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

**ELEVENTH ASSEMBLY**

**Bail Amendment Bill 2026**

**EXPLANATORY STATEMENT  
and  
HUMAN RIGHTS COMPATIBILITY STATEMENT  
(*Human Rights Act 2004, s 37*)**

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## Bail Amendment Bill 2026

This explanatory statement relates to the Bail Amendment Bill 2026 (the Bill). It has been prepared to assist the reader of the Bill and to help inform debate. It does not form part of the Bill and has not been endorsed by the Legislative Assembly.

The Bill is a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004* (Human Rights Act).

### OVERVIEW OF THE BILL

The Bail Amendment Bill 2026 (the Bill) proposes changes to the *Bail Act 1992* and related legislation. These amendments clarify and codify the matters that decision makers must take into account when making a decision on bail. The amendments set out the core matters that decision makers must consider when making decisions in relation to adults and children accused of an offence. The amendments also set out a number of general matters that decision makers must consider when making decisions.

In addition, the Bill sets out specific factors decision makers must consider when making decisions in relation to accused persons who are:

- Aboriginal or Torres Strait Islander people
- people with a disability or health condition
- children, and
- pregnant people.

The Bill does not impose an obligation on decision makers to consider all matters listed in sections 22A to 23 in every case when making bail decisions. A decision maker will only be required to consider the matters listed in a provision where relevant to the particular case. For example, if the information available to the decision maker demonstrates that the accused person has never been subject to bail undertakings, bail conditions, or any other orders of an Australian court, the decision maker is not required to consider those matters when making a decision. Similarly, a decision maker is not required to consider the matters listed in section 22D where the information they have available to them indicates that the accused person is an adult.

The Bill does not impose an obligation on decision makers to undertake investigations into each of the matters listed in sections 22A to 23 when making bail decisions. In some cases, as set out below, the relevant matters are presented as general considerations for the decision maker to turn their mind to. There is no requirement for authorised officers to specifically ask the accused person, or for the parties to specifically make submissions about, those general matters. This includes the matters set out in section 22B(1)(a) and (b) and section 22D(1)(d) and (e).

## Aboriginal or Torres Strait Islander people

The Bill requires bail decision makers to consider the following factors when making bail decisions in relation to an Aboriginal or Torres Strait Islander person:

- the risk of harm that custody may pose to the person as an Aboriginal or Torres Strait Islander person
- the likely effect of being held in custody on the person's ability to maintain their connections to culture, family, Elders, communities and Country
- any relevant matter in the person's history, culture or circumstances, including the ongoing effect of any of the following: trauma, including inter-generational trauma, abuse, neglect, loss or family violence; being dealt with under a child welfare law; or social or economic disadvantage, including homelessness or unstable housing arrangements
- if the person has carer responsibilities, including as a parent or guardian of an Aboriginal or Torres Strait Islander child, the effects of bail conditions or custody on the person's ability to discharge their responsibilities and on the person being cared for, and
- any other significant cultural issue or obligation.

The Bill adopts the definition of Aboriginal and Torres Strait Islander person from the *Aboriginal and Torres Strait Islander Children and Young People Commissioner Act 2022* and section 3 of the Victorian Bail Act. This definition is routinely used in legislation in the ACT and in other jurisdictions in Australia to provide consistency with other legislation, including bail legislation in other Australian jurisdictions.

Guidance material provided by the Judicial College of Victoria provides that it is sufficient to satisfy the meaning of 'Aboriginal and Torres Strait Islander people' under the Victorian Bail Act, regardless of:

- whether the person's connection to their culture has been intermittent throughout their life
- whether the person has only recently connected to or discovered their culture or heritage, or
- when the person first discloses that their status.

When considering all of the factors that may weigh for or against the granting of bail, it is intended that a decision maker will consider a person's Aboriginal or Torres Strait Islander status as a factor that is likely to weigh in favour of granting bail, and will never weigh against the granting of bail.

The guidance material directs the decision maker to first ask whether the person is an Aboriginal or Torres Strait Islander person, and notes that where a person says they are an Aboriginal or Torres Strait Islander person, the decision maker must accept this. Where a person does not answer or does not want to answer this question, the decision maker should determine whether there is evidence to suggest

the person is an Aboriginal or Torres Strait Islander person and make reasonable further enquiries (for example, checking existing ACT Policing holdings), but should not challenge a person's self-identification or require the person to provide evidence of their cultural identity.

#### People with a disability or health condition

The Bill acknowledges the vulnerability of individuals with a disability or health condition in the criminal justice system and the need to take their disability or health related needs into account when making decisions. Specifically, where an accused person self-reports or appears to have a disability or health condition, the Bill requires a decision maker to consider their treatment and other needs, and the effect of the disability or health condition on the person's ability to understand their rights and obligations, communicate their needs, and make and communicate decisions. It is intended that a decision maker will consider a person's disability or health condition as a factor that may weigh in favour of granting bail and may be relevant to the framing of bail conditions. It is not intended to be a factor that would weigh against the grant of bail.

#### Children

The Bill acknowledges the vulnerability of children in the criminal justice system and the criminogenic risks associated with being in custody, and requires a bail decision maker to consider factors when making bail decision in relation to an accused who is a child. These factors are additional to existing requirements in the Bail Act for a decision maker to consider the youth justice principles in section 94 in the *Children and Young People Act 2008*, including that a child or young person may only be detained in custody for an offence as a last resort and for the minimum time necessary. It is intended that in weighing all the factors, a decision maker will consider that if a person is a child, this is a factor that will weigh in favour of granting bail.

Where the accused is a child, the Bill requires a decision maker to consider to a range of factors when making bail decisions, including:

- the need to impose the least onerous necessary bail conditions in the circumstances
- the importance of preserving and strengthening the child's relationships with their parents, guardians and carers, and any other person who is significant to the child
- the need to support the child's education, training or lawful employment without unnecessary disruption
- the need to reduce the stigma associated with being remanded in custody, and
- the need to manage and reduce the effects of custody on children.

## Pregnant people

The Bill acknowledges the vulnerability of pregnant people in the criminal justice system and the need to take their pregnancy related needs and the needs of their unborn child (once born) into account when making decisions. Specifically, where an accused person self-reports or appears to be pregnant, the Bill requires a decision maker to consider the likely effect of custody on the person and on the unborn child after they are born, as well as the likely effect of complying with bail conditions on the pregnant person. In weighing all factors it is intended that a decision maker will consider a person's pregnancy as a factor that may weigh in favour of granting bail. A person's pregnancy is not intended in any circumstances to be a factor weighing against the grant of bail.

## Protection of victims

The Bill also requires bail decision makers to explicitly consider concerns about the need for protection, violence or harassment expressed by victims as well as other information provided by a primary victim about the accused when making bail decisions. The Bill acknowledges the vulnerability of victims, including those who do not wish to make their concerns known to the accused by providing a discretion on the prosecution not to share victim's concerns where that is the victim's preference, and by providing for primary victims to nominate a representative to participate in proceedings and/or receive notifications about updates in the bail status of a relevant accused person on their behalf.

The Bill proposes consequential amendments to the *Family Violence Act 2016* to protect information given under the new bail provisions and to the *Victims of Crime Act 1994* to clarify the requirements to sharing victim concerns about the need for protection and safety, and to align definitions of relevant terms in that Act that relate to bail.

The changes proposed by the Bill build on existing requirements in the Bail Act.

## **CONSULTATION ON THE PROPOSED APPROACH**

The amendments were developed in response to public consultation on the Bail Act. The discussion paper *Review of the decision-making criteria in the Bail Act 1992* (the Discussion Paper) was released for public consultation on YourSay on 5 May 2025. Thirty-nine submissions were received. Written submissions were received from identified individuals (5 contributions), Community and advocacy organisations (12 contributions), Government entities (7 contributions), and anonymous sources (15 contributions).

In addition, the following Government entities were consulted on the draft Bill:

- ACT Courts
- ACT Policing
- ACT Director of Public Prosecutions

- Legal Aid ACT
- ACT National Preventative Mechanism
- ACT Victims of Crime Commissioner
- ACT Human Rights Commission
- ACT Government Health and Community Services Directorate – Strategic Policy, and
- ACT Government Health and Community Services Directorate (Domestic, Family and Sexual Violence Office).

The following external organisations were also consulted on the draft Bill:

- Australian Federal Police Association
- Shop, Distributive and Allied Employees' Association
- Winnunga Nimmityjah Aboriginal Health and Community Services Ltd,
- ANTaR ACT
- ACT Bar Association
- ACT Law Society
- Women's Health Matters
- Domestic Violence Crisis Service
- Justice Reform Initiative
- Aboriginal Legal Service NSW/ACT
- Sexual Violence Legal Service (SVLS), and
- Canberra Rape Crisis Centre.

## **CLIMATE IMPACT**

The Bill has no impacts on the climate.

## **CONSISTENCY WITH HUMAN RIGHTS**

During the development of the Bill, due regard was given to its compatibility with human rights as set out in the Human Rights Act. As discussed above, the Human Rights Commission was consulted on the proposed amendments.

The Bill seeks to codify the matters decision makers already routinely consider when making bail decisions. This is designed to ensure an accused is aware of the factors considered and can raise relevant information at the earliest opportunity. It also expressly provides victims a right to make representations, including information about their safety concerns, to the attention of a decision maker. Listing the minimum matters that must be considered in all cases and where the accused person has a

particular characteristic, such as a disability, ensures decision makers can make fully informed decisions.

Listing the matters that a decision maker must take into consideration is not expected to result in a higher or lower overall rate of remand. Rather, it is designed to ensure decision makers have sufficient information to make fully informed decisions. This will reduce the likelihood that an accused is denied bail where there is information that any identified risk posed by the individual can be managed through appropriate bail conditions.

The Bail Act includes presumptions for and against the grant of bail depending on a number of factors, including the nature of the offence and the maximum sentence available for the offence charged. The Bill does not make any changes to the presumptions.

### **Rights engaged**

The amendment in the Bill engages the following rights.

- Section 8 – Right to equality and non-discrimination (promoted)
- Section 9 – Right to life (promoted)
- Section 11 – Right to protection of the family and children (promoted)
- Section 12 – Right to privacy (limited)
- Section 18 – Right to liberty and security of person (promoted and limited)
- Section 27 – Cultural rights of Aboriginal and Torres Strait Islander people (promoted)

### ***Rights promoted***

#### Right to life – section 9 Human Rights Act

The Bill promotes the right to life under section 9 of the Human Rights Act, which provides that everyone has a right to life and no one may be arbitrarily deprived of life.

#### *Vulnerable accused persons*

The Bill promotes the right to life of the accused person by ensuring decision makers are equipped with all relevant information when making bail decisions. Sections 22, 22A, 22B, 22C, 22D and 23 of the Bill require decision makers to consider a range of subjective factors, where relevant to the accused person, when making a bail decision. These amendments are designed to ensure decision makers have all available information upon which to make a fully informed decision about the accused before them. It is intended that a decision maker will consider specified vulnerabilities as factors that may weigh in favour of granting bail.

Ensuring decision makers have taken all relevant information into account before making a decision about whether to remand the person promotes the right to life for all accused persons, as decision makers will be aware of any particular

vulnerabilities for accused persons such as disability and health issues, pregnancy, Aboriginality and children in the custodial process, and be able to assess the potential impact of any of these vulnerabilities on a person in custody. This is a particular issue for the vulnerable cohorts covered by the amendments given the higher than average risks associated with the deaths of these cohorts while in custody, particularly Aboriginal and Torres Strait Islander people, people with a disability or health condition, pregnant people, and children.

### *Victims*

The Bill also promotes the right to life by promoting the safety of victims of family violence, by expanding the cohort of victims who can provide representations about their safety concerns and other matters, and requires bail decision makers to consider the risk that the accused person may use family violence if released on bail and how to manage the risk. Requiring decision makers to consider these issues will help mitigate the risk to life of victim-survivors posed by family violence, noting that interactions with the criminal justice system can result in an escalation of an accused person's behaviour, and can tragically result in fatality.

### Right to protection of the family and children – section 11 Human Rights Act

The Bill also promotes the right to protection of the family and children. Section 11 of the Human Rights Act provides that the family is the natural and basic group unit of society and is entitled to be protected by society. Section 11 also provides that every child has the right to protection.

The amendments aim to ensure decision makers make informed bail decisions in the best interests of all accused persons, including children and pregnant people, promoting the rights to safety, wellbeing, community ties and health.

An accused being remanded can be disruptive to their family, and particularly to children. Accordingly, a decision to remand an accused person who has caring responsibilities or dependents must only be made where the decision maker has all the relevant information.

Where an accused person who is remanded in custody is the primary carer, it significantly increases the likelihood of the child/ren being placed in out of home care, continuing the cycle of disadvantage. The damaging and intergenerational impact of imprisonment, even for short periods of time, for pregnant women, primary care-givers and their children is well documented. The 2022 Victorian Parliament [\*Inquiry into Children Impacted by Parental Incarceration\*](#) found that incarcerating pregnant women and parents of young children can have particular harms for the children impacted by that incarceration, and stakeholders advocated for avoiding incarcerating pregnant women and parents of infants and young children where possible.

## *Children*

Section 22(2) sets out the core matters a decision maker must consider with respect to an accused who is a child. This is supplemented by mandatory considerations set out in section 22D, and includes matters such as

- a. the importance of preserving and strengthening the child's relationships with the child's parents, guardians and carers and any other person who is significant to the child, and
- b. the importance of supporting the child to live in safe, stable and secure living arrangements in the community.

These amendments recognise that time in custody poses criminogenic and other risks to children. Avoiding time in custody is in the best interests of the child and should be a last resort and for the minimum time possible. Therefore, the Bill retains the requirement in the Bail Act for a decision maker to consider the youth justice principles in section 94 of the *Children and Young People Act 2008*, including that a child or young person may only be detained in custody for an offence as a last resort and for the minimum time necessary.

Many children who come into contact with the criminal justice system have experienced significant disadvantage and trauma. Detention or incarceration exacerbates that disadvantage and should therefore only be imposed as a last resort to help reduce the likelihood of the child being caught in a cycle of re-offending.

## *Aboriginal and Torres Strait Islander people*

For an accused who is an Aboriginal or Torres Strait Islander person, section 22B(1) of the Bill requires decision makers to consider, among other matters:

- the likely effect of being held in custody on the person's ability to maintain their connections to culture, family, Elders, communities and Country
- any relevant matter in the person's history, culture or circumstances, including the ongoing effect of trauma, including inter-generational trauma, abuse, neglect, loss or family violence, and
- if the person has carer responsibilities, including as a parent of an Aboriginal or Torres Strait Islander child—the effect of bail conditions or custody on the person's ability to discharge their responsibilities; and the person being cared for.

In doing so, section 22B(2) provides that a decision maker does not need proof that it is in the interests of an Aboriginal or Torres Strait Islander person to be able to maintain connections to their culture, family, Elders, communities and Country.

These provisions reflect the important and unique role of the extended family in Aboriginal and Torres Strait Islander cultures and helps promote the right to the protection of the family and children for Aboriginal and Torres Strait Islander people.

## *Pregnant people*

For an accused who is a pregnant person, section 23 of the Bill requires decision makers to consider, among other matters, the likely effect of custody on the unborn child after they are born.

This reflects the vulnerability of unborn children in custody and the challenges associated with providing appropriate and necessary support to pregnant women and their infants born in custody.

Most submissions to the YourSay Discussion Paper supported the proposal to specifically authorise decision makers to consider pregnancy as a consideration relevant to bail decisions, noting the incarceration of pregnant people can negatively impact perinatal health, maternal wellbeing and birth outcomes.

The 2025 Office of the Inspector of Custodial Services Healthy Prison Review of the Alexander Maconochie Centre (AMC) noted the inability of the AMC to accommodate a newborn child.<sup>1</sup> Being in remand also deprives a pregnant person from access to their chosen form of healthcare and support and isolates them from their community. These impacts can lead to significant physical and mental health impacts on the pregnant person, and their unborn child after they are born.

### Right to liberty and security of person – section 18 Human Rights Act

The right to liberty and security of person recognises that no one has the right to be arbitrarily arrested or detained. No one may be deprived of liberty, except on the grounds and in accordance with the procedures established by law.

An accused person who is denied bail is deprived of their liberty pending a further bail hearing or the outcome of the criminal charge/s against them. The Bail Act includes presumptions for and against the grant of bail depending on a number of factors, including the nature of the offence and the maximum sentence available for the offence charged. The Bill does not make any changes to the presumptions.

The Bill promotes the right to liberty and security of the accused person by ensuring decision makers are equipped with all relevant information when making bail decisions. Sections 22, 22A, 22B, 22C, 22D and 23 of the Bill require decision makers to consider a range of matters, where relevant to the accused person, when making a bail decision. These amendments are designed to ensure decision makers have all available information upon which to make a fully informed decision about the accused before them.

The amendments promote the right to liberty and security of person in several ways.

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<sup>1</sup> Office for the Inspector of Custodial Services, *Healthy Prison Review of the Alexander Maconochie Centre 2025*, 166 [https://www.ics.act.gov.au/\\_data/assets/pdf\\_file/0009/2984616/12039-ACT-ICS-Healthy-Prison-Review-of-the-AMC-2025\\_FA-tagged.pdf](https://www.ics.act.gov.au/_data/assets/pdf_file/0009/2984616/12039-ACT-ICS-Healthy-Prison-Review-of-the-AMC-2025_FA-tagged.pdf).

### *Accused people (general considerations)*

Sections 22 and 22A codify the core matters and relevant factors that must be taken into consideration when making a decision about the grant of bail. Overall, these provisions support a decision maker to consider the listed factors and assess whether that specific factor, in the individual's unique circumstances, warrants the person being granted or refused bail. Some of these factors, such as the likely effect of a refusal of bail on the person's family or dependants (section 22A(c)) may weigh in favour of the grant of bail. However, many of the factors in section 22 and section 22A are not determinative of a decision to grant or refuse bail. For example, the nature and seriousness of the offence (section 22A(a)) could weigh in favour of a refusal of bail for some alleged crimes of the most serious in nature and weigh in favour of a grant of bail if the alleged offending is less serious.

The intention of these provisions is to explicitly require a decision maker to consider the listed factors and balance each of those factors when making a determination. The provision is intended to provide accused persons transparency of the matters a decision maker turns their mind to and provide the community with clarity of the matters considered in making bail decisions.

### *Victims and witnesses*

Sections 22, 22A and 23A promote the right to security of person of victims.

Section 22 requires decision makers to consider the likelihood that the accused will endanger the safety or welfare of any person or intimidate a witness. Section 22A requires a decision maker to consider the likelihood of a person using family violence if released on bail and how to manage any risk of the person using family violence. . Where a decision maker considers, on balance, that the accused should be denied bail or should be granted bail subject to conditions designed to keep the victim safe, this promotes the security of the victim.

In addition, section 23A requires the prosecutor to advise the court about an expanded range of victims' concerns about the need for protection (unless the victim has objected to the information being shared) and the decision maker must consider those concerns when making decisions.

By including considerations about the impact of family violence and the safety needs of victims, their family members and the community more broadly, the decision maker can make an informed decision about the grant of bail and, if the accused is to be released, the conditions that will best manage any risk to victims. This promotes the security of victims.

By expanding the victims who can make representations and receive notification about changes in the accused person's bail status (including a decision to grant bail and release the accused), section 47A improves the ability of decision makers to take the safety needs of all victims into account. The broader notification requirement also facilitates all relevant victims taking appropriate action to keep themselves safe if they continue to have concerns about their safety or the safety of others in the

event the accused is released on bail. Expanding the range of victims who can make representations about the need for protection and other matters also gives victims a greater opportunity to participate in the justice process, promoting their right to security.

Right to liberty and security of person – section 18 Human Rights Act and the right to equality and non-discrimination – section 8 Human Rights Act

*Specific vulnerable accused people (Aboriginal and Torres Strait Islander people, people with a disability or health condition, children, pregnant people)*

The Bill promotes the right to liberty and security of person by considering the special needs and potential impact of custody on accused persons who are Aboriginal or Torres Strait Islander people (section 22B), who have a disability or health condition (section 22C), who are children (section 22D), and who are pregnant (section 23). It is anticipated that these considerations will allow decision makers to have all relevant information before making bail decisions.

Matters that are relevant to specific vulnerable accused people, contained in sections 22B, 22C, 22D and 23, are intended to be considered by the decision maker as factors that may weigh in favour of granting bail. For clarity, the provisions relating to the specific vulnerable cohorts are intended to have a beneficial effect for those cohorts, in recognition of their particular vulnerabilities and wellbeing needs. Remanding an accused person in custody should never be considered as a protective measure in their interests because of these vulnerabilities. While accused persons with these particular characteristics may still be remanded in custody based on an assessment of all considerations including relevant considerations under sections 22 and 22A, the factors in sections 22B, 22C, 22D and 23 ought not be considered as factors that could ever weigh *against* the granting of bail.

By ensuring that matters relevant to protecting vulnerable cohorts are considered in bail decisions, the amendments also promote the right to equality and non-discrimination under section 8 of the Human Rights Act, which provides that everyone is entitled to enjoy their rights without discrimination of any kind.

*A) Aboriginal and Torres Strait Islander people*

Aboriginal and Torres Strait Islander people are over-represented in the criminal justice system in the ACT and elsewhere in Australia. A range of historical factors has contributed to this. It is vital that decision makers take into consideration the range of factors listed in section 22B before making a bail decision in relation to an Aboriginal or Torres Strait Islander person.

It is intended that this provision is a protective consideration that will support a decision maker to consider the factors specific to Aboriginal and Torres Strait Islander people listed in the provision as factors that weigh in favour of granting bail. Accordingly, section 22B promotes the right to liberty and security of person and right to equality and non-discrimination of Aboriginal and Torres Strait Islander people.

Proposed section 22B requires a bail decision maker to consider the following factors when making a decision in relation to an Aboriginal or Torres Strait Islander person:

- the risk of harm that custody may pose to the person as an Aboriginal or Torres Strait Islander person
- the likely effect of being held in custody on the person's ability to maintain their connections to culture, family, Elders, communities and Country
- any relevant matter in the person's history, culture or circumstances, including the ongoing effect of any of the following: trauma, including inter-generational trauma, abuse, neglect, loss or family violence; being dealt with under a child welfare law; or social or economic disadvantage, including homelessness or unstable housing arrangements
- if the person has carer responsibilities, including as a parent or guardian of an Aboriginal or Torres Strait Islander child, the effects of bail conditions or custody on the person's ability to discharge their responsibilities and on the person being cared for, and
- any other significant cultural issue or obligation.

*B) People with a disability or health condition*

Proposed section 22C of the Bail Act requires decision makers to consider the treatment and support required to manage the accused's disability or health condition when making bail decisions. It is intended that this provision is a protective consideration that will support a decision maker to consider the person's treatment and support needs to manage the disability or health condition as a factor that may weigh in favour of granting bail, thus promoting the right to liberty and security of person and right to equality and non-discrimination.

The requirement to consider whether the person can access the treatment and support they need either in the community or in a custodial setting is designed to ensure that, if the person is remanded, appropriate treatment and support will be provided, and if the person is released on bail, the conditions imposed will not prevent the person from continuing to access the necessary treatment and support. It may also require consideration in the framing of bail conditions to ensure that a person with a cognitive disability is able to understand and comply with the conditions.

It is intended that a decision maker will consider a person's disability or health condition as a factor that may weigh in favour of granting bail and may be relevant to the framing of bail conditions. It is not intended to be a factor that would weigh against the grant of bail.

Explicitly requiring decision makers to consider the matters listed in section 22C will help address possible unconscious biases against vulnerable people. It would also be consistent with the ACT Disability Justice Strategy 2019-2029 which requires that

the criminal justice system be 'disability responsive' and with recommendation 2.3 of the 2024 Bail Inquiry Report.

### *C) Children*

Proposed section 22D of the Bail Act requires decision makers to consider a number of factors relating to the particular vulnerabilities of children in the justice system when making bail decisions. It is intended that this provision will support a decision maker to consider the relevant factors for children as factors that weigh in favour of granting bail, thus promoting the right to liberty and security and right to equality and non-discrimination. Section 22D is a protective consideration, recognising that it is never in a child's best interest to be incarcerated.

It will promote the right to liberty and security of person and right to equality and non-discrimination by ensuring decision makers are aware of the specific needs and vulnerabilities of the child as factors that weigh against a decision of refusing bail.

### *D) Pregnant people*

Proposed section 23 of the Bail Act requires decision makers to consider a number of factors relating to the particular vulnerabilities of pregnant people in the justice system when making bail decisions.

It is intended that this provision is a protective consideration that will support a decision maker to consider relevant factors for pregnant people as factors that may weigh in favour of granting bail, thus promoting the right to liberty and security.

A decision maker must consider the likely effect of custody on the person and the likely effect of complying with bail conditions.

Section 23 acknowledges that detention, even for a short period, can have adverse impacts on perinatal health and birth outcomes.

Accordingly, section 23 promotes the right to liberty and security of person and right to equality and non-discrimination of pregnant people.

### Cultural and other rights of Aboriginal and Torres Strait Islander peoples and other minorities – section 27 Human Rights Act

The Bill supports cultural rights of Aboriginal and Torres Strait Islander people. Section 27(2) of the Human Rights Act provides that Aboriginal and Torres Strait Islander peoples hold distinct cultural rights and must not be denied the right to maintain, control, protect and develop their cultural heritage and distinctive spiritual practices, observances, beliefs and teachings; languages and knowledge; and kinship ties.

Proposed section 22B of the Bill would require a decision maker to have regard to particular matters in circumstances where the accused is an Aboriginal or Torres Strait Islander person. These amendments respond to recommendations made by the Australian Law Reform Commission (ALRC) in *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report), the Legislative Assembly Standing Committee on Justice and Community

Safety in the 2024 Inquiry into the Administration of Bail in the ACT (the Bail Inquiry) and the Jumbunna Institute in the 2025 report Independent Review into Overrepresentation of First Nations People in the ACT Criminal Justice System (the Jumbunna Review).

Most submissions in response to the YourSay Discussion Paper supported amending the Bail Act to provide clarity and legislated recognition of the considerations specific to Aboriginal and Torres Strait Islander people when making bail decisions.

In 2017, the ALRC Report recommended that State and Territory bail laws should be amended to include standalone provisions that require bail authorities to consider any issues that arise due to a person's Aboriginality, including cultural background, ties to family and place, and cultural obligations (Recommendation 5-1). Such reforms were intended to facilitate release on bail with effective conditions for Aboriginal and Torres Strait Islander people who are accused of low-level offending. As with all other bail considerations, the requirement to consider issues that arise due to a person's Aboriginality would not supersede considerations of community safety.

Recommendation 2 of the ACT Bail Inquiry and Recommendation 8.2(a) of the Jumbunna Review also recommended the ACT pursue these reforms. These recommendations respond to issues of overrepresentation of First Nations people in the ACT Criminal Justice system. Data on the ACT's remand population continues to show over-representation of Aboriginal and Torres Strait Islander people on remand at the Alexander Maconochie Centre.

The Jumbunna Review observed while there is limited bail data available, 'As a rate per 100,000 of the relevant population, imprisoned Aboriginal and Torres Strait Islander people in the ACT are 30 times more likely to be unsentenced than their non-indigenous peers.' According to the Jumbunna Review, Aboriginal and Torres Strait Islander men in the ACT are more likely to be in prison remanded in custody than sentenced to a term of imprisonment.

The Bill expressly requires bail decision makers to consider matters relating to Aboriginal and Torres Strait Islander people when making bail decisions, including the likely effect of being held in custody on the person's ability to maintain their connections to culture, family, Elders, communities and Country. The Bill recognises that Aboriginal and Torres Strait Islander people have experienced harm in custody at a disproportionately higher level than other members of the population. The Bill also recognises that it is in the interests of an Aboriginal or Torres Strait Islander person to be able to maintain connections to their culture, family, Elders, communities and Country. The Bill provides that these are established facts that do not require evidence to be provided to the decision maker.

## ***Rights limited***

### Right to privacy and reputation – section 12 Human Rights Act

#### **1. Nature of the right and the limitation – sections 28(2)(a) and (c) Human Rights Act**

The right to privacy is protected by section 12 of the Human Rights Act. Section 12 of the Human Rights Act provides that “everyone has the right (a) not to have their privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and (b) not to have their reputation unlawfully attacked.”

The Bill engages with the right to privacy and reputation under section 12 of the Human Rights Act as it deals with the provision and sharing of certain information.

The proposed new dictionary definitions of primary victim and victims expands who can make representation about the need for protection from violence and harassment under new section 23A. New section 23A also provides for primary victims to make representations on a broader range of bail considerations than the concerns about need for protection from violence or harassment by the accused. Finally, as notification obligations under section 47A are directly related to the making of representations under section 23A, a broader cohort of victims will be entitled to be notified of bail decisions under section 47A. Expanding who can make representations about a defendant, what the representations can cover and who must be notified of a bail decision, impacts the defendant’s right to privacy.

#### **2. Legitimate purpose – section 28(2)(b) Human Rights Act**

The purpose of the Bill is to ensure that a decision maker makes an informed and appropriate bail decision having regard to the mandatory considerations. Allowing a broader cohort of victims to express concerns about their need for protection from the defendant, and for primary victims to make representations on a broader range of matters that are relevant to bail considerations, furthers this purpose by helping to ensure that the decision maker can be provided with relevant information to inform their consideration of the mandatory matters, and, consequently, make the most appropriate decision in the circumstances.

#### **3. Rational connection between the limitation and the purpose – section 28(2)(d) Human Rights Act**

In order for a decision maker to meaningfully take into account mandatory considerations in relation to bail such as the likelihood of the person using family violence if released (new section 22A(k)) or, more broadly, harassing or endangering the safety of anyone (new sections 22(1)(b)(ii) and 22(2)(b)(ii)), concerns a victim has about their need for protection from violence or harassment by the accused person, is information that allow a decision maker to meaningfully take into account these considerations.

Similarly, allowing a primary victim, who may have special insights and understanding of the behaviour of the accused, to provide broader information

relevant to the core matters a bail decision maker must consider, will also assist the decision maker to be able to meaningfully consider the core matters.

#### **4. Proportionality – section 28(2)(e) Human Rights Act**

The Bill has been drafted to ensure that the limitation on the accused person's right to privacy arising from a victim's representation and notification rights is proportionate to the legitimate purpose of ensuring a decision maker can be best informed to make the most appropriate bail decisions.

Under new section 23A the Bill only a victim (or victim representative) can make representations when a decision maker is considering whether to grant bail to an accused person. Broadly speaking a victim is someone who has suffered harm as a result of the offence, has suffered harm as a result of harm suffered by a primary victim or is in a specified relationship with a victim. As such, the right to make representations is limited to persons impacted by the relevant offence.

Additionally, a victim who is not a primary victim can only make representations (which may then be provided via a submission by the prosecution to the court), on a narrow issue – that is concerns about a need for protection from violence or harassment. Concerns about the need for protection from violence or harassment are a serious and highly relevant matter to bail decisions. Limiting the representations that can be made in this way ensures that opinions and information not relevant to the bail decision, are not permitted under section 23A.

While a primary victim may provide information on a broader range of issues, the right to provide this information is only to the extent that the information is relevant to the core matters in section 22. The Bill does not provide that a primary victim can provide information on any matters such that the defendant's privacy is limited without a decision maker being provided additional relevant information. Further, the prosecutor has a discretion as to whether submissions on these matters are put to the court (new section 23A(2)(a)(ii)) so that only matters useful and relevant to a decision maker may need to be disclosed to the court.

Finally, these amendments largely align the right to make representations and receive notifications in the Bail Act with existing rights in the Victims of Crime Act (see sections 17 and 16C). As such, any limitation on the right arising from these amendments, is substantively the same as existing limitations under ACT legislation.

Accordingly, the limitation of a person's rights under s 12 of the Human Rights Act is reasonable and proportionate to facilitate the court being able to make an informed and appropriate decision in relation to bail.

#### **Right to liberty and security of person – section 18 Human Rights Act**

The Bill engages with the right to liberty and security of person by ensuring decision makers have sufficient information to make fully informed decisions. The right to liberty and security of person recognises that no one has the right to be arbitrarily arrested or detained. No one may be deprived of liberty, except on the grounds and in accordance with the procedures established by law.

The intention of sections 22 and 22A is to explicitly require a decision maker to consider the listed factors and balance each of those factors when making a determination. These are core matters (section 22) or relevant factors (section 22A) to a decision maker's deliberation, they are not individually determinative of a specific outcome.

Sections 22 and 22A are intended to provide accused person's transparency of the matters a decision maker turns their mind to and provide the community with clarity of the matters considered in making bail decisions.

As discussed above, sections 22, 22A, 22B, 22C, 22D and 23 of the Bill require a bail decision maker to consider a range of relevant subjective matters when deciding whether to grant bail and, if bail is granted, when determining the conditions that will be imposed, if any. The information that must be considered under sections 22 and 22A could weigh in favour of or against the grant of bail and could result in conditions being imposed on the accused person in order to manage any risk associated with the person. This includes, but is not limited to, the likelihood that the accused will endanger the safety or welfare of any person or intimidate a witness, will use family violence if released, the accused person's ability to understand their rights and obligations (including their ability to comply with bail conditions if released), and the best interests (where the accused is a child).

In addition, section 23A facilitates the sharing of information with the decision maker about an expanded range of victims' concerns about the need for protection.

An accused person who is denied bail is deprived of their liberty pending a further bail hearing or the outcome of the criminal charge/s against them. An accused person subject to bail conditions designed to prevent the accused from engaging in certain conduct and/or designed to protect a victim or other person is also denied their full liberty.

A brief discussion of each of the limitations applicable to each relevant cohort is set out below.

#### *Accused people (general considerations)*

Sections 22 and 22A expand the mandatory matters to be considered when making bail decisions. The information that must be considered under sections 22 and 22A could weigh against the grant of bail and could result in conditions being imposed on the accused person in order to manage any risk associated with the person.

#### *Victims and witnesses*

Sections 22, 22A and 23A could limit the right to security of person of victims where the decision maker decides to grant bail to the accused.

Section 22 requires decision makers to consider the likelihood that the accused will endanger the safety or welfare of any person or intimidate a witness. Section 22A requires a decision maker to consider the likelihood of a person using family violence if released on bail and how to manage any risk of the person using family violence.

In addition, section 23A requires the prosecutor to advise the court about an expanded range of victims' concerns about the need for protection (unless the victim has objected to the information being shared) and the decision maker must consider those concerns when making decisions.

Where the decision maker is satisfied that any identified risk can be managed through the imposition of bail conditions but the victim remains concerned for their safety, the victim's right to security is limited.

For completeness, the provisions relating to the specific vulnerable cohorts (Aboriginal or Torres Strait Islander people, people with a disability or health condition, children and pregnant people) are intended to have a beneficial effect. That is, they may weigh in favour of granting bail in recognition of the particular vulnerabilities and wellbeing needs of these cohorts. They are not factors that would weigh against bail being granted.

### **1. Nature of the right and the limitation – sections 28(2)(a) and (c) Human Rights Act**

As discussed above, the amendments require a bail decision maker to consider a range of relevant matters when deciding whether to grant bail. This includes, but is not limited to, the likelihood that the accused will endanger the safety or welfare of any person or intimidate a witness, will use family violence if released, the accused person's need for physical protection, the accused person's ability to understand their rights and obligations (including their ability to comply with bail conditions if released), and the adult's interests or the child's best interests.

In addition, section 23A facilitates the sharing of information with the decision maker about an expanded range of victims' concerns about the need for protection.

If the information provided to the decision maker under the amendments result in a person being denied bail and/or result in more accused persons being denied bail or have more stringent or additional bail conditions imposed on them in order to mitigate the risks relating to appearing in court in relation to the offence, committing an offence while on bail, harassing or endangering the safety or welfare of anyone, or interfering with evidence, intimidating a witness or otherwise obstructing the course of justice, this would be considered a limitation to the right to liberty and security of person.

### **2. Legitimate purpose – section 28(2)(b) Human Rights Act**

The purpose of the amendments is to ensure that a decision maker is able to make fully informed bail decisions to improve the management of any identified risk associated with releasing the person. This includes facilitating the appearance of the accused at their next court appearance, the reduction of any safety risks associated with the release of the accused, and the enhancement of any victim's opportunity to participate in the criminal justice system and be informed of bail decision outcomes. In this way, these amendments enhance the right to life and right to liberty and security of person for victims and witnesses.

Domestic and family violence is recognised as a serious problem at the national level, having been declared as a national crisis by both the ACT and the Federal Government.

The amendments ensure that a bail decision maker has pertinent information about the risk of harm to victims and to witnesses, allowing the decision maker to make an informed decision about whether an accused should be granted bail. If this assessment results in an accused being remanded in custody or given more stringent bail conditions, this is an outcome that is directly linked to the safety of victims and witnesses.

### **3. Rational connection between the limitation and the purpose – section 28(2)(d) Human Rights Act**

Expressly requiring bail decision makers to consider the risks associated with releasing an accused person, including risks to their own safety and wellbeing, and to their family members, other victims and the community in general, has a direct connection to improving safety outcomes. The amendments are designed to ensure all relevant information is provided to a decision maker on the safety risks to the accused, victims, witnesses and the community before making a bail decision.

In the family violence context, this is designed to reduce the likelihood of the accused engaging in family violence, including the risk of offending in a relationship based on coercive control, the risk of grievous bodily harm or even death, in light of the fact that family violence often escalates after engagement with the criminal justice system if the accused is not remanded.

As discussed above, the proposed amendments are intended to codify the matters decision makers already routinely consider when making bail decisions. This ensures that an accused is aware of the subjective factors considered and can raise relevant information at the earliest opportunity. It also expressly provides victims a right to make representations, including information about their safety concerns, to the attention of a decision maker. Any limitations to the right to liberty and security of the person of a particular accused as a result of these changes is directly connected to the consideration of all the relevant matters by the decision maker.

### **4. Proportionality – section 28(2)(e) Human Rights Act**

Any limitations to the liberty and security of person for the accused as a result of the proposed amendments are reasonable and justifiable.

As discussed above, the information that must be considered by decision makers could weigh in favour or against the grant of bail, depending on all the information available. It could also be useful in determining the most appropriate, and least onerous, bail conditions that should be imposed on the accused person in order to manage any risk associated with the person.

The Bill takes the least restrictive approach in meeting its policy objective, by codifying and reflecting existing requirements in the bail process. The amendments do not make significant changes to the process for making bail decisions in the

Territory. Instead, the amendments are intended to codify the matters decision makers already routinely consider when making bail decisions. This ensures that an accused is aware of the factors considered and can raise relevant information at the earliest opportunity.

The notification obligations and the provisions providing for victims to make representations about their need for protection and other matters reflect existing requirements in the Victims Charter in the Victims of Crime Act to update victims on the progress of investigations/prosecutions and to share victims' concerns about the need for protection.

The bail process will continue to have its inherent safeguards. An accused person retains the right to legal representation. If a person has been refused bail by an authorised officer, the person must be brought before the court in accordance with section 17 of the Bail Act. Bail applications in court are public, supporting the principle of open justice. Section 19(4) of the Bail Act provides that a court must deal with an application in relation to bail as soon as reasonably practicable. The Bill does not make any amendments to limit the number of applications an accused may make in relation to bail. The Bill does not limit the obligation on a police officer, when exercising a function under a Territory law, to act consistently with human rights under section 40B of the Human Rights Act.

The Government will monitor the impact of the amendments on vulnerable groups.

## Bail Amendment Bill 2026

### *Human Rights Act 2004 - Compatibility Statement*

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **BAIL AMENDMENT BILL 2026**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly is consistent with the *Human Rights Act 2004*.

.....

Tara Cheyne MLA  
Attorney-General

## CLAUSE NOTES

### **Clause 1            Name of the Act**

This clause provides that the name of the Act is the *Bail Amendment Act 2026*.

### **Clause 2            Commencement**

This clause provides that the Act commences 6 months after its notification day.

### **Clause 3            Legislation amended**

This clause provides that the Act amends the *Bail Act 1992* (the **Bail Act**). Schedule 1 also amends the *Family Violence Act 2016* (Family Violence Act) and the *Victims of Crime Act 1994* (Victims of Crime Act).

### **Clause 4            Section 9A(2) etc**

This clause replaces references to section 22 and 23 in sections 9A(2), 9C(3), 9D(3) and 9F(3) with references to ‘the matters in section 22 (Bail decision – core matters)’. This is a technical amendment necessitated by the core matters for bail decisions for both adults and children now being contained in section 22 rather than section 22 and 23 respectively.

### **Clause 5            Section 12A heading**

This clause changes the heading of section 12A from ‘Meaning of *bail order* and *bail review application* – pt 4’ to ‘Definitions – pt 4’. This updates the heading to reflect that additional definitions will be set out in the section.

### **Clause 6            Section 12A, new definitions**

This clause inserts definitions of ‘child welfare law’, ‘disability’, ‘family violence’ and ‘health condition’ into section 12A of the Bail Act.

‘Disability’ is defined to include a physical, intellectual and cognitive impairment. This definition is deliberately broad and non-exclusive to ensure that disabling conditions are not excluded by a more prescriptive definition.

‘Health condition’ is also defined broadly, covering both physical and mental illness.

‘Child welfare law’ is defined by reference to the definition of child welfare law in section 640 of the *Children and Young People Act 2008* and ‘family violence’ by reference to section 8 of the *Family Violence Act 2016*.

The definition of ‘child welfare law’ is required as a result of the new mandatory consideration in new section 22D(1)(k)(iii) and the definition of ‘family violence’ because of the new mandatory consideration in section 22A(k) and the use of this term in the definition of violence or harassment in new section 23A.

### **Clause 7            Deciding on questions of bail by authorised officers New section 15(1A)**

New section 15(1A) requires an informant to give an authorised officer (who is required to consider whether to grant bail to an accused person), information about

whether a family violence order has been made under the Family Violence Act against the accused person. This information is relevant to the authorised officer's assessment under section 9F as well as a number of the core matters in new section 22 and relevant factors in section 22A (for example, new sections 22A(i) and 22A(j)).

**Clause 8                      Section 15(3)(b)**

Clause 8 omits the reference to 'section 9F(2), section 22 or section 23' and substitutes a reference to 'section 9F(2) or section 22'.

This is a technical amendment necessitated by the core matters for bail decision for both adults and children now being contained in section 22 rather than section 22 and 23 respectively.

**Clause 9                      Court bail—general  
New section 19(2A)**

Consistent with new section 15(1A) (see clause 7), new section 19(2A) requires the informant to give the court, considering bail in relation to an accused person, information about whether a family violence order has been made under the Family Violence Act against an accused person. This information is relevant to a number of the core matters in new section 22 and relevant factors in new section 22A (for example, new sections 22A(i) and 22A(j)).

**Clause 10                    Section 22 to 23A**

Clause 10 makes substantial changes to the structure and specificity of the provisions guiding bail decision makers in the matters relevant to bail decisions.

Clause 10 substitutes section 22 to 23A with new sections 22, 22A, 22B, 22C, 22D, 23 and 23A.

In summary, section 22 sets out the core matters that a decision maker must consider when making a decision about the grant of bail to a person. New section 22 covers the matters that must be considered in relation to an adult (new section 22(1)) and children (new section 22(2)).

New section 22A sets out factors that a bail decision maker must take into account, in considering the matters in section 22 and in addition to any other matter the bail decision maker considers relevant.

New sections 22B to 23 set out matters, additional to those specified in new section 22A, that a decision maker must take into account in making a decision under section 22 in respect to an accused person with the relevant characteristic.

Finally, new section 23A sets out how victims views are communicated in bail applications by setting out who can make representations, the nature of the representations and the obligations on relevant justice agencies and decision makers in relation to the representations.

It would be appropriate for the intake and bail consideration forms used by ACT Policing to reflect the matters listed in these provisions to ensure relevant matters are not overlooked when making bail decisions, including for vulnerable accused individuals.

#### New section 22 – Bail decision—core matters

New section 22 sets out the core matters a decision maker must consider when making a decision about the grant of bail to a person.

Currently, sections 22(1) and 22(2) of the Bail Act set out the matters that a decision maker must consider for an adult. New section 22(1) replicates existing section 22(1) and sets out the same core matters that a decision maker must consider when making bail decisions in relation to an accused who is an adult. The examples listed after section 22(1)(c) ('interests of the person') have been omitted as they are now listed in sections 22A(f) and (g) (discussed below).

Accordingly, the matters a decision maker must now consider under section 22(1) when making a bail decision in relation to an accused person who is an adult, are:

- (a) the likelihood the adult will appear in court in relation to the offence
- (b) the likelihood the adult, while released on bail, will commit an offence, harass or endanger the safety or welfare of anyone, or interfere with evidence, intimidate a witness or otherwise obstruct the course of justice in relation to the adult or anyone else
- (c) the interests of the adult.

In the ACT, when a child is taken into custody, ACT Police must notify the child's parent or guardian or another responsible adult, who can provide relevant information that assists the authorised officer or the Children's Court, as the case may be, to make bail decisions that are in the best interests of the child while also balancing all the matters that must be taken into account.

Currently, section 23 of the Bail Act provides that, if the accused is a child, a decision maker must consider the matters set out in sections 22(1)(a), 22(1)(b), 22(2) and 22(3) (section 23(1)(a)) as well as the matters set out in sections 23(1)(b) and (c) and 23(2).

New section 22(2) sets out the core matters that a decision maker must take into account when making a decision about the grant of bail for a child. New section 22(2) retains the requirement for a decision maker to consider the matters previously set out in sections 23(1)(a) and 23(2). The matters currently set out in sections 23(1)(b) and 23(1)(c) and additional matters that a decision maker must consider when making a decision under new section 22 in relation to an accused person who is a child, are listed in section 22D (discussed below).

Accordingly, the matters a decision maker must now consider under section 22(2) when making a bail decision in relation to an accused person who is a child, are:

- (a) as a primary consideration, the best interests of the child

- (b) the likelihood the child will appear in court in relation to the offence
- (c) the likelihood the child, while released on bail, will commit an offence, harass or endanger the safety or welfare of anyone, or interfere with evidence, intimidate a witness or otherwise obstruct the course of justice in relation to the child or anyone else.

Currently, section 22(3) sets out a number of matters the decision maker may have regard to when considering the matters in section 22(1) or 22(2). New section 22(3) replicates current section 22(2), and provides that, for an accused adult or child who is convicted or found guilty of an indictable offence but has not yet been sentenced for that offence, a court must consider the likelihood of the person being given a sentence of imprisonment when making a decision about the grant of bail.

New section 22(4) reflects the intent of current section 22(4) but uses more modern drafting language. New section 22(4) defines 'offence' for the purposes of sections 22(1)(b)(i) and 22(2)(c)(i) to include offences against a law of the Commonwealth or an Australian State or Territory.

#### New section 22A – Bail assessment—relevant factors generally

New section 22A sets out factors that a bail decision maker must take into account, in considering the matters in section 22 in addition to any other matter the bail decision maker considers relevant. Most of these factors were previously set out under section 22(3) as matters to which a decision maker may have regard.

In contrast to current section 22(3), new section 22A *requires* decision makers to take any matter they consider relevant into consideration when making bail decisions under section 22 in relation to an accused person who is an adult or a child.

Accordingly, the factors that a decision maker must consider under section 22A, where relevant, when considering the matters listed in section 22 are:

- (a) the nature and seriousness of the offence (currently section 22(3)(a))
- (b) the person's character, background and community ties (currently section 22(3)(b))
- (c) the likely effect of a refusal of bail on the person's family or dependants (currently section 22(3)(c))
- (d) the accused's history of compliance with bail undertakings, bail conditions, and any other orders of an Australian court (new; consistent with section 18(1)(f) of the Bail Act 2013 (NSW) and the Bail Act 1980 (Qld))
- (e) the strength of the case against the person (currently strength of the evidence in section 22(3)(e))
- (f) the person's need for protection (currently an example after section 22(1)(c))
- (g) the period that the person may be held in custody if bail is refused, and the conditions under which the person would be held (currently an example after section 22(1)(c))

- (h) whether the person was released on bail at the time of the offence (similar to the current consideration of any previous grants of bail to the person under current section 22(3)(d))
- (i) the behaviour of the person towards a primary victim of the offence, or a family member of a primary victim (new)
- (j) whether the offence is a family violence offence (new), and
- (k) the likelihood of the person may use family violence if released on bail and how to manage any the risk of the person using family violence (new).

Brief information about the changed and new matters listed above is set out below.

The inclusion of the accused person's history of compliance and alleged offending while on bail (new sections 22A(d) and (h)) is consistent with bail legislation in Victoria, New South Wales and Queensland. Explicitly requiring decision makers to more broadly consider a person's behaviours while they were subject to a previous court order, such as bail, parole, or a Family Violence Order, may further aid decision makers to consider the appropriateness and likelihood of a person's compliance with any bail order if made. This is relevant to the decision maker's considerations for granting bail under section 22. It may, for example, draw attention to repeated breaches of bail or bail conditions. Further examination of those repeated breaches may reveal that a person was not able to comply with bail conditions for valid reasons (such as not understanding them) and may result in better support being provided. Alternatively, repeated breaches may have an element of recklessness or disregard for enforcement which may warrant a different approach.

Changing the factor from the strength of the 'evidence' to the strength of the 'case' against the accused person (new section 22A(e)) is consistent with the fact that, on many occasions, a decision maker is considering whether to grant bail before the investigation is complete and all evidence has been collected. A reference to the case against the person is more appropriate in those circumstances.

Moving the reference to the person's need for physical protection (currently an example following section 22(1)(c)) to a matter that a decision maker must take into account (by listing this matter is new section 22A(f)) makes it clear that safety and wellbeing considerations are key components in decision making. For example, the decision maker may decide it would be unsafe to release an accused who is severely affected by drugs or alcohol or who has expressed suicidal intentions.

New sections 22A(i) to (k) reflect the importance of ensuring the safety and wellbeing of victims can be taken into account. These provisions supplement the existing requirement for a decision maker to consider the likelihood of the accused person harassing or endangering the safety or welfare of any person if released on bail in new sections 22(1)(b)(ii) and 22(2)(c)(ii). This amendment responds to recommendations made by the ACT Victims of Crime Commissioner and is similar to

section 5AAAA of the Victorian Bail Act, which requires bail decision makers to consider the family violence risks of releasing an accused person on bail.

The examples following section 22A(k) provide additional guidance to decision makers about the ways a risk of the person using family violence if released could be managed if the decision maker decided to release the person on bail.

The decision maker is only required to consider matters that the decision maker considers relevant. For example, if the information available is that accused person has never been subject to bail undertakings, bail conditions or any other orders of an Australian court, the decision maker will not need to consider the accused person's history of compliance with such matters.

There is an expectation that, where an authorised officer is the decision maker, the authorised officer will undertake appropriate enquiries to satisfy themselves about the relevance of each of the matters listed in section 22A and how it relates to both the matters listed in section 22 and, accordingly, to the bail decision. The information that must be considered should be available from ACT Policing holdings and from speaking with the accused person and completing the ACT Policing intake and bail consideration forms, with some of the relevant information being available from both of those sources. For most of the factors listed, including those listed under section 22A(a), (b), (d), (e), (f), (g), (h), (i), (j), and (k), relevant information is expected to be able to be available from speaking with the informant and from ACT Policing records. Information relevant to section 22A(b), (c) and (f) can be ascertained from the accused person. The onus is on the accused person to provide information relevant to their situation that may weigh in their favour. Where the accused person refuses to provide relevant information, the decision maker is expected to consider information about those matters that is readily available, and is not expected to undertake further enquiries with third parties to determine that information.

Where the decision maker is a court, the parties will be expected to provide relevant information to inform the court's consideration of the relevant matters.

#### New section 22B – Bail assessment—relevant factors for Aboriginal or Torres Strait Islander people

New section 22B sets out matters additional to those specified in new section 22A that a decision maker must take into account in making a decision under section 22 in respect to an accused person who is an Aboriginal or Torres Strait Islander person. New section 22B provides clarity and legislated recognition of the considerations specific to Aboriginal and Torres Strait Islander people when making bail decisions.

New section 22B(1) of the Bill requires a decision maker to have regard to the following where the accused person is an Aboriginal or Torres Strait Islander person:

- (a) the risk of harm that custody may pose to the person as an Aboriginal and Torres Strait Islander person

- (b) the likely effect of a refusal of bail on the person's ability to support and maintain the person's connections to culture, family, Elders, communities and Country
- (c) any relevant matter arising from the person's history, culture or circumstances, including the ongoing effect of any of the following:
  - i. trauma experienced by the person, including intergenerational trauma, abuse, neglect, loss, family violence
  - ii. being dealt with under a child welfare law
  - iii. social or economic disadvantage, including homelessness or unstable housing arrangements
- (d) if the person has carer responsibilities, including as a parent or guardian of an Aboriginal or Torres Strait Islander child, the effect of custody or bail conditions on the person's ability to discharge those responsibilities or on the person being cared for, and
- (e) any other significant cultural issue or obligation.

The matters listed in section 22B(1) set out some of the historical context that make Aboriginal and Torres Strait Islander people in the criminal justice system vulnerable.

The matters listed in section 22B(1)(a) and (b), in particular, are presented as general considerations for the decision maker to turn their mind to. Accordingly, there is no requirement for the decision maker to specifically ask the accused person about the specific impact of each of these general matters on them either generally or in the context of being detained in custody or compliance with potential bail conditions. This is confirmed by section 22B(2) which advises the decision maker that proof of the matters in that provision, which could be regarded as a summary of the matters listed in section 22B(1)(a) and (b) is not required (discussed further below).

The matters listed in section 22B(1)(c), (d) and (e) are intended to be considered both in general terms and specifically with respect to the individual accused person.

Where the decision maker is an authorised officer, it is expected that the decision maker will consider information already recorded in ACT Policing systems and seek information from the accused person about their personal circumstances, including past trauma, being dealt with under a child welfare law, and social or economic disadvantage, as well as their caring obligations and significant cultural issues or obligations when making decision. However, the onus is on the accused person to provide relevant information. Where the person self-reports that they have experienced trauma or are homeless, or have caring responsibilities or other impending obligations, the authorised officer can consider the relative relevance and credibility of this information along with any other information provided by the accused person. Where the accused person refuses to provide information in response to questions about these matters, the authorised officer is expected to

consider information that is readily or reasonably available to them. This could include reviewing information on ACT Policing systems about the accused person. However, the authorised officer is not expected to undertake enquiries with third parties in order to obtain this relevant information where the accused person is not willing to provide it.

Where the decision maker is a court, the parties will be expected to provide relevant information to inform the court's consideration of the relevant matters.

Consideration of the matters in section 22B is not determinative of whether bail will be granted or, if bail is granted, the conditions that will be imposed. This information must be balanced with the other information relevant in the particular case.

Currently, the Bail Act does not preclude a decision maker from considering the impact of custody or bail conditions on an accused person who is an Aboriginal or Torres Strait Islander person but does not expressly require the decision maker to consider and have regard to this. This is inconsistent with other ACT criminal justice legislation which includes specific provisions for Aboriginal or Torres Strait Islander persons.

This amendment responds to recommendations made by the Australian Law Reform Commission (ALRC) in [\*Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples\*](#) (ALRC Report), the Legislative Assembly Standing Committee on Justice and Community Safety in the 2024 [\*Inquiry into the Administration of Bail in the ACT\*](#) (the Bail Inquiry) and the Jumbunna Institute in the 2025 report [\*Independent Review into Overrepresentation of First Nations People in the ACT Criminal Justice System\*](#) (the Jumbunna Review).

As noted above, new section 22B(2) provides that in considering the matters in new section 22B(1), proof is not required to establish that:

- (a) Aboriginal and Torres Strait Islander people have experienced harm in custody at a disproportionately higher level than other members of the population, and
- (b) it is in the interests of an Aboriginal or Torres Strait Islander person to be able to maintain connections to their culture, family, Elders, communities and Country.

Accordingly, a decision maker is not required to undertake enquiries into those matters. Listing the matters is designed to remind decision makers of the vulnerability of Aboriginal and Torres Strait Islander persons resulting from historical events have led to a high risk of unconscious bias and overrepresentation of Aboriginal and Torres Strait Islander persons in the criminal justice system. It is also consistent with section 3A(1)(a) of the Victorian Bail Act, which has been described in the Judicial College of Victoria guidelines as being an aspect which does not require additional evidence and being part of a set of considerations on 'known facts

and significant issues that are relevant for all Aboriginal peoples that you will have received training about'.<sup>2</sup>

New section 22B(3) adopts the meaning for 'Aboriginal or Torres Strait Islander person' used in other Australian legislation. Adopting this definition assists with consistency in the application of laws throughout Australia.

The authorised officer is only required to consider the matters listed in section 22B if there is information or evidence available indicating that the person is an Aboriginal or Torres Strait Islander person. For example, if the accused person does not self-report or otherwise indicate they are an Aboriginal or Torres Strait Islander person when asked, and there is no record in ACT Policing systems that the person is an Aboriginal or Torres Strait Islander person, the authorised officer will not need to consider the matters listed in section 22B.

Similarly, if the parties do not notify the court that the person is an Aboriginal or Torres Strait Islander, there is no requirement for the court to undertake further enquiries to determine whether the accused person is an Aboriginal or Torres Strait Islander person. Self-reporting and checking police holdings, as appropriate, is sufficient.

#### New section 22C – Bail assessment—relevant factors for people with disability or health condition

New section 22C sets out matters additional to those specified in new section 22A that a decision maker must take into consideration when making a decision under section 22 in respect to an accused person with a disability or health condition.

Specifically, section 22C provides that, in considering the matters in section 22 in relation to a person for an offence, if the person has a disability or health condition, the court or authorised officer must consider the following:

- (a) the treatment and support required to manage the disability or health condition
- (b) the effect of the disability or health condition on the person's ability to—
  - (i) understand their rights and obligations
  - (ii) make decisions
  - (iii) communicate decisions, and
  - (iv) represent their interests.

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<sup>2</sup> Judicial College of Victoria 'Bail considerations for Aboriginal people', [https://judicialcollege.vic.edu.au/resources/bail-considerations-aboriginal-people#:~:text=All%20bail%20decision%20makers%20must,person%20\(s%203A%20BA\).&text=been%20intermittent%20throughout%20their%20life%3B&text=whether%20the%20person%20has%20only,discovered%20their%20culture%20or%20heritage%3B&text=when%20the%20person%20first%20discloses%20that%20they%20are%20an%20Aboriginal%20person.](https://judicialcollege.vic.edu.au/resources/bail-considerations-aboriginal-people#:~:text=All%20bail%20decision%20makers%20must,person%20(s%203A%20BA).&text=been%20intermittent%20throughout%20their%20life%3B&text=whether%20the%20person%20has%20only,discovered%20their%20culture%20or%20heritage%3B&text=when%20the%20person%20first%20discloses%20that%20they%20are%20an%20Aboriginal%20person.)

These types of matters are routinely considered by authorised officers and courts when deciding whether to grant bail to a person who has self-reported a disability or health condition or appears to have a disability or health condition (including mental illness or mental impairment), or whether to detain the person in custody, and/or the conditions that should be imposed on the person if released on bail. However, the Bail Act does not currently expressly require a decision maker to consider the impact of custody or bail conditions on an accused person who has a disability or health condition, including a mental illness.

A decision maker who is an authorised officer will be expected to undertake reasonable enquiries to determine whether the accused person's needs to manage the disability or health condition can be met before deciding whether to deny bail and, if the person is to be released, before imposing bail conditions. The authorised officer is expected to obtain relevant information from the accused person, including from the information recorded on the intake and bail consideration forms, and from asking additional questions of the accused person where this is necessary and appropriate to ensure the safety of the accused. Authorised officers are also expected to review information in ACT Policing systems obtained during previous interactions with the accused person when considering the matters specified in section 22C.

Where the decision maker is a court, the parties will be expected to provide relevant information to inform the court's consideration of the relevant matters.

Explicitly requiring decision makers to consider these matters when making bail decisions will assist decision makers by addressing possible unconscious biases against vulnerable people and would further align the Bail Act with human rights principles under the *Human Rights Act 2004* (Human Rights Act). It will also be consistent with the ACT Disability Justice Strategy 2019-2029 which requires that the criminal justice system be 'disability responsive'.

The decision maker is only required to consider the matters listed in section 22C if there is information or evidence available to the decision maker indicating that the person has a disability or health condition. For example, if the accused person does not appear to have a disability or health condition and does not self-report or otherwise indicate they have a disability or health condition when asked, the authorised officer will not need to consider the matters listed in section 22C.

It is fundamental that decision makers consider the treatment and support required by the person under section 22C(a) when deciding whether to deny bail and detain an accused person with a health condition or disability, including a mental illness, in custody. Failure to consider this and take steps to ensure the person can maintain access to necessary medical treatment or medicine may have detrimental impacts for that person.

It is also fundamental that decision makers consider the ability of a person with a health condition or disability to understand and comply with any bail conditions imposed on them as required by section 22C(b). If these matters are not taken into

consideration, there is a real risk that the accused person may not comply with the imposed conditions. This can result in a cycle of breaching bail conditions and further interaction with the criminal justice system, including further incarceration.

Consistent with section 22B, the decision maker is expected rely on information provided by accused person and other readily available information, including observations, to determine whether the accused person has a disability or health condition. Where it is apparent that the person has a disability or health condition, or where the person self-reports a disability or health condition, the decision maker should consider the credibility of this information in the same way they consider other information. For example, there is no expectation or requirement that decision makers contact medical facilities to confirm a reported or apparent disability or health condition. However, where the person has reported a disability or health condition for which medical attention or medication is required, consideration should be given to how those needs can be best met.

Consideration of the matters in section 22C is not determinative of whether bail will be granted or, if bail is granted, the conditions that will be imposed. This information must be balanced with the other information relevant in the particular case.

Definitions of 'disability' and 'health condition' will be inserted into section 12A of the Bail Act.

#### New section 22D – Bail assessment—relevant factors for children

As noted above in the discussion of section 22(2), when a child is taken into custody in the ACT, ACT Police must notify the child's parent or guardian or another responsible adult, who can provide relevant information that assists the authorised officer or the Children's Court, as the case may be, to make bail decisions that are in the best interests of the child while also balancing all the matters that must be taken into account.

New section 22D sets out matters additional to those specified in new section 22A that a decision maker must take into account in making a decision under section 22 in respect to an accused person who is a child.

New sections 22D(1)(a) and (b) of the Bill expressly requires a bail decision maker to have regard to the following factors which are currently in section 23(b) and (c) of the Bail Act:

- (a) the principles in the *Children and Young People Act 2008*, section 94 (Youth justice principles), and
- (b) if the decision is being made by a court and a report has been given to the court under the *Court Procedures Act 2004*, section 74D (Court may order report about young person) in relation to the child—the report.

The additional matters a bail decision maker is expressly required to have regard to when the accused is a child are:

- (c) the child's age, maturity and developmental capacity at the time of the offence

- (d) the need to impose only the least onerous necessary bail conditions in the circumstances
- (e) the importance of preserving and strengthening the child's relationships with the following: the child's parents, guardians and carers any other person who is significant to the child
- (f) the importance of supporting the child to live in safe, stable and secure living arrangements in the community
- (g) whether the child is receiving, or is likely to receive, therapeutic support services
- (h) the need to support the child's education, training or lawful employment without unnecessary interruption
- (i) the need to reduce the stigma associated with being remanded in custody
- (j) the need to manage and reduce the effects of custody on children, including a higher likelihood of future involvement with the criminal justice system and a higher likelihood of harm
- (k) if the child is found guilty of the offence, the likelihood that the child will be sentenced to a term of imprisonment and the likely length of that sentence, and
- (l) the ongoing effect of any of the following that apply to the child: a health condition; a disability; trauma, abuse, neglect, loss or family violence; and being dealt with under a child welfare law.

The matters listed in section 22D(1) reflect the matters listed in other Australian jurisdictions' bail legislation and that have been raised by stakeholders as relevant to bail decisions for accused children. Each matters is relevant to assessing the likely the impact on a child of being denied bail and remanded in custody. Each matter is also relevant to a decision maker's assessment of the type and number of bail conditions that can appropriately be imposed on a child who is granted bail. It is vital that decision makers consider each of these matters before making a bail decision in relation to an accused person who is a child.

While the decision maker must consider each of the matters listed in section 22D(1), some of the matters are general considerations for which the decision maker will not have specific information available. For example, the need to reduce the stigma associated with being remanded in custody as set out in section 22D(1)(i) is a general consideration.

However, where the decision maker is an authorised officer, the decision maker will be expected to undertake reasonable, appropriate enquiries in order to consider a number of the other matters listed in section 22D(1). The decision maker will be expected to consider any previous report provided under section 22D(1)(b), consider information reasonably available information when considering other relevant matters listed in section 22D(1)(c). For example, an authorised officer will be

expected to consider information provided by the informant and other police officers, including information recorded on the intake and bail consideration forms, and information recorded in ACT Policing systems.

In addition, particularly where no information about a particular matter specified in section 22D(1) is available from those sources, the authorised officer will be expected to seek relevant information from the accused child and/or their parent or other responsible adult. Where the child, their parent or responsible adult does not provide information, including in response to direct questions, the authorised officer is expected to consider information that is readily or reasonably available to them.

Where the decision maker is the Children's Court, the parties will be expected to provide relevant information to inform the Children's Court's consideration of the relevant matters.

Section 22D(2) provides that, in considering the matters listed in section 22D(1), proof is not required to establish that the following are in the best interests of the child:

- (a) avoidance, when not necessary, of onerous bail conditions or time in custody
- (b) preservation and strengthening of supportive relationships between the child and any of the following the child's parents, guardians and carers, and other people who are significant to the child
- (c) safe, stable and secure living arrangements in the community
- (d) continuation of education, vocational training or lawful employment, and
- (e) avoidance of stigma associated with being remanded in custody.

Accordingly, a decision maker is not required to undertake enquiries, or have information or submissions put to them to establish that the matters listed at section 22D(2)(a) to (d) are in the best interests of the child. Listing the matters is designed to remind decision makers of the vulnerability of children in general, as well as the special vulnerability of children who have experienced adversity in their young lives. It is also designed to remind decision makers of the cycle of incarceration in Australia which is marked by a higher rate of re-imprisonment and a revolving door. A large proportion of children who experience detention return to the criminal justice system and custody, demonstrating the failure of detention in many cases to address the root causes of offending in children. The matters listed highlight the importance of family, security and avoiding custody where possible to help address systemic disadvantage and to promote early intervention and rehabilitation.

Consideration of the matters in section 22C is not determinative of whether bail will be granted or, if bail is granted, the conditions that will be imposed. This information must be balanced with the other information relevant in the particular case.

The decision maker is only required to consider the matters listed in section 22D if there is information available to the decision maker indicating that the accused person is a child.

### New section 23 – Bail assessment—relevant factors for pregnant people etc

New section 23 sets out matters additional to those specified in new section 22A that a decision maker must take into account in making a decision under section 22 in respect to an accused person who is pregnant.

New section 23 of the Bill expressly requires a decision maker to have regard to the certain factors in relation to an accused person is pregnant when making bail decisions.

New section 23 requires that where the accused person is pregnant, a decision maker must consider the impacts of remand or any bail conditions they are considering imposing on the accused person. Additionally, if the accused person is pregnant, the decision maker will also be required to consider the impacts of on the child once born (for example if they were to be born in custody where the person is on remand).

Specifically, section 23(a) and (b) require the decision maker to consider the likely effect of custody on the pregnant accused person and on the unborn child after they are born.

Where the decision maker is an authorised officer, the decision maker is expected to ask the accused person if they are pregnant, and if they report that they are, make further enquiries with the accused person about their pregnancy needs.

Where the decision maker is a court, the parties will be expected to provide relevant information to inform the court's consideration of the relevant matters.

Incarceration of pregnant people can negatively impact perinatal health, maternal wellbeing and birth outcomes. Where an accused person who is remanded in custody is pregnant, it significantly increases the likelihood of the child being placed in out of home care after birth, continuing the cycle of disadvantage. The damaging and intergenerational impact of imprisonment for pregnant women and children born to individuals in custody is well documented. It is therefore fundamental that decision makers consider whether a pregnant person's particular medical needs can be met if the person is detained in custody.

Section 23(c) requires the decision maker to consider the effect of complying with bail conditions on a pregnant person. This ensures a pregnant person is not prevented from receiving medical and other necessary treatment in order to comply with their bail conditions. Where the decision maker is an authorised officer and the accused person reports that they are pregnant, the decision maker is expected to ask the accused person questions about their pregnancy needs to ensure that any proposed bail conditions would not prevent them from continuing to have their reasonable needs met while released on bail.

Where the decision maker is a court, the parties will be expected to provide relevant information to inform the court's consideration of the appropriateness of proposed or likely bail conditions.

For example, if a pregnant person is receiving pre-natal care interstate, the decision maker would need to consider the impact of imposing a bail condition precluding the person from leaving the ACT, as this may have a significantly detrimental impact on the pregnant person and their unborn child.

The insertion of section 23 into the Bail Act is consistent with bail legislation in other Australia jurisdictions, including section 119(3A) of the *Bail Act 1980* (Qld) and section 3AAA(1)(h)(iia) of the Victorian Bail Act.

In the 2022 Victorian Parliament [\*Inquiry into Children Impacted by Parental Incarceration\*](#), the Legislative Council Legal and Social Issues Committee recommended that the Victorian Government aim to reduce the risk of harm by avoiding remand for non-violent offenders who are pregnant women and by using custodial sentences for pregnant women or breastfeeding mothers only as a last resort where possible and appropriate.<sup>3</sup>

New section 23 is consistent with other ACT legislation, including section 9 of the Human Rights Act, which provides that everyone has a right to life, which applies to a person from the time of birth.

Requiring decision makers to take the special needs of pregnant people, including their unborn child (after they are born) into account is consistent with human rights, including international obligations with respect to the rights of the child.

The decision maker is only required to consider the matters listed in section 23 if there is information or evidence available to the decision maker indicating that the person is pregnant. For example, if the accused person does not appear to be pregnant and does not self-report or otherwise indicate they are pregnant when asked, the authorised officer will not need to consider the matters listed in section 23.

Consideration of the matters in section 23 is not determinative of whether bail will be granted or, if bail is granted, the conditions that will be imposed. This information must be balanced with the other information relevant in the particular case.

#### New section 23A – Victim’s concern about need for protection etc

New section 23A sets out how victims views are communicated in bail applications by setting out who can make representations, the nature of the representations and the obligations on relevant justice agencies and decision makers in relation to such representations.

As noted above, section 22(1)(b)(ii) of the Bail Act currently requires the decision maker to consider the likelihood of the accused person harassing or endangering the safety or welfare of any person if released on bail. In addition, section 23A currently provides that a prosecutor must tell the court about any concerns, of which the prosecutor is aware, expressed by a victim about the need for protection from

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<sup>3</sup> Victorian Parliament Legislative Council *Legal and Social Issues Committee (2022) Inquiry into Children Impacted by Parental Incarceration*, p124.

violence and harassment by the accused person and the court must consider the submission in the context of the consideration in section 22(1)(b). Similarly, an authorised officer is required to consider protection concerns expressed by a victim (that they are aware of) in their consideration of the matters in section 22(1)(b) and section 9F.

Those provisions may be too restrictive to allow decision makers to fully consider safety and other concerns expressed by victims, or to consider the potential intimate knowledge victims hold about the behaviour patterns of the accused. To address these limitations, new section 23A expands on current section 23A.

New section 23A(1) expands upon current section 23A by expressly providing that, where a court or authorised officer is making a decision about the grant of bail, a victim may express concerns about the need for protection from violence and harassment by the accused person to a relevant justice agency and a primary victim may give any other information to a justice agency.

New section 23A(2)(a) will permit the prosecutor to make a submission to the court regarding any victim's representations about the need for protection that the prosecutor is aware a victim has expressed. However, the prosecutor must make submissions if the prosecutor is aware that the victim has expressed that the court has expressed that court should be informed about the concerns.

This will give the prosecutor a discretion not to make submissions regarding a victim's representations about their concerns for the need for protection in circumstances where the victim does not wish these submissions to be made including because doing so may elevate the safety risks to a victim.

New section 23A(2)(b) will give the prosecutor a discretion to make submissions about other information provided by a primary victim if the prosecutor considers it is relevant to the bail decision under section 22. This could include information about the accused person's habits and behaviour that may be relevant to bail decisions.

New section 23A(2)(c) will require the court to receive submissions made under new section 23A(2)(b) and consider submissions in relation to concerns about the need for protection when considering the matters in sections 22(1)(b) and 22(2)(c) (matters relevant to safety), and submissions made in relation to other information provided by a primary victim, generally for section 22.

Authorised officers will also be required to consider concerns expressed by a victim about their need for protection and other information provided by a primary victim (which they are aware of) in their consideration of the matters in sections 9F, 22(1)(b) and 22(2)(c) and 22, respectively.

New section 23A(4) authorises a 'victim representative' to represent a primary victim's concerns and/or to give information to relevant justice agencies on behalf of the primary victim. This is designed to ensure vulnerable victims are not further disadvantaged in circumstances where their capacity, safety concerns or other factors such as cultural expectations make it difficult for them to make

representations or give information themselves. A definition of victim representative will be inserted by clause 20 into the Dictionary.

New section 23A(5) includes a definition of violence and harassment to clarify the scope representations can cover including to address concerns raised that a victim cannot make representations about the need for protection from violence or harassment to family members or pets of the victim. The definition explicitly provides that violence and harassment includes family violence, personal violence and violence against or harassment of a victim's family member or pets.

Allowing a primary victim (or their representative) to make representation on matters relevant to bail may assist in facilitating decision makers having relevant information put to them that the primary victim is uniquely privy to because of their relationship, insight or exposure to the alleged offender.

A definition of relevant justice agency has been included for consistency and alignment with the related bail obligations in section 17 of the Victims of Crime Act.

Consideration of the matters in section 23A is not determinative of whether bail will be granted or, if bail is granted, the conditions that will be imposed. This information must be balanced with the other information relevant in the particular case.

#### **Clause 11                    Section 28 heading**

Clause 11 replaces the heading for section 28 'Undertakings to appear' with the heading 'Bail undertakings'.

Section 28 of the Bail Act was amended in 2004 via the *Bail Amendment Act 2004* to require that, in addition to an undertaking to appear, a person must also give an undertaking to comply with bail conditions in order to be released on bail. The heading to the section was not updated. As a consequence, the current heading describes a narrower set of undertakings than all the undertaking required by section 28.

The new heading captures both the undertaking to appear and undertakings to comply with bail conditions under the general description of 'Bail undertakings'.

#### **Clause 12                    Right of review of bails decisions—prosecution Section 44(6), definition of family violence offence**

This clause deletes the definition of 'family violence offence' in section 44(6) as the definition is the same as the general definition of family violence offence in the Dictionary and so does not require a section specific definition.

#### **Clause 13                    Notice to victim of bail decisions Section 47A(2)**

Section 47A of the Bail Act requires an informant to notify a 'victim liaison officer' of certain matters and a victim liaison officer to tell a victim of certain matters in certain circumstances. A victim liaison officer is described in this section as a police officer assigned to liaise with victims of crime.

Operationally, it is not always be a sworn police officer who is assigned to liaise with a victim of crime as there is no requirement for a victim liaison officer to be a sworn member.

This clause omits 'a police officer assigned to liaise with victims of crime' as the description of a victim liaison officer and replaces it with 'a police officer or staff member of the Australian Federal Police whose functions include victim liaison' to align the obligations under this section with the employees within the Australian Federal Police assigned to perform the function.

This is consistent with amendments to section 29A of the Victims of Crime Act recently made by the Crimes Legislation Amendment Act 2026.

#### **Clause 14            Section 47A(3)**

Section 47A(3) of the Bail Act provides for a victim liaison officer to give notice to a victim about a bail decision in relation to a person if the victim liaison officer is told about a victim's concerns about the need for protection from violence or harassment by the person. Section 47A(3) provides that the victim liaison officer take all reasonable steps to tell the victim, (or if the victims is a child, a person who has parental responsibility for the child) as soon as practicable.

Clause 14 omits the reference to '(or if the victims is a child, a person who has parental responsibility for the child)' and replaces it with a reference to 'victim representative'.

This change complements changes made by clause 10 (to section 23A) that provide for a 'victim representative' to represent a primary victim's concerns and give information for the primary victim. Consistent with the representations being made by a victim representative, notifications can also be made to a victim representative for the primary victim.

#### **Clause 15            Dictionary, definition of *applicable bail criteria*, paragraphs (c) and (d)**

The current definition of 'applicable bail criteria' in the Dictionary includes criteria under a number of provisions including:

(c) section 22 (Criteria for granting bail to adults) and

(d) section 23 (Criteria for granting bail to children).

As outlined above in clause 10, the criteria for granting bail to both adults and children will be included in new section 22.

To reflect this, clause 15 deletes paragraphs (c) and (d) of the definition of 'applicable bail criteria' and substitutes a new paragraph (c) 'section 22 (Bail decision—core matter).'

#### **Clause 16            Dictionary, new definitions**

Clause 16 inserts new definitions of 'bail undertaking', 'child welfare law', 'disability' and 'family violence'.

The new definition of ‘child welfare law’ provides that, for the purposes of part 4 of the Bail Act, see section 640 of the *Children and Young People Act 2008*. This is consistent with the new definition of ‘child welfare law’ in section 12A, which is required because of the new mandatory consideration under new section 22D(1)(k)(iii) relating to ongoing effects of being dealt with under a child welfare law.

The new definition of ‘bail undertaking’ is a consequence of the changes made by clause 11 and 21 to more accurately describe the full scope of undertakings, required under section 28(1), as bail undertakings rather than undertakings to appear. Correspondingly, under the new definition, ‘bail undertaking’ means an undertaking under section 28(1).

The new definition of ‘disability’ refers to the new definition specified under section 12A (see clause 6).

The new definition of ‘family violence’ provides that, for the purposes of part 4 of the Bail Act, see section 8 of the Family Violence Act. This is consistent with the new definition of ‘family violence’ in section 12A, which is necessary because of the new mandatory consideration in section 22A(k) and the use of this term in the definition of violence or harassment in new section 23A.

#### **Clause 17            Dictionary, definition of *grant***

The current definition of ‘grant’ in the Dictionary provides that a grant, in relation to bail (other than in section 22 (Criteria for granting bail to adults) or section 23 (Criteria for granting bail to children)), includes continue.

As outlined above in clause 10, the criteria and grant of bail to adults and children will be included in new section 22.

To reflect this, clause 17 omits ‘section 22 (Criteria for granting bail to adults) or section 23 (Criteria for granting bail to children) and substitutes ‘section 22 (Bail decision—core matters)’.

#### **Clause 18            Dictionary, new definitions**

Clause 18 inserts definitions of ‘harm’, ‘health condition’, ‘legally incompetent person’ and ‘primary victim’.

The new definition of ‘harm’ defines harm as including physical injury; mental injury or emotional suffering (including grief), pregnancy, economic loss and substantial impairment of a person’s legal rights. Child sexual abuse is an example of harm under this definition.

The definition of harm is relevant to the definition of victim and including a broad, inclusive definition establishes that the concept of harm should not be interpreted narrowly.

The new harm definition is consistent with the definition of harm in section 6 of the Victims of Crime Act creating greater alignment between the definition of victim across the Bail Act and Victims of Crime Act.

The new definition of ‘health condition’ refers to the new definition specified under section 12A (see clause 6).

The new definition of ‘legally incompetent person’ provides that a legally incompetent person means an adult who is subject to—

- (a) an enduring power of attorney that has become operative; or
- (b) a guardianship order.

This definition is required as a result of new the expanded definition of ‘victim’ and new definition of ‘victim representative’ (see clause 20).

Clause 18 inserts a new definition of ‘primary victim’ into the Dictionary to more closely align with the definition of primary victim in section 6 of the Victims of Crime Act.

The definition of ‘primary victim’, inserted by this clause defines a primary victim as

- (a) a person who suffers harm because of an offence committed by an accused person and includes a person who suffers harm:
  - (i) in the course of, or as a result of, the commission of the offence
  - (ii) as a result of witnessing an offence, or
  - (iii) in the course of assisting a police officer in the exercise of the officer’s power to arrest the accused person or to take action to prevent the commission of the offence, but
- (b) does not include the accused person.

This definition captures individuals who are already primary victims under the Bail Act (paragraphs (a) and (c)) but also captures an additional category of primary victim (paragraph (c)) who are captured by the definition of primary victim in section 6 of the Victim of Crime Act. The definition relates to harm that the victim has suffered because of the offence the accused person is alleged to have committed.

The distinction between a primary victim and a victim is most relevant to the type of representations that can be made under new section 23A. All victims will be able to make representations regarding their need for protection from violence or harassment, but only primary victims will be able to provide information under section 23A that relate to bail considerations more generally.

#### **Clause 19                    Dictionary, definition of *undertaking to appear***

The definition of undertaking to appear in the Dictionary provides that undertaking to appear means an undertaking given under section 28(1).

As outlined in relation to clauses 11 and 21, the undertakings required under section 28(1) have, since 2004, included an undertaking to comply with bail conditions and relevant references to undertaking to appear will be replaced with the broader term ‘bail undertaking’. Bail undertaking will be defined, under a new definition inserted by clause 16, as an undertaking under section 28(1).

Consequently, the definition of undertaking to appear is no longer required and is omitted by clause 19.

## **Clause 20            Dictionary, definition of *victim***

The Dictionary in the Bail Act currently defines a ‘victim’ as a person (the primary victim) who suffers harm in the course of, or because of, the commission of an offence of which the accused person is accused, or a person who suffers harm in the course of assisting a police officer in the exercise of the officer’s power to arrest the accused person or to take action to prevent the commission of an offence of which the accused person is accused. If a primary victim dies because of the commission of an offence of which the accused person is accused, the victim is defined as anyone who was financially or psychologically dependent on the primary victim immediately before his or her death.

Clause 20 inserts a new definition of victim to more closely align the definition with the definition of victim in section 6 of the Victims of Crime Act.

Under the new definition a victim, of an offence by an accused person—

(a) means—

- (i) a primary victim; or
- (ii) a family member, of the primary victim, who suffers harm because of the harm to the primary victim; or
- (iii) a person who is financially or psychologically dependent on the primary victim, and who suffers harm because of the harm to the primary victim; or
- (iv) if a primary victim dies because of the commission of the offence—
  - (A) a close family member of the primary victim; or
  - (B) a carer of the primary victim; or
  - (C) a person with an intimate personal relationship with the primary victim; or
  - (D) a person who was financially or psychologically dependent on the primary victim immediately before their death; or
- (v) a person with parental responsibility for a person mentioned in subparagraphs (i) to (iv); or
- (vi) if a person mentioned in subparagraphs (i) to (iv) is a legally incompetent person—
  - (A) a legally appointed guardian for the person; or
  - (B) an attorney, appointed under an enduring power of attorney that has become operative, for the legally incompetent person; but

(b) does not include the accused person.

Under some of the paragraphs of the definition, a person is a victim because of harm suffered because of the offence, while other people are victims because they have suffered harm as a result of the harm suffered by a primary victim or because of their specific relationship to a primary victim.

As indicated above, a person's status as victim under the Bail Act, is related to the rights to make and obligations to consider representations under section 23A (and consequent notification obligations under section 47A).

#### **Clause 21            Dictionary, definition of *victim representative***

Clause 21 inserts a definition of 'victim representative' for the purposes of new section 23A and 47A.

Victim representative is defined as:

- (a) a person with parental responsibility for the victim; or
- (b) for a victim who is a legally incompetent person—
  - (i) a legally appointed guardian for the person; or
  - (ii) an attorney, appointed under an enduring power of attorney that has become operative for the legally incompetent person; or
- (c) a person nominated, in writing, by a primary victim to do 1 or more of the following:
  - (i) represent the primary victim's concern about the need for protection under section 23A(1)(a);
  - (ii) give information for the primary victim under section 23A(1)(b);
  - (iii) be told information for the primary victim under section 47A(3).

#### **Clause 21            Further amendments, mentions of *an undertaking to appear* etc**

Clause 21 replaces several references to undertakings to appear with references to bail undertakings or bail undertakings to appear.

As indicated in relation to clause 7 above, section 28 of the Bail Act was amended in 2004 via the *Bail Amendment Act 2004* to require that, in addition to an undertaking to appear, a person must also give an undertaking to comply with bail conditions in order to be released on bail. Several provisions in the Bail Act currently refer to an undertaking/undertakings to appear even though the relevant provisions in intended to capture the broader undertakings required under section 28(1). This clause updates relevant references to undertakings to appear with references to bail undertakings to capture the broader undertakings required and intended to be covered by these provisions.

## **Schedule 1 Consequential amendments**

### Part 1.1 Family Violence Act 2016

#### **Clause [1.1]      Schedule 1, table 1.2, new item 12**

Section 149 of the Family Violence Act creates an offence for publishing an account or report in respect of a proceeding for a family violence order and the account or report identifies any of a number of specified matters.

Section 150(1)(b) of the Family Violence Act provides an exception to the offence where the publication is a permitted publication about proceedings, mentioned in schedule 1, section 1.2.

Clause [1.1] inserts a new item in table 1.2 at Schedule 1 to the Family Violence Act to specify include

information given to an authorised officer under the Bail Act, section 15(1A) (Deciding of questions of bail by authorised officers) or given to a court under the Bail Act, section 19(2A) (Court bail—general).

This will provide protection, for those performing functions under the Bail Act associated with the provision of information under new sections 15(1A) and 19(2A) about family violence orders made against an accused person, against their conduct constituting an offence.

### Part 1.2 Victims of Crime Act 1994

#### **Clause [1.2]      Section 17(1), except note**

Section 17 of the Victims of Crime Act sets out obligations on a relevant justice agency to help inform decision makers to make bail decisions that take into account safety concerns expressed by victims.

Currently, section 17(1)(a) of the Victims of Crime Act requires the relevant justice agency to ask the victim of the accused whether they have concerns about the need for protection from violence of harassment by the accused person. However, there may be circumstances where it is not possible to ask the victim. For example, the victim may be unconscious or may be unwilling to speak with the relevant justice agency.

Currently, section 17(1)(b) of the Victims of Crime Act requires the relevant justice agency to tell the court or authorised officer about any concerns expressed by a victim (under section 17(1)(a)) about the need for protection from violence or harassment by the accused person.

Clause [1.2] substitutes existing subsection 17(1) with a new subsection 17(1).

Under new section 17(1), relevant justice agencies must take all reasonable steps to ask a victim if they have concerns about the need for protection from violence of harassment by the accused person. New section 17(1) does not include an obligation on justice agencies to tell the court or authorised officer about the concerns expressed by a victim about the need for protection.

As discussed in clause 10 above, new section 23A of the Bail Act will give the prosecution a discretion as to whether to make submissions to the court about concerns expressed by a victim about the need for protection unless the victim has expressed that the concerns should be put to the court. This change to the operation of section 23A would result in inconsistency between new section 23A(2) of the Bail Act and current section 17(1)(b) of the Victims of Crime Act.

To address this, new section 17(1) of the Victims of Crime Act does not include a requirement on relevant justice agencies to inform the decision maker of concerns expressed by the victim about the need for protection. New section 23A(2) of the Bail Act will apply in these circumstances, requiring the prosecution to communicate concerns expressed by a victim if they are aware that the victim has expressed that the court should be informed about the concern but providing discretion to the prosecution about whether it is appropriate to communicate those concerns where the victim has not asked for the court to be informed.

The note to section 17 is not deleted. The retention of this note is important as it points victims to additional information set out in section 23A of the Bail Act that is relevant to their rights.

#### **Clause [1.3]      Section 17(2), new definitions**

As amended, section 17 of the Victims of Crime Act sets out the obligations on a relevant justice agency to take reasonable steps to ask a victim if they have concerns about the need for protection from violence or harassment by the accused person. This is supplemented by section 23A of the Bail Act, which governs the communication of representations relating to concerns for the need for protection from violence or harassment.

As indicated above, clause 10 inserts a new definition of violence or harassment as part of new section 23A to ensure that violence or harassment is not interpreted narrowly.

To maintain consistency between the Victims of Crime Act and the Bail Act, clause [1.3] inserts the same definition of violence or harassment into section 17(2) of the Victims of Crimes Act as that included in new section 23A of the Bail (as well as definition of particular terms used in the definition).