



New South Wales

Bail Bill 2013

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to make provision for bail in connection with criminal and other proceedings.

This Bill repeals and replaces the *Bail Act 1978 (the 1978 Act)*.

Bail is authority to be at liberty for an offence (including an alleged offence). A person who is in custody because of an offence is, if granted bail for the offence, entitled to be released from custody. Bail can be granted for an offence if substantive proceedings for the offence have not concluded.

The Bill sets out a new scheme for the making of bail decisions in respect of accused persons. The key features of the Bill are as follows:

- (a) the Bill empowers bail authorities (certain police officers, authorised justices and courts) to make bail decisions in respect of accused persons,
- (b) four types of bail decision can be made:
 - (i) a decision to release a person without bail (which can only be made by a police officer), or
 - (ii) a decision to dispense with bail (which can only be made by a court or authorised justice), or

- (iii) a decision to grant bail, with or without conditions, or
- (iv) a decision to refuse bail,
- (c) the Bill establishes a simplified test for making bail decisions, based on unacceptable risk, and applies that test to all offences (this replaces the test in the 1978 Act that requires presumptions for or against bail to be applied to specified offences, and requires some offences to be treated as offences for which there is no presumption),
- (d) a bail authority is required, before making a bail decision, to consider whether there is any unacceptable risk that an accused person, if released from custody, will:
 - (i) fail to appear at any proceedings for the offence, or
 - (ii) commit a serious offence, or
 - (iii) endanger the safety of victims, individuals or the community, or
 - (iv) interfere with witnesses or evidence,
- (e) bail can be refused only if there is an unacceptable risk that cannot be sufficiently mitigated by the imposition of bail conditions,
- (f) bail conditions can be imposed only for the purpose of mitigating an unacceptable risk and are subject to certain general rules (such as reasonableness and proportionality),
- (g) for certain offences there is a right to release, which means that bail cannot be refused,
- (h) bail has effect (unless a bail authority specifies otherwise) until substantive proceedings for the offence conclude (the 1978 Act provides for the grant of bail for specified periods),
- (i) it will be mandatory for an accused person granted bail for an offence to appear before a court in proceedings for the offence and to comply with any bail conditions (the 1978 Act requires an accused person to agree to appear and to agree to conduct restraints imposed by bail conditions),
- (j) three distinct types of bail application can be made (a release application, a detention application or a variation application),
- (k) the rules for determining whether a court or authorised justice has power to hear a bail application are simplified.

Outline of provisions

Part 1 Preliminary

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 provides that the purpose of the proposed Act is to provide a legislative framework for a decision as to whether a person accused of an offence or who is otherwise required to appear before a court should be detained or released, with or without conditions. It also requires regard to be had to the presumption of innocence and the general right to be at liberty.

Clause 4 defines certain words and expressions used in the proposed Act. Key expressions are as follows:

accused person or *person accused of an offence* includes the following:

- (a) a person who has been charged with or convicted of an offence,
- (b) a person whose conviction for an offence is stayed,
- (c) a person in respect of whom proceedings on an appeal against conviction or sentence for the offence are pending,
- (d) a person in respect of whom a new trial has been ordered to be held for an offence.

bail authority means a police officer, an authorised justice or a court.

Clause 5 defines *proceedings for an offence* to mean criminal proceedings against a person for an offence, including committal proceedings, proceedings relating to bail, proceedings relating to sentence and proceedings on an appeal against conviction or sentence. All proceedings for an offence are *substantive*, other than bail proceedings, interlocutory proceedings and any proceedings declared to be non-substantive by the regulations.

Clause 6 explains when proceedings for an offence conclude. (Bail ceases to have effect if substantive proceedings for an offence conclude, and a bail decision cannot be made if substantive proceedings for an offence conclude and no further proceedings are pending.)

Part 2 General provisions

Clause 7 explains that bail is authority to be at liberty for an offence. As a general rule, a person in custody for an offence who is granted bail for the offence is entitled to be released from custody.

Clause 8 provides for the types of bail decisions that can be made under the proposed Act, namely:

- (a) a decision to release a person without bail, or
- (b) a decision to dispense with bail, or
- (c) a decision to grant bail (with or without the imposition of bail conditions), or
- (d) a decision to refuse bail.

Clause 9 provides that a decision to release a person without bail can only be made by a police officer with power to make that bail decision.

Clause 10 provides that a decision to dispense with bail can only be made by a court or authorised justice, and provides for the circumstances in which a court or authorised justice is taken to have dispensed with bail.

Clause 11 provides that a decision to grant or refuse bail can only be made by a police officer, court or authorised justice with power to make that bail decision.

Clause 12 provides that bail ceases to have effect if it is revoked or substantive proceedings for the offence conclude (and no further proceedings are pending). Bail may also be granted for a specified period and may be continued, if it would otherwise cease to have effect.

Clause 13 provides that a person to whom bail is granted, or in respect of whom bail is dispensed with, is required to appear before a court, and surrender to the custody of the court, as and when required to do so in proceedings for the offence.

Clause 14 makes it clear that the entitlement to be at liberty conferred by bail is subject to certain limitations, namely:

- (a) the accused person is not entitled to be released until he or she signs a copy of the bail acknowledgment for the decision and gives it to the bail authority, and
- (b) the accused person is not entitled to be released on bail unless all pre-release requirements of bail conditions have been complied with, and
- (c) the accused person must appear before a court in accordance with his or her bail acknowledgment, and
- (d) the accused person is not entitled to be at liberty if the accused person is in custody for some other offence, or reason, because of which the person is not entitled to be at liberty.

Part 3 Making and variation of bail decisions

Division 1 Preliminary

Clause 15 requires all bail decisions to be made or varied in accordance with proposed Part 3.

Clause 16 sets out a flow chart that illustrates the key features of the making of a bail decision. These are explained below.

Division 2 How a bail decision is to be made

Clause 17 requires a bail authority, before making a bail decision, to consider whether there are any unacceptable risks. An *unacceptable risk* is an unacceptable risk that the accused person, if released from custody, will:

- (a) fail to appear at any proceedings for the offence, or
- (b) commit a serious offence, or
- (c) endanger the safety of victims, individuals or the community, or
- (d) interfere with witnesses or evidence.

The provision also lists the matters that are to be considered in deciding whether there is an unacceptable risk. These include the circumstances of the accused person, the nature and seriousness of the offence, the strength of the prosecution case, and other matters.

Clause 18 provides that the following bail decisions can be made if there are no unacceptable risks:

- (a) a decision to release a person without bail,
- (b) a decision to dispense with bail,
- (c) a decision to grant bail (without the imposition of bail conditions).

Clause 19 provides that the following bail decisions can be made if there is an unacceptable risk:

- (a) a decision to grant bail,
- (b) a decision to refuse bail.

Clause 20 provides that bail for an offence can be refused only if the bail authority is satisfied that there is an unacceptable risk that cannot be sufficiently mitigated by the imposition of bail conditions. Bail cannot be refused for an offence for which there is a right to release.

Clause 21 provides that the following decisions are the only bail decisions that can be made for an offence for which there is a right to release:

- (a) a decision to release a person without bail,
- (b) a decision to dispense with bail,
- (c) a decision to grant bail (with or without the imposition of bail conditions).

Offences for which there is a right to release include offences not punishable by a sentence of imprisonment (fine-only offences) and some summary offences.

Clause 22 limits the power of a court to grant or dispense with bail for an indictable offence when the accused person has been convicted of the offence and an appeal is pending.

Division 3 Bail conditions

Clause 23 provides that bail can be granted subject to conditions or unconditionally.

Clause 24 sets out general rules for the imposition of bail conditions. The key rule is that a bail condition can be imposed only for the purpose of mitigating an unacceptable risk. Bail conditions must also be reasonable, proportionate to the offence and appropriate to the unacceptable risk.

Clause 25 provides that bail conditions can impose conduct requirements on an accused person.

Clause 26 provides that a bail condition may require security to be provided for compliance with a bail acknowledgment.

Clause 27 provides that a bail condition may require one or more character acknowledgments to be provided in respect of an accused person.

Clause 28 provides that a bail condition may require suitable accommodation arrangements to be secured for an accused person before the accused person is released on bail.

Clause 29 limits the powers of a bail authority to impose bail conditions as pre-release requirements (these are requirements that must be complied with before the accused person is released on bail).

Clause 30 permits a court to impose one or more bail conditions (*enforcement conditions*) for the purpose of monitoring or enforcing compliance with other bail conditions.

Division 4 Procedural requirements

Clause 31 provides that the rules of evidence do not apply to the exercise of a bail authority's functions in relation to bail.

Clause 32 requires bail matters to be decided on the balance of probabilities.

Part 4 Procedures after decision is made or varied

Division 1 Functions of bail authorities

Clause 33 requires a bail authority that grants bail to ensure that the accused person is given a bail acknowledgment. The bail acknowledgment is a written notice that:

- (a) requires the accused person to appear before a court, on such day and at such time and place as are from time to time specified in a notice given or sent to the person as prescribed by the regulations, and
- (b) requires the accused person to notify the court before which he or she is required to appear of any change in the person's residential address.

The bail acknowledgment also sets out bail conditions (if any) and other information relating to bail.

Clause 34 requires a bail authority (if a court or authorised justice) to give an accused person notice of a decision to refuse bail (including information about the review or variation of the decision).

Clause 35 requires a bail authority that varies a bail condition to give the accused person notice of the terms of the bail condition as varied.

Clause 36 requires a bail authority to provide information about bail security agreements.

Clause 37 requires a bail authority to provide information about character acknowledgments.

Clause 38 requires reasons for decisions to grant or refuse bail, or to impose bail conditions, to be recorded.

Clause 39 confers power to issue warrants of commitment in connection with the making and variation of bail decisions.

Division 2 General

Clause 40 provides for a stay of a decision to grant bail or dispense with bail for a serious offence if a detention application is to be made to the Supreme Court.

Clause 41 limits the length of adjournments that can be made if bail is refused.

Clause 42 requires a court to be given notice if an accused person who has been granted bail remains in custody after having been granted bail because bail conditions have not been complied with.

Part 5 Powers to make and vary bail decisions

Division 1 Powers of police officers

Clause 43 confers power on a police officer to make a bail decision for an offence if the person accused of the offence is present at a police station and the officer is of or above the rank of sergeant or for the time being in charge of the police station.

Clause 44 requires a bail decision to be made as soon as reasonably practicable after a person in police custody is charged with an offence. If a bail decision is not made, the person must be brought before a court or authorised justice. The accused person must also be given information about eligibility for bail.

Clause 45 provides for additional police procedures after a bail decision is made.

Clause 46 requires a person who is refused bail by a police officer with power to make a bail decision, or who is not released on bail, to be brought before a court or authorised justice.

Clause 47 permits a senior police officer to review a decision of a police officer to refuse bail or grant bail subject to conditions.

Division 2 Powers of courts and authorised justices—bail applications

Clause 48 confers power on a court or authorised justice to make or vary a bail decision under the proposed Division on a bail application. The powers of a court or authorised justice to hear a bail application are set out in detail in Part 6. The following types of bail application can be made under the proposed Act:

- (a) a release application,
- (b) a detention application,
- (c) a variation application.

Clause 49 permits an accused person to make a release application (an application for bail to be granted or dispensed with) to a court or authorised justice and provides for the powers of the court or authorised justice on hearing the application.

Clause 50 permits the prosecutor in proceedings for an offence to make a detention application (an application for the refusal or revocation of bail) to a court or authorised justice and provides for the powers of the court or authorised justice on hearing the application.

Clause 51 permits any interested person to make a variation application (an application for variation of bail conditions) to a court or authorised justice and provides for the powers of the court or authorised justice on hearing the application. An *interested person* is defined to include the accused person, the prosecutor in the proceedings for the offence, the complainant in a domestic violence offence and the Attorney General.

Clause 52 limits the powers of authorised justices to vary bail conditions on a variation application.

Division 3 Additional powers of courts and authorised justices

Clause 53 gives a court or authorised justice discretion to grant bail or vary a bail decision, of its own motion, to benefit the accused person.

Clause 54 gives a court or authorised justice discretion to refuse bail or affirm a decision to refuse bail, of its own motion, on a first appearance for an offence, if:

- (a) no bail decision has been made or bail has been refused, and
- (b) a bail application is not made.

Clause 55 gives a court or authorised justice that has power to hear a variation application power to conduct a hearing (without application) if an accused person granted bail has remained in custody because a bail condition has not been complied with. The court or authorised justice may vary the bail conditions after conducting a hearing.

Clause 56 gives a court or authorised justice discretion to defer making a bail decision in respect of an accused person who is an intoxicated person.

Division 4 Restrictions on powers of courts and authorised justices

Clause 57 prohibits the Local Court or an authorised justice from varying a bail condition, under the proposed Part, if a higher court has directed the court or authorised justice not to do so, except (in the case of the Local Court) with the consent of the accused person and the prosecutor in the proceedings. The provision does not limit the functions of a court or authorised justice on a breach of bail.

Clause 58 provides that an authorised justice must not vary enforcement conditions or impose new enforcement conditions.

Part 6 Powers to hear bail applications

Division 1 Interpretation

Clause 59 explains that a reference to proceedings pending before a court is a reference to substantive proceedings only. Accordingly, a power conferred on a court to hear a bail application if proceedings for the offence are pending in the court applies only if the proceedings are substantive proceedings.

Clause 60 makes it clear that Part 6 does not limit the powers of a court or authorised justice under other Parts of the proposed Act.

Division 2 General powers

Clause 61 confers power on a court to hear a bail application if proceedings for the offence are pending in the court.

Clause 62 confers power on a court to hear a bail application if proceedings on an appeal against a conviction or sentence of the court are pending in another court, and the accused person has not yet made a first appearance in those proceedings.

Clause 63 confers power on a court to hear variation application for a bail decision made by the court, and on an authorised justice to hear a variation application for a bail decision made by an authorised justice.

Division 3 Additional powers

Clause 64 confers additional powers to hear a bail application on the Local Court and on authorised justices.

Clause 65 confers additional powers on the District Court.

Clause 66 confers additional powers on the Supreme Court.

Clause 67 confers additional powers on the Court of Criminal Appeal.

Division 4 Restrictions on powers

Clause 68 limits the power of the Local Court to hear a bail application if proceedings for the offence are pending in another court.

Clause 69 limits the powers of courts to hear a bail application in relation to a Supreme Court decision.

Clause 70 limits the powers of authorised justices to hear bail applications.

Part 7 General provisions about bail applications

Clause 71 requires bail applications to be dealt with expeditiously.

Clause 72 requires a court or authorised justice to hear any release application or variation application made by an accused person on a first appearance in substantive proceedings for an offence.

Clause 73 gives a court or authorised justice discretion to refuse to hear a bail application if the application is frivolous or vexatious or if the application is without substance or otherwise has no reasonable prospect of success.

Clause 74 requires a court that refuses bail or affirms a decision to refuse bail after hearing a release application to refuse to hear another release application made by the accused person for the same offence unless there are particular grounds for a further release application. Similarly, a court that grants or dispenses with bail, or that affirms a decision to grant or dispense with bail, after hearing a detention application must refuse to hear another detention application made by the prosecution for the same offence unless there are particular grounds for a further detention application. The particular grounds for a further release application or detention application are specified.

Clause 75 requires any bail application to be dealt with as a new hearing.

Clause 76 enables regulations to be made about bail applications.

Part 8 Enforcement of bail requirements

Clause 77 lists the actions that can be taken by a police officer if an accused person granted bail fails to comply with, or is about to fail to comply with, a bail acknowledgment or bail condition. These actions include issuing a warning, issuing a notice requiring the accused person to appear before a court, and arresting the person. A police officer can also decide to take no action. A police officer is required to have regard to specified matters (such as the relative seriousness of the failure) in deciding whether to take action and what action to take.

Clause 78 provides for the powers of a bail authority in respect of a person who has failed or was about to fail to comply with a bail acknowledgment or bail condition. In such a case, a bail authority may release the person on the person's original bail or vary the bail decision that applies to the person (including by revoking bail).

Clause 79 makes it an offence for an accused person granted bail to fail to appear before a court in accordance with a bail acknowledgment.

Clause 80 provides for the summary disposal of proceedings for a fail to appear offence.

Clause 81 confers power on police officers to give directions in accordance with enforcement conditions of bail.

Part 9 General provisions about security requirements

Clause 82 provides for the way in which money or security deposited under a bail condition is to be dealt with by a bail authority.

Clause 83 allows a bail guarantor (a person other than the accused person who has entered into a bail security agreement) to apply to a court to be discharged of his or

her liability under a bail security agreement. A court may vary bail conditions if a bail guarantor is discharged of liability.

Clause 84 makes it an offence to dispose of bail security for the purpose of preventing it from being realised.

Clause 85 confers power on a court to revoke bail if it appears that any bail security provided under a bail condition has ceased to be intact.

Clause 86 makes it an offence to give or accept an indemnity in connection with entering into a bail security agreement.

Clause 87 makes it clear that a person who enters into a bail security agreement does not have a right to arrest an accused person as a result of entering into the agreement.

Clause 88 requires a court to consider returning bail money and security if a finding about guilt is made.

Part 10 Miscellaneous

Clause 89 restricts the publication of bail conditions that prohibit or restrict an accused person from associating with a named person.

Clause 90 makes it clear that the proposed Act does not affect the availability of relief in the nature of bail for a contempt of court.

Clause 91 makes it clear that the proposed Act does not affect the powers of the Supreme Court in respect of a writ of habeas corpus.

Clause 92 provides that a person granted bail who is present on court premises when the matter is called is taken to be in the custody of the court from the time it is called and until the court completes its dealing with the matter.

Clause 93 facilitates proof of bail acknowledgments and bail decisions.

Clause 94 facilitates proof of a failure to appear.

Clause 95 provides for the exercise of functions of a bail authority by officers of a court and other persons.

Clause 96 applies the *Criminal Procedure Act 1986* to court attendance notices and warrants issued under the proposed Act.

Clause 97 provides for proceedings for an offence against the proposed Act.

Clause 98 enables the Governor to make regulations for the purposes of the proposed Act.

Clause 99 enables rules of court to be made in connection with bail.

Clause 100 repeals the 1978 Act.

Clause 101 provides for the review of the proposed Act 3 years after the repeal of the 1978 Act.

Schedule 1 Application of Act to non-offenders

Schedule 1 provides for the application of the proposed Act to persons who are not accused of an offence.

Clause 1 provides for the application of the proposed Act in proceedings for the administration of sentence (for example, proceedings on a breach of a good behaviour bond).

Clause 2 makes it clear that other Acts may make provision for the grant of bail to persons who are not accused persons. For example, existing laws permit bail to be granted to a person who is a witness in proceedings and fails to appear in those proceedings. The other Acts may modify the operation of the proposed Act.

Schedule 2 Forfeiture of security

Schedule 2 provides for the forfeiture of security provided for the grant of bail when an accused person contravenes a bail acknowledgment by failing to appear before a court.

The provisions deal with the making of forfeiture orders, and objections to or appeals against, forfeiture orders. The provisions are substantially the same as Part 7A of the 1978 Act.

Schedule 3 Savings, transitional and other provisions

Schedule 3 contains savings, transitional and other provisions consequent on the enactment of the proposed Act and the repeal of the 1978 Act.

These include provisions that:

- (a) continue bail granted under the 1978 Act, and
- (b) continue obligations imposed in connection with bail under the 1978 Act, and
- (c) provide for bail applications pending under the 1978 Act to be dealt with under the proposed Act.