

## *Bail Amendment (Stage One) Act 2017*

### Overview of changes commencing 21 May 2018

All section references are to the *Bail Act 1977*, unless otherwise indicated.

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Old provision		New provision	Comment
<b>New purpose, guiding principles and definitions</b>			
N/A	Purpose	1A	This section in the <i>Bail Act 1977</i> provides the purpose of the Act is to provide a legislative framework for the making of decisions about whether a person should be granted bail.
N/A	Guiding principles	1B	This section sets out the principles to inform the application and interpretation of the Act. These include: <ul style="list-style-type: none"> <li>• maximising community safety</li> <li>• taking account of the presumption of innocence and the right to liberty</li> <li>• promoting fairness, transparency and consistency in bail decision-making</li> <li>• promoting the public understanding of bail practices and procedures.</li> </ul>
3	Definitions	3	<b>Bail decision-maker</b> is inserted to mean a court, bail justice, police officer, or the sheriff or a person authorised under section 115(5) of the <i>Fines Reform Act 2014</i> to grant bail. This replaces the old definition for <b>court</b> . Consequential amendments are made throughout the <i>Bail Act 1977</i> to reflect this change.  <b>Family violence</b> has the same meaning as in the <i>Family Violence Protection Act 2008</i> .  <b>Family violence intervention order</b> has the same meaning as in the <i>Family Violence Protection Act 2008</i> .

Old provision		New provision	Comment
			<p><b>Family violence offence</b> means an offence against section 37(2), 37A(2), 123(2), 123A(2) or 125A(1) of the <i>Family Violence Protection Act 2008</i> or an offence where the conduct of the accused is family violence.</p> <p><b>Family violence safety notice</b> has the same meaning as in the <i>Family Violence Protection Act 2008</i>.</p> <p><b>Recognised DVO</b> has the same meaning as in the <i>Family Violence Protection Act 2008</i>.</p> <p><b>Schedule 1 offence</b> means an offence specified in Schedule 1 and, if circumstances are specified in Schedule 1 in relation to that offence, means an offence committed in those circumstances.</p> <p><b>Schedule 2 offence</b> means an offence specified in Schedule 2 and, if circumstances are specified in Schedule 2 in relation to that offence, means an offence committed in those circumstances</p> <p>The definition of <b>undertaking</b> is replaced with a new definition referring to section 5.</p>
<b>The tests for granting bail</b>			
4(4)(a)–(d)	‘show cause’ is changed to ‘show compelling reason’	4(4)	The reverse onus test of ‘show cause’ will be removed and be replaced with ‘show compelling reason’. The intent of replacing the term "show cause" with the term "show compelling reason" is to ensure that proper weight is given to the onus placed on accused persons charged with Schedule 2 offences.

Old provision		New provision	Comment				
N/A (see below)	New schedules of bail offences	Inserted after Part 5 of the <i>Bail Act 1977</i>	Offences which place an accused person in an 'exceptional circumstances' or 'show compelling reason' test will be listed in Schedules 1 and 2 to the <i>Bail Act</i> .				
Exceptional circumstances offences are listed in section 4(2)(a), (aa) and (b)	New offences for bail - <u>exceptional circumstances</u>	Schedule 1, inserted after Part 5 of the <i>Bail Act 1977</i>	Existing 'exceptional circumstances' offences and new offences will be listed in Schedule 1 requiring an accused to show exceptional circumstances why bail should be granted. New - and existing - offences below: <table border="1" data-bbox="821 786 1412 1641"> <thead> <tr> <th>Existing</th> <th>New</th> </tr> </thead> <tbody> <tr> <td> <ul style="list-style-type: none"> <li>• Murder</li> <li>• Treason</li> <li>• Trafficking in a drug or drugs of dependence—large commercial quantity</li> <li>• Trafficking in a drug or drugs of dependence—commercial quantity</li> <li>• Cultivation of narcotic plants—large commercial quantity</li> <li>• Cultivation of narcotic plants—commercial quantity</li> <li>• Certain terrorism offences</li> </ul> </td> <td> <ul style="list-style-type: none"> <li>• A Schedule 2 offence committed in certain circumstances, including while on bail for a Schedule 1 or 2 offence</li> <li>• Aggravated home invasion</li> <li>• Aggravated carjacking</li> <li>• Additional drug offences under the Criminal Code (Cth)</li> <li>• Conspiracy to commit, attempt to commit or incitement to commit an offence listed in Schedule 1.</li> </ul> </td> </tr> </tbody> </table>	Existing	New	<ul style="list-style-type: none"> <li>• Murder</li> <li>• Treason</li> <li>• Trafficking in a drug or drugs of dependence—large commercial quantity</li> <li>• Trafficking in a drug or drugs of dependence—commercial quantity</li> <li>• Cultivation of narcotic plants—large commercial quantity</li> <li>• Cultivation of narcotic plants—commercial quantity</li> <li>• Certain terrorism offences</li> </ul>	<ul style="list-style-type: none"> <li>• A Schedule 2 offence committed in certain circumstances, including while on bail for a Schedule 1 or 2 offence</li> <li>• Aggravated home invasion</li> <li>• Aggravated carjacking</li> <li>• Additional drug offences under the Criminal Code (Cth)</li> <li>• Conspiracy to commit, attempt to commit or incitement to commit an offence listed in Schedule 1.</li> </ul>
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Section 4(4) sets out show cause offences	New offences for bail - <u>Show compelling reason</u>	Schedule 2, inserted after Part 5 of the <i>Bail Act 1977</i>	Existing 'show cause' offences will be listed in Schedule 2 and will require an accused to show compelling reason why bail should be granted. New show compelling reason offences - and existing show cause - offences are below. Also, for many existing show cause offences, there is now no need for the offence to have been committed by an accused who was convicted of failing to answer bail in the last 5 years.				

Old provision		New provision	Comment	
			Existing show cause offences	New
			<ul style="list-style-type: none"> <li>An indictable offence alleged to have been committed whilst the accused was awaiting trial for another indictable offence</li> <li>A serious offence where the accused has previously failed to answer bail</li> <li>Stalking in certain circumstances</li> <li>Breach of an intervention order and threatening violence (in certain circumstances)</li> <li>Aggravated burglary, home invasion, aggravated home invasion or aggravated carjacking</li> </ul>	<ul style="list-style-type: none"> <li>An indictable offence committed in certain circumstances, including while on bail for another indictable offence</li> <li>Manslaughter</li> <li>Child homicide</li> <li>Causing serious injury intentionally in circumstances of gross violence</li> <li>Causing serious injury recklessly in circumstances of gross violence</li> <li>Causing serious injury intentionally</li> <li>Threat to kill (in circumstances of family violence)</li> <li>Rape</li> <li>Rape by compelling sexual penetration</li> <li>Assault with intent to commit a sexual offence</li> <li>Incest – in circumstances other than where both people are aged 18 or older and each consented (as defined in section 36 of the Crimes Act 1958) to engage in the sexual act</li> <li>Sexual penetration of a child under the age of 12</li> <li>Sexual penetration of a child under the age of 16 – in circumstances other than where at the time of the alleged offence the child was aged 12 years or older and the accused was not</li> </ul>

Old provision		New provision	Comment	
			<ul style="list-style-type: none"> <li>An indictable offence using a weapon</li> <li>Arson causing death</li> <li>Certain drug offences (trafficking)</li> <li>An indictable offence where the accused is subject to an order under sex offender legislation.</li> </ul> <p>Offences added by the <i>Crimes Legislation Amendment (Protection of Emergency Workers and Others) Act 2017</i> (5 April 2018)</p> <ul style="list-style-type: none"> <li>Intentionally exposing an emergency worker or a custodial officer or a youth justice custodial worker to risk by driving</li> <li>Aggravated offence of intentionally exposing an emergency</li> </ul>	<ul style="list-style-type: none"> <li>more than 2 years older than the child.</li> <li>Persistent sexual abuse of a child under the age of 16</li> <li>Abduction or detention for a sexual purpose</li> <li>Abduction or detention of a child under 16 for a sexual purpose</li> <li>Kidnapping</li> <li>Carjacking</li> <li>Armed robbery</li> <li>Culpable driving causing death</li> <li>Dangerous driving causing death or serious injury</li> <li>Dangerous or negligent driving while pursued by police</li> <li>Intentionally exposing an emergency worker or a custodial officer or a youth justice custodial worker to risk by driving</li> <li>Aggravated offence of intentionally exposing an emergency worker or a custodial officer or a youth justice custodial worker to risk by driving</li> <li>Recklessly exposing an emergency worker or a custodial officer or a youth justice custodial worker to risk by driving</li> <li>Aggravated offence of recklessly exposing an emergency worker or a custodial officer or a youth justice custodial worker to risk by driving</li> </ul>

Old provision		New provision	Comment
			<ul style="list-style-type: none"> <li>• worker or a custodial officer or a youth justice custodial worker to risk by driving</li> <li>• Recklessly exposing an emergency worker or a custodial officer or a youth justice custodial worker to risk by driving</li> <li>• Aggravated offence of recklessly exposing an emergency worker or a custodial officer or a youth justice custodial worker to risk by driving</li> <li>• Damaging an emergency service vehicle</li> </ul> <ul style="list-style-type: none"> <li>• Damaging an emergency service vehicle</li> <li>• Additional drug offences under the Criminal Code (Cth)</li> <li>• Persistent contravention of a family violence intervention order</li> <li>• Conspiracy to commit, attempt to commit or incitement to commit an offence listed in Schedule 2.</li> </ul>
4(4)	The requirement to provide reasons – show compelling reason	4(4A)	A bail decision-maker who grants bail for a person accused of a Schedule 2 offence must provide reasons for that decision. This section replicates the requirement in current section 4(4) to record reasons for "show cause" offences.

Old provision		New provision	Comment
N/A	Committing further offences – exceptional circumstances	New Schedule 1 inserted – item 3	If an accused is charged with a Schedule 2 offence allegedly committed while they are on bail, summons, at large, on parole or undergoing a sentence for a Schedule 1 or Schedule 2 offence they must be refused bail unless the accused shows exceptional circumstances why bail should be granted.
N/A	Committing further offences – show compelling reason	New Schedule 2 inserted – item 1	If an accused is charged with any indictable offence allegedly committed while they are on bail, summons, at large, on parole or undergoing a sentence for another indictable offence they must be refused bail unless the accused shows compelling reason why bail should be granted.
Section 14	Refusal of bail where person seriously injured	4(4B)–(4C)	New subsections (4B) and (4C) are intended to replace current section 14, which is repealed.
N/A	Deferral – accused is intoxicated	4(4D)–(4G)	New section 4(4D)–(4G) concerns situations where an accused appears to be seriously affected by alcohol or another drug or a combination of drugs. This new provision will permit a bail decision-maker to defer making a bail decision for a limited period of time where an accused person is unable to participate in the bail hearing by reason of intoxication. A bail matter may be adjourned for up to 8 hours.
N/A	New requirement to enquire about family violence	4(4H)	New section 4(4H) requires a bail decision-maker to make enquiries of the informant, prosecutor, or other person appearing for the Crown as to whether there is in force a family violence intervention order, family violence safety notice or recognised DVO against the accused.

N/A	Requirement to consider risk of family violence	4(4I)	New section 4(4I) requires a bail decision-maker to consider whether, if released on bail, there is a risk that the accused would commit family violence, and whether that risk can be reduced by the imposition of bail conditions or a family violence intervention order.
N/A	Where an offence is both a Schedule 1 and Schedule 2 offence	4(6)	New section 4(6) provides that an offence that is both a Schedule 1 offence and a Schedule 2 offence must be taken to be a Schedule 1 offence.
<b>Who grants bail</b>			
Section 10 Section 12 (in relation to bail justices)	The power of police, bail justices and other authorised persons to grant or refuse bail.	New Sections 10 and 10A	<p>New Section 10 and 10A clarify the power of police, bail justices and other authorised persons to grant or refuse bail.</p> <p>Section 10 provides a police officer (above the rank of sergeant), sheriff or authorised person under the <i>Fines Reform Act 2014</i> is required to consider bail where it is not practicable to bring the accused before a court.</p> <p>Section 10A sets out the power of bail justices to grant or refuse bail.</p>
Section 12 (in relation to courts)	Power of the court to grant or refuse bail	New section 12	The section relating to clarify and simplify the power of the court to grant or refuse bail. Note that Section 13 imposes some restrictions on who may grant bail for persons accused of murder / treason)
Section 13	Treason and murder	New section 13	<p>Section 13 of the <i>Bail Act</i> is rewritten. It continues to provide that bail may only be granted to a person charged with treason or murder by –</p> <ul style="list-style-type: none"> <li>a) in the case of a person charged with treason – a judge of the Supreme Court</li> <li>b) in the case of a person charged with murder – a judge of the Supreme Court or</li> </ul>



			the magistrate who commits the person to trial for murder.
<b>Family Violence</b>			
4(2)(d)(i)		New addition to the foot of 4(2)(d)(i)	At the foot of this section the example of unacceptable risk in a family violence context is provided. “an unacceptable risk that the accused if released on bail would commit a family violence offence”
Section inserted after 8(1)(c)(ii)		New 8(1)(c)(ia)	This section adds a requirement to consider if there is a risk that the accused may subject another person to family violence.
<b>Bail conditions</b>			
Section 5		Section 5  5AAA conduct conditions  5AAB sureties	Section 5 has been redrafted to: <ul style="list-style-type: none"> <li>refer specifically to bail undertakings (section 5) and to improve its structure and wording.</li> <li>provide a separate section on conduct conditions (5AAA) and ensuring that these continues in effect until the condition is continued, varied or revoked, or the matter is finally determined.</li> <li>Provide a separate section on considerations relating to the imposition of sureties (5AAB)</li> </ul> <p>Note: Changes will also be made to the Bail Regulations 2012 to ensure that accused entering undertakings of bail are made aware of the continuing nature of the conditions.</p>
<b>Children</b>			
12 1AA and 1B	Children only remanded 21 days	12(4)  <i>Bail Amendment (Stage One) Act 2018</i>	If the court refuses bail it remand a person to appear before it at a later date – and can only remand a child for 21 clear days.

*Bail Amendment (Stage One) Act 2017 and Bail Amendment (Stage Two) Act 2017*– Overview of changes commencing 1 July 2018

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Old provision		New provision and under which Act	Comment
<b>New purpose, guiding principles and definitions</b>			
N/A	Definition of vulnerable adult	3AAAA  <i>Bail Amendment (Stage Two) Act 2018</i>	A ‘vulnerable adult’ will be defined to be an adult who has a cognitive, physical or mental health impairment that causes the person to have difficulty in— <ul style="list-style-type: none"> <li>a) understanding their rights; or</li> <li>b) making a decision; or</li> <li>c) communicating a decision</li> </ul> Certain provisions of the Act which prevent a police officer in new section 10A or bail justice from granting bail will not apply to a vulnerable adult. The definition is limited to adults as all children will be similarly exempted.
N/A	‘Surrounding circumstances’	3AAA  <i>Bail Amendment (Stage Two) Act 2018</i>	This non-exhaustive list of considerations to which a bail decision-maker must have regard gives effect to Mr Coghlan’s recommendation 5. It covers and expands on the list of factors currently listed in section 4(3) of the Bail Act.
4(6) (inserted by Stage One)	Where an offence is both a Schedule 1 and Schedule 2 offence	3AA  <i>Bail Amendment (Stage Two) Act 2018</i>	This provision is being relocated

Old provision		New provision and under which Act	Comment
N/A	Flowcharts	3D  <i>Bail Amendment (Stage Two) Act 2018</i>	The Bail Act will now include flowcharts – these are illustrative only and have no legal effect.
4	The tests for granting bail	4 to 4E  <i>Bail Amendment (Stage Two) Act 2018</i>	As recommended by Mr Coghlan, section 4 of the Act will be completely rewritten. Key features include: <ul style="list-style-type: none"> <li>• Where a reverse onus test, the Act makes clear the tests are to be applied in a ‘two stage’ process,</li> <li>• The first stage will be the reverse onus test, then the unacceptable risk test,</li> <li>• The wording of the unacceptable risk test has been changed, but not significantly.</li> </ul>
4(4H), 4(4I) (inserted by Stage One)	Requirement to consider family violence risks	5AAAA  <i>Bail Amendment (Stage Two) Act 2018</i>	These provisions are relocated.
5AAA (inserted by Stage One)	Conduct conditions	5AAA  <i>Bail Amendment (Stage Two) Act 2018</i>	This provision is slightly rewritten to reflect the rewording of the unacceptable risk test.
6	Person bailed to surrender himself into custody	5(1A)  <i>Bail Amendment (Stage Two) Act 2018</i>	These provisions are relocated.

Old provision		New provision and under which Act	Comment
4(4D)–(4G) (inserted by Stage One)	Deferral of bail hearing where accused intoxicated	8(3) to (6) <i>Bail Amendment (Stage Two) Act 2018</i>	These provisions will be relocated
4(2)(d)(iii)	Refusal of bail where insufficient information	8A <i>Bail Amendment (Stage Two) Act 2018</i>	This is not a new provision, but a provision that is currently in the Act relocated.
4(4C) (inserted by Stage One)  Formerly 14	Refusal of bail where uncertainty as to death	8B <i>Bail Amendment (Stage Two) Act 2018</i>	This is not a new provision, but a provision that is currently in the Act relocated.
10(6) and (7) (inserted by Stage One)	Where bail decision-maker not authorised to grant bail	10(5A) to (8) <i>Bail Amendment (Stage Two) Act 2018</i>	The Stage Two Act will increase the circumstances in which an accused person can only seek bail from a court.  These amendments clarify what should occur in these circumstances, and also clarify the steps required to be taken when an accused is refused bail or wishes to vary their bail.
N/A	Police remand	10AA <i>Bail Amendment (Stage Two) Act 2018</i>	10AA provides that where police refuse bail, they may hold the accused for up to 48 hours instead of taking the accused to a bail justice. It does not apply where the accused is a child, Aboriginal person, or vulnerable adult.
N/A	Statement of reasons provided by a court.	12(3A) <i>Bail Amendment</i>	For a Schedule 1 offence a court must provide a statement of reasons for granting bail.

Old provision		New provision and under which Act	Comment
		<b><i>(Stage Two) Act 2018</i></b>	
N/A	Persons before court on summons	12B <b><i>Bail Amendment (Stage Two) Act 2018</i></b>	This provisions gives effect to Mr Coghlan's recommendation 30, to clarify the power of a court to place on bail or remand a person who appears before it on summons.
13	Magistrate or judge to grant bail for exceptional circumstances offences	13 <b><i>Bail Amendment (Stage One) Act 2018</i></b>	The Stage One Act will amend this section to provide that only a court can grant bail to a person accused of a Schedule 1 offence.
N/A	Accused on two undertakings of bail	13A <b><i>Bail Amendment Stage One) Act 2018</i></b>  <b><i>Bail Amendment (Stage Two) Act 2018</i></b>	<p>This new section provides that an accused – other than a child, Aboriginal person or vulnerable adult – on two undertakings of bail who is alleged to have offended again will in some cases be required to attend court to seek a further grant of bail. This responds to Mr Coghlan's recommendation 15.</p> <p>The Stage Two Act further amends this provision to provide some exceptions to this rule, applicable when a person is in a Schedule 1 position by virtue of having committed other offences.</p>
18AD	Application for variation of bail	18AD <b><i>Bail Amendment Stage Two) Act 2018</i></b>	This section is rewritten to include a reference to 'surrounding circumstances'.

Old provision		New provision and under which Act	Comment
<b>Amendments to the <i>Children Youth and Families Act 2005</i>.</b>			
346	346	<b><i>Children Youth and Families Act 2005</i></b>	Minor amendments to the provision relating to requirements for a child in custody, to specify that where bail may only be granted by a court the child must be brought before a court
347	347	<b><i>Children Youth and Families Act 2005</i></b>	A child who is detained in police custody pending being brought to a court must be placed in a remand centre.