



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

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Submission Cover Sheet

Inquiry into the Administration of Bail

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Chair
Standing Committee on Justice and Community Safety
By email: LACommitteeJCS@parliament.act.gov.au

Dear Mr Cain

Inquiry into the Administration of Bail in the ACT

Thank you for the opportunity to make a submission to the Standing Committee on Justice and Community Safety's Inquiry into the Administration of Bail in the ACT. In light of my statutory role, I have experience with several of the issues identified in the Terms of Reference, as they relate to the Alexander Maconochie Centre and Bimberi Youth Justice Centre.

Therefore, while this submission focusses on the experiences of detained people, I appreciate that assessing risks and protecting victims and the broader community are critically important factors for courts and police to consider in granting bail.

About OICS

The ACT Office of the Inspector of Correctional Services (OICS) was established in 2018 to provide independent oversight of ACT correctional and youth justice facilities, focusing on continual improvement and prevention of ill-treatment.¹ The Inspector provides oversight by conducting reviews of ACT correctional facilities and services, and reviewing critical incidents. Reviews are conducted against published inspection standards, which set out the expectations for treatment and care, and indicators that help assess whether expectations are being met. My office is also part of the ACT National Preventive Mechanism (NPM) under the Optional Protocol to the Convention against Torture (OPCAT),² along with the ACT Human Rights Commission and the ACT Ombudsman. Part of the NPM function is to provide a broader role contributing to law and policy discussion relating to prevention of ill-treatment in detention. However, to be clear this submission is from OICS and not an ACT joint-NPM submission.

Human rights law and practice

Several human rights standards are relevant to people on remand including that people must be presumed innocent until proven guilty, pre-trial detention must be a last resort, and that when people are remanded in custody they must be treated in a manner consistent with their status as a person on

¹ See *Inspector of Correctional Services Act 2017* (ACT).

² Australia ratified the OPCAT in 2017 and the obligations in the treaty became binding in 2023.

remand. Particularly important for those remanded in custody is access to their lawyer, and any other supports that may assist in applying for bail.³

United Nations bodies have recently questioned Australia's protection of these rights. For example, the UN Committee against Torture (CAT) found Australia should 'ensure that the regulations governing pretrial detention are scrupulously respected and that such detention is resorted to only in exceptional circumstances and for limited periods, taking into account the principles of necessity and proportionality. It should also intensify efforts to significantly reduce the number of pretrial detainees by making more use of alternatives to detention, in particular with regard to Aboriginal and Torres Strait Islander adults and children.'⁴ Similarly, the UN Subcommittee on the Prevention against Torture (SPT) that plays a role under the OPCAT in supporting NPMs and visiting places of detention, has recommended that Australia 'take measures, including legislative measures, to ensure that recourse to pretrial detention is always a measure of last resort' after visiting in 2022.⁵

Remand rates of adults and young people on remand

Remand rates for adults and young people have increased significantly in Australia, and in the ACT over the last decades.

In 2006 (prior to the opening of the AMC) the Australian Institute of Criminology noted that the total number of prisoners in Australia had increased by around 20 percent since 1995, but remandee numbers had jumped almost 150 percent over the same period. From 2007 to 2017, the Australian Bureau of Statistics (ABS) reported that the overall sentenced prison population in Australia grew by 34%. Over the same period the remand prison population grew by 116%.

The latest ABS data on adult prisoner numbers show a slight decrease in the ACT. From 30 June 2022 to 30 June 2023, total number of prisoners decreased by 2% (6) to 375.⁶ However broken down by legal status, sentenced prisoners decreased by 9% (21) to 204, and unsentenced prisoners increased by 12% (18) to 174.

In relation to young people, over the 5 years from 2018–19 to 2022–23, numbers in detention on an average day fell by 13% (952 to 828).⁷ However, the proportion of young people in detention who are not sentenced has increased. On an average day in 2022-23, four in 5 (80%) young people in detention were unsentenced – that is, they were awaiting the outcome of their legal matter or sentencing. This compares to about 3 in 5 (or 63%) reported in 2018-19.⁸ Nationally, the vast majority (98%) of those 'unsentenced' were on remand.

In the ACT, in 2022-23, 79.7% of young people in detention were unsentenced. In comparison, in the ACT in 2018-19, 71% of young people in detention were unsentenced (however, some caution should be used in considering ACT data due to low numbers).

³ As protected in the *Human Rights Act 2004* s 18, s 19, s 20 (in relation to children), s 21, s 22.

⁴ *Concluding observations on the sixth periodic report of Australia*, 5 December 2022) UN DOC CAT/C/AUS/CO/6.

⁵ *Visit to Australia undertaken from 16 to 23 October 2022: recommendations and observations addressed to the State party*, (20 December 2023) UN DOC CAT/OP/AUS/ROSP/1.

⁶ [Prisoners in Australia, 2023 | Australian Bureau of Statistics \(abs.gov.au\)](https://abs.gov.au) (released 25 Jan 2024).

⁷ Australian Institute of Health and Welfare (2024) *Youth Justice in Australia 2022-23*.

⁸ Australian Institute of Health and Welfare (2020) *Youth Justice in Australia 2018-19*.

Role of places of detention

Places of detention have a role in relation to people on remand in ensuring they have access to all necessary supports to seek bail including contact with their lawyer.

As noted in the 2019 OICS review of *The care and management of remandees at Alexander Maconochie Centre*:

The reasons for increases in remand populations across Australia and in the ACT are complex and multifaceted. A growth in remand population can come about through an increase in the number of receptions, an increase in the length of stay, or both. Factors contributing to a rise in remand can include changing approaches to criminal justice (for example, removing presumptions of bail for certain offences), improved policing techniques [or additional resourcing for policing] leading to increased apprehensions and charges, high judicial case-loads leading to delays in hearings and hence longer time spent on remand, or a reduction in applications for or granting of bail due to reasons such as an inability to provide acceptable accommodation.

The report also noted:

Importantly, once an accused is remanded in custody, the AMC has an important role to play (alongside remandees' legal practitioners) in identifying potential bailees and supporting or facilitating processes to enable them to meet bail conditions... identifying and supporting the bail needs of remandees needs to be a specific and prioritised role rather than one of many functions of, for example, a case worker who may face a significant workload with many other demands.

In 2022, OICS also examined the treatment of remandees in our *Healthy Prison Review* of the AMC. That report noted that by 2021, the proportion of remandees had grown to 35.3% in the ACT. In 2021, ACT remandees spent a mean of 3.5 months in prison (median 1.9 months) compared to the national figures of 6 months (mean) and 3.4 months (median).

The review team heard from lawyers who noted that because there was often no one else to provide the support to clients, lawyers sometimes ended up playing the support role to assist clients to meet bail conditions. This is not the role of lawyers, and high caseloads often make it difficult for lawyers to perform these additional functions. Therefore, while acknowledging the work of non-government organisations such as the Aboriginal Legal Service and Advocacy for Inclusion, the report concluded that there were strong arguments for ACT Corrective Services providing bail support officers in the courts and at AMC.

The report also cited the challenges inherent to detaining a person on remand for a significant period of months or even years. The review cited a good practice at the AMC that remandees have access to all the programs of sentenced detainees except for the criminogenic ones (consistent with the principle that they are presumed innocent until proved guilty).

After OICS 2019 remand review report, ACTCS published a new policy for remandees. It requires that the General Manager Custodial Operations will facilitate access to legal representatives for remand detainees.⁹ Similarly, the *Corrections Management (Custodial Case Management Remand) Operating*

⁹ Corrections Management (Remand Detainees) Policy 2019.

Procedure 2022 sets out how such facilitated access will occur, for example requiring that AMC case managers ensure that remandees can access legal representation and are aware of how to maintain contact with legal representation. Case managers must also assist a remandee to complete their legal aid application and submit that application to legal aid. The case manager must also focus on key pillars of reintegration, including considering the remandee's accommodation options on release.

Particular challenges for young people

The challenges of providing support to detained young people on remand is a particularly pressing issue due to high remand rates. My Office is currently undertaking its second Healthy Centre Review of the Bimberi Youth Detention Centre. Consistent with the published figures for previous financial years, have we observed a high rate of remandees among the young people detained at Bimberi, with approximately only 1-2 detained young people at the centre being sentenced since the commencement of the Review. A particular challenge for Bimberi is the possibility a young person may be sentenced to 'time served' meaning the precise duration of their stay may not be known by the Centre.

Avoiding detention

Presumption against bail

I support the submissions of the ACT Human Rights Commission and ACT Legal Aid regarding the issues with the present presumptions against bail in the *Bail Act 1992*. I agree, that as reflected in the ordinary test of bail set out in the *Bail Act*, there are times when suspected people must be detained on remand to ensure community safety and prevent flight risks.

However, it is important to consider the risks of unnecessary detention. Firstly, contact with a place of detention must be a last resort, particularly for young people. The Australian Institute of Health and Welfare notes that 'the younger a person was at their first supervised sentence community based or detention), the more likely they were to returned to sentenced youth justice supervision'.¹⁰

Therefore, while the recent reforms to raise the age of criminal responsibility in the ACT are welcome, more must be done. For example, the United Nations Committee on the Rights of the Child has stated that children under the age of 16 should not be held in detention. Any legislated presumption against bail is clearly contrary to this standard.

A presumption against bail is also contrary to the National Agreement on Closing the Gap, of which the ACT Government is a signatory, which commits Australian Governments to reducing the rate of incarceration of both adults and children:

- Target 10: By 2031, reduce the rate of Aboriginal and Torres Strait Islander adults held in incarceration by at least 15 per cent
- Target 11: By 2031, reduce the rate of Aboriginal and Torres Strait Islander young people (10–17 years) in detention by at least 30 per cent.

This is a much-needed response to the over-representation of Aboriginal peoples and Torres Strait Islander peoples in the criminal justice system, which is why reviews such as this one and the recently commissioned independent review by the Jumbunna Institute are so important. Sadly, more than 30 years since its findings, the recommendations of the *Royal Commission to Aboriginal Deaths in Custody* remain relevant. The Royal Commission recommended that that governments, in conjunction

¹⁰ Australian Institute of Health and Welfare (2022) [Children under youth justice supervision](#).

with Aboriginal Legal Services and Police Services, give consideration to amending bail legislation ... to revise any criteria which inappropriately restrict the granting of bail to Aboriginal people.¹¹

Presumptions against bail also risk a person needlessly being exposed to the initial period of incarceration, which is the period of highest risk of ill treatment,¹² self-harm,¹³ as well as causing or exacerbating trauma.

Admission and induction are also the most resource intensive periods for places of detention, and wherever possible these resources should be diverted to community-based supports.

Bail Support

Previous reviews and reports in the ACT have identified the need for greater bail support for adults and young people in the ACT. The Final Report on the now expired Blueprint for Youth Justice in the ACT 2012-2022, noted that the After Hours Crisis Service that 'offers alternative community-based options to youth custody' had been found to be 'effective in reducing the number of young people held on remand'. I make no comment on this service but note with support the submission of the Aboriginal Legal Service that its Ngurrumbai Bail Support wraparound program for adults is a model that should be replicated for young people, through new discrete funding.

I note that the existing adult program is funded by the Justice and Community Safety Directorate (JACS). While not something OICS has looked into in detail, this may be an example of opportunities for inter-Directorate or cross-government collaboration, to ensure young people in the justice system can access initiatives.

Sunday Court trial

Further to the submissions of other stakeholders, during the course of our Healthy Centre Review, we have also heard from stakeholders positive reports of the pilot program for Sunday bail hearings and how it resulted in many being released on bail who otherwise would have been detained until Monday morning. I support the submission from Legal Aid ACT that the Magistrates Court permanently sit on Sundays for the purposes of bail, and this be accompanied by further investment into bail support programs.

Conclusion

Thank you again for the opportunity to make a submission to this important inquiry. While potentially outside the terms of reference for this review, I wish to conclude by noting the overarching reforms

¹¹ Recommendation 91.

¹² See eg, Office of the High Commissioner for Human Rights (2010), *Preventing Torture: An Operational Guide for National Human Rights Institutions* 4.

¹³ A recent review by the New Zealand Inspectorate of Corrections of suicide and self harm in prisons in New Zealand noted 'The risk of suicide and self-harm is heightened during the early days and weeks a person is in prison. Contributing factors described in the literature include a restrictive regime, disconnection from families and society, exposure to violence in prison and overcrowding (Liebling, 1992; Stoliker, 2018; Forrester & Slade, 2014). These factors may be especially relevant for remand prisoners who are awaiting conviction or sentencing and who are therefore also dealing with uncertainty over what will happen to them (Tartaro, 2019). Some prisoners may have had little or no time to prepare for their incarceration. There is some evidence to suggest that early days in prison may be a particularly high-risk time for women.' New Zealand Office of the Inspectorate (2024) *Suspected Suicide and Self-harm Threat to Life Incidents in New Zealand Prisons 2016-2021 – Thematic Report* 59.

needed to the criminal justice system identified by JRI, which are applicable to both adults and children:

To continue to improve outcomes for children in the ACT, it is vital that Government commits to long-term reform agendas, and funding models that enable sustained investment over multiple budgets and electoral terms. The justice reinvestment model requires initial strong investment in new and increased community sector services, which over time will reduce the cost and burden of our correctional services expenses.

Please contact to discuss any aspects of this submission further.

Yours sincerely,

Rebecca Minty
Inspector of Correctional Services