cases involving a risk of breach or reoffending and instead preferred to remand accused persons in custody and therefore force magistrates to 'bear the responsibility for the decisions'.

Webster, Doob & Myers' (2009: 99) Canadian research similarly found that:

Canada's growing remand population is largely the product of an increasing culture of risk aversion...we appear to be witnessing a

generalised practice whereby decisions are either continually passed along to someone else or simply delayed by those responsible for making them.

Webster, Doob and Myers (2009) account for this focus on risk avoidance in bail decision making by highlighting that while the benefits of granting bail to an accused person (eg cost savings, protection of innocence) are invisible, the potential costs of doing so (eg the risk that the accused person will offend while on bail) are visible, rendering the decision maker open to criticism.

One stakeholder from New South Wales interviewed for this research confirmed that in some cases, police avoid granting bail to young people bail to avoid being held accountable if the young person offends while on bail; therefore, police refuse the young person bail and force the court to determine the young person's bail. Stakeholders noted that police officers' desire to protect the community and minimise the risk of young people offending while on bail also extended to the imposition of onerous bail conditions on young people and/or the close scrutiny of young people granted bail.

Stakeholders from jurisdictions that utilise Bail Justices or Justices of the Peace to make bail decisions reported that these decision makers can be particularly sensitive to community attitudes towards youth offending and thus more risk averse than other bail decision makers, especially in regional areas where Bail Justices and Justices of the Peace are more visible to the public and may come under increased scrutiny.

As the above discussion indicates, it appears that bail decision makers other than Magistrates are the most risk averse, perhaps because the decisions made by police, Bail Justices and Justices of the Peace are later reviewed by a Magistrate (technically, bail is reconsidered by a Magistrate). It is important to note, as one Magistrate interviewed for this study explained, that judicial bail decision makers are accountable to superior courts and the public, and in most jurisdictions a young person has the right to appeal a bail decision. It appears, however, that judicial decisions are not subject to the immediate scrutiny to which the decisions of police and other bail decision makers are subject.

Table 16 Victims' rights legislation in Australia and provisions relating to bail

Legislation		Provisions relating to bail
NSW	<i>Victims Rights Act 1996</i>	<p>6.11 Protection from accused</p> <p>A victim's need or perceived need for protection will be put before a bail authority by the prosecutor in any bail application by the accused.</p> <p>6.12 Information about special bail conditions</p> <p>A victim will be informed about any special bail conditions imposed on the accused that are designed to protect the victim or the victim's family.</p> <p>6.13 Information about outcome of bail application</p> <p>A victim will be informed of the outcome of a bail application if the accused has been charged with sexual assault or other serious personal violence</p>
Vic	<i>Victims of Crime Assistance Act 1996</i> <i>Victims' Charter Act 2006</i>	<p>A prosecuting agency, on request by a victim, is to ensure that the victim is informed of</p> <p>(a) the outcome of any application for bail by the person accused of the criminal offence; and</p> <p>(b) if bail is granted, any conditions imposed on the accused person by the court that are intended to protect the victim or family members of the victim.</p> <p>In having regard to the safety or welfare of members of the public in accordance with the <i>Bail Act 1977</i>, the safety or welfare of the victim or family members of the victim and the attitude of a victim towards the granting of bail may be taken into account by a court in determining whether to grant bail to a person accused of a criminal offence (<i>Victims' Charter Act 1996 s 10</i>)</p>
Qld	<i>Victims of Crime Assistance Act 2009</i>	<p>So far as is reasonably practicable, an investigatory agency is to, if asked by a victim, give the victim the following information about the crime committed against the victim...the outcome of an application for bail by the charged person and if the charged person is released on bail or otherwise before the proceeding on the charge is finished, the arrangements made for the release, including any condition and any application for variation of the condition that may affect the victim's safety or welfare (s 11(g))</p>
SA	<i>Victims of Crime Act 2001</i>	n/a
WA	<i>Victims of Crime Act 1994</i>	<p>A victim who has so requested should be kept informed about</p> <p>(a) the progress of the investigation into the offence (except where to do so may jeopardise the investigation); and</p> <p>(b) charges laid; and</p> <p>(c) any bail application made by the offender; and</p> <p>(d) variations to the charges and the reasons for variations (Sch 1 (6)(c))</p>
NT	<i>Victims of Crime Assistance Act</i> <i>Victims of Crime Rights and Services Act</i>	n/a
Tas	<i>Victims of Crime Assistance Act 1976</i>	n/a
ACT	<i>Victims of Crime Act 1994</i>	n/a

The influence of victims' rights

The literature on bail and remand identifies concern for victims' rights as a potential influence on remand rates. For example, Booth and Townsley (2009) argue that changes to bail legislation in New South Wales that limit the number of bail applications that defendants can make (and which Vignaendra et al. (2009) found increased the remand of young people in New South Wales) were partly premised on the belief that repeated applications for bail may upset victims. Importantly, this reflects a newfound concern for 'the feelings (rather than the safety) of the crime victim' (Booth & Townsley 2009: 43). Sarre, King and Bamford's (2006: 5) study of bail for adults in Victoria and South Australia found that concerns about victims often informed bail decisions and that victims of particular types of offences factored into bail decisions more frequently than others:

Some bail decision makers indicated that they take special care when dealing with bail applications from defendants charged with domestic violence offences since the risks and consequences of re-offending were particularly significant in this situation.

Although every Australian jurisdiction has enacted legislation designed to promote the interests of crime victims, only four jurisdictions have legislation that makes explicit reference to bail and remand decisions (see Table 16).

In addition to provisions about the granting of bail contained in victims' rights legislation, some jurisdictions' bail legislation contains provisions about how victims should be considered. For example, SA's *Bail Act 1985*, which applies to both young people and adults, states that

where there is a victim of the offence, the bail authority must, in determining whether the applicant should be released on bail, give primary consideration to the need that the victim may have, or perceive, for physical protection from the applicant (s 10(4)).

Under Victoria's *Bail Act 1977*, in assessing whether there is an unacceptable risk of an accused person committing an offence, jeopardising community

safety, interfering with witnesses or failing to surrender into custody if granted bail, the court must consider 'the attitude, if expressed to the court, of the alleged victim of the offence to the grant of bail' (s 4(3)(c)). Further, if an application is made to the court (or a Bail Justice) to vary the amount or conditions of bail, the court can consider 'the attitude, if known, of the alleged victim of the offence to the proposed variation of the amount of bail or the conditions of bail' (s 18AD(1)(e)).

The NSW *Bail Act 1978* considers crime victims in only an abstract way. Under the Act, bail decision makers must consider the likelihood that an accused person will commit a serious offence while on bail. The 'likely effect of the offence on any victim and on the community generally' is one of the matters to be considered in determining whether an offence is 'serious' (s 32(2A)(b)).

Under the NT's *Bail Act*, in considering whether to grant bail to an accused person, the court must consider:

The risk (if any) that would result from the accused person's release on bail to the safety or welfare of:

- i. the alleged victim of the offence; or
- ii. the close relatives of the alleged victim; or
- iii. if the victim is a child—any person (other than a close relative) who has the care of the child; or
- iv. any other person whose safety or welfare could, in the circumstances of the case, be at risk if the accused person were to be released on bail (s 24(1)(e)).

Further, the NT's *Bail Act* stresses that 'if the alleged victim of an offence is a serious sexual offence or a serious violence offence, the safety and welfare of the alleged victim must be considered with particular care' (s 24(4)). Finally, the Act states that:

If an alleged victim expresses concern to the prosecutor that the release of the accused person on bail could lead to a risk to the alleged victim's safety or welfare, the prosecutor must, wherever practicable, inform the authorised member or court about that concern and the reasons for it (s 24(6)).

In Tasmania, neither the *Bail Act 1994* nor the *Justices Act 1959* currently contains any provisions

about considering the interests of alleged victims in bail decisions. Tabled amendments to the *Youth Justice Act 1997* will, however, outline that bail decision makers should consider the Youth Justice Principles when making a bail decision. These principles include that 'the victim of the offence is to be given the opportunity to participate in the process of dealing with the youth as allowed by this Act' (s 5(1)(d), *Youth Justice Act 1997* (Tas)).

In jurisdictions that have separate bail considerations for young people (Queensland, Western Australia and the Australian Capital Territory), alleged victims do not have to be taken into account in relation to bail decisions. As outlined above, however, both Queensland and Western Australia's victims' rights legislation contain provisions allowing alleged victims to be informed about bail decisions.

In contrast to some of the existing literature, most stakeholders interviewed for this research generally did not consider victims' rights movements or legislation to be a primary driver of custodial remand rates for young people. This is perhaps partly due to the less serious nature of offences allegedly committed by young people. Concerns were raised, however, that in jurisdictions in which Bail Justices or Justices of the Peace are empowered to make bail decisions in non-metropolitan areas, such decisions tend to be cognisant of victims' rights and concerns, as victims are often known to bail decision makers.

Inappropriate and/or arbitrary use of bail conditions

A concern that has been raised in the literature is that young people granted bail are often subject to inappropriately high numbers of bail conditions (Bailey 2009; Mulroney 2012; Noetic Solutions 2011; Wong, Bailey & Kenny 2010), many of which are unrealistic and may be difficult for young people to adhere to (ACCG 2010; Noetic Solutions 2011; NSW LRC 2012; Stubbs 2010). Importantly, bail conditions placed on young people often appear arbitrary and unrelated to the young person's offending (Mulroney 2012; NSW LRC 2012). Judicial officers in Clare et al.'s (2011: 31) study expressed

concern that police officers 'stipulate stringent conditions for bail, such as curfews or school attendance regardless of the relevance or appropriateness of such conditions'. Raine and Willson's (1995) study of bail in England and Wales found that there was little connection between the types of bail conditions imposed on accused persons and the rationale Magistrates gave for imposing the conditions. Further, they found no significant correlations between the number and type of bail conditions imposed on accused persons and the seriousness of the alleged offence, revealing 'a lack of clarity about the objectives being pursued by the various decision-shapers and decision makers in the process' (Raine & Willson 1995: 28).

As Clare et al. (2011) argue, unrealistic bail conditions are likely to impact more heavily on Indigenous young people and young people from regional, rural and remote areas, given the lack of resources these young people may be faced with. It has also been raised that bail conditions fail to take into account the mobile lifestyles of some Indigenous young people, particularly those from remote communities (Reynolds cited in House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs 2011). It is also likely that onerous and/or arbitrary bail conditions will impact more profoundly on young people in out-of-home care, who come under more scrutiny than other young people on bail. The issues faced by young people in out-of-home care are discussed in detail later in this report.

Further, there are issues regarding the practicalities of a young person complying with numerous and/or onerous bail conditions, which may result in an increased likelihood of breaching (ie failing to comply with) their bail conditions. By definition, young people have limited agency and are often dependent on their parents or other adults (NSW LRC 2012). For example, if a young person must report regularly to police as a condition of bail, the young person might be reliant on their parents for transport or public transport fares in order to meet this condition.

The frequency of the use of behaviourally based conditions as opposed to financial surety is demonstrated in Wong, Bailey and Kenny's (2010) NSW study, which listed the top four conditions imposed on young people granted bail as:

- curfew;
- reside as directed and specified;
- obey reasonable direction; and
- non-association.

To pay surety was the seventh most common condition imposed on young people's bail, with nine percent of the 78 young people who received conditional bail receiving this condition (Wong, Bailey & Kenny 2010).

Although breaching bail conditions is not a criminal offence in all jurisdictions (see discussion below), a breach of bail conditions results in an opportunity for the court to reconsider a young person's bail (Stubbs 2010). Placing young people on strict bail orders with numerous conditions that are difficult to comply with may therefore contribute towards larger numbers of young people being placed on custodial remand (NSW LRC 2012). This is an important issue to consider, given that the literature identifies breaches of bail by young people as a key driver of rates of custodial remand. This issue is considered in more detail in the section below.

The appropriateness of bail conditions placed on young people has thus been raised as a key issue for further consideration (ACCG 2010; Clare et al. 2011; Stubbs 2010). Bail conditions such as reporting regularly to police or not associating with peers may be difficult for young people to meet for a range of reasons including:

- practical reasons—most young people don't hold a drivers licence or have access to a vehicle and many may not be able to afford public transport (Noetic Solutions 2011);
- social reasons—young people are heavily influenced by their peers (Gatti, Tremblay & Vitaro 2009; Hay, Payne & Chadwick 2004; Steinberg 2005) and may find it more difficult than adults to disassociate from their peer group or social network; and
- biosocial and psychosocial reasons—young people may lack the maturity and insight that are often required to comply with bail conditions.

It has been recommended that bail conditions need to be more cognisant of the 'mental health, cognitive abilities, family situation and social needs' of young people in addition to their limited access to transport

(Noetic Solutions 2011: 15). In addition, it has been argued that young people (particularly those with an intellectual disability and Indigenous young people) often have difficulty understanding or remembering their bail conditions, resulting in unintended breaches of bail (Allan et al. 2005; Bailey 2009; NSW LRC 2012).

Many stakeholders from multiple jurisdictions interviewed for this research felt strongly that bail conditions for young people are often onerous, arbitrary or unrealistic. Examples of impractical bail conditions imposed on young people include prohibiting a young person from spitting and banning young people from whole towns and suburbs.

Stakeholders also expressed frustration with the 'welfarisation' of bail conditions and the way in which, as one stakeholder put it, they are used to 'control' young people. This was seen as especially problematic when bail conditions are not related to the charge(s) against the young person (although as Mulroney (2012) notes, some bail conditions that may appear to be based on welfare, such as attending school, may also address the young person's criminogenic needs). Stakeholders noted that bail conditions for young people are often more onerous than those imposed on adults and less relevant to the charge(s). Curfew was one bail condition that stakeholders deemed particularly problematic for young people to adhere to for a number of reasons. First, young people in trouble with the law are often from violent homes. Insisting that a young person return to a violent home and adhere to a strict curfew is likely to be damaging to the young person and may have a criminogenic effect on the young person (see Richards 2011b for a discussion). Second, young people's families are sometimes involved in offending behaviours themselves and/or encourage the young person's offending behaviour (Goodwin & Davis 2011). Again, therefore, having young people reside in the family home according to a curfew is likely to be counterproductive. Finally, stakeholders argued that placing a young person on a strict curfew prevents the young person participating in sporting and/or community activities that may be beneficial for the young person's development.

Stakeholders also raised concerns that in some instances, bail conditions imposed on young people

are more onerous than sentencing outcomes are likely to be.

In summary, the existing literature and stakeholder interviews conducted for this research suggest that the number and nature of bail conditions imposed on young people can result in young people being 'set up to fail'. Given that breaches of bail have been identified as a key driver of custodial remand rates (as discussed below), minimising the opportunities for young people to breach their bail conditions is one important strategy for reducing the custodial remand of young people.

Breaches of bail

The literature consistently identifies breaches of bail conditions as a key influence on rates of custodial remand. For example, the Auditor General for Western Australia (2008: 43) found that 'the largest single reason that police did not grant bail was that the young person was already on bail and had breached their bail conditions' (see also Clare et al. 2011; NSW LRC 2012). The recent inquiry into the youth justice system in the Australian Capital Territory also stated that breaching bail was the primary reason that young people were admitted to detention (ACT Government cited in Roy & Watchirs 2011). Further, a study undertaken in Parramatta Children's Court showed that 60 percent of young people attending court during a week in August 2008 and a week in January 2009 appeared for breaching bail conditions (Wong, Bailey & Kenny 2010; see also Noetic Solutions 2011).

A NSW study (Vignaendra et al. 2009) that examined the number of young people proceeded against for breach of bail from January 1998 to February 2009 and the average daily number of young people on custodial remand from January 1998 to December 2008, found a significant correlation between the changes of remand numbers and the numbers of those breaching bail, demonstrating that an increase in those arrested for breaching bail conditions is related to an increase in young people on custodial remand.

It is important to recognise, however, that not all breaches of bail are criminal offences. Bail conditions imposed on young people are often 'behavioural'

conditions, such as obeying parents, adhering to a curfew, residing at a particular premise, or not associating with peers. In other words, these behaviours would not be a criminal offence if the young person was not on bail. Data on breaches of bail by young people in New South Wales indicate that during 2008, new offences constituted only four percent of all breaches; more commonly, young people breached bail by not adhering to a curfew (47%), failing to reside as directed (12%), failing to report to police (12%) and breaching a non-association order (11%; Mulroney 2012).

Table 17 outlines whether it is an offence for a young person to fail to appear in court subsequent to a period of bail and whether it is an offence for a young person to breach other bail conditions in each jurisdiction. As Table 17 indicates, in all jurisdictions, failing to appear in court subsequent to a bail undertaking is an offence for young people and can be penalised. As can also be seen in Table 17, however, breaching other conditions of bail is an offence for young people in Western Australia, South Australia, the Northern Territory and Tasmania. This will no longer be the case in Tasmania following amendments to the *Youth Justice Act 1997*. Under these amendments, breaches of bail (other than failure to appear before a Justice or Court) will not be offences in their own right, but will be able to be considered at sentencing.

Importantly, however, even when it is not a criminal offence for a young person to breach bail (as is the case in New South Wales, Victoria, Queensland and the Australian Capital Territory), police still have powers to arrest a young person who is (or is suspected of) breaching any of their bail conditions. In all jurisdictions, it is lawful for police to arrest without a warrant a young person who is believed to be in breach of their bail conditions (*Bail Act 1978* (NSW) s 60; *Bail Act 1977* (Vic) s 24; *Police Powers and Responsibilities Act 2000* (Qld) s 367(3); *Bail Act 1992* (WA) s 54(1); *Bail Act 1995* (SA) s 18(2); *Bail Act* (NT) s 38; *Bail Act 1992* (ACT) s 56A; *Bail Act 1994* (Tas) s 10). Queensland is the only jurisdiction that clarifies that police must use arrest for breaches as a last resort:

Before arresting a child for suspected contravention of condition of appearance or another condition of the undertaking, a police

officer must consider whether it would be more appropriate for an application be made under the Bail Act (1980) for a variation or revocation of the child's bail (excluding not appearing at court and/or harassing witnesses) (*Police Powers and Responsibility Act 2000* s 367(4)).

Therefore, even in jurisdictions in which breaching bail conditions is not a criminal offence, a breach of bail can result in an arrest; this results in a further opportunity for the court to reconsider a young person's bail (Stubbs 2010) and may therefore contribute towards rates of young people on custodial remand.

In this context, whether breaching bail is a criminal offence is largely irrelevant. A more critical distinction that should be considered is whether 'technical' and 'criminal' breaches of bail are dealt with in the same way. Therefore, should there be a distinction between breaches of bail that would constitute an alleged offence even if the young person was not on bail (eg committing an assault) and those that are 'technical' breaches only and would not constitute an alleged offence if the young person was not on bail (eg disobeying parents)? Currently, even in those jurisdictions in which breaching bail conditions (with the exception of failure to appear) is not a criminal offence, there is no distinction between these two types of bail breaches. This lack of distinction creates a situation in which young people on bail can be arrested and placed on custodial remand for behaviours that are not criminal (or rather, are only criminal because the young person is on bail, such as not obeying a parent).

Research conducted in New South Wales found that there was only a slight difference between the proportion of young people remanded in custody following a technical breach of bail and the proportion of young people remanded in custody following a new alleged offence committed while on bail. Vignaendra et al. (2009) found that of a random sample of young people who had breached bail conditions (n=102), 76 (75%) were remanded in custody. Two-thirds of those remanded in custody (n=50) had not, however, committed a new criminal offence (ie they had breached a technical bail condition, such as not complying with a curfew or not being in the company of a parent):

To describe it differently, 81 per cent of juveniles who had breached their bail order by committing an offence were subsequently remanded in custody and 71 per cent of juveniles who had breached their bail order only through not complying with bail conditions were subsequently remanded in custody (Vignaendra et al. 2009: 3).

Somewhat ironically, in jurisdictions in which breaches of bail are not deemed to be criminal offences, it is precisely because the behaviour is not criminal that police have few options other than arrest. For example, in New South Wales, because breaches of bail do not constitute a criminal offence, police are not bound by the *Law Enforcement (Powers and Responsibilities) Act 2002* or the *Children (Criminal Proceedings) Act 1987*, both of which limit the use of arrest and stipulate that proceedings against young people should be carried out in the least onerous way possible (Wong, Bailey & Kenny 2010). Further, the diversionary measures legislated under the *Young Offenders Act 1997* cannot be used (Wong, Bailey & Kenny 2010), meaning that young people on bail cannot be diverted via a warning, caution or youth justice conference. As a result, a young person who is on bail could be arrested for a non-criminal act (such as not adhering to a curfew), while a young person who is not on bail may be diverted for a genuine offence (eg property damage or minor assault).

Given that limiting the use of arrest is a potential factor in reducing remand rates, it is important that jurisdictions consider whether arrest should be available for technical breaches of bail 'committed' by young people. This report posits that a distinction should be considered between technical and criminal breaches of bail by young people, and that technical breaches of bail should not be responded to via criminal justice measures such as arrest. New offences allegedly committed while on bail, however, should be dealt with as offences would ordinarily be dealt with (ie under the jurisdiction's youth justice legislation). As described above, where this is not the case, minor offences allegedly committed by young people on bail can be dealt with via arrest and result in a young person being placed on custodial remand, whereas the same act committed by a young person who is not on bail may be dealt with via a diversionary measure.

Table 17 Criminal status of bail breaches and penalties

	Offence for young person to fail to appear	Offence for young person to breach other bail conditions	Offence name and penalties			Can police arrest without warrant on breach of bail?	Warrant for arrest by court for failure to appear
NSW	Yes	No	<i>Bail Act 1978</i> s 51 'Offences for failing to appear'			Yes	Yes
			Maximum penalty: Imprisonment not exceeding three years or a fine not exceeding 30 penalty units				
Vic	Yes	No	<i>Bail Act 1977</i> s 30 'Failure to answer bail'			Yes	Yes
			Penalty: 12 months imprisonment				
Qld	Yes	No	<i>Bail Act 1980</i> s 33			Yes ^a	Yes
			'Failure to appear in accordance with undertaking'				
			Penalty: n/a				
WA	Yes	Yes	<i>Bail Act 1982</i> s 51 'Offence to fail to comply with bail undertaking'			Yes	Yes
			Penalty: A fine not exceeding \$10,000 or imprisonment not exceeding three years, or both				
SA	Yes	Yes	<i>Bail Act 1995</i> s 17 'Non-compliance with bail agreement'			Yes	Yes
			Maximum penalty: \$10,000 or imprisonment for two years				
NT	Yes	Yes	<i>Bail Act</i> s 37B 'Offence to breach bail'			Yes	Yes
			Maximum penalty: 200 penalty units or imprisonment for two years				
ACT	Yes	No	<i>Bail Act 1992</i> s 49 'Failure to answer bail'			Yes	Yes
			Maximum penalty: 200 penalty points, imprisonment for two years, or both				
Tas ^b	Yes	Yes	<i>Bail Act 1994</i> s 5(4) 'Contravening notice of appearance before justices given during grant of police bail'			Yes	Yes
			Penalty: Fine not exceeding 10 penalty points or maximum six months imprisonment or both				
			s 9 'Contravention, & c., of condition of bail order to be offence'				
			Penalty: Fine not exceeding 20 penalty points or imprisonment for a term not exceeding 12 months or both				

a: Under s 367(4) of the *Police Powers and Responsibility Act 2000*, before arresting a young person for suspected contravention of a bail undertaking, a police officer must consider whether it would be more appropriate for an application be made under the *Bail Act* (1980) for a variation or revocation of the young person's bail undertaking (excluding not appearing at court and/or harassing witnesses)

b: Under tabled amendments to the *Youth Justice Act 1997* (Tas), breaches of bail conditions, with the exception of failing to appear before a Justice or Court, will not be chargeable offences, but may be considered during sentencing (Tasmania Department of Human Services personal communication 5 November 2012).

Minimising breaches of bail by young people is an important strategy in minimising levels of young people on custodial remand, since a history of breached bail conditions can influence the outcome of future bail decisions, thereby increasing the likelihood of a young person being remanded in custody. This is of particular concern in jurisdictions in which breaching bail conditions is a criminal offence, as bail breaches in these jurisdictions constitute a criminal history. As described earlier in this report, a young person's criminal history can be taken into account during a bail decision.

It should also be considered whether it is fair and just for young people to be placed on custodial remand for breaches of bail even though the offence(s) they have been charged with does not carry a potential sentence of detention. As one Magistrate in Clare et al.'s (2011: 31) study on Western Australia commented:

What is starting to happen is that there are some kids for offences such as disorderly conduct, which don't carry detention as a sentencing option, and yet by the time the Court comes to deal with them they are in custody because they have breached bail conditions rather than being in custody because of the substantive offence in the first place.

In general, stakeholders from states and territories where breaching bail is a criminal offence were of the view that criminalising breaches of bail criminalises non-criminal behaviours and results in the unnecessary accumulation of fresh charges against young people. In particular, where young people receive bail conditions that are intended to address their welfare needs, stakeholders argued that it is counterintuitive for a breach of these conditions to constitute a criminal offence. As described above, therefore, a distinction should be made between 'technical' and 'criminal' breaches of bail conditions imposed on young people.

Policing performance measures

The literature on custodial remand posits that Key Performance Indicators (KPIs) relating to policing may also have an influence on remand rates.

Stubbs (2010) suggests that police performance measures in New South Wales, which focus on bail compliance, have contributed towards increases in remand rates as police proactively target bail compliance in order to meet performance measures (see also Noetic Solutions 2010; UnitingCare Burnside 2009; Wong, Bailey & Kenny 2010). Similarly, King, Bamford and Sarre's (2009) study on adult bail in Victoria and South Australia found that the then SA policy of targeting repeat offenders and using arrest rather than summons contributed towards higher rates of custodial remand in South Australia. Stakeholders consulted for King, Bamford and Sarre's (2009) study believed that reaching organisational performance indicators, such as bail compliance and targeting recidivists, influenced strategies for policing accused persons on bail and in turn contributed to levels of custodial remand.

Conversely, the NSW Police Force submission to the review of NSW Bail Act stated that although, in accordance with the NSW State Plan, bail compliance checks had increased by approximately 400 percent between January 2007 and September 2010; the rate of young people on custodial remand remained steady during this period (NSW Police Force 2011). However, using the data provided by police, NSW Juvenile Justice identified a moderate positive statistical correlation between the number of police bail compliance checks per month and the average daily number of young people in custody by month for this period (Pearson's $r=0.373$, $p<.01$) (Department of Attorney-General and Justice personal communication 30 January 2013). This would support data from other sources that indicated that there was in fact a substantial increase in the number of young people held on remand in New South Wales between 2007 and 2008 (see eg Richards & Lyneham 2010; Vignaendra et al. 2009). Yet, as noted above, the rates of young people on custodial remand in New South Wales have generally remained stable since 2008 (AIHW 2012b).

Importantly, as one bail decision maker from New South Wales commented when interviewed for this study, including bail compliance checks as an indicator of police performance had primarily resulted in increasing the quantity rather than 'quality' (or nature) of bail breaches being targeted. In other words, consideration was not given to the types of bail breaches, including whether these were

minor or serious, or whether they were technical or criminal breaches. It would be reasonable, therefore, to query to what extent this type of performance indicator can contribute towards community safety.

Of course, KPIs that are 'consistent with and likely to encourage positive outcomes' (Stubbs 2010: 500) could conversely be used to reduce remand rates, as Sarre, King and Bamford (2006) recommend. For example, compliance with the Convention on the Rights of the Child (United Nations 1989) could be implemented as a KPI for police. It emerged from interviews with stakeholders undertaken for this study, however, that key players in remand decisions for young people have varying objectives to meet and varying measures that indicate their level of performance against these objectives. For example, while police in some jurisdictions may have their performance measured against the objective of ensuring bail compliance by young people, bail service providers may have their performance measured against the rival objective of assisting young people to obtain bail within a specified period of time. According to stakeholders, the Metropolitan Youth Bail Service in Western Australia has a KPI target of 85 percent (previously 80%) of young people entering custody with bail options that are successfully bailed within seven days of admission. It is recommended that performance indicators for key actors in bail decision making, service provision and support for young people could become better aligned to more effectively meet the needs of both the community and young people in trouble with the law.

Policing practices

Even where meeting KPIs was not an issue, some stakeholders interviewed for this research raised concerns about what they consider to be the overzealous policing of young people's bail compliance and in some cases, a 'zero tolerance' approach to bail breaches. For example, one Tasmanian stakeholder raised concerns that the strict monitoring of young people's bail compliance by police was being used as an incapacitating strategy to reduce youth offending and that this was influencing the rate of custodial remand. While this may be a tempting strategy for police under

pressure to reduce youth offending rates, it needs to be considered whether it is appropriate to incarcerate young people who have not yet been tried on their current charge(s).

In another example, a WA stakeholder raised concerns about WA's effort to replicate the UK's Priority and Prolific Offender Program. According to the stakeholder, this program is based on the premise that a disproportionate amount of crime is committed by a small group of people. The issue raised by the stakeholder was that in some instances, young people are labelled 'priority and prolific offenders' and therefore intensively monitored not because they have a criminal history themselves (because some do not), but because of their familial connection with those with a criminal history. Similarly, a trial of curfews for young repeat offenders in Victoria involves close monitoring of bail compliance by police (see Dowsley & Hurley 2011).

Another issue raised in the existing literature on bail and remand for young people is that in some jurisdictions, a decline in the use of diversionary measures for young people has occurred. For example, the Auditor General for Western Australia (cited in Clare et al. 2011) reports that police diversions declined by 13 percent as a proportion of all police contacts with young people over the five year period from 2002–03 to 2006–07, resulting in 1,937 fewer instances of young people being diverted from the youth justice system. WA stakeholders interviewed for this research similarly reported a decline in the use of diversionary mechanisms by police. This is important to note in the context of bail decisions, given that any corresponding increase in the arrest of young people is likely to result in an increase in young people on custodial remand. In particular, it is important to consider in light of the fact that research has indicated that Indigenous young people are less likely to be diverted from the criminal justice system than their non-Indigenous counterparts (see eg Allard et al. 2010).

These examples suggest that policing practices can influence rates of custodial remand for young people. As described elsewhere in this report, policing practices may in turn be influenced by community punitiveness and/or media representations of youth offending.

Administrative errors

Wong, Bailey and Kenny's (2010) research in New South Wales found that three percent of a sample of young people whose bail hearings took place in Parramatta Children's Court (n=4) were in police custody due to administrative errors or unlawful arrests. More recently, a class action was launched in New South Wales seeking compensation for a number of young people who had been remanded in custody for 'breaching' bail conditions that the police's computer system did not show were no longer current (Brown 2011; Maurice Blackburn 2010). Maurice Blackburn lawyers, who have launched the class action with the NSW Public Interest Advocacy Centre, claim that approximately 200 young people have been detained due to computer errors (Maurice Blackburn 2010). At the time of writing, the case was being contested by NSW Police and the Department of Attorney-General and Justice and was subject to litigation (Department of Attorney General and Justice personal communication 30 January 2013).

Stakeholders from New South Wales and South Australia interviewed for this study noted that there are systemic issues with the courts' information management system in tracking the movements of young people between courts, particularly in tracking their bail conditions and current bail orders. This can result in young people receiving different bail conditions from a number of courts.

Access to accurate information on young people is therefore vital for police officers and the courts to make appropriate decisions regarding arrest and bail. Failures in administrative and data management systems to provide police with accurate and up-to-date data on a young person's current orders and the conditions of these orders can contribute to the unlawful apprehension of young people and the inappropriate use of custodial remand. Problems in tracking bail orders and conditions can also result in conflicting and potentially confusing bail conditions being imposed on young people with multiple orders.

Lack of access to services/programs

A lack of appropriate services and programs to assist and support young people on bail has also been identified as potentially contributing to rates of custodial remand. In addition to a lack of bail hostels and other appropriate accommodation options for young people, particularly Indigenous young people (QCCYPCG 2012 and those from regional/remote areas (Clare et al. 2011; Denning-Cotter 2008), a lack of access to after-hours services has also been raised as a key issue (Stubbs 2010).

A Youth Magistrate consulted for the review on the NT youth justice system stated that she would often refuse bail when she could not be confident that the sufficient services or support would be available for the young person. One of the recommendations of this review was the development of a bail support scheme similar to the one implemented in Western Australia.

Bail support services currently in operation for young people in each jurisdiction are described later in this report.

The influence of therapeutic jurisprudence

A number of research studies and the broader literature on bail and remand have highlighted the potentially problematic impact of therapeutic jurisprudence (which is the use of the law as a therapeutic agent; Wexler & Winick 1996) on rates of young people on bail and remand. Concerns are premised on the perception that there has been a 'shift in understanding about what the grant of bail can achieve' (Edney 2007: 101). Edney (2007) argues that while traditional bail conditions were designed to ensure that the accused person attend a subsequent court hearing and did not 'reoffend', a new generation of bail conditions has emerged, which aims to rehabilitate or reform the accused person. These new 'therapeutic bail conditions'

(Edney 2007: 105) are supported in some jurisdictions by bail legislation that allows for trials to be postponed while the defendant participates in a program designed to prevent recidivism (Edney 2007). Mather's (2008) study of bail supervision of young people in South Australia provides empirical support for the view that therapeutic jurisprudence has altered traditional understandings about the purposes of bail. Stakeholders in Mather's (2008: 684) study 'repeatedly said that services to all young people were provided on the basis of their needs, not on the type of order they were under'. One stakeholder (cited in Mather 2008: 684) claimed that:

It's not doing the right thing with young people if they don't have supports whilst the sentence is being heard. Irrespective of [the fact that] you are innocent until proven guilty, if they're in this sort of trouble there's something going on.

Therapeutic jurisprudence approaches are undoubtedly implemented with the best interests of both communities and young people themselves in mind and in practice, bail conditions have been found to assist and support some offenders to reduce 'reoffending'. For example, Raine and Willson (1995) found that some defendants appear to benefit from the structure that bail conditions can provide. As Mather (2008: 686) argues, however, in contrast to traditional understandings of bail, 'within the therapeutic framework the distinction between guilt and innocence loses all relevance'. This is a crucial issue to consider, as such an approach has the potential to have a 'mesh-thinning' effect, that is, once 'caught up' in the youth justice system, young people's opportunities to exit the system diminish — 'quasi-therapeutic bail conditions...create numerous opportunities in which otherwise legal (eg not obeying house rules or touching a remote control) or non-criminal (eg truanting) behaviours can be subjected to criminal sanctions' (Mather 2008: 687).

Conversely, it has been argued that the adoption of a therapeutic jurisprudence approach has resulted in increased resources and programs and therefore better support for those on bail (Ericson & Vinson 2011; Sarre, King & Bamford 2006) and that given the often complex needs of accused persons, a crucial intervention point may be missed if therapeutic programs are not provided at this stage of the criminal justice process (Raine & Willson

1997). Balancing the potential for therapeutic jurisprudence measures to have a positive impact on young people (Ericson & Vinson 2011) with the potential for net-widening that such measures may introduce (Mather 2008) is therefore critical.

It is important to note in this context that although alleged offenders, about whom bail decisions are being made, are technically innocent, much bail legislation (as well as the broader literature) refers to one of the purposes of bail as being to prevent reoffending. This underscores one of the key challenges faced by bail decision makers—while the accused person may be technically innocent on the current charges, they may already have an established track record of offending. 'Preventing the accused from reoffending' may therefore be a real concern for bail decision makers, even if the current charges are not serious. This may also help explain how some young people on minor charges are remanded in custody (see eg Jesuit Social Services 2013). This raises the question of whether it is fair for young people to be placed on custodial remand for a minor offence because they have committed more serious offences in the past. Further, it supports the findings of McAra and McVie's (2007) study on the Scottish youth justice system, which found that young people who had previous contact with the system were much more likely to have future contact than other young people (irrespective of the seriousness of their recent offending). It should be considered, in this context, whether it is appropriate to take into account a young person's previous offending behaviour.

In response to this shift in expectations about what bail can achieve, the Victorian Law Reform Commission (2007) recently recommended that bail legislation in Victoria should focus on achieving the traditional purposes of bail, by reducing the likelihood that an accused person will—fail to attend court, commit an offence while on bail, endanger the safety of the community, or interfere with witnesses or obstruct the course of justice.

Stakeholders interviewed for this study, however, saw the issue in more nuanced terms. While many agreed that therapeutic interventions are not appropriate for young people who have not yet been found guilty or admitted guilt, others commented that life skills interventions (eg interventions to assist

young people with needs such as accommodation, education, employment and relationships) would be suitable irrespective of the young people's guilt. One Magistrate commented, for example, that he has 'no problems' mandating young people to participate in such interventions. Interventions that address young people's offending behaviour (eg participation in the Changing Habits and Reaching Targets (CHART) program) were viewed as more problematic, although one Magistrate claimed he would mandate a young person's participation in such a program if the young person was on an existing youth justice order. This approach allows Magistrates to address the offending behaviour of a young person in trouble with the law even though the young person may be technically innocent on the current charge(s).

It was also noted by stakeholders that young people usually plead guilty or admitted their guilt to police (see also Mulroney 2012). As such, it was seen as something of a wasted opportunity to avoid addressing a young person's offending behaviour because of legal technicalities. A number of jurisdictions (New South Wales, Victoria, Western Australia and the Australian Capital Territory) have in place a system of deferred sentencing that operates in this context by allowing young people who have pleaded or been found guilty to participate in

therapeutic interventions designed to address their offending behaviour prior to sentencing taking place. A similar initiative is currently being trialled in the southern region of Tasmania.

Although these provisions should enable jurisdictions to limit or reduce the use of custodial remand for young people, as they allow young people to be on bail in the community prior to being sentenced, it is important to note that they only relate to young people awaiting sentencing, not those awaiting trial. Further, as one stakeholder interviewed for this research pointed out, whether a young person is encouraged or mandated to participate in a therapeutic intervention is often up to the relevant Magistrate and as discussed above, Magistrates' views on how best to deal with young people accused of offending vary considerably.

This discussion highlights that a key challenge for bail decision makers is targeting. In other words, how can bail decision makers apply the 'innocent until proven guilty' standard to young people who do not require intensive interventions, while intervening with those young people who are on a trajectory towards becoming entrenched in offending patterns?



Bail support services and programs

Bail support programs assist accused persons who would otherwise be remanded in custody to access bail and to remain on bail (ie to meet their bail conditions). A lack of appropriate services to support young people to obtain bail and meet bail conditions has been identified as potentially contributing towards the high number of young people on custodial remand, particularly for Indigenous young people and young people from regional or remote areas. As a result, the provision of support in completing bail orders can play an important role in reducing rates of custodial remand. Bail support programs are usually specifically targeted either for adults or young people, presumably to distinguish the different needs of these groups. They are provided either by the jurisdiction's youth justice department or by non-government organisations. In some states/territories, non-government organisations are funded by the jurisdiction's youth justice agency to implement bail support programs.

Bail support programs (both government and non-government) were consulted with in all states and territories. Following is a description of government and non-government providers of bail support services in each jurisdiction, including an overview of research findings about the efficacy of these programs, where such findings are available.

New South Wales

Bail assistance line

The following information was provided by the Department of Attorney General and Justice about this service (personal communication 30 January 2013).

The Bail Assistance Line (BAL) is an after hours service provided by Juvenile Justice in partnership with NSW Police Force and Family and Community Services, that operates between 4pm and 3am every day of the year (including weekends and public holidays). The BAL provides a service to NSW Police who are considering conditional bail where the child or young person is unable to meet certain conditions. Police can call a 1300 number and speak with a Bail Coordinator who can provide a continuum of services, ranging from providing transport, locating parents or guardians, to facilitating accommodation and case support through the non-government sector organisations who provide services for children and young people.

Originating as a recommendation from the Wood Special Inquiry into Children Protection Services in NSW, 2008, and the NSW Government 'Keep Them Safe' Action Plan, 2009, the Bail

Assistance Line is still in its pilot phase, commencing operations in Dubbo in June 2010, Western Sydney and South Western Sydney in August 2010, and the Hunter/Newcastle area in late November 2010. To date, the BAL has received 335 calls and provided 95 safe accommodation placements for children and young people at risk of entering the juvenile remand system due to issues related to lack of safe accommodation, transport and case support. The bail support services are provided by the non-government sector, and utilise a mixed model of service delivery—in metropolitan and south/western Sydney a house in the community is used for accommodation purposes—staffed on a 24 hour basis. In the Hunter/Newcastle area, foster care placements are provided for a period of up to 28 days.

Whilst the BAL operates primarily to assist Police in finding suitable services for children and young people for whom conditional bail is being considered, the BAL can also, where resources are available, accept referrals from Juvenile Justice Community Services Offices and Centres, from the Children's Court (particularly weekend Bail Court), as well as via Crisis Response Team/ Helpline Staff at Family and Community Services.

The Bail Assistance Line will be evaluated in March 2013.

Bail supervision

The NSW youth justice protocol is to only supervise young people on bail who have pleaded guilty. This is outlined in a 2005 Memorandum of Understanding between the NSW Department of Juvenile Justice and the courts. A youth justice stakeholder reported that although each youth justice office has a different approach, role and strategy for dealing with young people on bail and in remanded detention, bail supervision is available statewide.

Bail supervision is triggered by the courts imposing it as a condition of bail. According to information received from the Department of Juvenile Justice, bail supervision is meant to include one direct contact per week and if the bail supervision exceeds four weeks, weekly contact is to be maintained until the completion of a risk assessment. If the young

person is assessed as 'low risk', the young person can be referred to a community-based agency for further support (but not bail supervision). For those assessed as medium to high risk, bail supervision is to include offence-focused interventions such as the CHART program.

The Department of Attorney General and Justice advises that

as with all of the interventions provided by Juvenile Justice, community-based bail supervision delivers evidence-based and offence focused interventions. As only children and young people who have entered a guilty plea will be receiving bail supervision, this ensures that Juvenile Justice is allocating resources towards those children and young people most in need of offence focused interventions while on bail supervision (personal communication 30 January 2013).

Further:

New spending on juvenile bail and remand interventions in NSW resulted in a 9% rise in the agency's supervised bail undertakings between 2010–11 and 2011–12. Supports provided include the provision of information to the court outlining proposed bail supports and services, assisting young people find suitable accommodation, referral to alcohol and other drug rehabilitation services, and the provision of offence-focused interventions during the bail period. Since the new funding there has also been a decrease in the number of young people in custody who have conditional bail but have not been able to meet the conditions. During 2011–2012 there were 1,480 bail supervisions in NSW with 5,137 remand interventions (remand interventions are conducted by JJ staff to assist suitable young people in custody on remand to obtain bail; personal communication 30 January 2013).

Other services

There are a number of community services that provide bail support for young people outside of the NSW statutory youth justice agency. Stakeholders mentioned Mission Australia and Anglicare as two community organisations that have youth workers who provide general support, supervision and case

management for young people. These care workers can also provide information for a young person's bail application and assist in providing information to the court about the young person's level of support.

Victoria

Bail supervision

As with New South Wales, Victoria's statutory youth justice agency only supervises young people on bail who have pleaded guilty or where there has been a finding of guilt (and sentence has been deferred). Youth justice provides bail supervision statewide on a case-by-case basis, including:

- assisting with accommodation needs;
- referring the young person to relevant services (eg drug and alcohol counselling);
- linking the young person to education, training or employment; and
- addressing the young person's criminogenic needs.

Central After Hours Assessment and Bail Placement Service

This is a statewide service available for young people who are facing a bail decision outside of business hours. This is provided by the Department of Human Services and delivers information in matters where police and/or a Bail Justice are considering placing a young person on custodial remand outside of business hours (during business hours the police would contact the regional youth justice unit; Vic DHS 2010). Police are required to notify CAHABPS during these circumstances and allow the young person to be in contact with a CAHABPS worker prior to a bail hearing. The CAHABPS worker will 'undertake an assessment of the young person's suitability for bail placement, provide a bail facilitation role and bail advice' (Vic DHS 2010: 1). The worker can also provide advice to the young person on the nature of the proceedings, their rights and responsibilities and expectations if they are released on bail, and can assist with bail accommodation and refer to additional youth and family support services.

This assessment is conducted in person at the police station within the metropolitan area and over the telephone with young people in rural/ regional areas.

Youth Justice Intensive Bail Supervision Program (including Koori Intensive Bail Supervision Program)

The objectives of this program are to 'provide an intensive bail supervision service for young people aged 10–18 years who are at risk of being remanded or re-remanded' and 'to divert young people from future involvement in the criminal justice system' (Vic DHS 2011b: 1). This service is provided by the Victoria Department of Human Services.

A young person can only gain access to this program when it has been set as a bail condition by the courts. However, potential clients can be identified by the Youth Justice Court Advice Service, the police, the program's case managers, the Children's Court, Youth Justice Custodial Services, CAHABPS and legal representatives (Vic DHS 2011b). These actors can then refer the young person to be assessed for suitability by the program's case manager or a Youth Justice Court Advice Service worker. The case manager or the young person's legal representative can then make the recommendation for the young person to participate in the program as part of their bail to the presiding judicial officer (Vic DHS 2011b). The program is voluntary and young people must consent to participating in the program.

The young person is provided with case management to reduce the risk of them 'reoffending' while on bail and to assist them to comply with their bail conditions. The program also assists in addressing the young person's needs related to accommodation, education and training, employment, health and development, family and other matters.

This program is only available to young people in the North, West and South metropolitan regions. In the North and West regions, the Department collaborates with the community organisation Concern Australia, which provides outreach work with young people in addition to the support

provided by the program's case manager. A preliminary evaluation of the program found that

over 40 young people were effectively supervised in the community, the majority of whom had adhered to their bail conditions, and none had received a custodial order when they returned to court for sentencing (Vic DHS 2011a).

In addition to the metropolitan regions stated above, the Koori Intensive Bail Supervision Program is also available in the Gippsland, Hume and Barwon South West regions (AIHW 2012a). This program aims to provide culturally specific support to Indigenous young people (AIHW 2012a).

Queensland

Conditional Bail Program

The Conditional Bail Program is 'aimed at a young person whom the court believes is highly unlikely to comply with bail conditions unless supervised under a structured program' (Queensland Government 2012b: 2). The program is delivered by Queensland Government youth justice service centres as a form of supervised bail. A young person can only participate in the program if a court makes participation a condition of their bail order. The program is not intended to specifically address alleged offending behaviour or monitor bail conditions that do not involve the Department (Queensland Government 2012b); the majority of young people involved in the program have not entered a guilty plea.

The program is tailored to meet the needs of young people via assessment and a case planning framework. These program and activities may include:

- pro-social or leisure activities;
- initiatives to address immediate personal or developmental needs and strengthen family ties or cultural attachment;
- delivery of the CHART or Aggression Replacement Training programs, to address behaviours that have been assessed as causing problems in the young person's life or that place them at risk of breaching their bail undertaking;

- re-entry into school, vocational education and training, employment programs, a traineeship or apprenticeship;
- community-based sporting or recreational activities with a developmental focus; and
- activities to support the young person to access other community resources and services.

A 2012 snapshot review of 20 young people on a Conditional Bail Program found that in terms of the outcomes of the program, 11 successfully completed the program and had not subsequently been charged with new or different offences according to the latest available records (Department of Justice and Attorney-General personal communication 30 January 2013).

Youth Bail Accommodation Support Service

This program, delivered by the Youth Advocacy Centre (Queensland Government 2012a), aims to implement support services and developmental interventions (eg independent living skills, family support, access to education, employment and training etc) to increase a young person's capacity to comply with their bail conditions, maintain stable accommodation and to engage positively with family, pro-social peers and broader community on a sustainable basis (Department of Justice and Attorney-General personal communication 30 January 2013).

The program is based in Brisbane but is also available from the Sunshine Coast through to Ipswich in South East Queensland (Department of Justice and Attorney-General personal communication 30 January 2013). Young people can be referred to Youth Bail Accommodation Support Service by youth justice services or legal representatives. Participation in the program cannot be made a bail condition and is completely voluntary (Department of Justice and Attorney-General personal communication 30 January 2013).

Youth Opportunity Program

The Youth Opportunity program is based in Cairns and is delivered by the non-government organisation

ACT for Kids (Queensland Government 2012a). The Youth Opportunity Program consists of a bail support program and a rehabilitation program for young people on youth justice orders. The Bail Support Service provides bail support services within a developmental case management framework in collaboration with the local youth justice services. This includes assessment of a young person's support and accommodation needs, joint case planning with key stakeholders, providing support and coordinating interventions such as independent living skills, family support, access to education, employment and training etc; providing information, advice and referrals to necessary service and accommodation providers and holding regular reviews to assess progress towards the goals of the case plan (Department of Justice and Attorney-General personal communication 30 January 2013). Young people can be referred to the Youth Opportunity Program by Youth Justice Services, Youth Detention Centres and legal representatives. This service supports approximately 25 young people on bail per year (Department of Justice and Attorney-General personal communication 30 January 2013).

Townsville Bail Support Service

The service is provided by the Murri Watch Aboriginal and Torres Strait Islander Corporation. It provides 'living skills development, accommodation assistance and family support to Aboriginal and Torres Strait Islander young people at risk of being remanded, and their families' (Queensland Government 2012a: 15). Young people can be referred to this program by Youth Justice Services, Youth Detention Centres and legal representatives (Department of Justice and Attorney-General personal communication 30 January 2013).

Mt Isa Bail Support Service

This program is delivered by the Young People Ahead organisation. It 'provides assistance to Indigenous and non-Indigenous young people, and their families, at risk of breaching their bail conditions (Department of Justice and Attorney-General personal communication 30 January 2013).

Indigenous Families and Youth Coaching and Mentoring Service

This service is provided by Lifeline Darling Downs and South West Queensland Ltd. and covers the following areas—Roma, Cunnamulla, Charleville, St. George and surrounding areas (Queensland Government 2012a). The Bail Support Service component of the service 'provides practical assistance to young people on bail, to help them reside in the community, with their family, or extended family, and comply with conditions of bail' (Qld Government 2012a: 15).

Atherton Bail Support Service

The Atherton Bail Support Service is delivered by Community Services Tablelands Inc. This service provides casework support to young people and their families as part of the Conditional Bail Program or to those who are subject to bail with conditions (Department of Justice and Attorney-General personal communication 30 January 2013).

Supervised Community Accommodation

As part of the 2009 National Partnership Agreement on Homelessness, funding was made available to establish the Supervised Community Accommodation service in Townsville. This service is delivered by Mission Australia.

The service provides 24 hour/seven day per week supervised accommodation in the community for young males leaving detention (including young people previously remanded in custody) who are at high risk of homelessness. Young males are provided with case management support within the service to ensure that their developmental and support needs are met. The objectives of the services are to:

- provide supervised accommodation and tailored support to young people based on their developmental and welfare needs; and
- assist young people to develop the skills to transition to semi-independent/independent housing or assist them to reconnect with family.

The target group for this initiative is young males who are:

- aged primarily between 16 and 18 years who are residing in Townsville catchment areas;
- leaving detention on either a supervised release order or bail; and
- are homeless or at risk of homelessness.

Since the service opened in November 2010 to the end of the financial year of 2011–12, 12 young people have completed and/or exited the program. For those who have exited the Supervised Community Accommodation in 2011–12:

- six exited to family;
- three exited to further non-government housing/homelessness support providers;
- one exited to a non-government training and accommodation program;
- one exited to a mental health unit; and
- one exited to a youth detention centre (Department of Justice and Attorney-General personal communication 30 January 2013).

Western Australia

Metropolitan Youth Bail Services

The Metropolitan Youth Bail Service (MYBS) was established to avoid the unnecessary custodial remand of young people in circumstances where they have been deemed eligible for bail by the Court, but a responsible adult could not be found, was not considered suitable or was unwilling to sign a bail undertaking on their behalf. MYBS is a government service that delivers supervised bail to young people.

Under the program, Prevention and Diversion Officers are authorised to act as a 'responsible person' when no one else can be located. As signatory to the bail undertaking, they have a responsibility to withdraw bail should a breach occur. They also ensure the young person attends the relevant court, at the requested time with an understanding of the court process and why they are there. In addition, MYBS assumes a duty of care to ensure that young people being bailed have access to a safe, secure and supportive living environment.

MYBS functions from multiple sites across the Perth metropolitan area, providing a seven day a week service, with extended hours of coverage during peak arrest times. The service assists young people to obtain bail and meet bail conditions by providing the following services:

- risk assessments (ie offending behaviour, past compliance, safety and wellbeing of the young person and community safety);
- accommodation suitability assessments;
- short-term placements in the MYBS Youth Options Bail facility (see below);
- assisting young people to re-engage with educational, vocational and recreational pursuits;
- undertaking assessment and referral to various mental health and substance misuse programs/facilities;
- providing point of arrest intervention to prevent young people from entering custodial remand by taking up bail at the time of arrest when no other responsible adult can be located;
- maintaining an office at the Perth Children's Court, providing submissions and advocacy to the judiciary, undertaking assessments and bailing young people directly following their Court appearance. This service is also provided to seven outer metropolitan Children's Courts;
- maintaining an office at the youth detention facility (at the time of consultations this was Rangeview Remand Centre. As Rangeview has since closed as a youth detention facility, the office is now located at Banksia Hill Detention Centre) to undertake assessments and bail young people from custodial remand;
- family engagement and brief intervention for young people who receive a 'high end' police caution; and
- monitoring young people's curfews.

According to stakeholder consultations, MYBS has substantially expanded since its inception 20 years ago. In its first year of operation, the service conducted 25 placements and in the last year the service conducted 900 placements.

According to consultations, young people are required to telephone the service three times a week. Workers also conduct home visits once

or twice a week. An independent third party is employed to determine whether the young person is participating in required programs. Curfews of young people on bail are monitored by police, or by staff if the young person is accommodated in a Youth Options facility. The primary aim of the program is to protect first-time 'offenders' who are on the lower end of the offending scale. The MYBS will not sign a young person's undertaking if they believe they cannot mitigate the risks of young people harming themselves or the community.

According to stakeholder consultations, the service has had approximately 70 percent of young people's bail orders completed successfully, compared with about half of bail orders with a 'responsible person' undertaking. There has also been an increase of Indigenous clients, up from 30 to 54 percent in the previous five years.

Regional Youth Justice Services

The Regional Youth Justice Services Strategy established in the Goldfields, Mid-West Gascoyne, West Kimberley, East Kimberley and Pilbara regions offers a range of services, including:

- an extended-hours bail service to help police make suitable young people eligible for bail;
- an extended-hours bail service to help police make suitable young people eligible for bail. As with the MYBS, this service also assists in locating suitable adults to provide bail for eligible young people, or short placements in the MYBS Youth Options Bail facility;
- emergency short-stay accommodation for young people who have been granted bail but have nowhere to bail them and nowhere to go;
- an expanded Juvenile Justice Team to target young offenders who are in the early stages of offending and divert them from the formal justice system; and
- education and counselling services.

Youth Bail Options Facilities and Program

Drug Arm and Life Without Barriers are two non-government organisations contracted to provide regional bail support for young people.

Drug Arm offers short-term accommodation for young people on bail that are staffed 24 hours a day, seven days a week in Armadale, Geraldton, Kalgoorlie and Port Hedland (Drug Arm WA 2011). The service also provides within the facility a day program that aims to reengage young people with education (Drug Arm WA 2011).

Life Without Barriers provide a host family for a young person to live with until another responsible person can be found to sign their bail undertaking. This service is available in the Broome/Kununurra region (Life Without Barriers 2011).

South Australia

Bail supervision

In South Australia, supervised bail is administered by Community Youth Justice, Youth Justice Directorate within the Department for Communities and Social Inclusion. Bail conditions are set by the court. Community Youth Justice may also set goals with the young person on bail (eg school attendance), but these are not formal bail conditions and the young person cannot be 'breached' for failing to adhere to these goals.

Tasmania

Bail supervision for young people is not currently available from youth justice (Department of Health and Human Services) in Tasmania. However, under tabled amendments to the *Youth Justice Act 1997*, youth justice workers can be required to establish and implement an intervention plan for young people released on a bail order who have had their sentence deferred by the courts (Department of Health and Human Services personal communication 22 February 2013). Currently, a non-government organisation provides voluntary bail support, as outlined below.

Save the Children

Non-government organisation 'Save the Children' operates the Bail Support Program in Tasmania (see

Daly 2012 for more information). This is a voluntary program, but a Magistrate may order a mandatory meeting of the young person with Save the Children workers. The process begins with a Bail Support Plan that the workers construct with the young person to outline their goals and aspirations. This Plan is submitted to the Magistrate for consideration in a bail decision. However, the goals are time-dependent and have to coincide with the length of the bail order. A progress report is then submitted to the Magistrate to inform his/her decision about sentencing. This program is only available in the South area and for young people who are not child protection clients.

According to a representative of the organisation interviewed for this research, 62 percent of young people approached do not choose to engage in the program, primarily because a large proportion of young people believe they do not need support because they have made a 'stupid mistake' and already have support from their family.

Young people are not sent back to court if they 'breach' the conditions of their bail plan. Their lack of engagement and/or missed appointments are, however, noted in their progress report, which is submitted to the Magistrate and reflected in their sentence.

Northern Territory

Supervised Bail Program

Supervised bail is a territory-wide program administered by the Northern Territory Department of Correctional Services. Under the program, Northern Territory Community Corrections provides compliance and surveillance management for young people placed on supervised bail orders. This usually comprises regular curfew and school attendance checks, and alcohol and other drugs tests. The court may include additional requirements on a case-by-case basis, such as referral options for the management of substance abuse.

Prior to the commencement of the order, Northern Territory Community Corrections will conduct a bail

assessment, which includes a review of family welfare and home environment.

Australian Capital Territory

After-hours Bail Support Service

This service aims to divert young people from custodial remand with a focus on those with fresh charges. It focuses on finding accommodation for those who have breached their bail conditions or are at risk of breaching bail conditions. The service also provides assistance in getting 'reside as directed' conditions changed as well as overall support for bail applications and during release on bail. Staff are in the office from 5 pm to 11 pm and on-call until 2 am on weekdays, and on-call from 4 pm to 2 am on weekends and public holidays.

A recent internal evaluation showed that there had been a 17 percent reduction in short-term custodial remand episodes at the Bimberi Youth Detention Centre in the After-hours Bail Support Service's first six months of operation and it had helped divert 21 young people from custody between November 2011 and April 2012 (ACT Government 2012).

Supervised bail

The Office for Children, Youth and Family Support (OCYFS) provides supervised bail to young people regardless of their plea status. According to stakeholder consultations, staff members work to establish areas of need and construct a plan for the young person. Sometimes the OCYFS is given specific instructions by the Magistrate about addressing the young person's needs during their supervised bail.

One challenge identified during consultations is supervising young people who have not pleaded guilty. It is important that staff avoid any discussion of untried charges or other offences the young person has not been charged with, to prevent becoming a witness. The bail status of the young person also limits the capacity of OCYFS staff to address the criminogenic needs of the young person. For this reason, staff tend to focus on the

broader issues unrelated to specific criminogenic needs, such as accommodation, attitudes to women, schooling and relationships as part of their supervision.

Discussion

A number of important issues emerge from this information about bail support services for young people in Australia.

Lack of evaluations of bail support services for young people

First, it is clear that few evaluations of bail support service for young people have been conducted. The evidence about effective bail support for young people in Australia is therefore very limited. As providing effective bail support has been identified as an important factor in reducing remand rates (Denning-Cotter 2008), a key recommendation of this report is that good-quality evaluations of bail support services provided to young alleged offenders be carried out.

A review of international literature on the elements of effective bail support programs posited the following 'principles of best practice':

- voluntary participation rather than mandatory intervention;
- support and intervention;
- holistic, with broad needs assessment and response, providing information, support and intervention as required;
- coordinated and interdepartmental, to provide access to pathways across different service systems; and
- adaptable and responsive to local conditions (Denning-Cotter 2008).

Small numbers of young people participating in bail support programs

Next, in some instances, it appears that only small numbers of young people are participating in bail support programs. For example, as described above, 40 young people took part in Victoria's

Intensive Bail Supervision Program in during 2010–11.

Figures are not currently available for all the programs described above and it is not uniformly the case that only small numbers of young people participate in bail support programs. It is nonetheless worth considering why, in some cases, only small numbers of young people access bail support, whether it is desirable to have larger numbers of young people accessing such support and if so, what might be done to increase young people's access to bail support services. These issues are touched on further below.

Lack of bail support in regional, rural and remote areas

As is clear from the above description of current programs, many bail support services are available in metropolitan areas only. For example, the Bail Assistance Line in New South Wales is available only in Sydney and Newcastle. Although some jurisdictions have bail support services in place in some regional areas (see in particular the programs described in the Queensland and Western Australia sections above), support for young people from rural and remote areas in particular is a clear service gap.

It should also be noted that although Indigenous-specific programs for young people in regional areas (such as Victoria's Koori Intensive Bail Supervision Program) are laudable, equating young people from regional areas with Indigenous young people creates a service gap for non-Indigenous young people in these areas.

Purpose of bail support programs

The programs described above vary according to whether they assist young people get bail in the first instance or remain on bail by meeting their bail conditions. For example, while WA's Metropolitan Youth Bail Services assist young people to get bail by having a staff member act as a 'responsible person' for the young person's bail undertaking, SA's system of bail supervision helps young people remain on bail by providing case management for the young person. Some programs address both of these aims.

Ultimately, these two types of programs have the same aim—avoiding the unnecessary placement of young people on custodial remand. It is nonetheless worth recognising these two program types, as well as that not all jurisdictions have both types in place. Determining which type of program is most effective in reducing the number of young people placed on custodial remand is beyond the scope of this report; nonetheless, it may be valuable for jurisdictions to consider their existing program coverage in this regard.

Lack of engagement with young people with complex needs and/or offending histories

While a number of the bail support programs described above focus specifically on young people with complex needs and/or histories of offending or non-compliance with orders, others intentionally exclude these young people. For example, Tasmania's Save the Children program excludes 'clients' of the child protection system.

Although intervening with young people before they become entrenched in offending careers is a laudable aim, it is undoubtedly the case that young people with complex needs and histories of offending are those who are least likely to be granted bail. To some extent, therefore, programs that exclude these young people miss a key opportunity to reduce the number of young people on custodial remand by focusing on those most likely to be granted bail.

Whether young people are required to plead guilty to participate in bail support programs

Another important distinction among the programs described above is whether young people are required to plead guilty (or otherwise acknowledge guilt) in order to participate. This is an important issue, since there is some debate about whether young people who have not pleaded guilty should be encouraged or even required to participate in programs designed to address their alleged offending behaviour. While young people who have not yet had a court hearing are technically

innocent (ie they are 'innocent until proven guilty') and should therefore not be required to address their alleged offending, it has been argued that in many cases, not intervening in the life of a young person in trouble with the law represents a missed opportunity (Mazerolle & Sanderson 2008). For example, a young person may be technically innocent on a current charge, but may have prior convictions and may be becoming entrenched in a pattern of offending.

Some bail support services attempt to overcome this difficulty by working with young people irrespective of their plea status on issues not directly related to offending. For example, the ACT's supervised bail service works with young people on broader issues of accommodation, education and relationships, rather than their more specific criminogenic needs.

It is beyond the scope of this report to consider which of these approaches is best, or which has been shown to be most effective. It is nonetheless an important issue for each jurisdiction's statutory youth justice agency to consider.

Increased monitoring and scrutiny of young people

As has been highlighted in this report, young people who come under increased scrutiny while on bail appear to be more likely to breach their bail conditions than other young people. This research found, for example, that young people who are in out-of-home care while completing a bail period come under increased scrutiny and that this increased scrutiny often results in these young people coming back to court for breaches of bail that may not have come to the notice of authorities if they were living with their families.

It is interesting to note, in light of this, that some bail support programs for young people appear to intentionally increase the monitoring of young people on bail. For example, the NT's Supervised Bail Program has a focus on bail compliance. While these approaches undoubtedly aim to assist young people to remain in the community on bail, it is worth considering to what extent the increased monitoring of young people is consistent with this aim.

Stakeholders interviewed for this study were unanimous in considering bail support services and programs to be an important component of any strategy that aims to reduce the use of custodial remand for young people. Bail support services and programs were conceptualised by some stakeholders as simply providing bail decision makers with an option other than custodial remand. This was seen as particularly vital in jurisdictions in which case managed supervised bail is not available for young people.

A police stakeholder from one jurisdiction criticised the bail support on offer to young people in that jurisdiction for a range of reasons, including that program staff did not enforce mandated meetings with bail supervisors, there was a lack of individualisation or structure to the program

and activities provided to the young person, and there was a lack of reporting consistent breaches of bail supervision to the police. This suggests a lack of clarity about the purpose of bail support services and programs, and the goals that bail support services and programs are designed to achieve. Further, it suggests that, as outlined elsewhere in this report, there is a lack of consensus among the key players in bail and remand decisions—police, youth justice staff, Magistrates and service providers—about what bail is designed to achieve for young people and about what the best strategies to achieve the aims of bail might be. A review of the international evidence about what works in bail support for young people would provide useful information for Australian jurisdictions.



Discussion, conclusions and recommendations

The custodial remand of young people has recently been raised as a critical issue in the youth justice sphere in Australia. In this context, this preliminary study sought to identify trends in the use of custodial remand for young people in Australia, explore the factors that influence the use of custodial remand for young people, document differences among the legislation, policy and practice frameworks that underpin custodial remand for young people across Australia and to make recommendations, where appropriate, about limiting the inappropriate use of custodial remand for young people.

Although concerns about the increased use of custodial remand for young people are to some extent unfounded, analysis of quantitative data undertaken for this project and the existing research literature indicates recent increases in the use of custodial remand for young people in some jurisdictions. Further, analyses indicate that the use of custodial remand for young people is much higher in some jurisdictions than others, with the Northern Territory in particular having a consistently higher rate of young people on custodial remand than the national average.

Irrespective of increases or decreases, the large number of young people on custodial remand and the significant proportion they comprise of the youth detention population in Australia remains a concern. Due to Australia's obligations under the United

Nations' (1989) Convention of the Rights of the Child and other international instruments that stipulate that detention be used as a last resort for young people (see *Appendix 1*) and the impacts of remand on both young people and the broader community, avoiding the unnecessary use of remand for young people should remain a priority for each of Australia's jurisdictions.

The remainder of this report highlights the key findings of this study and makes recommendations about minimising the unnecessary use of custodial remand for young people based on these findings.

Key issues and ways forward

As this report highlights, rates of young people on custodial remand are influenced by numerous and diverse factors, from the 'macro' (eg shifts in understanding about the purpose of bail) to the 'micro' (eg specific legislative provisions in any given jurisdiction). It is clear that the drivers of custodial remand are not uniform across jurisdictions and that a variety of factors unique to a jurisdiction (eg demographic makeup, geographical features, legislation) can influence levels of young people on remand. To the extent possible in an exploratory research project, these have been discussed in the

section on drivers of custodial remand above. Strategies to minimise the unnecessary use of custodial remand for young people will therefore, in many cases, be specific to individual jurisdictions and it is beyond the scope of this preliminary study to make recommendations on the situation in individual jurisdictions.

Nonetheless, some broad strategies and key issues that may be relevant to all jurisdictions emerged from the research and these are discussed below.

Looking beyond legislation

Research has indicated that in some instances, changes to legislation can influence rates of young people on custodial remand. Vignaendra et al. (2009), for example, found that changes to NSW Bail Act, which limited the number of applications that accused persons can make, had an impact on the length of time young people spend on custodial remand. Indeed, they argued that the impact following this legislative change was so profound that 'it would be superfluous to test its statistical significance' (Vignaendra et al. 2009: 3).

By contrast, in some instances, it is clear that legislative changes have not had the intended effect(s). For example, while a change to Victoria's Bail Act that limited the period a young person could spend on custodial remand to 21 days may be laudable, it appears to have had little practical effect. Stakeholders interviewed for this study commented that young people can be held on consecutive 21 day periods of custodial remand. Similarly, while a recent legislative change in Queensland means that young people cannot be placed on custodial remand for their own safety unless it is directly related to the charge(s) against them, stakeholders claimed that this has had little practical effect, as Magistrates have simply shifted the justification for remanding young people in custody from protecting them to preventing them from offending while on bail.

In the main, stakeholders supported separate legislative provisions for bail decisions concerning young people. One of the key reasons for this view was that having standalone provisions for young people protects them from 'knee jerk' amendments to legislation that are primarily a response to offending by adults. Numerous examples were

given to support this view in addition to the changes to NSW Bail Act as discussed above. For example, changes to the NT's legislation that preclude diversionary responses for some motor vehicle offences were raised. Further, in jurisdictions that do not have separate bail provisions, young people may also have been inadvertently affected by changes to legislation that governs responses to charges of domestic violence.

Stakeholders also perceived standalone provisions for young people as highlighting the differences between young people and adults and providing guidance to Magistrates, particularly those who are not specialists, in youth matters. This is important given the principle that detention should be used as a last resort for young people. While this is reflected in all jurisdictions' youth justice legislation, it is absent in bail legislation that applies to both adults and young people.

It is, however, important to consider the potential disadvantages of having separate and specific legislative provisions governing bail decisions for young people. As discussed earlier, existing legislation for young people often focuses on 'protecting' young people by allowing welfare issues to be taken into account and/or allowing young people to be remanded in custody to 'protect' them from life in the community. Although the influence of such provisions is not known and as argued below may be limited, a recommendation of this report is that consideration be given to the issue of separate legislation governing bail decisions for young people and whether current legislation is appropriate, fair and having the intended effect.

This research suggests, therefore, that in general terms, the influence of legislation on rates of custodial remand is limited. A direct relationship between 'better' legislation that considers young people separately from adults and lower rates of remand is not reflected in current rates of young people on remand (see Figure 4). Further, as discussed in detail in this report, a multitude of direct and indirect factors—from broad shifts in understandings about the purpose of bail to the attitude of individual bail decision makers—can influence rates of custodial remand. As Mazerolle and Sanderson's (2008) research demonstrates, custodial remand practices can even vary within

jurisdictions. In their study, bail decisions in particular locations (predominantly rural and remote locations) were more likely to result in custodial remand, even after the accused's age, gender, Indigenous status, current and past offence characteristics, remand history, and child protection history were controlled for.

Therefore, while legislation is obviously an important contributor to levels of remand, it needs to be understood as part of the complex interplay of 'macro' and 'micro' influences. It is therefore recommended that while changes to legislation may form an important component of any reform agenda relating to minimising levels of young people on custodial remand, consideration needs to be given to strategies well beyond legislation—including better service provision, crime prevention measures, changes to policing policy and practice, and training of relevant professionals, as discussed below.

Re-engagement with the purpose(s) of bail

A renewed consideration of the objectives that bail is designed to meet is critical prior to legislative or other changes taking place. Mather's (2008) research found that the traditional purpose of bail—that is, to ensure the accused person appears before the court and to protect the community (Edney 2007; Henson 2011; Vic LRC 2007)—has broadened to include a focus on therapeutic jurisprudence (see also Edney 2007). The current study similarly found that this is sometimes the case and that young people are especially vulnerable to the lens of therapeutic jurisprudence, given their perceived capacity to desist from offending.

It was also found that, albeit in a small number of instances, custodial remand has been used as a strategy to minimise young people's potential to commit new offences and therefore build an extensive criminal record (see discussion below). This again shows that custodial remand can be used for purposes far removed from its traditional aims.

Further, it was apparent that there was a lack of consensus among bail decision makers. In particular, stakeholders felt that Magistrates have different views about what bail can be expected to achieve from police and Bail Justices.

It is therefore recommended that renewed discussion and debate about the objectives of bail (especially for young people) is needed. In addition to broad political, academic and community discussion, training for a range of relevant professionals on the objectives of bail is also required, particularly for bail decision makers. A related recommendation is to give consideration to requiring bail decision makers to document and provide a rationale for bail conditions imposed on young people.

Young people with complex needs and welfare issues are most vulnerable to receiving custodial remand

It is clear that a small proportion of young people come into contact with the youth justice system repeatedly, offend persistently and/or seriously, and are repeatedly placed on custodial remand. According to AIHW (2012a) figures, 13 percent of young people who completed a remand period during 2010–11 completed four or more remand periods. This finding is consistent with a substantial body of research that shows that a small 'core' group of young people is responsible for a disproportionate amount of crime (Hua, Baker & Poynton 2006; Livingstone et al. 2008; Marshall 2006; Morgan & Gardner 1992; Skrzypiec 2005).

Stakeholders interviewed for this study were virtually unanimous that they have observed an increase in the seriousness of offending by young people, with a number noting, for example, an increase in sexual offending by young people. As outlined earlier in this report, the limited available data on trends in offending by young people support the observation that serious offending by young people may have increased in recent years.

It is also clear that this 'core' cohort of young people has extensive and extremely complex needs, including substance abuse problems, physical and mental health problems, Foetal Alcohol Spectrum Disorder, disengagement from education, complex family issues and/or cognitive dysfunction. This finding is also consistent with a body of existing research that demonstrates that young people in contact with the criminal justice system—especially those entrenched in the most serious end of the

system—are far more likely to have a constellation of these complex problems than other young people (eg see Frize, Kenny & Lennings 2008; HREOC 2005; Indig et al. 2011; Snow & Powell 2008, 2002). These factors render young people vulnerable to custodial remand due their need for specific services in the community and the fact that legislation and a lack of community-based services can contribute to young people being remanded ‘for their own good’ and/or to ‘protect the community’.

Young people with multiple, complex needs are excluded from relevant services

Young people with complex needs require specific services in the community. While a small proportion of young people with highly complex needs repeatedly cycle through the youth justice system and are a primary concern for bail decision makers, it is precisely this group of young people that is most frequently excluded from services and programs that might address their criminogenic and other needs. Stakeholders interviewed for this research repeatedly raised concerns that mainstream services that should assist young people to remain in the community on bail often exclude particular groups of young people with complex histories and needs—such as those who are very young, those with histories of violence and/or those who are ‘clients’ of statutory child protection agencies.

It should be noted in this context that Indigenous young people often come into contact with the criminal justice system at an earlier age and therefore develop more extensive criminal histories than their non-Indigenous counterparts. It is therefore likely that the exclusion of young people with the most complex needs from services impacts more profoundly on Indigenous young people. As described earlier in this report, even dedicated bail support programs sometimes work primarily with young people who might be thought of as ‘low-hanging fruit’ in the youth justice system, rather than with young people with complex needs who are most in need of bail support services.

Further, while strategies to monitor this core group of young people (eg through targeted policing of recidivist offenders) have been employed within many jurisdictions, adequate services have not been implemented to address their criminogenic needs.

Mulroney (2012) notes, for example, that there are inadequate drug and alcohol rehabilitation and alternative education services for young people in New South Wales. There are also very few secure mental health facilities for young people in Australia; for example, Queensland’s only secure facility for young people with severe mental health problems has recently been ordered to close (Moore 2012). This lack of service provision is often more profound for young people from non-metropolitan areas; as such, young people from regional, remote and rural locations, and by extension, Indigenous young people, may be more affected by the limited range of appropriate services. Given this context, it is unsurprising that this cohort of young people repeatedly comes into contact with the youth justice system, including spending repeated periods on custodial remand. Therefore, a lack of access to community-based services not only increases the likelihood of receiving custodial remand in order to receive formal support (as described below) but may also contribute to their propensity to repeatedly reoffend.

Young people are sometimes placed on custodial remand ‘for their own good’

Another key finding of this research is that in some instances, young people are remanded ‘for their own good’, reflecting the use of bail and custodial remand to resolve a young person’s welfare needs. Young people with complex needs are therefore a primary target of this use of bail and custodial remand. This occurs in a variety of ways. First, as described earlier in this report, legislation in some jurisdictions enables young people to be placed on custodial remand to ‘protect’ them from the outside world. This is not, however, the case for adults. Under the relevant legislation, adult accused persons are instead to be protected from the impacts of spending time on custodial remand.

Second, it appears that young people are sometimes remanded because services and programs exist for young people in custody that are not available in the community. Stakeholders noted, for example, that young people would be more likely to receive appropriate mental health assessments, or better-supported schooling, in custody than in the community. In this way, custodial remand acts as a pathway to adequate services for young people

with complex histories and needs. This again highlights the lack of appropriate services—including alcohol and other drug services, physical and mental health services, child protection and out-of-home care services—available to young people in the community and the important role that these services could play in minimising the unnecessary use of remand for young people.

Finally, stakeholders in one jurisdiction stated that in some instances, young people are placed on custodial remand to prevent them offending and/or breaching bail—in other words, to limit young people's criminal histories, 'for their own good' and at times as a protection for the wider community. Custodial remand is used in this context to incapacitate young people and ensure they don't offend or breach bail conditions, thereby minimising their future likelihood of being detained—either on remand or on an order of sentenced detention. Although the motivation for such decisions may be laudable, their rationale appears somewhat flawed, as young people are detained on remand to reduce the likelihood of being detained for future offences. Further, to remand young people for this reason is at odds with the purpose of custodial remand; while remanding a young person to protect the community from a young person likely to offend if granted bail meets the objectives of custodial remand, remanding a young person to protect him/herself from the consequences of future offending or bail breaches is clearly not.

Although it is problematic that young people should be remanded in custody 'for their own good', it is undoubtedly sometimes the case that custodial remand is indeed the best option for a young person's welfare, particularly given the limited availability of services in the community for young people with complex needs. For example, the significant lack of services in the community for young people with profound mental health problems may result in custodial remand being the most appropriate outcome available to bail decision makers.

Young people in out-of-home care are—increased risk

Generally, young people who have histories of maltreatment and/or who come into contact with child protection agencies are overrepresented in the youth justice system (see eg Cashmore 2011; Stewart et al. 2002). This is particularly the case for young people in out-of-home care (see eg McFarlane 2010; Mendes, Snow & Baidawi 2012). It should be noted in this context that Indigenous young people are overrepresented in out-of-home care and as such, are likely to be made increasingly vulnerable to remand than non-Indigenous young people.

Two discrete scenarios were described by stakeholders in relation to these young people. The first involved young people under the care of statutory child protection agencies frequently being unable to obtain bail as they 'slipped through the cracks' of 'the system', with neither youth justice nor child protection agencies supporting the young person to remain in the community on bail (see also Mendes, Snow & Baidawi 2012). Stakeholders explained that young people in care facing bail decisions are often reliant on child protection agencies to provide accommodation. When they are unable to do so, bail will often not be granted and young people are consequently placed in custodial remand until accommodation can be arranged. As explained earlier in the report, accommodation is lacking for young people facing bail generally, but for those under care, particularly those with complex needs, the challenges are exacerbated. In New South Wales, numerous stakeholders held the view that young people who offend are often put into the 'too hard basket' by child protection staff, resulting in them being placed on custodial remand.

Further, stakeholders interviewed for this research commented that young people under the care of child protection agencies are often excluded from bail accommodation services, as it is assumed that child protection agencies should be providing services to these young people. It is noteworthy that neither WA's Metropolitan Youth Bail Service nor Tasmania's Save the Children bail support program works with young people under the care of child protection agency

In the second scenario, young people in out-of-home care were frequently placed on custodial remand as a result of coming under a high level of scrutiny in out-of-home care facilities. These young people often amass criminal charges, convictions and/or breaches of bail much more readily than young people who live with family members. As one stakeholder put it, 'young people in their family environment are disciplined by their parents, whereas young people in a care setting are disciplined by the criminal justice system'. Some stakeholders explained that it was common to see young people in out-of-home care with criminal histories that were exclusively comprised of 'offences' perpetrated in group residences. Often, these 'offences' are technical breaches of bail, such as the young person disobeying the rules of the residence. For example, one stakeholder revealed that in one case, a young woman in out-of-home care was arrested for breaching house rules when she threw some lasagne. The young woman was arrested and due to her out-of-home care placement closing, was unable to be granted bail due to a lack of suitable accommodation. Stakeholders described these situations as the criminalisation of the antisocial or 'acting out' behaviours of young people in out-of-home care.

Numerous stakeholders explained that this increased scrutiny is caused primarily by a heavy reliance on the police to solve disputes that occur in out-of-home care residences. The decision to call police is often part of the residences' policy in ensuring that the safety of staff is not compromised and that occupational health and safety requirements are met. The safety and wellbeing of other young people at out-of-home care residences is of course also critical.

The reliance on police could also be attributed to the limited capability of the staff at these out-of-home care residences. Stakeholders in a number of jurisdictions commented that staff members are typically young and inexperienced and that the police are therefore often relied on to resolve disputes that may have been resolved by more experienced staff.

Further, in some jurisdictions, the charge of assaulting a public officer (residence staff are deemed public officers) is exempt from diversionary measures. As one stakeholder argued, staff

members in out-of-home care are entitled to be safe in their workplaces; however, when police do not have recourse to diversionary measures and have no option but to charge the young person, this impacts the young person's future and makes young people in out-of-home care particularly vulnerable to custodial remand.

The factors described above contribute to an environment that perpetuates a cycle of bail breaches and custodial remand for young people in out-of-home care. This results in a 'vicious cycle' whereby these young people frequently breach bail and come before the court for further bail decisions. As breaches of bail are often considered to demonstrate young people's risk of offending while on bail, this history of breached bail orders make these young people very vulnerable to custodial remand. Stakeholders interviewed for this research emphasised the vulnerabilities inherent among this group of young people and recommended a review of how behaviour is managed within the out-of-home care sector, as well as an increase in the available bail support and diversionary mechanisms for these young people.

Histories of serious and/or violent offending

It should be recognised that in addition to the response of the child protection and youth justice systems to young people in out-of-home care, discussed above, a proportion of these young people have been severely maltreated as children and/or have come from highly dysfunctional families (Mendes, Snow & Baidawi 2012). As these experiences can have criminogenic effects on young people (Stewart et al. 2002), it is likely that some young people in out-of-home care have a profile of serious, violent offending (see QCCYPCG 2012). Offending histories of this nature also make young people in out-of-home care particularly vulnerable to being placed on custodial remand.

Effective implementation and evaluation of bail support services for young people

Targeted bail support programs (outside of statutory bail supervision) are limited in Australia and are not

available to all young people who require these services to avoid being unnecessarily placed on custodial remand. In particular, either as a result of formal policy or informal practice, groups of young people such as young people from regional rural and remote areas, young people in the care of statutory child protection agencies (and by extension, Indigenous young people) and other young people with highly complex needs, are excluded from adequate bail support. In essence, it appears that those young people who are most in need of bail support are least likely to obtain it. Further, some bail support programs for young people have unclear aims and objectives, and/or are not specifically targeted towards assisting young people to remain in the community on bail.

A key recommendation is therefore that bail support services and programs consider the international evidence about what works to achieve the best outcomes for young people on bail. A related recommendation is that agencies responsible for bail support services and programs develop a 'program logic' (ANAO 1996; Hurworth 2008) to clarify and articulate their purpose and objectives, and to ensure they are based on the existing evidence. Further, bail support programs for young people should be rigorously evaluated and an evidence base developed about bail support efficacy for young people in Australia.

More broadly, mainstream service provision across a range of sectors related to preventing young people's offending, including health, mental health, accommodation, family and welfare services, are limited for young people, particularly those from non-metropolitan areas and/or those with very complex needs. As custodial remand is sometimes a pathway to services for young people and as remand is sometimes the best option for young people due to a lack of appropriate services in the community, strengthening community service provision is a vital component of reducing the rate of young people on custodial remand. Improved collaboration among agencies, particularly child protection and youth justice agencies is also critical, given that young people with multiple needs often fall between the cracks of these systems.

Early intervention and prevention of offending by young people

It follows that preventing young people's contact with the criminal justice system by preventing offending in the first instance is vital if the use of custodial remand is to be limited. The importance of preventing youth offending and intervening early in young people's offending trajectories has been iterated at length in the literature; it nonetheless bears repeating here. As described above, it can be difficult for young people—especially young people in out-of-home care and/or with complex needs—to become extricated from the criminal justice system once they are caught up in it. Therefore, preventing young people's initial contact with the criminal justice system will contribute towards reducing rates of young people on custodial remand.

As Weatherburn, Fitzgerald and Hua (2003) have argued in relation to Indigenous young people, while measures employed by the criminal justice system (eg diversionary measures) have been implemented to reduce young people's likelihood of becoming entrenched in the system, reducing offending and reoffending are also critical strategies that should be implemented to meet this objective. This is also the case in relation to non-Indigenous young people.

Numerous research studies have been undertaken to assess the effectiveness of policies and programs to prevent and reduce offending by young people (see Delfabbro & Day 2003; Freiberg & Homel 2011; Homel et al. 2006; Prior & Paris 2005; Sallybanks 2003; see Richards, Rosevear & Gilbert 2011 on Indigenous young people specifically). Implementing policies and programs based on this evidence to reduce young people's offending is a vital strategy for governments to implement in order to avoid detaining young people on remand in the long term.

'Mesh-thinning'—reduced opportunities to exit the criminal justice system

Youth justice policies and programs are often criticised for having a 'net-widening' effect; in other words, they 'widen the net' of control over young people by inadvertently bringing more young people under the regulation and control of the criminal

justice system (see Austin & Krisberg cited in Roberts & Indermaur 2006). Little is said, however, about net-widening's twin concept — 'mesh-thinning' or 'net-strengthening', which describes intensifying offenders' involvement in the criminal justice system (see Roberts & Indermaur 2006 for a discussion). This research clearly shows that a process of 'mesh-thinning' occurs for some young people for whom bail decisions are made—especially very vulnerable groups of young people such as those in out-of-home care. For some young people, a process of mesh-thinning occurs whereby once 'caught up' in the youth justice system, young people's opportunities to exit the system diminish.

One way this occurs is via the imposition of numerous, onerous and unrealistic bail conditions on young people. As described earlier, both the existing research literature and stakeholder interviews undertaken for this project suggest that the number and nature of bail conditions imposed on young people can set young people up to fail. As bail breaches are a key driver of remand rates of young people, a recommendation of this report is that strategies be implemented that minimise young people's opportunities to breach bail. Appropriate bail support programs, including a focus on assisting young people to understand, remember and adhere to bail conditions, are key to addressing this aim.

The criminalisation of non-criminal behaviours is another way in which young people experience mesh-thinning, or become caught up in the criminal justice system with few opportunities to exit the system. As documented in this report and the existing research literature, in some jurisdictions bail breaches are dealt with as criminal offences even when the behaviour itself (eg truanting, disobeying parents) is not criminal. Even in jurisdictions in which breaching bail conditions is not a criminal offence, a breach of bail can result in the arrest of a young person and therefore in an opportunity for a Magistrate to reconsider whether a young person should be granted bail or held on custodial remand.

A related issue is the use of arrest as a response to breaches of bail, including technical breaches, by young people. As an arrest provides an opportunity for the court to reconsider a young person's bail, the use of arrest rather than a diversionary measure such as a caution may entrench young people in

the criminal justice system. It is recommended that consideration be given to ways in which the use of arrest might be limited, particularly for technical breaches of bail. Specifically, it is contended that a distinction could be made between technical and criminal breaches of bail by young people, with technical breaches of bail not being responded to via criminal justice measures such as arrest. New offences allegedly committed while on bail, however, could be dealt with as offences would ordinarily be dealt with (ie under the jurisdiction's youth justice legislation) rather than by way of an automatic arrest.

Young people also face diminished opportunities to exit the criminal justice system as a result of intense scrutiny while on bail. In some jurisdictions, police have adopted strategies that monitor young people on bail intensively. Coupled with the numerous and onerous bail conditions imposed on some young people, these strategies may work to entrench young people—particularly those deemed 'recidivists'—in the criminal justice system. This situation was described by one stakeholder as 'all stick and no carrot' for young people on bail. Young people in out-of-home care also face high levels of scrutiny while on bail, minimising these young people's opportunities to exit the criminal justice system.

Consideration of young people's criminal history at the point of a bail decision may also 'thin the mesh' and limit young people's ability to leave the criminal justice system. As argued in this report, while a young person's criminal history is not usually admissible evidence at trial, it frequently informs bail decisions. It is recommended that consideration be given to the appropriateness of this approach. It is further recommended that bail decision makers take both risk and potential harm into account when making bail decisions. While a young person may be at high risk of offending while on bail, the potential harm likely to result may be minimal.

Finally, the limited bail support available to young people in Australia may also entrench young people in the criminal justice system and prevent them from exiting the system. It is noteworthy that even initiatives designed to support young people on bail can potentially inadvertently enmesh young people further into the criminal justice system. For example, Tasmania's Bail Support Program reports young people's lack of engagement with the

program to the court for consideration during sentencing, even though program participation is voluntary for young people.

Recommendations

The recommendations arising from this report are summarised below to assist in minimising the inappropriate use of custodial remand for young people (see Table 18). The recommendations include measures indirectly associated with bail and remand processes (eg early intervention and out-of-home care behaviour management strategies) and measures directly associated with bail and remand processes (eg responses to bail breaches, evaluating bail support programs). These recommendations are broad and may not be relevant for all jurisdictions. They reflect the general issues and drivers evident from the literature and described by stakeholders.

Conclusion

In line with Australia's international obligations, as well as domestic legislation in each jurisdiction, it is important that detention, including custodial remand, is used as a last resort for young people. A wide range of current influences on rates of custodial remand of young people across Australia's jurisdictions have been identified and described. Given the numerous factors that impact these rates, if the unnecessary custodial remand of young people is to be minimised, a multifaceted approach will be required. This research highlights in particular the need for renewed debate about the purpose(s) of bail, the importance of early intervention measures, and the implementation and evaluation of appropriately targeted bail support services for young people, particularly those with multiple, complex needs.

Table 18 Indirect and direct measures for consideration to minimise the custodial remand of young people	
Indirect measures	
Measures for consideration	Objectives
Diversion and early intervention	
Support the implementation of evidence-based prevention, early intervention and diversionary programs and policies to prevent young people's offending and initial contact with the criminal justice system	Minimise young people's initial contact with the criminal justice system Minimise young people's antisocial and criminal behaviour
Ensure that there are adequate diversionary measures for young people with complex needs (including recidivists and child protection clients)	
Support the implementation of policies, programs and practices that prevent the maltreatment and victimisation of young people	
Out-of-home care facilities	
Review behaviour management strategies of young people in out-of-home care facilities	Minimise this group of young people's initial contact with the criminal justice system
Provide better support for out-of-home care service providers—eg enhanced training for staff on how to deal with young people with very challenging behaviours	Minimise bail breaches for young people on bail in these facilities by reducing police intervention for behaviour management issues
Inter-agency collaboration	
Better collaboration between youth justice and child protection agencies is needed—a case management or 'wraparound' service could be considered	Prevent young people's needs remaining unidentified and/or unaddressed by both systems Minimise the refusal of bail by ensuring bail decision makers are better informed about young people's circumstances
Provide supported alternatives to custodial remand	

Table 18 (Continued)

Indirect measures	
Measures for consideration	Objectives
Access to mainstream community support	
Increase and ensure access for young people generally to age-appropriate accommodation, secure mental health, alcohol and other drug rehabilitation residential facilities	Minimise young people's antisocial and criminal behaviour
Limit the exclusion of young people living in rural and regional areas from such supports	Minimise the refusal of bail for young people for welfare reasons by increasing bail decision makers' alternatives to custodial remand
Access to court and legal support	
Increase and ensure access for young people in the criminal justice system to:	Minimise the refusal of bail by supporting young people during bail decisions
<ul style="list-style-type: none"> • Timely and appropriate legal representation • In-court youth justice support • Limit the exclusion of young people living in rural and regional areas from such supports 	
Direct measures	
Measures for consideration	Objectives
For bail programs (other than statutory bail supervision)	Minimise the refusal of bail for young people for welfare reasons by providing bail decision makers with alternatives to custodial remand
<ul style="list-style-type: none"> • Access to bail support in regional areas and by young people with complex needs should be reviewed • Programs must be sufficiently resourced and supported to provide services for young people with complex needs, including histories of violence • Bail programs must be evaluated and their effectiveness monitored, particularly regarding their success in meeting the accommodation and supervisory needs of young people on bail • Ensure referrals to a range of bail support and supervisory options are available to all bail decision makers, not just the courts. • Implement and evaluate programs that aim to support young people and the bail decision maker during bail hearings made after business hours 	Minimise bail breaches by providing young people on bail with appropriate support Minimise the refusal of bail by better informing bail decision makers on the local options for bail support and alternatives to custodial remand Minimise the overnight custodial remand of young people by supporting the relevant authority in their bail decision made after-hours
Defining the purpose of bail	
Further dialogue and discussion on the purposes of bail for young people (and how it may or may not differ from adults) and how bail conditions can achieve this purpose is required	Ensure the consistent application of bail decisions and the bail conditions within jurisdictions
Fund research to better identify the impact of a period of detention on a young person's subsequent offending behaviour	Inform bail decision makers' understanding of the impact of remand on subsequent offending—enhance understanding of the cost/benefits of using custodial remand as a last resort.
Bail decision makers should be trained in line with the purposes of bail for young people and the role of bail conditions	Create clear and consistent parameters for stakeholders involved in the bail process for young people to work within
Make sure the purpose and response to bail for young people is compliant with the international normative frameworks for the treatment of young people (ie Convention on the Rights of the Child)	Enable the measurement of effectiveness for stakeholders working with young people on bail or facing bail decisions
Create key performance indicators for bail decision makers and bail support systems (including statutory bail supervision and bail programs) in line with the purposes of bail for young people	

Direct measures	
Measures for consideration	Objectives
Responding to bail breaches	
Enhance diversionary mechanisms for young people who breach bail	Divert young people from further bail decisions
Reduce use of arrest in relation to technical bail breaches	Minimise bail refusal for technical breaches of bail
Decriminalise technical breaches of bail	
Table 18 (Continued)	
Issues for bail decision makers	
Reconsider the use of criminal history to determine the granting of bail and to consider the 'potential harm' as well as the 'risk' of a young person offending while on bail	Divert young people at risk of further offending but of little harm to the community from custodial remand
Assess the impact of domestic and family violence legislation in some jurisdictions and the impact of a presumption against bail on young people	Minimise bail breaches by ensuring bail decision makers are consistent and accountable for their bail decisions and do not apply overly onerous bail conditions
Review bail orders and update if necessary at each court appearance (including first court appearance rather than the continuance of a police bail order)	Minimise bail breaches by ensuring that the conditions reflect a young person's changing circumstances
Enhance bail decision makers' understanding of the ways in which certain bail conditions impact on young people differently from adults	Minimise bail breaches by ensuring that a young person understands their bail conditions
Ensure that a young person understands their bail conditions and the consequences of breaching them	
Recording bail decisions	
Create better record keeping systems for bail orders and associated conditions	Minimise unnecessary bail refusal and the implementation of overly onerous or contradictory conditions by ensuring bail decision makers are fully informed of a young person's situation, current orders and conditions
Supporting the role of family in bail processes	
Provide greater support for family to attend court bail hearings and to make sure they understand the process, the consequences of custodial remand and if relevant, the young person's bail conditions and the consequences of breaching them	Minimise the refusal of bail by the courts, particularly in jurisdictions where a 'responsible person' and/or family member is required to attend court for bail to be granted to a young person
	Minimise young persons breaching bail by ensuring that key family members support the granting of bail and the young person's adherence to its conditions



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All URLs are correct at July 2013

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Appendices

Appendix 1: International instruments that relate to the custodial remand of young people

A number of United Nations instruments, to which Australia is a signatory, provide guidelines that relate to periods of custodial remand. Some relate to custodial remand in general, others offer guidance on custodial remand for young people specifically.

The Standard minimum rules for the treatment of prisoners 1955 (United Nations 1955) stipulate that unconvicted prisoners are presumed innocent and are to be treated as such, and should be subject to a 'special regime' that meets the following requirements (under Articles 85 to 93):

- untried prisoners shall be kept separate from convicted prisoners;
- young untried prisoners shall be kept separate from adults and shall in principle be detained in separate institutions;
- untried prisoners shall sleep singly in separate rooms, with the reservation of different local custom in respect of the climate;
- within the limits compatible with the good order of the institution, untried prisoners may, if they so desire, have their food procured at their own expense from the outside, either through the administration or through their family or friends. Otherwise, the administration shall provide their food;
- an untried prisoner shall be allowed to wear his own clothing if it is clean and suitable;
- if he wears prison dress, it shall be different from that supplied to convicted prisoners;
- an untried prisoner shall always be offered opportunity to work, but shall not be required to work. If he chooses to work, he shall be paid for it;
- an untried prisoner shall be allowed to procure at his own expense or at the expense of a third party such books, newspapers, writing materials and other means of occupation as are compatible with the interests of the administration of justice and the security and good order of the institution;
- an untried prisoner shall be allowed to be visited and treated by his own doctor or dentist if there is reasonable ground for his application and he is able to pay any expenses incurred;
- an untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution; and
- for the purposes of his defence, an untried prisoner shall be allowed to apply for free legal aid where such aid is available and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions. For these purposes, he shall if he so desires be supplied with writing material. Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official.

The International covenant on civil and political rights (United Nations 1976) stipulates in Article 9 that:

- anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him; and
- anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings and should occasion arise, for execution of the judgment.

In relation to young people specifically, the Convention of the Rights of the Child (United Nations 1989), the Standard minimum rules for the administration of juvenile justice (the 'Beijing Rules') (United Nations 1985) and the Rules for the protection of juveniles deprived of their liberty (the 'Havana Rules') (United Nations 1990) all stress that incarceration should be used only as a last resort for young people and should be used for the minimum necessary period. The Beijing Rules and the Havana Rules also stress that young people on custodial remand should be detained separately from adults and/or sentenced detainees.

Article 18 of the Havana Rules, which contain the most detailed guidance relating specifically to the treatment of young people on custodial remand, state that untried young people should be treated according to the following provisions (but not necessarily restricted to these provisions):

- young people should have the right of legal counsel and be enabled to apply for free legal aid, where such aid is available, and to communicate regularly with their legal advisers. Privacy and confidentiality shall be ensured for such communications;
- young people should be provided, where possible, with opportunities to pursue work, with remuneration and continue education or training, but should not be required to do so. Work, education or training should not cause the continuation of the detention; and
- young people should receive and retain materials for their leisure and recreation as are compatible with the interests of the administration of justice.

Under the Beijing Rules, young people on custodial remand are entitled to all the rights contained in the Standard minimum rules for the treatment of prisoners (United Nations 1955) and the International covenant on civil and political rights (United Nations 1976).

Appendix 2: Interview participants

Aboriginal and Torres Strait Islander Legal Service (Queensland)

Australian Capital Territory Community Services, Youth Justice

Australian Capital Territory Legal Aid

Australian Capital Territory Magistrates Court

Brahminy Foundation (Northern Territory)

Central Australian Aboriginal Legal Aid Service (Northern Territory)

Drug Arm (Western Australia)

Legal Aid (Queensland)

Magill Training Centre (South Australia)

New South Wales Children's Courts

New South Wales Department of Attorney General and Justice, Juvenile Justice

North Australia Aboriginal Justice Agency (Northern Territory)

Northern Territory Department of Children and Families

Northern Territory Department of Justice, Youth Justice Unit

Northern Territory Legal Aid Commission

Queensland Department of Communities

Queensland Police Service

Queensland Youth Bail Accommodation Service

Save the Children (Tasmania)

South Australia Department for Communities and

Social Inclusion

South Australia Police

South Australia Youth Legal Services

Tasmania Department of Health and Human Services

Tasmania Magistrates Court, Youth Justice Division

Tasmania Police Prosecution Services

The Shopfront Youth Legal Centre (New South Wales)

Victoria Children's Court

Victoria Department of Human Services

Victoria Office of the Child Safety Commissioner

Western Australia Department of Corrective Services

Western Australia Department of Corrective Services, Metropolitan Youth Bail Service

Western Australia Department of Corrective Services, Youth Justice Court Services

Western Australia Department of Public Prosecution

Western Australia Youth Legal Services (LegalAid)

Youth Affairs Network (Queensland)

Youth Justice Coalition (New South Wales)

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Research and Public Policy Series 125

Funded and endorsed by the Australasian Juvenile Justice Administrators, this is one of the first national scale research reports into the bail and remand practices for young Australians. A young person can be placed in custody on remand (ie refused bail) after being arrested by police in relation to a suspected criminal offence, before entering a plea, while awaiting trial, during trial or awaiting sentence.

Although custodial remand plays an important role in Western criminal justice systems, minimising the unnecessary use of remand is important given the obligations Australia has under several UN instruments to use, as a last resort, youth detention of any kind. This research identifies trends in the use of custodial remand and explores the factors that influence its use for young people nationally and in each of Australia's jurisdictions.

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