



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

Submission Number: 010

Date Authorised for Publication: 29 May 2024



Standing Committee on Justice and Community Safety
Office of the Legislative Assembly
Via LACommitteeJCS@parliament.act.gov.au

24 May 2024

Dear Secretary,

Submission to the Inquiry into the Administration of Bail in the ACT

The ACT Human Rights Commission welcomes the opportunity to provide this submission to the Inquiry into the Administration of Bail in the ACT. This submission is made on behalf of the President and Human Rights Commissioner, Dr Penelope Mathew; the Public Advocate and Children and Young People Commissioner, Jodie Griffiths-Cook; and the Discrimination, Health Services, and Disability and Community Services Commissioner, Karen Toohey. Without seeking to be exhaustive, it outlines a number of legal principles and other matters that, the Commission submits, should inform the Inquiry's consideration of four aspects of the administration of bail in the ACT.

In the coming months, the President and Human Rights Commissioner will participate in further consideration of the operation of the *Bail Act 1992* (Bail Act) in her capacity as a member of the ACT Law Reform and Sentencing Advisory Council. That Council is undertaking a review of the Bail Act with particular reference to, among other topics, its compatibility with the *Human Rights Act 2004* (Human Rights Act) and whether it appropriately deals with bail for young persons. The Council is due to report to the Attorney-General on this review by 30 November 2024.¹

Presumption in favour of bail

The presumption in favour of bail is a well-established human right. Section 18(5) of the Human Rights Act articulates this right, by providing that "Anyone who is awaiting trial must not be detained in custody as a general rule". The right is drawn from, and expressed in substantially similar terms in, the *International Covenant on Civil and Political Rights* (ICCPR), the principal global treaty addressing human rights relating to criminal processes and the deprivation of liberty. Australia is a party to it, as is the vast majority of other countries.²

Both Division 2.3 and Division 2.4 in Part 2 of the Bail Act limit this human right, by removing the presumption in favour of bail. Division 2.3 provides that there is no such presumption for the

¹ See further ACT Law Reform and Sentencing Advisory Council, *Terms of Reference for review of the Bail Act 1992*, available at <https://www.lrsac.act.gov.au/current-projects/bail>.

² *International Covenant on Civil and Political Rights* [1980] ATS 23 (adopted 1966, entered into force for Australia 1980, 174 States parties at 24 May 2024). Article 9(3) provides in relevant part, "It shall not be the general rule that persons awaiting trial shall be detained in custody".

offences, and in certain other circumstances, specified in that Division. Division 2.4 reverses the presumption outright, establishing instead a presumption *against* granting bail with respect to specified offences and circumstances.

Division 2.4 of the Bail Act includes section 9C, which sets out the presumption against bail for murder and certain serious drug offences. The section has not changed since 2005. This is notwithstanding the fact that in 2010, following a challenge to the ACT Supreme Court's decision to refuse to grant bail to Mr Isa Islam, that Court declared that section 9C **"is not consistent with the human right recognised in s18(5) of the Human Rights Act, being that 'Anyone who is awaiting trial must not be detained in custody as a general rule'."**³ Section 32 of the Human Rights Act empowers the Court to make such a declaration (a "declaration of incompatibility") if satisfied that an ACT law is inconsistent with a human right. The s 9C declaration was then, and remains, the Court's only declaration of incompatibility regarding a provision of an ACT Act.⁴

The Human Rights Commission has repeatedly expressed its concern that the Government has not responded legislatively to this declaration of incompatibility and stated that further reform to bail laws is needed as a result of the *Isa Islam* decision.

Rights of children and young people

In addition to the presumption in favour of bail, international human rights law specifically requires that children not be detained except as a measure of last resort and for the shortest appropriate period of time.⁵ Moreover, the best interests of the child must be a primary consideration in every decision to initiate or continue any deprivation of a child's liberty,⁶ including pre-trial detention.

The ACT's *Children and Young People Act 2008*, accordingly, specifies that a decision-maker must, in deciding what is in the best interests of a child or young person, consider that they "may only be detained in custody for an offence (whether on arrest, on remand or under sentence) as a last resort and for the minimum time necessary".⁷ The Bail Act, in turn, obliges a court or authorised officer when making a decision about the grant of bail to a child to consider both that principle⁸ and, "as a primary consideration, the best interests of the child".⁹ There are further relevant obligations in the Human Rights Act: an accused child must be treated in a way that is appropriate for a person of their age who has not been convicted (section 20(2)) and has the right to a

³ *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147, para. 403, emphasis in bold added.

⁴ The Court has also made one declaration of incompatibility that concerned a delegated legislative instrument, specifically an operating procedure, rather than primary legislation. The Court found that the procedure was invalid for inconsistency with the *Corrections Management Act 2007*, as well as being incompatible with the plaintiff's human rights. See *Davidson v Director-General, Justice and Community Safety Directorate* [2022] ACTSC 83.

⁵ *Convention on the Rights of the Child* [1991] ATS 4 (adopted 1989, entered into force for Australia 1991, 196 States parties at 24 May 2024) (CRC), art. 37(b). See further Human Rights Committee, General Comment 35: Article 9 (Liberty and security of person), CCPR/C/GC/35, 16 December 2014 (HRC General Comment 35), paras 18, 38, 62; Committee on the Rights of the Child, General Comment No. 24 (2019) on children's rights in the child justice system, CRC/C/GC/24, 18 September 2019, paras 6(c)(v), 85-88.

⁶ CRC, art. 3(1); HRC General Comment 35, paras 18, 62.

⁷ Section 94(1)(f).

⁸ Bail Act, s 23(1)(b).

⁹ Bail Act, s 23(2).

procedure that takes account of their age and the desirability of promoting their rehabilitation (section 22(3)).

Rights of Aboriginal and Torres Strait Islander peoples

The Human Rights Act, section 27(2), recognises that Aboriginal and Torres Strait Islander peoples hold distinct cultural rights. The same provision specifically prohibits denying those peoples the right to maintain, control, protect and develop, among other matters, their cultural heritage, distinctive spiritual practices, observances, beliefs and teachings (27(2)(a)(i)) and kinship ties (27(2)(a)(iii)).

The cultural background and kinship ties of an Aboriginal or Torres Strait Islander person, and their rights under section 27(2), may be relevant considerations in whether to grant the person bail. The Bail Act, section 22(3), permits a court or authorised officer in making a decision about the grant of bail to have regard to any relevant matter, including the person's "background" (s 22(3)(b)). In Victoria – where, unlike in the ACT, bail legislation expressly obliges the decision-maker to take into account any issues that arise due to the person's Aboriginality¹⁰ – Aboriginal people's cultural background and ties to an extended family or place have been taken into account in several proceedings concerning bail and the Supreme Court of Victoria has found¹¹ that the relevant obligation in Victoria's Bail Act should be read in conjunction with the cultural rights of Aboriginal persons under the Victorian equivalent of s 27 of the Human Rights Act.¹²

Rights of people with disability (including mental health concerns)

A person with a significant mental health disorder or illness or other cognitive disability is more likely to be subject to arrest than a person of the general public population; may be less able to exercise their rights under the Bail Act, such as to make submissions in support of bail (s 15(1)) or to ask for facilities to communicate with a lawyer or interpreter in order to do this (s 13(1)(c)); and without proper supports, is more likely to be refused bail. A person experiencing mental health issues may (because of assumptions, stigma or otherwise) be assessed as more likely to commit further offences, or harass or endanger others' safety or welfare. Additionally, the risk of a person self-harming might sway a decision-maker against a grant of bail. This would amount to a criminal justice system response to the management of a risk more properly dealt with as a health matter.

The *ACT Disability Justice Strategy 2019-2029*, goal 2, requires that the ACT has a disability responsive justice system that supports the needs of people with disability and makes reasonable adjustments.¹³ However, the Bail Act at present contains no clear reference to disability. The Commission notes that decisions on bail require weighing a range of factors outlined in section 22(1) of the Bail Act and that per section 22(3), as earlier mentioned, in doing so, the court or authorised officer may have regard to any relevant matter. However, the section does not *require* consideration of the disability, mental health or other health needs and circumstances of an accused person.

¹⁰ *Bail Act 1977* (Vic), section 3A.

¹¹ In *DPP v SE* [2017] VSC 13, para. 21. On this and other Victorian jurisprudence on the issue, see further Kylie Evans and Nicholas Petrie, *Annotated Queensland Human Rights Act* (Lawbook Co, 2023), p. 251.

¹² *Charter of Human Rights and Responsibilities Act* (Vic), section 19.

¹³ *ACT Disability Justice Strategy 2019-2029*, p. 8.

The Commission further notes that the imposition of conditions on a grant of bail, under section 25 of the Bail Act, presents particular challenges for people with a mental health disorder or illness or other cognitive disability. The Commission is aware of matters where bail has been granted subject to a range of technical and complex conditions which such a person is simply unable to comply with or which may become oppressive. For example, a requirement to attend a counselling session may be onerous if the person is not oriented to time or day. Conditions that the person may not be near a stated place or people, meanwhile, may prevent the person from seeking assistance, including access to health services, to address the issues that might be contributing to alleged offending. While section 25(8) provides for a person to make representations that they are unable to comply with a bail condition, this can only happen if the person is informed and able to take that step, and in any case, the court or authorised officer must either amend a condition or refuse bail – there is no reference to making reasonable adjustments for the person to enable compliance with the bail conditions.

The Commission considers that the Bail Act requires modernisation to address these issues. In particular, we recommend that the accused person's health needs and circumstances be included as a mandatory consideration in the Bail Act, to help guide both the assessment of bail and the provision of appropriate supports, reasonable adjustments and referrals to relevant services. We would also suggest the Committee give consideration to the role of disability liaison officers in the bail process, and whether they could assist to broker appropriate referrals, supports or submissions as to grant of bail for people with known or suspected mental health disorders or conditions.

We also suggest consideration be given to the level of disclosure of a person's personal health information while a person is on bail. We are aware of circumstances where these disclosures have affected negatively a person's mental health and wellbeing because of the amount of personal information in media reports or media statements by justice agencies. This information remains in the public domain and can have a compounding negative effect both on that person's behaviour and on the wellbeing of other community members with similar disabilities or mental health issues who feel stigmatised by the association of mental illness with particular crimes.

We would welcome the opportunity to provide more detail about the matters raised in this submission to the Committee in an appearance before it.

Should you wish to discuss any other aspect of this submission further, the contact in my office is --, who may be reached on --.

Yours sincerely

Dr Penelope Mathew
President and Human
Rights Commissioner

Jodie Griffiths-Cook
Public Advocate and
Children and Young People
Commissioner

Karen Toohey
Discrimination, Health Services,
and Disability and Community
Services Commissioner