2011

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

Declaration by the ACT Supreme Court that section 9C of the *Bail Act 1992* is not consistent with section 18(5) of the *Human Rights Act 2004*

GOVERNMENT RESPONSE

June 2011

Tabled in the ACT Legislative Assembly on 28 June 2011 by
Attorney General
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Introduction

On 19 November 2010, Justice Hilary Penfold of the ACT Supreme Court issued a declaration of incompatibility in the following terms:

"Under subsection 32(2) of the *Human Rights Act 2004* (ACT), the Court is satisfied, for the reasons set out in *In the Matter of an Application for Bail by Isa Islam* (2010) 4 ACTLR 235, that section 9C of the *Bail Act 1992* is not consistent with the human right recognised in subsection 18(5) of the *Human Rights Act*, being that 'Anyone who is awaiting trial must not be detained in custody as a general rule' ".

In accordance with section 33(2) of the *Human Rights Act 2004* (the Human Rights Act), the Attorney General presented a copy of the declaration of incompatibility to the Legislative Assembly on 15 February 2011.

This Government response is presented to the Legislative Assembly in accordance with the Attorney General's obligation pursuant to section 33(3) of the Human Rights Act.

Background to section 9C

Section 9C is found in division 2.4 of part 3 of the *Bail Act 1992* (the Bail Act) which governs presumptions against bail. The section provides:

9C Bail for murder and certain serious drug offences
(1) This section applies to a person accused of—
(a) murder; or
(b) an offence against any of the following provisions of the Criminal Code, chapter 6 (Serious drug offences):
(i) section 603 (1) (which is about trafficking in a large commercial quantity of a controlled drug);
(ii) section 607 (1) (which is about manufacturing a large

commercial quantity of a controlled drug for selling);
(iii) section 616 (1) (which is about cultivating a large commercial quantity of a controlled plant for selling);
(iv) section 619 (1) (which is about selling a large commercial quantity of a controlled plant);
(v) section 622 (1) (which is about supplying etc a commercial quantity of a controlled drug to a child for selling);
(vi) section 624 (1) (which is about procuring a child to traffic in a commercial quantity of a controlled drug).
Note A reference to an offence against a territory law includes a reference to a related ancillary offence, eg attempt (see Legislation Act, s 189).
(2) A court or authorised officer must not grant bail to the person unless satisfied that special or exceptional circumstances exist favouring the grant of bail.
(3) However, even if special or exceptional circumstances are established, the court or officer must refuse bail if satisfied that refusal is justified after considering—
(a) for an adult—the matters mentioned in section 22 (Criteria for granting bail to adults); or
(b) for a child—the matters mentioned in section 23 (Criteria for granting bail to children).

Section 9G of the Bail Act provides further guidance as to the 'special or exceptional circumstances' test:

9G Special or exceptional circumstances
(1) This section applies if a court or authorised officer is required under this part to be satisfied of the existence of special or exceptional circumstances favouring the grant of bail to a person.
(2) A circumstance that would be an applicable bail criteria for the person is not a special or exceptional circumstance only because it is an applicable bail criteria.
(3) Also, the court or authorised officer must consider the applicable

bail criteria for the person only after the court or authorised officer is satisfied of the existence of the special or exceptional circumstances.

To put sections 9C and 9G in context they should be viewed against the background of the Bail Act as a whole.

Bail

Bail can be described as the granting of temporary freedom to a person charged with a criminal offence who undertakes to return to court at a specified time. Although historically bail concerned the purchase of freedom pending trial, in a modern democratic society it is recognition of the individual's right to liberty (subject to conditions, prior to any determination of guilt). The law relating to bail endeavours to balance this right of the individual with the interests of the community in ensuring the individual's attendance at court and the competing rights of others in the community to be safe and free from interference.

The Bail Act 1992

Prior to the Bail Act, the law governing bail in the ACT was a combination of common law principles and statutory provisions found in six different Acts. This situation made ascertaining the relevant law problematical and it was clearly desirable to create a single statute which drew together all the legal principles.

The Explanatory Statement to the Bail Bill 1992 stated that, when in force, the Act was not intended to codify the law relating to bail by supplanting the common law entirely but rather to gather all the statutory provisions in one place. At the same time the opportunity was taken to introduce some important innovations and a comprehensive set of procedures for the police. At commencement, the Bail Act included a right to bail for offences carrying not more than six months imprisonment as a maximum penalty and a presumption in favour of bail for all other offences.

The Bail Act has been amended on a number of occasions since becoming law in 1992. Some of those amendments have been of a minor or technical nature while others have been more extensive.

The ACT Law Reform Commission Report

In 1997, the then Attorney General for the Liberal Government issued a reference to the ACT Law Reform Commission (the Commission) as follows:

I, Gary Humphries MLA, Attorney General for the Australian Capital Territory, having regard to community concern about the application of the Bail Act 1992, refer the following matter to the ACT Law Reform Commission:

- *To review the provisions of the Bail Act 1992 to determine whether they are best suited to the public interest and particularly, the interests of victims of crime;*
- *To identify how successfully the provisions of the Bail Act 1992 are operating;*
- *To identify appropriate criteria, if not already identified, for the grant of bail and whether discretion for various offences is appropriately exercised by police or members of the judiciary and under what circumstances;*
- *To determine whether amendments to the Bail Act 1992 should be recommended; and*
- *To identify and make recommendations on any associated issue that the Commission considers relevant.*

In undertaking this reference, the Commission will consult with, and have regard for, views of members of the community.

The reference appears to have been born out of public concerns about the way in which the Bail Act was operating, particularly in relation to the presumption in favour of bail. In the introduction to the report the Commission stated:

> *In recent years there have been a number of cases which have generated considerable public concern about the grant of bail. In the*

ACT this concern has been fuelled by a number of well publicised cases, such those in which bail was granted to David Eastman in relation to a charge of murder and to Colin Dunstan in relation to charges of sending letter bombs through the mail. Cases of this kind obviously led to fears that other people might be harmed if bail were granted or continued. However, similar concerns have been expressed, not only in relation to allegations of murder, rape and other offences of violence, but cases in which alleged offenders have been granted bail in relation to property offences such as burglary and car theft. These concerns have been echoed in other Australian jurisdictions. Many people have plainly felt that the law has not adequately protected them from violence, the violation of their homes and/or the theft of their property.[1]

It also appears that judicial concerns were being expressed in connection with the presumption in favour of bail. On 25 June 2003, Mr Stefaniak presented the Opposition's Bail (Serious Offenders) Amendment Bill 2003. This Bill was informed by the Commission's report and preceded the Government's Bail Amendment Bill 2003, but was defeated in the Assembly. In commenting on the Commission's observation that the presumption in favour of bail "effectively casts on to the Crown the burden of proving any facts that might justify a denial of bail", Mr Stefaniak stated:

This is an issue that many judges and magistrates have commented on in recent times. Only last Saturday week, the President of the Court of Appeal, the second most senior judge of the Supreme Court of the territory, indicated that, in the case before him—a case of murder—because of the Bail Act, in which there is a presumption in favour of bail, he felt his hands were tied; he had to grant bail.

He's not the first one to complain about that. The former Chief Justice has mentioned it on a number of occasions, as has the Chief

[1] *ACT Law Reform Commission Report 19- Report on the Laws Relating to Bail, July 2001 par 8.*

Magistrate. They have mentioned it publicly in cases. They've certainly mentioned it privately with me, as indeed have a number of other judicial officers. Quite clearly, it is an issue that concerns our courts.[2]

One of the particular cases referred to as highlighting concerns surrounding the presumption in favour of bail was *Dunstan v Director of Public Prosecutions* (1999) 92 FCR 168. In this widely-known case, the charges related to the sending of bomb-like devices through the post to various people. Bail was refused in both the Magistrates Court and Supreme Court. The defendant appealed to the Full Court of the Federal Court of Australia, which was the final court of appeal from the ACT Supreme Court at the time, and bail was granted. In delivering the judgment of the Federal Court, Gyles J made clear the importance of the presumption in favour of bail and the task the prosecution faced in overcoming the presumption.

The decision in *Dunstan* and other cases gave rise to questions about whether the presumption in favour of bail created an imbalance by operating too strongly in favour of defendants.

The Commission formed a working group comprising representatives from the Magistrates Court, Supreme Court, Legal Aid Office (ACT), the Australian Federal Police and the Director of Public Prosecutions. The Commission was chaired by Justice Ken Crispin and reported in July 2001 (the report).

The report contained 25 formal recommendations to amend the Bail Act, including a recommendation that the presumption in favour of the grant of bail be amended not just to displace the presumption, but replace it with a positive presumption against bail for certain offences.

At the time the Commission reported, the presumption in favour of the grant of bail was contained in subsection 8(2) of the Bail Act. This presumption

[2] *Hansard* 25 June 2003 page 2442.

applied in relation to even the most serious offences. The Commission acknowledged that:

> "*the general principle that anyone seeking to deprive another person of freedom should be obliged to prove that such a course is necessary cannot be doubted*".

The report went on to say:

> *"the Commission accepts that people should not have their freedom restricted save for compelling reasons. Hence, it does not suggest that the presumption should be reversed in all cases but only when the accused person is charged with an offence of sufficient gravity to fairly raise substantial concerns that his or her release might involve real danger to members of the public".*

The Commission recommended that the Bail Act should be amended to provide that bail should not be granted for certain offences unless the court or authorised officer was satisfied, having regard to the bail criteria in either section 22 or 23, it would be appropriate.

The Government Response to the report

In preparing its response to the report, the government sought the views of key stakeholders including the Director of Public Prosecutions, the Australian Federal Police, the Legal Aid Office of the ACT, the Women's Legal Centre, the Victims of Crime Co-ordinator, the Law Society, the Bar Association, the Domestic Crisis Service, the Domestic Violence Prevention Council and ACT Corrective Services.

The government considered carefully the recommendations contained in the report, taking into account the views expressed during consultation.

The majority of recommendations were supported by the government, but the government did not agree with the Commission's recommendation to introduce a broad presumption against bail for a number of classes of serious offences. The government responded to this recommendation by stating:

The government considers that, in the vast majority of cases, the Bail Act allows for sufficient scope for courts and authorised officers to take the circumstances of an alleged offence into account when deciding on bail. However, the government acknowledges that the general presumption in favour of bail contained in the Act has led to community concern over the release on bail of people alleged to have committed very serious offences, such as murder.

The government was persuaded that a presumption against bail should be introduced in relation to the most serious offences, having regard to the increased risks of absconding, interfering with witnesses and, to a lesser extent, other offending on bail reflecting (in a few cases) a risk of harm to other members of the community.

At the time of the response, only murder and ancillary offences were to be included but subsequently a number of serious drug offences were added. In respect of other serious charges, the government considered that the presumption in favour of bail should simply be removed leaving no presumption for or against bail.

Sections 9C and 9G of the Bail Act 1992

The formulation of sections 9C and 9G was set against the background of the Commission's report and the upcoming *Human Rights Act 2004* (the Human Rights Act). Not only was the government's stance reached following extensive consultation but the Bail Amendment Bill 2003 underwent the legislative process and received support from the Liberal opposition.

It is clear from the explanatory statement to the Bail Amendment Bill 2003 that the intention of the government was to re-introduce the concept of exceptional circumstances that existed in the common law with regard to the grant of bail in cases of murder, which had previously been removed by the *Bail Act 1992*. It had long been established by numerous cases that a charge

of murder attracted, in effect, a presumption against bail unless exceptional circumstances existed[3].

Section 9(2) created the 'special or exceptional circumstances' test and this was further expanded on in section 9G. The explanatory statement to the Bail Amendment Bill 2003 states that the intent underpinning section 9G was to:

> *"make it clear that the test of special or circumstances is a higher test than the bail criteria".*

It is notable that the 'special and exceptional circumstances' test already existed in both sections 9 and 9A (now sections 9E and 9D) to create presumptions against the granting of bail for those sentenced to imprisonment pending appeal and in respect of a person accused of a serious offence who was already on bail for a serious offence. Neither section was criticised by the Commission's report in respect of the test to be applied.

Presumptions against bail in other jurisdictions

The ACT is by no means the only jurisdiction in Australia or overseas to have enacted provisions that create a presumption against bail. Examples include New South Wales, Victoria, the Northern Territory, South Australia, Canada and the United Kingdom, although there is variety in wording and application. Presumptions against bail do not necessarily impose an unreasonable limit on human rights.

The United Kingdom provision[4] (as amended) has been tested in the House of Lords[5] and been found not to contravene the *Human Rights Act 1998* (UK) or the European Convention for the Protection of Human Rights and Fundamental Freedoms. Although direct comparisons cannot be drawn between the UK and the ACT, a conclusion can at least be drawn that presumptions against bail do not automatically breach human rights. Indeed,

[3] *R v Borsboom* (1887) WN 14; *R v Barronet and Allain* (1882) Dears CC 51; *Barthelemy and Morney* (1852) Dears CC 60; *R v Watson* 1848 64 WN 100.
[4] section 25 of the *Criminal Justice and Public Order Act 1994*
[5] *R(O) v Crown Court at Harrow* [2007] 1 AC 249

this is acknowledged by Justice Penfold in her judgment in *Islam*[6], while not reaching any conclusion as to the human rights compatibility or justification for such provisions.

The Human Rights Act 2004

The Dialogue Model

The *Human Rights Act 2004* commenced on 1 July 2004 and was the first legislative bill of rights enacted in Australia.

The Human Rights Act was developed as a 'dialogue' model, designed to protect the role of the Legislative Assembly as the law-maker in the Territory, while still encouraging meaningful dialogue between the legislature, the judiciary (the courts) and the executive arm of government about human rights. By protecting the role of the legislature, this model ensures that the law-making role remains with the democratically elected representatives of the people. While the judiciary is an influential party in this process, shaping views that may be taken in relation to a particular law, it is not the final law-maker.

Where a court decides that there is no way that an Act or part of an Act can be interpreted in a way that is consistent with the Human Rights Act, it may make a declaration of incompatibility under s 32 of the Human Rights Act. In this event, the Attorney General is required to report the government's response to the declaration to the Legislative Assembly.

In this way, a declaration of incompatibility provides a trigger for further dialogue within the Assembly and eventually further dialogue between the courts, the legislature and the executive.

[6] *In the matter of an application for bail by Isa Islam* [2010] ACTSC 147, pars 337-378, (2010) 4 ACTLR 235

This is the first declaration of incompatibility made under the Human Rights Act. It therefore presents us with the first opportunity to work through our 'dialogue' model of human rights law.

That this is the first declaration made under the Act since it commenced in June 2004 reflects the efforts of the government to ensure that human rights are taken into account when developing legislation and policy. These efforts are particularly apparent in the internal processes that underpin policy and legislation. All government departments are required to consider the impact of policies and proposed legislation on human rights and to provide an assessment of the impact in the explanatory statements that accompany bills. The Human Rights and Regulatory Policy section of the Department of Justice and Community Safety (HRRP) engages with agencies as early as possible in the policy and legislation development process to support them to develop human rights compatible legislation.

Under the Human Rights Act all government bills are scrutinised for human rights compatibility and the Attorney General presents a compatibility statement in relation to each. It may be, of course, that the Legislative Assembly determines that some laws may be required, notwithstanding that they are incompatible with the Human Rights Act. This highlights the supremacy of the Assembly as law maker.

As Justice Penfold noted in her decision, the declaration has no impact on the operation of, in this case, section 9C of the Bail Act. Any decision to change the legislation remains a matter for this Legislative Assembly. Nor does the declaration affect the outcome of the proceedings for the individual applicant in the case.

The relevant Human Rights Act provisions

Before moving on to discuss the interaction between section 9C of the Bail Act and the Human Rights Act it is important to set out the principles under discussion.

Part 3 of the Human Rights Act sets out the rights which are protected. Section 18 governs the rights in connection with liberty and, in particular, s18(5) provides:

> *Anyone who is awaiting trial must not be detained in custody as a general rule, but his or her release may be subject to guarantees to appear for trial, at any other stage of the judicial proceeding, and, if appropriate, for execution of judgment.*

Children and young people are given special consideration under the Human Rights Act[7] and so the application of protected rights to this group of individuals requires particular deliberation.

It should be noted that not all human rights are absolute, and so may be subject to limitations. Section 28 of the Human Rights Act provides that:

> *(1) Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.*
>
> *(2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:*
>
> *(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.*

Further, Territory laws must be interpreted in light of section 30 of the Human Rights Act which states:

> *So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights.*

In interpreting the relevant provision section 31(1) provides:

International law, and the judgments of foreign and international courts and tribunals, relevant to a human right may be considered in interpreting the human right.

It is the question of exactly how section 30 should be applied to Territory law that is the main focus of the Supreme Court's decision in *Islam.*

Section 9C of the Bail Act and Human Rights

The Legislative Process

As described above, section 9C and 9G of the Bail Act were formulated following the ACT Law Reform Commission's report on bail which included community consultation and further government consultation with a wide range of stakeholders.

The Human Rights Act was being developed simultaneously and although not in force until after the *Bail Amendment Act 2004*, its impact was clearly anticipated and affected the approach taken in formulating the amendments to the bail laws. Evidence of this is apparent in the legislative process through the Legislative Assembly and in submissions received as part of the government's consultation process.

Following presentation on 11 December 2003, the Bail Amendment Bill (containing the provisions that became sections 9C and 9G) was automatically referred to the Standing Committee on Legal Affairs for scrutiny. Scrutiny Report 44 was issued on 24 February 2004 and, in what was described as a "broad brush approach", drew the Assembly's attention to a variety of views relating to human rights and bail presumptions.

At the debate stage of the Bail Amendment Bill 2003 the human rights issues were clearly underlying the debate speeches. As the then Attorney General, Mr Jon Stanhope stated:

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[7] Sections 11(2), 20 and 22(3) of the *Human Rights Act 2004* makes specific provision for individuals who are under the age of 18 years.

On the issue of bail and human rights, it is interesting to see that the passage of the Human Rights Act has perhaps had its first success. People are now looking at laws of the ACT Assembly with a view to the extent, or the effect, that they impact on human rights.

Mr Stanhope went on to express the government's view that the Bill was consistent with human rights. In referring particularly to the right not to be detained in custody pending trial as a general rule, he pointed out that the right was not absolute but must be balanced against other policy imperatives. It is notable that the Bill was passed with support of the Liberal Opposition.

The application of the Human Rights Act to s9C

As already stated, Territory laws must be interpreted in light of section 30 of the Human Rights Act. It is the question of exactly how section 30 should be applied to the Territory law which is the issue that was central to the decision of the Court to make the declaration of incompatibility in the case of *Islam.*

Two different approaches have been developed by the courts. The first was adopted by the ACT Supreme Court in the case of *R v Fearnside*[8] and the second developed by Justice Penfold in *Islam* following, to a large extent, the reasoning of the Victorian Court of Appeal in *R v Momcilovic*[9]*.* The crucial difference between the two approaches is whether the courts should interpret the relevant provision prior to asking whether any limitation of human rights is justified or vice versa.

Momcilovic and Islam

When Victoria enacted the *Charter of Human Rights and Responsibilities Act 2006* (the Charter) it became the second Australian jurisdiction to legislate in respect of human rights. The Charter also contains provisions as to the application of human rights to Victorian law in similar terms to the ACT's Human Rights Act. On the 17 March 2010, the Victorian Court of Appeal made a declaration of inconsistent interpretation in the case of *Momcilovic*,

[8](2009) ACTR 22

which equates to a declaration of incompatibility in the ACT. Although the case does not relate to bail proceedings, it is of significance to the ACT because of the approach adopted in applying the interpretation provisions to Victorian domestic law. This decision is the subject of an appeal in the High Court, in which the ACT (along with other States) is an intervener. The appeal was heard on 8 February 2011 but a judgment is not expected until the second half of 2011.

In *Islam,* the ACT Supreme Court largely adopted the approach used by the Victorian Court of Appeal in *Momcilovic* but adapted it to the particular terms of the Human Rights Act. Justice Penfold formed the view that it was not possible to interpret section 9C of the Bail Act to be consistent with section 18(5) of the Human Rights Act, using that approach.

The government remains of the view that section 9C is human rights compatible. Accordingly, an appeal was filed with the ACT Court of Appeal on 17 December 2010. This appeal will not be heard until after the High Court of Australia has delivered its judgment in *Momcilovic* and the implications of that decision can be considered.

Conclusion

It is fair to say the approach involved in the application of human rights to a jurisdiction's domestic law is a complex issue which has been litigated in overseas jurisdictions and now in Australia. The ACT government had expected that one approach would be taken to that issue, consistently with the approach that had been taken in many of those jurisdictions. The courts in *Islam* and *Momcilovic* have taken a different view.

This is now a matter for dialogue, with the declaration of incompatibility being the starting point.

[9] (2010) 265 ALR 751

This response has detailed the steps taken by the government to ensure the human rights compatibility of section 9C and evidences the government's commitment to supporting human rights in the Territory.

It is not appropriate for the government to engage in detailed argument as to whether section 9C is compatible with human rights outside the court process. The appropriate forum for resolution of this question is the courts. It is accordingly also premature for the government to take any action in respect of section 9C until final rulings have been made.

The government is in the position where the statutory requirements of section 33(3) of the Human Rights Act mean that a response must be presented to the Assembly at this time, but is precluded from responding to the substance of the declaration of incompatibility due to the outstanding court proceedings. Further, the government acknowledges that the making of the declaration ordinarily requires the government to respond in terms of whether it proposes to amend the Bail Act. At this stage it is not possible to come to such a decision. Consistent with the requirement in section 33(3) of the Human Rights Act to present this response within six months following a declaration of incompatibility, the government will present a further response within six months after the appeal proceedings in both courts have finally concluded.