Submission cover sheet

Inquiry into the Bail Amendment Bill 2026

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Submitter: ANU Law Reform Social Justice Research Hub

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Standing Committee on Legal Affairs

ACT Legislative Assembly,

GPO Box 1020,

Canberra ACT 2601

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

12 June 2026

Dear Officer,

RE: Inquiry into the Bail Act Amendment Bill 2026

We thank the Standing Committee on Legal Affairs for the invitation to make a submission to the Inquiry into the Bail Amendment Bill 2026. This submission has been prepared by students within the ANU's Law Reform and Social Justice Program, Aboriginal and Torres Strait Islander Justice Project, who engage in research and advocacy focused on the furtherance of social justice for Aboriginal and Torres Strait Islander peoples. The project's function in law reform discussions is to amplify the work of Aboriginal and Torres Strait Islander communities and organisations.

If further information is required, please contact us at anulrsj.indigenousproject@gmail.com

On behalf of the ANU LRSJ Aboriginal and Torres Strait Islander Justice Project,

Summary of Recommendations

The Aboriginal and Torres Strait Islander Justice Project recommends that the ACT Government:

1. Undertake a comprehensive review of the presumptions scheme in accordance with recommendations set out in the *Independent Review into the Overrepresentation of First Nations people in the ACT Criminal Justice System ('the Independent Review');*[1]
2. Include an equivalent to s 3A(1)(a) of the *Bail Act 1977* (Vic);
3. Include an equivalent to s 3A(2)(a) of the *Bail Act 1977* (Vic);
4. Include equivalents to s 3A(4) and (5) of the *Bail Act 1977* (Vic);
5. Reconsider amendments to s 23A *Victims concerns about the need for protection*;

[1] Cunneen et al, *'Independent Review into the Over-Representation of First Nations People in the ACT Criminal Justice System'* (Final report, July 2025).

6. Introduce guidelines on the application of s 22B *Bail assessment—relevant factors for Aboriginal or Torres Strait Islander people*, as per recommendation 5-2 of the ALRC report; and
7. Continue support for the Ngurrambai Bail Support Program and extend the program so that it is available for First Nations young people.

i. Support for s 22B, 22C and 22D

We welcome the introduction of the standalone provision, 22B in the Bail Amendment Bill 2026 (the Amendment Bill) which implements an equivalent to s 3A of the *Bail Act 1977* (Vic) as per recommendation 5-1 of the Australian Law Reform Commission's *Pathways to Justice Report ('the ALRC Report').*[2] We also note the proposed amendment is consistent with recommendation 8.2 of *the Independent Review.* [3]

Likewise, we welcome the standalone provisions requiring consideration of a person's disability, mental health, and other health conditions under s 22C, and the expansion of relevant factors for bail assessments for children under s 22D and for pregnant people under s 23.

ii. Amending the presumptions scheme

As made clear in the explanatory memorandum, the amendment Bill does not change the presumptions set out in Divisions 2.2-2.4 of the *Bail Act 1992* (ACT).[4] The *Independent Review* recommended the ACT Government undertake a comprehensive review of the presumptions present in *Bail Act 1992* (ACT).[5] As highlighted in the *Independent Review*, the presumption against bail risks unnecessary periods of incarceration and is contrary to the National Agreement on Closing the Gap, which commits the ACT Government to reducing the incarceration rate of Aboriginal and Torres Strait Islander people.[6] We urge the ACT Government to more extensively consider, with the consultation of community legal services, the impact of bail presumptions on individuals and abolish the 'special or exceptional circumstances'[7] test for both adults and children. We echo Aboriginal Legal Service NSW/ACT's call for there to be a blanket presumption in favour of bail for children, reflecting the international human rights law principle that imprisonment of children should be a measure of last resort.[8]

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[2] The Australian Law Reform Commission '*Pathways to Justice - An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*' (ALRC Report 133, December 2017) 13.
[3] Cunneen et al, *'Independent Review into the Over-Representation of First Nations People in the ACT Criminal Justice System'* (Final report, July 2025).
[4] Explanatory Statement and Human Rights Compatibility Statement, Bail Amendment Bill 2026 (ACT) 6.
[5] Ibid 253.
[6] Ibid 252.
[7] *Bail Act 1992* (ACT) s 9G.
[8] ALS NSW/ACT, Submission ACT Government *'Submission on Discussion Paper on the Review of Decision-Making Criteria in the Bail Act 1992'* (June, 2025)9.

iii. Inclusion of an equivalent to s 3A(1)(a) of the *Bail Act 1977* (Vic)

We note that s22B of the Amendments Bill is modelled on the *Bail Act 1977* (Vic), and recommend these bail reforms include an equivalent to s 3A(1)(a) of the *Bail Act 1977* (Vic) requiring a decision-maker to take into account the 'historical and ongoing discriminatory systemic factors that have resulted in Aboriginal people being over-represented in the criminal justice system.'[9] We further recommend that the ACT amendment recognise 'systemic racism at every stage of the criminal process'.[10]

iv. Inclusion of an equivalent to s 3A(2)(a) of the *Bail Act 1977* (Vic)

We similarly recommend that an equivalent to s 3A(2) *Bail Act 1977* (Vic) be adopted.

S3A(2) of the *Bail Act 1977* (Vic) provides that, when making a bail determination in relation to an Aboriginal Person, the bail decision maker is to refer to evidence and information reasonably available, including information provided by (a) the Aboriginal person's family and community; and (b) providers of Aboriginal Bail Services.

The Judicial Commission of New South Wales's *Equality Before the Law Bench Book* notes that bail assessments should be made;

> not just based on police views but also on the views of the … local Aboriginal and Torres Strait Islander community and/or the Local Court Aboriginal Client Service Specialist (if there is one) about the particular person's ties to the community and likelihood of absconding, and about culturally appropriate options in relation to bail conditions.[11]

Reference to information provided by the Aboriginal or Torres Strait Islander person's family and community is necessary, given that such individuals are usually in a greater position to provide 'specific cultural knowledge about an offender … or specific 'cultural knowledge'.[12] Adoption of such a provision would recognise that Aboriginal and Torres Strait Islander peoples have distinct cultural needs and obligations that are often best understood and communicated by family and community. Reference to such information would aid consideration of 'any other significant cultural issue or obligation'[13] under s 22B(1)(e), given its generality.

The *Independent Review* emphasised the importance of bail support programs including the Ngurrambai Bail Support Program and the Front Up program.[14] The report cited data that from 2022-2023, 'the Ngurrambai service developed 271 bail plans for their clients, and 229

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[9] *Bail Act 1997* (Vic) s 3A(1)(a).
[10] ALS NSW/ACT, Submission ACT Government *'Submission on Discussion Paper on the Review of Decision-Making Criteria in the Bail Act 1992'* (June, 2025) 4.
[11] Judicial Commission of NSW '*Equality Before the Law Bench Book',* First Nations People, Practical consideration, Bail 2.3.2 (last updated April 2026) <Section 2 - First Nations people>.
[12] Ibid.
[13] *Bail Act 1992* (ACT) s22B(1)(e).
[14] Cunneen et al, *'Independent Review into the Over-Representation of First Nations People in the ACT Criminal Justice System'* (Final report, July 2025) 255.

of them were granted bail, a success rate of 85%'.[15] The ALS has previously noted magistrates 'have called upon program staff during proceedings to assist in their respective decisions to grant bail'.[16]Adoption of a provision which requires referral to information provided by providers of bail support programs will codify this practice and thus ensure consistency across decisions.

The Victorian Department of Justice and Community Safety notes that 'what is considered "reasonably available" will require an assessment about what is practicable in the circumstances.'[17] Inclusion of the term 'reasonably available' will ensure that decision makers are required to weigh their consideration of information provided by family, community and providers of bail support programs with the understanding that bail determinations should not be delayed.

v. Inclusion of an equivalent ss 3A(4) and (5) of the *Bail Act 1977* (Vic)

We urge the ACT Government to include an equivalent provision to s3A(4) of the *Bail Act 1977* (Vic).

S 3A(4) of that Act provides that the meaning of 'Aboriginal and Torres Strait Islander people' is satisfied regardless of:

> (a) whether the person's connection to their Aboriginality and culture has been intermittent throughout their life; and
>
> (b) whether the person has only recently connected to or discovered their culture or heritage; and
>
> (c) when the person first discloses that they are an Aboriginal person.

Citing *Re Hooper (No 2)* [2021] VSC 476, the Judicial College of Victoria Bail Bench Book notes that an 'accused's inconsistent connection with their Aboriginal heritage does not weaken its importance in considering whether bail should be granted'.[18] Self-identification may be inconsistent across parts of the process in the criminal justice system due to fear or apprehension: 'a lot of people don't identify with [police] because of the 'joys' of intergenerational trauma and the engagements of those before them.'[19] The ALS has previously highlighted that 'it is not culturally appropriate for courts or other legal system actors to be assessing a person's Aboriginal and Torres Strait Islander status.'[20]

The Bail Amendment Bill 2026 Explanatory Statement and Human Rights Compatibility Statement explicitly acknowledges 3A(4), and notes that:

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[15] Ibid.
[16] Ibid 253.
[17] The Department of Justice and Community Safety (Vic), '*Bail considerations for Aboriginal people'* (Guide, 25 March 2024).
[18] Judicial College of Victoria *'Bail Bench Book'*, 2.2.4 Aboriginal Person (last edited March 2026) 27 < Bail Bench Book - BarNet Jade - Judicial College of Victoria>.
[19] Ibid.
[20] ALS NSW/ACT, Submission ACT Government *'Submission on Discussion Paper on the Review of Decision-Making Criteria in the Bail Act 1992'* (June, 2025) 5.

> The guidance material directs the decision maker to first ask whether the person is an Aboriginal or Torres Strait Islander person, and notes that *where a person says they are an Aboriginal or Torres Strait Islander person, the decision maker must accept this*. Where a person does not answer or does not want to answer this question, the decision maker should determine whether there is evidence to suggest the person is an Aboriginal or Torres Strait Islander person and make reasonable further enquiries (for example, checking existing ACT Policing holdings), but *should not challenge a person's self-identification or require the person to provide evidence of their cultural identity.*[21]

To strengthen the effect of this direction, we recommend it be codified in an equivalent to s 3A(4) of the *Bail Act 1997* (Vic). We support ALS NSW/ACT's position that the 'provision should make clear that a bail decision-maker is not able to request evidence of confirmation of a person's Aboriginal and Torres Strait Islander status.'[22]

We recommend the ACT additionally codify the requirement for bail decision makers to state their reasoning when refusing an Aboriginal or Torres Strait Islander person bail, in line with s 3A(5) of the *Bail Act 1977* (Vic):

(5) If a bail decision maker refuses bail to an Aboriginal person, the bail decision maker must—

> (a) identify the matters the bail decision maker had regard to in taking into account the issues set out in subsection (1); and
>
> (b) either—
>
> > (i) state those matters orally when refusing bail and ensure that an audio visual recording, or an audio recording, is made of that statement; or
> >
> > (ii) record those matters in writing in a form that the bail decision maker considers appropriate.

The inclusion of an equivalent to s 3A(5) provides a mechanism for ensuring the considerations in s 22B are explicitly addressed by bail decision makers and recorded for reference bail decision reviews.

vi. S 23A -Victims concerns about the need for protection

In terms of the amendments to s 23A *Victims concern about need for protection etc*, as ALS NSW/ACT have highlighted on a previous occasion, the current framework provides sufficient scope for consideration of a victim's concerns in that bail decision-makers are already required to consider the likelihood of the person applying for bail harassing or endangering the safety or welfare of anyone in s 22(1)(b)(ii) and in 23A(1) of the current *Bail Act 1992* (ACT).[23]

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[21] Explanatory Statement and Human Rights Compatibility Statement, Bail Amendment Bill 2026 (ACT) 2-3.
[22] ALS NSW/ACT, Submission ACT Government *'Submission on Discussion Paper on the Review of Decision-Making Criteria in the Bail Act 1992'* (June, 2025) 4.
[23] ALS NSW/ACT, Submission ACT Government *'Submission on Discussion Paper on the Review of Decision-Making Criteria in the Bail Act 1992'* (June, 2025) 3.

vii. **Guidelines on the application of bail amendments**

We recommend that the ACT Government introduce guidelines on the application of s 22B of the Amendment Bill, as per recommendation 5-2 of *the ALRC report:*

> State and territory governments should work with relevant Aboriginal and Torres Strait Islander organisations to develop guidelines on the application of bail provisions requiring bail authorities to consider any issues that arise due to a person's Aboriginality, in collaboration with peak legal bodies.[24]

The ALRC Report highlighted that s 3A of the *Bail Act 1977* (Vic) implementing recommendation 5-1 in Victoria 'has been underutilised, and that this underutilisation had contributed to s 3A having little impact on remand numbers in Victoria.'[25] Further, that s 3A 'has been narrowly interpreted by the court to apply to setting conditions, such as providing for multiple residential addresses and attending funerals, but not to the determination of risk and whether to grant bail.'[26] There is a risk that s 22B may be underutilised by defence lawyers, specifically, lawyers at private firms that regularly represent Legal Aid and ALS grant clients.

The ALRC Report continued:

> [S]ome members of the legal profession were not adept at posing the right questions and recognising issues that may arise due to a person's Aboriginality. The number of Aboriginal and Torres Strait Islander people, especially women, still held on remand indicated that the provision was not well understood….Dr Thalia Anthony submitted that s 3A has had an 'equalising effect on bail outcomes' for Aboriginal and Torres Strait Islander peoples, but that the benefit only arose when lawyers who sought to rely on the provision made detailed submissions on the relevance of the person's Aboriginal background to the Court.[27]

The experience in Victoria serves as a valuable lesson to ACT about the proper implementation of recommendation 5-1 and the need for well-constructed written guidelines for criminal justice participants, including the judiciary.

The ALRC report did not make any recommendation as to the content of s5-1 guidelines but noted the Judicial College of Victoria recommended that cultural awareness and cultural competence education for judicial officers should include:

- background information regarding the historical and ongoing impact of colonisation on Aboriginal and Torres Strait Islander people;
- an explanation of intergenerational trauma;
- contemporary issues such as daily exposure to racism;
- cultural competency information about modes of communication, body language,
- the need for and use of interpreters, and related issues aimed at improving cultural
- safety in court; and

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[24] The Australian Law Reform Commission '*Pathways to Justice - An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*' (ALRC Report 133, December 2017) 14.
[25] Ibid 173-174.
[26] Ibid 174.
[27] Ibid.

- information about culturally-appropriate programs and services that support Aboriginal and Torres Strait Islander people who are on bail, community-based sentences or parole.[28]

Further, 'the need for all education to have been developed and delivered with Aboriginal and Torres Strait Islander communities, noting the need for a localised approach in order for judicial officers to 'understand the specific issues affecting those who come before their particular court.''[29]

viii. Continued support for the Ngurrambai Bail Support Program and extension of the program to young people

We urge the ACT government to continue the support of Ngurrambai Bail Support Program and ensure sustainable, long-term funding of the program under the incoming Justice Futures Fund.

As aforementioned, the *Independent Review* identified widespread recognition of the value of the Ngurrambai Bail Support Program, and Front Up program operated by ALS NSW/ACT. The *Independent Review* noted that:

> [t]he absence of bail support for First Nations young people is particularly problematic. It is recognised that criminal legal systems can themselves be potentially criminogenic, with early contact being one of the key predictors of future offending. Bail support not only has the more immediate effect of reducing the potential remand population, it can also have a longer-term effect of decreasing the likelihood of entrenchment and over representation in youth and adult prison systems.[30]

The LRSJ understands the ACT Government is currently co-designing a bail support program for First Nations young people. We echo *Independent Review's* suggestion that there be inter-directorate collaboration between the Community Services Directorate and the Justice and Community Safety Directorate to ensure First Nations young people in the justice system can access initiatives.

ix. Conclusion

As a party to the National Agreement on Closing the Gap and having committed to many of the recommendations in the *Independent Review*, the ACT Government has committed to reducing the disproportionate rates of incarceration of Aboriginal and Torres Strait Islander children and adults. We are pleased to see the proposed introduction of s 22B and strongly encourage the ACT Government to adopt the aforementioned accompanying provisions, which would support the use and implementation of s 22B.

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[28] The Australian Law Reform Commission '*Pathways to Justice - An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*' (ALRC Report 133, December 2017) 176.
[29] Ibid 176 citing, Judicial College of Victoria, Submission 102.
[30] Cunneen et al, *'Independent Review into the Over-Representation of First Nations People in the ACT Criminal Justice System'* (Final report, July 2025) 253.