



**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

STANDING COMMITTEE ON LEGAL AFFAIRS

(Reference: [Inquiry into Bail Amendment Bill 2026](#))

Members:

MS C BARRY (Chair)
MR T WERNER-GIBBINGS (Deputy Chair)
MS R VASSAROTTI

PROOF TRANSCRIPT OF EVIDENCE

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THURSDAY, 25 JUNE 2026

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Secretary to the committee:
Ms A Lee (Ph: 620 70524)

By authority of the Legislative Assembly for the Australian Capital Territory

Submissions, answers to questions on notice and other documents, including requests for clarification of the transcript of evidence, relevant to this inquiry that have been authorised for publication by the committee may be obtained from the Legislative Assembly website.

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Amended 20 May 2013

The committee met at 9.00 am

ANDERSON, MR IAIN, ACT Ombudsman

MATHEW, DR PENELOPE, President and Human Rights Commissioner, ACT
Human Rights Commission

MINTY, MS REBECCA, Inspector of Custodial Services

THE CHAIR: Good morning and welcome to the public hearings of the Standing Committee on Legal Affairs for its Inquiry into the Bail Amendment Bill 2026. The committee will today hear from legal industry representatives; the Domestic Violence Crisis Service; the Justice Reform Initiative; the Australian Federal Police Association; the Shop, Distributive and Allied Employees' Association; the ACT National Preventive Mechanism; the Victims of Crime Commissioner; Legal Aid ACT; and the ACT government.

The committee wishes to acknowledge the traditional custodians of the land we are meeting on, the Ngunnawal people. We wish to acknowledge and respect their continuing culture, and the contributions they make to the life of the city and this region. We would also like to acknowledge and welcome other Aboriginal and Torres Strait Islander people who may be attending today's events.

This hearing is a legal proceeding of the Assembly and has the same standing as the proceedings of the Assembly itself, therefore today's evidence attracts parliamentary privilege. The giving of false or misleading evidence is a serious matter and may be regarded as contempt of the Assembly.

The hearing is being recorded and transcribed by Hansard and will be published. The proceedings are also being broadcast and web streamed live. When taking a question or notice, it will be useful if the witnesses use these words: "I will take that question or notice." This will help the committee and the witness to confirm questions taken on notice from the transcript. Does anyone have an opening statement?

Witnesses: No.

THE CHAIR: Thank you. We will go on to questions, then. Thank you so much for attending this morning and thank you for your submission. I just had one question in relation to your submission where you noted that the ACT Supreme Court has stated that the presumption against bail under section 9C of the Bail Act is incompatible with human rights—with the Human Rights Act. I just wanted you to explain the inconsistency. And, is it your position that there should never be a presumption against bail, even for serious offences or repeat offences?

Dr Mathew: Yes. So, the court has indeed, in one of the many Islam cases—a 2010 case delivered by Her Honour Justice Hilary Penfold—made a declaration of incompatibility with section 18(5) of the Human Rights Act. And that section, or that subsection, says:

Anyone who is awaiting trial must not be detained in custody as a general rule, but their 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.

In the Islam case, Her Honour talked about the irrationality of section 9C; that there was no rhyme or reason to picking particular offences and saying there should be a presumption against bail for these offences. And she did see it as a violation of section 18(5), and that would be, certainly, the commission's view and that is what the National Preventive Mechanism is also saying in its submission.

One point of interest for you, given that you have got the Victims of Crime Commissioner coming in to make a submission—although she is not addressing the presumptions of bail—is that there is a section of the act which talks about police bail, essentially, for domestic violence possible-perpetrators, and in the judgment—I think it is at paragraph 255—Justice Penfold does say that is phrased in a very different way. It actually talks about the authorised officer, in that case, being satisfied that there is no possibility of harm to the offender. So, it is actually getting to the individualised risk, which is the problem with a generalised presumption like the one in section 9C and potentially section 9D—although we have not yet had a declaration of incompatibility against section 9D.

MS VASSAROTTI: Given all of that: in some of the other submissions that have been provided, particularly from ACT Policing, they are actually suggesting an increase in the presumption of presumptions against bail, and saying that it should be expanded. So, I was just interested to get your perspective on that evidence that has been presented.

Dr Mathew: We are not in favour of that, and I am sure I am speaking for my colleagues here as well, and I am not sure why police want to go that route, really. It would be interesting to see what Corrective Services thought about that.

As we have said in our submission, there are problems with rising remand rates across the country, and the ACT certainly is not immune to that. Nearly half the prisoners—and my friend at the inspectorate will know these statistics like the back of her hand—but nearly half the people in and the AMC are on remand. So, we are contributing to problems like overcrowding, prisoner-on-prisoner assaults and those sorts of things.

And it also runs contrary for Aboriginal and Torres Strait Islander detained persons to have presumptions against bail when we have had the Jumbunna Institute report saying we really need to lower the over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system.

So, presumptions against bail are not helpful. So, I am somewhat horrified, actually, to hear that there are suggestions that we should expand them beyond presumptions that have already been described in one case by the Supreme Court as not being particularly rational.

Mr Anderson: If I could add something to that. I mean, there is a bill before the Assembly, to consider. And so that means that the debate is often about: legislate in one way, or legislate in a different way. But when you come to bail, as we say in our submission, it is really important to think about the supports for bail, for people on bail, and that is not a legislative thing.

It may be that some of the arguments in favour of increasing the presumptions against

bail are because people on bail sometimes are not receiving the support that they actually need and that would help them to behave in a way that maintains community safety. So, we would simply encourage the Assembly to bear in mind it is not just about legislating; that, in itself, will not guarantee that something works in a particular way that will improve outcomes for both individuals and the community.

MS VASSAROTTI: That does actually lead me to another question in terms of your submission, particularly talking around the issue of children being refused bail due to lack of accommodation, which I think really does speak to that issue. I was particularly interested to get your understanding of how often this type of bail refusal is happening for children.

Ms Minty: I think that it is difficult to ascertain exactly, because of the lack of data that is kept on bail statistics. But when we did the Healthy Centre Review in 2024, we did look at data from the HCSD Cyrus database around six months from January to June in 2024. In that period, there were 87 unique young people that were incarcerated in Bimberi. I think it was around 63—so yes, obviously, people coming in and out—there were about 63 of those were in and out multiple times, but around just over half of those were for breach of bail.

And so anecdotally, what we heard is that often that breach of bail is not—so that is not committing a new offence; it is for breaching a condition of bail—and it was quite common to hear that those sorts of breaches were for failing to reside as directed, which is sort of a general condition; breach of curfew for example, so being out later than the bail condition requires. And so, I think that data sort of indicates, going to Iain’s point, “What supports are out there for young people when they are getting bail?”

And then this lack of discretion for police to—if they catch a young person in breach of their bail condition, they are going back into Bimberi—and often for a very short time. So, it might be over a weekend; they are appearing for the court on Monday and they may get released.

And as our submission says, it is that incarceration—I think, we have got to remember in this debate—I mean, you talk about not having suitable accommodation in the community, and I mean that is a matter of concern to everyone to think about young people out there not having a safe place to go—but what I would say, as well, is that detention is not a safe place for young people.

There are staff that care deeply, there is a good—we as a system try to put supports in place, but incarcerating people in that initial period of custody, they have to be searched, they have to be often isolated in a cell, they are not able to mix in those initial hours, and the risks of detention are the highest in that first period. So, if we can provide supports in the community and stop people coming into custody in the first place, the longer-term safety for the community of not re-traumatising young people or causing additional harm to them is significant. It is hard to measure, but I think we must remember that in this discussion.

THE CHAIR: Just a few clarifications. So, is it your position that there are no circumstances where a presumption against bail should exist, particularly in serious offences and repeat offences?

Dr Mathew: I mean, as I say, there is the one provision—it might be 9F.

THE CHAIR: 9F, yes, in family violence—

Dr Mathew: Yes, of the Bail Act. That puts things in—it is a different kind of hurdle to having to show special or exceptional circumstances, which is how section 9C reads. But, look, section 18(5) of the Human Rights Act: “Must not be detained in custody as a general rule.” And so, we are picking out particular offences and saying, well, we will, as a general rule, have a presumption against those accused’s being granted bail.

THE CHAIR: Don’t the rights of the victims play a part here?

Dr Mathew: Of course, rights of victims is important but it is absolutely fundamental, as you know, to our criminal justice system, that there is a presumption of innocence. And until someone has been proven guilty, the idea that we just multiply presumptions and put people—remand them—in custody, runs afoul of that provision. It is not something we should be doing.

Ms Minty: I mean, the prosecution can still prove that it is the interests of the community safety that someone be remanded. So, it is not removing the option of remanding people in custody and, certainly, there will be circumstances. But it is about the onus of proof and the presumption, and making the state or the prosecution sort of reach that hurdle of proving the interests of community safety and the other factors that lie in that.

Dr Mathew: I think that the critical thing is, most of this bill is about section 22 and thinking about the factors that decision-makers on bail should be looking at. There are some fundamental things already in section 22 about the safety of victims and the community. And I am not sure why it is we are not prepared to trust judges. That domestic violence provision is actually about police, bail officials, and, given the previous record or the historical record of police around the country on domestic violence, that might withstand scrutiny from a court.

But in general, no, there should not be presumptions against bail. We should be considering the ordinary factors in section 22, and we should be making sure that bail decision-makers have the best evidence in front of them. And it is just fundamental to the idea that someone should be presumed innocent until they have been proven guilty.

THE CHAIR: Just on that, one of the tensions in the submissions that I have read so far is, I guess, the tension between discretionary and mandatory considerations. Is it your view, then, that there should be fewer mandatory considerations?

Dr Mathew: No, I think it is perfectly appropriate to say to decision-makers, “Here are the things that we think you absolutely must consider.” We already do it in section 22. We have spelt out obvious things that have always been part of the common law, to do with community safety and so on. Now that things have moved on and we are beginning to think about, for example, the experience of Aboriginal people and Torres Strait Islanders, it is important that that background also be taken into account.

Having to have that as a mandatory consideration does not require that bail will not be granted at the end of the day. Putting a barrier like a presumption against bail may mean that someone who could be supported to be in the community, who may in the end not be found guilty, could be out in the community—and that is important.

MS VASSAROTTI: You have touched on a few of the issues that I was really interested in exploring. And you have touched, particularly, on the issue of the recommendation that you have put forward around ACT Policing being able to re-grant bail to children being arrested. And again, I am really interested in hearing your understanding of how often children are being arrested for breaches, and what does happen to them in those circumstances.

Ms Minty: Well, the best data that we could ascertain, given the lack of holistic system-wide data, was this review of the Cyrus system and that it was just over half of re-admissions were for breach of bail.

MS VASSAROTTI: And it has talked about the fact that they were offered for very short periods of time.

Ms Minty: Yes, I mean, we also looked at—as you would be aware—the significant vast majority of young people at Bimberi are on remand; upwards of 85 per cent. We looked at the periods spent on remand. I think the average period that young people spent on remand across that six-month period was around 29 days. But if you take out the outliers, if you look at the median number, it was actually just one day. So, I think that sort of illustrates the churn; the short remands.

And I think it goes to something the NPM has recommended around supporting the Sunday court, and there has been a successful trial of that. And I think to have a court sit on a Sunday and just avoid the young people being sent to Bimberi—and the same for AMC—going to jail until a court sits on a Monday. It is more efficient across the system, and it also causes less concern and rupture in people's lives if they can avoid going to custody.

And I think, as well, Penny alluded to the increasing numbers and the impact that is having on AMC; that numbers are getting really high. It is really concerning for staff that are trying to manage accommodation options in such a difficult environment. There are not many places to place these people coming in. And they are doing their best in what is essentially not a fit-for-purpose facility, with numbers that high.

MS VASSAROTTI: I was interested to get your feedback around—if you were able to elaborate on your point about the regular presumptions against bail that are applied before a decision-maker would consider any section 22B exceptional circumstance, particularly for Aboriginal and Torres Strait Islander people. I am really interested to get your perspective on the consequence of that.

Dr Mathew: Well, I am not sure we have lots of statistics on it but, obviously, the commissioner has had a role intervening in bail cases and this is how it applies. So, a person has to—if they are accused of those particular offences in 9C, they have to overcome that bar of special or exceptional circumstances before judges get to look at the criteria in section 22.

So, it is somewhat ironic, I guess, that we are looking at a bill that seeks to expand mandatory considerations and so on around bail, but for certain offences there will be a hurdle that has to be gotten over before a judge can even get to that.

As a commissioner, I have intervened in three cases involving bail and those presumptions against bail. And in two of the cases, the judge did not grant bail at the end of the day even though the barrier was overcome, because there was an issue around respect for human rights within the prison at the time, ie, the lack of separation between remanded and sentenced prisoners. So, there is only one example where the person was actually granted bail in those three cases, and there were significant restrictions or conditions put on bail in that case.

THE CHAIR: Legal Aid, in their submission, raised that the imposition of mandatory considerations could make bail harder to be granted. Do you share those views? Because I think your evidence is that there are circumstances where those mandatory considerations actually help in the grant of bail.

Dr Mathew: Yes.

THE CHAIR: But Legal Aid's position is that it could actually mean that bail is delayed, which means, then, that people are remanded in custody for longer. I just wanted to get your views on whether you think that that tension exists, and whether you share the same views as Legal Aid.

Dr Mathew: Well, it is not our position, I suppose but, you know, obviously, great respect to Legal Aid. They are dealing with these cases all the time in front of the courts, and we obviously respect their views on that. I think that is the best we could probably offer on that.

Mr Anderson: Yes, I think we all endorse what Penny said before, about it can actually be helpful to expressly state that certain factors do need to be taken into account in that process because there can be a risk that a judicial officer might not turn their mind to a particular thing that has been shown to be an important consideration. The Aboriginal and Torres Strait Islander status is an example of that.

Ms Minty: And I think the bill attempts to try and—I do not know if it has found the right balance, but it attempts to make it clear that the decision-maker does not have to go on an investigative process and, you know, go deep into investigations. Maybe that is a point of further consideration. But I think it is helpful to have that in the legislation, to be requiring decision-makers to look at factors.

I mean, if we look at Aboriginality, for example, and there is a lot of discussion about the importance of Closing the Gap and experiences of Aboriginal people in the justice system. And in the Healthy Prison Review last year, for example, we looked at data around the experience of Aboriginal people in custody. And so, not only are they grossly over-represented but their experiences are, in the whole, a lot harsher. So, they are over-represented in strip searches, in segregation, separate confinement, in high security classifications. And so, I think, you know, getting a decision-maker to turn their mind to what the experience for that person in front of them might be and the

contextual factors around colonisation history, et cetera, is a helpful thing.

MS VASSAROTTI: I think this, again, flows on really nicely from that last discussion. I was just really interested in getting a really specific view from you in terms of—in your view, in passing this bill and the application of decision-makers, do you think it is going to result in more people being put on remand, or less?

Dr Mathew: I think that is an incredibly difficult question to answer.

MS VASSAROTTI: Sorry, I did not mean to put you on the spot.

Dr Mathew: I think, in theory it should lead to more people being put on remand, and our position has been that we are supportive of the changes that are being suggested. In some instances, we do not think that they go far enough around explicit considerations—of carer obligations, for example. That was a common theme in our submission. And just, importantly, seeing it as something of a lost opportunity to actually deal with this question of a presumption against bail that has been declared incompatible. And it really is up to the legislature to make a response.

Are we really happy with something that has been declared incompatible with a fundamental human right being on our books in the ACT? Particularly when presumptions against bail can only contribute to the problems in terms of overcrowding in the jail, over-representation of Aboriginal people and Torres Strait Islanders, and so on. So, that is the general gist, I guess.

MS VASSAROTTI: That is helpful. Thank you.

Dr Mathew: Very tricky question. Thank you.

THE CHAIR: Thank you. On behalf of the committee, I thank you for your attendance today. If you have taken any questions on notice—which you have not—please provide your answers to the committee secretary within five business days of receiving the uncorrected proof Hansard. Thank you.

Short suspension

WEBECK, MS SUE, Chief Executive Officer, Domestic Violence Crisis Service

THE CHAIR: We welcome Ms Webeck from the Domestic Violence Crisis Service. Please note that, as a witness, you are protected by parliamentary privilege and bound by its obligations. You must tell the truth as giving false or misleading evidence will be treated as a serious matter and may be considered contempt of the Assembly. Would you like to make a brief opening statement?

Ms Webeck: I am happy to. Thank you. DVCS is very grateful to be able to make comment on the Bail Amendment Bill. Largely, we represent the rights and experiences of victim-survivors in our criminal justice system as it relates to domestic and family violence. There are a number of notable advancements in the amendment bill. However, we continue to be concerned around victim-survivors' ability to express views and their views being taken into consideration with a level of surety about the process that applies at any given moment. We are thrilled with the advancement around the ability for a victim's views not to be shared broadly outside of engagement with the DPP but taken into consideration, but the subjectivity of that does not allow for reliance on that mechanism for all victim-survivors. And we continue to be concerned around the elements of risk and risk assessment as it applies in the context of domestic and family violence and decision-making regarding bail applications and the consideration of information or submissions potentially provided by police in the context of the bail reforms—the ability to have informed risk analysis and a lens applied by the judiciary in making their determinations.

Broadly speaking, we see the amendments having a positive impact in our criminal justice system. However, we see this as an opportunity for some further clarity around the application of the amendments, to see more consistency and an increase in safety for victim-survivors more broadly.

THE CHAIR: Thank you. In your opening statement you mentioned the relevance of the mechanics for victim-survivors. Could you please expand on that a bit?

Ms Webeck: There is an addition in this reform that allows for the discretion of the prosecution to not share the victim's concerns, where that is the victim's preference. This is an additional protection for victims, particularly as they are managing safety. A public declaration around their views may actually increase the risk of further violence or ongoing violence. However, when we see mechanics like this operate, where it is "at the discretion of", it does not provide consistency around the information that helps in a safety plan for a victim-survivor. When they provide their views to the prosecutor, with every best endeavour of the prosecutor, the prosecutor may determine that it is appropriate to share that view in the court environment, which means the person using violence is then aware of the victim-survivor's stance on their bail.

We see advancement in the discretion approach. However, that does not provide consistency for every victim-survivor, because it is subjective. There is no threshold built into that or analysis as to how someone would choose to use their discretion regarding the need to share that in an open court versus withholding that information because it might impact safety. You still have to navigate the system in the hope that the discretion is applied to you.

THE CHAIR: For their safety, essentially. Thank you. That is useful to know. The conversation we were having with the previous group was around the presumption against bail. It is the position of the commissioner that there should be no presumption against bail. However, my understanding is that she indicated that she was partly in support of, I think, 9F of the Bail Act in family violence offences. I want to get your views on that—whether you believe that there should be presumption against bail for serious offences.

Ms Webeck: When we are working in these parts of the criminal justice process, a lot of the outcomes rely on the risk being held by a victim-survivor—they providing information to the court, them providing their views and wishes, or their disclosure of a wide range of behaviours and experiences that may have happened over a long period of time that led to the offence which has been charged for. A presumption against bail in family violence matters, particularly those of a serious nature, means that there is less onus on the victim-survivor to have to provide all of that in order to fight for their safety. It provides an onus on the representation about why someone should get bail as opposed to representation of someone who has been harmed and the prosecution being in the position to say, “This is why this person should not get bail.” That often comes with a large amount of risk and communication throughput that has to ultimately be held by the victim-survivor. In the context of where bail assumptions should or should not be made, there is a very strong case to say that, in serious domestic and family violence matters, there should be no presumption of bail.

THE CHAIR: Do you believe that compliance with FVOs should be mandatory or discretionary considerations, particularly given the ongoing issues around victim-survivor misidentification?

Ms Webeck: In the same way that we talk about discretion in sharing the views and wishes of victim-survivors, we have discretion thresholds when it comes to family violence orders as well, as to when and how contravention of a family violence order is provided. Perhaps from Corrective Services through to Policing, it is at the discretion of a corrections officer. Whether a breach to a family violence order is reported to police and whether police actually action that as a breach or believe that to meet the threshold is another area where we see disparate responses to victim-survivors.

If a family violence order has been issued, compliance to that should not be voluntary or haphazard; it should be that compliance is the bare minimum that we should expect as a community, but also as individual victim-survivors. An efficient and effective response to family violence order contravention should be in place, which also means that, if there is a pattern and a history of breaches to a family violence order, it should be taken into consideration regarding utilisation of bail, on the basis that it demonstrates a pattern of not adhering to the consequences that the law, whether it be civil or criminal, put forward. There should be alternative mechanisms to navigate misidentification of primary aggressors in domestic and family violence circumstances that mean we should not have to reverse engineer our criminal justice system to manage what I think we have decided is just a fait accompli that people are going to be misidentified. We need to work on upskilling the behavioural and attitudinal underpinnings of the system that misidentify victim-survivors as the primary aggressors, in order to eradicate that issue rather than trying to work out how we undo the pieces when they are already in motion.

THE CHAIR: Thank you.

MS VASSAROTTI: That flows really nicely to my substantive question. In your submission you expressed concerns, particularly around magistrates, registrars and court staff not being adequately informed about the risks posed by alleged domestic violence offenders, and you recommended further training, as well as the court needing to give regard to submissions from police in decision-making. I would be really interested in you elaborating on this, particularly around whether you think police submissions should be mandatory or left as a flexible option for decision-makers.

Ms Webeck: Our commentary on this comes with all respect to court staff and magistrates presiding over these matters. The reality is that we are all subjected to the same social norms and nuances and the same community attitudes and standards in our lives that create an environment where violence can occur. Being in a position in a system does not mean that people are actually immune to that or that they have the resourcing and support to unpack and underpin that. We also conflate the idea that hierarchical or statutory positions in our broader ecosystem have a multidisciplinary skillset, and that we have devalued the expertise that is responding to domestic and family violence, particularly when it comes to perpetrator behaviour mapping, but also as it relates to ongoing risk and further harm.

Our judiciary has extensive legal expertise, but are they actually able to identify domestic and family violence risk and risk indicators and factors to inform decisions? If bail was grant, does that pose further risk to the person or persons subjected to the individual's use of violence? No. That is a different skillset. Do they have the ability to contextually think about the ability of the system to police that behaviour, recidivism or engagement in programs or activities that may support more prosocial behaviour? Possibly, but risk assessment is a very specific and nuanced skill as it relates to domestic and family violence. Can we burden the court with having to gather all of the information that is required in doing a comprehensive risk assessment? No. That will jam an already overstretched and under-resourced system.

Are police in the best position to provide that information? Part of it, potentially. They will be able to provide information about other engagements with the person, other matters that may be on foot, information regarding family violence orders and contraventions to them, or reports of breaches that may not have gone to charges—all of those sorts of things. Should a police submission be mandatory? I think that is, in part, for a conversation with police, around the resourcing constraints of that. Do police, in and of themselves, have the skills to actually provide what we are talking about? No. They are not resourced to do that and that is not their expertise as people who, broadly, are employed to keep the community safe from a range of contributing factors. Do we, as a specialist organisation, understand that a series of offences that might be about radical and dangerous driving indicate against a domestic and family violence risk assessment? Yes. Do we expect that of the rest of the system? Not necessarily.

Do I have a solution to that problem? No. I can see it on your face! In the reality of the resource-constrained environment that is the criminal justice system, the frontline response system et cetera, I do not have a perfect response to that. What I can say is that police submissions should be available and not subjective to the resources

available. Magistrates should be able to receive relevant information to make their determinations on that. Victim-survivor views and wishes are absolutely part of that. Is it about training and engagement with the court around domestic and family violence risk and risk indicators so that they are able to better pull apart what they might be hearing across a range of submissions or information, so that they can have a more informed and balanced view on that? That is absolutely part of the puzzle. Does it solve the issue in full? No. Are we able to embed domestic and family violence expertise and practitioners within the system? Not with the resource constraints in which we operate, but, absolutely, that training and support is a very good start.

THE CHAIR: Do you know of any conversations with the National Judicial College about embedding family violence training in the judicial training package?

Ms Webeck: Not to our knowledge. When it comes to institutional training, that is often borne within the institution and is very unlikely to engage external service providers. At this stage, we have had no insight into that, nor have we seen the existing Judicial College training package. We are talking about attitudinal and behavioural social norm deconstruction alongside domestic and family violence risk analysis. Often, when you see institutional training packages, whether it be with police, the judiciary or even health care, it is often about how you do your job in the context of that, how you police family violence or how you ensure a safe court environment for a victim-survivor, not necessarily the behavioural and attitudinal work to actually ensure that people are hearing the full breadth of the story that is being put before them, not just through the lens of the assumptions that we are all socialised to adhere to.

THE CHAIR: But it is your view that training should happen at some point for the judiciary, if possible?

Ms Webeck: Yes. Our view is that the domestic and family violence system is an ecosystem and we should be relying on expertise in all of the parts of that to ensure that the ecosystem functions as best as it can. In the ACT, that would be utilising the skills and expertise of the Domestic Violence Crisis Service to support the court and the judiciary alongside their institutional packages from the Judicial College. It is the same when we talk about policing. We go to police to understand what it means for somebody to be charged with A, B, C, D or E, or how a breach is handled in the context of policing a family violence order breach. We exist also to serve their needs with regard to attitudinal and behavioural prevention and understanding domestic and family violence. Responses can be effective, informed and balanced, but also create no further harm to victim-survivors.

THE CHAIR: How does it currently work? How do you fit into the bail system right now? Is it just to support victims or are you feeding into the risk assessment as well?

Ms Webeck: No. Our role in the judicial system in that context at this point is through our partnership which sits across a range of criminal justice agencies, around case tracking. It is to support victim-survivors in understanding the criminal justice process when a bail application has been put forward. At times, we may gather their views and wishes in order to provide that to parts of the system, like the DPP, if that is something that they would wish, and we provide them the outcome of bail. At times, we provide advocacy around things like the address to which bail may be granted, to make sure that

it is not a victim-survivor's residential location or going to cause safety considerations for the victim-survivor, but we are not part of information gathering with regard to domestic and family violence risk. We are not party to providing our views or expertise into that process in any way. We support victim-survivors in the context of their knowledge, information and, potentially, their views and wishes to appropriate parts of the system, like the DPP.

THE CHAIR: In a system that works as it should or in a less constrained fiscal environment, where would you see your role fitting into the bail process? Would it be an expanded role? Where do you think you can come in in the bail process?

Ms Webeck: We can come in well before the bail process. It is about training, support and education for the system that is engaged with the bail process. If we want to talk about thorough domestic and family violence risk assessments and engagement around that, it is about providing a risk analysis to the court for consideration alongside, potentially, police information and views and whatever the judiciary is sitting with as well at that point. Then we could be where victim-survivors wish to engage in that process. We could support risk assessment management and safety planning of that and, with consent, provision of the risk assessment to the judiciary, noting that risk assessment is generally built on the experience of the victim-survivor, so their experiences and incidences of harm are not tested by the criminal justice system or the court system. However, there is a way of rationalising the experiences, as to how they relate on a risk assessment scale to indicate potential further harm, or, where the violence sits in an escalation framework, the charge may not represent that. There may be 40 other experiences that mean that the charge might seem fairly entry level, but the risk is actually quite imminent and significant.

In the ACT, where work has been done to revamp the risk assessment management framework, some of that risk assessment should absolutely be aligned with a common tool that the government has invested in and they want rolled out across the service system. As naive as this statement might be, I see the court and the criminal justice system as part of the domestic and family violence response system, and therefore the risk assessment management framework should apply.

THE CHAIR: Thank you.

MS VASSAROTTI: I have a supplementary question on all of that, reflecting on the fact that a lot of the training and development comes from institutional work. I am interested in your perspective on how open and willing the court system is to take a more holistic approach and engage expert services such as yours?

Ms Webeck: Again, with deep respect to all members of a court—because we can talk about institutions, but institutions are made up of people; we all participate in institutions in a variety of ways—the institution, when we are talking about a court, is a very old and hierarchical system. It takes a long time to shift and move, while also recognising the considerable demand for the resources of a court. I would say that, when time allows at various junctures, there is engagement. When time does not allow because of large volumes of matters or priority area shifts, that kind of external engagement disappears somewhat. I would say that there has been a significant advancement in engagement over the last three or four years in particular, but it is still

a very hard environment to get a seat at the table. We certainly respond to the court's request for engagement and participation. However, that continues to be sporadic. As with the whole ecosystem, I would argue that it is about the limitation of resources, not necessarily the limitation of want or desire.

MS VASSAROTTI: Thank you. One of the things that you mentioned in your submission is a concern around bail breaches that occur regularly. Even when breaches are enforced, offenders are regularly bailed again, and that can result in an erosion of the victim-survivor's faith in the justice system, particularly to support their safety. Can you talk a bit about what you think are some of the solutions?

Ms Webeck: Again, we believe that some of the solutions are in part around underlying training, including attitudinal and behavioural training, not the mechanics of the law or the process of charging et cetera. That is not our domain. The validation from the criminal justice system provides a level of consistency and understanding of what will be pursued as a breach, what will be pursued as a violation of bail, and what is available to the courts and the court system in response to that. We have an issue around the broader community's understanding of the criminal justice system. Regarding media reporting around bail, when it is granted, or the dismay that is held when somebody is bailed for the third time or they commit an offence while on bail for another offence, there is often a media push around distrust of the judiciary and the court process without understanding what the limitations are and the material that is being worked with, or without understanding what living in a human rights jurisdiction actually means, not just for victim-survivors but also for those accused of crime in the ACT. We again have an ecosystem issue—what I think our community, as a baseline, expects of our criminal justice system versus what is actually available to the criminal justice system to use and apply, and how media buys into that and promotes distrust of that system.

But there is also recognition that two things can be true at any given time. You could have a victim-survivor who goes through a court process and does not get an outcome. To be honest, when domestic and family violence or sexual violence occurs, the outcome is never going to make the harm that was done better. It does not take away from the fact that it occurred and that harm has been done. But we can get through criminal justice system engagement without causing further harm to a victim-survivor. We can have an outcome where somebody is provided bail or, maybe, a charge is not finalised in a court or it is rolled up, or there is an outcome of not guilty. We can still recognise that harm has been done to a victim-survivor and not cause further harm in the use of the system.

I think we have a lot of work to do around community support and community messaging around what is possible and what is not possible. We also have standards of practice for parts of the criminal justice system around defence that we need to make sure are well upheld, so that those presiding over court matters ensure that the safety and wellbeing of victim-survivors in those processes is at the fore. We have a quite comprehensive system in the ACT to try to ensure that. And we need to be really clear about what the expectations can and cannot be, based on what is available to everybody in the system. It is a big and wicked problem in many ways, and it is not just about what happens in the four walls of the court.

MS VASSAROTTI: Thank you.

THE CHAIR: What can we do to support victims in reporting breaches of bail? You talk about not going through the system and not causing further harm. How can we assist victims in the reporting of breaches of bail? Or what can we do in general to ensure bail conditions are enforced?

Ms Webeck: Again, that is such a subjective experience, depending on the victim-survivor and the experience of breach of bail. There is the monitoring of particular bail conditions that apply to Corrective Services or ACT Policing. If you fail to meet one of them, it is quite obvious to the system. We need to be really clear with victim-survivors about what a breach of bail looks like, but also what the likely outcome or what the necessary information from them would be if their experience of a breach of bail happens outside of the monitoring system. If there is a bail condition about exclusion from a particular area and a victim-survivor reports that to police, there is an evidence threshold: “Was somebody else there? Do you have video footage?” The risk of the person on bail might determine whether police have the resources to investigate CCTV footage from the area or the like. The intersection around the choice of reporting a breach of bail versus that being investigated or substantiated is quite subjective.

A holistic response for victim-survivors would be clarity about what is considered a breach to bail and the process of reporting that. In family violence matters, there is the Domestic and Family Violence Investigation Unit in ACT Policing. That can sometimes mean, when applied, that a breach of bail could be reported to a particular case officer, rather than just having to turn up to a police station or calling the police attendance number. Clarity for victim-survivors is really important, as well as transparency around how a breach needs to be evidenced or what actually occurred. We see that sometimes victim-survivors report breach of a bail condition or a family violence order and are then harmed because their reporting of that—

THE CHAIR: Does not lead to anything.

Ms Webeck: does not lead to anything. The response is: “How is that known? How do we understand that? Where is the evidence of it?” And they say, “I saw it. It happened to me. They approached me, but no-one else was around.” That cannot necessarily be substantiated, so it does not require any further action at times. As a service provider, the lack of consistency is very difficult to support victim-survivors through. Sometimes you will see a fairly like-for-like circumstance, where one is pursued and one is not, so it is hard to provide consistent information. That is always going to be tricky because so many of these things are somewhat subjective to the person you are talking to at any given time, and that determines what happens next.

Review processes are really important. Escalation processes are really important so that, if victim-survivors do not feel heard, understood or taken seriously, there is a really clear and inviting escalation pathway for those matters to be resolved and supported. That would encourage people to report if something else happened. We see attrition in victim-survivors over time, where they say, “Well, there’s no point. I’ve reported X number of times and nothing happened, so why would I keep going?”

THE CHAIR: That is really useful. You touched on enforceability of bail conditions. I am wondering whether you think the bill addresses that in any way.

Ms Webeck: Not specifically. We have noted that the maintenance of the current presumptions is important. Regarding the stronger risk and safety decision-making framework, I have spoken about how to increase that, but there are strengthenings in the bill. There are currently no presumptions in place for family and sexual violence related offences around presumptions of bail. That is important to maintain some of the safety standards of the bail conditions. Again, we think that enforceability and consistency go back to well before bail is set. Training, resourcing and skill development are important. We think that the inclusion of the court orders as a factor is quite important, as an information factor, when that is relevant. The relevancy point that we come back to is that the determination of the relevance of something should be considered. How are we supporting the people making the determination about what is relevant and what is not? The additional protections around the victim-survivor's voice in that process are important, but we would like to see standards and thresholds around what that discretion means. Is that discretion built on a risk analysis of the likely burden of risk and harm to the victim-survivor if their views were expressed in that process?

THE CHAIR: This is about the prosecution's discretion?

Ms Webeck: Yes. We see that not being required—to have to share the victim's views and wishes in the court. We see that as a safety enhancement. It is about the consistency of that and the threshold of that, so that victim-survivors can make informed decisions about what they do and do not wish to share with the prosecution, based on what they do, do not have to do or might decide that they do not need to share with the court.

MS VASSAROTTI: In the context of the bill before us, there is a mechanism that goes to some of that. How comfortable are you with what is in the bill? And what would you specifically like to see that fleshes out some of those issues around consistency, decision-making and discretion?

Ms Webeck: It is always tricky with a bill because there is a limitation to what can fundamentally sit in a bill—

MS VASSAROTTI: That is right.

Ms Webeck: and we are talking about operationalisation of the bill more than anything else. We would like to see the language around discretion of the prosecutor to talk about “informed by risk” or “informed by victim-survivor wishes” and a risk assessment of that. I think discretion should be qualified—“What are the pieces that inform that discretion?”—similar to the way that some information enhancements are being made for the court around taking things into consideration. That would be the primary little shuffle that we would like to see made on that. And there is the risk assessment piece and risk information. In WA, their system allows for risk assessment submissions, utilising their common risk assessment management framework. Perhaps that is a possible inclusion around the information that could be considered alongside police submissions et cetera. In an ideal world, a domestic and family violence informed risk assessment would be considered alongside that, where a victim-survivor would wish that to occur, because what you can build a risk assessment from is ultimately platformed on the information that they share. That would be a significant inclusion and advancement.

We can have a conversation about how that is resourced and how you actually manage timelines and timeframes with court processes in order to not delay the occurrence of the matters at hand. But there could be the inclusion of a risk assessment, even as an option for the prosecution, centred on the victim-survivor's views and wishes—noting that sometimes these occurrences happen for the first time for somebody coming into a domestic and family violence criminal justice matter. For a victim-survivor, in the current timeline of bail applications and hearings, to be in a position to actually undertake a risk assessment may be incredibly fraught.

MS VASSAROTTI: Yes. It would have to be optional.

Ms Webeck: Yes.

MS VASSAROTTI: We know that victims are sometimes stuck in a pretty insidious position, where they do not want the accused to reside with them, but they do not want them to be incarcerated. I am interested in hearing your perspective. Are there options in that case? And what are the missing appropriate supports in the ACT in order to enable a remand situation?

Ms Webeck: That is an incredibly complex question in many ways. It becomes an increasingly complex conversation as we become a jurisdiction where housing is a human right as well. If there is no other housing option for an individual, they should not be remanded on that basis. If bail is appropriate, then bail should be provided. We have instances where, because of names on tenancy agreements or property agreements, bail of an individual to their residing property may render a victim-survivor, and potentially children, without safe residential accommodation. Given that the court process and the timelines of the court change based on the submissions of all parties, that can be a never-ending cycle, which means that you may find somebody in emergency crisis or transitional accommodation and no clear pathway. Regarding housing stability and housing opportunity for those who are bailed, there are programs in the ACT to support that. We find that, through our case tracking process, when we come across information around a proposal for bail to a particular address or to a house down the road, we can advocate and engage with the DPP and the court system to vary that.

There is another fraught environment around the rights and responsibilities of the accused in caring capacities. We have had experiences where victim-survivors see the offender bailed back because of an argument around supplementary personal care for the individual without context and understanding around the vulnerability of further harm and the like. It is not easy to provide a holistic map. It is quite individualised, which means that there needs to be advocacy support as well as an eye to bail processes, particularly around addresses or bail amendments and the like, to follow the bouncing ball of: "How does that actually impact the person or people who have been harmed by that person's use of violence?" While untested in the court at that point, it is still true that somebody feels harmed by that person. It is a complex balance. It is complex for housing providers and support providers.

Regarding the requirement around accommodation, our experience is that, generally, we work on creating safety and wellbeing regarding the housing environment for those

impacted by somebody's use of violence. Somebody who has an opportunity to be bailed will generally find a housing solution. Our issue comes into play when that housing solution threatens to destabilise or make the situation of those impacted by the person's use of violence worse.

MS VASSAROTTI: Thank you. Sorry—that was a tricky question.

Ms Webeck: If we could solve the housing problem—

MS VASSAROTTI: That is right. It is all connected.

Ms Webeck: Yes.

THE CHAIR: Thank you. On behalf of the committee, thank you for your attendance today. If you have taken any questions on notice—which you have not—please provide your answers to the committee secretary within five business days of receiving the uncorrected proof *Hansard*. Thank you.

Hearing suspended from 10.13 am to 11.55 am

BARTELS, PROFESSOR LORANA, Patron and ACT Co-Chair, Justice Reform Initiative

REFSHAUGE AM, THE HON. RICHARD, Patron, Justice Reform Initiative

THE CHAIR: We welcome witnesses from the Justice Reform Initiative. Please note that as witnesses you are protected by parliamentary privilege and bound by its application. You must tell the truth as giving false or misleading evidence will be treated as a serious matter and may be considered contempt of the Assembly. Do you have a brief opening statement to make?

Mr Refshauge: Yes, we do. I am not sure that it is brief because I write a lot. But we are grateful for the opportunity to appear and grateful that in this jurisdiction we do have an opportunity to engage, and we hope that that is valuable to members of the Assembly. We do commend the ACT government on taking an evidence-based approach to bail reform. Bail reform is often very emotional and brings a lot of baggage in that sense, and evidence is really important. It is particularly important given that nearly half the people in the Alexander Maconochie Centre are on remand, and the ACT has the highest over-imprisonment rate of Aboriginal and Torres Strait Islander people in the country.

It has to be kept in mind that most of the people who seek bail are not convicted and are properly presumed to be innocent, thus a court cannot simply rely on an allegation of offending to speculate that the defendant will reoffend. Further, while statistics are not easily forthcoming, the latest annual report of the ACT Director of Public Prosecutions shows that of all criminal matters completed in 2024-25, nearly a quarter were not proved. Some of those persons who have lost their liberties were, according to law, not guilty. It is not shown how many were on remand or granted bail. In the Supreme Court, 30 per cent of cases of sexual offences, which are cases where the defendant is more likely to be refused bail, resulted in an acquittal.

It must also be borne in the front of mind that remand is for specific purposes—namely, to ensure the attendance of the defendant at trial, to contribute to the preservation of evidence, and to protect the community. It is not, as some in the community think, a punishment for what may not be a crime or a punishment that is not appropriate for any crime actually found to have been committed.

It is also important to bear in mind, while legislation is very important, unless the arrangements are in place for the proper administration of the actions that follow the grant of bail to ensure that it is a reasonable or possible decision, the effect of it will be undermined. Hence, we have raised in our submission a number of matters that are not directly related to the legislation but which, unless addressed, will mean that the proper decision on bail will have no substance and will not result in what the legislation intends.

So we would urge the committee to recognise and possibly make some comments about things that are needed to underpin the new legislation. We do commend it and we have got some suggestions, but we think it is progressive in the best sense of the word.

Prof Bartels: Building on my colleague, I would like to note that being on remand for that time that the person is in custody is effectively dead time, as many people refer to

it, and people on remand often cannot participate in programs. It is also from a corrections management perspective quite difficult to manage people on remand because of that uncertainty. So minimising that is also important not just for the individual but for correctional management purposes.

In relation to the bill, we are pleased to see the proposed changes to sections 22 and 23, and we make three further suggestions for reform. One is a simple legislative change that is consistent with the tenor of the bill. The other two are more ambitious. The simple change is in relation to the wording of proposed section 22A(d), which currently states, “the person’s history of compliance with the following.” We suggest that it would be appropriate to add, “and any reasons for noncompliance.” This will ensure that courts consider factors that give rise to any lack of compliance. That may include, for example, an inability to understand the bail conditions due to disability or lack of literacy or lack of access to housing or transport. It is too often assumed that failure to comply with bail conditions is due to a wilful desire to disobey them as opposed to an inability to comply, often due to reasons beyond the person’s control.

More ambitiously, for future consideration, we note that some jurisdictions have pre-trial custody time limits. So this is a maximum time limit for how long a person can be detained in custody prior to trial. This safeguards unconvicted defendants by preventing them from being held in pre-trial custody for an excessive period of time. In the UK, this is 182 days—about six months—for indictable offences and 70 days for offences that can be heard in the Magistrates Court—a little bit over two months. If a matter has not gone to trial in that time, there is a presumption in favour of release on the bail. And I think we would all know that there are cases where people are held on remand for far longer than that—in fact, years. If they are found not guilty, they never get that time back.

Our third suggestion is to introduce a legislative requirement for the ACT to ensure people have a house or home to live in. This, of course, brings broader funding dimensions to ensure that there is, in fact, available housing other than at the so-called Hume Hotel that we are all familiar with.

As Richard has noted, generally our submission is concerned with issues that are beyond the specific scope of the bill but aligned both with promoting its objectives and the recommendations of an early iteration of this committee in its 2024 report on bail administration, and we endorse the recommendations of that report. This goes to issues such as the social determinants of justice and a renewed call for a general bail support program like our neighbours in New South Wales and Victoria have had for decades. I am speaking there of the MERIT and CISP programs respectively. There have been numerous calls for such programs and yet we still do not have them.

We reiterate that the underlying primary objective in forming bail policy should always be the recognition a person charged with an offence has a right to bail as they are presumed innocent until being found guilty. There is, of course, a need to protect the public from the risk of future offending and ensure that a person charged with an offence appears at their trial. But the response to addressing this risk should be an evidence-based approach that genuinely centres community safety. Remanding people in custodial settings should be used only as a last resort, and we need to ensure that bail conditions are practical and not unduly onerous. Thank you again for the opportunity

to appear, and we are happy to take any questions.

THE CHAIR: Thank you very much for that comprehensive opening statement. Justice Refshauge, you indicated—and rightly—that bail is not to be used as a punitive measure; it is to ensure that defendants attend courts and several other considerations. Do you believe those considerations are still valid and should apply where a person is a repeat offender?

Mr Refshauge: At one level, yes, because unfortunately there is a risk that someone who is alleged to be a repeat offender is being charged because of their history and not necessarily the strength of the case currently against them. I am not saying that that often happens, and I have to say that we have in the ACT a better police force than we used to have and that many other places have. I am not suggesting that they necessarily target people; I am sure there are bad apples in the police that do. But just because you are a repeat offender and have committed that offence before does not mean that you are guilty.

However, I think it is relevant when, if it is a serious offence, for example, that there may be risk to the community. We do know and I have written many times and the law recognises that past behaviour is an indicator of future behaviour. But there is always a proviso to that, and the proviso is that the circumstances are the same, and you do not know that. We have people who do ultimately learn that going about and committing crimes is not a good thing and they do change so that their previous history may not be necessarily an indicator of future behaviour.

So you have got to be careful about these things. But yes, I can understand that if you have had five assaults outside Mooseheads and you have been found drunk another time, there is a real likelihood that you are going to do it again. So it should be taken into account, but it has got to be discretionary and it should not be mandatory.

THE CHAIR: Both your comments centred mostly around evidence-based decision-making. One of the things submissions have indicated, especially the submission from the Victims of Crime Commissioner, is that there is really no appropriate data on bail to make these decisions. In your experience, what sort of data should we be collecting to ensure we are making appropriate decisions when it comes to bail?

Mr Refshauge: I will make a few comments, but I think Lorana is probably the better person to talk about that. My first comment is that I did read a very good report from New South Wales. I do not remember the precise terms of it—Lorana might—but it was quite a good report and it did do things like identify—a bit like what I gleaned from the DPP report—how many people were granted bail and reoffended. And the number in New South Wales—I am sorry, I should have got it out for this submission—was minimal.

MR WERNER-GIBBINGS: You can take it on notice.

Mr Refshauge: I am sure you have it. But we do not have that information in the ACT. And the trouble is you get what I call the McLuckie problem—where someone is released on bail and they ruin it for everyone else by reoffending. But the fact is that if

the New South Wales numbers are so, 90 per cent, as I remember, of those granted bail do not reoffend while on bail. So that would be useful evidence to determine that the way in which we approach bail is not to assume that people who have committed offences will commit further offences. But Lorana is the academic; she knows the real stuff that you need to know in this space.

Prof Bartels: I certainly acknowledge that the data picture in the ACT is in need of improvement and we do not have a lot of specific recent data on how many people on bail go on to commit offences and the nature of those offences. However, there is no reason to think that people in the ACT are any different from elsewhere in terms of those underlying factors. The reality is that if we do not deal with those underlying factors, we will increase that offending during that period of bail. Those underlying factors generally coalesce around things like untreated mental health, untreated substance use, lack of access to housing, lack of access to employment, lack of access to education, and literacy is part of that.

Some but not all of that can be addressed through a bail support program. This has been used, as we have said, in other jurisdictions for decades now. The data on the impact of those programs is clear from both a reducing reoffending perspective and reducing cost perspective. Judicial officers say it enables them to make better sentencing decisions because they have a fuller picture of the person's behaviour during that period that they have been under supervised bail.

That would be an example of an evidence-based decision, to actually implement a tried and true kind of program. These have literally been operating for over 20 years in New South Wales and Victoria, so during the period that the person is on bail having an individualised case plan that deals with things like substance use, financial counselling, mental health issues. We do not have a bail support program. We have had many recommendations that we have that, but we don't have that.

Mr Refshauge: Insofar as there are reporting conditions, most of those are to a police station where it is a tick and flick there is no interaction. Where you might sometimes have a requirement to report to Corrective Services—although Corrective Services have moved on, and I am pleased to say that my sense is that those who are Corrective Services supervision officers are more committed to rehabilitation and support than has been so—the pressure on them now is so much that most of it will be tick and flick.

Prof Bartels: But these are court programs. These are programs that operate in the other jurisdictions through the court, which gives them independence that the corrections programs do not have. And they have other service providers—NGOs and the like—that are providing those additional supports around mental health, substance use, brokerage for housing, all of that. This has been happening in other jurisdictions. Do not quote me on this, but I think it was the first recommendation from the bail administration report of this committee in 2024. Nothing has changed in this jurisdiction in the intervening two years, other than perhaps the housing crisis becoming more acute.

THE CHAIR: There is this tension in the bill between mandatory considerations and non-mandatory considerations. The evidence we have heard—mostly from the commissioner—indicates that mandatory considerations, whilst useful, could limit

people's ability to get bail or make the process longer. I just wanted to get your views on whether you share those views as well—that is, that mandatory considerations perhaps does not give discretion to judges to be able to make faster decisions essentially about bail.

Mr Refshauge: I am not quite sure what that is directed towards. I do not think there are problems in some requirement for consideration. Indeed, one of our recommendations is that if you are considering the noncompliance with bail as a question of whether you continue bail following a breach or whether you grant bail because of prior failure, I think it is important to have a mandatory consideration to hear what the reasons for that is.

A classic example is where for, say, a young person has had an altercation or an assault with another young person. If they are both at the same school they are not going to be able to not interact with each other, even though they might be required to try and separate each other. It is just not going to happen in the school. So the reason for noncompliance in that case, I think, should be mandatory.

I do not think judges are such that they would be affected adversely by mandatory considerations as long as they are not mandatory as to the result. If you are saying—and this would be an example of the one I have just talked about—the mandatory consideration is if you have breached bail you shall not get bail again—I absolutely agree with the Commissioner, if that is what he has said, that it should not be there. There should be discretion. I know that puts a lot of onus on the judges and magistrates but in general—and not because I was one—we have a very high calibre of judges and magistrates and they can make an assessment of a mandatory consideration as to whether it is pro or con the grant of bail.

If they have got to think about the reasons for breaching bail rather than if there is a breach of bail, then one result, in that sense I think there is a value in mandatory consideration. Indeed, in many cases, that is what this legislation says—these are the considerations you will take into account. So it is mandatory in that sense, but I am absolutely opposed to mandatory considerations as to result. Does that make sense to you? I think that is what we are talking about.

Even in cases of charging with murder, the likelihood of getting bail is probably 0.001 per cent, but there will be cases where it may be appropriate. For instance—I am thinking of a current case so I have to be a little bit careful—if someone who has a severe mental illness and in a mental breakdown murdered someone like his mother or something like that, then it may be that bail with a condition that he enter into a mental health rehabilitation facility would be appropriate. So even there I think mandatory outcome is not appropriate. We can trust our judges and magistrates. Yes, they get it wrong, but the appeal court will soon tell them that they got it wrong. Although the appeal court can be wrong too!

Prof Bartels: I wouldn't put that on record.

Mr Refshauge: Yes, probably scrub that. But seriously, I think we can trust our judges and magistrates, but it is helpful for them to know what the community—speaking through the Legislative Assembly—wants them to take into account, and then they

make their decision on a discretionary basis. I hope that is helpful.

Prof Bartels: I read legislation across the country. I read case law from across the country. It is so standard to see judges say, “These are the factors I must take into account”—not just in relation to bail, sentencing, whatever—“and in this particular case I do not consider that it has much weight.” That is pretty standard.

MS VASSAROTTI: I was really interested in getting more information on the proposal around pre-custody time limits and how they might operate in the ACT. I reference the fact that they are operating in places like the UK. I’m interested to get your perspective on what length it should be and what is the practical outcome if a person is held on remand for this period and then still has no trial? Relating to what has happened in the UK, what are the practical outcomes of that?

Prof Bartels: We may have to take some of this on notice. Again, I am mindful of broad discussions at play around funding to the DPP and Legal Aid and the Aboriginal Legal Service. It would need to be coupled with adequate funding to legal services on both sides of the bar table. But it would be a way of ensuring that people do not linger in custody for too long. If implemented—I do not think this is going to happen in this current round of legislative reform—it would signal at that point of decision-making, “Wait a second, is this the kind of matter where someone might be sitting for years? And is it necessary in this particular case for them to be in custody for the safety of the community or could they, with the appropriate conditions, be in the community and meet those needs there?”

I would have to check the data in the UK on how long this has been happening and how many people are released. But then the presumption would be that if that time elapses and the trial is not ready to proceed, as I understand it, the presumption is that they would then be released. I think it is really about kind of creating a more normative framework that expedites matters generally and it would have to be part of a much bigger discussion. It is not uncommon for us to have delays of a year, two years or more, so we would need to come back with a fuller proposal of what that would look like.

Mr Refshauge: It does not seem appropriate to automatically grant bail just because the time has elapsed, but there ought to be then a reverse presumption, a presumption in favour of bail. That puts some pressure on the situation. There would be factors. If there are delays caused by the defendant that would militate against a grant of bail in those circumstances. So a degree of discretion there. But they ought not languish. My understanding is trials at the moment are probably two years after committal even, and two years is too long.

MR WERNER-GIBBINGS: You answered most of the questions I had in your useful and helpful opening statements, thank you very much. Was it fair for me to characterise the position of the reform initiative as supporting the bill, but there are caveats, work needs to be done, and you have suggestions the committee should really be taking seriously and suggesting to the government.

I will put on notice a couple of questions in the context of the bill’s expanded decision-making framework. I would like you to elaborate on how assessors should be

operationalised in practice. I would be really interested to know what specific supports or interventions you consider should be prioritised to reduce breach risks, noting that the supports would be largely outside of the legislation. I think that would be a useful conversation and information for the community to place it in the context of what the Bail Amendment Act is trying to do.

Prof Bartels: So not assessments so much as supports? We are not talking risk assessment—

MR WERNER-GIBBINGS: Decision-makers should look deeply at why prior bail breaches occur and what supports could have prevented those breaches, but it is not all just going to be within the Bail Act.

Prof Bartels: Correct, yes.

MR WERNER-GIBBINGS: I am really interested in the sort of information you have about the ACT government spending at AMC and the limited rehabilitation outcomes. That is something the committee has been thinking about as well, looking at that probably down the track. I am interested in the evidence that is being relied on to assess rehabilitation outcomes in the AMC and better alternatives. But I will put that more clearly in some questions on notice.

THE CHAIR: On behalf of the committee, I thank you for your attendance today. If you have taken any questions on notice, please provide your answers to the committee secretary within five business days of receiving the uncorrected *Proof Hansard*. I will also put a few questions on notice as we are out of time.

Mr Refshauge: Thank you for your time, and thank you for extending the time a bit. Unfortunately when you talk to ex-judges they talk on and on and on.

THE CHAIR: Thank you for your time.

CARUANA, MR ALEX, President, Australian Federal Police Association
ROBERTS, MR TROY, Government Relations Manager, Australian Federal Police Association

THE CHAIR: We now welcome witnesses from the Australian Federal Police Association. Please note that, as witnesses, you are protected by parliamentary privilege and bound by its obligations. You must tell the truth. Giving false or misleading evidence will be treated as a serious matter and may be considered contempt of the Assembly. Do you have an opening statement to make?

Mr Caruana: I do. Noting that you are indulging us by putting us in this slot, I will be very quick and, if it pleases you, I will table my document here for you guys to peruse out of session and we can go to questions, just for the time, if that suits. I have a very quick opening statement.

THE CHAIR: Thank you.

Mr Caruana: Thank you for the opportunity to appear today. The AFPA supports the intent of the Bail Amendment Bill 2026. We support clearer bail criteria, better recognition of victims, stronger family violence considerations and proper consideration of vulnerability. Our concern is that the bill does not go far enough. The frontline experience of our members is that a small group of repeat offenders creates a disproportionate amount of harm to the community. These offenders are often known to police and often already on bail or subject to other court orders. The AFPA is not asking the Assembly or this committee to remove discretion from the courts or to abandon human rights; we are asking for a stronger risk framework. Bail must remain where risk can be managed. Where risk cannot be managed or bail has failed, the law must give a greater weight to the victims, police and community safety. The bill is a useful start, but we believe it needs some strong amendments.

THE CHAIR: Thank you very much.

MR WERNER-GIBBINGS: Now that we have a bit more time, would you expand a bit on the initial thoughts or comments that you have got from your members about how the current legislation works in practice today, what would change if this bill were passed as it stands and recommendations on where it could or should go further?

Mr Caruana: Sure. I guess the first part is that the changes in the bill will have an impact on resourcing. There is obviously going to be some consideration for resourcing. We also believe there will probably be some resourcing issues or concerns in DPP and other services that go around them as well. We want to make sure that we put that on the table early.

Members feel that the current system is frustrating for them. They often feel that they have seen this person before, this person is well known, and that they have a strong case but, because of court delays or whatever it happens to be, the person is continually out reoffending and the court is not considering or does not give a high priority to the fact that this person is in breach of bail or in breach of an order. They feel that the current system is disheartening.

The system as has been proposed would be a better system and it would alleviate some of that. However, we have outlined a number of points where we could see changes, and I will touch on a couple of them. When it comes to victim-based crime, there needs to be some better recognition of the victim, and that victim's needs and the community's needs need to be valued better. As an example of that: if someone is a repeat offender for unsociable driving and has had a motor vehicle collision that has resulted in significant harm to a person, the victim, in many cases, has a lifelong injury whereas the perpetrator or the alleged perpetrator who has done this multiple times is out there living their life to their fullest with minimal restrictions to their life. So the fairness from a victim base is not there. We would like to see some stronger support given in those circumstances.

We recommend that section 22 include community safety, victim safety, witness safety and police safety as its core. What we are saying there is that it is in the interests of the safety of the victim, the police and the community to make sure that this person or this perpetrator who has a known criminal history is somewhat subdued from being able to continue to do crime.

Particularly when it comes to violence—family violence and other violence—where there is a victim involved, we need to consider the rights of that victim very strongly. If someone is a repeat offender for domestic violence or violence in the community, we need to take that into consideration when we are saying, “We have given you bail once before”—or twice before, or three times before or 15 times before—“and you have not listened to those conditions, you have not reformed and you have not made any attempt to change your behaviour. So we are now at a point in time where, for community safety and to prevent further harm occurring in the community, we are taking your liberty away from you while the hearing and the court processes occur.” We can see that a risk matrix or a risk assessment type system could be there to help the decision-makers to say, “Okay, if this, then this” et cetera. Then it can be a risk-based decision as opposed to an empathetic-based decision—so there are some facts and some evidence around those decisions.

Mr Roberts: The bill lists relevant factors but the relevant factors are not a structured risk assessment; they are just factors. I think this is a key gap in the legislation. We think decision-makers need more than a list of possible matters; they need a consistent framework that identifies risk, tests whether risk can be managed and records why bail is or is not appropriate. We would recommend a mandatory statutory bail risk assessment where a person is charged with a serious offence, family violence, dangerous driving, repeat property offending, weapons-related offending or an alleged offence committed while on bail, parole or an ICO, a good behaviour order or a family violence order. So, instead of just having it as a consideration, actually formalise it as a proper risk assessment matrix.

THE CHAIR: Just for my own benefit, just to clarify: so there is a difference between a person who commits an offence while on bail and a person committing a breach of bail offence? Are you saying the risk assessment should apply to both instances?

Mr Caruana: In our assessment, if someone is already on bail and they commit another offence, that needs to be considered as to whether or not bail will be given again. One of the considerations for bail is whether the community is safe or whether the victim is

able to be safe. The sheer fact that that person has committed another offence is indicative that the community is not safe. They have had a warning, they have a system that is in process, on foot, in order to find them guilty or not guilty and, if it is now alleged that they have committed another offence, then we—

MR WERNER-GIBBINGS: Charged with an offence, not committed necessarily.

Mr Caruana: Yes, charged with an offence. Then consideration must be given to whether the community is safe if this is the second, third, fourth or 15th time that this person has been charged with an offence.

Mr Roberts: That probably leads to a bigger question: should breach of bail be a criminal offence?

THE CHAIR: That is correct. We have heard evidence in this hearing that a breach of bail could be failure to reside at a bailed address, which in itself is not really a criminal offence. But, yes, there is a bigger question as to whether a breach of bail should be—

Mr Caruana: I think there is discretion in that. In the case of, for example, “I have been told I cannot attend a certain location where a person is”—because I might be in fear of intimidation or otherwise—and you breach that bail, some would argue that is intentional. Being unable to find a suitable house or accommodation may not be intentional. So I think there needs to be some discretion in that.

THE CHAIR: Thank you. I just wanted to clarify that.

MS VASSAROTTI: Thanks very much for your evidence. I would be really interested to hear a bit more around the risk framework, because it is actually very consistent with some evidence that has come up from the Domestic Violence Crisis Service. It would be interesting to get your perspective on what that looks like in practice, particularly about the roles of different players in the ecosystem. Police obviously have particular information. From discussion with DVCS earlier today, they obviously would have information to bring. I am very interested to understand how that might play out in practice and, again, how to manage some of the resource implications of that as well.

Mr Caruana: For us, the risk assessment is essentially considering victims, the community, police and anyone else that is involved in it. We believe the risk-based approach is a fairer approach. It takes away some ambiguity, because it creates a fair platform for the decision-makers to go, “Okay, we have tried this and, despite this, this has occurred. So what other measures or what other things can we put in place to try to keep the community safe or respond to police concerns about this person or make sure that the victim, or the alleged, is feeling that they are being heard or listened to and responded to?” I think that having those key criteria in there will help the decision-makers. It will be a fairer process. Also, when it comes to DPP and defence, when they come to opposing bail or asking for bail to be refused, there would be criteria that they have to then meet as well to satisfy the decision-makers. Criteria No 7 might say X, Y, Z—and “We are presenting that, based on this evidence, they are not meeting that criteria.” So it gives a bit more weight. I acknowledge that it is going to be somewhat more resource-intensive to where we are currently at. Resources is one thing, but we need to make sure that the community sentiment and what the victims and, in some

levels, the alleged go through a fairer process. If we have to deal with the resources, we can deal with them in another.

Mr Roberts: I think a key part is consistency. I know a lot of our members struggle with the consistency in relation to bail and sentencing. There is a whole heap of consistency issues with the court. I think a dedicated matrix would help assist with consistency. I am not saying consistency is mandatory, but it needs to be great in bail. There needs to be—

MS VASSAROTTI: Every circumstance is different, yes.

THE CHAIR: That is correct.

Mr Roberts: But, obviously, if this assists in that decision-making and we all understand that decision-making, that will help address the perception of consistency out there. We know there is such a thing as magistrate shopping that occurs. Some magistrates are more lenient and some are harsher.

Mr Caruana: Or perceptions.

Mr Roberts: Yes, perceptions, I should say. Thank you. This may help address that feeling of doubt in the community about magistrate shopping.

Mr Caruana: It is also important that that matrix can then be overlaid for youth offenders and then offenders with a disability or otherwise. So there is a matrix that is standard but then there is an overlay that says, “Okay, this is a youth offender; do we need to have different considerations?” There is a matrix there to look at that. The same as members with a disability, whether it is a learning disability or otherwise: are there other factors that we need to consider over the top of that? It creates, as Troy said, fairness and consistency—people know what they are going to expect when they come to court.

Mr Roberts: We already use a matrix in the family violence team. When police on the ground attend a family violence incident, they undergo a risk assessment matrix. Surely that could be translated and transitioned across into a bail environment.

THE CHAIR: I want to follow on from a question Ms Vassarotti asked around the role of domestic and family violence service providers in bail applications. The evidence we heard from DVCS was—and I am paraphrasing here—that they would like to be what we call the friends of the court in terms of bail applications. What additional information do you think DVCS would be able to provide in a bail application in terms of risk assessments?

Mr Caruana: I would have to look at it in detail. But, on face value, I think being a trusted person for the victim to speak to is good enough. On being able to provide additional information, I think it is the court’s job to find that additional information. Potentially, if these support people have additional information, the court can ask for it and they can provide it. But it needs to be tested, just like all the other evidence that is provided in there. If there is a mechanism whereby the victim can provide the evidence through that support person, that is a different matter because it is just a conduit. But,

if it is introducing different evidence, that is something that the court needs to find and it needs to come out through the whole process. Without looking at what their actual proposal is, it is difficult for me to give much more of an answer.

THE CHAIR: Sorry; maybe I should be a bit clearer. Their proposal is essentially feeding into that risk assessment that you proposed either prior to bail or during a bail application process.

Mr Roberts: It should be mandatory as part of the bail process.

Mr Caruana: Are you suggesting that domestic and family violence would provide that risk assessment mandatorily—based on their own assessment—for the courts to then consider?

Mr Roberts: Yes.

Mr Caruana: I have no issues with that.

Mr Roberts: That would create extra work for attending officers and support agencies. As part of our paperwork, what we find is “Victim provisions need operational detail”. What that means is the victim provisions are positive within the bill but their effectiveness will depend on process. The legislation should be supported by a standard bail safety form and clear information-sharing protocols. The form should capture risk, threats, escalation, children, pets, weapons, stalking, coercive control, property damage, technology facilitated abuse, previous breaches and a victim’s views about disclosure. As I said, we are happy to table all of this information.

THE CHAIR: Thank you. Does anyone have any burning questions?

MS VASSAROTTI: I think we will get the submissions and then we might have some questions on notice.

Mr Caruana: We can take questions on notice out of session, if need be, as well.

THE CHAIR: Excellent. Thank you very much. On behalf of the committee, I thank you for your attendance today. If you have taken any questions or notice, please provide your answers to the committee secretary within five business days of receiving the uncorrected proof *Hansard*.

Hearing suspended from 12.43 pm to 1.25 pm

SMITH, MR BERNIE, Branch Secretary-Treasurer, SDA Union, New South Wales & ACT Branch

THE CHAIR: We welcome Bernie Smith from the Shop, Distributive and Allied Employees' Association. Please note that as a witness you are protected by parliamentary privilege and bound by its obligations. You must tell the truth, as giving false or misleading evidence will be treated as a serious matter and may be considered contempt of the Assembly. Would you like to make an opening statement?

Mr Smith: Sure. The SDA is the union for retail, fast food and warehouse workers. There are a large number of young workers employed in the retail and fast food industries in particular, and we represent several thousand retail fast food workers across the ACT. We have probably come to this inquiry from a slightly different perspective to many groups in that we come to it from the perspective of, "How can we protect young child workers who have in some way slipped through the cracks of various child protection measures that are in place in the ACT laws and laws around the country?"

The SDA has been campaigning for three years now across the country to try to get changes made to various pieces of legislation to enhance protection of young child workers. In relation to the bail law act, we have a recommendation in relation to the bail law act itself and then two supplementary recommendations to other pieces of legislation which reflect our concerns more broadly for child worker welfare in the ACT. In terms of the issue of people falling between the cracks in child protection legislation, I suppose we would put it this way: most working with children protections are designed for people who work to provide a service to children, rather than for protecting child workers who work alongside adults in the workplace, and that is where we see a significant failing in the act.

I will give you two examples. I will give you an analogous example, because there is a very similar case like this currently before the courts in ACT, so I will not use this as an exact example but, rather, as one of the concerns we have: a retail manager for a large store on serious child sexual offences against child employees under their care would not be currently prevented from working under their bail conditions at that store again if they were to be released whilst facing those serious child sex offences, and, in fact, having stable employment is actually something that goes in favour of granting bail.

THE CHAIR: Sorry—"having"?

Mr Smith: Having stable employment is something that actually goes in favour of having bail, but there is no actual strict requirement that that would then protect any child workers that might be working alongside that particular employee.

Another example we had recently from regional New South Wales involves an employee who was up on serious child sex-related offences—not in the workplace this time; this was outside of the workplace. That person was prevented from continuing to carry out their SES volunteer duties because of the child protection laws in place in New South Wales—which would be reflected the same here in ACT—but was enabled to still work, if they wished, supervising children in their workplace, and they were the

service supervisor of children in that workplace. Other measures were taken to prevent that happening, but, again, there were no requirements under either the bail law act, or even if the person had been convicted, that would have required them to have not participated in those workplaces.

So, we are calling for three essential changes: one to the bail law act and two to other pieces of legislation. In relation to the bail law act, we are calling for the amendment of section 24 to mirror, effectively, what has been put in place in South Australia, which is the only jurisdiction that has done this so far, which would require a condition of bail be that somebody not engage in child-related work or look for child-related work either—to engage in child-related work or to be employed in child-related work. This would then require a supplementary change to the definition of what is child-related work in the Crimes (Child Sex Offenders) Act 2005. We think that section 124(1) of that act should be amended to explicitly include workplaces where children are employed. We would require an amendment to that act which requires that working in or providing services to workplaces where children are employees would also be covered by child-related employment.

And then the third recommendation that we have is to amend the Working with Vulnerable People (Background Checking) Act 2011 to require that people who work with child employees should have to have a Working with Children Check or a Working with Vulnerable People Check as well. ACT has one of the highest rates of people with those sorts of checks, but the retail and fast food industries where people are actually directly employed with children are not required to have those checks.

THE CHAIR: Thank you. So just on your comments around the amendments to section 24, are you saying that currently the legislation as drafted, or currently as the bail law stands, part of a person's bail conditions may not reflect that they are not to work with children? Are you saying that that happens or that it needs to be mandated in the legislation?

Mr Smith: It needs to be mandated in the legislation so that it does not happen. It should be the starting point that it should not happen, and if there was a reason to depart from that starting point, then that would be acceptable, as opposed to now, when you have to argue that the bail conditions should include a restriction on them working with children in terms of child employees in their workplace.

THE CHAIR: I understand the argument, but the one tension that we have heard today is between mandatory requirements and discretion of the magistrate, depending on the circumstances. Are you concerned, perhaps, if it were to be mandated, for example, that you will capture people who are required to work in conditions that are similar to a child-related environment? Are you concerned, perhaps, that there would be unintended consequences if we were to mandate that?

Mr Smith: No. At the moment, the unintended consequence is that people who are on serious sex offence charges can work with children. That is our concern at the moment in terms of it. We do think it should be mandatory. If it were not to be mandatory, then there should be a presumption that it would apply, and the discretion would only apply in very limited circumstances where you would have to show that there are very extensive controls in place to prevent interactions between child employees and the

person on the relevant charges, which is very hard to do in a lot of retail settings because of the nature of the hours of work and the extent of work involved.

THE CHAIR: So the mandatory nature of the application then means it shifts the onus from the victim to the perpetrator, in that instance, to prove that they require some kind of—

Mr Smith: Yes, and also—I think the willingness on the part of the employer to provide the environment in which they could guarantee that there would not be those interactions as well.

THE CHAIR: There have been some conversations here—and thank you again for your submission, which is quite different to what I was expecting—around the risk assessment metrics by the police. In circumstances where consideration of bail is being made, I wonder whether you have any comments around what that risk assessment perhaps could include in the circumstances you have highlighted.

Mr Smith: One of our concerns, when you move to a risk assessment model only, is the risk to the workers involved, and we come unbiasedly from that position. We have the experience that retail workers are often undervalued in the community. The nature of retail work is often undervalued in the community, and therefore the weight put upon the importance of retail work is often undervalued in the community. Often that plays into how retail workers are perceived, and even into how the threat that is posed to retail workers is perceived.

We have a current epidemic of crime against retail workers both in the ACT and across Australia, including customer abuse and violence, where we also see a need for increased assistance to retail workers in their workplaces. I suppose our concern with such an assessment would be how it would be applied from the perspective of very vulnerable workers entering the workplace for the first time to ensure that they are properly protected.

THE CHAIR: Sorry, maybe that question was not really clear. My understanding, from the conversations we have had here, is that the risk assessment would ensure that parties to a proceeding—that is, say, in this instance, Care and Protection, for example, if it is a child worker, or the parent—will inform decisions whether or not to grant bail—

Mr Smith: Sorry—

THE CHAIR: Yes, so not whether or not the retail worker is—

Mr Smith: Not what the conditions of bail would be but rather whether the bail should be granted or not?

THE CHAIR: That is my understanding from the conversation. So my question is: do you think then that there is value in having, say, for example, your union feed into that risk assessment as well?

Mr Smith: I think it would be valuable to have some capacity to feed into the risk assessment because of the role of the employment in the community. We did not have

a particular view on whether bail was to be granted or not—we did not have a strong view on that aspect of it—but rather, if bail was to be granted, what safety measures would be put in place for the safety of child workers.

THE CHAIR: Thank you.

MS VASSAROTTI: I have got a couple of clarification questions. In terms of the proposed amendment, are you suggesting this as a consideration for particular categories of alleged crime, not blanket-wise?

Mr Smith: Yes, for class 1 and class 2.

MS VASSAROTTI: Okay. The other question from me is around the scope. In terms of a discussion around retail, how big is that category? I am thinking that, depending on the type of retail, it is a very, very big category. And as you said, we know that things such as stable work actually can be protective, so I am interested in terms of the practical application of some of this, and this is coming from a parent of a number of child retail workers, so I really understand the importance of it—but just in terms of the practical applications of precluding a whole category of work, potentially, for people who have not been—

Mr Smith: Convicted.

MS VASSAROTTI: convicted of a crime. How would that work?

Mr Smith: I suppose it depends on the nature of the retail establishment, but where the retailer has child employees, we think that the risk to the worker outweighs the issue of the employment of the person concerned. That is our starting point. We have seen too many examples across the country of young workers exposed to this risk and actually being assaulted or suffering from grooming practices. We think that their safety and wellbeing should take precedence.

If it is a retail environment where there are no child workers involved—for example, say, a liquor shop where you have to be over 18 to serve alcohol—then I do not think that necessarily poses a problem in respect of it. But where there are child workers present, we would have very serious concerns.

MS VASSAROTTI: Just a really quick follow-up: is there research or information regarding this issue? It would be really helpful for the committee to see.

Mr Smith: Yes, appended to our submission at appendix 1 is some research that we had commissioned, which is the McKell report, *Safety not guaranteed*. Appendix 1 of the submission.

MS VASSAROTTI: Right, okay.

THE CHAIR: Sorry, we did not receive your submission.

Mr Smith: We put one in.

MS VASSAROTTI: Yes, that was—

THE CHAIR: That is why we were wondering—

MR WERNER-GIBBINGS: My opening question was—

Mr Smith: There is a copy if you want.

MS VASSAROTTI: Fantastic. Thank you.

THE CHAIR: Yes, thank you.

Mr Smith: Want me to hand one up?

MS VASSAROTTI: Yes, please.

MR WERNER-GIBBINGS: Appendix 1, was it?

Mr Smith: Yes.

MS VASSAROTTI: It is appendix 1.

Mr Smith: Yes. Our submission is very short, and the research is the major part of the submission.

MS VASSAROTTI: Great; that is very helpful.

THE CHAIR: Thank you.

Mr Smith: I thought we put it in. I thought I was boring you by going over old ground!

THE CHAIR: No, no—

MS VASSAROTTI: No! We are all very happy.

MR WERNER-GIBBINGS: And you did talk about specific changes—I was interested in that, and you have already mentioned those. This is perhaps not a philosophical approach but a communication approach that you have had with members. Presumably, there is not a lot of routine engagement with bail policy, but do you have data or observations from members about offences in the retail environment, particularly where—I guess, it might be in the submission—individuals are repeatedly coming into contact with the justice system? Has this helped or served to frame or influence your position?

Mr Smith: Do you mean, do we have examples of where work—

MR WERNER-GIBBINGS: Do you have, maybe not data but, certainly, observations that there are people in the retail environment who are coming into contact, more than once, potentially with people who have been repeatedly engaging with the justice system previously, whether or not they are on bail or whether or not they have been

charged with other offences?

Mr Smith: Well, if it is not a child-related offence, we do not have a concern about those people being in the workplace, where it is appropriate—

MR WERNER-GIBBINGS: Okay, right.

Mr Smith: Work can be a good thing, and people will have a right to turn their lives around. We have no issue with that. And I am aware of several examples of people who turned their lives around by having access to work, effectively. I suppose our concern predominantly is with the risk to child workers that we have seen. It is the combination—the bail law act has given us a chance to air our broader concern about the child sex offenders register and the Working with Children Check provisions, which mean there is no visibility as to whether you have a person in your workplace in that situation.

Employers in the retail industry are not mandated to have Working with Children checks for their employees, so they would not necessarily know if they have—the example I gave you in regional New South Wales came to light just because it is a small town. So everybody happened to know, and that is why some procedures were put in place. But in terms of the obligation of that employee to notify that they were on those charges, there was no obligation to do that. So whilst they could not do their SES work, they could have, and they did for a period of time, continued to do their work supervising children. They were, effectively, the service supervisor of the check-outs at that store. For people who have got control over the working hours of those children, it is a significant influence over those children, and in some environments, working in isolation with children as well, when you look at the staffing levels that you see in different stores.

THE CHAIR: Just a quick follow-up. So, criminal history checks are not done for retail employees?

Mr Smith: They can be done, but what happens is that they are asked on their employment form if they have a criminal history; if they say “no” and they are found to have lied on their application, they can be validly terminated from their employment, but there is no requirement to be able to provide a Working with Children Check.

MR WERNER-GIBBINGS: Or Working with Vulnerable People?

Mr Smith: Working with Vulnerable People—sorry; it is the ACT.

MR WERNER-GIBBINGS: Yes.

THE CHAIR: And no requirement if you were—

MR WERNER-GIBBINGS: That is really interesting.

Mr Smith: I grew up in the ACT—I got mixed up. The ACT has got one of the highest levels of people with Working with Children checks, and a lot of people have them who may or may not require them for their work, because when I spoke to the government

about this, they indicated the numbers that actually have them. But for people who actually should have it for their work, there is no requirement for them to have it with their work.

I suppose our concern is that you could be working with somebody, and they might be a risk, and the employer, if the person is completely honest on their employment form, sure, will know that, but if they are not, then they will not necessarily know that. And that applies both in terms of someone applying for work with a Working with Children Check and in terms of somebody who will not be on the sex offenders register for the purposes of retail work with children. And if someone was up on serious charges, again, that would not have visibility beyond what might be known in the local community and not necessarily required to be declared to the employer.

THE CHAIR: I am so sorry to go back to this question again, if that is okay. So there is no requirement for the retailer to undertake a criminal history check?

Mr Smith: No. Again, it would be standard practice to ask, “Have you been convicted of any offences?” That is a very standard question in employment processes, but there is no requirement to have it—

THE CHAIR: A requirement to do it—

Mr Smith: No.

THE CHAIR: Even when there are children—

Mr Smith: I know it is called Working with Vulnerable People here, but the great irony of the title “Working with Children” is that it actually should be called “Working for Children”, because it is actually when you are providing a service to children that you have to have a Working with Children Check. My wife works in after-school care, so she has to have a Working with Vulnerable People Check or a Working with Children Check. But when you actually work with children, alongside them, there is no requirement to have a Working with Children Check, except perhaps in the theatre and, ironically, in New South Wales it is in the theatre and door-to-door sales. I do not know why door-to-door sales came about, but they are the only two areas where it is required.

THE CHAIR: Okay. And just to clarify: the amendment you are suggesting is strictly for when it is a child sex offence, not every—

Mr Smith: Yes. Not for every offence but definitely related to child sex related offences and violence. Child sex offences and violence—

THE CHAIR: Child sex related offences and violence.

Mr Smith: Yes.

THE CHAIR: Okay.

Mr Smith: Class 1 and class 2—I cannot remember what they are exactly off the top of my head, but that is the nature of the offences.

THE CHAIR: Does anybody have any more questions?

MR WERNER-GIBBINGS: No. That was interesting—really interesting.

THE CHAIR: Yes, it was very interesting. It was completely not what we expected, by the way. Thank you very much for your attendance today. If you have taken a question on notice, please provide your answers to the committee's secretary within five business days of receiving the uncorrected proof *Hansard*.

Mr Smith: Thank you very much.

Short suspension

FORD, MS JULIETTE, Victims of Crime Commissioner, ACT Human Rights Commission

THE CHAIR: We welcome the Victims of Crime Commissioner. Please note that, as a witness, you are protected by parliamentary privilege and bound by its obligations. You must tell the truth. Giving false or misleading evidence will be treated as a serious matter and may be considered contempt of the Assembly. Do you have a brief opening statement that you would like to make?

Ms Ford: If I could; thank you very much, Chair. It is my position that I support the purpose of the bill to ensure that bail decisions are informed by the right matters, are made consistently and are more transparent. I therefore support the approach that is taken at sections 22 to 23A, which provide greater certainty about matters that a decision-maker must consider, while also preserving the independence and discretion of decision-makers.

I do note that, at page 3 of the government's submission, they have acknowledged that the ACT is a human rights jurisdiction. As a result, apart from the accused, victims and the community are recognised to have human rights. Those rights are not mutually exclusive and should not be considered to be adopting an adversarial construct, which is sometimes a trap that we are tempted to fall into.

This bill acknowledges that it is a matter of balancing those competing rights, and does so in a way that recognises the rights of the accused, and the need for the community to understand how the administration of justice is conducted in a manner which is transparent and consistent, whilst at the same time therefore ensuring that the community's support for, understanding of and belief in the rule of law is maintained.

In relation to this particular bill, those rights can be seen through the mechanisms proposed regarding applications for bail and a victim's right to safety and to participate in the process in a manner which is maintained and which is prioritised.

The proposed amendments to the Bail Act through this bill must also be supported by the appropriate supervision of bail conditions and their enforcement, which is an operational matter which is always maintained through education, training and a consistent approach.

That was, in essence, what I wanted to put on the record, Chair, as an opening piece, in relation to my approach to this proposed reform.

THE CHAIR: Thank you very much. I have a couple of questions. One thing that I have observed today and generally in the community is the tension between the rights of the accused and the rights of the victim. Some parts of society think that the rights of the accused take precedence over other rights. One part of that tension is because of, as you have mentioned, section 18 of the Human Rights Act. I think that, often, society believes that that is sometimes applied to the detriment of the victim.

I asked the Human Rights Commissioner today about the presumption against bail in serious offences, particularly sexual assault offences. I think her view was that, because we have that human rights provision, there should not be, as a starting point, a

presumption against bail, because the person who is accused is essentially innocent until proven guilty. I wanted to get your views on how you see that presumption against bail working in favour of victims.

Ms Ford: We have a presumption against bail in section 9F of the Bail Act, as you would be aware, when bail is being considered by an authorised officer. I understand that my fellow commissioner observed this morning that it is likely that that section is human rights compatible because of the reasonable limits in relation to the manner in which that section is applied.

The question as to whether that presumption should be extended into, I think, section 9C of the Bail Act goes to the issue that I have raised in my submission in relation to reforms of such a substantive nature needing to be evidence-based. The presumption that sits underneath the question, Chair, is this question: is that an appropriate response to maintain the safety of victim-survivors?

When embarking upon such a reform, given that is the principle that is to be addressed, it is imperative that those reforms are evidence-based. That goes to the part of my submission that observes that, here in the ACT, there is not the collection of data in the manner in which it is obtained in both New South Wales and Victoria. We are dependent upon, in essence, what occurs in court, informal information and data which is collected through that process.

I note that, in the 2024 inquiry, the government supported in principle that there is a need for such data to be collected in a systemic way, because it is only when we have that data that we can understand the questions that I have put in my submission, which go to issues in relation to how many people are granted or refused bail, for which types of offences, the trends in relation to the granting and refusing of bail, rates of breaches, why there are breaches in relation to bail, were those conditions of bail the appropriate conditions in all the circumstances, and what has been the engagement and availability of the appropriate programs prior to criminal trial and/or sentencing.

It is a truism to say that matters in relation to bail are complex. It is also noted that victims' rights and the consideration in relation to their safety and the rights of the community must be balanced with the rights of the accused, particularly in circumstances, as you put it, Chair, where the matter in relation to their guilt or innocence has not been tried, and one is presumed innocent until proven guilty.

That does not mean that one should not prioritise the interests of victims, but the reform must be done in a way which is evidence-based and considered, because the point of my submission is that those people that are making decisions in relation to bail—the decision-makers—have the best information before them at that time.

THE CHAIR: One other issue that was raised, I think, by DVCS is the idea of a risk assessment matrix which is informed by service providers, including DVCS and yourself. I want to get your views on what utility that would have and how you think that should be developed.

Ms Ford: The proposition of how you operationalise the proposed amendments and the submissions put by DVCS in relation to how you achieve that in a consistent and

informed way is supported by me. When considering matters of safety, it is important for the decision-maker to have the best evidence available before them in order to make that decision. Therefore, engaging with and obtaining what I would consider broadly within the term “expert evidence” in relation to what that risk looks like is appropriate.

I am aware that the previous VOCC, in the submission to the inquiry, certainly supported the proposition of specialised, structured, evidence-based risk assessments forming part of the evidence for a decision-maker to form a view in relation to the matter of safety and the matter of risk, which is now directly referred to in the proposed amendments.

There is an opportunity in the territory to apply a consistent tool because significant work has been undertaken by government in relation to the development of a risk assessment and management framework. Its intention is to provide services with the tool in order to be able to undertake a risk assessment in a consistent way. The type of risk assessment tool that would be required in the circumstances of a hearing would have to be one that is at the specialised end of the spectrum and undertaken by those who have that specialisation.

I am aware that my organisation has provided such information to the court in matters, of which a case study was provided in our submission to the inquiry in 2024, in relation to the question of risk from the Family Violence Safety Action Program. DVCS, our organisation and other organisations are in a position to be able to provide the expert evidence that the court would benefit from, in receiving specialised material and adopting a consistent tool in relation to the matter of safety and risk.

THE CHAIR: Do you see that extending to other victim-related offences outside family violence?

Ms Ford: The potential for expert evidence in relation to risk and the matter in relation to whether, at the end of the day, the principle is that decision-makers have the opportunity to have the best evidence before them which is relevant to the issue before them, is certainly a proposition that I have put at the forefront of my submission. What that exactly looks like in different matters is, of course, to be informed by the nature of the case that is before the court.

We go back to the imperative in relation to applications for bail is noting that they are often made in urgent circumstances. We now have a set of considerations which are formalising what is understood to be the law today. But making it transparent and clear to the community is of benefit; therefore, it lends the opportunity to then include within, let us say, the operationalising of the legislation opportunities as to what best evidence looks like.

THE CHAIR: Thank you. Ms Vassarotti?

MS VASSAROTTI: I would like to continue to explore the opportunities by ACT government around using a consistent process and tool. One of the discussion points has been in terms of the collection of evidence and the resourcing implications of that on particular areas. With the work that has been done to date on the use of a consistent tool, I am interested in your perspective around the resource implications of having a

consistent tool. Once you get it going, does it make it easier, or would it still require a lot of resourcing?

Ms Ford: There would certainly be a resource implication, in that such a formalised, specialised piece of evidence being provided to the court does not occur right now. That safety information is most likely provided through a number of different mechanisms, including, of course, the justice agency seeking information from the victim. Noting that these reforms promote and protect participatory rights of victims, their lived experience and expertise are what is being drawn upon right now.

In the contextual piece, however, where, to some extent, it is important to reduce the burden upon victims to be both experts and advocates on behalf of their own position, in a moment when they are at their most traumatised, arising from the harm that has been caused to them as a result of an offence being committed, cannot be understated.

The reforms do formalise some of the rights that victims have under the charter in relation to a representative and, of course, also formalise the definition of “victim” to be one which is consistent across the justice space. It would therefore require an agency to consistently be providing or conducting that risk assessment. That would be a new resource.

Would it be a lost opportunity to not invest in that, in circumstances where a risk assessment and management framework is about to be launched in the ACT, and not to utilise that tool—to use it as a basis for training and education of judicial officers and registrars, and for it to be utilised in a court setting, in a manner which would assist them in receiving a robust piece of evidence that deals with the question of safety and risk?

I note that the point around establishing a consistent tool is about supporting multiple agencies sharing or providing information so that the lens in relation to what that victim is experiencing through the issue of risk is fully understood. That is the key, because what someone may say to one agency may not necessarily raise risk for that agency. But when multiple agencies may provide information and a more informed picture is understood, you have better evidence to understand what the true risk looks like.

The hard work and the real investment in the establishment and creation of the tool have been done. To then be able to utilise that tool in many different forums for the purposes of maintaining safety and, at the same time, in the interests of the public and the rights of the accused, to make a good decision about what bail may or may not look like and what conditions should be placed upon bail, if granted, I would see as an imperative.

THE CHAIR: Mr Werner-Gibbings?

MR WERNER-GIBBINGS: In your submission, on page 2, you talk about the collection of data in relation to bail administration. If possible, are you able to expand a little bit on this suggestion? What sort of data, and in what context? Do you have that analysis? It is obvious that it would improve the justice system, but from your perspective, in your role, how would that data improve the justice system, from where you sit?

Ms Ford: The collection of data that occurs in a systematic way in New South Wales and Victoria has been directly relevant towards reforms made in those jurisdictions in the criminal justice area. The collection of data can be on two fronts, in relation to those things that I was pointing out before, regarding what decision was made, or why that decision was made at certain points. You can then start having an analysis in relation to what that may indicate.

The value of a databank that allows us then to draw upon, in relation to what sorts of decisions for bail are made at any point in time—what the trends are, whether it was effective or not, whether better decisions could be made—can directly inform reform in a way which is systemised.

Recognising that the ACT is a smaller jurisdiction than New South Wales and Victoria, there must be opportunities to leverage off what they have learnt in relation to how they have rolled out their commitment to data collection in a manner which is separate to the justice system but informs how the justice system operates. I can provide some explicit examples about what it looks like in those other jurisdictions, if you would like me to do so, but I would have to take that away and provide that to you out of session.

MR WERNER-GIBBINGS: Yes, if possible, without putting yourself out too much. That would be really helpful.

Ms Ford: Absolutely. I can provide you with an example of what it looks like in New South Wales and Victoria and how it operates in a manner which supports the reform piece, which goes back to the first question that I was asked today.

MR WERNER-GIBBINGS: Thank you kindly.

THE CHAIR: The domestic and family violence rep this morning mentioned that the operation of the discretion by the DPP to provide information to the magistrate on whether or not the victim's voice or choice should be a consideration in the bail hearing may increase risk to the victim. Do you have any suggestions on how that section could be improved?

Ms Ford: We certainly support the amendments that are being made to section 23A, because they are addressing an unintended consequence of the previous drafting of those sections. Previously—and I am saying this in order to be able to then answer the question, Chair—it compelled the DPP to provide information to the court that may have gone beyond its duty of disclosure. It also undermined victims' agency, which is one of the key participatory rights under the charter.

The amendments and how they are drafted, frankly, reflect how our justice system is structured, and reflect and highlight that the DPP has a positive obligation of duty of disclosure. It is bringing its case before the court on behalf of the state, and a victim is a witness in that case. It is important that the manner in which it is currently drafted ensures that there is engagement, respect, consideration of a victim's views in relation to their concerns around safety; that it creates a positive obligation upon the DPP to put that before the court; and circumstances where it also allows the DPP to maintain its discretion in relation to putting other information before the court, which is the matter that my friend raised this morning.

With respect to the question of how that discretion is exercised, whether it should be vetted, and whether that is a matter of legislative reform or whether that is by way of ongoing training for officers of the DPP in relation to their expertise and understanding of not only agency but also matters of risk, is important. At the same time, we are in this dilemma—which is a function of our justice system—that the victim is not in a position to be requiring that the DPP not put things before the court, because the DPP has its own obligation in relation to a duty of disclosure.

Certainly, what is imperative is that, whatever approach is taken by the DPP, the victim is fully informed, so that any appropriate safety planning can be made, and the victim fully understands that, when engaging with the DPP regarding issues of their safety and sharing information, there will be some information that the DPP may choose to provide to the court and which may be because the DPP has its own obligations, but also the dynamism of court may be such that that information is important in order to protect and maintain the safety of the victim.

To make that decision, expertise, training, education and understanding are crucial. Whether it is by way of legislative reform or actually in the operationalising of the section, one is not without the other, and one does not cure the other, so it is not an either/or. It is an interesting issue, because it certainly crystallises that point where, in some cases, it may be appropriate for a victim to be separately represented, which goes to different issues.

THE CHAIR: Around how the justice system works.

Ms Ford: Correct.

THE CHAIR: On behalf of the committee, I thank you for your attendance today. If you have taken any question on notice, please provide your answers to the committee secretary within five business days of receiving the uncorrected proof *Hansard*. Thank you for your time today, Commissioner.

Ms Ford: Thank you very much, Chair. Thank you very much, committee.

Hearing suspended from 2.15 to 2.53 pm

DE BRUIN, DR JAN, Head of Practice, Criminal Litigation Practice, Legal Aid Commission (ACT)

THE CHAIR: We welcome the witness from Legal Aid ACT. Please note that, as a witness, you are protected by parliamentary privilege and bound by its obligations. You must tell the truth, as giving false or misleading evidence will be treated as a serious matter and may be considered contempt of the Assembly. Would you like to make an opening statement?

Dr de Bruin: Yes.

THE CHAIR: Please go ahead.

Dr de Bruin: Thank you, Chair, and members of the committee, for the opportunity to appear today. Legal Aid ACT welcomes the opportunity to assist the committee in its consideration of the Bail Amendment Bill. Through our duty services, in both adult and children's court matters, we appear in a significant proportion of bail applications in the territory, and we see their practical operation daily.

Our submission supports reforms that improve clarity, fairness and community safety, including greater recognition of the circumstances of Aboriginal and Torres Strait Islander people, children, people with a disability or health conditions, and pregnant people.

Our main concern is that expanding mandatory considerations may make bail applications more complex and lengthier, and risk delaying decisions and increasing time on remand for people who have not been convicted of any offence. For children, bail should not become a choice between release without support and remand. It is more likely to be safe and effective when supported by early therapeutic and practical intervention. The In-Roads program in Western Australia provides a useful example of a children's court therapeutic scheme that brings the court and support services together to address the underlying drivers of offending and support compliance in the community.

In short, we urge further careful consideration of the bill's practical consequences and the support needed to make bail operate fairly, safely and effectively.

THE CHAIR: Thank you very much. I have a few questions, particularly around your views on section 22. Is it your view that the current structure of section 22 already provides the appropriate balance between mandatory and relevant considerations that the court must consider for bail applications, and that the insertion of section 22A would unnecessarily complicate or extend the process? Please expand on how you see that playing out.

Dr de Bruin: That is correct. Our submission is that the Bail Act already takes into account all the relevant considerations and that there are ways to get the information before the court. We say that that section has worked well in the past. In fact, the issue with the Bail Act is more in relation to the presumptions created in terms of section 9 of the Bail Act.

THE CHAIR: Can you expand on how, in your experience, that information will come to the attention of the court?

Dr de Bruin: The information is usually put forward to the court by way of the bail consideration form. The bail consideration form is prepared by the AFP, and it provides a handy source of information as to what should be considered on behalf of victims, complainants and the community. That information is before the court. In the past we used an informant, who gave evidence. The bail consideration form is a way of taking up less court time.

THE CHAIR: One of the things we have heard in this hearing is about the lack of consistency across decision-making, when it comes to bail. I hear your comments around that information being already before the court, in the form of a bail consideration form. Do you think that legislating for those considerations in this bill gives better consistency and clarity in terms of decision-making? One of the things we have heard is that bail decision-making is not consistent. What is your view about whether or not this helps to address that issue?

Dr de Bruin: To some extent, bail decision-making can never be consistent because it is a unique question, each and every time that the court considers a matter of bail. Each bail application will turn on its own facts. In one case, for example, there is the concern that someone may not answer bail; that is the dominant consideration, and you do not have to consider any other considerations because, ultimately, the court will refuse bail, based solely on that. In other cases, it will turn on the risk of reoffending, and that will present itself by way of information contained in a bail consideration form, for example, or a criminal history that speaks of someone who is not capable of complying with bail conditions.

Therefore, having mandatory considerations makes the process more onerous. In a day, we have limited court time, and limited time to consider all these applications in a “must” type of way. It is a case of the court and experienced practitioners quickly working to what the real issues are and working on those issues to determine whether or not bail should be granted in a matter.

THE CHAIR: Can you please elaborate on your concerns around the duplication of the provisions of section 22A(d) and (h)?

Dr de Bruin: I think that is all set out in our submission. Can I return to that question?

THE CHAIR: Yes, absolutely.

MS VASSAROTTI: Thank you very much for the submission. We have been exploring the concerns around increased complexity. There seems to be quite a lot of support for adding some of the new mandatory considerations, while recognising that there are potentially some resource implications of that. I am interested in whether you have any thoughts, beyond sticking with what we have, around ways that we could mitigate some of the concerns around time lags and reduced flexibility, in terms of looking at a broader set of mandatory considerations.

Dr de Bruin: I am not certain about whether I understand the question. Is the

question—

MS VASSAROTTI: In terms of addressing the concerns about increased complexity, beyond not adding the additional mandatory considerations; in your experience, are there ways that we could move forward in terms of adding additional mandatory considerations, while mitigating some of those concerns about increased complexity or additional onerousness for the courts?

Dr de Bruin: Our submission is that it should all be listed for the court and considered as if it is put before the court to consider. There is not always an exclusive list. Some bail applications turn on factors that I have never contemplated before, as an experienced practitioner.

The court may turn to some considerations, if a practitioner wants the court to consider that. It is the practice of the prosecution to put a number of things before the court, such as on reporting. The court, even though practitioners are not interested in using a certain point, can determine a bail application on something that is apparent to the court. The court can then look at the considerations that are put forward in the Bail Act, and it does not have to go through it in an artificial way: “I must consider this.” “I must consider that.” It can then turn to, “In terms of this or that section, I have considered whether a grant of bail is appropriate or not.”

MS VASSAROTTI: Is there a concern that, in having additional mandatory considerations, it might limit the things that people think about?

Dr de Bruin: I do not think that is the case. If you look at the Crimes (Sentencing) Act, for example, in section 33, there are a number of criteria listed there, and the court does not always go through each and every criterion. It is a good guideline to consider in this matter, but it is not a matter of saying, “We must consider this; we must consider it against that.” A “must” type of approach, in my submission, creates a situation where the court may go, in a very artificial way, through all these “must” considerations and may lose what are the prominent features of such a bail application.

MR WERNER-GIBBINGS: On the same theme, of whether or not increasing the number of mandatory considerations may impede nuanced bail decision-making, from my reading, the mandatory considerations that are already there, and the ones that are suggested, serve to ensure that decision-makers engage with the nuance of each issue, or each separate case that comes through, as opposed to making sure that something that might be applicable is considered. Do you think that is important? I think that is an important part of this decision-making. Would that create too much burden or difficulty?

Dr de Bruin: I will start with the first part of your question. I think that is what the court should consider. As I have already said, it is highlighted by the prosecution saying why bail is opposed. That is your first starting point: is bail opposed or not opposed?

If bail is not opposed, there is a clear way for the court to grant bail. The argument against, and what we have put in our submission, is that a “must” type of scenario will require the court to consider matters so that, even though bail is not opposed, we must consider it against the following, and they may then engage with the criteria set out

there.

The problem with a scenario like that is that that information may not be readily available. That means the matter will be stood down and someone will spend time in custody, until that information is provided by either the DPP or the defence lawyer. Something that would usually take three or four minutes may now become a matter that stretches over days, and take 30 minutes of court time. Court time is quite precious and there is not a lot of it available. I suppose the mandatory considerations will stop matters quickly moving through the court where there is obviously no concern.

If there is a concern, a number of decisions have been made prior to that bail position being formed. In other words, a police officer has prepared a bail consideration form, and in that bail consideration form they have said why bail should not be opposed and what conditions should be considered. At some point in time a prosecutor also sits at a desk and considers what is in the bail consideration form. That is ultimately the position that is being put in court.

That saves a lot of court time—the fact that some of these applications would turn over without much thought. That means you have more time for the matters where bail is opposed and where you have to put a lot of thought into what needs to be considered. Where the parties are quite good in addressing what the real issues are, and more so the court, is where you can get across the documents in very little time and work out what the real issue is. Often a bail application is determined on one or two grounds, where the risk of reoffending is a concern, or where the defendant may not answer bail.

MR WERNER-GIBBINGS: There are mandatory considerations and the court, presumably, is turning their mind to them now. The scenarios you have outlined as possible may be happening already?

Dr de Bruin: It is already happening.

MR WERNER-GIBBINGS: What kind of information is required now for the interests of the accused to be elucidated or clarified?

Dr de Bruin: If you meet with an accused, and you are seeing them in the cells, as we put in our submission, we spend between five and 10 minutes with such a person. With the type of information and the requirement, for example, it is what the impact of a refusal of bail will have on that person. It may be something like the loss of employment, having the ability to pay their rent, and the impact that that will have on the family, if this person has bail refused. That information is very easily obtainable from an accused person.

If the accused person has to respond to all the mandatory considerations, you will have to take him through whatever is put in the bail consideration form in a mandatory type of way, and consider what the response is to that. You will go through this bail checklist and, instead of spending five to 10 minutes with an accused, you will be spending 20 to 40 minutes with an accused. That means that the duty legal service that we provide would require additional lawyers to go in, to ensure that we have a starting time at 9.30 am, which is when the court now starts.

In short, mandatory considerations will require us to spend far more time with the accused to take him through the case, through all the considerations, take instructions in relation to those considerations, and be ready to put all these submissions before the court in relation to matters that may have very little impact on the consideration of the grant of bail.

MR WERNER-GIBBINGS: Thank you, Dr de Bruin; that is well explained. With respect to the time that a solicitor would be spending with the accused, what kind of questions currently are not being asked in those sorts of engagements that would be required under this bill?

Dr de Bruin: If bail, for example, is not opposed, most of the conference is spent on informing the accused of the charges before the court, summarising the allegations that are put before the court, and perhaps suitable conditions that the prosecution has asked for, to make certain that the accused could comply with such conditions, and crafting some alternative conditions.

A good example is where the prosecution says, “Bail is not opposed, but the accused is not allowed to return to the family home.” The accused tells you that he is conducting a business from that home and may need to get access to a vehicle that he uses for work purposes. You then craft an exception to the condition to allow him to collect the vehicle on one occasion, in the company of the AFP. That becomes a very simple type of application.

If you have to go through mandatory considerations, the vehicle becomes one of the issues; you then have to go through all the other material that is put to you through the prosecution and, before that, by the AFP. You have to take the accused through all of that, because there may be explanations offered by an accused as to why he cannot comply or why something is wrong in that case. That will take considerable time.

THE CHAIR: Just to clarify, is it your advice or submission that mandatory considerations should only apply where bail is opposed and not where bail is not opposed?

Dr de Bruin: That would be a better position, yes—if bail is opposed, the court must consider all of that. If bail is not opposed, considering all the mandatory considerations may turn that into a lengthy type of matter. Again, it goes to court time. Yes, I would support that.

THE CHAIR: That is really useful clarification. On behalf of the committee, I thank you for your attendance today. If you have taken any questions on notice, please provide your response to the secretary within five business days of receiving the uncorrected proof *Hansard*. Thank you.

KUKULIES-SMITH, MR MICHAEL, Chair, Criminal Law Committee, ACT Law Society

MORRISROE, MS BETH, Vice-President, ACT Bar Association

MUSGROVE, MS KATRINA, Secretary, ACT Bar Association

THE CHAIR: We welcome witnesses from the ACT Bar Association and the ACT Law Society. Please note that as witnesses you are protected by parliamentary privilege bound by its obligations. You must tell the truth as giving false or misleading evidence will be treated as a serious matter and may be considered contempt of the Assembly. Would you like to make an opening statement?

Mr Kukulies-Smith: The Law Society has long called for the Bail Act to better align with the Children and Young People Act with a stronger focus on rehabilitation, diversion and decisions based on each child's individual circumstances, meaning a careful consideration of assessing risks in a way that considers a young person's age, maturity and personal vulnerabilities.

We are pleased the bill moves in this direction, especially with the inclusion of those criteria in section 22D of the bill. However, we remain concerned about the presumptions contained in sections 9D and 9F in particular of the Bail Act. In our view, these provisions are overly complex and risk shifting the focus away from broad common-sense assessment of risk based upon evidence before the court and rather provide a more rigid and box-ticking approach that does not allow for consideration of evidence and an evidence-based approach to bail. This is a particular concern for children and young people who need flexible and tailored decision-making, and it also impacts other vulnerable members of our community who come before the courts.

Overall we support a clearer and simpler bail system, a system that allows for decisions to be based on evidence and focuses attention on the individual circumstances of the case and the person before the court while properly balancing community safety and the interests of others, including those coming before the courts making complaints in relation to offending against them and balances those against the rights of the accused.

THE CHAIR: Thank you for those comments. One of the tensions, as we have heard, is the presumption against bail for serious offences and the tension in community that sometimes that presumption works in favour of the accused rather than the victim. In your experience, and noting your concerns around sections 9D and F, how do you think that balance properly sits? What recommendations can you make to balance the rights of the offender and the rights of the victim?

Mr Kukulies-Smith: Abolishing the presumptions and then allowing for an evidence-based consideration of the question. That then allows the individual circumstances of the case. That includes all aspects—so the individual circumstances of an accused, the individual circumstances of a victim, and the individual circumstances of the other elements of the risk matrix that may exist in a particular case. Simply putting a checkbox at the front of the process that asks is this presumption overcome precludes evidence-based consideration rather than promotes evidence-based consideration.

I have not listened to all of the speakers before today's inquiry, but consistently those

that I have heard, including, for example, the Victims of Crime Commissioner, spoke to you about the need for and the importance of evidence-based consideration. That is what the Law Society is advocating for. The Law Society is not presuming or expecting that is going to radically necessarily shift the number of people either in custody or on bail; it is not about that. It is about us being satisfied that those who are in custody are in custody because the evidence justifies that, but those that are on bail are on bail with conditions that the evidence justifies and supports the needs of other members of the community, whether that be victims or other people. It depends on the offence.

We are talking section 9F, so we are talking specifically about family violence matters and it is easy in those matters to identify who a victim is. But there are obviously a whole range of matters that come before the court where victims, for example, are not as easily identified. Drug cases are a classic example of that where the victims or the risk that is posed is to the community at large, not necessarily any one individual or a more easily defined group of individuals. And so what the Law Society is saying is those presumptions really preclude that consideration and they reduce the bail exercise to focusing on trying to overcome that rather arbitrary test, and that ends up often focusing attention on a very narrow set of criteria that occupies a large amount of the court's time.

I heard what was said in the session immediately preceding this with Dr de Bruin from Legal Aid ACT. I noted and I agree with his comments in terms of the limitations on court time in considering bail. It is unrealistic that a bail application is going to go for hours and hours or days of court time; they do not. The vast majority of bail decisions are by necessity made with about 20 to 30 minutes of court time at the upper end. That is purely by virtue of the fact that we have each day in our Magistrates Court one bail list that is staffed by one magistrate who sits from 9.30 in the morning until around 2 o'clock as the bail court. It then move to doing sentences in the afternoon. It is not uncommon for there to be around 15 to 20 bail applications dealt with in that timeframe. That necessitates a certain degree of efficiency just by virtue of the availability of the resource of time.

THE CHAIR: Is it your submission that the presumption against bail should not exist at all even for repeat offending?

Mr Kukulies-Smith: Yes.

Ms Musgrove: Can I just add something to your question? You have used the terms "the offender" and "the victim", and I just would like to reiterate that at the time of a bail consideration, nothing has been determined in relation to the guilt of the person that has been accused of the offending. And so using the language of offender and also victim derogates and takes away from the presumption of innocence. That has to be our starting point because that is the fundamental tenet of the criminal justice system. You are presumed to be innocent unless and until it is determined otherwise beyond reasonable doubt. So using that language of victim and offender actually implies that the offence has been proven.

It might sound like being a pedant, but it actually means a lot to those who practise within the criminal justice system because once you shift from being an accused or a defendant and it has been proven, then you become the offender and then the

complainant transfers into being the victim. There is a definite shift because there has been a determination.

If you can come back to what that fundamental tenet is, that is really important in framing the considerations for the Bail Act as well because they are still presumed to be innocent at the time that bail decision is being made. That should not be lost in all of the criteria that might be set forth that the court needs to take into consideration. The number one consideration should be they are still presumed to be innocent.

THE CHAIR: Going back to some of the evidence we just heard from Legal Aid around the mandatory considerations in the bill, their submission is that the bail consideration form already has some of those mandatory considerations. I want to get your views on that but also around comments we have heard in this committee around the consistency in bail decisions. One of the comments I think from DVCS—and I could be wrong—is that there is a lack of consistency in decision-making and that perhaps this provides some pillar for there to be consistency. What are your views on that?

Ms Morrisroe: I think there is a real difficulty in approaching a bail decision from a standpoint that there must be consistency in decisions. The difficulty with that is fundamentally every single case is different. There are different aspects to a complainant, different aspects to an offender, different aspects to an offence and different aspects to where a police investigation is up to. For example, if a family violence evidence-in-chief interview has been taken and a record of interview has been taken with an accused et cetera, sometimes it can be quite straightforward, but often it involves much more significant things that need to be done—for example, if a Cellebrite download of a phone is needed, how long are digital forensics going to take to do that? How long are all these various things going to take?

So for a common assault aggravated by family violence offence, even if it is the same act of violence that is alleged, the circumstances that surround a bail decision are extremely unlikely to be the same across two. Just because the offence is the same—even if the criminal history or lack thereof is the same, even if the concerns of the complainant or lack thereof are the same—there are so many factors that go into a bail decision that I think it is fundamentally flawed to consider it from a consistency standpoint. The entire purpose of it is—and I think a lot of what Ms Kukulies-Smith is saying about the need for it to be evidence-based—is that this is such an individualised process. And I do not mean individualised only for the accused; it is individualised for the circumstances of the particular matter that comes before the court, and the different weighting that must go on those factors is very, very significant. I can appreciate that it would be convenient for there to be a consistency argument, but I just do not think that it is possible.

And I also think that within that there is a fundamental misapprehension about perhaps the knowledge and experience of those dealing with it. The magistrates making these decisions make these decisions all the time. They are making these decisions on a daily basis; this is their bread and butter at work. They understand the various issues they are dealing with. Consistency, of course, would be one of the things that is on their mind, but they are focused on individualised justice for individual circumstances at a time in a case where very often the least is known about the overall circumstances. So they need to make the best decision they can.

Ms Musgrove: It is a bit like sentencing in terms of the courts aim for consistency in sentencing, but it does not mean you are going to get exactly the same sentence for exactly the same offence, and that is because of the individual circumstances. So the consistency comes about through the considerations, so the mandatory considerations or the other considerations the court might take into account. That is where your consistency in decision-making at law tends to come about because you are dealing with individualised justice. You cannot expect to get the same outcome when you put different circumstantial factors into that decision. It is just not possible. And if you do achieve that, it means you are not providing individualised justice or individualised decision-making relevant to the circumstances that are before you for that decision.

THE CHAIR: How do you consider the mandatory considerations in this bill affecting that individualised justice?

Ms Musgrove: Which section are you talking about?

THE CHAIR: Section 22, which are the core considerations.

Ms Musgrove: That is right. They are the core considerations, and they are the considerations that we have now. But they work as a fundamental basis and I do not see that there is an issue with them. There are some really important words in there like “likelihood”, and the likelihood is different to the risk. So some of the new considerations that you are proposing use the term “risk” rather than “likelihood”. Likelihood is higher. It is a higher threshold than just the risk. You cannot quantify likelihood, but risk is actually lower than that. So that is where I think there needs to be consistency in the language.

Generally in terms of 22A, the relevant factors, inclusion of that would not necessarily be a bad thing for the Bail Act. I think the key words in 22A are that the court or the authorised officer must consider any matter that the court or officer considers relevant. So it is not actually going to be in every circumstance that they are going to do a tick through the list of this because they actually have the discretion to make a determination as to whether they think it is relevant in the circumstances. It is similar to section 33 of the Crimes (Sentencing) Act—there is a list of considerations for the court, but if it is not relevant then you just discard it and you move on to the next one that is relevant.

As to section 22B, I think it is appropriate for Aboriginal and Torres Strait Islander people. There is nothing of an issue in there. One of the considerations might be that many people that come before the court who do not have an Indigenous background also suffer from a different type of trauma, perhaps, but have trauma backgrounds that actually brings them to the court for the offending. I do not know whether the section in relation to factors with people with disability or a health condition is broad enough to cover those who might have that trauma background.

As to section 22D, in terms of children, again it lists what must be considered and there is no discretion there. A discretion if the court feels it is relevant may be appropriate.

Section 23A deals with the victim’s concerns. One of the concerns in relation to this is subsection (2)(b)(ii) which provides that the prosecutor must make a submission to the

court about any concern about the need for protection that they are aware of the victim expressing. That is the legislature mandating a consideration for a prosecutor. They are supposed to have prosecutorial discretion, and I do not know how that sits with their prosecutorial discretion. It has never been my experience that a prosecutor would not put forward any concerns expressed to them by a complainant. They do it on a regular basis on every occasion that I am aware of. They would put that forward. So to actually constrain their prosecutorial discretion, I do not know how that sits. That might be a matter for the DPP.

But the other concern is that the prosecutor may make further submission about the information they are aware of given under subsection (1)(b) that relates to a matter in section 22. What that, in my opinion, is opening up is a lot of perhaps context evidence or, he-said, she-said. They have had an argument. The complainant's perspective of that relationship being brought in, it is difficult to counter such information because it is not factually based. There is no evidence. It might be that the complainant has said it, but it might not be in a police report and it might just be a conversation that the complainant actually had with the prosecutor back in the DPP's office or whatever.

How does an accused person effectively meet some of that hearsay evidence for a bail consideration where they have also got to keep in mind their right to silence? And what they might not want to say to the court in a bail consideration is something that they might want to use in cross-examination later at the substantive trial. So that is where I think it creates a tension and it is perhaps somewhat unfair to an accused person at that point in time to allow that type of evidence to be before the court.

Generally, having an outline of the considerations I think can be a positive, but it depends on what you are trying to achieve by having that outline. If the outcome you are wanting to achieve is that they are considered and that you then get an individualised bail decision based upon those considerations, then that is appropriate. But if they are there to try and get standardised decisions, then you are not going to meet that end.

MS VASSAROTTI: Given that, what is your perspective on how well the bill does in relation to that? You have talked about mandatory considerations potentially being a useful guide. I am also quite interested in picking up that comment around it potentially precludes an evidence-based decision. I can really understand the arguments around potentially increasing the complexity and the time. I am interested in exploring why it might preclude evidence-based decision-making.

Mr Kukulies-Smith: In terms of the preclusion, I am not talking about the matters listed in section 22, and by that I mean the various sections 22A, 22B et cetera. What the Law Society is talking about in terms of precluding evidence-based decision-making are the presumptions that exist within the various sections 9 of the act.

We accept that what is happening in the various sections 22 is the starting point and that they are directing attention to a range of things for which evidence can be provided. We do not have a difficulty with that as the Law Society. In fact, where it relates to Indigenous people and children, we particularly support it because we have advocated for quite a long period of time that there ought to be attention drawn to additional issues or a further set of issues or special issues in those cases because of the circumstances of the accused in those cases. So to that extent, we think that criteria will assist because

it will direct that attention and give some weight.

Having said that, I do not want to be heard to be suggesting our courts are ignorant of those issues today. Consideration of those factors in the various sections 22 is going to be reaffirming a lot of what happens, and the Legislative Assembly and this committee should understand that. In my experience of over 20 years in criminal law in the ACT, that is not going to be a radical shift to what is happening day to day in our courts. It will assist in some cases to direct attention, and I think it will also assist in the evidence-gathering outside of the courtroom, because obviously the focus of lawyers is what happens in the courtroom.

I know you have heard from others today about the process of supporting these decisions with evidence from outside the courtroom and then after the proceeding wraparound services supporting the outcomes afterwards, whether they be those from victims' groups or supporting complainants of offending or services designed to assist an accused to minimise risks around substance abuse or whatever might be felt to be the risk factors in a particular accused's case. Certainly having these criteria there will often assist, for example, the AFP when they are gathering material for the prosecutors to present in court. It probably is a useful guide at that level in directing their attention to putting together a relevant set of information.

At the end of the day, this is happening under a degree of time pressure. The time from arrest to bail is, by dint of the Bail Act, a period less than 48 hours. That is the maximum permitted under our Bail Act. In most cases it is significantly less than that. In most cases certainly within 12 hours and in many cases within four or five hours of their arrest accused persons are in court and these issues are being ventilated. So having that guidance may assist, but it is not radically going to shift what our judicial officers are doing in the courtroom because the reality is we are well served in the territory for judicial officers and they would be commonly considering these issues whether or not specifically required under our current Bail Act.

Ms Musgrove: That is the other issue if you mandate what considerations are. If the evidence is not available to actually address that mandated consideration, what happens then? Does the court say, "I can't consider it so I can't actually consider your application for bail until the police or whoever has had an opportunity to go and gather more evidence"? That then can be a disadvantage to the accused person because they cannot legitimately bring their bail application. That is one of the issues with mandated considerations.

Quite often people are arrested—particularly for family violence issues—overnight or in the early morning. They are out and are having a fight in the street. They have been to the pub, are arrested and are taken to the watch house, and then they are taken over to the court the first thing the next morning. As Michael said, there is a very small period of time in which to obtain the relevant information. And it just might be that at the point in time they are taken to the court the information is not available. I would be loath to see anyone remanded in custody for extra time because there has not been time available to obtain the necessary information.

MR WERNER-GIBBINGS: I have a very quick question for Ms Morrisroe. Do you think the bill is about making the bail decision-making process consistent or about

getting closer to the same consistency of outcome from the process?

Ms Morrisroe: I think the intention is to ensure that there is a consistency in terms of the considerations that are taken into account. Of course that would be the goal. That is certainly the goal in terms of having any particular considerations for any type of matter, like, in section 33—which I think the committee has been referred to a number of times—sentencing. In an appropriate, individualised justice system there cannot be a consistency of outcome. That is just not—

MR WERNER-GIBBINGS: Because of people.

Ms Morrisroe: This is human behaviour. You are just not going to receive a consistency of outcome. That is not how it operates. If you were receiving consistency of outcome across everything, in my view, that would be indicative of the fact that the system is actually not working. In terms of the approach, clearly the bill is trying to achieve a consistency in the considerations. I suppose my approach, and the Bar Association approach—and often something that comes back through our submissions that we do, particularly with the Criminal Law Committee in terms of legislation—is: what specifically is the mischief that the bill is attempting to correct? So what is it that the bill is attempting to do in terms of: what are the problems; when is it the case that the court has not taken into account the relevant considerations; and why is it that these then need to be mandated considerations that have the potential to overcomplicate a process that, although it could be analysed for hours, days, months and years, is actually a process that that operates in a very short period of time on very limited information and operates on the fundamental premise that everybody involved in the system the whole way along knows what they are doing?

The judicial officers—and, again, we are very well served here in the territory—know what they are doing. There needs to be a level of trust afforded to those judicial officers to make proper decisions on the basis of the relevant consideration fundamental to the operation of the law in the territory. That is what they are appointed to do. I think that there is some level of micromanagement. Ultimately, will it fundamentally change the things that are taken into account by judicial officers day to day? It is very unlikely. I agree entirely with what Mr Kukulies-Smith has been saying about that. I do not know if that truly answered your question.

MR WERNER-GIBBINGS: Well, it was interesting.

Ms Morrisroe: I think there needs to be a fundamental consideration of that. What I think the bill is missing is dealing with the issue of these bail presumptions. The legislature has been on notice for more than 15 years that these bail presumptions are incompatible with the Human Rights Act. There is a declaration of incompatibility, made by the Supreme Court in 2010, that has still not properly been engaged with. Instead, we now have a number of considerations and these further sections where there are these mandatory considerations. But it does not really engage with this other quite glaring, fundamental problem—and again, I agree with what Mr Kukulies-Smith has said—and that is a preclusion to taking an evidence-based approach to each matter as it comes before the court.

Mr Kukulies-Smith: I would raise one further thing about consistency. I think it was

only a couple of months ago that there was an article in the *Canberra Times* suggestive of inconsistency in the bail approach, because a different outcome had been achieved in the same case before a different magistrate—so magistrate X on one occasion and magistrate Y on a subsequent bail application, but the same matter. While I accept superficially that that may appear to demonstrate inconsistency, a lot can change between two separate dates in a matter. It could be that the location of the person who the court was seeking to protect in the first bail application, by the refusal, have now relocated. So, in giving the accused bail on the second occasion, there is no relevance in that the risk matrix may be totally different.

Similarly, in many drugs cases, it is the case that on day one of the investigation, there are a lot of witnesses and there may still be warrants that are to be executed by police and so the possibility of an accused interfering with or hampering the police investigation is very high. Two weeks later, when all of the warrants have been executed and all of the material that is going to be obtained by police is safely locked away in a police exhibit warehouse, the risk matrix has totally changed. So it may appear, externally, two inconsistent decisions—that is, in same case, on occasion A, bail refused and on occasion B, bail granted. At its broadest level it appears inconsistent, but that does not necessarily mean that there has been a failure of the system in that regard, because, when one looks at the actual evidence and the details of the case, they could well have fundamentally shifted in that time just by the effluxion of time or the change of events between occasion A and occasion B.

THE CHAIR: I have one quick question, going to what you mentioned earlier, Ms Musgrove, around the use of the terminology “victim”. Do you then have a concern with the use of that language in 23A as the bill is currently drafted?

Ms Musgrove: It is throughout the entire bill, yes.

THE CHAIR: Okay. Thank you.

Ms Musgrove: Could I just add something?

THE CHAIR: Yes.

Ms Musgrove: I know you have not asked me about this. If the amendments were to pass and you were to see an increased rate of bail being refused, there are knock-on effects for an accused throughout the criminal justice system of being remanded in custody. One of the practical issues is actually being able to obtain instructions from your client in a timely manner and to be able to discuss their changes and the facts frankly. The AMC do all they can to facilitate legal visits, whether it is in person or via AVL, but they obviously have operating restrictions that can certainly limit and curtail the ability that we have to go and see our clients or to take those instructions.

Further to that, some of those that are on charges, for example, for alleged child sexual offending, are afraid to actually take any of the material, any of the charges and any of the brief to the prison with them for fear of other inmates or detainees finding it and they are then the subject of potential assaults. That is a very real and very live fear and consideration for those who are remanded in custody on a day-to-day basis, which impacts their ability to prepare for trial. I am not raising that to negate the concerns

about safety of complainants or safety of the community, but there are practical effects for the criminal justice system and those who are accused once they are remanded in custody.

THE CHAIR: Thank you. I do not think this was answered. On the comments around the bill consideration form already having some of the mandatory requirements on there, is that your experience as well—that the bill consideration form already covers the mandatory requirements?

Mr Kukulies-Smith: Yes. In its current format, it mirrors the subsections or the paragraphs within section 22 of the bail legislation. They have boxes with headings such as, “risk of interfering with evidence,” “risk of flight” et cetera. Then police fill in information about that. In some cases it might be that they have nil concerns about flight and that will be all that is there. But, in others, there will be a detailed explanation about flight saying the person has no ties to the territory, they have a foreign passport or they have a booking on a flight in two days-time and police have big concerns they are going to leave the jurisdiction and not come back, for example. Those headings in our current bail consideration form can mirror the paragraphs in the current 22 and the considerations there. So I would anticipate that, if the bill were to go through in its current form, they would simply rejig and add some additional boxes in relation to 22A, 22B et cetera and the various criteria and perhaps would use different forms. But you would have to ask the AFP about that. But I would not be surprised if, in relation to children’s matters—because it is different criterion—where it was a young person, they would actually adopt a new variance of the form and there would be a young person’s variance of their bail consideration form that the police prepare.

THE CHAIR: Thank you. On behalf of the committee, I thank you for your attendance today. If you have taken any questions on notice, please provide your answers to the committee secretary within five business days of receiving the uncorrected proof *Hansard*. Thank you.

Short suspension

CHEYNE, MS TARA, Attorney-General, Minister for Human Rights, Minister for City and Government Services and Minister for the Night-Time Economy

PATERSON, DR MARISA, Minister for Police, Fire and Emergency Services, Minister for Women, Minister for the Prevention of Domestic, Family and Sexual Violence, Minister for Corrections and Minister for Gaming Reform

CHIN, MR RICHARD, Deputy Chief Police Officer, ACT Policing

FUNNELL, MR LACHLAN, Executive General Manager, Corporate, ACT Policing

GUO, MS EMMA, Senior Team leader, Legislation and Governance, ACT Policing

HAIGH, MS KATHRYN, Deputy Director-General, Justice, Justice and Community Safety Directorate

LEE, MR SCOTT, Chief Police Officer, ACT Policing

NG, MR DANIEL, Deputy Director-General, Justice, Justice and Community Safety Directorate

SPRAGUE, MR MATT, Detective Superintendent, Judicial Operations, ACT Policing

THE CHAIR: We welcome Ms Tara Cheyne MLA, Attorney-General; Dr Marisa Paterson MLA, Minister for Police, Fire and Emergency Services; and officials. Please note that as witnesses, you are protected by parliamentary privilege and bound by its obligations. You must tell the truth, as giving false or misleading evidence will be treated as a serious matter and may be considered contempt of the Assembly. Would you like to make an opening statement?

Ms Cheyne: Yes, please.

THE CHAIR: Yes.

Ms Cheyne: Thank you, Chair. Deciding whether to grant bail is ultimately a risk assessment, where complex and often competing considerations need to be balanced when making a decision that is directly impacting some of the most vulnerable people in our community, and those decisions are usually made in a short timeframe.

The Bail Act currently requires the decision-maker to consider a range of matters when making decisions, and it authorises the decision-maker to consider any other matter they consider relevant. This is designed to ensure that bail is not denied where the risk is low and that the bail conditions imposed on a person who is refused bail are appropriate and necessary.

The outcome we are seeking with this bill and these amendments is to improve decision-making, or at least the community's confidence in the decision that is being made, through relevant information being considered by the decision-maker so that, firstly, accused persons are remanded in custody where it is necessary and appropriate to protect the safety and wellbeing of any complainant or the community; secondly, accused persons are released on conditional bail unless the risk associated with releasing the accused cannot be managed through the imposition of conditions; and thirdly, the least onerous conditions are imposed on accused persons who are released on bail. To achieve this, the bill codifies factors that experience has shown are often relevant, including: the risks to victims or complainants; the circumstances of Aboriginal and Torres Strait Islander people; and the needs of vulnerable groups, such as people with disability or mental illness, pregnant people and children. It also includes

consideration of any accused person's history of bail compliance.

The bill also strengthens victim protections by requiring consideration of factors such as the accused's behaviour towards victims, risks of family violence and the safety of victims or complainants and their families. It expands opportunities for complainants to provide input and to receive information about bail decisions. This is designed to ensure that decision-makers are considering all matters that are relevant to the particular circumstances of the case to make fully informed decisions as to the risks of granting bail or not.

This is not about ensuring consistency of outcome. We recognise that bail applications are necessarily individualised processes with individual circumstances and, thus, outcomes; however, it is about applying a degree of consistency of process. In this way, the amendments are intended to reflect the matters that decision-makers can, and already routinely do, consider when making bail decisions: to ensure both accused persons and victims are aware of the matters taken into consideration by decision-makers so that they are able to raise relevant matters when bail is being considered; to reassure the community that a range of relevant matters are taken into consideration so that they understand the balanced approach to bail decision-making; and to provide guidance, or a reminder, to decision-makers about the matters that must be taken into account if relevant to a particular case.

Importantly, these considerations required to be taken into account would be factors relevant to the matter based on information that is reasonably available, without requiring decision-makers to conduct an additional or onerous investigation that might take a considerable amount of time or delay bail decisions.

Where the court is the decision-maker, the court will rely on submissions from the prosecution and the defendant or their legal representative. Where the decision-maker is an authorised police officer, that officer will rely on information provided by the informant and the defendant. Police informants are expected to provide to the decision-maker information available to them, including information readily available in police holdings and from their interactions with the accused. This is about making sure that decision-makers are turning their mind to relevant matters, but it is not about requiring them to undertake investigations or to collect evidence to support that decision-making process. While this is included in the explanatory statement to the bill, we do acknowledge that there have been some issues raised by ACT Policing regarding a preference for these matters to be more specifically clarified in the bill.

The government is working with ACT Policing to consider whether there may be an opportunity to provide that greater clarity as to the intended operation of provisions in a way that is consistent with the broader framework of the Bail Act. Subject to the committee's views, you may wish to hear from ACT Policing about what happens in practice when a police officer is a decision-maker, but it is open to you.

THE CHAIR: Thank you very much. Noting that Ms Vassarotti will be leaving soon, I will go to her to start.

MS VASSAROTTI: Thanks very much for attending, everyone, and thanks for the opening statement, Minister Cheyne. That is exactly where I wanted to go in some of

my questioning. What happens in the case when it is a mandatory consideration has been raised by a number of people appearing, particularly regarding cases where evidence may not be available. The submission provided by Policing noted concerns around resourcing. There has also been quite a bit of discussion about the fact that these are the kinds of things that happen pretty routinely. I was particularly interested to hear from Policing in terms of the concerns raised in the submission—how it happens in practice—and whether there are improvements that we could make to the bill to ensure that we do not see time lags and people staying in remand for longer than they needed to.

Mr Lee: Thanks, Ms Vassarotti. I would say right from the outset that ACT Policing is supportive of the policy intent of the bill, and we appreciate the engagement that we have had with government and the Justice and Community Safety Directorate on development of the bill. As you have outlined, in our submission we raised some concerns. From our perspective, we continue to appreciate the engagement with directorates on whether those changes can be accommodated in the legislation. We certainly think that those changes would assist in ensuring the intent of the bill is operationally applied, where we have categories of what we must consider and where that information may not be readily available. We have certainly turned our mind to that.

If you wish, I could pass to Mr Funnell initially, who could outline some of the concerns that we have in a couple of areas. They go to the readily-available information and ensuring that there is clarity for our decision-makers. If you wish, in terms of the process at the watch house, I am happy to hand to Detective Superintendent Sprague, if that would assist.

MS VASSAROTTI: Yes—that would be of assistance.

Mr Funnell: Thank you, CPO. As outlined in our submission, there would be concern from our officers that they may need to go further than reasonably available, regarding how the bill has been drafted. If we are put in that position, there may be delays in trying to meet the threshold, because clarity is not there. As we have stated already, we are working with the directorate on how we can potentially address those concerns, and those engagements have definitely been positive to date.

Mr Sprague: Thank you, CPO. I also thank the committee for allowing me to speak on this important area of reform. I would like to take you through an overview of how the watch house process works. I will break it down into seven key areas, with the caveat that this is just a high-level overview to illustrate the process. It is more granular in practice than what I am about to outline.

Step 1 is that we have an arrest of a person for an offence. The watch house is notified via Policing Communications that there is a person en route to the watch house. When known, the name of the accused person may be provided to watch house staff in order to conduct some preliminary checks to see if they are recorded on our systems.

Step 2 is that, upon arrival at the watch house, the accused person remains in the vehicle while the arresting or transporting members brief the watch house sergeant. The watch house sergeant inquires into the demeanour of the accused person and any known health

concerns, and determines whether they are satisfied with the grounds for arrest and the sufficiency of evidence available from that briefing. If they are satisfied with those aspects, the accused person is escorted into the watch house and preparation of the watch house intake form and other relevant material is undertaken.

We move to step 3, which is the intake process itself. This is where the accused person is searched, normally at the watch house charge counter, and the watch house sergeant undertakes a conversation with the accused person, advising them of the process to follow. During that initial conversation, they will be asked questions on the watch house intake form. That is referred to as our Reception and Lodgement of Detainee form. Importantly, this part of the process is primarily aimed at the safety of the person whilst in our custody. The watch house sergeant will also seek to determine if the accused person is aware of the reason they have been arrested, if there is any risk to the accused person whilst in custody, and if there are any risk factors that the accused person has presented with—for example, mental illness or aggressive or heightened behaviours, whether they are affected by alcohol or illicit substances, whether they have any injuries, and general health questions. They will also be asked if they identify as First Nations. Where relevant to the offence and the circumstances alleged, the watch house sergeant will engage with the informant or the arresting officer with regard to considerations of bail.

We move to step 4. That is the transfer of the accused person to a cell, where they are provided with food and drink if required, and observations and physical cell checks of the person commence to monitor their safety and wellbeing while they are in our care and custody.

Step 5 is the finalisation of the intake paperwork and formal charging processes. The watch house sergeant reviews the statement of facts and other relevant paperwork prepared by the informant or arresting member. When the paperwork is completed, the person in custody is advised of the charges and is formally charged, along with the taking of their fingerprints and photographs, and/or DNA if required or relevant to the circumstances.

We then move to step 6, which is the consideration of bail step. Under the Bail Act 1992, and with regard to the presumption of bail, the watch house sergeant must consider section 22, with criteria for granting bail to adults, or section 23, with criteria for granting bail to children, to inform their bail determination. These include the likelihood of the person appearing in court, and the likelihood of the person, while released on bail, committing an offence, harassing or endangering the safety or welfare of anyone, or interfering with evidence, intimidating a witness or obstructing the course of justice. For an adult, there are the interests of the person, and, for a child, as a primary consideration, there are the best interests of the child, and the youth justice principles under section 94 of the Children and Young People Act 2008 must also be considered. Section 22(3) of the Bail Act outlines that the court or authorised officer may have regard to any relevant matter, including: the nature and seriousness of the offence; the person's character, background and community ties; the likely effect of the refusal of bail on the person's family or dependents; any occasions of previously granted bail to the person; and the strength of evidence against the person. Each case will be considered individually on its merits and can be informed by information provided in the ACT Bail Consideration Form.

Step 7 is the determination of bail itself, with categories of “suitable”, “not suitable”, “release from custody” where bail is suitable, or “await court sitting” if bail is not suitable. Where the watch house sergeant has determined, based on their consideration of the criteria under the Bail Act, that the accused person is suitable for bail or bail is granted, the conditions of bail to be imposed are explained to them and, where they are willing to accept those conditions, they are given the opportunity to sign the bail paperwork, given a copy of the bail paperwork, including the statement of facts, and then released from custody.

Alternatively, where the watch house sergeant has determined, based on their consideration of the criteria in the Bail Act, that the accused person is not suitable for bail or bail is opposed, they are advised that, if court is sitting, they will be conveyed to court, and, if it is outside of court hours, they will remain in custody until court sits. Where an accused person is not satisfied with the watch house sergeant’s determination in relation to bail, they can seek to have the bail decision reviewed. If they choose to do that, the decision is usually reviewed by an independent sergeant, who is a patrol sergeant in most cases. At a high level, that is the intake process.

MS VASSAROTTI: Thank you.

Ms Cheyne: Can I, then, give the intent of the bill, as cover for some of that? So, I think where our conversations—and again, I iterate the view expressed that they have been really constructive to date—I think, that from a drafting perspective, we do think how we have calibrated the duty is sufficient and is precisely to avoid a burden. But I think there is a question about where that clarity lives.

So, at the moment it is in the human rights compatibility statement and in the explanatory statement. So, I think there is a question of, would it actually aid decision-makers if it is in the primary legislation? I am agnostic about that, but I am also conscious of the broader Bail Act framework and drafting practices. And I am not a drafter, but I think, ultimately, having something that all agencies and decision-makers have confidence in and is workable, that is exactly what we are looking to achieve.

To super-clarify: regarding the decision-maker, the intent is that they are considering things that are observable, disclosed, readily available. So, through speaking to the accused, through those police holdings, the intake forms. And the onus, really, is on the accused about what they are putting forward. And I have said before, I am not expecting an MRI to be undertaken. I am not expecting a sonograph to see if someone is pregnant—is that what it is? I am not expecting, you know, someone chasing a clinical decision at 3 am to find information that is otherwise not readily available. So, decision-makers are not expected to go find it, and go on some big investigation.

But, conversely, we do still want the decision-maker to be alive to, or considering, what support a person might need.

I think there have been some occasions—and I think any occasion that I am thinking of is not in the policing space—where an unmet need—so, housing not being available, or a person’s disability, or their mental health status—that unmet need has been treated as a reason for custody. And I think we know that any touchpoint with AMC, ultimately,

is a criminogenic factor.

And, I think, what has been really driven home to me is remand is not crisis accommodation, and it is not disability support, and it is not a substitute for having a roof over your head. So, I think that us naming these matters explicitly is about reducing the risk that an under-supported person is kind of quietly being held, and sometimes for a long time, because no one turned their mind to the alternative. And it is just about providing confidence that the mind was turned to that, at the time.

THE CHAIR: The evidence we have heard from Legal Aid, I think it was, is that some of the mandatory considerations as you have outlined are already being covered in your bail consideration form, and that, you know, the additional considerations would probably be the new sections on disability and the children's section. I just wanted to get your views on whether or not that is sufficient and whether there is, then, a need to mandate—noting that the evidence is that it would add time, for example, in matters where bail is not opposed.

Mr Lee: Do you want to talk to that, Matt?

Mr Sprague: In matters where bail is not opposed, they would potentially be released from our custody, depending on the nature of the presumptions of bail. So, if that would help, I could probably outline those—

Mr Lee: I think it is more in the context of—for the chair, just in terms of our considerations. But I think, going to what Detective Superintendent Sprague outlined before, when we undertake our watch house intake as it relates to mental health, health, some of those other factors, an element of that relates to bail but a key component of it is actually more to do with the person's safety in custody.

So, the concern we have that where it is—and we certainly support the codification—but where it is a “must consider” and in some of these areas where it may require, then, specialist clinical advice or expert clinical advice or other expert evidence to inform a decision-maker, it is just really that clarity for our decision-maker that where they consider—I think as the Attorney outlined—it is readily-available information, but at 2 am in the morning the authorised officer does not feel that to meet their obligations they have to then seek expert evidence, or expert advice to inform the bail decision. So, that is the difference.

THE CHAIR: So just to clarify: you support the codification but probably a “may consider” not a “must consider”?

Mr Lee: Well, I think we are comfortable with the “must consider” so long as, I think, the legislation is clear. And certainly, as the Attorney said, there has certainly been some work with the directorates around the explanatory memorandum. But certainly, from an ACT Policing perspective, we would be more comfortable if it was contained within the legislation, and it outlined details that go to what material is readily available. And be explicit that there is no requirement for additional inquiries or additional investigation to be undertaken; it is the information that is available that is considered by the decision-maker at that time.

Dr Paterson: Ms Barry, what the current explanatory statement says is “the bill does not impose an obligation on decision-makers to undertake investigations into each of these matters listed in the sections” when making bail decisions and:

In some cases, as set out below, the relevant matters are presented as general considerations for the decision-maker to turn their mind to. There is no requirement for authorised officers to specifically ask the accused person, or for parties to specifically make submissions about, those general matters.

So, what we are discussing, and what has been an ongoing discussion, is whether that is sufficient or whether there should be some slight wording in the bill.

Ms Cheyne: We also accept and will work with policing and others about the onboarding material relating to these reforms. So, there is what do we make explicit in the bill itself, versus what is in the ES and in the human rights compatibility statement. But then there is the work that we will do—and that is why there is a delayed commencement date—to ensure that everyone is feeling pretty comfortable about what this looks like.

I think there was some evidence from the law society, before, about a lot of these are routinely considered anyway, and so, in terms of a material difference for many people and many officers and many court decision-makers, there is not going to be too much change. It is about there being some confidence and consistency about those things people turn their minds to.

So, if I can be exceptionally crude—I might regret this—if someone turns up and they are eight months pregnant, that is probably a pretty obvious disclosure to someone. If someone is at the watch house and they say they are pregnant, then that is a relevant disclosure. But we are not asking police to ask every single person, “So, tell me: how many months are you along?” “Well, none.”

That is not the level of investigation that we are asking them to do. It is things that are being readily disclosed or available to them.

THE CHAIR: Thank you.

MS VASSAROTTI: Picking up on some of your previous commentary, Minister Cheyne, with the reflections about AMC not being crisis accommodation, we have heard a bit of evidence about the importance of the service system that needs to wrap around this bill and this piece of legislation. In particular, the Justice Reform Initiative talked about the fact that, here in the ACT, we do not currently have a bail support program that is connected to the courts. I am interested in understanding the government’s intentions in terms of the service system that wraps around the act, when it comes into effect.

Ms Cheyne: Funnily enough, Ms Vassarotti, just a few hours beforehand, I met with the Sentence Administration Board, and we talked about where it is most appropriate for someone to be. I think that is almost at the heart of these reforms as well. If there are those supports available and they are more appropriate, that is where someone should be, rather than remanded. I will hand over to officials to talk a little bit about

where some of our bail support program work is up to. It is not at the level of maturity that I would like it to be, but it is certainly developing, and it is better than it has been.

Ms Haigh: Ms Vassarotti, the government is working closely with the Elected Body, with the aim of preparing a response to a range of the Jumbunna report recommendations. This includes a response to an implementation plan, which responds to recommendation 8.4, concerning an expansion of the Ngurrambai Bail Support program, and extending that program to children and young people. I suspect you will be aware that there was additional funding provided in the recent budget to support that expansion, and that work remains ongoing. Mr Ng, is there anything further that you would like to add?

Mr Ng: I have read and understand the privilege statement. I will add to Ms Haigh's evidence by reflecting that there has been funding to the Ngurrambai Bail Support program. The appropriation in the 2025-26 financial year is \$417,627. That increases to \$430,000 in the 2026-27 financial year. That funding is currently dedicated to adults, but the work that Ms Haigh has alluded to relates to a potential expansion to cover young people.

Dr Paterson: Ms Vassarotti, some of the work that I have been doing in the corrections portfolio has been looking at bail accommodation, and options there. I have been in discussions with Minister Berry around the types of options, as well as looking at models interstate for bail accommodation. That is definitely something that we would like to pursue here in the longer term.

MS VASSAROTTI: Could I flag, if it does not come up in the discussion today, that I will probably be putting some questions on notice, particularly around section 9, which I suspect might already be getting looked at. I am also interested in some of the drafting discussion, particularly around the use of the term "victim" in relation to bail.

Ms Cheyne: Yes, we certainly heard Ms Musgrove, loud and clear.

MS VASSAROTTI: Yes, it was interesting.

Ms Cheyne: Consistency is key, in terms of our drafting, so we will look at that, definitely.

THE CHAIR: I have a few questions for the Attorney-General. Forgive me for not clarifying this with the Victims of Crime Commissioner, but she did mention a risk assessment tool that is currently being developed or has already been developed. I want to get a better understanding of that. I am sorry; is that for you?

Dr Paterson: Yes.

THE CHAIR: One of the suggestions she made was for the risk assessment to be enhanced to ensure, for example, that the Victims of Crime Commissioner and domestic and family violence services can input into a bail hearing. I want to clarify what that tool is, how it is being used and whether you see a need to expand that tool to include what the service providers have suggested.

Dr Paterson: That is the risk assessment and management framework. That work has been underway for over a year now, in the development of the second version of that framework. That was specifically to expand the framework based on the current evidence and to include coercive control in it.

This framework is a notifiable instrument under the information sharing act. We will have the information-sharing scheme commencing in November this year, and that is whole-of-government information-sharing. There are entities defined as government entities, and we are working with our community services to see them potentially being defined as entities in the long term as well.

This risk assessment and management framework is a risk assessment tool that will provide consistency across government and the community sector to assess risk in respect of domestic and family violence. It is an important tool. We have funding in this year's budget to commence training across government. That tool is being developed into a training package, and training will commence in different sectors of ACT government.

We will also look to implement and employ an information-sharing coordinator, which will be a single point of coordination across government. There is already substantial information-sharing across government, but this basically legislates for it and, where there may be disputes in information-sharing, the coordinator will then be the decision-maker over that process.

It will provide everyone with a common understanding of how to assess risk. Police already do this on a very regular basis, and this will complement their work. It expands it to other agencies—for example, Health and Education, which also come into contact with people who may be at risk. Ultimately, it is a best-practice model. It is in other jurisdictions as well, to a greater or lesser extent, in terms of their implementation of these types of information-sharing schemes. This is all work that will be coming in the second half of this year.

THE CHAIR: That is really useful information. Is it anticipated that this tool would be used to assess risk in bail hearings?

Dr Paterson: No, I do not believe so. Police will use their frameworks; they will be working with the perpetrator.

Mr Lee: It probably could. At the moment, Ms Barry, when our members respond to a domestic and family violence matter, we have a risk assessment tool that they need to complete. It is an operational, tactical decision-making tool. With the risk assessment framework that the minister outlined, I believe it will contribute information into that assessment process. It is more of a cross-sector or whole-of-sector risk assessment framework. I think it could well inform decisions around bail. Obviously, it will be more of a holistic view of an individual's risk, based on greater information held across the sector. It probably could be used, yes.

THE CHAIR: I think DVCS and the Victims of Crime Commissioner were alluding to the fact that you have greater information-sharing with this tool, but it could potentially support a bail application because then, in DVCS's words, you are having

the experts feeding into this tool, and it makes for a better decision.

Mr Lee: Absolutely.

THE CHAIR: I have some clarification questions. Legal Aid, in their submission, mentioned that the practical implication of sections 22A(d) and 22A(h) is largely duplicative. I want to get your views on whether you think that is correct.

Ms Cheyne: On the history of bail compliance?

THE CHAIR: In terms of bail assessment, relevant factors generally. The Legal Aid submission indicates that (d) and (h) have the same effect in practice. How do you see the difference working in practice?

Ms Cheyne: We do not necessarily agree that they are duplicative, but I think we take the point that we could see whether we should be streamlining these into one, with both factors under the history of bail compliance. We think that they are separate factors. Where a person is on bail at the time of the alleged offence, this is a relevant consideration, as is any previous history of compliance or noncompliance with bail. They are two separate factors, in our view, and we do not think it is about requiring double handling. We are happy to look at the drafting and how that is clarified.

THE CHAIR: I have another clarifying question. The Justice Reform Initiative submitted that perhaps one other condition that could be included in in that section is the reason for breach of bail. Have you considered that?

Ms Cheyne: I am open to that. I am just checking whether I have advice that says that I should not be.

MR WERNER-GIBBINGS: Tentatively open to it!

Ms Cheyne: That is probably a relevant factor—that history of compliance. I think that another submission says that it is not just a history of noncompliance but a history of compliance. Ms McKinnon is nodding, which tells me that she knows what we are talking about. I think that all of those are relevant considerations, and perhaps it is being too narrow to just talk about whether they were on bail and/or what their history of noncompliance is. Should we broaden that to history of compliance or noncompliance and, if they were noncompliant, what was the reason for it? Were they skylarking or were they in danger? Is that correct?

Mr Ng: Just to supplement the attorney's advice, in some respects, I will guide the committee to page 26 of the explanatory statement, on the issue of the difference between the history of compliance and alleged offending while on bail. We do see that those are slightly different, but they will be relevant to the same sort of facts. That approach that we have taken has sought to be consistent with the approach that is taken in New South Wales, Queensland and Victoria. I wanted to draw that to the committee's attention.

THE CHAIR: Thank you. The Bar Association, in their evidence, indicated that the effect of section 23A(a) is that mandating considerations for the prosecution does

impede the prosecution's discretion on what evidence to present. Have you contemplated that and do you think that is balanced and—

Ms Cheyne: I listened carefully and heard that, loud and clear. It is not our intention that their discretion is limited in any way; it is more that these are the things that are relevant information that should be presented. If there is other relevant information that should be presented, go for your life.

THE CHAIR: Similarly with (b) as well, the concerns are that this is contextual evidence, “he says, she says” type evidence. It is not factually based, and it would be difficult for an accused person to prove. I want to get your views on that, and whether you share those views.

Ms Cheyne: With what we are trying to balance here, we are not trying to create something where the burden on proof then creates a time lag, delay or anything further.

MR WERNER-GIBBINGS: I have a question for the Attorney-General and team. The Bar Association earlier today queried certain provisions in the bill relating to victims' views and highlighted section 23A. Does that interfere with prosecutorial discretion or further concerns?

Ms Cheyne: Similarly to Ms Barry's questions, no. We are outlining what should be relevantly presented, but anything else that might be relevant can also be put forward. I will ask officials to expand on that.

Ms Haigh: I draw to the committee's attention the existing relevant provision in the Bail Act, which requires that the prosecutor is required to make the court aware of the views expressed by the victim. It is continuing to replicate that, as well as arguably increasing the prosecutorial discretion by the introduction of both subsections (a) and (b).

MR WERNER-GIBBINGS: The Bar Association also raised concerns about the court receiving other information from victims. Is the court bound to accept the information without testing it as evidence, or is it required to take that information into consideration? How is that information treated?

Ms Haigh: The court will weigh up all the evidence and information presented to it by both the prosecution and the defendant, and take all those various factors into account to reach the decision that, in this instance, the court considers is the most appropriate bail outcome, after carefully weighing a range of factors.

MR WERNER-GIBBINGS: So it does come down to the discretion of the court to treat the information that it receives as it deems appropriate?

Ms Haigh: That is right, yes. This legislation is in no way looking to bind the court to any particular outcome. The court will continue to carefully weigh up a range of factors and take into account the particular facts and circumstances relevant to the matter that the court is considering in that moment.

THE CHAIR: Turning to your submission, and more substantial reforms around

expanding the presumptions against bail, the evidence that the committee has heard, particularly strongly from the Human Rights Commission, is that the presumption against bail is inconsistent, or incompatible, with section 18 of the Human Rights Act. I want to get your views on, firstly how you see that playing out in practice and, secondly, whether it is still your submission that you support an expansion of the presumption against bail.

Mr Lee: Certainly, ACT Policing's position, as per our submission, as well as our own earlier submission, is that we are still supportive of working with government around additional offences where there may be presumptions against bail. That would need, obviously, to be an evidence-based discussion with government. Where we are seeing offences or conduct, we are of a view that there is increased risk to the community as a result of some of that offending. But that is outside the scope of the bill. It would be something on which we will continue to engage with government into the future.

Ms Cheyne: You have probably heard today, Chair, lots of views that are in quite extreme tension about presumptions. This bill does not contemplate amending presumptions. It is about decision-making and the considerations regarding decision-making. It does not stop people from the agencies sharing their views, but it is outside the scope of this bill.

THE CHAIR: Is there any work currently ongoing to—

Ms Cheyne: No.

THE CHAIR: I guess, expand or remove the presumption?

Ms Cheyne: No. The focus has been on this.

THE CHAIR: Going back quickly to the mandatory requirements in the bill, there was evidence from Legal Aid that perhaps the requirements should not apply where bail is not opposed. I want to get your views on that.

Ms Cheyne: I heard that, too, and I appreciate that that argument is somewhat compelling. For me, there could be a circumstance where bail might not be opposed, but perhaps something has been missed, or whatever it might be, that is a relevant consideration. Again, you have heard that decisions are happening quickly. Sometimes there has been very little time for people to get their head around what is in front of them. There could well be a circumstance where bail is not opposed but a decision-maker pulls up a piece of paper, looks underneath and sees a victim saying, "I'm fearing for my life." It has been years of coercive control, or something like that.

That is what we are trying to balance here. Again, I do not wish to dismiss Legal Aid's evidence, but in terms of the amount of time that it takes to consider these things—and you would hope they would be considered routinely, anyway—I do not think there will be the time impost that they have said that there might be.

THE CHAIR: I want to get your views on how the application of the bill will increase or decrease your workload. What is the resourcing implication of the bill for you?

Mr Lee: I might pass to the Deputy Chief Police Officer on that question.

Mr Chin: Ms Barry, as Superintendent Sprague pointed out, there are already a range of factors that are considered. It really comes down to how we work with the government on those considerations being information that can be reasonably obtained at the time. You have had evidence around the depth of inquiry that already happens, and I think that will probably cover quite a lot of what we are already thinking about.

I think it is just a matter of ensuring that we meet the intent of the items that are covered. With respect to extra resourcing or an impost, it probably comes down to that sense of how deeply we go into what is mandatory. Once that is clarified, as has been pointed out, in terms of the explanatory statement, there should not be much more of an impost than what is already carefully considered.

Dr Paterson: It is not designed to be an impost on police. It is designed to be a codifying of decision-making for both police and the courts, to really streamline how decisions are made. We will continue to work with ACT Policing, once the bill comes into effect. If there are challenges, we will work with them to address that.

THE CHAIR: I have some clarifying questions around data.

Ms Cheyne: It is terrible.

THE CHAIR: Okay; I will not ask the question!

Ms Cheyne: I probably do not have it!

THE CHAIR: Is it that some data is not being collected or is it being collected on an ad-hoc basis? I refer, for example, to the number of people who have been granted bail and then gone on to reoffend whilst on bail, and the number of people who have not been granted bail and are in custody, and whether or not the circumstances for not granting bail are captured.

Mr Lee: Certainly, on the data that we capture—

Ms Cheyne: I am sorry; I was speaking for us and the courts. Policing's data is much better.

Dr Paterson: And corrections, on the other side; there is a bit of a gap there.

Ms Cheyne: But we will tease all this out.

Mr Lee: Certainly, we do have data in relation to where people have been granted bail and then reoffended, whether that is for a breach of bail or they commit other offences whilst on bail. We do capture that data within the Policing systems. In terms of the second part of your question, around remand, I will look to my colleagues for any assistance on that, or we may need to take that on notice. I do not think we would capture that.

Dr Paterson: I think it is captured under corrections.

Mr Lee: It would be recorded in our systems, where it is remanded—

THE CHAIR: Could you take it on notice?

Mr Lee: Whether it is extractable is the other issue. We can certainly take it on notice and have a look for you.

THE CHAIR: Thank you. You may also need to take this on notice: how many people have been held on remand and subsequently been found not guilty? I do not know whether that is courts data.

Ms Cheyne: That is a very interesting question. I can probably take it a little further as well. The data that we do have that is pretty reliable, and corrections is now routinely publishing this, is on the number of people in AMC and the number of people on remand. Close to 50 per cent of all detainees are remanded. That is—

THE CHAIR: Fifty per cent of detainees are remanded—

Ms Cheyne: Remand, sentenced.

THE CHAIR: Yes.

Ms Cheyne: Remand means “bail refused”.

THE CHAIR: When you say you are close to 50 per cent of people on remand, has it been—

MR WERNER-GIBBINGS: Fifty per cent of people in AMC are on remand.

Ms Cheyne: In AMC, yes.

THE CHAIR: Okay; so 50 per cent of people in AMC are on remand?

Ms Cheyne: That is right.

THE CHAIR: Okay.

Ms Cheyne: That is consistent nationally, but it is problematic on so many levels—so many that I am not even sure I want to start listing them, because we could be here all day—but particularly because of the presumption of innocence, ultimately. What we are seeing—and this goes to the efficiency of the administration of justice and the access to justice and court efficiency—is that there can be some people who may be held on remand who, yes, might end up being found not guilty or there are some circumstances where charges may be withdrawn or the prosecutor, the DPP, may choose not to proceed. I think what we are seeing more commonly is that there are people who have been held on remand and then have been sentenced and they have been sentenced effectively for time served. That is a real concern because—and, at the moment, we are looking at how we can reform this—people who are on remand in AMC do not have access to any programs, supports or anything like that. So if someone has been on

remand for a year and then—

Dr Paterson: Not the criminogenic ones; they do have access.

Ms Cheyne: Yes, that is worth clarifying—and I will hand to Minister Paterson in a moment. We can have the circumstance where someone may have been held on remand for a reasonably longish period of time, six or 12 months, and then their sentence means they are basically released on the day of sentencing and can have no real transitional mechanism in terms of getting back out into the community. Minister Paterson has a worthwhile clarification.

Dr Paterson: Just to clarify: Corrections has been doing a lot of work to be able to offer programs and support to detainees who are on remand. But where there is a bit of a threshold and a line is around the criminogenic program. For example, with the sex offender program and, I believe, the domestic violence EQUIPS program as well, if someone has not pled guilty or been found guilty of those programs then they are not applicable. It is the view that it might impact their court case. What Corrections is trying to do is to offer as many broad programs to detainees who are coming in on remand. But, yes, it is ongoing work.

THE CHAIR: So, just to clarify, you currently do not have data around where they are on remand and then found not guilty?

Mr Lee: Chair, there may be Australian Bureau of Statistics reporting on that issue. If I could take it on notice for the moment and perhaps come back to you before the end of the hearing, I would be happy to.

THE CHAIR: Thank you. The other data that I am hoping that you would probably have is for people who have breached their bail conditions and are remanded. Do you capture that data—as opposed to people who have breached bail by committing further offences?

Mr Lee: I think we will need to take that on notice in terms of where someone might be on bail, if they reoffend into remand, we would need to see whether that is extractible.

THE CHAIR: Yes; whether you capture it.

Mr Lee: Yes; we can certainly look at that for you.

THE CHAIR: Thank you. I have another question related to that. There have been suggestions that perhaps there needs to be conversations around whether a breach of a bail condition like failure to attend or failure to reside at a premises is a criminal charge. Have you had conversations about whether or not that needs to remain a criminal charge?

Ms Cheyne: I think reasonable views vary. Ultimately—and it comes back to that earlier conversation that we were having with Ms Vassarotti—it is about decision-makers having the relevant information to make the decision that is best in terms of the risk that is posed to the person or the community. There are some conditions that are

more difficult for someone to meet, depending on their circumstances, than others. For example, let's say that you might be someone who routinely might be living on the streets. They might be required to reside at a residence but, actually, they have been on the streets for x amount of time. Would that be something reasonable to criminalise? I do not think so. Similarly, someone might be living on the streets and does not have a watch or a phone. They might not know that they need to be turning up and presenting at a certain place, at a certain time. Again, it is about making sure that, whatever conditions are attached to a person's bail, they are appropriate for a person's circumstances and the risk.

Ms Guo: Building further on the Attorney's points, I think it is very dependent on the situation. There can be some technical breaches associated with those breaches of bail. Other considerations might be one of the bail requirements is the person is not have alcohol or drugs, but that person might be having a co-dependency associated with that. So the challenges associated with enforcing that breach there maybe can be seen as unjust.

THE CHAIR: Thank you. Just for my own benefit: for people who have been held on remand and who have then subsequently been found not guilty, is there a compensation scheme? How does it work if someone has been held on remand and then subsequently found not guilty? It is clearly around the loss of personal liberty.

Ms Cheyne: I do not know. I can take it on notice, unless—

Ms Haigh: We would defer to colleagues from Police, but I think that, generally, if the process has been followed properly, there would be no automatic recourse to compensation as the starting proposition.

THE CHAIR: Thank you.

Mr Lee: Depending on the circumstances, it is open to a person to seek or to undertake some type of a settlement for costs or other litigation action if they believe there are grounds in terms of police action. In the situation where a person was remanded and then found not guilty, it would depend on the circumstances of the case and whether there were grounds for that person to bring a claim against the police or the prosecution. It would depend on the circumstances.

THE CHAIR: Where would I go to find that information? Who would hold that?

Mr Lee: In terms of our own guidelines, we would hold some of that information—in terms of the process, if you like, that might be open to a person.

THE CHAIR: Would you be able to provide that on notice? So in the last five years anyone who was found not guilty—

Mr Lee: It would be publicly available, but we can work through that and would be happy to provide that to you.

THE CHAIR: Thank you. The Justice Reform Initiative mentioned a few things. One was the idea of a hostel, where a person is not held on remand. It goes to the question

around accommodation being a huge consideration in the granting of bail. Perhaps the hostel scenario could potentially work to remove those instances where people are held on remand awaiting trial. I wonder whether consideration has been given to a model like that.

Dr Paterson: Yes. I answered Ms Vassarotti's question around that. We have been looking at models of bail accommodation and at some models that are used interstate. There have been discussions around how we could potentially implement something like that here.

THE CHAIR: Here in the ACT?

Dr Paterson: Yes.

THE CHAIR: I think I had one more question. It has escaped me now. I will put it on notice.

Ms Cheyne: It has been a very long day for the committee.

THE CHAIR: It has, yes, but we have had a few breaks in between.

Ms Cheyne: True, but still.

THE CHAIR: It has come to me; you probably will not be able to answer it.

Ms Cheyne: We will try.

THE CHAIR: One of the other recommendations that the Justice Reform Initiative put forward is for perhaps a minimum remand time to be considered, similar to what happens overseas. The UK was an example. I think it was 70 days for non-indictable offences and six months for indictable offences. Has any consideration been given to that?

Ms Cheyne: Not actively, Chair, but I am open to anything that produces a good outcome. There is an issue of risk here. We might solve one problem and create another. But what we are doing as a whole is working closely with the courts about what efficiency looks like. Similarly, with the DPP, some of the funding that they have received through this budget will be directed to—it has many different names—effectively a team that looks at cases or matters that are before them really early and confirms whether they should be proceeding to mention or not, to committal or whatever it might be.

There have been some instances where someone might have been held on remand for a period of time, it has got to the point where someone has picked up the matter and it is going to court in a few days' time, and they say, "Actually, I think it is not in the public interest to continue." We are trying to weigh that action as early as possible rather than as late as possible, because we think that will have some benefits in reducing the amount of people on remand.

Dr Paterson: Something like 40 per cent of the people on remand are remanded for

domestic and family violence-related charges. The risk element, if there was a flat, blanket release date, is pretty significant. It should be considered that a court would have assessed all of these risk factors and determined that they posed a risk, potentially, to a victim, which is why they were remanded in the first place. I understand the premise and the intent of that recommendation, but I think that it comes with some risks. It would be better, as the attorney said, to see how we can make courts and the process more efficient rather than having some blanket point in time.

THE CHAIR: We had a conversation this morning with the Domestic Violence Crisis Service around the upskilling of both Policing, in terms of domestic and family violence upskilling, and the judiciary. Are any conversations currently being had to do that work? Also, there has been some suggestion that if there was perhaps a separate, specialist family violence court, we would be better served with that.

Noting, again, your stats around 40 per cent of people being on remand, I anticipate that the reason is that the matters are not going through the courts quickly enough. Are you considering whether there should be additional training? In DVCS's words, the fact that these laws exist does not necessarily mean that they would provide better outcomes, if you do not have the specialist knowledge, essentially.

Mr Lee: Chair, we can certainly talk about the police training and the capability uplift that we are doing at the moment, which is significant. I might hand over to the Deputy Chief Police Officer, who can outline the training that we already have in place and what we are progressing.

Mr Chin: We have been undertaking extensive training across the whole of ACT Policing for the last few weeks. It is very recent, very contemporary and very detailed. Our specialist family violence area has been delivering that training. It is a package that they have developed at Swinburne university—a two-day package that everyone from superintendent to constable has been undertaking, across the whole of ACT Policing.

It goes into some significant depth around the underlying factors surrounding family violence—issues such as mis-identification of victims, coercive control and the nuances. It is very comprehensive, and it has been quite recent. We have certainly implemented that significant uplift in recent times, and we are looking to build on that into the future as well.

THE CHAIR: Attorney-General, has there been any conversation with the National Judicial College about some uplift in—

Ms Cheyne: In terms of training, at least at our local level, there is funding for our courts for judicial officer training in relation to coercive control, which is great. It is, I know, an area of focus for the new Chief Magistrate as well, in terms of making sure that those skills are shared across all of the magistrates. That is certainly true as well for our criminal judges. In terms of a family—

THE CHAIR: Specialist family violence court.

Ms Cheyne: No, it is not being considered. You would know, better than most, Chair, that hiving off a part of the court does not change the resourcing ask. In fact, it would

create a much bigger resourcing ask, not least through accommodation, as well as through staffing and whatnot. At the moment, we still believe that there are some interventions, actions and investments that we can take at the front end of the system that mean we can improve some of the efficiencies throughout each stage of the court process.

It is still complex. What we hear most readily from the Supreme Court is about the complexity of cases and the complexity of trials. There have been a considerable number of trials where juries have not been able to reach a verdict. All of that costs the system as a whole. It costs time. It costs AMC time, if someone is remanded. It basically just extends the cost. There are lots of threads to the fabric and, if you pull one, the others adjust as well.

THE CHAIR: It unravels the others.

Ms Cheyne: We have to be constantly looking at this.

THE CHAIR: On behalf of the committee, I thank you for your attendance today. If you have taken any questions on notice, please provide your answers to the committee secretary within five business days of receiving the uncorrected proof *Hansard*. Thank you very much.

The committee adjourned at 5.10 pm.