

**1994**

**LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**BAIL (AMENDMENT) BILL 1994**

**EXPLANATORY MEMORANDUM**

**Circulated by the authority of  
Terry Connolly MLA  
Attorney General**

## OUTLINE

The proposed legislation contains amendments of the *Bail Act 1992*. The proposed amendments are technical in nature and are designed to reinforce existing policy.

One significant amendment will clarify the ability of police to grant bail when a person is arrested pursuant to a warrant. This could prevent a recurrence of the recent incident where the wrong person was held over a weekend.

It will not be possible for persons arrested under warrant to be granted police bail in all instances. The amendment confines police bail on warrants to circumstances where it is not feasible to bring the person before the court immediately (say, for example, the warrant is served on a weekend), the warrant does not expressly disallow bail and the offence is minor (punishable by a fine only or by imprisonment for two years or less).

Other significant changes proposed by the Bill include:

- there will be a right to bail in the case of breaches or apprehended breaches of the peace, except in cases that might give rise to a domestic violence order or other restraining order, or where there has been non-compliance with bail for a previous breach of the peace, in which cases bail will be discretionary;
- clarification that persons caught by the exceptions in section 7 may be considered for bail under section 8;
- the exception in paragraph 7(3)(a) is restricted to prior breaches of bail relating to the same offence;
- the court will be deemed to have dispensed with bail where no specific order or direction is made in respect of bail;
- a waiver provision will be inserted into section 16, allowing police to deny access to a lawyer in order to prevent the escape of an accomplice or the destruction of evidence and requiring police to record their reasons for denying access to a lawyer;
- police will be required to inform the accused, where bail is refused or a condition imposed, that he or she may apply for internal review of the decision;
- the court may continue bail following a committal or other deferment;
- the court will have an express power to amend conditions when continuing bail;
- bail will be deemed to be continued where an accused appears before a court after bail has been already been granted and the court does not make any further direction as to bail;
- the Minister may approve those forms which the Act currently requires to be prescribed.

## FINANCIAL IMPLICATIONS

The proposals contained in the Bill are budget neutral.

## CLAUSE NOTES

### Clause 4 - Interpretation

Currently, the word 'undertaking' has two meanings under the Act. The main meaning is the undertaking to appear, which is the bail bond. The term also refers to the undertaking given to observe certain requirements as to conduct as a condition of bail (eg reporting to police station).

The use of the term 'undertaking' with two meanings is a source of confusion. The Bill therefore proposes to amend the Act so that the term is used with only the one meaning, namely, the undertaking to appear, and that another term 'agreement' be used to describe the undertaking as to conduct.

This is the purpose of amendments contained in clauses 4(a) and (d), 10, 11, 12, 13, 15(h) and (i), 16 and 20.

The amendments in clauses 4(b) and (c) are related to proposed section 7A in clause 6.

### Clause 5 - Bail for minor offences and breaches of the peace

Clause 5(a) - contains an amendment of paragraph 7(3)(a) that would restrict the operation of that provision to prior breaches of bail relating to the same offence. This brings the provision into line with the equivalent NSW provision [subparagraph 82(a)(i) of NSW Bail Act]. A similar amendment is contained in proposed paragraph 7A(d).

Clause 5(b) - this amendment would omit paragraph 7(3)(c), which is already covered by paragraph 5(2)(b). Paragraph 8(2)(b) has been omitted from the proposed revision of section 8 for the same reason.

### Clause 6 - Bail for offences other than minor offences

In addition to the police power to arrest for offences an officer may also arrest for a breach or apprehended breach of the peace for the purpose of bringing the person before the court to seek to have the person bound over to keep the peace.

The provisions of the Bail Act do not currently apply to persons arrested for a breach or an apprehended breach of the peace. If the arrest takes place after hours, this can mean the police must either hold the person overnight for what may only be a trivial incident or let the person go. If a person arrested for a breach of the peace is brought before the court, the Magistrate must deal with the matter straight away, because to adjourn the hearing would require the person to be held in custody.

The philosophy of the Bail Act is that persons arrested for minor offences should have a right to bail without conditions. Arrests for breaches of the peace should be treated in a similar way and the Act should be amended accordingly, with appropriate exceptions (eg cases of domestic violence).

Accordingly, proposed section 7A would allow a right to bail without conditions, or on condition that the person keep the peace, in cases where the person is arrested for a breach or an apprehended breach of the peace, except cases where the *Domestic Violence Act 1986* or Part X of the *Magistrates Court Act 1930* may be relevant, or where there has been previous non-compliance with bail granted under section 7A.

Proposed section 8 - this is a revised version of section 8 of the Act, under which bail may be granted on a discretionary basis. The main purpose of the revision is to clarify that people caught by the exceptions in subsection 7(3) and proposed paragraphs 7A(c) and (d) may be granted discretionary bail under section 8.

#### **Clause 7 - Dispensing with bail**

Section 10 of the Bail Act allows the court, instead of bailing an accused, to dispense with the requirement for bail. This procedure is normally followed when an accused appears in court in response to a summons. The effect of dispensing with bail is that the person is entitled to remain at liberty until required to appear in court (section 11).

Proposed subsection 10(3) would deem the court to have dispensed with bail where no specific order or direction is made in respect of bail. The provision is designed to make things easier for judicial officers, especially during mentions when many of those accused are not even present in court.

Proposed subsection 10(4) is consequent upon the proposed amendment of section 33 providing for deemed continuations [clause 15(c)].

#### **Clause 8 - Determination of bail after charge laid**

Questions have arisen whether police can grant bail to a person arrested under warrant, or whether the person has to be brought before the court. The matter is not free from doubt, and the Bill proposes an amendment to clarify the issue.

The relevant provision is proposed paragraph 13(1)(b) in clause 8(a). It was not thought appropriate for persons arrested under warrant to be granted police bail in all instances. The amendment therefore confines police bail on warrants to circumstances where it is not feasible to bring the person before the court immediately (say, for example, the warrant is served on a weekend), where the warrant does not expressly exclude the possibility of bail, and where the offence is minor (punishable by a fine only or by imprisonment for two years or less).

#### **Clause 9 - Notification of decision of authorised officer**

Paragraph 13(1)(c) of the *Bail Act 1992* gives the accused rights to communicate with a lawyer, interpreter or other suitable person. Subsection 13(4) allows police to waive those rights where there is a risk of an accomplice being alerted or evidence being destroyed. This waiver could be an important safeguard in the event of a sensitive police operation. But a loophole in section 16 renders this waiver only partially effective. Under section 16, if the police refuse bail then the accused must be given a second opportunity to consult a lawyer. The waiver in subsection 13(4) does not apply to section 16.

In order to close the loophole, it is proposed that a waiver provision be inserted into section 16, allowing police to deny access to a lawyer in order to prevent the escape of an accomplice or the destruction of evidence. Accordingly, proposed subsection 16(2A) (in clause 9(b)) would allow the authorised officer to refrain from complying with subsection (2) on the same grounds as provided in subsection 13(4).

Where access to a lawyer is denied under proposed subsection 16(2A), proposed subsection 16(2B) will require reasons to be recorded [mirroring subsection 13(5)].

Clause 9(a) - contains an amendment requiring police to advise the accused of the right to internal review if they refuse bail or impose a (harsh) condition.

#### **Clause 15 - Continuation of bail and undertakings**

One of the most frequently used provisions under the Bail Act is section 33, the provision allowing for bail to be continued. But a number of problems of interpretation have arisen in relation to section 33, which certain amendments in clause 15 propose to remedy.

Clause 15(a) - this amendment seeks to clarify that bail may be granted following a committal or other deferment. At present section 33 allows bail to be continued only after an adjournment or postponement. There were doubts about whether a committal or other deferment (such as a deferment during jury deliberations) could be characterised as adjournments or postponements. The amendments in clauses 15(d), (f) and (k) are related.

Clause 15(b) - this amendment proposes to clarify that the court has the power to vary conditions when continuing bail.

Clause 15(c) - there are many situations where an accused appears before a court after bail has been already been granted and the court neglects to make any further direction as to bail. In those situations bail should be deemed to be continued, and that is the purpose of this proposed amendment.

Clauses 15(e), (g) and (j) - the word 'continue' and 'extend' is used interchangeably throughout section 33. These amendments standardise usage to 'continue'.

Clauses 15(h) and (i) - related to amendment in clause 4.

#### **Clause 19 - Failure to answer bail**

Section 49 of the Act makes it an offence to fail to appear in court in accordance with an undertaking. The policy objective of subsection 49(2) was unclear and following a review it is proposed that it be omitted.

#### **Clause 20 - Form of certain instruments**

The Act makes provision for various forms to be prescribed for giving effect to different procedures under the Act. To date only one form has prescribed in the Regulations, namely, the notice from the Superintendent of the Remand Centre to the Court that a bail condition has not been satisfied. A number of other forms were prepared by the Department, but they have no official status and are not binding on the users.

Prescription of forms has become unfashionable because of the difficulty of adapting the forms to changing circumstances. It is important, however, for forms such as the undertaking to be common to all users, be they the police, the Magistrates Court or the Supreme Court.

The amendment in clause 20 therefore proposes to allow for forms to be approved by the Minister. This approach strikes a reasonable balance between formality and administrative convenience.

Related amendments are contained in clauses 14, 17 and 18.