

1991

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

BAIL BILL 1991

EXPLANATORY MEMORANDUM

**(Circulated by the authority of
the Attorney-General)**

BAIL BILL 1991

OUTLINE

The Bail Bill 1991 consolidates the law of bail into one Act which deals comprehensively with the subject, although it is not intended to be a code which supplants the common law entirely.

At present, the relevant law in the Territory is a combination of common law principles and statutory provisions distributed over six separate Acts. The law is unsatisfactory in its current state. First, it is difficult to determine what the applicable rules are in individual cases because the law is scattered over so many sources. Second, the existing law puts undue emphasis on an accused's financial means as a criterion for granting bail. This effectively discriminates against the poor who cannot raise money bail and against those new in a community who may not have friends or relations to act as surety.

The proposed legislation deals with all aspects of bail, that is: the issue of when bail is available; the procedures to be followed and the criteria to be considered in granting bail; the form of bail undertakings and permissible conditions of bail; and the review of bail decisions. It will apply to child offenders as well as to adults.

While the Bill largely reflects established law and practices, it does feature several important innovations. The Bill creates a right to bail for minor offences which are punishable by no more than six months gaol or by a fine only and a rebuttable presumption in favour of bail in all other cases. [Clauses 7 and 8.] It exhaustively specifies all the criteria which may be taken into account when deciding a bail application [clauses 22 and 23] and the conditions which may be attached to bail [clauses 24-26]. Bail will be contingent on the accused's signing a written undertaking to appear in court on the appointed day. It is to be an offence, punishable by up to two years imprisonment, to breach the undertaking. While the option of depositing a sum of money will still be available, it will no longer be the primary means of ensuring attendance at court.

The Bill also establishes a comprehensive set of procedures to guide the police in the exercise of their power to grant bail. [Clauses 13-18.]

FINANCIAL CONSIDERATIONS

The Bill is intended to be budget neutral.

BAIL BILL 1991

CLAUSE NOTES

PART I - PRELIMINARY

Clause 1: Short title

This provides that the proposed Act may be cited as the *Bail Act 1991*.

Clause 2: Commencement

Clause 2 provides that the substantive parts of the Act comes into force on a day which the Minister fixes by a notice in the Gazette. If no notice is gazetted within six months of the Act being made the whole Act comes into effect automatically.

Clause 3: Interpretation

This clause defines certain terms which are used throughout the Bill. One of the more important terms is *authorised officer* which denotes a person who may grant police bail (as opposed to court bail).

Three other important definitions are *undertaking to appear*, *bail condition* and *bail undertaking*. The term *undertaking to appear* refers to the undertaking which a bailed person must give to appear before a specified court at a specified place, date and time (see subclause 28(1)). The phrase *bail condition* means the conditions set out in clauses 25 and 26 to which a grant of bail may be subject. Some of the proposed bail conditions involve the bailed person giving an undertaking (for example, paragraph 25(1)(a)). These are called *bail undertakings*.

Subclause 3(2) defines the key expression *accused person*. Clause 5 stipulates that bail is available to accused persons. The expression refers to a person charged with, convicted of, or found guilty of an offence; a person whose conviction is stayed; a person who is discharged under section 556A of the Crimes Act on giving security in accordance with subsection 556A(1); an offender who has an appeal pending; and an offender for whom a new trial has been ordered.

Clause 4: Application

This provision specifies that the proposed Act applies to juveniles as well as to adults. The proposed Act will therefore supplant the bail provisions for juveniles contained in the *Children's Services Act 1986*.

The provision precludes the operation of any other statutory bail laws in force before the commencement of the proposed Act.

Clause 4 also applies the proposed Act to fraudulent debtors imprisoned under Division 5 of Part IX of the *Magistrates Court Act 1930* and who are appealing against their imprisonment.

PART II - AVAILABILITY OF BAIL

Clause 5: Availability of bail

This clause defines the periods when bail is available. Bail may be granted for any period during which an accused person is not required to attend court in relation to the charged offence. Bail is not available during periods when the person is in custody: (a) for some other offence (or reason) for which bail is not allowed; or (b) already serving a sentence of imprisonment.

Clause 6: Rights following grant of bail

Clause 6 sets out the rights of a person to whom bail is granted. Where bail is granted, the person gives an undertaking to appear and enters into any conditions which are imposed, that person is entitled to be released (if in custody) and to remain at liberty until required to appear before a court in accordance with the undertaking to appear. It is modelled on section 7 of the *Bail Act 1978* (NSW). The provision does not apply if the person is in custody for an offence other than the bailed offence or for some other reason.

Clause 7: Bail for minor offences

Where an offence is either not punishable by imprisonment or punishable by a term of imprisonment not exceeding six months, the accused person is to be granted unconditional bail. This provision substantially mirrors paragraph 99(1)(b) of the *Magistrates Court Act 1930*. The right to bail does not apply to a person who has previously breached bail or to certain persons with alcohol, injury or drug problems or who are at risk of injury or in need of physical protection. There are also exceptions for persons already in custody or for whom bail has been dispensed with under clause 10.

Clause 8: Bail for offences other than minor offences

This provision creates a presumption in favour of bail for all other offences. The presumption entitles the person to bail unless the court or police officer hearing the application believes on reasonable grounds that the person:

- . will fail to appear in accordance with the bail undertaking;
- . obstruct the course of justice;
- . hinder police enquiries;
- . harass certain classes of person which are defined in the Regulations (for example, someone under the protection of the *Domestic Violence Act 1986*); or
- . commit an offence while on bail.

The presumption does not apply if the court or the authorised officer believes on reasonable grounds that the person should remain in custody for his or her own physical protection. Nor does it apply if the person is in custody for another reason by virtue of subclause 5(2).

Clause 9: Bail in respect of persons sentenced to imprisonment

This clause provides that where a person has been sentenced to imprisonment and has an appeal pending against conviction or sentence, an applicant seeking bail will have to establish before a court that special or exceptional circumstances exist justifying the grant of bail.

PART III - DISPENSING WITH BAIL

Clause 10: Dispensing with bail

This provision allows a court, which may grant bail, to release the person without bail instead. In determining whether to dispense with bail the court may have regard to any relevant and reliable information. Authorised officers will not have the power to dispense with bail.

Clause 11: Effect of dispensing with bail

Clause 11 provides that, where bail is dispensed with, the accused person is entitled to be and to remain at liberty in respect of the offence until required to appear before a court. The provision does not apply where the person is in custody for another reason or is otherwise not entitled to be at liberty.

Clause 12: Decision to dispense with bail.

Clause 12 provides that, where bail is dispensed with, the court is deemed to have made a decision in relation to bail. The provision will ensure that a decision to dispense with bail is reviewable under Part VI. Clause 38 provides that 'any decision . . . in relation to bail' is reviewable.

PART IV - GRANT OF BAIL

Clause 13: Determination of bail after charge laid

This clause regulates police bail. It requires that where a person is charged by a police officer with an offence but is not brought before a court forthwith, the police officer must inform the person of:

- . his or her rights;
- . the criteria for granting bail; and
- . the conditions which may be applied.

The person's rights, notice of which the charging officer must give notice of are specified as the right:

- . to apply for bail;
- . to communicate with a legal practitioner;
- . to have the services of an interpreter if necessary; and
- . to communicate with any other person who might be able to help the accused person get bail. Reasonable facilities must be provided to enable the accused person to communicate as allowed.

If the person then applies for bail, the police officer must consider whether to grant bail, or, if he or she is not an authorised officer, bring the person before such an officer. That authorised officer must then make the bail determination. The term *authorised officer* is defined in clause 3 to mean a police officer at the police station who is above the rank of sergeant or to the officer in charge of the station. In the case of juveniles, the term also includes the Commissioner or a Deputy Commissioner of the AFP or delegate.

In appropriate cases the accused may be released on bail, subject only to giving an undertaking to appear.

A charging police officer may withhold an accused person's right to communicate with a lawyer, an interpreter or a third party where he or she believes on, reasonable grounds, that it might lead to an accomplice escaping or the loss, destruction or falsification of evidence. The charging officer must record the reasons for his or her decision.

Clause 14: Grant of bail by authorised officers

Clause 14 empowers an authorised person to grant bail to an accused person present at a police station except, where a court has already determined bail or where the charged offence is a domestic violence offence of murder, attempted murder or a breach of a domestic violence order which constitutes an offence under the *Domestic Violence Act 1986*.

Clause 15: Determination of questions of bail by authorised officers

This provision sets out the procedure which an authorised officer must follow when considering a bail application. First, the accused (or his or her lawyer) and the investigating officer(s) are to be given an opportunity to make submissions about the bail conditions to which the grant of bail should be subject. (Clauses 25 and 26 set out the range of possible bail conditions.) The authorised officer must then determine bail having regard to those submissions and the criteria for granting bail set out in clauses 22 and 23. The authorised officer may then release on bail subject only to the person undertaking to appear [subclause 15(2)], release the accused on bail subject to allowable conditions, or refuse bail [subclause 15(3)].

Clause 16: Notification of decision of authorised officer

Clause 16 provides that where the authorised officer refuses bail or sets bail with conditions he or she is to inform the accused of the decision. Where bail has been refused or has been granted subject to a condition with which the accused will not or cannot comply, the authorised officer must inform the accused person of his or her right to communicate with a lawyer and must provide reasonable facilities for the accused to do so [subclause 16(2)].

The provision also requires that, in cases of domestic violence or child abuse, the police officer inform the spouse or guardian, as the case may be, of the bail decision. This provision will supplant the corresponding provision in section 26 of the *Domestic Violence Act 1986*.

Clause 17: Charged persons in custody to be brought before court

This provision requires that where police bail is refused, or the accused person is not released after police bail has been granted, the accused must be brought before a court within 48 hours after being taken into custody. This provision corresponds with section 20 of the *Bail Act 1978* (NSW).

Clause 18: Facilities to be provided to accused persons

Clause 18 provides that where an accused is to be brought before a court for the first time in relation to the relevant offence and it is more than 4 hours since he or she was taken into custody, then the police are to provide the accused with facilities to wash, shower or bathe, to shave (if appropriate) and to change clothing. The police, the A.C.T. and the Commonwealth are not required to provide clothing unless a third party brings it to the place of custody. This provision is modelled on regulation 5 of the NSW Bail Regulations.

Clause 19: General provisions relating to court bail

Clause 19 contains some general provisions relating to court bail. It gives a court - subject to the qualification contained clause 20 - the power to grant bail, or to enlarge, vary or revoke bail already granted. The court may not release on bail a person who is in custody for another offence or some other reason. Bail applications must be dealt with as soon as is reasonably practicable. While there is no limit on the number of bail applications that may be made [subclause 19(2)], the court may refuse to hear a frivolous or vexatious application [subclause 19(4)] and cannot consider second or further applications unless the accused was unrepresented at the hearing of the first application or unless there is significant new evidence which was not available at the last hearing [subclause 19(5)]. In determining bail, the court may take into account any information considered relevant and reliable [subclause 19(6)].

Clause 20: Limitation on power of magistrates to grant bail

Clause 20 precludes a magistrate from granting bail where the accused has appeared before the Supreme Court following committal or on appeal against a conviction.

Clause 21: Bail in respect of several offences

This provides that, where an accused is charged with more than one offence, bail is to be determined in relation to all the charges [paragraph 21(b)(i)]. If bail is granted, it is to apply in relation to all the charges, the accused need give only the one undertaking, and the conditions (if any) apply in respect of each offence. This provision applies both to court bail and police bail.

Clause 22: Criteria for granting bail to adults

Clause 22 sets out exhaustively the sole criteria which a court or authorised officer may have regard to when determining bail for adults. The criteria fall into three categories:

- criteria affecting the probability that the applicant will appear in court having regard to the person's background, community ties and the circumstances of the offence;
- criteria concerning the interests of the applicant, having regard to the period likely to be spent in custody and the conditions of that custody, the person's need to be free to prepare his or her defence, and the person's need for physical protection; and
- criteria relating to the protection of the community, having regard to the likelihood of the person interfering with evidence, committing an offence, or harassing other persons, whilst on bail.

Clause 22: Criteria for granting bail to children

This provision sets out exhaustively the criteria that a court or authorised officer may have regard to when determining bail for a juvenile. The criteria comprise those applicable to adults under clause 22, as well as matters concerning the welfare of the child as specified in section 5 of the *Children's Services Act 1986*. A court determining bail for a juvenile must also have regard to the contents of any welfare report furnished in accordance with section 162 of that Act.

PART V - CONDITIONS OF BAIL, UNDERTAKINGS TO APPEAR AND BAIL UNDERTAKINGS

Clause 24: Conditions of bail

Clause 24 provides that bail may be granted without conditions or subject to bail conditions which are imposed in writing.

Clause 25: Conditions on which bail may be granted to adults

This provision governs the imposition of conditions when bail is granted to an adult. It specifies the general conditions that may be imposed, which (in summary) are:

- a written undertaking to observe specified requirements as to conduct (including reporting) [paragraph 25(1)(a)];
- a character reference (acknowledgment) [paragraph 25(1)(b)]; and
- money securities (from the accused or an acceptable person or persons) [paragraphs 25(1)(c)-(e)].

There are also additional conditions that may be imposed in domestic violence cases to ensure that an accused does not harass or approach the victim of the domestic violence.

The general conditions are listed in descending order of priority. Subclause 25(3) requires that when imposing conditions, the court or authorised officer is to consider them in sequence. The depositing of money in court by the accused or by someone else is therefore the least favoured option.

A court or authorised officer may impose a condition only if of the view that it is necessary to guarantee the person's attendance at court, to protect the person or another from harm or to prevent obstruction to the course of justice (for example, interfering with evidence, intimidating witnesses): [paragraph 25(4)(a)]. Paragraph 25(4)(b) requires the court or authorised officer to impose the least onerous condition which will achieve one of the purposes laid out in paragraph 25(4)(a), unless the accused asks for a condition which is lower down on the hierarchy. Sometimes a condition which is *prima facie* more burdensome may suit the individual circumstances of an accused. Money securities may not be imposed if there are reasonable grounds for believing the amount specified is beyond the means of the accused [subclause 25(5)]. The object of these provisions is to ensure that bail conditions are imposed only where strictly necessary. Unconditional bail is the norm.

Subclause 25(6) provides that where the accused satisfies the court or authorised officer that he or she cannot comply with a condition imposed on bail, bail is to be refused or granted subject to other conditions with which the court or authorised officer believes the accused can comply.

Clause 26: Conditions on which bail may be granted to children

This clause specifies that the conditions which a court or an authorised officer may impose when granting bail to a juvenile are the same as those specified for adults under clause 25. The welfare matters contained in subsections 5(1) and (3) of the *Children's Services Act 1986* are incorporated in the decision procedure. The rules for imposing the conditions are the same as for adults except that the aims of imposing conditions include the welfare matters in subsection 5(1) of that Act.

Clause 27: Recording of certain bail decisions

This clause requires judges, magistrates and authorised officers to record their reasons for decisions on applications for bail or release without bail.

A court or authorised officer must also record reasons if a general condition under subclause 25(1) is imposed (without the accused having requesting it) to achieve one of the specified aims contained in clause 25 or 26.

Clause 28: Undertaking to appear

Clause 28 provides that a person is not to be released on bail unless he or she gives an undertaking in writing to appear at a court at a specified time or at some other time notified by a police officer. A single undertaking can be given for more than

one offence, and creates a duty for the person to appear (unless excused under clause 30). The undertaking may include, if bail is continued, a promise to appear at any time and place where proceedings may be continued.

Clause 29: Bail undertakings in respect of more than offence

This clause provides that a single bail undertaking may be given for more than one offence.

Clause 30: Accused persons may be excused from attendance before court

This provision empowers the court to excuse a person from attending court as required by the undertaking. The effect of such an order is to waive the requirement for attendance while preserving the other conditions of the bail. An application may be made by the accused's counsel without the person being present in court.

An order excusing attendance may be made regardless of whether any evidence has been given in the proceedings, or whether the accused has previously attended the court.

A court may direct, by notice in writing, that the accused appear even though it has previously excused attendance. A procedure is set out in subclauses 30(5) to (7) for serving and enforcing the notices.

Clause 31: Giving of bail undertakings and entry into bail agreements, etc

Clause 31 provides that a bail undertaking may be given to a court, a clerk of a court or an authorised officer (police). If the accused is in a remand centre or gaol it can be given the superintendent of the remand centre or the officer in charge of the gaol, as the case may be [paragraphs 31(1)(a) and (b)]. The accused may also enter into an agreement with, make an acknowledgment or deposit money with any of those same officials where it is necessary to do so as a condition of bail [subclause 31(2)].

Clause 32: Acceptable persons and security for bail

Clause 32 stipulates that the court or authorised police officer imposing the bail conditions, or the official to whom the bail undertaking is given shall determine who is an acceptable person (and the number of acceptable persons required) to act as surety under clause 25. The same authorities are to determine the nature and adequacy of security given for agreements to pay money in the event of the accused failing to appear.

An acceptable person may be a body corporate which is prescribed in the regulations. It is envisaged that incorporated charitable or public aid organisations will be prescribed for this purpose.

There is also a regulation making power to specify the information to be included in an acknowledgment under clause 25.

Clause 33: Continuation of bail and bail undertakings

This clause allows previously set bail to continue following adjournments or postponements. [Subclause 3(4) states that references in the proposed Act to the granting of bail includes a reference to the continuation of bail.] A court may extend bail already granted where a hearing date changes, without the accused having to be present. Agreements to act as surety may be extended if the agreement contains provision for extension or the surety agrees. Bail may not be refused merely because a surety will not agree to automatic extensions [subclause 33(4)]. Where bail is extended, the accused is required to appear on the new date (and at the new place if so specified) without entering into a fresh undertaking to appear. Subclause 33(6) also allows bail to be extended where the court is satisfied that the accused is unable to appear because of illness, accident or other sufficient cause.

Clause 34: Written notice of conditions of bail

This provision requires a written notice to be given to the accused and surety (if any) setting out the obligations of the accused person and the consequences of a breach (subclause 34(2)). The accused may not be released on bail unless the court or authorised officer is satisfied that the accused and surety (if any) understand the conditions and the consequences of a breach. If a bail condition is varied, the accused and surety (if any) must be given a notice setting out the new condition [subclause 34(3)]. Where bail is continued, the accused must be given a new notice specifying conditions on which bail is currently allowed and the new hearing date [subclause 34(4)].

Clause 35: Warning to person making acknowledgment

Clause 35 requires a person who intends to make an acknowledgment, under paragraph 25(1)(b), to be warned that it is an offence knowingly to make an acknowledgment containing false information. This offence is created by clause 47. However, failure to give the warning does not make the acknowledgment invalid.

Clause 36: Discharge of sureties

This provision allows the surety to apply for discharge or his or her liabilities. The surety may apply to the court which originally granted bail or to the court before which the accused is to appear. When an application is made, the accused must be brought before the court and a warrant or summons may be issued for this purpose. Once the accused appears, the court has to discharge the surety unless satisfied that it would be unjust to do so [subclause 36(3)]. Once discharged, the surety is to be given back the security or deposit. The court may impose further bail conditions on the accused or commit him or her into custody until the conditions are met [subclauses 36(4) and (5)]. A surety may not apply for discharge if the accused has breached bail [subclause 36(6)].

Clause 37: Enforcement of bail agreements

Clause 37 provides that a magistrate may order that the money held or promised as security for bail be forfeited or partly forfeited to the Territory if bail is breached.

Any money so forfeited may be recovered in the Magistrates Court as a debt due to the Territory.

PART VII - REVIEW OF BAIL DECISIONS

Clause 38: Right of review of bail decisions

This provision gives the accused and the informant a right to apply for the review of a bail decision, whether a decision of a court or of an authorised officer.

Clause 39: Power of magistrate to review

Clause 39 gives a magistrate the power to review the bail decisions of police or magistrates, including the power to review his or her own decisions.

Clause 40: Power of Supreme Court to review

This provision gives the Supreme Court power to review bail decisions of police, magistrates and the Supreme Court itself, however constituted. This power is not affected by any previous review by a magistrate.

Clause 41: General limitations on the power to review

Clause 41 provides that a court may not review a decision where there was no power to make a decision in the first place.

Clause 42: Exercise of power to review

Clause 42 makes certain provisions regulating review of bail decisions. In summary, these provisions specify:

- . The power to review includes a power to affirm, vary or substitute another decision [subclause 42(1)];
- . a new decision must conform with the proposed Act [subclause 42(2)];
- . a review is to be by way of a rehearing, and additional evidence may be admitted [subclause 42(3)];
- . if bail is changed on review, the accused must be notified in accordance with clause 27 [subclause 42(4)];
- . if bail is revoked on review, the court may issue a warrant to commit the accused to prison [subclause 42(5)];
- . if on review bail is granted the court may issue a warrant to commit the accused to prison until he or she gives the undertaking or the conditions are satisfied [subclause 42(6)]; and
- . a request for review may be refused if frivolous or vexatious [subclause 42(7)].

Clause 43: Review limited to bail conditions

This clause allows a court to review just bail conditions if an accused has not met a condition which the court has imposed and is therefore still in custody.

PART VII - MISCELLANEOUS

Clause 44: Furnishing of information relating to bail

This clause obliges the police officer who is charging an accused and the court where the accused first appears to provide him or her with details of bail entitlements in the form specified in the regulations.

Clause 45: Notification to court that bail condition not satisfied

This clause provides a mechanism to notify a court - which has granted bail subject to conditions - that the accused person is still in custody because he or she either cannot or will not satisfy the condition. It obliges the officer who is for the time being in charge of the institution where the accused person is being held in custody to inform the court if that person is still in custody seven days after the court has granted bail. Once informed, the court may then exercise its power under clause 43 to review the conditions on which it originally granted bail.

Clause 46: Failure to answer bail

This provision creates an offence of failing to answer bail which is punishable by a maximum of 2 years imprisonment, a fine of \$20,000 or both. It does not apply to a bail undertaking made following the institution of an appeal.

Clause 47: False statements in acknowledgments

This provision makes it an offence to make an acknowledgment knowing it to be untrue in a material particular, and provides for a penalty of 2 years imprisonment, or a fine of \$20,000 or both.

Clause 48: Indemnification of sureties

Clause 48 makes it an offence to indemnify a surety against liability under an agreement to secure bail, whether before or after the person goes surety, and provides for a penalty of 2 years imprisonment, a fine of \$20,000, or both.

Clause 49: Contravention of proposed Act by police officers

This provision gives police a general exemption from criminal prosecution for failing to comply with the provisions of the proposed Act, but the exemption does not cover the offence provisions or civil liability, nor does it prevent an investigation under the *Complaints (Australian Federal Police) Act 1981* (Commonwealth).

Clause 50: Apprehension of person admitted to bail

Clause 50 gives police a power to arrest without warrant a person where the police officer believes on reasonable grounds that the person has breached bail. A person arrested under this provision must be brought before the Magistrates Court as soon as practicable after being taken into custody.

Clause 51: Power of court where person apprehended

This provision gives the Magistrates Court the same power in relation to persons apprehended under clause 50 for breaching bail to remand in custody, to grant bail or to dispense with bail, that it has in relation to other accused persons in custody.

Clause 52: Civil standard of proof for certain purposes

Clause 52 applies the civil standard of proof (balance of probabilities) to decisions in relation to bail by a court or an authorised officer, but not to proceedings for offences under clauses 46, 47 or 48..

Clause 53: Abolition of right of surety to arrest

This clause provides that a surety does not have the right to arrest an accused by virtue of being his or her surety. Such a right exists at common law. A surety will still retain the normal common law powers of arrest available to any citizen, and could arrest an accused for failing to answer bail (which is an offence) but not for breach of any other condition which is not of itself an offence. The proposed section reflects section 61 of the *Bail Act 1978* (NSW).

Clause 54: This Act to prevail

Clause 55 provides that the proposed Act is to prevail over any other law immediately in force before it commences. An exception is made for anything contained in The Bill of Rights 1689 (Imp) or its application under the *Imperial Acts Application Act 1986*.

Clause 55: Regulations

This creates a regulation making power for the purposes of the proposed Act.