



New South Wales

Bail Amendment Bill 1998

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament. This Bill is cognate with the *Criminal Procedure Legislation Amendment (Bail Agreements) Bill 1998*.

Overview of Bill

The object of this Bill is to amend the *Bail Act 1978* so as:

- (a) to remove the presumption in favour of bail under section 9 of the Act for certain serious violent and sexual offences (Schedule 1 [1] and [2]), and
 - (b) to clarify the provisions concerning the application of the presumption in favour of bail for domestic violence offences and offences of contravening apprehended domestic violence orders and to provide an exception to the presumption in favour of bail for offences of contravening apprehended domestic violence orders where an accused person has failed to comply with certain bail conditions (Schedule 1 [3]–[5]), and
 - (c) to require a police officer to sign an acknowledgment that he or she has given information respecting the entitlement to or eligibility for bail of a person charged with an offence and who is in custody (Schedule 1 [7]), and
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- (d) to include within the criteria that a court or police officer must take into account under section 32 of the Act in determining whether to grant bail for a serious offence to a person, whether, at the time the offence is alleged to have been committed, the person had been granted bail or released on parole in connection with any other serious offence and to simplify certain other provisions of that section (Schedule 1 [8]–[10]), and
- (e) to require a police officer or court to be satisfied that a bail condition is appropriate having regard to any intellectual disability of an accused person that may affect the person's capacity to understand or comply with the bail condition before imposing the bail condition (Schedule 1 [11] and [12]), and
- (f) to enable NSW courts to make arrangements with courts in other States or Territories so that agreements, acknowledgments and deposits of security or amounts of money with respect to bail conditions imposed by the NSW courts can be entered into or made with or to the courts of the other States or Territories (Schedule 1 [13] and [14]), and
- (g) to enable a senior police officer to review a decision by another police officer to refuse to grant bail (Schedule 1 [16]), and
- (h) to require notice of any alteration or variation of a bail condition to be given to any person other than the accused who had entered into an agreement or made an acknowledgment pursuant to the bail condition (Schedule 1 [18]).

The Bill also makes various other amendments of a consequential or savings or transitional nature to the Act (Schedule 1 [6], [15], [17] and [19]).

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision giving effect to the amendments to the *Bail Act 1978* set out in Schedule 1.

A detailed explanation of each of the amendments is set out in Schedule 1 to the proposed Act.

Clause 4 provides that the matter appearing under the heading "Explanatory note" in Schedule 1 does not form part of the proposed Act.

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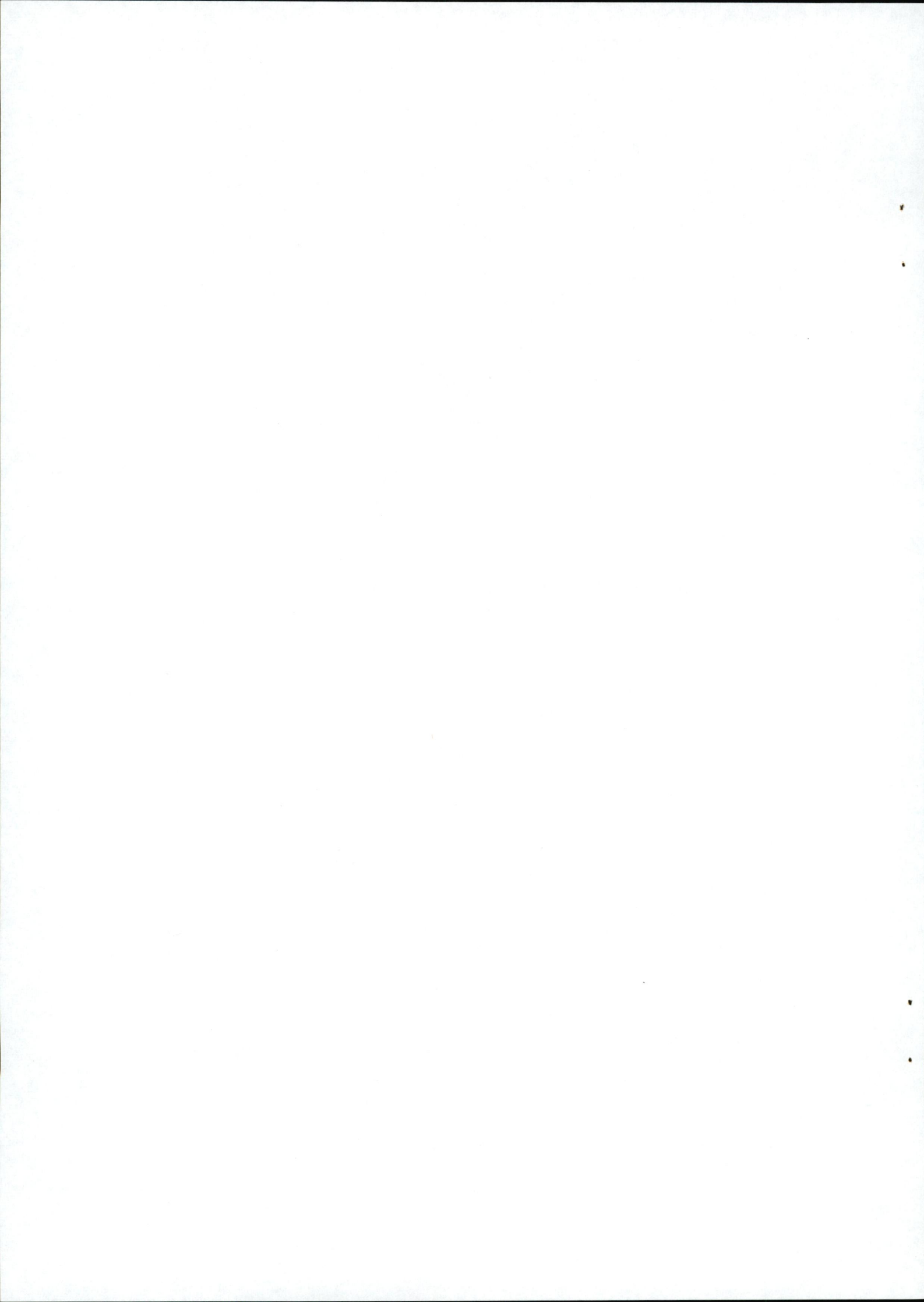


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New South Wales

Bail Amendment Bill 1998

No. , 1998

A Bill for

An Act to amend the *Bail Act 1978* to remove the presumption in favour of bail for certain offences and to make miscellaneous other amendments.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Bail Amendment Act 1998*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation. 5

3 Amendment of Bail Act 1978 No 161

The *Bail Act 1978* is amended as set out in Schedule 1.

4 Explanatory notes

The matter appearing under the heading "Explanatory note" in Schedule 1 does not form part of this Act. 10

Schedule 1 Amendments

(Section 3)

[1] Section 9 Presumption in favour of bail for certain offences—exceptions

Insert “33, 61J, 61K, 66A, 66B, 78H, 90A.” after “31.” in section 9 (1) (c). 5

[2] Section 9 (1) (f)

Insert “or manslaughter” after “murder”.

Explanatory note

Section 9 of the *Bail Act 1978* provides a presumption in favour of granting bail to an accused person for all offences with the exception of certain offences specified in section 9 (1). Items [1] and [2] amend the subsection to include within the offences for which there is no presumption in favour of bail manslaughter and the following other offences under the *Crimes Act 1900*: 10

33 (Wounding etc with intent to do bodily harm or resist arrest) 15

61J (Aggravated sexual assault)

61K (Assault with intent to have sexual intercourse)

66A (Sexual intercourse—child under 10)

66B (Attempting, or assaulting with intent, to have sexual intercourse with child under 10) 20

78H (Homosexual intercourse with male under 10)

90A (Kidnapping)

[3] Section 9 (5)

Omit the subsection.

[4] Section 9A Exception from presumption in favour of bail—certain domestic violence offences and offences of contravening apprehended domestic violence orders 25

Omit section 9A (1). Insert instead:

(1) This section applies to the following:

(a) any domestic violence offence, 30

- (b) any offence of contravening an apprehended domestic violence order by an act:
 - (i) involving violence, or
 - (ii) that would constitute an offence against section 562AB of the *Crimes Act 1900*. 5
 - (1A) Section 9 does not apply if a grant of bail is sought for an accused person in respect of an offence to which this section applies alleged to have been committed (or to involve an act) against another person if the authorised officer or court is satisfied that the accused person:
 - (a) has a history of violence, or 10
 - (b) has been violent to the other person in the past (whether or not the accused person has been convicted of an offence in respect of the violence), or 15
 - (c) has failed to comply with a bail condition in respect of the offence to which this section applies that was imposed for the protection and welfare of the other person (unless the authorised officer or court is satisfied that the accused person will comply with any such bail condition in the future). 20
- [5] Section 9A (3), definition of "intimidation"**
- Omit the definition.
- Explanatory note**
- Items [3] and [4] amalgamate sections 9 (5) and 9A (1) of the *Bail Act 1978*, which relate to removal of the presumption in favour of bail in certain cases involving domestic violence, so as to clarify the effect of those provisions and to provide for the exception from the presumption in favour of bail concerning failure to comply with certain bail conditions contained in section 9 (5) and which currently relates only to domestic violence offences to extend to certain offences in respect of apprehended domestic violence orders (proposed section 9A (1A) (c)). Item [5] makes a consequential amendment to section 9A (3) to omit a definition that is superfluous in view of proposed section 9A (1) (b) (ii). 25 30
- [6] Sections 12 and 54 (3) (b)**
- Omit "Part 6" wherever occurring. 35
- Insert instead "Division 2 of Part 6".
- Explanatory note**
- Item [6] contains amendments that are consequential on the insertion of a new Division in Part 6 (see item [16]).

[7] Section 18 Determination as to bail to be made after charge laid

Insert "and sign an acknowledgment in the prescribed form that he or she has given the accused person the information" after "regulations" in section 18 (1) (a).

Explanatory note

Section 18 (1) (a) of the *Bail Act 1978* requires the proper officer (the appropriate police officer) to give a person charged with an offence who is in custody such information in writing respecting the person's entitlement to or eligibility for bail as is prescribed by the regulations. Item [7] amends the paragraph to require the proper officer to also sign an acknowledgment that he or she has given the accused person this information.

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[8] Section 32 Criteria to be considered in bail applications

Omit section 32 (1) (c) (iv). Insert instead:

- (iv) whether or not it is likely that the person will commit any serious offence while at liberty on bail, but the authorised officer or court may have regard to this likelihood only if permitted to do so under subsection (2).

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[9] Section 32 (1) (c) (v)

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Insert at the end of section 32 (1) (c) (iv):

, and

- (v) if the offence for which bail is being considered is a serious offence, whether, at the time the person is alleged to have committed the offence, the person had been granted bail, or released on parole, in connection with any other serious offence.

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[10] Section 32 (2) and (2A)

Omit the subsections. Insert instead:

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- (2) The authorised officer or court may, for the purposes of subsection (1) (c) (iv), have regard to whether or not it is likely that the person will commit one or more serious offences while at liberty on bail if the officer or court is satisfied that:

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- (a) the person is likely to commit the offences, and
 - (b) that likelihood, together with the likely consequences, outweighs the person's general right to be at liberty.
- (2A) The following matters are to be considered in determining for the purposes of subsection (1) (c) or (2) whether an offence is a serious offence (but do not limit the matters that can be considered):
- (a) whether the offence is of a sexual or violent nature.
 - (b) the likely effect of the offence on any victim and on the community generally.
 - (c) the number of offences likely to be committed or for which the person has been granted bail or released on parole.

Explanatory note

Section 32 of the *Bail Act 1978* sets out the criteria that must be taken into account before granting bail in relation to an offence to an accused person who is not entitled to be granted bail in respect of the offence under section 8 of the Act. Item [9] inserts proposed section 32 (1) (c) (v) to require the court or police officer determining whether to grant bail for an offence that is serious to take into consideration whether, at the time the person is alleged to have committed the offence, the person had been granted bail or released on parole in connection with any other serious offence. Item [8] simplifies existing section 32 (1) (c) (iv) and (2), without changing the substance of the provisions. Item [10] inserts a new section 32 (2A) which sets out some of the matters that the court or police officer must consider in determining whether an offence is a serious offence for the purposes of proposed section 32 (1) (c) and (2). These are similar to the matters that are currently required to be taken into consideration under section 32 (2A) in determining whether an accused person is likely to commit an offence or offences that is or are serious while on liberty on bail.

[11] Section 37 Restrictions on imposing bail conditions

Insert after section 37 (2):

- (2A) Before imposing a bail condition on an accused person who has an intellectual disability, the authorised officer or court is to be satisfied that the bail condition is appropriate having regard (as far as can reasonably be ascertained) to the capacity of the accused person to understand or comply with the bail condition.

[12] Section 37 (5)

Insert in alphabetical order:

intellectual disability means a significantly below average intellectual functioning (existing concurrently with two or more deficits in adaptive behaviour) that results in the person requiring supervision or social rehabilitation in connection with daily life activities. 5

Explanatory note

Item [11] amends section 37 of the *Bail Act 1978* to require an authorised officer or court to be satisfied that a bail condition is appropriate having regard to any intellectual disability of an accused person before imposing a bail condition. Item [12] inserts a definition of *intellectual disability* based on the definition of the term recommended by the Law Reform Commission in its report "People with an Intellectual Disability and the Criminal Justice System" LRC 80 (1996). 10

[13] Section 39 Entry into agreement and acceptance of acknowledgment or security 15

Insert "or, if any arrangement has been made under section 39A, in accordance with the arrangement" after "regulations".

[14] Section 39A

Insert after section 39: 20

39A Entry into arrangements with courts in other States and Territories

(1) In this section:

State includes a Territory.

(2) A court that imposes a bail condition referred to in section 39 may make an arrangement with a court of another State for the court in the other State to enter into an agreement, or accept an acknowledgment or deposit of security or an amount of money, that is required by the bail condition on behalf of the court. 25 30

(3) An agreement entered into with, or acknowledgment made to or deposit made with, a court of another State in accordance with an arrangement referred to in subsection (2) is, for the purposes of this Act, to be treated as if it

were entered into with or made with or to the court that imposed the bail condition.

- (4) The regulations may make provision for or with respect to entering into agreements or making acknowledgments or deposits of security or amounts of money under this section and any other relevant matters. 5

Explanatory note

Items [13] and [14] enable agreements, acknowledgments and deposits of security or amounts of money with respect to bail conditions imposed by a NSW court to be made with or to a court in another State or Territory. 10

[15] Part 6 Review of bail decisions

Omit "this Part" wherever occurring. Insert instead "this Division".

[16] Section 43A

Insert after the heading to Part 6:

Division 1 Power of senior police officers to review 15

43A Power of senior police officer to review

- (1) An accused person who is refused bail by an authorised officer may request a review of the decision under this section.
- (2) A review is not to be conducted under this section if conducting the review would cause any delay in bringing the accused person before a court in accordance with section 20. 20
- (3) A review of a decision under this section is to be conducted by an authorised officer who is more senior than the authorised officer who made the decision. 25
- (4) The power to review a decision under this section is a power:
- (a) to affirm the decision to refuse bail, or
 - (b) to grant bail unconditionally or subject to conditions in accordance with this Act. 30

- (5) Without limiting the grounds on which an authorised officer conducting a review of a decision under this section may grant bail, the authorised officer may grant bail if the authorised officer is of the opinion that:
 - (a) the accused person is no longer incapacitated by intoxication, injury or use of a drug or is no longer in danger of physical injury or in need of physical protection, or 5
 - (b) there has been a significant change in circumstances since the decision was made, or 10
 - (c) exceptional circumstances exist that justify a grant of bail.
- (6) The power to review a decision under this section may not be exercised if any power to review the decision has been, or has been sought to be, exercised under Division 2. 15

Explanatory note

Item [16] inserts a new Division into Part 6 of the *Bail Act 1978* which will enable a senior police officer to review the decision of a more junior police officer to refuse bail. Items [6], [15] and [17] contain amendments that are consequential on the insertion of the new Division. 20

[17] Part 6, Division 2, heading

Insert before section 44:

Division 2 Powers of justices, magistrates and courts to review 25

[18] Section 54 Notices

Insert after section 54 (3):

- (3A) Where:
 - (a) a bail condition is altered under section 41, or
 - (b) a bail condition is varied on a review pursuant to Division 2 of Part 6 of a decision to grant bail, 30

the court must forthwith give or cause to be given to any person other than the accused who entered into an agreement or made an acknowledgment pursuant to the condition that is altered or varied a copy of the condition as altered or varied.

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Explanatory note

Section 54 (3) of the *Bail Act 1978* requires notice of bail conditions that are altered or varied to be given to the accused person and any other person who makes an acknowledgment or enters into an agreement pursuant to the altered or varied conditions. Item [18] amends the section to require notice of any alteration or variation of bail conditions to be given to any person who had entered into an agreement or made an acknowledgment pursuant to the bail conditions that are altered or varied. This will ensure that such a person has the opportunity to apply for a discharge from his or her liability under the agreement.

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[19] Schedule 1 Savings and transitional provisions

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Insert in Schedule 1 (with appropriate Part and clause numbers):

Part Bail Amendment Act 1998

Definition

In this Part, *amending Act* means the *Bail Amendment Act 1998*.

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Presumptions in favour of bail

Sections 9 and 9A, as amended by Schedule 1 [1]–[5] to the amending Act, apply to offences alleged to have been committed by a person who is charged with an offence on or after the commencement of the amendments to those sections.

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Grant of bail

Section 32, as amended by Schedule 1 [8]–[10] to the amending Act, applies to offences alleged to have been committed by a person who is charged with an offence on or after the commencement of the amendments to that section.

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References to Part 6

A reference in any other Act, in any instrument made under any Act or in any other instrument of any kind, to Part 6 of this Act, as in force immediately before the commencement of Schedule 1 [16] to the amending Act, is to be read as a reference to Division 2 of Part 6 of this Act.

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Explanatory note

Item [19] contains various savings, transitional and other provisions.

