



Tasmanian Aboriginal Legal Service (“TALS”) Written Submission:

Bail Bill 2024 Response

February 2025

INTRODUCTION

NOTE – This submission contains the name of a deceased First Nations person.

As an advocate for law reform, justice and equity for all Tasmanian Aboriginal peoples, the Tasmanian Aboriginal Legal Service (“TALS”) welcomes the opportunity to provide feedback on the *Bail Bill 2024*.

TALS is an Aboriginal and Torres Strait Islander Legal Service (ATSILS) that specialises in criminal, civil and family law matters for Aboriginal Tasmanians. As an Aboriginal Community Controlled Organisation incorporated under the Office of the Registrar of Aboriginal Corporations (ICN 9283), TALS is committed to improving the life outcomes of Aboriginal peoples.

In this submission, any reference to Aboriginal peoples is understood to encompass Torres Strait Islander peoples.

TALS’ strategic goal is to halve Tasmanian Aboriginal’s rate of negative contact with the justice system in a decade. This is consistent with the identified objectives of the Tasmanian Government, who have committed to improving outcomes for all Tasmanian Aboriginal peoples and communities, and to address the entrenched inequalities faced by Aboriginal and Torres Strait Islander peoples.

TALS is also committed to addressing recidivism and recognises that Aboriginal people in Tasmania continue to be overrepresented in the Tasmanian prison population. As of September 2024, Aboriginal people made up almost 24% of the prison population in Tasmania.¹ Additionally, over 30% of Aboriginal people in the prison population are unsentenced.²

This submission aims to provide insight and drive discussion on the impact that the *Bail Bill 2024* will have on Tasmanian Aboriginal communities and peoples in Tasmania. The result that we expect to see an increase in people being remanded in custody or appearing before the Court, we will also discuss the impact it will have on our legal service, which is already underfunded, and the Tasmanian Government achieving their strategic goals and the objectives respectively.

¹ Tasmanian Government - Department of Justice, *Prisoners, detainees and community-based offenders output data* (23 October 2024).

² Australian Bureau of Statistics, *Prisoners in Australia* (25 January 2024).

BAIL BILL 2024

In an effort to modernize Tasmania's bail laws, the Tasmanian Government have moved to provide a statutory framework for what decision makers should consider when considering a person's release on bail. This will also bring Tasmania in line with all other Australian jurisdictions, who already have such frameworks in place.³

Whilst TALS supports providing a legislative framework for bail considerations, we do not support creating additional barriers to the granting of bail, including an *unacceptable risk* test, as it will have a disproportionate impact on Aboriginal peoples.

Whilst it is acknowledged that the existing common law presumption in favor of granting bail will remain (save for family violence offences), it will be displaced if a person is found to be an *unacceptable risk*, based on a two-step test.⁴

Unacceptable Risk

The *unacceptable risk* test creates a statutory test for granting bail. This is a two-step process used to establish where a person poses an 'unacceptable risk'.⁵

First consideration is whether under Section (1)(a) the person would:

- Pose a danger to the safety of others;
- Be unlikely to attend court;
- Be likely to commit an offence;
- Be likely to interfere with witnesses or otherwise obstruct justice.⁶

If it's deemed the person poses a risk of one or more of the above behaviors, then it is assessed under section (1)(b) of the proposed *Bail Act 2024* as to whether the risk posed is *unacceptable*. A non-exhaustive list of factors come into consideration during this assessment.⁷

³ Office of Parliamentary Counsel, *Bail Bill 2024* (27 November 2024).

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

RESPONSE

This response will include discussion on retributive responses to justice, how and why this response disproportionately impacts Aboriginal peoples and subsequently, how the proposed *Bail Bill 2024* will exacerbate that impact. There will also be discourse around how the *Bail Bill 2024* perpetuates the systemic discrimination long experienced by Aboriginal peoples.

This response will also offer thoughts how these impacts can be mitigated and show evidence of how other jurisdictions benefitted from having a mechanism in place that considers Aboriginal and Torres Strait Islander identify in bail decision making.

The justice system is in an unenviable position where it faces pressure to guarantee public safety from people who engage in criminogenic behaviours or otherwise pose a risk to the community.

The most effective response to achieving this has long been a matter for debate. There are those who believe the just response to crime is purely retributive, where a cost or imposition is inflicted as a deterrent from further offending. Alternatively, there are those who seek a more rehabilitative model, where support is provided to an offender so that they can address the underlying issues that has contributed to their behaviour.⁸

Broadly, it can be said that Australia still favours retribution, with imprisonment rates steadily increasing for several decades.⁹ The ongoing rise of imprisonments in Australia has been partially attributed to a substantial increase to unsentenced prisoners.¹⁰ In fact, the 2023/24 financial year alone saw a thirteen (13) percent increase in the unsentenced prisoner population in Australia, while the overall prisoner population increased by six (6) percent.¹¹ In Tasmania, unsentenced prisoners also increased by thirteen (13) percent, with the overall population increasing by just four (4) percent.¹²

However, despite Australia incarcerating a higher number of people, whether they be sentenced or unsentenced, we are still seeing a negligible shift in recidivism rates, and by extension people avoiding repeat custodial episodes.¹³ In the 2023/24 financial year, sixty (60) percent of the prison population had previously experienced time in custody.¹⁴ These figures add to the debate regarding the best way to manage offenders, or accused offenders, as the prospect of incarceration does not present as a deterrent to repeated contact with the justice system. People cannot escape a system where the underlying cause of offending is perpetual upon release and remains unchanged, being social disadvantage.

Aboriginal peoples continue to be disproportionately represented in custodial settings, with thirty-six (36) percent of all prisoners in Australia identifying as Aboriginal or Torres Strait Islander during the 2023/24 financial year.¹⁵ In Tasmanian custodial settings, as of September 2024 Aboriginal peoples made up

⁸ Australian Government – Australian Law Reform Commission, *Criminal Law* (10 November 2010).

⁹ Australian Bureau of Statistics, *Twenty-seven years of Prisoners in Australia* (3 November 2022).

¹⁰ The Guardian, *Unsentenced prisoners make up a third of Australia's prison population as bail refusals boom* (1 February 2023)

¹¹ Australian Bureau of Statistics, *Prisoners in Australia* (19 December 2024).

¹² Ibid.

¹³ Australian Government – Productivity Commission, *Report on Government Services 2023* (31 January 2023).

¹⁴ Australian Bureau of Statistics (n 10)

¹⁵ Australian Bureau of Statistics (n 10)

twenty-four (24) percent of the prison population.¹⁶ Of the Aboriginal or Torres Strait Islander peoples who spent time incarcerated during this period, seventy-eight (78) percent had previously experienced a custodial episode. When we consider that the Aboriginal and Torres Strait Islander community makes up just over three (3) percent of the total Australian population, these figures demonstrate the gross over-representation of the Aboriginal and Torres Strait Islander community in contact with the prison system.¹⁷

Social Determinants of Incarceration

Studies have identified several social determinants (or factors) that, if experienced, considerably increase a person's likelihood of being incarcerated at some point of their life¹⁸.

- 1 – Having lived in 'out of home' or foster care.
- 2 – Receiving an inadequate school education.
- 3 – Having unsupported mental health or cognitive issues.
- 4 – Experiencing homelessness/transience.
- 5 – Coming from, or living in, a low socio-economic or disadvantaged location.
- 6 – Living with substance dependency.
- 7 – Having contact with the justice system at a young age.
- 8 – Identify as Aboriginal or Torres Strait Islander.

Not all people experiencing one or more of these determinants will end up incarcerated. There are structural factors to consider, such as access to support or having a strong family dynamic, that can increase someone's ability to navigate these challenges successfully.¹⁹ This is where the concept of equity is important, as it recognises that certain people or groups require a different allocation of resources, responses and initiatives to access the same opportunities and achieve *fairness*.²⁰

A person experiencing one of the mentioned 'social determinants' is often suffering the impacts of 'service failure', where a person has not been adequately supported or protected by the social systems in place. The inadequate provision of support can be due to several barriers, including access, cost or systemic discrimination. Therefore, there are going to be certain communities that are at higher risk of experiencing one or more of the factors listed above due to inequities beyond their control.

Unfortunately, Aboriginal peoples are the 'highest risk' community in Australian and are far more likely to experience one or more of the social determinants of incarceration.²¹ Therefore, it is more probable that

¹⁶ Tasmanian Government – Department of Justice, *Prisoners, detainees and community based offenders output data* (23 October 2024).

¹⁷ Australian Bureau of Statistics, *Australia: Aboriginal and Torres Strait Islander population summary* (1 July 2022).

¹⁸ University of New South Wales, *The social determinants of justice: 8 factors that increase your risk of imprisonment* (18 April 2023).

¹⁹ Australian Government – Australian Law Reform Commission, *Social determinants of incarceration* (9 January 2018).

²⁰ Australian Human Rights Commission, *Let's talk about equality and equity* (accessed 31 January 2025).

²¹ Parliament of Australia, *Chapter 13 – Indigenous Australians* (accessed 1 February 2025).

Aboriginal peoples will be overrepresented in the prison system, as their lived experiences, and lack of access to appropriate support, 'pre-determine' that outcome for many.

Family Violence

Family violence amongst Aboriginal and Torres Strait Islander peoples is a significant concern. Aboriginal peoples are overrepresented as both victim-survivors and perpetrators. Sixty-seven (67) percent of Aboriginal peoples over the age of fifteen (15) have experienced family violence during their life.²²

It is important to acknowledge the impact that an *unacceptable risk* test may have on people living in a family violence situation. If there is a Family Violence Order ('FVO') imposed, then either party may find themselves experiencing housing difficulties, mental health issues or financial barriers that see them eventually have further contact with the justice system.²³ If then subject to an *unacceptable risk* test during a bail application, those same factors resulting from a family violence incident could have a 'ripple effect' and adversely impact bail applications.

Equality and Equity

The concepts of equality and equity are often used interchangeably in discussions about social justice; however, they are quite distinct from one another.

Equality focuses on treating everyone the same way, regardless of their individual circumstances or needs. In an equal society, everyone would receive the same resources, benefits, and opportunities, regardless of their different circumstances.²⁴

Equity focuses on fairness by considering individual circumstances, differences, and needs. Equity is a more flexible approach to addressing systemic and historical inequalities by allowing for resources and opportunities to be allocated in a way that 'levels the playing field' for everyone.²⁵

Equity often involves targeted interventions to ensure additional assistance is allocated to disadvantaged groups or individuals. This might mean the provision of extra resources and services to certain groups or enabling more accommodating conditions. Essentially, the concept of equity is unashamedly unequal in the pursuit of *fairness* and justice.²⁶

Impact of the Unacceptable Risk Test on Aboriginal and Torres Strait Islander Peoples

We see it will almost be a certainty that the *Bail Bill 2024* will exacerbate the already disproportionate representation of Aboriginal and Torres Strait Islander people in custody.

Firstly, the proposed *Bail Bill 2024* does not have a mechanism that considers a person's Aboriginal descent. This means that the proposed *Bail Bill 2024* could not only be perceived as being paternalistic, as

²² Australian Government – Australian Institute of Health and Welfare, *Family, domestic and sexual violence* (9 December 2024).

²³ State Government of Victoria, *Misidentification is a significant issue that has enormous consequences for the victim survivor* (16 December 2021).

²⁴ The University of Melbourne, *What is Social Equity?* (accessed 1 February 2024).

²⁵ *Ibid*

²⁶ *Ibid*

it disregards the needs of Aboriginal and Torres Strait Islander peoples, but also insufficient to decrease disproportionate remand rates.²⁷ This is contrast to 2024 amendments to bail laws in Victoria, which saw bail decision makers mandated to consider a person’s Aboriginality and the context of discriminatory practices that lead to overrepresentation.²⁸ This amendment was implemented in order to make bail fairer and more likely to achieve better outcomes.²⁹

Additionally, by not having a mechanism that considers a person’s Aboriginal descent, the *Bail Bill 2024* could be perpetuating systemic discrimination that has long existed in many public policies, practices and social structures.³⁰ This not only places Aboriginal peoples at risk of further harm and disadvantage but contradicts the Tasmanian Government’s efforts to ‘modernise’ Tasmania’s bail laws and works against commitments made under the *National Agreement on Closing the Gap*. While both the State and Federal Governments have made a commitment to reduce the rate of incarceration of Aboriginal people, they are already failing to reach targets, and the number of Aboriginal people in custody has increased. The introduction of stricter bail laws will guarantee these targets will not be met and the lives of Aboriginal people further negatively impacted.

The *unacceptable risk* test may be discriminatory toward Aboriginal and Torres Strait Islander peoples due to the social and structural disadvantage they experience. As stated, on all standard indicators of disadvantage, Aboriginal and Torres Strait Islander peoples emerge as the most socially and economically deprived, making them the most disadvantaged and marginalized group in Australia.³¹ The non-exhaustive list that helps inform whether bail risk is *unacceptable*, found in the proposed *Bail Act 2024*, section (5) (2), corresponds with the indicators of disadvantage where Aboriginal and Torres Strait Islander peoples remain disadvantaged, or disproportionately represented.³² The corresponding items include:

- Criminal history – Section (5)(2)(e).
- Compliance history with previous bail conditions – Section (5)(2)(f)
- The home environment and background of a person – Section (5)(2)(g)
- Accommodation stability and suitability – Section (5)(2)(h)
- Special vulnerability or needs of a person – Section (5)(2)(m)³³

Veronica Nelson

The in-custody death of Gunditjmara, Dja Dja Wurrung, Wiradjuri and Yorta Yorta woman Veronica Marie Nelson (‘Veronica’) on 2 January 2020 demonstrated the need for bail reform in Victoria after her death was found to be preventable, and the conditions under which she lived her final days ‘harrowing’.³⁴

²⁷ Australian Government – Australian Law Reform Commission, *Existing mechanisms to consider issues that arise due to Aboriginality* (11 January 2018).

²⁸ Victoria Legal Aid, *Educating the sector on Victoria’s new bail laws* (2 April 2024).

²⁹ *Ibid.*

³⁰ Victorian Aboriginal Justice Agreement, *Underlying causes of Aboriginal over-representation* (15 August 2024).

³¹ Parliament of Australia (n 18).

³² Parliament of Australia (n 18).

³³ Office of Parliamentary Counsel (n 3).

³⁴ Victorian Aboriginal Legal Service, *Inquest into the passing of Veronica Nelson* (January 2024).

Veronica was detained three (3) days prior to her death for shoplifting offences and a failure to appear on bail. Despite the power to grant Veronica bail, Police refused to do so as she fell into the highest 'exceptional circumstances' threshold under the *Bail Act*.³⁵ During the eventual Coronial Inquest into Veronica's death, Police gave evidence of an 'unwritten policy' to always refuse bail in this situation, despite being legally required to consider individual circumstances in each decision.³⁶

The Coroner found that Police failed to give proper consideration to grant Veronica bail, despite being empowered to do so. It was also found that Police failed to consider Veronica's vulnerability in a custodial setting as an Aboriginal woman.³⁷ Further, it was noted that the 'unwritten policy' of always refusing bail to people in Veronica's situation, who were also subjected to the 'exceptional circumstances' test, as unlawful.³⁸

After Police refused bail, Veronica spent the night in custody alone prior to her 31 December 2024 appearance before the Magistrates Court. Despite Victoria Legal Aid being briefed to appear for Veronica, she ultimately represented herself during her bail application.³⁹ The Coroner ultimately determined that Veronica should not have appeared unrepresented and that the legal services provided were inadequate.⁴⁰ During her bail hearing, Veronica's Aboriginality was not mentioned by Prosecution or the Magistrate, nor were relevant questions asked about her circumstances despite it being a requirement under the *Bail Act*. As she was unable to show 'exceptional circumstances', Veronica was once again refused bail.⁴¹

During her short time remanded in custody The Coroner found that Veronica was culturally isolated and was not provided with culturally competent support. Although there was a Koori Court Officer available, Veronica did not engage with them as the officer was not notified of Veronica's detainment.⁴² Overall it was determined that many procedural and structural barriers hindered important health and circumstantial information being collected from Veronica and prevented her receiving the appropriate support. Veronica passed away after three (3) days in remand due to complications arising from opiate withdrawal and Wilkie Syndrome in the setting of malnutrition.⁴³

During the inquest into Veronica's death, the Coroner turned their attention to the *Bail Act* amendment that introduced an 'exceptional circumstances' test. This amendment stated that a bail decision maker must refuse bail unless 'exceptional circumstances' exist. The burden of demonstrating said 'exceptional circumstances' in bail applications was to lie with the accused.⁴⁴ The Coroner found the 'exceptional circumstances' test to be a 'complete and unmitigated disaster' which had a discriminatory impact on Aboriginal peoples.⁴⁵ In light of their findings, the Coroner recommended an urgent review of *Bail Act* with a

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Australasian Legal Information Institute, *Bail Act 1977 – Sect 4A* (25 February 2025).

⁴⁵ Victorian Aboriginal Legal Service (n 28)

view to removing provisions that disproportionately impact Aboriginal peoples, repealing the presumption against bail and 'reverse onus' regime and repealing the bail offences contained within the *Bail Act*.⁴⁶

⁴⁶ *Ibid.*

BENEFITS OF HAVING MECHANISMS THAT CONSIDER ABORIGINAL DESCENT

Broadening the non-exhaustive list for determining *unacceptable risk* in bail decisions to include considerations for Aboriginal and Torres Strait Islander descent will better support and guide decision makers, challenge any unconscious biases and aid culturally appropriate decision making.⁴⁷

The benefits of having a mechanism that considers Aboriginal descent, and experiences relevant to Aboriginal peoples, are evidenced by the 2024 amendment to the *Bail Act* in Victoria. A key reform to the *Bail Act* was the addition of a new clause that included:

*'consideration of broader systemic factors that drive inequality as well as circumstances relevant to Aboriginal people, including factors that make them particularly vulnerable in custody'*⁴⁸

The amendment intended to not only guide decisions makers, as stated, but also to ensure the disproportionate incarceration rates were not compounded and ensure that Aboriginal cultural rights were protected.⁴⁹

The months preceding the 24 March 2024 commencement of the amended *Bail Act* found that whilst there was limited reduction in the over incarceration of Aboriginal and Torres Strait Islander people, there was a 14.6% reduction in the number of Aboriginal and Torres Strait Islander people held on remand (as of June 2024).⁵⁰ This figure contributed to an overall reduction in the number of people in remand, saving the Victorian Government an estimated one million (1,000,000) dollars per week,⁵¹

We also note that decision makers must receive appropriate and ongoing cultural awareness training that considers the diverse communities in any jurisdiction, to ensure that they are considering Aboriginality appropriately.

Youth

TALS is supportive of the additional protections provided in the Bill to protect the rights of young people who are being considered for bail. However, we are concerned as to how these considerations will be implemented and again renew a call to ensure that decision makers are provided ongoing and appropriate cultural awareness training to ensure Aboriginality is properly considered.

Whilst we accept this cannot be addressed in legislation; we raise that there needs to be significant consideration and resources available to support young people who are involved in the criminal justice system including the introduction of a bail support program.

Bail Support Program

TALS received funding via a *Closing the Gap* initiative to develop and pilot a bail support program for an eighteen (18) month period. The TALS Bail Support Pilot Program ('BSP') commenced August 2023 and

⁴⁷ Judicial College of Victoria, *Aboriginality and Bail -Section 3A bail considerations* (25 March 2024).

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Victorian Aboriginal Legal Service, *Successful bail reforms prove more can be done* (8 August 2024).

⁵¹ Ibid.

supported Tasmanian Aboriginal adults located in Northern Tasmania. The pilot concluded 31 December 2024, as per the agreement with the Grantor of funding. A summary of the program outcomes tells us:

Clients that engaged with the BSP experienced life improvements, most notably:

- A 63% decrease in housing instability or homelessness.
- A 47% decrease in substance dependency.
- A 30% increase of formal mental health assessment and engagement in treatment.

These life improvements subsequently saw a reduction in both imprisonment rates and recidivism for BSP clients. The imprisonment rate was 88% lower for BSP clients when compared to national court outcome rates for Aboriginal peoples, and 49% lower than Tasmanian court outcomes rates. BSP clients also experienced lower recidivism, with the rate 55% lower amongst BSP clients in comparison to the national rate for Aboriginal peoples.

The results achieved by the BSP demonstrate how a well-developed support program can proactively address the issues that result in bail breaches, or other offending behaviours, and ultimately address the disadvantage experienced by Aboriginal peoples that leads to disproportionate incarceration.

Other considerations

The Tasmanian Police Manual provides that the TALS must be notified when there is an Aboriginal person in police custody. Delivering this service has provided TALS significant insight into circumstances where Police should be able to bail but are either prohibited by legislation or policy to do so.

The first is when it is alleged court bail is breached, and Tasmania Police have arrested a person. Currently, Section 11 of the *Bail Act* grants the power, to a justice, to *restore the order for bail* of a person arrested under Section 10 and brought before a justice. There is no similar provision in the *Bail Act* relating to the power of police to *restore bail*. Whilst parliament may have intended the restoration of bail to be the remit of the Court, we have seen many circumstances where very minor breaches of bail have led to a person being held in custody awaiting a court hearing. An example of this may be where a person has failed to sign in on one occasion, which may have occurred prior to their last appearance in Court. Another example may be arriving slightly late for curfew.

The alternative to arrest in the circumstances of minor breaches, would be for Police to exercise discretion not to arrest but proceed by summons, but we have seen many examples where this has not occurred and has led to Aboriginal people being held in custody due to a minor breach.

The second, we regularly see is Police not having the power to grant bail in respect of a breach of restraint order and suggest this is rectified in any new *Bail Act*. A minor breach of restraint order could lead to a person being held in custody overnight unnecessarily to be bailed by the Court the following day. The Police should have the discretion to admit people to bail for breaches of a Restraint Order if considered appropriate.

The third is in respect of breaches of Police Family Violence Orders and Family Violence Orders (or interim orders). Police regularly advise us during provision of the out of hours service that their policy is not to police bail in respect of breaches of these orders. Whilst we understand this is police policy rather than legislative prohibition, we ask that the question as to police power to bail in circumstances of breaches when Police can be satisfied that the safety and well-being of the protected person and any affected children can be protected, be addressed in any *Bail Bill* so there is clarity.

CONCLUSION

TALS are generally supportive of the Tasmanian Government's objective to modernize Tasmania's bail laws. However, as an advocate for law reform, justice and equity for all Tasmanian Aboriginal peoples, TALS maintain the position that the proposed *unacceptable risk* test found in the *Bail Bill 2024* may be discriminatory toward Aboriginal and Torres Strait Islander peoples. In fact, we have already seen a worst-case example of how such tests can impact Aboriginal and Torres Strait Islander peoples in the case of Veronica Nelson's untimely death.

Aboriginal and Torres Strait Islander peoples have long experienced structural disadvantage and suffered systemic discrimination. If the Tasmanian Government truly wants to modernise Tasmania's bail laws, the proposed *Bail Bill 2024* must have a provision that mandates that decision makers consider Aboriginal descent and the context of historical discriminatory practices that have led to overrepresentation in the justice system. This will ensure that *unacceptable risk* is assessed equitably and achieves just outcomes for Tasmanian Aboriginal peoples in contact with the justice system.

If you have any questions or would like to discuss anything in the contents of this report, please reach out to me directly.

Warmest regards,



Jake Smith (He/Him)

Chief Executive Officer

P: 1800 595 162 | M: 0492 857 491 | E: jsmith@tals.net.au

Level 1, Office 1A, 67-69 Brisbane Street, Launceston