

# COMMUNITY LEGAL CENTRES TASMANIA

12 March 2025

Members of the House of Assembly  
Parliament House  
Hobart Tasmania 7000

To all members of the House of Assembly  
**Re: *Bail Bill 2024***

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Community Legal Centres Tasmania (CLC Tas) welcomes the opportunity to provide comment on the consultation on the *Bail Bill 2024*.<sup>1</sup> We support the Tasmanian Government's aim to codify, consolidate and clarify existing bail laws. However, we are concerned that the proposed introduction of an unacceptable risk test will result in increased numbers of people being refused bail and likely increase pressures on an already overstretched prison system.

CLC Tas is the peak body representing the interests of nine community legal centres (CLCs) located throughout Tasmania. We are a member-based, independent, not-for-profit and incorporated organisation that advocates for law reform on a range of public interest matters aimed at improving access to justice, reducing discrimination and protecting and promoting human rights.

- ***Simplifying and clarifying bail law***

The failure of our legislators to clearly articulate the purpose and objectives of bail contributes to the lack of understanding and uncertainty in the wider community. This confusion is compounded by the competing considerations that the judiciary must weigh up in their decision to grant bail. We therefore strongly support the adoption of a clear statement that sets out the purpose and objectives of bail as well as articulating the principles that underpin the grant of bail.<sup>2</sup> Importantly, the Bill articulates the presumption of innocence and the *prima facie* right to liberty, limited only to the extent necessary by the administration of justice and the protection of the community.

- ***Unacceptable risk***

It is a long-established principle of both Australian and international law that a person is innocent until proven guilty<sup>3</sup> and that a person should only be deprived of their liberty where there are appropriate grounds for doing so. In Tasmania, the seminal case in *R v*

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<sup>1</sup> CLC Tas would like to acknowledge those persons and organisations who gave freely of their time in assisting with our submission.

<sup>2</sup> Clause 3 of the *Bail Bill 2024* (Tas).

<sup>3</sup> Article 14(2) of the *International Covenant on Civil and Political Rights*.

*Fisher*<sup>4</sup> in which Crawford J affirmed the fundamental presumption “... that *prima facie* every accused is entitled to his freedom until he stands trial”<sup>5</sup> except in cases where an accused is charged with murder. Crawford J then sets out a non-exhaustive list of factors that should be considered in determining the grant of bail.<sup>6</sup>

More recently, Victoria, New South Wales and Queensland have sought to emphasise the safety and welfare of the community by introducing an ‘unacceptable risk’ test. The test requires a court to refuse a bail application if satisfied that there is an unacceptable risk that the accused if released on bail would:

- Fail to surrender himself or herself into custody in answer to his bail;
- Commit an offence whilst on bail;
- Endanger the safety or welfare of members of the public; or
- Interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or herself or any other person.

Whilst all of these factors are broadly recognised in the Tasmanian decision of *R v Fisher*, it is acknowledged that as the law currently stands, the primary consideration is whether the accused will answer bail. The Bill’s elevation of the public interest above other factors is likely to result in increased numbers of people being refused bail and increase pressures on an already overstretched prison system.

In a 2002 Tasmania Law Reform Institute report it was observed that the proportion of prisoners on remand in Tasmania’ had increased over the previous decade from 12.3 per cent to 20.8 per cent.<sup>7</sup> The most recent data is even more dire for people on remand, with the Australian Bureau of Statistics reporting that the number of Tasmanians in custody who have not yet been sentenced has grown significantly, from 28 per cent a decade ago to 41 per cent in 2024. Expressed in another way, 4 out of 10 people housed in prison in 2024 were awaiting trial or sentence.

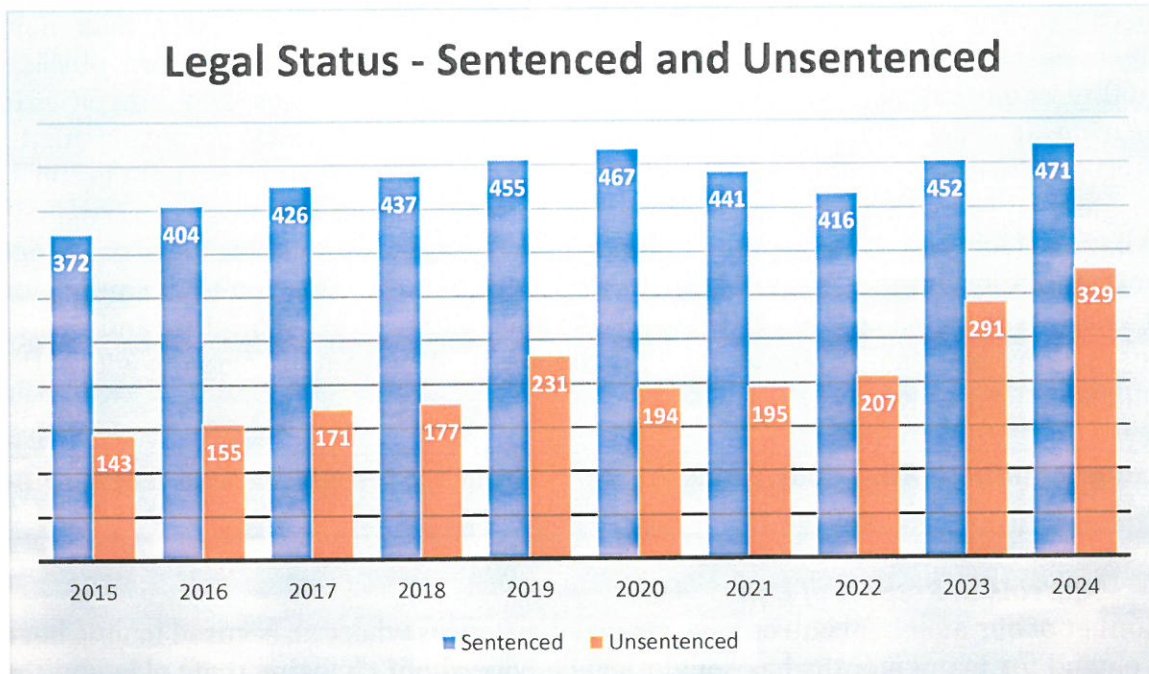
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<sup>4</sup> (1964) 14 Tas R 12.

<sup>5</sup> (1964) 14 Tas R 12.

<sup>6</sup> (1964) 14 Tas R 12 at paras. [8]-[19] per Crawford J.

<sup>7</sup> Tasmania Law Reform Institute, Offending while on Bail Research Paper No 1 May 2004 at 6.



Source: Australian Bureau of Statistics, *Prisoners in Australia, 2024*, Table 14.

The proportionately large number of people imprisoned without having been formally sentenced, means that any weakening of the presumption of innocence and their liberty is likely to place a significant strain on an already over-stretched prison system.

In the event that the Government does intend to proceed with the Bill, we are concerned that bail may be refused because the accused “is likely to commit an offence”.<sup>8</sup> We strongly believe that this threshold is too low and recommend that it be amended to “is likely to commit a *serious* offence”. In our opinion, the possible carrying out of a nonviolent crime such as drug possession or shoplifting should not be a reason to refuse bail. Expressed in another way, if a person is unlikely to commit a crime resulting in a term of imprisonment, they should not be refused bail. In New South Wales, the unacceptable risk test requires the likely commission of a ‘serious offence’,<sup>9</sup> while in Victoria a list of serious offences warranting the refusal of bail is set out in the Act.<sup>10</sup> In our opinion, a ‘serious offence’ threshold better balances the right of the accused and the protection of the community.

**Recommendation:** That the refusal of bail is narrowed to circumstances where there is an unacceptable risk that the applicant is likely to carry out a serious offence.

- ***Special vulnerabilities***

We strongly support the bail authority taking into account “any special vulnerability or needs of the person, including, but not limited to, age, health, background, nationality and ethnicity”.<sup>11</sup> While it is accepted that some bail authorities will take into account whether the applicant is indigenous we strongly recommend that this is explicitly included. This

<sup>8</sup> Clause 5(1)(iii) of the Bill.

<sup>9</sup> Section 19(2)(b) of the *Bail Act 2013* (NSW). Also see section XXX

<sup>10</sup> Section 4E(1)(a)(iaa) of the *Bail Act 1977* (Vic).

<sup>11</sup> Clause 5(2)(d)(m) of the Bill.

is because Aboriginal and Torres Strait Islander people are less likely than non-Indigenous persons to be granted bail,<sup>12</sup> due to high rates of mental and physical disability, communication and language difficulties, lack of education, and difficulties in appearing at court at an appointed place or time.<sup>13</sup> For example, according to the Australian Bureau of Statistics, 32 per cent of the Tasmanian prison population is Aboriginal or Torres Strait Islander compared to 5 per cent in the broader Tasmanian population.<sup>14</sup> As a result, 'indigenous status' should be expressly added to the broad range of vulnerabilities listed in clause 5(2)(d). We believe that the inclusion of this provision will assist in recognising the particular vulnerabilities faced by Aboriginal and Torres Strait Islander persons and better address the needs of Indigenous persons within the criminal justice system.

**Recommendation:** That 'indigenous status' is explicitly recognised as a factor to be considered.

- ***Appeals in Respect of Bail***

A number of our member centres have reported instances where an accused having been on remand for many months has sought legal advice about changing their plea and the likely sentences. Having received the advice, the accused has concluded that they are likely to get time served and have changed their plea to guilty. In other words, the accused has made the decision to plead guilty, not based on their guilt or innocence but for finalisation.

To uphold the established principle that an individual's liberty should not be deprived except in necessary and appropriate circumstances, clause 25 should be amended to include a provision that the referral for an appeal of bail must be heard 'as soon as practicable'. We are concerned that some individuals may be held in custody for a significant period of time before the refusal of bail appeal is heard. Inserting 'as soon as practicable' will ensure that appeals are heard in an expeditious manner.

**Recommendation:** That refusal of bail appeals are heard in an expeditious manner by explicitly requiring that they be heard 'as soon as practicable' after the appeal is lodged.

- ***Justices of the Peace***

Finally, we also note our concern that Tasmania's current systems allows justices of the peace to determine bail applications in afterhours sittings of the Magistrates Court. Alarming, justices of the peace are laypeople, require no legal qualifications, and are employed in a volunteer, unpaid capacity. We do not believe that delegating power to justices of the peace to hear and determine bail applications should occur. Anecdotally, we are aware that justices of the peace are reluctant to grant bail if prosecution and defence are not in agreement. In many cases, when the same application is made before a Magistrate the next

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<sup>12</sup> Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples - Discussion Paper* (DP 84: July 2017). As found at <https://www.alrc.gov.au/publication/incarceration-rates-of-aboriginal-and-torres-strait-islander-peoples-dp-84/2-bail-and-the-remand-population/background-28/> (Accessed 18 March 2021).

<sup>13</sup> Commonwealth Government, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Volume 3 at 51.

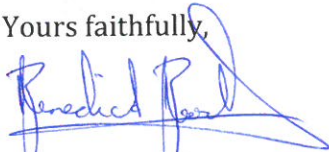
<sup>14</sup> Australian Bureau of Statistics, *Prisoners in Australia*, Table 15. Also see Tasmania 2021 Census All persons QuickStats.

day or in the days after bail is refused, bail is granted. The power to take away a person's liberty should be solely vested in judicial officers and be made only by a legally qualified decision maker.<sup>15</sup> This is especially important given that the refusal to grant bail can have major consequences, including impacting the individual's relationships, employment and housing situation.

**Recommendation:** That all bail applications are heard by Magistrates or Judges.

If you have any queries, please do not hesitate to contact us.

Yours faithfully,



Benedict Bartl  
Policy Officer

**Community Legal Centres Tasmania**

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<sup>15</sup> Victorian Law Reform Institute, Review of the Bail Act – Final Report (2007) at 84. As found at [https://www.lawreform.vic.gov.au/sites/default/files/VLRC\\_Review\\_of\\_the\\_Bail\\_Act\\_Final\\_Report.pdf](https://www.lawreform.vic.gov.au/sites/default/files/VLRC_Review_of_the_Bail_Act_Final_Report.pdf) (Accessed 18 March 2021).