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Black letter law

The Honourable Justice Lucy McCallum and Erica Timmins*

"If a dominant society denies recognition to the very things on which an individual's identity is built, it will not be surprising if that individual becomes a delinquent from the point of view of that society. Yet that is what the European society that took power in Australia has been doing to Aboriginals for two hundred years. As a result there has developed a complex and difficult situation which cannot be simply unravelled, or washed away by better social services for Aboriginals. If Australia is going to deal with it in some way other than locking Aboriginals up in large numbers, it will have to learn to recognise Aboriginals as a people, to listen to them, and patiently build understanding and move to a genuine reconciliation between peoples."[1]

Those words were written over 30 years ago by the Honourable JH (Hal) Wootten AC QC, one of the five Commissioners of the Royal Commission into Aboriginal Deaths in Custody (the Royal Commission). The reckoning of the experience of the 30 years that have passed since the presentation of the Royal Commission's Final Report[2] (the Final Report) has been sobering and demoralising. On the 30th anniversary of the tabling of that report, the Honourable Adam Searle MLC expressed extreme disappointment that many of the recommendations made by the Royal Commission have still not been implemented and "that governments have even given up monitoring the implementation of those recommendations".[3]

Last month's edition of the *Judicial Officers' Bulletin* featured important observations by Professor Marcia Langton AM concerning aspects of those failings[4] and an article by Judge Stephen Norrish QC, former Chair of the Ngara Yura Committee, offering suggestions as to what judicial officers can do in the field of sentencing to address the abiding "underlying issues" identified in the Final Report.[5]

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

1 Royal Commission into Aboriginal Deaths in Custody (RCIADIC), *Regional Report of Inquiry in NSW, Victoria and Tasmania*, 1991, p 3.

2 RCIADIC, *National Reports*, 1991, at www.austlii.edu.au/au/other/IndigLRes/rciadic/, accessed 10/5/2021.

3 Legislative Council Select Committee, *The high level of First Nations people in custody and oversight and review of deaths in custody*, Report 1, 2021, ix.

4 M Langton, "Thirty years on from the Royal Commission, what needs to change?" (2021) 33 *JOB* 25.

5 S Norrish, "Thirty years on from the Royal Commission, what can judicial officers do?" (2021) 33 *JOB* 29.

FEATURES

REGULARS

This article seeks to encourage critical thinking about current practices in the application of bail laws and explores the proposition that, even leaving aside the question of any further reform of those laws, a black letter application of the current legislation permits and requires judicial officers to have regard to culturally appropriate solutions, as well as circumstances of disadvantage in First Nations communities, in a way that does not appear to be reflected in the statistics discussed in this article.[6]

Learnings from the Royal Commission's Report

The Final Report concluded that a major reason for the phenomenon of Aboriginal deaths in custody was "the grossly disproportionate rates at which Aboriginal people are taken into custody, of the order of more than twenty times the rate for non-Aboriginals".[7] The Final Report found that First Nations people in custody do not die at a greater rate than non-Aboriginal people in custody: "what is overwhelmingly different is the rate at which Aboriginal people come into custody, compared with the rate of the general community."[8] One of the key recommendations (Rec 92) was that governments "legislate to enforce the principle that imprisonment should be … a sanction of last resort".[9]

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

> Bail conditions should not be set which obviously will not or cannot be complied with. Unrealistic conditions simply set the defendant up for failure, and produce the result that bail is at the discretion of the police, who can arrest the defendant for breach of conditions whenever they choose not to turn a blind eye to the breach.
>
> The principal purpose of bail conditions should be to ensure that people attend at court to answer particular charges, although there may be other purposes in particular cases, e.g. the avoidance of further offences. However the conditions should not be used by police officers or magistrates to impose their views of an appropriate life style on offenders.[10]

Commissioner Wootten gave examples drawn from his investigations. One was a condition requiring total abstention from alcohol, a condition not sought by police but repeatedly added by magistrates. Another was the case of a man whose "final custody flowed from an unrealistic and irrelevant condition requiring him to report at 5:00 pm each day in a sober condition which, given his known habits, meant that his bail was revocable at the whim of police".[11] Days after failing to report, that man was arrested when seen at the Griffith Show with his girlfriend, which Commissioner Wootten concluded was "one of the reasons for the anger which he later expressed by taking his own life". He referred to another "very onerous condition which seems to be much too readily imposed", namely, "one requiring the defendant to stay out of his own town, often the town in which he has lived his whole life".[12]

The Final Report found that "the lack of flexibility of bail procedure and the difficulty Aboriginal people frequently face in meeting police bail criteria by virtue of their socioeconomic status or cultural difference contributes to their needless detention in police custody" and that this was the case for both adults and juveniles.[13] The Final Report accordingly made recommendations for the diversion of First Nations people from police custody, including Rec 89, that "the operation of bail legislation should be closely monitored by each government to ensure that the entitlement to bail, as set out in the legislation, is being recognised in practice" and Rec 91, that consideration be given to amending bail legislation for a number of purposes including "to revise any criteria which inappropriately restrict the granting of bail to Aboriginal people".[14]

Thirty years on — going backwards

Disturbingly, despite the findings and recommendations of the Final Report, incarceration rates of First Nations people have continued to rise to staggering levels. In 1989, First Nations people represented 14.3% of the prison population.[15] In December 2020, First Nations people represented 29% of adult prisoners in custody, despite accounting for only 3.4% of the Australian population.[16] In NSW in 2020, 25.5% of adult prisoners and 40.2% of young people in custody were First Nations people.[17] Over one-third of First Nations people in custody are on remand.[18] Some are ultimately acquitted. Of those who are convicted, 39.3% do not receive a custodial sentence or are

6 Australian Bureau of Statistics (ABS), *Prisoners in Australia*, 2020, at www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release#aboriginal-and-torres-strait-islander-prisoners, accessed 10/5/2021.
7 RCIADIC, *National Reports*, above n 2, Vol 1, preface.
8 ibid, Vol 1, [1.3.2].
9 ibid, Vol 5.
10 RCIADIC, *Regional Report of Inquiry in NSW, Victoria and Tasmania*, above n 1, ch 8.
11 ibid.
12 ibid.
13 RCIADIC, above n 2, Vol 3, [21.4.2].
14 RCIADIC, above n 2, Vol 5.
15 RCIADIC, above n 2, Vol 1, [6.2.3].
16 ABS, *Prisoners in Australia*, 2020, above n 6.
17 BOCSAR, *NSW custody statistics: quarterly update December 2020*, 2021, at https://www.bocsar.nsw.gov.au/Publication%20Supporting%20Documents/custody/Custody-Infographic-2020-12.pdf, accessed 10/5/2021.
18 Legislative Council Select Committee, above n 3, at 45.

sentenced to time served while on remand, likely resulting in a longer sentence than would have been imposed had bail been granted.[19]

Many judicial officers need no persuading that urgent action is required to address what must now be recognised as a crisis.[20] There is enormous energy and goodwill in the pursuit of that objective. And yet, as the statistics reveal, the alienation of First Nations people under the criminal law described in the Final Report is still as acute a problem as ever.

Early reform: a simplified approach to bail in NSW

Bail in NSW is currently governed by the *Bail Act* 2013 (NSW) (the 2013 Act), which came into force on 20 May 2014, replacing the cumbersome, presumption-based *Bail Act* 1978 (NSW). The 2013 Act was introduced in response to a recommendation of the report of the NSW Law Reform Commission (NSWLRC) on bail,[21] which noted that the 1978 Act had been amended by more than 80 other Acts since its introduction and had become "difficult to comprehend and operate, even for those with legal expertise".[22]

One of the key goals of those reforms was to simplify bail laws so that they were easier to understand.[23] Speaking anecdotally, the impression at the time was that the 2013 Act (as it originally came into force) achieved that goal.

The introduction of the "show cause" requirement

However, just five weeks after the commencement of the 2013 Act, a review was initiated following a series of bail decisions granting conditional bail to high-profile (alleged) crime figures. The reporting of those decisions saw the NSW Government and the court publicly criticised as being "soft on [alleged] crime".[24] The review resulted in the introduction of the *Bail Amendment Act* 2014 (NSW) which commenced on 28 January 2015. The reforms introduced by the amending Act included the introduction of a "show cause" requirement.

Perhaps the most enigmatic reform effected by the amending Act was the amendment of the objects clause. When the 2013 Act first came into force, s 3(2) directed a bail authority making a bail decision "to have regard to the presumption of innocence and the general right to be at liberty". That subsection was repealed in 2014, leaving the balance of the section intact and moving the reference to the presumption of innocence and the general right to be at liberty into a preamble identifying matters to which Parliament had regard when enacting the Act. What is to be made of the enactment and subsequent repeal of an objects clause requiring the court to have regard to fundamental principles to which regard must be had in any event is obscure.

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

The overall size of the remand population and the average length of time spent on remand have both increased at a faster rate since the introduction of the show cause requirement.[25]

That development is more acute in the case of First Nations people, who are more likely to be refused bail than the general population. The NSW Bureau of Crime Statistics and Research (BOCSAR) released a study earlier this year confirming that First Nations people were 20.4% more likely to be refused bail by police, even after controlling for relevant case characteristics such as criminal history and offence severity.[26]

Where bail is granted, the imposition of bail conditions continues to have a disproportionate impact on First Nations people. Commonly imposed conditions, such as residence and reporting conditions, often conflict with cultural obligations to attend funerals and care for family members.[27] The NSWLRC report recognised that these standard conditions may have far more detrimental impacts on First Nations people due to cultural ties to particular locations.[28] That is particularly the case in regional and remote communities.

Recommendation 8 of the Report of the Select Committee is: "That the NSW Government amend the *Bail Act* 2013 to include a standalone provision that stipulates a bail decision maker must take into account any issues that arise due to the person's Aboriginality, similar to section 3A of the *Bail Act* 1977 (Vic)".[29]

19 D Weatherburn and S Ramsay, "What's causing the growth in Indigenous imprisonment in NSW?" *Crime and Justice Statistics Bureau Brief No 118*, BOCSAR, 2016 at 8.

20 Stronger language has been used: see *R v DS* [2017] NSWSC 1842 at [7] (Hamill J).

21 NSWLRC, *Bail*, Report 133, 2012.

22 ibid at [3.71].

23 Second Reading Speech, Bail Bill 2013, NSW, Legislative Assembly, *Debates*, 1 May 2013, pp 87–88.

24 J Quilter and D Brown, "Speaking too soon: the sabotage of bail reform in NSW (2014) 3 *International Journal for Crime, Justice and Social Democracy* 76.

25 S Yeong and S Poynton, "Did the 2013 Bail Act increase the risk of bail refusal?" (2018) 212 *Crime and Justice Bulletin*, BOCSAR.

26 I Klauzner and S Yeong, "What factors influence police and court bail decisions?" (2021) 236 *Crime and Justice Bulletin*, p 12. The study excluded matters considered in higher courts, finding that 97.4% of cases were finalised in either the Local Court or Children's Court, p 6.

27 Australian Law Reform Commission, *Pathways to justice — Inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples*, Report No 133, 2017, Ch 5.

28 NSWLRC, *Bail*, above n 21, [11.56].

29 Legislative Council Select Committee, above n 3, p xi.

The question of reform is of course a matter for Parliament. In the meantime, judicial officers must apply the law as it stands. Is that what we are doing?

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

Leaving aside the vexed question of the "show cause" requirement, the 2013 Act does respond to Rec 91 of the Final Report; the Act does not, in terms or by any necessary aspect of its application, inappropriately restrict the granting of bail to First Nations people. The Act expressly requires the bail authority to have regard to any special vulnerability or needs the applicant has "because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment": s 18(1)(k) of the 2013 Act.

The critical task imposed on the decision-maker is the assessment of risk. The Act requires the court to assess any "bail concerns" to determine whether there is an "unacceptable risk" of a particular kind. If the court concludes that there is no unacceptable risk, bail must be granted (arguably, leaving aside show cause offences): s 20. If there is an unacceptable risk, bail must be refused: s 19. The Act accordingly confers no discretion in the sense of a choice as to dispositive orders of the kind that exists, for example, in sentencing, where it is recognised that there is no single "correct" sentence. However, although there is no judicial discretion in that sense, the task of assessing whether a bail concern amounts to an "unacceptable risk" does requires the bail authority to undertake an evaluative assessment. A strict application of the Act not only permits but requires the bail authority, in forming that assessment, to have regard to any "special vulnerability or needs" of a First Nations applicant.

There are four kinds of risk or "bail concerns" to be assessed: failure to appear, commission of a serious offence whilst at liberty, endangering the safety of certain persons or the community and interference with witnesses or evidence. Section 18 provides a list, which is both mandatory and exhaustive, of matters to be taken into account in that assessment. Many of the mandatory considerations are capable of pointing either way. For example, the court must have regard to the length of time the person is likely to spend in custody if bail is refused. A submission that commonly finds favour in the consideration of a bail application is that the period on remand might exceed the term of any sentence likely to be imposed if the applicant is found guilty. Conversely, where a release application comes before the court shortly before the substantive hearing, that might be a neutral factor.

The important thing to be borne in mind is that the assessment required to be made is broad and evaluative; only the conclusion that a concern amounts to a risk which is "unacceptable" having regard to matters that include the needs of the applicant triggers the operation of a statutory requirement that bail be refused. That part of the Act makes sense and, provided it is properly applied, should not operate unfairly.

The "show cause" requirement raises more difficult questions. The rule created by s 16A of the 2013 Act is that, in the case of a person charged with a "show cause" offence, the court must refuse bail unless the accused person "shows cause why his or her detention is not justified." The language is opaque. Detention is not justified if it is not authorised. That is not a statement that appears in the Act; it is an incontestable statement of legal principle. The imposition of an unguided requirement to show "cause" why detention is "not justified" is apt to obscure the fact that the 2013 Act confers authority to deprive a person of the right to be at liberty for an offence of which the applicant has not been and may never be convicted.

Conditional liberty

One welcome aspect of the amending Act was the inclusion, in the list of mandatory considerations, of s 18(1)(p), which requires the bail authority to have regard to "the bail conditions that could reasonably be imposed to address any bail concerns in accordance with section 20A". Structured in that way, the required process of evaluating risk compels attention to the ways in which any risk might be addressed other than by refusing bail. The 2013 Act regulates the kinds of conditions that can be imposed and the purpose for which they can be imposed. Perhaps most importantly, the power to impose conditions is constrained by notions of proportionality. Any bail conditions to be imposed must be reasonably necessary to address a bail concern; reasonable and proportionate to the offence for which bail is granted; appropriate to the bail concern in relation to which it is imposed; no more onerous than necessary to address the bail concern in relation to which it is imposed; reasonably practicable for the accused person to comply with and likely to be complied with by the accused person: s 20A. Refusal of bail is, in that way, properly seen as a decision of last resort.

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

> for example an offence occurs at night and so a curfew is imposed, an offence occurs at a particular location and so a geographical restriction covering that location is imposed, or an offence occurs with a young person so a non-association condition is imposed.[30]

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

The ALS has also expressed the concern that bail conditions are sometimes imposed for "welfare reasons".[31] In *R v Connor Fontaine (a pseudonym)*,[32] police had attended the home of the 10-year-old applicant late at night on multiple occasions to enforce a curfew condition and had arrested him numerous times for breach of that condition. Hamill J deleted the curfew condition. Citing a decision of Fullerton J in relation to extended supervision orders,[33] his Honour said at [7]:

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

Other relevant precedents

Before the introduction of the 2013 Act, the NSWCCA had accepted that, in an application for bail by a First Nations person, particularly where the applicant was also a young person, "alternative culturally appropriate supervision, where available, (with an emphasis on cultural awareness and overcoming the renowned anti-social effects of discrimination and/or an abused or disempowered upbringing), should be explored as a preferred option to remand in gaol": *R v Michael John Brown*.[34] That decision has been applied since the introduction of the 2013 Act.[35] In other decisions, the Supreme Court has emphasised the appropriateness of determining bail applications brought by First Nations people in the broader context of their overrepresentation in the prison population.[36]

Conclusion

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

31 ibid.
32 [2021] NSWSC 177.
33 *State of NSW v Bugmy* [2017] NSWSC 855 at [89].
34 [2013] NSWCCA 178 at [35].
35 See for example *R v Wright* [2015] NSWSC 2109 at [7] (Rothman J).
36 See for example *R v Greenup* [2020] NSWSC 1866 at [11]–[12] and [16] (Rothman J); *R v Ceissman* [2018] NSWSC 1244 at [12] (Rothman J) and *R v Alchin* [2015] NSWSC 2112 (McCallum J).

Retirement of his Honour Judge Stephen Norrish QC

A special sitting of the District Court was held on 23 April 2021 to farewell his Honour Judge Stephen Norrish QC who has retired after more than 20 years of service as a judicial officer. His Honour was appointed to the Bench in October 2000 after a distinguished legal career, including working as a solicitor with the Aboriginal Legal Service, Deputy Senior Public Defender and Senior Counsel assisting the Royal Commission into Aboriginal Deaths in Custody in NSW, Victoria and Tasmania 1988–1990.

His Honour was a great supporter of the Judicial Commission, serving as a member and then Chair of the Ngara Yura Committee 2007–2012. His Honour published 11 articles in the Commission's publications, *The Judicial Review* and the *Judicial Officers' Bulletin*. Most of these articles are concerned with both highlighting the problems that First Nations people face in the criminal justice system but also proposing solutions. Judge Norrish conceived and helped the Judicial Commission to facilitate two "Exchanging Ideas" conferences in 2009 and 2011 to promote cross-cultural understanding and explore meaningful solutions to the problem of First Nations people's over-representation in the criminal justice system. Reports of these conferences may be found in the *Judicial Officers' Bulletin*.[1]

1 K Lumley and S Norrish, "Lighting the way forward: respect, responsibility, engagement, diversity, local solutions" (2009) 21 *JOB* 37; K Lumley and S Norrish, "Exchanging ideas about Aboriginal contact with the criminal justice system" (2011) 23 *JOB* 83.