

2010

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

BAIL AMENDMENT BILL 2010

EXPLANATORY STATEMENT

Circulated by authority of
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Bail Amendment Bill 2010

Outline

The Bail Amendment Bill 2010 amends the *Bail Act 1992* (the Act). The Bill:

- introduces new procedures in relation to the grant of bail and the review of bail decisions in the courts; and
- modifies the limitations on the power of the Magistrates Court to grant bail.

The procedural reforms aim to address a substantial increase in the number of bail applications being made in the Supreme Court as opposed to the Magistrates Court. This increase is contributing to delays in the disposal of cases in the Supreme Court which, in turn, affects access to justice. The reforms endeavour to support human rights by providing increased opportunity for bail applications early in proceedings in the Magistrates Court where procedures are less onerous and formal.

The Government, with input from key stakeholders, identified that there are two main reasons for the increase:

- first, that accused people are proceeding to apply for bail in the Magistrates Court in the absence of appropriate information for the Court; and
- second, that following refusal of bail in the Magistrates Court, accused people are renewing their applications for bail in the Supreme Court rather than the Magistrates Court.

First applications for bail by accused people are frequently made at the initial appearance following arrest. This provides limited opportunity to properly prepare the application and gather all the available supporting evidence that could lead the Magistrates Court to conclude that bail should be granted. The result is that the application is properly refused by the Magistrate.

Further applications for the granting of bail, in contrast, are made at a point when further relevant evidence in support is available and provide an accused person with the best possible case for bail. At present, these applications are often made in the Supreme Court and, where appropriate, are granted. Over time, this has had the effect of encouraging accused people to pursue the question of bail in the Supreme Court rather than the Magistrates Court.

The procedural reforms will make second applications for bail in the Magistrates Court easier by removing the requirement for an accused person to demonstrate a change of circumstances. Further, the reforms will encourage accused people to continue the pursuit of bail in the Magistrates Court by requiring that they make two applications for bail and apply for a review of the bail decision in the Magistrates Court before making further application for bail or review in the Supreme Court.

The review provisions apply to both accused people and informants. The reforms to the review provisions ensure that both parties are placed on an equal footing and work in conjunction with the reforms to the grant of bail provisions. The new provisions

require that accused people and informants seek review of a bail decision by the Magistrates Court in that court. Applications for review in the Supreme Court may only occur once a review in the Magistrates Court has taken place.

Throughout the provisions relating to bail applications and applications for review of a bail decision is a requirement that the relevant court be satisfied that either:

- since the last application for bail there has been a change in circumstances relevant to the granting of bail; or
- that there is fresh evidence or information of relevance to the granting of bail that was unavailable at the last application for bail.

The new ‘change of circumstances’ test removes the requirement of ‘significance’ from the existing legislation. This step has been taken to ensure parties have appropriate access to the courts with regard to bail in the context of the *Human Rights Act 2004* (the HR Act).

The Bill also modifies the existing limitations on the power of the Magistrates Court to grant bail. The reform in this area will allow the Magistrates Court to deal with accused people who have been arrested for breach of bail granted in respect of Supreme Court cases when the Supreme Court is not sitting. The reform responds to judicial concern that it may be contrary to human rights that accused people are currently not able to appear in court on a breach of bail on weekends and public holidays.

Human Rights Considerations

Section 18 of the HR Act sets out the right to liberty and is particularly relevant to the formulation of legislation relating to bail. Reasonable limitations of the right are permitted pursuant to section 28 of the HR Act.

Section 18(2) of the HR Act states that “no-one may be deprived of liberty, except on the grounds and accordance with the procedures established by law”. Those laws should be proportionate to the purpose (*Winterwerp v Netherlands* (1979 2 EHRR 387)). The *Bail Act 1992* provides both the grounds and procedures for continued detention in custody following charge. The Bill does not change the criteria set out in the Act which justify remanding an accused person in custody, but does alter the procedures.

The addition in the Bill of a second bail application without restriction removes the previous requirement for an accused person to have new reasons to justify the granting of bail. This provides the opportunity at an early stage in proceedings to fully argue the issue of bail before a court and is therefore a positive amendment in human rights terms.

Section 18(5) of the HR Act provides that accused people awaiting trial should not be detained in custody as a general rule. The ACT Supreme Court has expressed the view that the strictness of the test that must be met before making further bail applications or applications for review required moderation (*In the matter of an application for*

bail by Rodrigues [2008] ACTSC 50) in light of section 18(5) of the HR Act. In response to judicial views the Bill lowers the threshold for an accused person making further bail applications, by removing the requirement of ‘significance’ from the test.

The right of accused people to apply for bail or review of a bail decision in the Supreme Court is subject to some restrictions. For example, in a case that is proceeding in the Magistrates Court, an accused person must have made two applications for bail and had a review of bail heard in the Magistrates Court, before being able to make further application to the Supreme Court. Also, the change of circumstances test must be satisfied. Section 28 of the HR Act permits reasonable limitations on human rights and sets out in section 28(2) considerations in deciding on whether the limitation is reasonable. While introducing additional procedures before an accused may apply to the Supreme Court for bail, the Bill also relaxes restrictions on applications to the Magistrates Court.

Section 18(4) of the HR Act states that “anyone who is arrested or detained on a criminal charge -

- (a) must be promptly brought before a judge or magistrates; and
- (b) has the right to be tried within a reasonable time or released”.

The Bill seeks to support this right in two respects. First, the Bill aims to reduce delays in the Supreme Court by ensuring, wherever possible, the question of bail has been resolved in the Magistrates Court. Second, by increasing the jurisdiction of the Magistrates Court to deal with Supreme Court breach of bail cases in certain circumstances, accused people will be dealt with more promptly.

Bail Amendment Bill 2010

Detail

Clause 1— Name of Act

This is a technical clause that names the short title of the Act. The name of the Act is the *Bail Amendment Act 2010*.

Clause 2— Commencement

This clause states that the Act will commence on a day fixed by the Minister by written notice.

Clause 3— Legislation amended

This is a technical clause stating that the Act being amended is the *Bail Act 1992* (the Act).

Clause 4— New section 12A and 12B

This clause inserts new definitional sections 12A, 12B and 12C into the *Bail Act 1992*.

12A

This section provides a definition of ‘*bail review application*’ as meaning an application in relation to bail made under section 41.

The term ‘*bail order*’ is referenced as defined in section 19(1).

12B

This section contains the definition of ‘*before the Supreme Court*’. The definition serves to clarify when the Supreme Court has jurisdiction in relation to bail and specifies that this occurs in three circumstances:

- the accused has been committed for trial or sentence;
- the prosecution has been commenced pursuant to section 7 of the *Director of Public Prosecutions Act 1990*; or
- the accused has lodged an appeal.

12C

This section ensures that the Bill only applies to applications made on or after the section commences.

The amendments will apply in relation to people already in custody who make an application on or after commencement.

Clause 5 – Sections 19 and 20

This clause substitutes sections 19 and 20 of the Act.

19 Court Bail - general

Section 19 contains general provisions as to bail and largely reflects the previous section 19. A court has the power to grant bail or to enlarge, vary or revoke bail that has been granted previously. It remains the case that while there is no limit on the number of bail applications an accused person may make, the court has discretion not to hear applications that are frivolous or vexatious. Also retained is the obligation for a court to deal with an application in relation to bail as soon as reasonably practicable and the liberty to take into account any information the court considers relevant and reliable.

The previous section 19(5) which imposed limitations on a court considering second or subsequent bail applications has been removed. This has occurred to allow additional provisions to be inserted in the Act at sections 20A, 21 and 21A which address repeat applications for bail in the Magistrates Court and Supreme Court separately.

20 – Power in relation to bail – Magistrates Court

This section replaces the previous section 20, which precluded the Magistrates Court from making a decision in relation to bail once an accused person was subject to Supreme Court bail following committal or on appeal.

The new section 20 has the same effect as the previous section 20 and provides a new power to the Magistrates Court to make a bail decision in relation to Supreme Court cases in limited circumstances.

Section 20(1)(a) provides authority for the Magistrates Court to exercise its power in relation to bail in respect of an accused person who has been charged with an offence.

Section 20(1)(b) extends the jurisdiction of the Magistrates Court to deal with accused people:

- whose cases are proceeding before the Supreme Court because they have been committed for trial or sentence, have lodged an appeal or because proceedings have been commenced on indictment;
- who have been granted bail by either the Magistrates Court or the Supreme Court;
- who are in custody because they have been arrested for a breach or anticipated breach of bail pursuant to section 56A; and
- if it is not a Supreme Court sitting day.

This provision acknowledges that people arrested pursuant to section 56A may be held in custody because the Supreme Court does not sit at weekends or on public holidays. For example, an accused person who is arrested on a Friday evening for breach of bail granted by the Supreme Court is currently held in custody until Monday morning when the Supreme Court sits for business.

The Magistrates Court's new jurisdiction to deal with Supreme Court bail matters is limited to Saturdays, Sundays and Public Holidays and then only when the Magistrates Court is already sitting in relation to other matters. This ensures that the Magistrates Court will not be required to sit specially to deal Supreme Courts matters.

20A – Repeat application for bail – Magistrates Court

The effect of section 20A(1) is to provide an entitlement to an accused person, whether legally represented or not, to make two bail applications as of right in the Magistrates Court. This means that any argument, information or evidence can be presented whether or not this information was put before the court previously.

Section 20A(2) requires that before a third or subsequent application for bail can be entertained, the Magistrates Court must be satisfied that there something new to consider either because there has been a change of circumstances or fresh evidence or information is available (the change of circumstances test). Whatever the change or new information, it must be considered by the court to be relevant to the issue of bail and have occurred or become available since the last bail application.

The new ‘change of circumstances’ test departs from the existing test in the Act, by removing the requirement of ‘significance’. This expresses in legislative terms the interpretation of the previous test by the Supreme Court in light of the HR Act. It is not intended that by removing the requirement of ‘significance’ that the test to be applied should be moderated still further.

This new test still requires the court to consider that the ‘change of circumstances’ is relevant to bail and merits entertaining a further application. The courts can find guidance as to the application of the new test from the interpretation of section 18(4) of the *Bail Act 1977* (Victoria). In the case of *Re application for bail by Antonios Mokbel* [2002] VSC 127 39-40, Kellam J stated that:

“The applicant must satisfy the Court that new facts or circumstances have arisen since the making of the previous order before the court may proceed to hear the application. In my view the new facts or circumstances must be of such a nature that they are relevant to bail and justify a conclusion by the Court that reconsideration of the refusal of bail is required. Clearly not every new fact or change of circumstance will fall into this category.”

Overall, the construction of section 20A offers improved protection of the right to liberty contained in 18 of the HR Act.

20B Power in relation to bail – Supreme Court

Section 20B provides the Supreme Court with jurisdiction to make a decision in relation to bail when either:

- the case is proceeding in the Supreme Court having been committed for trial or sentence, proceedings have been instituted by indictment or an appeal has been lodged; or
- the case is still proceeding in the Magistrates Court, but the accused is applying to the Supreme Court under the review provisions contained in sections 43 or 43A.

This section in combination with sections 43 and 43A means that accused whose case is proceeding in the Magistrates Court must have made two applications for bail and an application for review heard in the Magistrates Court before the Supreme Court has any power in relation to bail.

An accused person's entitlement in section 18(6) of the HR Act to apply to a court without delay to allow the court to rule on the lawfulness of their detention is not being limited as ample opportunity is provided to apply for bail in the Magistrates Court.

20C Repeat application for bail – Supreme Court

Once a case is before the Supreme Court, this section limits the circumstances in which an accused person may make an application for bail without first satisfying the 'change of circumstances' threshold.

An accused person who has made two (or more) applications for bail in the Magistrates Court will not be able to make a further application in the Supreme Court unless the court is satisfied that there has been a 'change of circumstances' since the last application. The 'change of circumstances' test is identical to that in section 20A(2).

However, if an accused person has not made a bail application at all in the Magistrates Court or only made one application, the Supreme Court may consider bail on one occasion without the need for the accused to demonstrate a 'change of circumstances'.

The section provides examples to assist in interpretation.

Clause 6 - Sections 42 and 43

This clause substitutes section 42 and 43 of the Act.

Both an accused person and an informant can apply for the review of a bail decision. The new review provisions reflect the new scheme relating to the grant of bail and ensure that both sets of provisions work together.

42 Power of the Magistrates Court to review – decision of authorised officer

This section largely replicates the existing section 42 of the Act and gives a Magistrate the power to review bail decisions of the bail. However, this section has been altered in two important respects. First, it reflects the altered 'change of circumstances' threshold that applies in relation to the grant of bail decision in Part 4 by removing the requirement of 'significance'. Second, the power of the Magistrates Court to review a decision of that court has been removed to section 43A to provide a separate procedure in respect of such applications.

42A Power of Magistrates Court to review – decision of Magistrates Court

Section 42A empowers a Magistrate to review bail decisions of the Magistrates Court providing that:

- the proceeding to which the application to review relates is in the jurisdiction of the Magistrates Court;
- the applicants is able to satisfy the change of circumstances test; and
- if the application is being made by an accused person, the court has already heard two bail applications in the proceedings.

The terms of this provision ensure that accused people use their entitlement to make two bail applications for bail before moving to review. It also places informants on an

equal footing as they must also apply to the Magistrates Court for review before being able to apply to the Supreme Court.

43 Power of Supreme court to review – decision of authorised officer

This provision permits the Supreme Court to review a bail decision made by the police. This power is limited to instances when either the Magistrates Court does not have the power to hear the review application or has already heard a review application under section 42A. The applicant must meet the ‘change of circumstances’ test.

43A Power of Supreme Court to review – decision of Magistrates Court or Supreme Court

This section requires an accused person to have made two applications for bail and a review in the Magistrates Court before being able to make an application for review in the Supreme Court. An informant is also restricted from making an application unless a review has already occurred in the Magistrates Court. Again, the applicant must meet the ‘change of circumstances’ test before the Supreme Court may consider the application.

Clause 7 – Review limited to bail conditions section 46(5)

This is a technical clause which adds a reference to the new section 43A to section 46(5).

Section 46 allows a court to review the bail conditions alone if an accused has not met a condition which the court has imposed and so is still in custody. Section 46(5) operates to clarify that this is a separate function to the review powers pursuant to sections 43 and 43A and so the Supreme Court may not review bail conditions alone under section 46 unless they were imposed by the Supreme Court.

Clause 8 – Dictionary, new definitions

This is a technical clause which inserts the terms ‘bail order’ and ‘bail review application’ into the dictionary of the Act.