

**2021**

**LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**CRIMES LEGISLATION AMENDMENT BILL 2020**

**SUPPLEMENTARY EXPLANATORY STATEMENT**

**To be moved by  
Shane Rattenbury MLA  
Attorney-General**

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# Crimes Legislation Amendment Bill 2020

## Government Amendments

### Outline of Government Amendments

On 3 December 2020, the Crimes Legislation Amendment Bill 2020 (the Bill) was introduced to the Legislative Assembly. The Bill makes minor and technical amendments to the provisions of several acts to improve the efficacy and clarity of criminal justice legislation.

The explanatory statement accompanying the Bill provides a detailed account of the provisions contained in the Bill and can be accessed at:

[https://www.legislation.act.gov.au/b/db\\_63530/](https://www.legislation.act.gov.au/b/db_63530/)

The Government amendments to the Bill (the Government amendments) are to insert minor and technical amendments to provisions of the *Bail Act 1992* (the Bail Act) dealing with service of notice to continue a person's bail, and a consequential amendment to the *Bail Regulation 1992*.

These proposed amendments follow consideration of these provisions in light of a decision of the Chief Magistrate in *Elder v Metyang* [2020] ACTMC 24 (*Elder*) that the Court had a mandatory legal obligation to immediately, personally serve an accused person with a notice to continue bail under the *Bail Regulation 1992* (the Regulation), section 4 (Service of notice under Act, s 34 (4) (c)).

The primary purpose of bail is to ensure that an accused person re-appears in court either to face charges or be sentenced. The purpose of a notice to continue bail is to notify the accused person the place, date and time to which the proceedings are adjourned or postponed and/or to notify the accused person that proceedings are adjourned or postponed to a yet to be determined place, date and time.

The decision in *Elder* highlighted:

- (a) an inconsistency between an express legal requirement to 'immediately' serve notices to continue bail personally under the Act, section 34(4)(c), and the established practice of the Law Courts Registry (the registry) to post notices to continue bail to an accused person in some circumstances, including where an accused person is absent from proceedings due to illness or accident; and
- (b) that the methods of service available for notices to continue bail are unduly limited and do not reflect contemporary methods of communication.

Clearly prescribing service requirements for notices to continue bail, reflecting contemporary methods of communication, will remove any uncertainty on the approach to be taken in a given case. This requires amendments to section 4 of the Regulation, as well as amendments to the Bail Act.

These Government amendments complement amendments to the *Bail Regulation 1992* to provide for more flexible and contemporary methods of service for bail continuation notices.

The amendments to section 34 (4) of the Bail Act will:

- (a) replace the requirement for ‘immediate’ service, with a requirement for service ‘as soon as practicable’. There are circumstances in which an accused is not able to be served immediately following the court continuing bail, including where the accused person is not present at court;
- (b) clarify that the regulation prescribes what the written notice to an accused person should include whether bail is adjourned or postponed to a specified place, date and time, or whether bail is stated to be adjourned or postponed to a place, date and time yet to be determined: and
- (c) require a court to serve the notice in a way nominated by the accused from the prescribed list (excepting personal service on the person or any other person), but if there is no nomination then the court may serve the notice in any way prescribed by regulation

Subsection 34 (7) clarifies that non-compliance with subsection (4) or (5) does not invalidate the continuation of bail.

### Human Rights

Section 30 of the *Human Rights Act 2004* (the HRA) requires that all Territory laws be interpreted in a way that is compatible with human rights. The court in deciding on which of the service methods open to it under the amended Bail Act and Bail Regulation, for a bail continuation notice, should adopt methods that are compatible with the rights of accused persons not to be arbitrarily or unlawfully detained as a result of failing to receive such notices. The methods adopted may vary with the particular circumstances of the accused person.

In the event of any prosecution for the offence of failure to answer bail (s 49 Bail Act) there is a defence of reasonable excuse open to the accused person and the opportunity to raise non-receipt of a bail continuation notice as a reasonable excuse. Whether the court accepts this excuse will be a matter of evidence.

### **Rights engaged**

The Government amendments engage the following HRA rights

- Section 18 – Right to liberty and security of persons
- Section 21 – Right to a fair trial
- Section 22 – Rights in criminal proceedings

## **Detailed human rights discussion**

### *Rights engaged*

The amendments engage and both limit and promote the right to liberty. The limitation may occur where a bail notice is not personally served as, if the accused does not receive the notice when served by other means, then they may be subsequently arrested and held in custody for failing to answer bail. Further, a court may then remand in custody if it is not accepted that the accused had a reasonable excuse for failing to answer bail.

In contrast, the amendments also support the right to liberty in that they create an authority for an accused to be provided with a notice of continued bail by the most effective means and allow the accused to nominate a specified method of service.

The amendments also engage the right to a fair trial and rights in criminal proceedings and can be viewed as both limiting and supporting. The limitation may occur should a hearing proceed in the absence of an accused who has not received their bail notice served through one of the permitted methods. However, the amendments also support those rights by allowing an accused to nominate their preferred method of service.

### *Legitimate objective.*

The amendments are designed to modernise how bail notices are served to assist in the effective administration of justice. The provisions also operate to assist an accused person to receive a bail notice in the way most convenient to them.

### *Rational connection*

The amendments provide a balanced approach to the service of bail to ensure that service can be achieved in the most effective way possible.

### *Proportionality*

The measures are reasonable in that they allow an accused person to nominate a method of service with the exception of personal service or service by leaving it at a home or business address with a person who appears to be aged 16 or over and to live or be employed at the address. These exceptions are made to ensure the accused does not seek to frustrate the purpose of the service provisions by avoiding service and take the least restrictive approach.

# Crimes Legislation Amendment Bill 2020

## Government Amendments

### Detail

#### **Government amendment 1 – Clause 3, page 2, line 9**

This amendment inserts into clause 3, which describes the legislation amended by the Bill, references to the *Bail Act 1992* and the *Bail Regulation 1992*.

#### **Government amendment 2 – Proposed new parts 1A and 1B Page 2, line 13**

This amendment inserts new Parts 1A and 1B, comprising new clauses 3A and 3B, amending the *Bail Act* and *Bail Regulation*, respectively.

Clause 3A substitutes new subsections 34 (4), (5) and (6), for existing subsection 34 (4) of the *Bail Act*. Section 34 deals with written notice of conditions of bail.

The changes effected by the substituted subsections 34 (4), (5) and (6) are that:

- the current requirement for ‘immediate’ service of a notice continuing bail is replaced with a requirement for service ‘as soon as practicable’; and
- clarification that the regulation prescribes what the written notice to an accused person should include whether bail is adjourned or postponed to a specified place, date and time, or whether bail is stated to be adjourned or postponed to a place, date and time yet to be determined.
- a court must serve the notice in a way nominated by the accused from the prescribed list (excepting personal service or service on any other person), but if there is no nomination then the court may serve the notice in any way prescribed by regulation.

New subsection 34 (7) in clause 3A clarifies that non-compliance with subsection (4) or (5) does not invalidate the continuation of bail.

Clause 3B consequentially amends the *Bail Regulation* to reflect that the requirement for notice under subsection 34 (4), to be given as prescribed by regulation, is now referenced in new subsection (5).