



LEGISLATIVE ASSEMBLY

FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

Mr Peter Cain MLA (Chair), Dr Marisa Paterson (Deputy Chair), Mr Andrew Braddock MLA

Submission Cover Sheet

Inquiry into the Administration of Bail

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Legal Aid ACT

The Committee Secretary
Standing Committee on Justice and Community Safety
Office of the Legislative Assembly
GPO Box 1020, Canberra ACT 2601

By email: LACommitteeJCS@parliament.act.gov.au

17 May 2024

Dear Committee Secretary

RE: INQUIRY INTO THE ADMINISTRATION OF BAIL IN THE ACT

1. The Legal Aid Commission (ACT) welcomes the opportunity to make a submission to the Inquiry into the Administration of Bail in the ACT ('the Inquiry').

About the Legal Aid Commission (ACT)

2. The Legal Aid Commission (ACT) ('the Commission') is an independent statutory authority established under the *Legal Aid Act 1977* (ACT). The Commission's function is to provide legal assistance in the Australian Capital Territory (ACT). Legal assistance includes legal information and advice, duty lawyer services, and grants of financial assistance. The Commission provides these services under the name Legal Aid ACT.
3. The Commission's mission is to promote a just society in the ACT by:
 - 3.1. Ensuring that vulnerable and disadvantaged people receive the legal services they need to assert or defend their rights;
 - 3.2. Developing an improved community understanding of the law; and
 - 3.3. Seeking the reform of laws that adversely affect those we assist.
4. This submission will address the following Terms of Reference of the Inquiry:
 - 4.1. Prevention of re-offending on bail;
 - 4.2. Presumption of bail; and
 - 4.3. Any other related matter.

Prevention of re-offending on bail

5. The Commission considers that the prevention of re-offending by persons on bail may be achieved through the introduction of diversionary pathways at the point of bail.
6. The Commission welcomes and strongly supports the steps taken by the ACT Government to minimize reoffending through the *Reducing Recidivism 25% by 2025* Strategic Plan, which include the introduction of the Justice Housing Program, the Galambany Circle Sentencing Court, and the Drug and Alcohol Sentencing List, among other initiatives.
7. Whilst these initiatives provide crucial support for offenders following sentence or upon release from prison, the Commission would welcome the introduction of similar diversionary pathways for accused persons whilst on bail. The Commission considers that such diversionary options during bail would have a two-fold effect on recidivism:
 - 7.1. it would reduce re-offending rates of accused persons while on bail, thereby decreasing the risk accused persons pose to the community; and
 - 7.2. by promoting the rehabilitation of accused persons whilst on bail, it would increase the scope of the sentencing court to impose non-custodial sentences, thereby minimizing the rates of imprisonment in the ACT.
8. The Commission submits that the ACT Government should consider implementing a similar program to the Magistrates Early Referral into Treatment (MERIT) Program in New South Wales. The MERIT Program is a voluntary program for adults released on bail to access alcohol and drug treatment services for 12 weeks while their matters are adjourned. The MERIT Program does not require a plea to be entered before participation, and has been demonstrated to support the decrease in participants' substance use and offending behaviour, while improving their health and wellbeing and increasing the likelihood of a better outcome at sentence.¹ The Commission notes that similar programs exist across Australia, including the Court Referral and Evaluation for Drug Intervention and Treatment (CREDIT) Programs in Victoria and the Northern Territory, and the Court Assessment and Referral Drug Scheme (CARDS) in South Australia.²
9. The Commission considers that the introduction of a similar program in the ACT would provide an effective alternative to detention and remand, while also increasing compliance with bail conditions and reducing the likelihood of re-offending in future.

¹ 'The Magistrates Early Referral into Treatment (MERIT) Program', *Local Court of New South Wales* (Web Page, Last Updated 8 May 2023) < [The Magistrates Early Referral into Treatment \(MERIT\) Program \(nsw.gov.au\)](https://www.localcourts.nsw.gov.au/the-magistrates-early-referral-into-treatment-merit-program)>.

² Matthew Willis, *Bail Support: A Review of the Literature* (Australian Institute of Criminology, Research Report 04, 2017) 9-13.

Presumption of Bail

10. The *Bail Act 1992* (ACT) ('Bail Act') explicitly identifies offences to which three different types of presumptions apply: a presumption for bail; a presumption against bail; and a 'neutral' presumption for bail.³
11. The Commission considers that the scheme of presumptions of bail should be abolished in favour of a general presumption for bail for all offences, subject to the criteria for granting bail at sections 22 and 23 of the Bail Act.
12. The Commission recognizes that a balance must be struck in relation to the preservation of an accused person's dignity and liberty against the protection of the community from offensive behaviour. The Commission considers that this balance is most appropriately achieved through the application of the criteria at sections 22 and 23 of the Bail Act and the imposition of appropriate bail conditions.
13. The Commission considers that the current presumptions scheme should be abolished on the basis that:
 - 13.1. The presumption against bail and 'neutral' presumption of bail are incompatible with human rights;
 - 13.2. The existence of a 'neutral' presumption creates complexity; and
 - 13.3. The 'special or exceptional circumstances' threshold disproportionately impacts disadvantaged people, and it is unclear how this threshold supports the purposes of the Bail Act.

Incompatibility with human rights

14. The fundamental principles of the ACT criminal justice system include the presumption of innocence and the right of accused persons to be at liberty before trial and sentence. These rights are protected under sections 18 and 22 of the *Human Rights Act 2004* (ACT) ('Human Rights Act'), which are sourced from the *International Covenant on Civil and Political Rights* (ICCPR).
15. Relevantly, Article 9(3) of the ICCPR provides that:

Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. **It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any**

³ *Bail Act 1992* (ACT) Divisions 2.2, 2.3, 2.4.

other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.⁴

16. The Commission considers that the right to the presumption of innocence and the right to security and liberty of person promotes a presumption for bail for all offences. The Commission considers that the scheme of presumptions in the Bail Act is incompatible with the Human Rights Act, insofar as Division 2.3 removes the presumption for bail for certain offences and Division 2.4 provides for a presumption against bail. This incompatibility was declared by the ACT Supreme Court in *In the matter of an application for bail by Isa Islam* [2010] ACTSC 147 (*'Isa Islam'*).⁵

Issues with a 'neutral' presumption

17. The Commission considers that the application of a 'neutral' presumption is unclear, and unnecessarily complicates the determination of whether bail should or should not be granted.
18. Section 9B of the Bail Act provides that the presumption for bail does not apply to the grant of bail for persons accused of certain offences explicitly stated at Schedule 1 of the Bail Act, or otherwise under section 9B(b) to (e).⁶
19. Despite the provision that there is no presumption for bail for these specified offences, the court or authorized officer is still required to consider the criteria for granting bail pursuant to sections 22 and 23 of the Bail Act, and the prosecution continues to bear the onus of demonstrating that bail should not be granted subject to these criteria.⁷ There is no requirement that the court or authorized officer must consider any additional matters to these criteria, which it must also consider for offences to which section 9A of the Bail Act applies.
20. As provided in section 30 of the Human Rights Act, a Territory law must be interpreted in a way that is compatible with human rights so far as it is possible to do so consistent with its purpose.⁸ Therefore, section 9B of the Bail Act should be properly interpreted consistently with the right to the presumption of innocence and the right to liberty and security of person, which implicitly supports a presumption for bail.
21. Accordingly, it is ultimately unclear how the 'neutral' presumption in section 9B operates in a way that is distinct from section 9A so as to have a meaningful effect on the assessment of whether an accused person should be granted or refused bail.

⁴ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) Article 9(3).

⁵ *In the matter of an application for bail by Isa Islam* [2010] ACTSC 147 at [2] (Penfold J).

⁶ *Bail Act 1992* (ACT) s 9B.

⁷ *In the matter of an application for bail by Michael Aaron Le Clair* [2014] ACTSC 245 at [30]-[44] (Refshauge J).

⁸ *Human Rights Act 2004* (ACT) s 30.

Issues with the 'special or exceptional circumstances' threshold

22. The presumption against bail applies to Division 2.4 of the Bail Act, which provides that bail for people charged with certain serious offences, or appealing a sentence of imprisonment, must not be granted unless the court is satisfied that special or exceptional circumstances exist favouring the grant of bail.⁹ For sections 9C and 9D of the Bail Act, even if the court is satisfied that special or exceptional circumstances exist, it must refuse bail if satisfied that refusal is justified after considering the criteria at sections 22 and 23 of the Bail Act.¹⁰
23. The 'special or exceptional circumstances' threshold applies to sections 9C, 9D, and 9E of the Bail Act. This test has been interpreted to mean that there must be some 'unusual or uncommon' circumstance that would justify the grant of bail.¹¹ Section 9G of the Bail Act provides that a circumstance that would be an applicable bail criteria is not a special or exceptional circumstance only because it is an applicable bail criteria.¹² The purpose of the 'special or exceptional circumstances' threshold is to introduce a higher test than the normal criteria for granting or refusing bail,¹³ and operates to reverse the onus of proof on the accused person to establish these circumstances.
24. The Commission considers that it is unclear how the 'special or exceptional circumstances' threshold supports the purpose of the Bail Act. The purpose of the Bail Act, as interpreted by the courts, is to ensure that accused persons appear at trial, protect the community and the administration of justice, while also protecting the liberty of persons presumed to be innocent.¹⁴
25. However, there is nothing in the language of the Bail Act or its explanatory materials to explain the role of the 'special or exceptional circumstances' threshold in achieving the purpose of the Bail Act. As stated by Penfold J in *Isa Islam* at [268]:
- The purpose of s 9C ... is, in practical terms, to make it very difficult for a person charged with murder or an ancillary offence to obtain bail, and to achieve this by providing a significant extra obstacle to the granting of bail to such persons. Whether the underlying purpose is to ensure that such persons turn up for trial, to protect the community or the administration of justice, or to protect the accused person, is not apparent from either the text of the provision or the explanatory material.¹⁵
26. The Commission considers that these purposes are appropriately achieved through the application of the criteria for granting bail at sections 22 and 23 of the Bail Act. A person

⁹ *Bail Act 1992* (ACT) ss 9C, 9D, and 9E.

¹⁰ *Bail Act 1992* (ACT) ss 9C and 9D.

¹¹ See *In the matter of an application for bail by Massey* [2008] ACTSC 145 at [7]-[8] (Refshauge J); *In the matter of an application for bail by Isa Islam* [2010] ACTSC 147 at [387] (Penfold J).

¹² *Bail Act 1992* (ACT) s 9G(2).

¹³ Explanatory Statement, *Bail Amendment Bill 2003* (ACT).

¹⁴ *In the matter of an application for bail by Isa Islam* [2010] ACTSC 147 at [258] (Penfold J).

¹⁵ *Ibid* at [268] (Penfold J).

accused of a serious offence, or accused of committing a serious offence whilst on bail for other offences, may be less likely to be granted bail on an assessment of the likelihood of the person reoffending or endangering the safety and welfare of the community. This assessment is achieved through consideration of the sections 22 and 23 criteria, and the application of the 'special or exceptional circumstances' threshold does not go towards this assessment. Rather, the blanket application of this threshold encumbers judicial discretion to assess each matter on a case-by-case basis, by limiting the ability of an accused person to apply for bail if they fail to establish 'special or exceptional circumstances'.

Any other related matter

27. In addition to the matters identified above, the Commission considers that bail matters should be heard on Sundays and bail supports made available on weekends, and that police powers should be expanded to deal with minor breaches of bail.

Sunday bails and weekend bail supports

28. The Commission considers that the Magistrates Court should hear bail matters on Sundays in accordance with section 17 of the Bail Act, and that bail supports must be made available on weekends and public holidays.
29. Section 17 of the Bail Act requires an accused person to be brought before the court within 48 hours after being taken into custody, or within 96 hours if a doctor provides that the accused person is an inpatient of a hospital and unfit to be brought before the court within the 48-hour period.¹⁶
30. In practice, the cut-off period for an arrested person to be brought before the Magistrates Court on Saturday is 9:00am. This means that any arrested person who is not processed by the City Watchhouse by 9:00am on a Saturday must be dealt with on Monday morning, even if the person was taken into custody on Friday evening or Saturday morning. Depending on the number of bail matters before the Magistrates Court on Monday, it is possible that a person arrested on Friday evening or over the weekend would only have their matter heard by Monday afternoon.
31. This means that an accused person may be detained in custody without being brought before the court for longer than 48 hours, in contravention of section 17 of the Bail Act and in violation of their right to liberty and security of person and their rights in criminal proceedings under sections 18 and 21 of the Human Rights Act.
32. The Commission considers that this issue is best addressed by introducing an additional sitting of the Magistrates Court on Sundays, to allow bail matters to be heard for accused persons who are unable to have their matters dealt with on Saturdays. The Commission

¹⁶ *Bail Act 1992 (ACT)* s 17(2).

notes that a pilot program for Sunday bail hearings was trialed in November 2023, and welcomes the permanent sitting of the Magistrates Court on Sundays for the purposes of bail.

33. The Commission also considers that further investment into bail support programs is required, to increase their capacity to assist accused persons on weekends and public holidays.¹⁷
34. The Commission recognizes the essential support provided to accused persons through the Commission's Community Liaison Unit, the Mental Health Court Assessment and Liaison Service, the Aboriginal Legal Service bail support program, and the Prisoner's Aid program. These services provide crucial assistance to accused persons in accessing health and welfare services, receiving housing support, and meeting financial needs. The Commission would welcome the increase in funding and staffing in these programs to increase their capacity to assist persons on bail.

Police powers to deal with breaches of bail

35. The Commission also considers that the power of police to deal with bail should be expanded to include dealing with minor breaches of bail. The Commission considers that this would increase the efficiency of the courts while minimizing the need for accused persons to be remanded in custody before they are brought before the courts.
36. Under the current legislation, police are empowered to arrest a person who is believed on reasonable grounds to have failed to comply with a bail condition.¹⁸ That person must then be brought before a court as soon as practicable, in which their bail may be continued or revoked by the court.¹⁹
37. The Commission considers that authorized police officers should be empowered to continue a person's bail in circumstances where the failure to comply with a bail condition is minor and the officer does not consider that bail should be revoked. If the officer considers that bail should be revoked, the ordinary procedure of arresting the person and bringing the person before the court should apply.
38. The Commission views that this power would relieve the burden on the courts to deal with minor bail matters, while also preserving the liberty of persons who are otherwise compliant with their bail.

¹⁷ See *Crimes Act 1900* (ACT) s 309.

¹⁸ *Bail Act 1992* (ACT) s 56A.

¹⁹ *Bail Act 1992* (ACT) s 56AD.

Thank you for the opportunity to provide the Commission's views in relation to this Inquiry.
Should you have any questions about our submission, please do not hesitate to contact me.

Yours faithfully



Mr John Boersig PSM

■ Chief Executive Officer
Legal Aid Commission (ACT)