



BAIL ACT 1992 SECTION 44 STATUTORY REVIEW REPORT

Justice and Community
Safety Directorate

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BAIL ACT 1992 SECTION 44 STATUTORY REVIEW REPORT

EXECUTIVE SUMMARY

This is a report on the statutory review (the Review) of the operation of section 44 of the *Bail Act 1992* (Bail Act). Section 44A of the Bail Act states that the Minister must review the operation of section 44 as soon as practicable after the end of its second year of operation and present a report of the review to the Legislative Assembly within six months after the day the review is started.

Section 44 was inserted into the Bail Act by the *Crimes (Serious and Organised Crime) Legislation Amendment Act 2016* and commenced on 1 May 2017. The Review was undertaken by the Justice and Community Safety Directorate (JACS) and commenced on 28 October 2019.

Section 44 provides the ACT Director of Public Prosecutions (DPP) with a right of review of bail decisions made in relation to accused persons charged with a family violence offence or a serious offence. The provision states that an application for review may only be made where the DPP considers there are exceptional circumstances and it is in the public interest to make the application.

The Review aimed to determine:

- > whether section 44 is being used appropriately;
- > whether amendments are required to support the intended operation of section 44; and
- > whether section 44 should continue operating.

Stakeholder feedback on the operation of section 44 was provided by:

- > ACT Director of Public Prosecutions (DPP)
- > ACT Human Rights Commission (HRC)
- > ACT Corrective Services (ACTCS)
- > ACT Courts and Tribunal (ACTCT)
- > ACT Bar Association
- > Civil Liberties Australia
- > Legal Aid ACT

The Review makes the following key findings and conclusions:

- > the DPP has published Guidelines on how section 44 will be used by the DPP, including pre-approval requirements that prosecutors must follow before initiating a section 44 application;
- > the DPP has not made any section 44 applications, though oral notice of the DPP's intention to make a section 44 application has been given on two occasions;
- > there are divergent stakeholder views about the merits of section 44;
- > there is an anomaly in timeframes in section 44, which requires amendment;
- > communication and operational processes, and legal considerations for custody arrangements in relation to section 44 applications should be clarified through further stakeholder consultation to ensure the provision operates as intended; and
- > section 44 is being used appropriately and should continue to operate.

FINDINGS AND CONCLUSIONS

Findings

1. The DPP has published Guidelines which set out the factors the DPP will take into account in deciding whether to seek a review of a decision to grant bail pursuant to section 44 of the Bail Act, and which outline processes to be followed by the DPP in relying on the review power.
2. The pre-approval process in the DPP Guidelines, which requires prosecutors to obtain authority from the Director to approve a matter as a section 44 review matter before providing oral notice to the court about the intention to make a section 44 application, is an important safeguard for ensuring section 44 is used appropriately.
3. The DPP has not made an application to the Supreme Court for review of a bail review decision pursuant to section 44(2) since the commencement of the provision on 1 May 2017.
4. The DPP gave oral notice of a proposed application for review to the Magistrates Court, pursuant to section 44(4), on two occasions, but no applications were ultimately pursued, and advice that the applications would not proceed was provided to the Magistrates Court in a timely way.
5. Since its commencement, section 44 has not been used in any way inconsistent with legislation or applicable DPP Guidelines.
6. There are divergent views about the merits of section 44. Some stakeholders consider the provision is unnecessary and inconsistent with the independence of the judiciary, and should be repealed, and others support the use of section 44 as an important protection for victims and the general public where significant safety issues are concerned.
7. There is an anomaly in section 44, in that the timeframe that a bail decision can be stayed under section 44(5)(b) is inconsistent with the time limit for the DPP to make an application for a review of bail under section 44(3).
8. There is uncertainty in relation to the communication processes between the DPP, ACTCT and ACTCS and the accused.
9. There are legal and operational issues requiring clarification in relation to the transfer and custody of an accused the subject of a section 44 application.
10. There are concerns about the financial impacts for administering section 44 review applications.

Conclusions

1. Section 44 is being used appropriately. This is supported by the finding that there have been no instances where section 44 has been used inconsistently with the legislation or applicable DPP Guidelines. In addition, the fact that there have been no applications is consistent with the intent that section 44 be used only in exceptional circumstances.
2. Amendment is required to address an anomaly in the timeframes in section 44. Section 44(5)(b) should be amended to align the time that a bail decision is stayed with the time allowed for the DPP to make an application for a review of bail under section 44(3).

3. Further consultation with stakeholders should be undertaken to address concerns about communication processes between the DPP, ACTCT, ACTCS and the accused, and legal and operational frameworks for the transfer and custody of an accused in relation to a section 44 application, to ensure section 44 operates as intended. This may lead to the need for legislative amendments.
4. The Review concludes that section 44 should continue to operate. As the provision contains relevant safeguards, has not been used inappropriately, maintains an important purpose of protecting public safety, and was introduced with human rights compatibility, the Review considers there is justification for section 44 to continue.
5. Use of section 44 should continue to be monitored, and the operational and legal issues raised by stakeholders through the Review should be addressed as soon as practicable, to ensure the provision continues to operate as intended and administration of the provision is appropriately resourced.

1. INTRODUCTION

Terms of reference

Section 44 ('Right of review of bail decisions – prosecution') and the accompanying review provision, s 44A ('Review of s 44'), were inserted into the *Bail Act 1992* (Bail Act) by the *Crimes (Serious and Organised Crime) Legislation Amendment Act 2016* and commenced on 1 May 2017.¹

Section 44A of the Bail Act provides:

Review of s 44

- (1) The Minister must review the operation of section 44 as soon as practicable after the end of its 2nd year of operation.
- (2) The Minister must present a report of the review to the Legislative Assembly within 6 months after the day the review is started.
- (3) This section expires 3 years after the day it commences.

The Attorney-General has ministerial responsibility for the Bail Act under the *Administrative Arrangements 2019 (No 3)*.

Conduct of the Review

The aim of the Review was to examine the operation of the prosecution bail review power under section 44 and to determine:

- > whether section 44 is being used appropriately;
- > whether amendments are required to support the intended operation of section 44; and
- > whether section 44 should continue operating.

The review was conducted by the ACT Government Justice and Community Safety Directorate (JACS) and commenced on 28 October 2019.

The review process involved requesting information from the DPP as to the use of section 44, and consultation with targeted stakeholders to obtain views on the operation and effectiveness of section 44.

This report will be tabled in the ACT Legislative Assembly by 28 April 2020.

¹ Section 44A expires three years after the day it commences (that is, on 1 May 2020): s 44A(3).

2. BACKGROUND

Bail in the ACT

Principles and purposes of bail

When a person is charged with having committed an offence, they can either be held in custody until their court case is heard or they may be released from police or court custody to return to court at a later date to face the charge or charges against them. In the ACT, the legislation dealing with matters of bail is the *Bail Act 1992*.

The primary context for making bail decisions is the presumption of innocence and a person's right to remain free until trial. Reform of bail laws often requires balancing broad objectives of ensuring the integrity of the justice system, protecting the community, and safeguarding the best interests of the defendant.

Review of bail decisions under the Bail Act

The legislative framework for review of bail decisions is provided under Part 6 of the Bail Act. Division 6.1 addresses review of decisions by authorised officers, and Division 6.2 is in relation to review by courts.

Section 41 of the Bail Act provides the right of an accused person or the informant (as represented by the DPP) to apply for review of a bail decision by an authorised officer or a court. In applying to the Magistrates Court or Supreme Court for review of a bail decision (other than under section 44) the applicant must show a change in circumstances relevant to the granting of bail, or the availability of fresh evidence or information relevant to the granting of bail since the initial bail decision.²

Overview of section 44 of the Bail Act

Policy objectives of section 44

Section 44 provides the DPP with a right of review of bail decisions made in relation to accused persons charged with a family violence offence or a serious offence. The provision states that an application for review may only be made where the DPP considers there are exceptional circumstances and it is in the public interest to make the application.

Section 44 was inserted into the Bail Act by the *Crimes (Serious and Organised Crime) Legislation Amendment Act 2016* and commenced on 1 May 2017. The provision was introduced in order to deal with the rare circumstances in which high risk situations arise in relation to certain bail decisions and it is imperative that the decision should be reviewed in order to protect public safety.³

The Explanatory Statement to the Crimes (Serious and Organised Crime) Legislation Amendment Bill 2016 (the **Bill**) provides the following commentary on section 44 as it was inserted:

- > Limiting the offences for which review of a bail decision can be sought pursuant to s 44 is recognition that the power is to be exercised sparingly and only in circumstances where there is likely to be a safety risk to the community if the person is released on bail;
- > Given that the DPP must consider that it is in the public interest to make the application, this will involve scenarios where the likelihood of re-offending or harm to another is high, and where the DPP has evidence to demonstrate that the review is required;

² See *Bail Act 1992*, s 42, 42A 43 and 43A.

³ Explanatory Statement, Crimes (Serious and Organised Crime) Legislation Amendment Bill 2016, p 17.

- > The Bill would be accompanied by the implementation of guidelines prepared by the DPP for an exercise of this power.⁴

The review power provided to the DPP in section 44 is distinct from the rights of review which may be relied on by an accused person or an informant, which depend on the applicant establishing the availability of fresh evidence or information, or otherwise satisfying the court of a change in circumstances.⁵

In contrast, under section 44, the DPP may seek review of a relevant bail decision *as of right* where the DPP considers that exceptional circumstances exist and it is in the public interest to make the application, without having to demonstrate a change in circumstance or the availability of fresh evidence or information relevant to the granting of bail to the accused that was unavailable when the bail decision was made.

The process under section 44

The procedure under section 44 is as follows:

1. An accused person charged with a domestic violence offence or a serious offence is either granted bail or their bail conditions are varied by the court (the *original decision*).
2. The DPP gives immediate oral notice of a proposed application to seek review of the original decision (section 44(4)).
3. The operation of the original decision is immediately stayed, and continues to be stayed until the earliest of the following occurs:
 - a. the DPP tells the court that it will not make an application,
 - b. 24 hours have passed and the DPP has not made an application and given written notice to the accused;
 - c. the Supreme Court makes a decision on the application;
 - d. 48 hours have passed since oral notice was given and the Supreme Court has not made a decision (section 44(5)).
4. If the DPP decides to seek review, it must make an application to the Supreme Court and provide written notice of the application to the accused person within two hours of the original decision being made (or if the decision is made between 4.00pm and 8.00am, by 10.00am on the second day) (section 44(3)).

Section 44 is extracted in full at Appendix A.⁶

⁴ Explanatory Statement, Crimes (Serious and Organised Crime) Legislation Amendment Bill 2016, p 23.

⁵ See *Bail Act 1992*, ss 41, 42, 42A, 43 and 43A.

⁶ Similar prosecution review provisions exist in other jurisdictions, under the *Bail Act 2013* (NSW), s 40; *Bail Act 1977* (Vic), s 18A; and *Crimes Act 1914* (Cwlth), s 15AA.

3. CONSULTATION AND SUBMISSIONS TO THE REVIEW

Information from the Office of the Director of Public Prosecutions (DPP)

On 23 October 2019, JACS wrote to the DPP to request information on the use of section 44. The DPP responded on 28 October 2019.

DPP guidelines for using section 44

The DPP has developed guidelines which set out the factors to be taken into account by the DPP in deciding whether to seek a review of a decision to grant bail pursuant to section 44 of the Bail Act, and set out the processes to be followed by the DPP in relying on the review power.

The Guidelines were issued in 2017 soon after the introduction of the provision ('initial Guidelines') and were amended in 2019 following the appointment of the current Director, Mr Shane Drumgold SC. A key difference between the initial and revised Guidelines is that, under the current Guidelines, a prosecutor may only give oral notice of a review application where pre-approval has been granted by the Director.⁷ Prosecutors appearing in court must identify potential matters for review under section 44, and bring those matters to the attention of the Director prior to a bail application. The Director will pre-approve matters for which prosecutors may give notice of a review application if the defendant is given bail.

The DPP's initial Guidelines and current Guidelines⁸ are at Appendix B and C, respectively.

The Guidelines state that circumstances where a section 44 application will be made will primarily be where there are concerns as to the likelihood of the accused endangering the safety of anybody, or intimidating a witness or otherwise obstructing the course of justice if released on bail, and must all be of an exceptionally serious kind.

The Guidelines state that factors relevant to the DPP's decision to make an application for review include if serious threats to the safety of a person have been made, and those threats are credible, and if the circumstances otherwise indicate a not fanciful possibility that threats may be carried out.

Findings

1. The DPP has published Guidelines which set out the factors the DPP will take into account in deciding whether to seek a review of a decision to grant bail pursuant to section 44 of the Bail Act, and which outline processes to be followed by the DPP in relying on the review power.
2. The pre-approval process in the DPP Guidelines, which requires prosecutors to obtain authority from the Director to approve a matter as a section 44 review matter before providing oral notice to the court about the intention to make a section 44 application, is an important safeguard for ensuring section 44 is used appropriately.

⁷ The Guidelines state that in the Director's absence, prosecutors are required to consult the Deputy Director, Assistant Director or a Senior Advocate to obtain pre-approval. Previously, under the DPP's initial Guidelines, all prosecutors had the necessary authority to give oral notice of a proposed application for review of a relevant bail decision.

⁸ The current Guidelines are also available on the DPP's website: see 'Director of Public Prosecutions right of review of bail decisions pursuant to s44 of the Bail Act 1992 – Director's Guideline', available at https://www.dpp.act.gov.au/_data/assets/pdf_file/0019/1324342/S-44-bail-review-guideline.pdf

DPP use of section 44

The DPP indicated there have been nil instances of pre-approval to give oral notice of a proposed application for review of a bail decision given by the Director.

The DPP has not made any applications to the Supreme Court for review of a bail decision pursuant to section 44(2).

Prior to the introduction of the pre-approval process through revision of the Guidelines in 2019, there were two instances of oral notice of proposed application for review of a bail decision given by the DPP to the Court.⁹ Neither of these instances of oral notice resulted in an application for review of the relevant bail decision being made. On both occasions, the DPP told the Magistrates Court that an application would not be made to the Supreme Court to review the relevant bail decision. This information was communicated to the Magistrates Court within an hour of the oral notice being given and while the accused remained in the ACT Magistrates Court. These two instances were factors in the introduction of the DPP's original guidelines.

Findings

3. The DPP has not made an application to the Supreme Court for review of a bail review decision pursuant to section 44(2) since the commencement of the provision on 1 May 2017.
4. The DPP gave oral notice of a proposed application for review to the Magistrates Court, pursuant to section 44(4), on two occasions, but no applications were ultimately pursued, and advice that the applications would not proceed was provided to the Magistrates Court in a timely way.
5. Since its commencement, section 44 has not been used in any way inconsistent with legislation or applicable DPP Guidelines.

Submissions received from stakeholders

On 5 December 2019, JACS wrote to stakeholders to invite written submissions on the operation and effectiveness of section 44. A list of stakeholders invited to provide written submissions and a copy of correspondence is at Appendix D and E, respectively.

Responses were received from: the ACT Human Rights Commission (**HRC**), Legal Aid ACT, ACT Corrective Services (**ACTCS**), ACT Courts and Tribunal (**ACTCT**), ACT Bar Association, and Civil Liberties Australia. The DPP's views on the merits and operation of section 44 were provided through the DPP's response to JACS' request for information in October 2019.

Views on section 44

Stakeholders' support for the use of section 44 was based on the following views:

- > Section 44 is an appropriate safeguard for the rare circumstance where a person presenting a significant risk to the community may otherwise be released;
- > The appropriate use of section 44 is safeguarded by the requirement, in the DPP Guidelines, for prosecutors to obtain the Director's pre-approval to provide oral notice of a proposed section 44 review application;

⁹ The matter of *Police v West* was considered by the court on 2 May 2017 in relation to charges under the *Crimes Act 1900* which were categorised as family violence offences: forcible confinement (s 34); Acts endangering health (s 28); Assault occasioning actual bodily harm, (s 24); Common assault (s 26); Acts endangering life etc (s 27); Threat to kill (s 30); and possession of offensive weapon and disabling substances (s 380). The matter of *Police v Jurcevic* was considered by the court on 5 June 2017 in relation to charges categorised as family violence offences: destroying or damaging property (s 116(3) *Crimes Act 1900*) and possession of offensive weapon (s 380 *Crimes Act 1900*).

- > Bail review itself is not incompatible with human rights and the powers in section 44 are suitably circumscribed to be compatible with the *Human Rights Act 2004*;
- > Section 44 is an important safeguard to protect victims of crime and the general public in the context of serious offences and/or family violence offences that raise significant safety issues; and
- > The fact that the power has not been exercised does not necessarily indicate it is not required.

The following concerns were raised by stakeholders:

- > Section 44 is inconsistent with the independence of the judiciary as it empowers a member of the executive to stay a decision of the court, which is a judicial decision usually exercised by the court;
- > Section 44 does not require the DPP to show a change in circumstances or the availability of fresh evidence or information relevant to the granting of bail;
- > Section 44 is inconsistent with human rights as it causes a person to stay in custody without fulsome information about the grounds that the DPP will rely on in the event the review application is made;
- > An accused, without an order of a court, can be incarcerated for up to two days;
- > Section 44 is unnecessary as prosecutors can already quickly appeal a bail decision to the Supreme Court.

Findings

6. There are divergent views about the merits of section 44. Some stakeholders consider the provision is unnecessary and inconsistent with the independence of the judiciary, and should be repealed, and others support the use of section 44 as an important protection for victims of crime and the general public where significant safety issues are concerned.

Amendments to section 44

Two stakeholders commented on the need for legislative amendments to section 44. One stakeholder was of the view that no legislative changes were needed. Another stakeholder considered that amendments could be explored to reduce the operational burden on judges and ACTCT staff while addressing the need to reduce the time the defendant spends in custody pending a review application.

During the Review, JACS identified an inconsistency in provisions in relation to the length of time a bail decision can be stayed. The 2-hour time limit for the DPP to make an application and provide written notice to the accused under section 44(3) is inconsistent with section 44(5)(b), which suggests the DPP has 24 hours to make an application and give written notice. This has the effect that an accused person can be held for up to 24 hours from the time of the court's decision on bail, without the DPP making a written application for review.

This anomaly appears to have occurred during debate of the Bill when government amendments were negotiated on the floor of the Assembly, resulting in section 44(3) being amended to the effect that the DPP has '2 hours', rather than 24 hours from the court's decision to grant bail, in which to apply for a review of the decision. The intent was to ensure that a person would not be held in custody for a longer period than is absolutely necessary. However, no complementary amendment was made to section 44(5)(b) to align the timeframe for the DPP to make an application for review, with the period for which the court's bail decision is stayed.

It is noted that the DPP Guidelines align with the 2-hour limit for making an application under section 44(3) and state that the DPP will notify the court within 2-hours about whether a section 44

application will not be proceeded with so that, in practice, the intention to establish a 2-hour limit on how long a bail decision can be stayed will be observed.

Findings

7. There is an anomaly in section 44, in that the timeframe that a bail decision can be stayed under section 44(5)(b) is inconsistent with the time limit for the DPP to make an application for a review of bail under section 44(3).

Operation of section 44

Two stakeholders commented on the sharing of appropriate information between the DPP, ACTCT and ACTCS and the accused, in relation to the making or abandonment of a section 44 application. One stakeholder stated that safeguards and processes with respect to communicating information are best dealt with by way of DPP policy (as opposed to legislative changes).

Another stakeholder highlighted the importance of ensuring appropriate management of notifications to relevant correctional officers, particularly in relation to the giving of oral notice under section 44(4) and matters arising under s 44(5), in order to protect against the risk of incorrect release or unlawful custody of an accused. Opportunities to mitigate risks in this context should be considered to ensure section 44 operates as intended.

Another stakeholder raised concerns about the financial cost of administering section 44 review applications, as it requires the Supreme Court to ensure the availability of a judge and ACTCT and external staff to be on call, including after-hours, on public holidays and weekends. In addition, it was considered that there would be significant on-call costs for ACTCT where the court must be convened outside business hours, including costs for staff overtime, external security services and recording and transcript services. It was also suggested that clarification is needed in relation to operational processes and the legal basis for the transfer and custody of an accused impacted by a section 44 review application.

The issue of custody of an accused requires consideration. In particular, there is a lack of clarity as to who is empowered to hold the accused in custody pending the DPP's decision to apply for review and completion of any review that might occur. For example, where an accused is in police custody at the time of the section 44 'stay', is the accused to remain in police custody or be placed in ACTCS custody; and where the accused is not in custody at the time of the section 44 'stay', what legal mechanism exists for them to be placed in custody? Further, if the accused is in ACTCS custody at the time of the s 44 'stay', what mechanism exists to allow the accused to remain in ACTCS custody?

Findings

8. There is uncertainty in relation to the communication processes between the DPP, ACTCT and ACTCS and the accused.
9. There are legal and operational issues requiring clarification in relation to the transfer and custody of an accused the subject of a section 44 application.
10. There are concerns about the financial cost for administering section 44 review applications.

4. CONCLUSIONS

Is section 44 being used appropriately?

The Review concludes that section 44 is being used appropriately. This is supported by the finding that there have been no instances where section 44 has been used inconsistently with legislation or applicable DPP Guidelines. In addition, the fact that there have been no applications under section 44 is consistent with the intent that the provision be used only in exceptional circumstances.

Are amendments required to support the intended operation of section 44?

An amendment is required to address an anomaly in the timeframes in section 44. Section 44(5)(b) should be amended to align the time that a bail decision is stayed with the time allowed for the DPP to make an application for a review of bail under section 44(3).

Further consultation with stakeholders should be undertaken to address concerns about communication processes between the DPP, ACTCT, ACTCS and the accused, and operational and legal frameworks for the transfer and custody of an accused in relation to a section 44 application, to ensure section 44 operates as intended. This may lead to the need for legislative amendments.

Should section 44 continue to operate?

The Review concludes that section 44 should continue to operate. The Review acknowledges there are divergent views on the merits of the provision. However, as the provision contains relevant safeguards, has not been used inappropriately, and maintains an important purpose of protecting public safety, the Review considers there is justification for section 44 to continue.

This position reflects the human rights assessment of the provision, as outlined in the Explanatory Statement to the Bill. This concluded that limitations on human rights in section 44 are proportionate and justified in the circumstances because they are the least restrictive means available to achieve the purpose of ensuring that a power is available for the DPP to seek a review where, in rare circumstances in which high risk situations arise in relation to certain bail decisions, the decision should be reviewed to protect public safety.¹⁰

Use of section 44 should continue to be monitored, and the operational and legal issues raised by stakeholders through the Review should be addressed as soon as practicable, to ensure the provision continues to operate as intended and administration of the provision is appropriately resourced.

¹⁰ See Explanatory Statement to the Crimes (Serious and Organised Crime) Legislation Amendment Bill 2016, pp 17-18, 20-21.

APPENDIX A

Extract of Bail Act 1992, section 44

Section 44 Right of review of bail decisions—prosecution

- (1) This section applies to a decision by a court in relation to bail for an accused person charged with a family violence offence or a serious offence.
- (2) The director of public prosecutions may apply to the Supreme Court for review of the decision if the director of public prosecutions considers that exceptional circumstances exist and that it is in the public interest to make the application.
- (3) An application must be made, and written notice of the application given to the accused person—
 - (a) within 2 hours after the decision is made; or
 - (b) if the decision is made between 4pm on a day and 8am the next day (day 2)—by 10am on day 2 (whether or not it is a working day).
- (4) However, an application may only be made if the director of public prosecutions gives the court that made the decision oral notice of the proposed application immediately after the decision is made.
- (5) On giving notice under subsection (4), the operation of the decision is stayed until the first of the following happens:
 - (a) the director of public prosecutions tells the court that made the decision that an application will not be made;
 - (b) 24 hours have passed since notice was given under subsection (4) and the director of public prosecutions has not—
 - (i) made an application; and
 - (ii) given written notice of the application to the accused person;
 - (c) the Supreme Court makes a decision on the application;
 - (d) 48 hours have passed since notice was given under subsection (4) and the Supreme Court has not made a decision on the application.
- (6) In this section:

family violence offence—see the Family Violence Act 2016, dictionary.

serious offence means—

- (a) an offence that involves causing harm, or threatening to cause harm, to anyone, punishable by imprisonment for more than 10 years; or
- (b) an offence under the Criminal Code, chapter 3 (Theft, fraud, bribery and related offences), punishable by imprisonment for more than 10 years; or
- (c) an offence under the Criminal Code, part 4.1 (Property damage offences), punishable by imprisonment for more than 14 years; or
- (d) an offence under the Criminal Code, chapter 6 (Serious drug offences), punishable by imprisonment for more than 10 years.

APPENDIX B

Director of Public Prosecutions Right of Review of Bail Decisions Pursuant to s44 of the *Bail Act 1992* – Director’s Guideline (2017 Initial guidelines)



Director of Public Prosecutions right of review of bail decisions pursuant to s44 of the Bail Act 1992 Director’s guideline

This guideline sets out the factors to be taken into account by my Office in deciding whether to seek a review of a decision to grant bail pursuant to s44 of the *Bail Act 1992*.

Section 44 permits the Director of Public Prosecutions (“the Director”) to apply for a review of the decision of a court to grant bail if the director considers that exceptional circumstances exist and it is in the public interest to make the application: s44(2).

The right to review exists where a person is charged with a **family violence offence** or a **serious offence**.

Family violence offence is defined in the *Family Violence Act 2016* as **an offence if the conduct making up the offence is family violence**. **Family violence** is defined at s 8 of the Act and covers a range of acts committed by a person upon a family member. **Family member** is defined at s 9 of that Act to include intimate partners and domestic partners (including former partners), relatives, and children of domestic partners including former domestic partners, and a parent of a child of the person. **Intimate partner** and **relative** are further defined in that Act. **Relative** is defined to catch a broad range of familial relationships.

Serious offence is defined in the Bail Act to include a range of serious offences, including an offence of causing harm or threatening to cause harm punishable by imprisonment for more than 10 years.

The decision to review bail does not rest upon either a change of circumstances or the availability of fresh evidence. Other provisions in the Bail Act cover this.

An application will only be made where exceptional circumstances exist and it is in the public interest to make the application.

Those circumstances will primarily be concerns as to the likelihood of the person endangering the safety of anybody, or intimidating a witness or otherwise obstructing the course of justice if released on bail.

The endangering of the safety of the person, the interference with evidence, or the intimidation of a witness or otherwise obstructing the course of justice must all be of an exceptionally serious kind.

If serious threats to the safety of a person have been made, and those threats are credible, and the circumstances otherwise indicate a distinct and not fanciful possibility that threats may be carried out, these are factors which are relevant to the decision to make an application for review.

Jon White SC
ACT Director of Public Prosecutions

APPENDIX C

Director of Public Prosecutions Right of Review of Bail Decisions Pursuant to s44 of the *Bail Act 1992* – Director’s Guideline (current guidelines)



Director of Public Prosecutions right of review of bail decisions pursuant to s44 of the *Bail Act 1992* Director’s guideline

This guideline sets out the factors to be taken into account by my Office in deciding whether to seek a review of a decision to grant bail pursuant to s44 of the *Bail Act 1992*. It also sets out the process followed by my Office under s 44.

Section 44 permits the Director of Public Prosecutions (“the Director”) to apply for a review of the decision of a court to grant bail if the director considers that exceptional circumstances exist and it is in the public interest to make the application: s44(2).

The right to review exists where a person is charged with a *family violence offence* or a *serious offence*.

Family violence offence is defined in the *Family Violence Act 2016* as an offence if the conduct making up the offence is family violence. *Family violence* is defined at s 8 of the Act and covers a range of acts committed by a person upon a family member. *Family member* is defined at s 9 of that Act to include intimate partners and domestic partners (including former partners), relatives, and children of domestic partners including former domestic partners, and a parent of a child of the person. *Intimate partner* and *relative* are further defined in that Act. *Relative* is defined to catch a broad range of familial relationships.

Serious offence is defined in the *Bail Act* to include a range of serious offences, including an offence of causing harm or threatening to cause harm punishable by imprisonment for more than 10 years.

The decision to review bail does not rest upon either a change of circumstances or the availability of fresh evidence. Other provisions in the *Bail Act* cover this.

An application will only be made where exceptional circumstances exist and it is in the public interest to make the application.

Those circumstances will primarily be concerns as to the likelihood of the person endangering the safety of anybody, or intimidating a witness or otherwise obstructing the course of justice if released on bail.

The endangering of the safety of the person, the interference with evidence, or the intimidation of a witness or otherwise obstructing the course of justice must all be of an exceptionally serious kind.

If serious threats to the safety of a person have been made, and those threats are credible, and the circumstances otherwise indicate a distinct and not fanciful possibility that threats may be carried out, these are factors which are relevant to the decision to make an application for review.

The DDP's decision on whether to apply for a bail review will be made prior to a bail application. Prosecutors appearing in court must identify potential matters for review under section 44, and bring those matters to the attention of the Director. The Director will pre-approve matters for which prosecutors may give notice of a review application if the defendant is granted bail. The Prosecutor may only give oral notice of a review application where pre-approval has been granted.

The pre-approval process for bail review is taken at the highest level of the Office. Ordinarily, the decision will be made by the Director. In the Director's absence, the decision will be made by the Deputy Director. In the Deputy's absence, the Assistant Director will make the decision, and in the Assistant Director's absence, the decision will be made by a Senior Advocate.

Shane Drumgold
ACT Director of Public Prosecutions

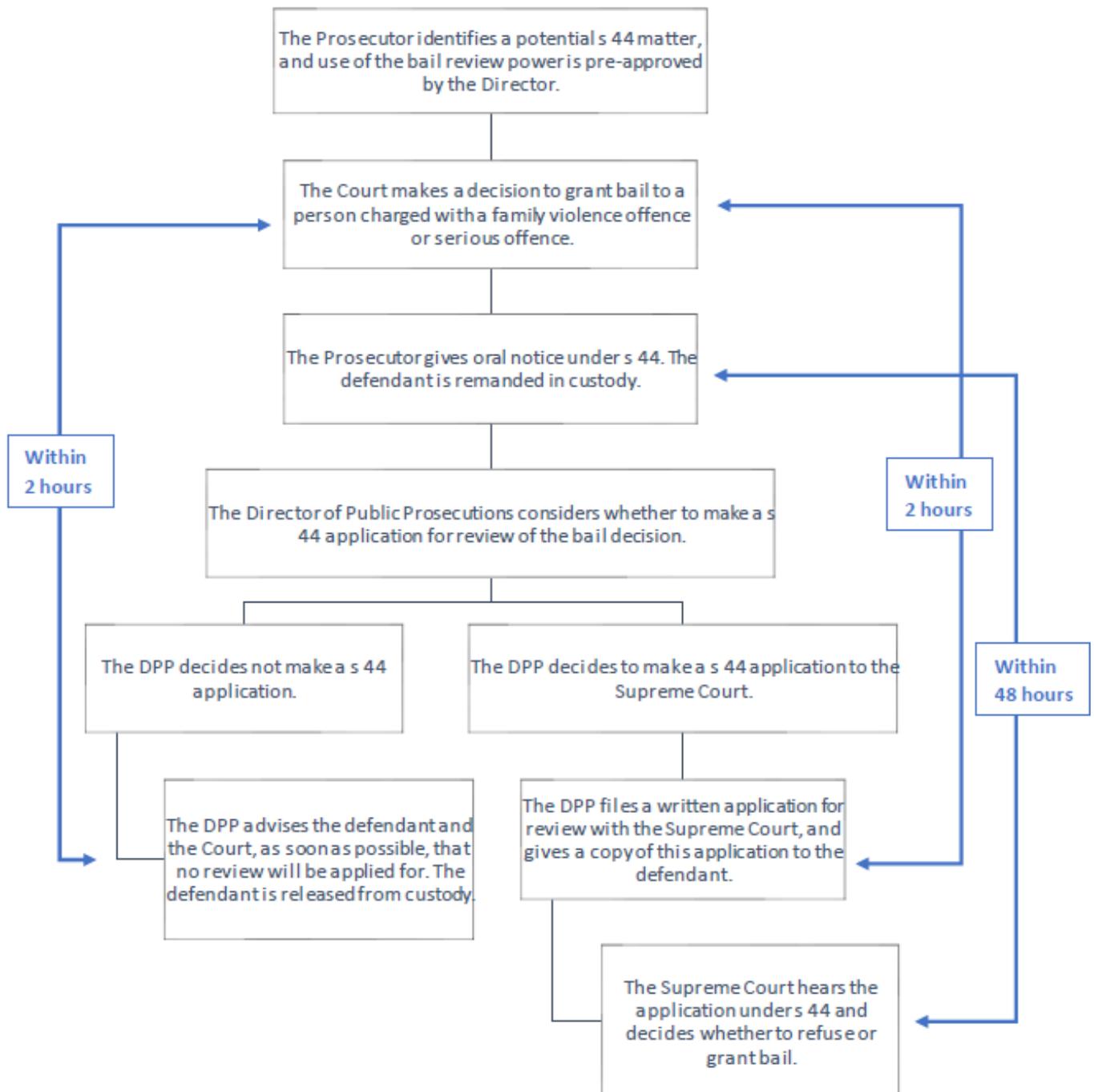
Section 44 bail review process

1. Prior to court, the Prosecutor appearing in the bail list identifies a matter (which must involve a charge for a family violence offence or a serious offence) as a potential section 44 review matter if the defendant is granted bail.
2. The Prosecutor consults the Director (or in their absence, the Deputy Director, Assistant Director or a Senior Advocate). Only the Director (or a nominated person) has authority to pre-approve a matter as a section 44 review matter. The Director will consider whether exceptional circumstances exist and whether it is in the public interest to make a review application if the defendant is granted bail (s 44(2)).
3. The potential s 44 matter goes before the court and the defendant is granted bail (s 44(1)).
4. The Prosecutor gives oral notice of an application for review immediately after the decision to grant bail is made (s 44(4)).
5. The Prosecutor informs the Court that the bail decision is now stayed under s44(5) and the defendant is remanded in custody as if bail had not been granted.
6. The Prosecutor contacts the Office of the DPP (ODPP) to notify the Director that oral notice under s 44 has been given. This will usually be done through the informant.
7. Within 2 hours of the decision to grant bail,¹ a written bail review application signed by the Director must be:
 - a. filed with the Court (r 4724 *Court Procedures Rules 2006*); and
 - b. served on the defendant (this may be through the defendant's lawyer if legally represented).
8. If the Director decides not to make a bail review application:
 - a. as soon as possible after this decision is made, and within 2 hours of the bail decision, the ODPP must advise:
 - i. the Court: s 44(5)(a); and
 - ii. the defendant.
 - b. The ODPP should then advise (if possible, before the defendant is released):

¹ Note: if the Court makes the bail decision after 4:00pm, the DPP must make the application and give a copy to the defendant by 10:00am the next day (s 44(3)(b)).

- i. the informant; and
 - ii. the complainant (this may be via the informant).
9. The Supreme Court is required to hear the bail review application within 48 hours of oral notice being given in court by the Prosecutor.

Timeline of bail review process



APPENDIX D

List of stakeholders

The following stakeholders were invited to provide a written submission for this review:

- > ACT Director of Public Prosecutions
- > ACT Policing
- > ACT Human Rights Commission
- > Aboriginal and Torres Strait Islander Elected Body
- > ACT Corrective Services
- > ACT Courts and Tribunal
- > ACT Bar Association
- > ACT Law Society
- > Victim Support ACT
- > Civil Liberties Australia
- > Aboriginal Legal Service NSW/ACT
- > Legal Aid ACT
- > Women's' Legal Centre ACT
- > Winnunga Nimmityjah Aboriginal Health Service
- > Gugan Gulwan Youth Aboriginal Corporation

APPENDIX E

Invitation for written submissions



ACT
Government
Justice and Community Safety

Dear Stakeholders,

Consultation on s 44 Bail Act Statutory Review

In compliance with section 44A of the *Bail Act 1992* (the Act), Legislation, Policy & Programs (LPP) on behalf of the Justice & Community Safety Directorate (JACS) is undertaking a statutory review (the review) of section 44 ('Right of review of bail decisions- prosecution') of the Act.

Section 44 of the Act commenced on 1 May 2017 to ensure that a power is available for the ACT Office of the Director of Public Prosecutions to seek a review where, in rare circumstances, high risk situations arise in relation to certain bail decisions and it is imperative that the bail decision is stayed in order to protect public safety.

Section 44A of the Act requires a mandatory statutory review of the operation of s 44 as soon as practicable after the end of its 2nd year of operation (1 May 2019) and a report of the review to be tabled in the Legislative Assembly within 6 months after the day the review is started. The review period commenced on 28 October 2019.

LPP is inviting written submissions from stakeholders on the operation and effectiveness of s 44 of the Act.

To inform the review we are seeking your written submissions by COB 10 January 2020. Please provide submissions via email to JACSLPPCRIMINAL@act.gov.au.

If you have any questions, or would like any further information, please contact Bianca Shaw on (02) 6207 1686 or alternatively by email at bianca.shaw@act.gov.au.

We look forward to receiving your input in this important process.

Yours faithfully

Philippa Spence
Senior Director
Criminal Law Team
Legislation, Policy and Programs
Justice and Community Safety Directorate



ACT
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Justice and Community
Safety Directorate

March 2020