



HUMAN RIGHTS & DISCRIMINATION COMMISSIONER

ACT Human Rights Commission

Mr Steve Doszpot MLA
Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly

Via email

Mr Doszpot

Inquiry into Sentencing



A.C.T. LEGISLATIVE ASSEMBLY COMMITTEE OFFICE	
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BC -

Thank you for the opportunity to make a submission to the Standing Committee on Justice and Community Safety's Inquiry into Sentencing, and for the extension in time for my submission.

For your information, Mary Durkin, the Disability and Community Services Commissioner, was consulted in relation to the comments on People with Disability in the Criminal Justice System and she concurs with those comments.

Please contact me if you have any concerns or questions regarding my submission. The relevant contact point in my office is Sean Costello, Human Rights and Discrimination Law Policy Adviser.

Yours sincerely

Helen Watchirs

Dr Helen Watchirs OAM

Human Rights and
Discrimination Commissioner



**HUMAN RIGHTS &
DISCRIMINATION COMMISSIONER**

ACT Human Rights Commission

Standing Committee on Justice and Community Safety

Review of Sentencing

Submission by the ACT Human Rights and Discrimination Commissioner

October 2013

About the ACT Human Rights and Discrimination Commissioner

The Human Rights Commission is established under the *Human Rights Commission Act 2005* (the HRC Act). My role includes promotion of the human rights and welfare of people living in the ACT by making recommendations to the ACT Government and non-government agencies on legislation, policies, practices and services that affect vulnerable groups in the community.

As Human Rights and Discrimination Commissioner, I handle discrimination complaints and promote the right of people to be free from unlawful discrimination. My role is also to promote human rights and advise Government on the operation of the ACT *Human Rights Act 2004*.

Introduction

My submission will focus on these specific matters detailed in the Terms of Reference:

1. Sentencing practice in the ACT, its effects and implications, including:

- a) the law, legal doctrine and rationale of contemporary sentencing practice;*
- d) timeliness in handing-down decisions and sentences.....*

.....3. The practice and effectiveness of current arrangements in the ACT for:

- a) parole;*
- b) periodic detention;*
- c) bail;*
- d) Restorative Justice; and*
- e) Circle Sentencing.*

4. Alternative approaches to sentencing practice in the ACT.

I will focus on:

- The impact of the *Human Rights Act 2004* on questions posed by the terms of reference;
- My work with partner organisations exploring the concept of Justice Reinvestment in the ACT;
- The recommendations of the ACT Law Reform Advisory Council in relation to sentencing, of which I am a member;

Impact of the ACT Human Rights Act

The ACT *Human Rights Act 2004* is relevant to several aspects of this Review. As you know s28 of the Act requires that any limitation on human rights be reasonable and demonstrably justified in a

free and democratic society. In deciding whether a limit is reasonable, the following must be considered:

- (a) the nature of the right affected;*
- (b) the importance of the purpose of the limitation;*
- (c) the nature and extent of the limitation;*
- (d) the relationship between the limitation and its purpose;*
- (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve*

The various sentencing options in the ACT will engage many rights protected in the Act, most particularly the right to liberty under s18. Depending on the particular issues of a case, relevant rights include equality (s8), life (s9), privacy (s12), movement (s13), association (s15), fair trial (s21), humane treatment when deprived of liberty (s19), and specific criminal proceeding rights (ss20 and 22).

Section 30 of the Human Rights Act requires that all ACT laws be interpreted consistently with human rights. Part 5A of the Act also requires Public Authorities, including agencies like the DPP and Corrective Services, to act and make decisions compatibly with human rights.

Human rights jurisprudence suggests sentencing must strike a balance between the needs of community safety and rights of the public generally, against the rights of a defendant to liberty, dignity, humane treatment and rehabilitation.

There are some specific issues in relation to sentencing and human rights I would like to cover.

Bail

I note that your Terms of Reference refer to bail. According to Professor David Biles the ACT has the highest proportion of remandees in detention at 34.7%, compared to a national average of 23.4%.¹ This ACT situation is concerning and partly explained by the increasing number of presumptions against bail made through legislative amendments enacted before the Human Rights Act came into force on 1 July 2014. For example legislative activity in respect of repeat offenders, may indicate a conceptual shift of bail being a procedural issue relating to attendance at court to a crime prevention approach, being favoured over the presumption of innocence and general right to liberty.² The NSW Law Reform Commission's 2012 Report on its comprehensive review of the *Bail Act 1978* recommended that there be a justification approach to bail with a uniform presumption in favour of release, as well as piloting an electronic monitoring scheme.³ However, the NSW Government passed a new *Bail Act 2013* that is simpler in its operation by removing the offence–

¹ 'No Justice for forgotten thousands in custody' *Canberra Times* 8 April 2013.

² D.Brown, 'Looking Behind the Increases in Custodial Remand Populations in 2013 (3) 2 *International Journal for Crime, Justice and Social Democracy* 80-99.

³ *Report 133*, Recommendation 8.1, p123.

based presumptions scheme and focusing on risk management, with reasonable and proportionate bail conditions.⁴ This new model could be considered in the ACT.

The first ACT Declaration of Incompatibility issued under s32 of the *Human Rights Act 2004* made by Justice Penfold *In the Matter of an Application for Bail by Isa Islam*.⁵ Section 9C of Bail Act requires those accused of murder, certain drug offences and ancillary offences, to show 'exceptional circumstances' before having a normal assessment for bail undertaken. This was found to be inconsistent with the requirement in s18 of the HR Act that a person awaiting trial not be detained in custody as a 'general rule'. I made a written amicus curae submission in this matter on the subject of unreasonable delay.

Justice Penfold's Declaration was in part due to the range of offences to which s9C of the *Bail Act 1992* applies. In particular, Justice Penfold referred to s9C, the 'arbitrary or irrational operation' of which, made it difficult to find a rational connection between the various offences covered by the provision. Although these offences all carry maximum sentences of life imprisonment, not all offences carrying such penalties are included in s9C. Her Honour also noted that s9C did not apply to a range of other serious offences carrying maximum penalties of 25 years imprisonment, or to a person charged with multiple serious offences, where there is scope for extremely long total periods of imprisonment.

In 2012, the Government consulted the community on a range of potential amendments to s9C to address the incompatibility. While the proposed submissions went some way to address Justice Penfold's concerns, my submission suggested that the presumptions against bail based on the nature of the offence should be removed.

I am still concerned that the current s9C, even with the proposed amendments, may still unreasonably limit the right to liberty under s18 of the Human Rights Act, by maintaining a presumption against bail and placing an additional burden on certain defendants to overcome this presumption. If these constraints were removed, the usual assessment of bail under s22 would apply. Section 22 of the Bail Act sets out a range of highly relevant considerations that the court must ordinarily take into account in assessing a bail application, including: the likelihood of the person reoffending; the likelihood of them appearing again in court; and perhaps most importantly in this context, the nature of the alleged offence. In my view, these criteria already cover all of the relevant factors that a court should consider, and s9C and other presumptions against bail should be removed. A copy of my submission regarding the *Islam* matter is attached at Appendix 1.

Delay

The terms of reference also refer to timeliness in decision making. I note that s22(c) of the Human Rights Act requires that a defendant be tried without unreasonable delay. This has been a contentious issue in the ACT, and I note in one case an accused was released on bail due to delay, although it does not appear the Human Rights Act had a material impact upon Justice Penfold's decision.⁶ I am also aware of other defendants arguing that their human rights have been

⁴ The *Bail Act 2013* comes into effect in 2014.

⁵ (2010) 4 ACTLR 235

⁶ In the matter of an application for bail by Rebecca Massey [No. 2] [2009] ACTSC 70

unreasonably limited by trial delay. As detailed above, I did make a written submission regarding unreasonable delay in the *Islam* matter.

Periodic Detention

I have not had the resources to consider the current system of periodic detention in any detail. However, I do hold some concerns that the nature of periodic detention means that the rights of families and rights of children under the Human Rights Act are likely to be limited in situations where parents are sentenced to periodic detention. This can be a particular issue for new mothers and I am aware that there have been some challenges posed by breastfeeding mothers serving such sentences on weekends. I am aware that ACT Corrective Services have been particularly mindful about the rights of children and parents in such situations. However there are obvious practical limitations on the extent to which these issues can be accommodated when a parent is obliged to spend two nights per week away from their children. Of course, full-time detention is a much more onerous limitation on parents with children.

I also note that New South Wales has elected to move away from this form of sentencing, based on a 2007 Report by the NSW Sentencing Council. That Report found the lack of availability of periodic detention throughout the State, 'by reason of resource limitations, and the resulting discriminatory impact, the underutilisation of the current facilities, and the absence of meaningful case management for periodic detainees, give rise to significant concerns'.⁷ The Report also noted the difficulties for detainees in continuing employment when sentenced to periodic detention, and the particular pressure this puts on family relationships when someone is working fulltime during weekdays. The Council of Social Services of NSW also raised concerns in its submission about the impact to a person's, and their family's, emotional wellbeing from spending weekend time in a prison environment.

However, that report also noted that detainees believed if they had not been sentenced to periodic detention, they may have lost custody of their children, and referred to a UK study that found the value of the periodic detention scheme in keeping families with dependent children together.⁸ The Report sought to address these issues with alternative sentencing options.

While I have not reached a definitive view on this issue, I welcome more research and consideration of the impacts of periodic detention on families, and what alternative sentencing options might be utilised, such as home detention which was discontinued approximately 10 years ago in the ACT. The NSW Government abolished weekend detention in 2010, and detainees sentenced under the old scheme completed their sentences in 2013. However, NSW, Queensland, WA and NT have a scheme with 'persons in community-based corrections; restricted movement'. Victoria abolished home detention with effect from 16 January 2012 for both sentencing and pre-parole purposes.

⁷ NSW Sentencing Council, 'Review of Periodic Detention', December 2007, http://www.sentencingcouncil.lawlink.nsw.gov.au/agdbasev7wr/sentencing/documents/pdf/periodic_detention_report.pdf

⁸ Penfold C, Hunter G & Hough M, The intermittent custody pilot: a descriptive study, Home Office Online Report 23/06, London, 2006 at 24 citing The Prison Reform Trust, Justice for Women: the need for reform, London, 2000.

Aggravated Offences

I note that ACT law currently includes some aggravated offences, in the sense that if certain additional conditions are met, the maximum penalty is higher. For example, s48A of the *Crimes Act 1900* provides for an aggravated offence where the victim is a pregnant woman, and the commission of the offence caused death or serious harm to the child.

Proposals have been made to extend the coverage of such offences, for example in 2012 when new aggravated offences involving police officers as victims were proposed.

Obviously each offence of this kind needs to be assessed on its individual merit, but in my submission I have echoed the views of this committee, exercising its functions as the Scrutiny of Bills Committee, that such aggravated offence engage the right to liberty of s18 and must be considered in light of the proportionality analysis under s28 of the Human Rights Act.

Irreducible life sentences

The European Court of Human Rights recently held that the imposition of an irreducible life sentence is a breach of article 3 of the European Convention, which prohibits torture, inhumane or degrading treatment.⁹ The equivalent protection is contained in s10(1) of the ACT Human Rights Act. Section 31 of the Act states that judgements of foreign and international courts and tribunals may be considered in interpreting human rights. The case considered the United Kingdom law which allowed life sentences to be imposed without the possibility of parole. In cases where the sentence is imposed, there is a possibility of release through an application to the Secretary of State for he or she to exercise their statutory discretion to release the prisoner in exceptional circumstances which justify release on compassionate grounds. The Secretary of State had issued written policy suggesting such a discretion would only be exercised where the prisoner was terminally ill or seriously incapacitated.

The European Court found that a prisoner must have some possibility of being released, and that it was incompatible with human dignity to deprive a person of liberty without offering them some chance of regaining their freedom. The Secretary of State's narrow policy was not sufficient to meet this criterion.

In contrast, in the earlier decision of *Kafkaris v Cyprus* in which the Grand Chamber found that, Cypriot law was compatible because the President of the Republic of Cyprus had a discretion (which had in fact been exercised) to remit, suspend or commute any sentence or to order a prisoner's conditional release.¹⁰

In the ACT, Chapter 13 of the *Crimes (Sentence Administration) Act 2005* allows a life prisoner, who has served at least 10 years of their sentence, to apply to the Attorney-General to be released on licence. The Attorney-General can seek the views of the Parole Board on this question, who in turn consults others including the DPP, offender and victim. Under s293, the Board's recommendation to the Attorney-General must take into account a range of factors, including offenders' conduct

⁹ *Vinter v United Kingdom* [2013] ECHR, Applications nos. 66069/09, 130/10 and 3896/10 (9 July 2013)

¹⁰ [2008] ECHR 21906/04

while imprisoned, risks to victims and their families, and the likelihood of further offences being committed.

It is unclear if the ACT's 'licence' system meets the requirements of the European Court. Arguably, the current system may be closer to the facts in *Kafkaris* than *Vinter*, but this issue remains untested by the ACT Supreme Court.

Costs for an Accused

In the recent Supreme Court case of *R v MT*,¹¹ former Chief Justice Higgins considered the issue of an acquitted person receiving a costs order and the impact on the rights to liberty, fair trial and to be tried without unreasonable delay under the Human Rights Act. His Honour noted that it was unjust that delays causing loss to an accused through no fault of that accused are currently without remedy. His Honour noted the NSW *Suitors Fund Act 1951* and *Costs in Criminal Cases Act 1967* would provide such a remedy. Consistent with the human rights of an accused protected in the ACT Human Rights Act, I submit that legislation like these Acts should be considered.

Recommendations of the 2011 Review of Youth Justice

In 2011, the Human Rights Commission completed a comprehensive review, and corresponding Human Rights Audit, of the Bimberi Youth Justice Centre, and the broader youth justice system. The report on the outcome of the review contained 244 recommendations, many of which have been implemented and have led to significant improvements across the youth justice system. The outcomes of the Review particularly relevant to sentencing are included in the submission of the Children and Young People Commissioner to this Inquiry.

Over-representation and Justice Reinvestment

In relation to our 2011 Review, I have continued to progress our recommendations regarding a Justice Reinvestment strategy in the ACT. Motivating that recommendation was the continued over-representation of Aboriginal and Torres Strait Islander young people and adults in the justice system and more specifically, in detention. I would welcome more research and consideration of how this over-representation could be addressed.

I have been working with the ACT Aboriginal Torres Strait Islander Elected Body (ACT ATSIEB), Aboriginal Justice Centre, Australian Institute of Aboriginal and Torres Strait Islander Studies, ANU National Centre for Indigenous Studies, Community Services Directorate, Justice and Community Safety Directorate and the ACT Chief Minister and Cabinet Directorate to further explore justice reinvestment research in the ACT. Academics from the ANU in particular have led this work, including convening regular meetings of stakeholders.

I continue to believe that such a model would have benefits in the ACT, and is worthy of further investigation.

¹¹ [2013] ACTSC 152 at paragraph 64 .

Law Reform Advisory Council Review of Suspended Sentences

In 2010, the Law Reform Advisory Council completed a review of suspended sentencing. Dr Watchirs is a member of that Council. It made a range of recommendations, including improved data collection and systems, better Supreme Court administrative systems, and improved training of Supreme Court registry and judicial staff on collecting sentencing data. The Report concluded that further policy questions were required into:

1. Should suspended sentences be a sentencing option in the ACT?
2. What should be the consequences of the breach of a condition of the good behaviour order associated with a suspended sentence?
3. What can be done to enhance consistency and predictability in the imposition of suspended sentences?
4. Does the terminology that is used adequately convey the nature of a suspended sentence?

I note that the 2011 Government Response, and that it largely noted or agreed in principle with the Recommendations, and agreed that the questions raised warranted further investigation. Subject to improved sentencing data being captured as proposed by the LRAC Report, I submit that the above policy questions are still relevant in the ACT Justice system and warrant further investigation.

Social Disadvantage

I note the growing discussion of the weight that should be placed on social disadvantage in sentencing. This issue was recently considered by the Western Australian Supreme Court case of *Bropho v Harrison*, which concerned a breach of 'move-on' laws.¹² The defendant successfully appealed the decision of the presiding Magistrate to imprison her for 7 months, on the basis that her criminal record was the product of social disadvantage, rather than disrespect for the law. This disadvantage included a history of homelessness and drug addiction, as well as prior offending. The appellant identified as Aboriginal. The Supreme Court suggested 'whether a sentence of imprisonment would act as a more effective personal deterrent was a question that could only be answered having regard to the appellant's socioeconomic circumstances'.¹³ The problems of alcohol abuse and violence within the Aboriginal community were also considered by the Court.

I would welcome further consideration of whether current sentencing law in the ACT, including the *Crimes (Sentencing) Act 2005*, sufficiently contemplate an offender's social disadvantage. It is not an issue I have had the opportunity to consider in detail, particularly since the WA Supreme Court decision in *Bropho*. I note that s33 of that Act includes relevant considerations in sentencing, such as the offender's cultural background, character, antecedents, age and physical or mental condition and financial circumstances. In *Bropho*, Justice Hall also cited the High Court case of *Neal v The*

¹² [2013] WASC 250

¹³ At para 5.

Queen for the proposition that all material facts relating to the defendant must be taken into account in sentencing, including facts that only exist by reason of the offender's ethnicity.¹⁴

I have previously raised concerns regarding the disproportionate impact move-on laws can have on minority and disadvantaged groups, and children and young people.

People with Disability in the Criminal Justice System

All Australian jurisdictions provide diversion out of the criminal justice system for people with cognitive impairment at the time of an offence, or time of trial, to enable greater access to support and treatment options. Part 13 of the *Crimes Act 1900* deals with defendants who are unfit to plead and/or suffering mental impairment in the ACT. It allows referrals to be made from the courts to the ACT Civil and Administrative Tribunal for assessment, treatment and potential detention.

The Federal Disability Discrimination Commissioner, Graeme Inness, recently released a discussion paper on the treatment of people with disability in the criminal justice system. It noted several barriers to people with disability achieving justice, in particular:

'Barrier 4: Specialist support, accommodation and programs may not be provided to people with disability when they are considered unable to understand or respond to criminal charges made against them ('unfit to plead'). Instead, they are often indefinitely detained in prisons or psychiatric facilities without being convicted of a crime. This situation mainly happens to people with intellectual disability, cognitive impairment and people with psychosocial disability.'

*Barrier 5: Support, adjustments and aids may not be provided to prisoners with disability so that they can meet basic human needs and participate in prison life. They often face inhuman and degrading treatment, torture and harmful prison management practices.'*¹⁵

People with Disabilities Australia have similarly noted that Aboriginal people in particular in the Northern Territory, Queensland and Western Australia have been subject to indefinite detention.¹⁶

In submissions to the ACT Government's Review of the *Mental Health (Treatment and Care) Act 1994*, I have advocated that any amendments to this system ensure that defendants subject to Part 13 are not held in indefinite detention because of delay in court or tribunal proceedings, or because of a lack of suitable accommodation. In my view, such an outcome would be an unreasonable limitation on the right to liberty, and other rights such as the right to equality. It is unclear to what extent that is occurring in the ACT, but I am hopeful legislative amendments arising from the Mental Health Act Review will prevent any future occurrence.

¹⁴ At para 45.

¹⁵ Australian Human Rights Commission, 'Access to Justice in the Criminal Justice System for people with disability', Issues Paper, April 2013.

¹⁶ People with Disability Australia, 'Indefinite incarceration of Aboriginal People with Cognitive Impairment', <http://www.pwd.org.au/adjc/issues-in-the-northern-territory-adjc.html>

2013 Audit and Review of the Women's Area of the AMC

I am currently undertaking an Audit under the Human Rights Act, and corresponding Review under the *Discrimination Act 1991* into the treatment of female detainees at the Alexander Maconochie Centre. This Review is expected to be completed by the end of 2013, and may make some recommendations regarding sentencing options for women.

Appendix 1: Submission by Human Rights and Discrimination Commissioner to the ACT Government Consultation on a response to the Declaration of Incompatibility in *Re: Islam*

Proposed Government Amendments to the *Bail Act 1992*

Thank you for the opportunity to make a submission regarding the Government's proposed amendments to the *Bail Act 1992*. I note these amendments are in response to a declaration of incompatibility issued under s32 of the *Human Rights Act 2004* made by Justice Penfold *In the Matter of an Application for Bail by Isa Islam*.¹⁷ I note that you are consulting on two sets of amendments – one from the Government, and another proposal from the Australian Federal Police Association.

I will comment on all three amendments proposed by the Government, as I understand that together they are intended to render s9C of the *Bail Act* no longer incompatible with s18(5) of the *Human Rights Act*.

Government Proposals

In short, my view is that while the proposals go some way to addressing this incompatibility, they may not go far enough. To some extent, I agree with the Government's suggestion that the Supreme Court's declaration of incompatibility in the *Islam* matter was in part due to the range of offences to which s9C applies. By making the category of offences more consistent, some of her Honour's concerns are addressed. In particular, Justice Penfold referred to s9C's 'arbitrary or irrational operation', which related to her difficulty in finding a rational connection between the various offences covered by the provision. Although these offences all carry maximum sentences of life imprisonment, not all offences carrying such penalties are included in s9C. Her Honour also noted that s9C did not apply to a range of other serious offences carrying maximum penalties of 25 years imprisonment, or to a person charged with multiple serious offences, where there is scope for extremely long total imprisonment.¹⁸

I also note that her Honour speculated as to whether s9C coupled with the s22 assessment criteria in the *Bail Act* might go some way to addressing the incompatibility of that section:

*'... s 9C read with s 9G makes it clear that the court cannot engage in a preliminary consideration of the general "bail criteria" in order to reach a decision in favour of bail that can then be identified as a special or exceptional circumstance; such a circumstance must be found before the general availability of bail is assessed.'*¹⁹

Nonetheless, it is unclear if the proposed changes will ensure that s9C is actually compatible with human rights. The particular drafting of these revisions will obviously be crucial, but her Honour's analysis reveals that the human rights incompatibility of s9C is not solely about the nature of that

¹⁷ (2010) 4 ACTLR 235

¹⁸ See paragraphs 273 and 274.

¹⁹ Paragraph 292

section in isolation, but also its interaction with other key provision such as s9G and s22 of the Bail Act.

I am still concerned that the proposed amendments may unreasonably limit the right to liberty under s18 of the Human Rights Act by maintaining a presumption against bail and placing an additional burden on certain defendants to overcome this presumption. Section 22 of the Bail Act sets out a range of highly relevant considerations that the court must ordinarily take into account, including: the likelihood of the person reoffending; the likelihood of them appearing again in court; and perhaps most importantly in this context, the nature of the alleged offence. In my view, these criteria already cover all of the relevant factors that a court should consider, and support for such a view is found in Justice Penfold's decision. As I'll be noting the irrational coverage of offences in s9C, she made a range of other comments regarding its operation. Many of her Honour's points go beyond the changes proposed by the Government, for example:

1. Murder may not be an appropriate charge for this rule

Those charged with murder may pose a lesser risk to the general community than people charged with other serious offences, given that Institute of Criminology data shows that homicide victims are usually known to the perpetrators.²⁰

2. Section 9C may take into account irrelevant factors

Her Honour pointed to the recent decision, in which bail was initially refused and then granted on the basis of delay to demonstrate that *'if Ms Massey had been unable to identify a distinguishing but effectively irrelevant circumstance, s9C would have operated to deny bail to a person who under s22 could safely have been granted bail.'*²¹

Her Honour ultimately concluded, prior to undertaking a s28 limitation justification analysis that *'as a "general rule" that is structured to implement a presumption against bail, and therefore in favour of the continued detention of a class of persons awaiting trial, I consider that s 9C is not compatible with the human right recognised by s 18(5) of the Human Rights Act.'*²²

3. Section 9C is pointless, irrational and random

In applying s28, her Honour stated the 'heart of what is wrong with s9C' is that it has a 'potentially random or irrational operation'. Her Honour suggested it was pointless as s22 already permits the court to consider the particular offences with which the bail applicant has been charged, but does not particularly alter the application to the s22 criteria because of those charges in issue. Her Honour also referred to s9C being 'irrational or random' on the basis that it could lead, as she alluded to in reference to the Massey cases, to 'making it more appropriate to grant bail despite s22'.²³

While I accept that her Honour noted that she was not necessarily forming a view that any presumption against bail would be objectionable,²⁴ I believe the Government's proposals do not appear to address many of these issues. In particular, even with the inclusion of s22 criteria in the

²⁰ Paragraph 277

²¹ Paragraph 333

²² Paragraph 333

²³ Paragraphs 348 to 350

²⁴ Paragraph 333

assessment of bail for serious offences, the Government's response would still see those people charged with murder needing to overcome a general rule against bail simply on the basis of their charge.

I understand the community concern regarding the older cases cited in the Government Response, particularly those involving the granting of bail to Mr Eastman and Mr Dunstan. Nonetheless, the former presumption in favour of bail for these offences obviously had an impact on these decisions. There is a question as to whether removing this presumption *in favour* of bail would address the concerns raised, without needing to take the additional step of including a presumption *against* bail currently contained in s9C.

I accept that the proposals include providing explicit direction to the Court to take into account the general criteria for bail in s22 (and s23 for children) of the Bail Act, but this in some ways reinforces the proposition that those existing tests are adequate. If those matters are to be taken into account in all bail applications, including these serious offences, then why is the presumption necessary, and why not simply apply these tests on an equal basis to all bail applications, noting her Honour's central point that the nature of the offence is already contemplated in applying s22.

International Authorities

Her Honour rejected the contention from the ACT Attorney-General that decisions from the United Nations Human Rights Committee confirmed that a person charged with murder could be subjected to a general rule precluding bail or denied bail. Her Honour stated:

*'This is not the same as saying that a person charged with murder may be subject to a general rule precluding bail or that such a person may be denied bail, irrespective of how the standard criteria for granting bail would operate in the particular case, simply because the person cannot point to a particular circumstance that distinguishes his or her case from the general run of cases involving murder charges.'*²⁵

I note that the final Government Response of May 2012 refers to authority from the United Kingdom regarding presumptions, without identifying a specific authority. However, the June 2011 Interim Government Response does explicitly refer to the House of Lords in *O(FC) (Appellant) v Crown Court at Harrow (Respondents)* as authority for the general proposition that the House of Lords has found that presumptions against bail do not necessarily breach human rights²⁶

In *Islam* Justice Penfold explicitly dismisses the decision in *Harrow* as persuasive, on the basis that the House of Lords read down the relevant provision so as to eliminate the burden of proof. Her Honour was unable to undertake such a 'reading down' exercise in *Islam*, due to her interpretation of the differently worded ACT HR Act, and so it appears that this case cannot be relied upon as persuasive UK authority for the proposition that presumptions against bail are necessarily compliant with human rights. Her Honour also stressed in *Islam* that s18 of the HR Act was unique in its construction, compared to other international instruments,

²⁵ Paragraph 329

²⁶ [2006] UKHL 42

*'Thus, s 9C is to be assessed for consistency with a human right not protected in an equivalent form in any other human rights instrument drawn to my attention. The question is whether s 9C creates a general rule for the detention of a class of accused persons.'*²⁷

Her Honour also contrasted her decision with that of the South African Constitutional Court in *Dlamini*²⁸ on the basis that in that decision, the South African Court did not apply the provision in question as a separate threshold test.

Purposes of 9C

As noted in the Government Response, s9C was inserted before the HR Act was operational and had no Compatibility Statement accompanying it. Her Honour raised concerns in *Islam* regarding the purposes of s9C of the Bail, stating at paragraph 268:

'The purpose of s 9C, read in context and noting the Explanatory Statement for the original version 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.'

Her judgment in particular refers to the particular confusion regarding the purpose of s9C, the onus and burdens it applies, and its interaction with the factors listed in s22. Her Honour found four possible meaning of s9C:

- (a) *The currently accepted meaning, namely that s 9C imposes a threshold barrier to consideration of a bail application, being that the court must be satisfied of "special or exceptional circumstances" in the nature of those identified by Australian courts over many years (which include inordinate delay in bringing a person to trial;*
- (b) *That s 9C imposes an obstacle on consideration of a bail application that consists of a requirement for the court to find "special or exceptional circumstances", but it is a low threshold, of a much less significant nature than the kinds of circumstances identified by Australian courts previously;*
- (c) *That s 9C is simply a warning to a court hearing a bail application by a person covered by s 9C that it is necessary to be particularly rigorous in considering the s 22 criteria for the purposes of that application; or*
- (d) *That section 9C can be satisfied by a finding that bail can safely be granted by reference to s 22.*

²⁷ Para 318

²⁸ *Dlamini v The State* [1999] ZACC 8

Her Honour ultimately settled on either (a) or (b) being the meaning of s9C. However, the Government amendments appear to support all four interpretations, and perhaps further additional meanings. In formulating this conclusion, her Honour noted:

*'I also reject the submission made on behalf of the Attorney-General that s 9C is only a rebuttable presumption and not a general rule that bail cannot be granted. Section 9C is a general rule that bail cannot even be considered in accordance with the usual bail criteria until a special or exceptional circumstance not necessarily relevant to those criteria has been established.'*²⁹

I recommend that the Explanatory Statement to any subsequent amendment clearly state the purpose of s9C.

Alternative Amendments

The Government could also decide to retain the provision in its current incompatible format, which is clearly contemplated by the dialogue model of the Human Rights Act. However, my view is that this would be a particularly poor policy outcome, given the deficiencies identified by Justice Penfold in the operation of 9C, and that it is incompatible with the very important right to liberty.

Her Honour did offer an alternative way forward to achieve compatibility, which the Government should consider.

*'Without expressing any conclusions about their human rights-compatibility or their justifiability, I note several alternative approaches that have emerged from the foregoing discussion. The Bail Act could require rather than permit the court to have regard to the matters set out in s 22(3), or it could require the court in some or all cases to specify its reasons for granting bail so as to indicate the conclusions it has reached about each of the s 22(1) matters. Prohibiting the court from granting bail unless it is satisfied that the grant is justified after considering the matters mentioned in s 22 (the mirror image of s 9A, which entitles a person to bail unless the court is satisfied that refusal is justified) would not necessarily make it easier for an applicant to obtain bail but would focus the court's attention more directly on whether bail could safely be granted.'*³⁰

NSW Law Reform Commission Proposals

Further, the NSW Law Reform Commission recently released its review into Bail.³¹ It considers the issue of presumptions against Bail in some detail.

"The current scheme of presumptions, exceptions and exceptional circumstances is unduly complex and restrictive. It is an unwarranted imposition on the discretion of police and the courts. It throws the emphasis onto the offence with which the person is charged or onto prescribed elements in the person's criminal history, instead of allowing a balanced assessment of all the considerations which bear rationally on the question of detention or

²⁹ Paragraph 325

³⁰ Paragraph 378

³¹ New South Wales Law Reform Commission (2012), 'Report 133: Bail', http://www.lawlink.nsw.gov.au/lawlink/lrc/lrc.nsf/pages/LRC_r133toc

*release... The overwhelming majority of submissions advocated the removal of the existing scheme of presumptions, exceptions and special circumstances, and its replacement with a uniform presumption in favour of release.*³²

The NSW Report is particularly critical of presumptions based on category of offence, especially when the charge at the time of bail application may change at trial:

*'The assignment of a presumption to a category of offence offends against the notion of individualised justice. It constitutes an approach that is too blunt as it overlooks the fact that the circumstances that constitute an offence that is the subject of the initial charge can vary substantially in their objective seriousness. Moreover it is often the case that the offence which the offender faces at trial differs from the initial charge and may well be one for which there is a lesser presumption.'*³³

A similar recommendation to remove presumptions against bail was made by the Victorian Law Reform Commission in its 2007 review of bail:

*'There should be no presumption against bail for any offence in the new Bail Act.'*³⁴

In making this recommendation, the Victorian Law Reform Commission noted that reverse onus provisions in the Victorian Bail Act might 'potentially conflict with the right to liberty and presumption of innocence'.³⁵

In the *Islam* case I note that although while the accused was charged with attempted murder, he was ultimately convicted of grievous bodily harm. The NSW Law Reform Commission's Report instead recommended that presumptions against bail be removed and replaced 'with a uniform presumption in favour of release applicable to all cases except those covered by an entitlement to release and appeal cases'.³⁶ The NSW Commission made three further recommendations that:

- (1) A new *Bail Act* should provide that, in deciding whether to release a person and whether to impose a condition or give a conduct direction, the authority must take the considerations specified in paragraph (2), and only these considerations, into account. The considerations are not listed in any hierarchy, and the weight given to each consideration should be considered in the circumstances of the particular case.
- (2) The considerations should be:
 - (a) The public interest in freedom and securing justice according to law.
 - (b) The integrity of the criminal justice system having regard to, and only to:
 - (i) the likelihood that, if released, the person will abscond

³² Ibid, Paragraph 0.26

³³ Ibid, Paragraph 8.66

³⁴ Recommendation 12 in Victorian Law Reform Commission (2007), *'Review of the Bail Act: Final Report'*, <http://www.lawreform.vic.gov.au/inquiries/bail>

³⁵ Ibid, 41.

³⁶ Recommendation 8.1

- (ii) the fact that the person has a history of persistent failure to attend court for whatever reason and the authority is satisfied that the person is unlikely to attend court on a future occasion as required if released;
- (iii) the likelihood that, if released, the person will interfere with the course of justice, such as by interfering with evidence, witnesses or jurors;
- (iv) the fact that the person is charged with an indictable offence committed while subject to conditional liberty and:
 - A. has one or more pending charges for an indictable offence committed while subject to conditional liberty; or
 - B. has been convicted on one or more prior occasions of an indictable offence committed while subject to conditional liberty. "Subject to conditional liberty" means being released pending proceedings, or being on parole, or serving a sentence of imprisonment by way of home detention or an intensive corrections order, or being subject to a suspended sentence or a good behaviour bond.
 - C. The likelihood that, if released, the person will harm or threaten harm to any particular person or people including, in particular, anyone with whom the person is in a domestic relationship as defined in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).
 - D. The protection and welfare of the community having regard to and only to the likelihood that, if released, the person will commit:
 - (i) an offence causing death or injury, or
 - (ii) a sex offence, or
 - (iii) an offence involving serious loss of or damage to property, or
 - (iv) an offence or series of offences which give rise to a substantial risk of causing death or injury or serious loss of or damage to property.
 - E. The interests of the person and of the person's family and associates.

- (3) The provision should state that it does not apply to cases where there is an entitlement to release without conditions or conduct directions or where the authority exercises its absolute discretion to release on this basis.

The NSW Report is the most recent comprehensive analysis of bail and provides a compelling argument for the ACT to move away from presumptions against bail. It is consistent with earlier recommendations made by the Victorian Law Reform Commission. The proposal put forward by the NSW Law Reform Commission is practical, and offers a solution that meets the safety needs of victims, witnesses and the wider community, while ensuring the human rights of the accused are not unreasonably infringed. It would be anomalous if NSW legislation was amended to become more compatible with human rights than the ACT. In that regard, the Government might consider other presumptions in the Bail Act in addition to s9C.

Ancillary Offences

It is clear in *Islam* that the inclusion of ancillary offences for the purposes of s9C was a substantive factor in her Honour declaring the provisions incompatible:

*"Counsel for the DPP submitted that the purpose of s 9C is to ensure the protection of the community from those alleged to have committed the small group of offences covered by the section, which are said to "have wide ranging and detrimental effects on the community". This may be a fair description of the direct impact of the serious drug trafficking offences covered by s 9C, and it is probably also true that murders have detrimental effects on the community that extend beyond the victims and those who know them. However, it is not clear that an attempted murder, especially if it does not result in significant or long-lasting injuries to the victim, has an effect on the community that is more wide-ranging or more detrimental than, for instance, an offence involving grievous bodily harm, for which, as mentioned, there is generally no exceptional circumstances requirement in the Bail Act."*³⁷

I welcome the proposal in the Government Response to remove ancillary offences from the operation of s9C.

Statistical Evidence

I suggested in earlier comments on these proposals, this consultation time could provide the Government with the ability to undertake further analysis of the application of s9C before making a final decision on appropriate amendments. In particular, it remains unknown how many defendants may have been refused bail under s9C, and were later acquitted of the offences charged, or cases in which defendants have been convicted only of lesser offences that would not have engaged the s9C presumption. Such an analysis may demonstrate individual cases where a defendant has been unreasonably denied the right to liberty, particularly if it is apparent that without the s9C presumption, bail would have been granted.

The NSW Law Reform Commission has similarly noted that presumptions against bail have an unknown financial cost without clear evidence of their worth:

*'The evidence clearly shows that the current scheme has resulted in additional people being detained pending trial. There is evidence to suggest this effect has reduced absconding rates. There is no similar evidence, one way or the other, in relation to the prevention of crime. The overall cost in financial terms and in terms of the personal effect on people imprisoned while proceedings are pending has not been assessed against any possible benefits in terms of community safety.'*³⁸

I suggest such an analysis is needed to justify any presumption against bail in the ACT, particularly in light of the findings of the NSW Law Reform Commission.

AFPA Proposal

The Government also seeks my views on a proposal from the Australian Federal Police Association (AFPA) to add an additional presumption against bail for people who commit offences punishable by five years imprisonment when they have been convicted of two similar offences in the past two years.

³⁷ Paragraph 276

³⁸ Paragraph 864.

As I have already expressed, I believe this would be an unjustifiable limitation on the presumption of innocence, as it predicates a grant of bail on previous convictions. That is currently not considered in section 22 of the *Bail Act 1992*.

The NSW Law Reform Commission is critical of the suggestion that prior criminal history should automatically be a consideration for bail. It noted that people with cognitive or mental health impairments often have a history of offences relating to their disability, particularly in relation to s8C of the NSW Bail Act which 'disproportionally affects those defendants'.³⁹ A similar provision in ACT Bail Act could unreasonably limit the right to equality under s8 of the Human Rights Act. The NSW Report states:

*'The point is that the person's criminal history should not be taken into account as a relevant matter in itself although it may be relevant to a mandatory consideration. For example, criminal history may go to the likelihood of a custodial sentence and its duration, and hence to a likelihood of failure to appear. Criminal history may also be relevant to whether the person is likely to commit further serious offences, such as in the case of a serial killer or serial sex offender, or a person with a history of gang related offending. It may be relevant to the risk of harm to a particular individual, as in some instances of serious repeat family violence.'*⁴⁰

In light of these concerns, I recommend strongly against adopting a presumption based on the current NSW legislation, which is a jurisdiction without human right legislative protections.

Further Amendments

I note that the Government has added these above amendments proposed by the Australian Federal Police Association for consultation in this process, but has so far refused suggestions from the ACT Human Rights Commission that the unresolved issues arising from the *Islam* decision (in light of the High Court decision of *Momcilovic*) regarding the application of section s30 and s28 of the Human Rights Act be clarified through legislative amendment. This consultation process could have been an opportunity to discuss this issue also, and I am disappointed that these previous suggestions were not also included in the proposed discussion.

The Final Government Response to *Islam* highlights the High Court's decision in *Momcilovic*, and notes the differing opinions of the Judges on the operation of the reasonable limits test under s7 of the Victorian *Charter of Human Rights and Responsibilities Act 2006* and s28 of the Human Rights Act. I consider that the current confusion as to the appropriate tests for determining whether a law is compatible with rights, caused by the conflicting case law across Victorian and ACT jurisdictions,⁴¹ could be addressed through a clear legislative test. In *Islam*, her Honour spent some time comparing the various tests utilised in different human rights jurisdictions. Since the *Islam* matter, there has been further confusion regarding an appropriate test under the ACT HR Act. This confusion could be overcome by codifying one of the tests already adopted in Australian cases like *Islam*, *Fearnside*⁴² or *Momcilovic*, or could draw on International case law such as *Oaks*,⁴³ *Noonen*,⁴⁴

³⁹ Paragraph 11.43

⁴⁰ Paragraph 10.93

⁴¹ In the Matter of an Application for Bail by Isa Islam, R v Momcilovic and R v Fearnside.

⁴² *R v Fearnside* [2009] ACTCA 3

or *Hansen*⁴⁵. I do not necessarily have a clear preference, but am concerned about the lack of clarity regarding this issue currently. Already there are few substantive human rights matters brought before the ACT courts, and I am concerned that this uncertainty adds further unnecessary barriers to such cases.

Conclusion

In summary, I believe these proposals do not sufficiently address the issues raised by Justice Penfold in *Islam*, and I recommend the removal of presumptions against bail, as recommended recently by the NSW and Victorian Law Reform Commissions. Contact officers for this matter at the Commission are Sean Costello and Gabrielle McKinnon.

⁴³ *R v Oakes* [1986] 1 SCR 103

⁴⁴ *Moonen v Film and Literature Board of Review* [2002] NZLR 754 and earlier decision of *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9

⁴⁵ *R v Hansen* [2007] 3 NZLR 1

