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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*

FINAL GOVERNMENT RESPONSE

May 2012

Presented by

the Attorney-General

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Introduction

On 19 November 2010 the first declaration of incompatibility under the *Human Rights Act 2004* (HRA) was issued by Justice Hilary Penfold of the ACT Supreme Court in *In the Matter of an Application for Bail by Isa Islam* (2010) 4 ACTLR 235.

The declaration stated that section 9C of the *Bail Act 1992,* which deals with 'Bail for murder and certain serious drug offences', is inconsistent with section 18(5) of the HRA being that 'Anyone who is awaiting trial must not be detained in custody as a general rule.'

On 28 June 2011 the Government tabled its interim response to the declaration of incompatibility in accordance with the Attorney-General's obligation under section 33(3) of the HRA.

At the time the interim response was tabled the Government had filed an appeal against the decision in *Islam* in the ACT Court of Appeal. The appeal in *Islam* was awaiting the judgment of the High Court of Australia in the case of *Momcilovic* as it dealt with similar interpretation issues under the *Victorian Charter of Human Rights and Responsibility Act 2006.*

As these matters were at issue when the interim report was tabled in the Legislative Assembly, the Attorney-General undertook to provide a final Government response six months after proceedings in Islam were resolved.

Following the High Court judgment in *Momcilovic* in September 2011, the Attorney-General withdrew the appeal in *Islam*.

This final Government response to the statement of incompatibility provides a summary of the interim report, discusses *Momcilovic* and explains why the appeal of *Islam* was withdrawn. The response also provides options for reform in relation to section 9C of the Bail Act to make it more compatible with human rights.

Summary of Interim Response

The interim response provided context for the formulation of sections 9C and 9G of the Bail Act which were introduced through an Amendment Bill in 2003.

The introduction of sections 9C and 9G was set against the background of the 2001 ACT Law Reform Commission Report on the Bail Act as referenced by then Liberal, Attorney-General, Mr Gary Humphries. At the time of the report there had been growing public concern about the operation of the Bail Act, particularly in relation to the presumption in favour of bail. The report stated that prominent cases such as that of David Eastman, who was granted bail in relation to a charge of murder, resulted in the community feeling as though the law was not adequately protecting them from violence.

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

Following the release of the report the Government undertook consultation with a number of key justice stakeholders. The Government, taking into consideration views expressed during the consultation stage initially disagreed with the proposed broad presumption against bail for serious offences. However, the Government was later persuaded that a presumption against bail should be introduced for the most serious offences, such as murder, due to the increased risk of absconding, interfering with witnesses and, to a lesser extent, the risk of harm to other members of the community.

At the time the amendments were being considered the HRA had not yet come into force, but the engagement of human rights was taken into account during the formulation of section 9C. Evidence of this is apparent in the legislative process and in submissions received as part of the Government's consultation process. During the debate stage of the *Bail Amendment Bill 2003*, the then Attorney-General Jon Stanhope expressed the Government's view that the Bill was consistent with human rights. In reference 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.

From the explanatory statement it is clear that the intention of the Government in creating section 9C was to re-introduce the concept of exceptional circumstances which previously existed in the common law with regard to granting bail in murder cases. Sections 9 (2) (now section 9 (E)) created the 'special or exceptional circumstances' test and this was further expanded in section 9G.

The interim report provided a summary of the HRA and its development as a 'dialogue model'. It then discussed the application of the HRA to sections 9C and 9G of the Bail Act.

The main issue was how section 30 of the HRA should be applied to Territory law. This was one of the of the issues central to the Court making the declaration of incompatibility in the case of *Islam*. The interim report looked at the two approaches that have been developed by the courts. The first was adopted by the Supreme Court in the Case of *R v Fearnside*[1] and the second in *Islam*, following the reasoning of the Victorian Court in *Momcilovic*. The difference between the two approaches is whether courts should interpret the relevant provision prior to asking whether any limitation of human rights is justified or vice versa.

The approach taken in *Momcilovic* and closely followed in *Islam* was that before the limitation provision can be applied the court must first interpret the legislation in a way that is compatible with human rights. This approach led to Justice Penfold forming the view that

[1] (2009) ACTR 22

it was not possible to interpret section 9C of the Bail Act to be consistent with section 18(5) of the HRA and thus making the declaration of incompatibility.

The response commented that the ACT is not the only jurisdiction in Australia or overseas to have enacted provisions that create a presumption against bail. Such a provision in the UK has been tested in the House of Lords and found not to contravene the *Human Rights Act 1998* (UK) or the European Convention for the Protection of Human Rights and Fundamental Freedoms. Whilst a direct comparison between the UK and the ACT cannot be made, it can be said that a presumption against bail does not automatically breach human rights.

The interim response concluded by saying that the application of human rights to jurisdictions domestic law is a complex issue. It commented that the courts in *Islam* and *Momcilovic* had taken a different view to interpreting legislation in line with human rights to the approach previously taken in other jurisdictions.

At the time of the interim response, the Government stated its view that section 9C was human rights compatible, and encouraged dialogue with the declaration of incompatibility being the starting point. The Government felt that it was premature to take action in relation to section 9C until final rulings had been made in *Islam* and *Momcilovic*.

Momcilovic and *Islam*

High Court decision in *Momcilovic*

On 8 September 2011 the High Court handed down six separate judgment s in the matter of *Momcilovic* which upheld the constitutional validity of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The judgments provided varied guidance as to how the Charter should be applied in practice.

The majority of the High Court concluded that courts can interpret laws in a way that is compatible with human rights so far as it is consistent with their purpose. The majority concluded that section 32 of the Charter (similar to section 30 of the HRA) required a court to interpret legislation but could not be taken to require a court to make legislation. If a law cannot be interpreted in a way that is consistent with human rights, the Charter and HRA confer powers on Supreme Courts to make a declaration of incompatibility.

While none of the judges considered that a declaration involved the exercise of judicial power, they considered that whatever its character it is a proper exercise of judicial function.

The High Court also considered the operation of the reasonable limits test (section 7 of the Victorian Charter and similar to section 28 of the HRA). Several members of the Court concluded that a reasonable limits test did not form a direct part of the interpretive process. Other members however accepted that it was part of the process. This issue raised the most diversity in the judgments resulting in a lack of consensus about the relationship between the interpretive rule and the reasonable limits test.

Following the High Court decision in *Momcilovic* the appeal in *Islam* was withdrawn.

What were the Attorney-General's submissions, as intervener, in the matter of *Islam*?

In the matter of *Islam* the Attorney-General intervened to make submissions solely in relation to the effect of the HRA on the interpretation of section 9C.

The Attorney-General, as intervener, submitted that section 9C (and section 9G) of the Bail Act must be interpreted in light of section 30 of the HRA and section 30 must be applied by the Court according to the methodology adopted by the Court of Appeal of the ACT Supreme Court in *Fernside*. The Attorney-General was of the view that the tentative views expressed by the Victorian Court of Appeal in *Momcilovic* should not be followed.

On this basis the main arguments made by the Attorney-General in the matter were as follows:

- The ordinary construction of section 9C is consistent with section 18(5), and thus there is no need to undertake a justification analysis or a reinterpretation of the section.
- If section 9C is apparently inconsistent with section 18(5), it is demonstrably justifiable in a free and democratic society and is thus compatible with section 18(5) as a consequence of section 28 of the HRA.
- In the further alternative, if not demonstrably justifiable in a free and democratic society, section 9C can be reinterpreted so as to broaden the understanding of 'special or exceptional circumstance' (within the confines of section 9G) and this would render section 9C compatible with s18(5).

Why was the appeal in *Islam* withdrawn?

On 17 December 2010, the ACT Government Solicitor filed an appeal on behalf of the Attorney-General in the ACT Court of Appeal against the decision that section 9C is not compatible with the HRA made in the case of *Islam.*

There were a number of factors that led to the withdrawal of the Attorney-General's appeal in the case of *Islam*.

Since the time that the appeal in *Islam* was lodged, Mr Islam was convicted and sentenced for the offence for which he sought bail. Therefore the issue of bail which was the subject of the matter was no longer a live issue.

As discussed, the appeal against conviction in *Momcilovic* was upheld in September 2011 by the High Court. The High Court indicated, in six separate judgments that the Victorian Charter validly conferred on Victorian courts, and the High Court, obligations to interpret Victorian laws consistently with the protected human rights.

None of the judges considered that a declaration of incompatibility involved the exercise of judicial power, while a majority held that, whatever its character, it was compatible with proper judicial functions.

In light of the fact that Mr Islam is now serving a sentence of imprisonment together with the views of the High Court in relation to the status of a declaration of incompatibility, it was decided that the appeal in *Islam* should no longer be pursued.

The ACT Solicitor-General on behalf of the Attorney-General withdrew the appeal on 31 October 2011.

Proposed amendments to the *Bail Act 1992*

Current legislation

To understand the Government's proposed amendments to section 9C it is useful to first look at the current wording of the section. Section 9C 'Bail for murder and certain serious drug offences' states;

(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).

(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).*

Furthermore section 9(G) 'Special or exceptional circumstances' provides;

(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.

How has the current legislation been applied by the Courts?

There are a number of cases where the ACT Supreme Court has applied section 9C to a bail application.

In the case of *In the matter of an application for Bail by Timothy Noel Allen*[2], Justice Penfold stated "Where s 9C applies, the court must not grant bail unless satisfied 'that special or exceptional circumstances' exist favouring the grant of bail.' Only when such circumstances have been established is the court permitted to consider the criteria for granting bail set out in s 22 of the Bail Act."

In *In the matter of an application for bail by Rebecca Massey*[3] Justice Refshauge took the view that in raising special or exceptional circumstances the applicant must "establish that there is some unusual or uncommon circumstances which justify the granting of bail and those circumstances must relate to the granting of bail."

In the case of *Islam* Justice Penfold found that section 9C sought to apply a threshold barrier to consideration of a bail application. Her honour found that as section 9C applied a general rule implementing a presumption against bail, it was not compatible with the requirement in section 18(5) of the HRA that no one should be detained in custody as a general rule.

[2] [2009] ACTSC 64
[3] [2008] ACTSC 145

Recommended amendments

The Government recognises that there are a number of options available to reform the Bail Act but considers that the following recommendations address the issues raised by Justice Penfold. The proposed amendments would also retain the operation of bail policy approach as developed in 2003.

The proposed amendments do not eliminate the requirement for an applicant to establish special and exceptional circumstances but will allow the court to consider the regular bail criteria in determining the existence of special and exceptional circumstances. The Government considers that this makes the limitation of section 18(5) of the HRA reasonable and justified.

Drafting suggestions:

1. That section 9C (1) be amended so that it applies to any offence that carries a penalty of imprisonment for life.

2. That sections 9C (2), 9D (2) and 9E (2) be amended to state the court must have regard to the nature of the offence when determining special or exceptional circumstances.

3. That section 9G be amended to allow the court, in considering whether special and exceptional circumstances exist, to have regard to matters mentioned in section 22 or, for a child, in section 23.

The Government is aware that amending section 9G will impact on other sections in division 2.4 (Presumption against bail) of the Act. This needs to be taken into consideration in determining the appropriateness of the proposed amendments.

How would these amendments address Justice Penfold's concerns in *Islam*?

1. **Drafting suggestion one -** That section 9C (1) be amended to refer to any offence that carries a penalty of imprisonment for life.

In her decision Justice Penfold noted that section 9C does not apply to all offences carrying penalties of life imprisonment that might be dealt with in ACT courts. She went on to say that this raises the question of whether the limitation imposed by section 9C is rationally connected to its purpose. The Government sees that this creates an anomaly in the law and has recommended that section 9C be amended to address this.

Justice Penfold also commented that serious offences punishable by 25 years are not covered by section 9C. Most of these crimes are currently covered under section 9B of the Bail Act which has no presumption in relation to the granting of bail. The Government

believes that this is still the appropriate approach to take with these offences as one aim of section 9C is to capture the most serious criminal charges.

2. **Drafting suggestion two** - That sections 9C (2), 9D (2) and 9E (2) be amended to state the court must have regard to the nature of the offence when determining special or exceptional circumstances.

In her decision Justice Penfold stated that she was not convinced that there is a real risk of the court ignoring the nature of the offence when it is of a serious nature. However she found that if there is such a risk the direction to consider the offence must operate as a requirement rather than a general consideration.

Drafting suggestion two is intended to operate as a sign post to the court that the presumption against bail is in operation due to the serious nature of the offence the accused is charged with. This is signposted by the offence carrying a maximum penalty of life imprisonment.

When the presumption against bail was first introduced it came largely in response to community concerns in relation to serious offences and the way the Bail Act was operating. For example in the case of *Dunstan v Director of Public Prosecutions* (1999)[4] the defendant was charged with offences relating to the sending of bomb-like devices. He was refused bail in the Magistrates Court and the Supreme Court. On appeal to the Full Court of the Federal Court of Australia bail was granted due to the presumption in favour of bail.

It is intended that by drawing attention to the serious nature of the offence a parallel can be drawn with the increased burden placed on the accused.

3. **Drafting suggestion three-** That section 9G be amended to allow the court, in considering whether special and exceptional circumstances exist, to have regard to matters mentioned in section 22 or, for a child, in section 23.

Drafting suggestion three intends to clarify that when considering special or exceptional circumstances the Court may have regard to issues that would normally be considered under the normal bail criteria. If the Court finds that special or exceptional circumstances exist then it must have regard to the bail criteria at section 22 or for a child section 23.

The Government wants to make it clear that bail criteria contained in section 22 and 23 can be considered by the Court when assessing a bail application that requires special or exceptional circumstances to exist. This highlights that there is not a hard barrier between the defendant and the normal bail criteria but there is still a two-step process to draw attention to the seriousness of the offence.

[4] 92 FCR 168

Furthermore this approach retains the original policy behind the provisions introduced in 2003 that there should be a presumption against bail for the most serious offences, such as murder, due to the increased risk of absconding, interfering with witnesses and, to a lesser extent, the risk of harm to other members of the community.

What effect will the proposed amendments have on bail applications that fall under section 9C?

It is anticipated that the new test in relation to a bail application from a person charged with a relevant offence may have little to no substantive effect on the result in consideration of bail applications. It will instead clarify the process for the courts to assess bail applications under section 9C and provide further confidence that it is human rights compliant.

The Government supports a presumption against bail for people charged with an offence captured by section 9C. Crimes that are punishable by life imprisonment represent the worst criminal offences. The need to protect the community from the danger presented by the alleged perpetrators of such crimes and to ensure that people charged with these offences appear for trial is a priority for the government.

The community as well as key justice stakeholders have supported a higher threshold for people charged with these offences in regards to bail applications (for further discussion see the interim response pages 5 to 10). However the Government is committed to addressing doubts that the Territory's bail laws are compatible with human rights.

These amendments intend to balance these two Government objectives.

Conclusion

Issues around bail are serious and complex and not to be dealt with in a hasty manner. The Government is committed to bail laws that properly balance the presumption of innocence on the one hand and the right of the community to be safe and for justice to be done on the other. The Government acknowledges that amendments to section 9C of the Bail Act are desirable to ensure that it is compliant with human rights.

While no amendment can guarantee that a declaration of incompatibility will not be made by the Courts in relation to these provisions in the future, it is hoped that the proposed approach will address the issues raised by the decision in *Islam* and minimise the likelihood of a declaration. The amendments suggested in this response try to ensure that the limitation of section 18(5) of the HRA is justified and proportionate by removing the hard barrier between the defendant's application and the normal bail criteria.

Acknowledging the dialogue model of the HRA, the Government plans to consult with the key stakeholders over the next three months in relation to the proposed amendments.

The consultation period will precede any amendments to the Bail Act to ensure that all issues are canvassed before reform to the Bail Act is formally considered by Government.

The proposal to conduct consultation on the proposed amendments recognises the competing tensions arising from concern for the community's safety and the need to see justice done on the one hand and the need to protect the rights of accused people on the other.