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**THE LEGISLATIVE ASSEMBLY FOR  
THE AUSTRALIAN CAPITAL TERRITORY**

**BAIL AMENDMENT BILL 2003  
EXPLANATORY STATEMENT**

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## **Bail Amendment Bill 2003**

### **Explanatory Statement**

#### **Outline**

In July 2001 the ACT Law Reform Commission's Report No.19 on Bail (the Bail Report) was transmitted by the Commission to the ACT Government.

The Bail Report contained 25 formal recommendations for changes to legislation and procedure relating to bail. On 19 June 2003 the Government tabled its response to the Bail Report in the Assembly. The Government Response formed the basis of this Bill.

The major change the Bill makes to the Territory's bail system is the explicit identification of crimes which attract different types of presumption: a presumption for bail, a presumption against bail and no presumption at all.

The Bill introduces a presumption against bail for charges of murder and its extensions, such as attempted murder, and accessory to murder. (Extensions of criminal liability are outlined in Part 2.4 of the *Criminal Code 2002*.)

The Bill removes any presumption whatsoever for the following serious crimes:

- manslaughter;
- industrial manslaughter;
- intentionally inflicting grievous bodily harm;
- sexual assault in the first degree;
- sexual assault in the second degree;
- sexual intercourse with a young person under the age of ten;
- manufacture of drugs of dependence;
- cultivation of prohibited plants for supply;
- wholesale or sale of prohibited substances or drugs of dependence;
- Commonwealth Customs Act drug trafficking offences;
- armed robbery;
- aggravated burglary; and
- treason.

The Bill also creates a neutral presumption towards bail for people charged with an offence involving violence, or threatened violence, if the accused person was found guilty of one of the following offences within ten years prior to the current charge:

- threat to kill;
- threat to inflict grievous bodily harm;
- stalking; and
- contravention of a protection order.

Removing any presumption for, or against, bail in relation to these serious offences will allow the courts to hear each and every case on its merits without any intervening statutory bias.

All other offences before authorised officers or the courts will retain a presumption for bail.

Introducing a hierarchy of presumptions for bail has no bearing on whether the accused is guilty or not. In *Chau v DPP (Cth)* (1995) 132 ALR 430, Kirby P noted that:

The setting of bail is not, as such, a comment on the guilt or lack of guilt of an accused. It cannot affect the process of the trial, the giving of evidence, the determinations of a judge or jury, the outcome of the trial or the subsequent sentence. Indeed, in the course of the trial, the grant of bail is rarely, if ever, alluded to. [At 445.]

In the same case, Gleeson CJ noted at 438 that:

A law conferring a discretion on a court can determine the factors to which the court must have regard in exercising the discretion, or the relative weight to be given to different factors, or it can provide that there is a presumption that the discretion should be exercised in a particular way, save in exceptional circumstances.

The Government is of the view that this Bill reflects this spirit. The Bill sets out the factors ACT courts must consider in exercising their discretion to allow, or disallow, bail.

Other measures introduced by the Bill include:

- expanding the criteria to be considered in bail decisions and to provide additional guidance to bail decision makers;
- adjusting the criteria for granting bail to children by ensuring the interests of a child remain a primary consideration but not a consideration that overrides all other considerations;
- clarifying the status of bail between a finding that charges are proven and a custodial sentence. The Bill ensures that any cases of this kind attract any presumptions relating to the charges involved and the likelihood of a custodial sentence is a criteria in disallowing, or allowing, bail; and
- clarifying the use of the term ‘special or exceptional circumstances’ as a higher test than the normal criteria for allowing or disallowing bail and that this test must be met before the normal criteria can be addressed.

Amendments to the *Mental Health (Treatment and Care) Act 1994* are introduced by the Bill to enable corrections officers and youth justice officers to refer people under their supervision to the Mental Health Tribunal for assessment and treatment orders.

The Bill also clarifies the decision making relationship between authorised officers, Magistrates and Judges to ensure that decision makers do not re-make decisions made by higher authorities.

## **Bail Amendment Bill 2003**

### **Clauses**

#### **Part 1 Preliminary**

##### **Clause 1: Name of Act**

This is a technical clause which names the short title of the Act.

##### **Clause 2: Commencement**

Clause 2(1) triggers the commencement of the Act, other than clause 40, three months after notification day. An Act is defined as a notifiable instrument in section 10 of the *Legislation Act 2001* and must be notified on the ACT legislation register after being made by the Legislative Assembly.

Clause 2(2) and 2(3) enables the Bill to contemplate the crime of industrial manslaughter, should the Legislative Assembly enact the Crimes (Industrial Manslaughter) Amendment Bill 2003. If the industrial manslaughter Bill is passed, then the *Bail Act 1992* will include industrial manslaughter offences, which will attract no presumption for, or against, bail. If the industrial manslaughter Bill is not passed within six months of the commencement of the Bail amendments, that is nine months in total, then clause 40 introducing industrial manslaughter, expires without commencing. (Clause 40 is called section 40 in the Bill as it foreshadows clause 40 becoming section 40 of the amending Act.)

##### **Clause 3: Legislation amended**

This clause lists the parent Act, the *Bail Act 1992*, which will be amended by the Act. The amending Act will also amend the *Crimes Act 1900*, the *Magistrates Court Act 1930* and the *Mental Health (Treatment and Care) Act 1994*. Explanation of the amendments to these latter Acts are discussed at clauses 2.1 to 2.4 on page 18 below.

##### **Clause 4: Interpretation**

The term ‘entering into a bail condition’ is derived from the existing section 25 which requires accused people to agree in writing to any conditions set by an authorised officer or the court. Section 28 currently requires the accused to make another, separate, written agreement to appear before court when required.

Amendments to section 25 and section 28 will create one written agreement, rather than two. Rather than institute a separate agreement about conditions in section 25, section 25 will simply state the conditions the authorised officer or the court can set. Section 28 will require the accused to agree in writing to appear in court and abide by any conditions set by the court or authorised officer.

Consequently the definition for the term ‘entering into a bail condition’ is redundant.

## Part 2 Availability of bail

### Clause 5: Part 2 (Availability of Bail)

Clause 5 introduces new sections to part 2 of the Act and re-orders them with existing provisions for clarity and logic. The provisions in part 2 are ordered and labelled consistent with the logic of identifying offences which attract a presumption for bail, no presumption and a presumption against bail. The new sections and amendments to existing sections set out the offences which hold these presumptions. Amendments to part 2 also establish that conditional bail may be applied to any offence covered by the Act. (An offence for this Act includes a breach of the peace and a breach of a periodic detention order.)

What follows is an explanation of each amendment to part 2.

Clause 5 introduces new Division 2.1: ‘When bail may be granted and rights following’. Sections 5 and 6 fall under this heading. The existing section 5 is modernised with a new heading and better expression in subsection (2). Likewise, existing section 6 is modernised. Section 6(1)(c) clarifies that if a condition on bail is a security or a deposit, the deposit must be made, or security given, before the rights in section 6 apply.

Subsection 6(3) clarifies that a person may be arrested under new section 56A if they fail to comply with bail conditions. New section 56A is explained at clause 36.

New Division 2.2 is labelled ‘Presumption for bail’. The sections in division 2.2 identify the offences which hold a presumption for bail. New section 7 stipulates that division 2.2 yields to division 2.3 (no presumption for bail) and division 2.4 (presumption against bail) if the relevant offence, or circumstance, falls within the ambit of division 2.3 or 2.4.

Section 8(1) sets out the offences which are labelled as minor and which attract a presumption for bail. Sections 8(1)(a), 8(1)(b) and 8(1)(c) restate existing provisions. Section 8(1)(d) is introduced to enable bail to be granted to people arrested because they failed to comply with a summons or subpoena.

Section 8(1)(e) introduces a provision to enable bail to be granted to a person arrested for breaching periodic detention.

Section 8(1)(f) enables a person identified in a writ of *habeas corpus* to be granted bail. A writ of *habeas corpus* in this context refers to a Supreme Court order which directs a relevant entity to bring a detained person before the court so that the court can determine if the person’s detention is legal. The court may not be able to determine the issue in the first instance, hence bail may be appropriate under the circumstances.

For example, a person may be detained as part of a treatment order of the Mental Health Tribunal under the auspices of the *Mental Health (Treatment and Care) Act 1994*. The Supreme Court may issue a writ to direct that the person be brought before them to test the legality of the detention. The court may decide that the issue

cannot be resolved at the first hearing. The person may apply for bail under these circumstances.

Section 8(3) restates an existing provision.

Section 8(4) enables a condition of keeping the peace to be imposed on a grant of bail to a person arrested for a breach of peace. Section 8(4) is also subject to section 25, or 26 for children, which sets out conditions that can be imposed on bail. This changes the current position in the Act. Previously people bailed for breach of peace would only have a condition of keeping the peace imposed. The new position enables authorised officers and courts to impose other conditions in section 25, or section 26, when necessary.

Section 8(5) defines ‘periodic detention order’ for section 8 by referencing the *Periodic Detention Act 1995*.

Section 9(1) qualifies an entitlement to bail for people charged with an offence that attracts a fine or imprisonment for up to six months. In 9(1)(a) a person is not entitled to bail if the person failed to appear at a hearing specified in an undertaking or breached a bail condition imposed for the same or similar offence.

Section 9(1)(b) restates an existing provision which enables the court to disallow bail on the basis of a need for the person to be in protective custody.

Section 9(2) stipulates that a person arrested for breaching the peace is not entitled to bail if they did not appear at a hearing specified in an undertaking or failed to comply with a bail condition on a breach of the peace, or apprehended breach of the peace.

Unlike existing section 7, section 9 does not include a power for the Executive to prescribe offences that set aside an entitlement to bail. The introduction of a hierarchy of presumptions to the Act means that any power for the Executive to add, or subtract, offences — which now attract a type of presumption — would undermine the authority of the Legislature.

Section 9A covers all other offences which are not minor offences listed in section 8, or offences listed in divisions 2.3 and 2.4. Section 9A also applies to people who are not entitled to bail in section 9. The difference between section 9 and 9A for people who are not entitled to bail in section 9 is that section 9 declines entitlement without consideration of the bail criteria in section 22, or 23 for children. In 9A the people declined an entitlement to bail in 9 may still be entitled to bail but the authorised officer or court must consider the criteria for granting bail to establish the entitlement.

If an accused person falls into the category of section 9A the court must consider the criteria for granting bail in section 22, or 23 for children. Having addressed the bail criteria the court may allow, or disallow, bail.

Division 2.3 covers offences which hold no presumption for, or against, bail.

Section 9B outlines all of the offences which hold no presumption for bail.

Section 9B(a) refers to the offences listed in schedule 2 which names offences in the *Crimes Act 1900*, the *Drugs of Dependence Act 1989* and the *Customs Act 1901* (Cth)

that will hold no presumption for, or against, bail. The offences in the *Crimes Act 1900* are:

- section 15, manslaughter;
- section 19, intentionally inflicting grievous bodily harm;
- section 51, sexual assault in the first degree;
- section 52, sexual assault in the second degree;
- section 54, sexual intercourse without consent;
- section 55(1), sexual intercourse with young person under 10 years old;
- section 92, armed robbery; and
- section 94, aggravated burglary.

The Government has taken the view that manslaughter should hold a neutral presumption for bail given the myriad of circumstances that may involve a charge of manslaughter. In the NSW Review of the Law of Manslaughter, conducted by the Hon Mervyn Finlay QC in 2003, Nicholas Cowdery QC, NSW Director of Public Prosecutions, notes that manslaughter occurs in an “infinite variety of circumstances and situations” and incur “widely differing degrees of moral culpability”.

Mr Cowdery cites the High Court in *Wilson v R* (1991–92) 174 CLR 313 and the Hon Justice Beazley in *R v Adamson* [2002] NSWCCA 349.

Justice Beazley noted that “the offence of manslaughter covers a particularly wide range of factual circumstances and is therefore one where appropriate penalties vary, perhaps more than for any other serious crime”. (*R v Elliot*, unreported NSWCCA 14 February 1991.)

Should the Legislative Assembly enact the Crimes (Industrial Manslaughter) Amendment Bill 2003 then the *Bail Act 1992* will include industrial manslaughter offences, which will hold no presumption for, or against, bail.

The offences in the *Customs Act 1901* (Cth) which hold a neutral presumption for bail are:

- section 231(1), assembly for unlawful purposes;
- section 233AC, master allowing use of ship for smuggling etc narcotic goods; and
- section 233B, special provisions about narcotic goods.

Section 9B(2) refers to offences listed in schedule 2 which names offences in the *Drugs of Dependence Act 1989* that will attract no presumption for bail. These offences are:

- section 161, manufacture of drug of dependence or prohibited substance;
- section 162(3), cultivation, or participation in cultivation of, prohibited plants for sale or supply;



- section 163, wholesale selling of prohibited substance or drug of dependence; and
- section 164, sale, supply etc of prohibited substance or drug of dependence.

Section 9B(b) creates a neutral presumption for the offences listed if the person charged with the offence listed was found guilty of an offence involving violence or threatened violence within ten years prior to the current charge.

The Commonwealth offence of treason is identified by section 9B(c) as an offence which holds no presumption for bail.

Section 9B(d) clarifies that no presumption for bail applies to a person convicted of an indictable offence but not yet sentenced. An indictable offence is defined by the *Legislation Act 2001* as an offence punishable by imprisonment for longer than a year or is declared by law to be an indictable offence.

Division 2.4 covers offences and circumstances which attract a presumption against bail.

The Government is cognisant of the impact of introducing a presumption against bail and has considered judicial views on this matter. The NSW Supreme Court sitting as the Court of Appeal considered the issue of presumption against bail in the context of procedural fairness, amongst other issues, in *Chau v DPP* (Cth) [1995] 132 ALR 430.

In *Chau* Kirby P stated that a provision which held a presumption against bail in the NSW *Bail Act 1978* did not “amount to a new development of, or intrusion upon, the judicial function” (at 448).

Section 9C(1) stipulates that the offence of murder and its ancillary offences holds a presumption against bail. The ancillary offences are listed in part 2.4 of the *Criminal Code 2002* (these are also known as extensions of criminal responsibility). The ancillary offences are: attempt, complicity and common purpose, innocent agency, incitement and conspiracy.

Section 9C(2) evokes the common law position on murder, which attracted a presumption against bail unless exceptional circumstances existed. (See *R v Borsboom* (1887) 3 WN 14; *R v Barronet and Allain* (1852) Dears CC 51; *R v Barthelemy and Morney* (1852) Dears CC 60; *R v Watson* 1948 64 WN 100. Also noted by Kirby P in *Chau v DPP* (Cth) [1995] 132 ALR 430 at 448.)

The test of special or exceptional circumstances is discussed at section 9G.

Even if the test of special or exceptional circumstances is met, section 9C(3) stipulates that the court or authorised officer must still consider the criteria for granting bail.

Section 9D is substantially the same as existing section 9A. However, section 9D(2) now uses the word ‘favouring’ the grant of bail, rather than ‘justifying’ the grant of bail. This amendment is consistent with the decision of the Federal Court in *Achanfu-Yeboah v R* [2001] FCA 1152 which found that the word justifying in existing section 9A(2) should be interpreted as meaning favouring.

Section 9D has some archaic terms updated and has a new example.

Section 9E is substantially the same as existing section 9, ‘Bail for persons sentenced to imprisonment’. The section is updated to reflect modern drafting practice.

Section 9F is substantially the same as existing section 8A, ‘Bail by authorised officer — domestic violence offences’. The section is updated to reflect modern drafting practice.

Clause 5 introduces section 9G which outlines the test of special or exceptional circumstances. In conjunction with introducing a presumption against bail for a charge of murder, the Government is of the view that the Act should make a clear distinction between the bail criteria (as set out in sections 22 or 23) and the test of special or exceptional circumstances.

This new section intends to make it clear that the test of special or exceptional circumstances is a higher test than the bail criteria, and that the bail criteria should only be considered if the test of special or exceptional circumstances has been decided by the court or authorised officer.

As noted in the context of murder, the common law position of bail for a charge of murder was that it would not be allowed unless exceptional circumstances existed.

### **Part 3 Dispensing with bail**

#### **Clause 6: Dispensing with bail**

Clause 6 replaces references to section 9 and 9A in section 10 with references to 9E and 9D respectively. Section 9E is an updated version of existing section 9 and section 9D is an updated version of existing section 9A.

### **Part 4 Grant of bail**

#### **Clause 7: Grant of bail by authorised officers**

Clause 7 amends section 14(2) to make it clear that an authorised officer cannot make a bail decision about an offence if a court has already made a bail decision about that particular offence. The amendment will enable authorised officers to make bail decisions about offences that have not been dealt with by a court, even though the accused may have had a bail decision made in court for a separate offence.

Clause 7 also modernises the section.

#### **Clause 8: Determination of questions of bail by authorised officers**

Clause 8 updates the reference to section 8A(1) by replacing 8A(1) with 9F(2). Existing section 8A and new section 9F deals with bail by authorised officers for domestic violence offences. Section 9F(2) stipulates that an authorised officer must not grant bail to an accused person unless the authorised officer is satisfied that the accused person poses no danger to the person who allegedly experienced domestic violence.

**Clause 9: General provisions relating to court bail**

Existing section 19(5)(b) only allowed accused people to re-apply to the court for a bail decision on the basis of an absence of legal representation or where fresh evidence or information came to light that was not available at the preceding hearing. Clause 9 introduces an amendment to 19(5)(b) which adds a further basis of re-application to the court, namely a significant change in circumstances relevant to bail.

**Clause 10: Limitations on power of magistrate**

Clause 10 clarifies the decision making relationship between magistrates and judges. The amendments allow magistrates to make bail decisions about matters that are not before the Supreme Court but involve an accused person who is before the Supreme Court.

The amendments specify that magistrates cannot make bail decisions about offences that are before the Supreme Court following committal for trial, or sentence. Likewise, magistrates cannot make bail decisions about offences that are before the Supreme Court on appeal against conviction, or sentence. However, magistrates can make bail decisions about other offences charged against the accused that are not before the Supreme Court.

**Clause 11: Criteria for granting bail to adults and children**

Clause 11 introduces a new section 22 which creates a greater scope of discretion for bail decision makers and structures the prominence of factors that must be considered by bail decision makers. The intent of section 22 is to enable authorised officers or the courts to weigh up the interests of justice, the accused person and the community when making a bail decision.

Section 22(1) identifies the factors that must be considered when making a decision. Section 22(2) lists other factors that should have prominence when considering the items in section 22(1).

Section 22(1)(a) is the consideration of the probability of the person absconding from the trial or appearing for trial.

Section 22(1)(b) addresses the interests of community safety.

Section 22(c) addresses the interests of the accused person.

Section 22(2) addresses the period of time between a finding of offence proven and conviction, or the time between conviction and sentencing. If the court considers a bail application during this time the court must consider the likelihood of a custodial sentence when making a bail decision.

Section 22(2) accounts for the gap in the Act identified by the Supreme Court in *R v Shane Edmund Johnson* [2003] ACTSC 79. In that case Gyles J noted at paragraph ten that:

Section 22 of the Bail Act omits any reference to conviction or to impending sentence, and the only way in which those matters have been taken into consideration in the cases to which I have been referred is by the indirect means of saying that the fact of conviction relates to the nature and seriousness of the alleged offence which is referred to in s 22(1)(a)(ii) [of the Act]. . . . In my opinion that is an unsatisfactory way of taking the fact of conviction into account and stretches construction of the section to achieve a practical result. In my view the legislature should examine s 22, and the Act generally, in relation to the factors to be taken into account in relation to the grant of bail after conviction and before sentence.

Section 22(3) empowers authorised officers and the courts to consider any matter they believe to be relevant when considering the factors in section 22(1). This section also lists other factors that should have prominence when considering factors in section 22(1).

Section 22(4) restates the existing section 22(2) which clarifies that an offence can mean any offence in any Australian jurisdiction.

New section 23 mirrors section 22 except that the interests of the child are articulated as the principles in section 68 of the *Children and Young People Act 1999*, or a report to the court under section 73 of the *Children and Young People Act 1999*.

The principles in section 68 are:

- (a) if a young person does anything that is contrary to law, he or she should be encouraged to accept responsibility for the behaviour and be held accountable;
- (b) the young person should be dealt with in a way that acknowledges his or her needs and that will provide the opportunity to develop in socially responsible ways;
- (c) a young person may only be detained in custody for an offence (whether on arrest, in remand or under sentence) as a last resort;
- (d) young offenders should be dealt with in the criminal law system in a manner consistent with their age and maturity and have the same rights and protection before the law as would adults in similar circumstances;
- (e) on and after conviction, it is a high priority to give a young offender the opportunity to re-enter the community;
- (f) a balanced approach must be taken between the needs of the young offender, the rights of any victim of the action that constituted the young offender's offence and the interests of the community.

Consistent with the principle listed as (f) immediately above, section 23(2) provides bail decision makers with the discretion to assess the interests of the child as a primary consideration, not as the paramount consideration. In some cases the interests of the community may outweigh the interests of the child.

### **Clause 11: Victim’s concern about need for protection**

Clause 11 also restates existing section 23A using modern drafting practice and terms. It also updates the references to relevant sections.

## **Part 5 Bail conditions and undertakings to appear**

### **Clause 12: Conditions on which bail may be granted to adults**

Clause 12 modifies existing section 25 in a number of ways.

Firstly, section 25(1) will now refer to persons rather than accused persons only. This enables the court to set bail conditions on people who are arrested under warrant for failing to comply with a summons or subpoena, or people arrested for breaching the peace.

Secondly, section 25(1) no longer includes a provision that enables a person to attest in writing that the arrested person is responsible and likely to answer the charge in court. As noted by the ACT Law Reform Commission this provision was rarely, if ever, used. (Report No.19, paragraph 186.)

Thirdly, section 25(1) no longer refers to a written agreement. Instead the Act will now use one written agreement in section 28 which is an undertaking to appear in court and to comply with bail conditions.

Combined with these changes, section 25(1) is also re-written using modern drafting practices. Consistent with the original enactment, the conditions set out in section 25(1) are listed in an order of least onerous to most onerous.

Clause 12 introduces subsection 25(1A) and 25(1B). These subsections contemplate a situation where a person is granted bail until a hearing date, but the hearing is postponed, or changed for some reason. Rather than review the allowance of bail altogether the court may decide to continue bail on the same basis until the new date.

Subsection 25(1A) enables a deposit or security made by the accused, or another person, as a condition of bail to apply to any extension of bail. Consent must be given by the relevant person for the deposit or security to continue. Subsection 25(1B) ensures that consent remains meaningful by ensuring that consent to continuing a deposit or security cannot be a condition of bail.

### **Clause 13: Conditions on which bail may be granted to adults**

Clause 13 introduces a new subsection to section 25(2). The new subsection enables a court or authorised officer to impose a condition that requires the person to accept the supervision of the Director of ACT Corrective Services and comply with reasonable directions issued by the Director or their delegate. (The Director may delegate functions consistent with part 19.4 of the *Legislation Act 2001*.)

This new power provides a legislative basis for the courts’ practice, in some cases, of requiring a defendant to accept the supervision of corrective services.

Amongst other things, the new section also contemplates directions to undergo psychiatric assessments or treatments. However, these kinds of assessments are within

the ambit of the *Mental Health (Treatment and Care) Act 1994*. To reconcile this problem and to ensure consistent application of the law, amendments will also be made to the *Mental Health (Treatment and Care) Act 1994*, to explicitly enable corrections officers to refer people to the Mental Health Tribunal for assessments and treatment orders.

Once orders for assessments or treatment are made by the Mental Health Tribunal, the Director of ACT Corrective Services can then uphold those orders through reasonable directions to the accused person.

These amendments also recognise the situation where a person on conditional bail and under the direction of corrective services begins to elicit signs of a mental health problem. Listing corrective services as having a referring power in the *Mental Health (Treatment and Care) Act 1994* will help early assessment and treatment.

#### **Clause 14: Conditions on which bail may be granted to adults**

Clause 14 is a technical amendment to renumber the paragraphs when the Act is next republished.

#### **Clause 15: Conditions on which bail may be granted to adults**

Clause 15 updates the references in 25(5) to 25(1)(b) or 25(1)(c).

#### **Clause 16: Conditions on which bail may be granted to adults**

As noted above in clause 14, section 25 will no longer refer to a written agreement. Instead the Act will now use one written agreement in section 28 which is an undertaking to appear in court and to comply with bail conditions. Clause 16 removes subsection 25(7) which refers to a written agreement for section 25.

#### **Clause 17: Conditions on which bail may be granted to adults**

Clause 17 is a technical amendment to renumber the paragraphs when the Act is next republished.

#### **Clause 18: Conditions on which bail may be granted to children**

Clause 18 amends section 26(1), which sets out bail conditions that can be applied to children. Section 26(1) mirrors section 25(1) except that in 26(1)(a) there is no power for a child to accept supervision or direction of the Director of ACT Corrective Services. In 26(1)(b) the court must consider the interests of the child as articulated by the principles in section 68 of the *Children and Young People Act 1999*. These principles are listed on page 11 of this Explanatory Statement.

Consistent with the amendments to section 23, explained on page 11 of this statement, section 26(1)(b) provides bail decision makers with the discretion to assess the interests of the child as a primary consideration, not as the paramount consideration. In some cases the interests of the community may outweigh the interests of the child.

Clause 18 introduces new subsection (1A) which empowers the court or authorised officer to impose a condition that requires the child to accept the supervision of the

chief executive responsible for the *Children and Young People Act 1999* and to comply with any reasonable directions made by the chief executive. (The chief executive may delegate functions consistent with part 19.4 of the *Legislation Act 2001*.)

This new power provides a legislative basis for the courts' practice, in some cases, of requiring a defendant to accept the supervision of youth services.

As is the case with adults, this new section also contemplates directions for the child to undergo psychiatric assessments or treatments. However, these kinds of assessments are within the ambit of the *Mental Health (Treatment and Care) Act 1994*. To reconcile this problem and to ensure consistent application of the law, amendments will also be made to the *Mental Health (Treatment and Care) Act 1994*, to explicitly enable youth officers to refer people to the Mental Health Tribunal for assessments and treatment orders.

Once orders for assessments or treatment are made by the Mental Health Tribunal, the chief executive responsible for the *Children and Young People Act 1999* can then uphold those orders through reasonable directions to the accused child.

These amendments also recognise the situation where a child on conditional bail and under the direction of youth services begins to elicit signs of a mental health problem. Listing youth services as having a referring power in the *Mental Health (Treatment and Care) Act 1994* will help early assessment and treatment.

#### **Clause 19: Conditions on which bail may be granted to children**

Consistent with amendments outlined in clauses 11 and 18, clause 19 omits the reference to section 12 of the *Children and Young People Act 1999* and retains the reference to the principles in section 68. The principles are listed on page 11 of this Explanatory Statement.

#### **Clause 20: Conditions on which bail may be granted to children**

Clause 20 is a technical amendment to renumber the paragraphs when the Act is next republished.

#### **Clause 21: Notice to victim of bail decisions**

Clause 21 removes section 27A. This section will now be consolidated into a new section, section 47A, which will address the needs of victims in relation to bail decisions.

#### **Clause 22: Undertakings to appear**

Clause 22 modernises the form of section 28 and makes two changes to the section.

Firstly, 28(1)(b) enables written undertakings to include any bail conditions imposed by the court or authorised officer.

Secondly, 28(5) excludes people arrested for breach of peace, or apprehended breach of peace, from having to attend court if the court or authorised officer does not require them to attend court.

### **Clause 23: Bail requirements**

Clause 23 replaces existing sections 31 and 32, and introduces section 31A.

In line with aspects of clauses 12 and 22 which enable the Act to rely on one document to account for an undertaking to appear and bail conditions, clause 23 removes the reference to a separate agreement on conditions in section 31.

Clause 23 also amends section 31 to add a definition for deposit which includes electronic funds transfers (EFT). The structure of section 31 is modernised and the term ‘clerk of a court’ is updated with ‘registrar or deputy registrar’.

Clause 23 introduces section 31A, which ensures that monies paid to the court, authorised officer or any entity mentioned in section 31, are held in trust by the public trustee.

Existing section 32, which deals with acceptable people who can offer security for bail, is re-written in modern form by clause 23. Appropriate new references to section 25 are made.

### **Clause 24: Continuation of bail and undertakings**

Section 33 of the Act enables a court to continue bail granted to a person if the time and date the person is scheduled to appear at court has changed for some reason. Rather than review the allowance of bail altogether the court may decide to continue bail on the same, or modified basis, until the new hearing date.

Clause 24 adds a note to section 33(2) to draw attention to the fact that a decision to continue bail must be conveyed to the defendant. Section 34(4) sets out what should be in a written notice to a defendant if bail is continued.

### **Clause 25: Continuation of bail and undertakings**

Section 33(3) provides that if the court does not give a direction about bail then the existing bail decision continues. Clause 25 amends section 33(3) by removing the qualification that the person has to be present at the hearing foreshadowed in the accused person’s written undertaking.

Clause 25 also modernises subclauses (3), (4), (5) and (6) of section 33.

### **Clause 26: Warning to person making acknowledgement**

As noted in this Explanatory Statement on page 11, section 25(1) will no longer include a provision that enables a person to attest in writing that the accused person is responsible and likely to answer the charge in court. As noted by the ACT Law Reform Commission this provision was rarely, if ever, used.



Clause 26 deletes section 35 of the Act which required a warning to people attesting on behalf of an accused person that false statements are an offence under the Act. Given these statements will no longer exist, no warning is required.

**Clause 27: Discharge of surety**

Existing section 36 relies upon references to section 25. Clause 27 modernises the terms of section 36 and removes references to section 25.

**Clause 28: Payments of amounts to Territory**

Clause 28 modernises section 37 and introduces section 37(4) which automatically renders amount owed to the Territory as a fine after 28 days as a result of a breach of conditional bail.

**Part 6 Review of bail decisions**

**Clause 29: Court may review on its own initiative**

Clause 29 introduces new section 41A. Section 41A gives the court a new discretion to review its own decision if the court thinks it is in the interests of justice. The court may issue a warrant for the arrest of the person to facilitate the review.

**Clause 30: Power of a magistrate to review**

Clause 30 creates bases for magistrates to review bail decisions made by magistrates and authorised officers. The bases for review are: significant change in circumstances; or new evidence or information significant to a bail decision.

The addition to section 42 aims to prevent successive requests for reconsiderations when there is no basis for a reconsideration, while also providing an avenue for reconsideration of a decision rather than going to appeal.

**Clause 31: Power of Supreme Court to review**

Akin to clause 30, clause 31 creates bases for judges to review bail decisions made by judges, magistrates and authorised officers by introducing section 43(1A). The bases for review are: significant change in circumstances; or new evidence or information significant to a bail decision.

The addition to section 43 aims to prevent successive requests for reconsiderations when there is no basis for a reconsideration, while also providing an avenue for reconsideration of a decision rather than going to appeal.

**Clause 32: Miscellaneous**

Clause 32 deletes the small division 6.3, which contains one section dealing with notice to victims about bail decisions. This matter is now addressed in new section 47A.

## **Part 7 Miscellaneous**

### **Clause 33: Notice to victim of bail decisions**

Clause 33 introduces new section 47A. This new section consolidates the communication that should occur with victims of a crime about relevant bail decisions. Section 47A requires informants, primarily police officers who initiate charges against a person, to tell the police victim liaison officers that a victim is concerned about their safety. The police liaison officers must then take reasonable steps to keep the victim informed about bail decisions.

### **Clause 34: False statements in acknowledgements**

Clause 34 removes section 50, which created an offence for making a false statement in an acknowledgement in section 25(1)(b) of an accused person's disposition towards appearing at court. As explained under clause 12, this Bill removes this provision in section 25. Hence, the need for an offence is redundant and is also removed.

### **Clause 35: No right of surety to arrest**

Clause 35 simplifies the existing provision in section 56 of the Act, which negates the common law power of a surety to arrest the accused person. The revised section drops unnecessary references to section 25 and uses plain language.

### **Clause 36: Arrest without warrant of a person on bail**

Clause 36 moves police powers to arrest people who are on bail from sections 215 and 216 of the *Crimes Act 1900*, to the *Bail Act 1992*. The new sections 56A and 56B have been modernised in the transition.

### **Clause 37: Approved forms**

Clause 37 simply deletes the reference to a form for section 25, as the Bill consolidates the conditions upon bail and the bail undertaking into one document under section 28.

### **Clause 38: Definition of accused person**

Clause 38 introduces a definition of accused person for the Act.

### **Clause 39: Offences to which presumption of bail does not apply**

Schedule 2 is introduced by clause 39. The schedule lists the offences that hold a neutral presumption towards bail and their Acts of origin. This Explanatory Statement discusses these offences at clause 5, section 9B.

### **Clause 40: Industrial manslaughter offences**

Clause 40 enables industrial manslaughter offences in the foreshadowed Crimes (Industrial Manslaughter) Amendment Bill 2002 to hold a neutral presumption for bail.

If the industrial manslaughter Bill is not passed within six months of the commencement of the Bail amendments, that is nine months in total, then this clause, which will become section 40 of the amending Act, expires.

## **Schedule 1: Technical amendments**

### **Clauses 1.1, 41–48: Technical amendments**

Schedule 1 to the Bill makes a range of technical amendments to the Act so that the Act complies with contemporary forms of legislative drafting.

Notes explaining the technical amendments accompany each amendment.

The existing definitions in section 3 of the Act are now placed into a dictionary at the end of the Act, as is the modern form.

## **Schedule 2: Amendments to other Acts**

### **Part 2.1 Amendments to the *Crimes Act 1900***

#### **Clause 2.1: Arrest without warrant of a person on bail**

As noted at clause 39 in this Explanatory Statement, police powers to arrest people who are on bail will be moved from sections 215 and 216 of the *Crimes Act 1900*, to sections 56A and 56B of the *Bail Act 1992*. The old sections in the *Crimes Act 1900* are deleted.

#### **Clause 2.2: Definition of authorised officer**

Section 309 of the *Crimes Act 1900* enables emergency assessment of a person in custody who may be suffering a mental health problem. The section refers to an authorised officer under the *Bail Act 1992* as one means of addressing the custodial issues under the circumstances. Clause 2.2 updates the reference to authorised officer.

#### **Clause 2.3: Definition of bail undertaking**

Clause 2.3 removes the definition of bail undertaking from the *Crimes Act 1900*, as the term is not used in the *Crimes Act 1900*.

### **Part 2.2 Amendments to the *Magistrates Court Act 1930***

#### **Clause 2.4: Remand of defendant**

Clause 2.4 modernises section 70 of the *Magistrates Court Act 1930*, which sets out magistrates' powers to remand a defendant.

**Part 2.3 Amendments to the  
*Mental Health (Treatment and Care) Act 1994***

**Clause 2.5: Definition of referring officer**

Clause 2.5 modernises the reference to the Director of Public Prosecutions as a referring officer.

As explained in clause 13 and clause 18 of this statement, the court or authorised officers can place a condition upon a defendant which requires the defendant to accept the direction of corrective services officers, or youth justice staff for children. As explained in clauses 13 and 18, an explicit power to enable corrective services or youth justice to refer defendants to the Mental Health Tribunal is being introduced.

Clause 2.5 introduces corrective services and youth justice as referring officers to the *Mental Health (Treatment and Care) Act 1994*.