BAIL AMENDMENT BILL 2007

EXPLANATORY MEMORANDUM

PART 1 – Preliminary

1. Short title

This is the *Bail Amendment Act 2007*.

2. Commencement

Section 22 of the *Interpretation Act* has the effect of making Part 1 (being sections 1 and 2) take effect from the date of Royal Assent whereas the remaining provisions take effect on whatever date or dates are fixed by proclamation. This allows the time required to complete the changes to the regulations and the forms. Due to the wide ranging nature of the amendments there are numerous changes required to the Bail Regulations and forms, including a redesign of most forms

As the proposed amendments are substantial it is also considered necessary to conduct some education sessions for users of the criminal justice system. "Proclamation" day will be scheduled to enable completion of these tasks prior to the day the Act comes into operation. This clause provides therefore that the Act will come into operation on a date to be fixed.

PART 2 – BAIL ACT 1982 Amended

3. The Act amended in this Part

The amendments will amend the *Bail Act 1982* and there is also a consequential amendment to the *Supreme Court Act 1935* to accommodate the new appeal provisions.

The *Bail Act 1982* was developed as a consequence of a Law Reform Commission of Western Australia review of the law and procedure relating to bail (*Bail,* Project No. 64 March 1979).

The principal recommendation was to enact a separate *Bail Act* to govern the grant of bail.

At the time of the review, the law relating to bail was contained in 14 different statutes dating from 1679, regulations to the *Criminal Practice Rules*, case law and practice directions. As a consequence, according to the Law Reform Commission Report:

"…There [was] no single source of authority either for the power to grant bail, or as to the relevant principles on which the bail decision should be made. There [were] doubts as to the legality of some practices adopted by bail decision-makers…[and]…In some areas there [were] conflicting views as to the applicable law…"

According to the Law Reform 30th Anniversary Reform Implementation Report that principal recommendation was effected by the passage through Parliament of the *Bail Act 1982* but it was not until 1988, following a further review by the Government, that the other recommendations for reform were enacted by the *Bail Amendment Act 1988*.

However, the second reading speech in relation to the Bail Amendment Bill in 1988 records that the principal *Bail Act* had not been proclaimed due to criticism from individuals and organisations involved in the bail process. The object of the amending Bill was to "*try to assuage some of the criticisms that have been made*." (The Leader of the House, Mr Pearce, Hansard 30 August 1988).

The *Bail Act 1982* was proclaimed 6 February 1989.

4. Section 3 amended

This clause amends a number of existing definitions in section 3(1) of the Act and also inserts some new definitions.

- definition of '*appropriate judicial officer*'

  The amendment to the section 3 definition of "*appropriate judicial officer*" is necessary as a consequence of the proposed amendments in clause 15 to section 14 of the Act. It is a consequential amendment.

  Basically, section 14 as amended creates co-extensive jurisdiction between a Judge of the Supreme Court, the District Court and the Children's Court for the purposes of bail decisions.

  The same exception with respect to section 49 continues to apply. Section 49 relates to forfeiture proceedings against a surety and allows proceedings to continue in the jurisdiction where the offence of failing to appear may have occurred albeit that the accused may have been sent to another jurisdiction (eg by committal).

  In view of the amendments to the Act providing for a right of appeal to the Court of Appeal, the amendment expands the definition of '*judicial officer*' to include the Court of Appeal. A new definition for '*judge of appeal*' has also been inserted. The amendments take into account the recent creation of the Court of Appeal.

- definition of '*approved*'.

  Some forms (eg Form 6 – Undertaking; Form 8 – Surety Undertaking) will continue to be prescribed but there are others which clearly do not need to be prescribed (eg Forms 1 and 9 – information to accused and surety respectively).

  Those forms which are not prescribed will now be approved. This facilitates quicker amendment where necessary. Redesign of forms will be done prior to proclamation.

  The definition of "*approved*" has been modified to refer to the CEO of the agency assisting in the administration of this Act. There is no reference to the Department of Attorney General (or its acronym) because, as the recent reorganisation of the Department of Justice (DoJ) demonstrates, names of agencies are liable to change.

  The current definition of "*CEO (Justice)*" in section 3 is deleted by the Prisons and Sentencing Legislation Amendment Bill clause 51(b).

- the definitions of '*Chief Judge*' and '*Chief Justice*' have been included for the sake of completeness.

- definition of '*court custody centre*'.

  The *Court Security and Custodial Services Act 1999* created a new 'detention' facility known as a '*court custody centre*' which was defined in s.3 of that Act. An adult accused may be held in custody in any range of facilities pending a court appearance and then released on bail from a court custody centre managed by AIMS Corporation at one of 14 city and regional locations. This amendment thus incorporates the definition of '*court custody centre*' into the *Bail Act 1982*, so that the provisions relating to release from custody include court custody centres.

- definition of '*Director of Public Prosecutions*'.

  The definition of '*Director of Public Prosecutions*' is self explanatory and recognises the differentiation between the proper authorities that are responsible for conducting prosecutions in this State aside from police.

- definitions of '*electronic address*' and '*electronic communication*' are new and have been inserted to support the new section 3A and new references to the terms in service provisions throughout the Act. It has been better to insert general definitions as opposed to repeating the definitions whenever they are used throughout the Act.

- definition of '*registrar*'.

  The definition of '*registrar*' recognises the difference between registrars in superior courts and those in lower courts. A registrar or deputy

registrar in the superior courts is a legally qualified officer, and thus is capable of discharging the obligations placed on registrars in the *Bail Act*. In lower courts, however, registrars are not necessarily legally qualified. Therefore, it would be inappropriate for a deputy registrar, who may also be relatively inexperienced, to be empowered to discharge some of the obligations of registrars under the *Bail Act*. Exclusions on the exercise of some powers by deputy registrars of the Magistrates Court are dealt with in the relevant sections.

- the definition of '*court*' has been amended to include a reference to the Coroner's Court.

  The change in definition does not impact negatively on a magistrate sitting as a coroner in a regional court. This would appear to be addressed in section 5(3) of the *Coroner's Act 1996*. When any magistrate sits as a coroner they are sitting as the Coroner's Court of Western Australia, albeit that similar such courts may be sitting at the same time elsewhere in the State.

- the definition of '*surety approval officer*'

  This definition has been inserted to cover those officers who are now authorised by section 36 to approve sureties. The range of such persons has been broadened under these amendments. The grounds for this are provided in the discussion to clause 24.

  The term has been inserted more as a collective noun. The reference to a '*surety approval officer*' in relation to sureties is less cumbersome than, for instance, '*an officer referred to in section 36(1)*'. The introduction of the concept of a surety approval officer to approve sureties has been to provide some clarification.

5. Section 3A inserted

The definition of '*electronic communication*' in section 3(1) adopts the definition of the term in section 5 of the *Electronic Transactions Act 2003*.

The object of this provision is to ensure that there is an effective and efficient means of notifying an accused and surety where the circumstances of the situation are urgent. However, it is also envisaged that the use of electronic communication will have a wide application under the Act in terms of all users.

The provision for service by electronic communication accords with the amendments to section 32 (clause 23) which deals with the giving and proof of notices issued under section 31.

The Act currently provides in section 32 that the facility of "*telegram*" is available for sending notices to the accused advising of a different time and/or

place of appearance and for dates of appearance pursuant to a committal in cases of urgency.

The practice of using telegram to provide urgent notification is outdated. The use of facsimile transmission and email are now more accepted means of providing urgent advice. This allows advice to be sent directly to an individual if they have provided a facsimile or email address, for instance. The broadness of the definition of '*electronic communication*' will also take in future technological advances.

When facsimile is used, proof of the transmission can be obtained by the sending party as there is the capacity to obtain a message confirmation advice. Similarly, where email is used, it is possible to obtain a read receipt when it is received.

In any event, the new section contains deeming provisions, so that it may be presumed that the documentation sent by electronic communication will be received when it would have been received '*in the ordinary course of events'*. In the context of section 31, where an accused provides an email address for the purposes of notification, for example, that amounts to an acceptance that the method of contact will always be open and accessible. Thus, emails sent to that address will be deemed to have been received at the time they would normally be received.

While the provision for service by electronic communication is particularly useful to the giving and proof of notices under section 31, it has been included as an "interpretation" provision under Part 1 of the Act as it is envisaged that it will have a wider application under the Act.

With the issue of proof of receipt, it will be for the intended recipient to prove that they haven't received a message. The drafting accommodates this with '*unless the contrary is shown*'. In reality, it is easier to prove that e-mails have been received than to prove receipt of ordinary mail.

If a person chooses not to print an e-mail or has the facility to read but not to print it, this should not affect the fact of the message being received. Whether or not a receiver also has a printer or chooses not to print an email should not impact on the fact that once the email has been sent, it is deemed to have been served. Given that there might be some argument as to what "*received*" means in the context of email, subclause (2) refers to the communication entering the relevant information system. It is therefore immaterial that the email or fax is not actually opened or read by the person concerned.

As a consequence, a person is deemed to have been served once the electronic communication has been sent, whether or not they choose to open it or print it. The proposed s.3A(2) deals with this matter. Service by electronic communication is subject to the same terms as service by post (cf. proposed s.32 (1)(b) and (3a)). The onus falls to the recipient to show that they have not received the communication.

6. Section 4A inserted and transitional provision

Some magistrates interpret current provisions of the Act as requiring an accused who appears before them in answer to a summons or court hearing notice to enter into a bail undertaking for their future appearances before the Court. This was never intended by the original Act but has arisen from a strict interpretation of the current wording. Section 4 of the Act provides that it "*extends to any appearance in court for an offence*". This has been applied to persons who appear in response to a summons or court hearing notice.

The strict interpretation leads to the unnecessary and time-consuming preparation of bail papers. The interpretation also leads to the inequitable situation that an accused who appears at court in answer to a summons or court hearing notice for a simple offence will be placed on bail while an accused who chooses to notify the court in writing of his intention to defend the charge, remains on summons.

This amendment is intended to alleviate the inconvenience of placing all offenders, including minor offenders who are required to attend Court on a summons or court hearing notice as opposed to a warrant or as a result of being arrested, on a bail undertaking. Generally, proceedings for minor traffic offences and other trivial offending are commenced by a summons or court hearing notice to attend court.

The amendment provides that release on a bail undertaking for the next appearance is not required in the case of an offender summoned to appear unless the judicial officer before whom the offender appears is of the view that a bail undertaking is necessary to secure the next appearance. In these cases the duties imposed by section 7(1) on a judicial officer to consider bail will apply. The section no longer requires a person who appears in response to a summons or court hearing notice to be placed on a bail undertaking simply because they "*appeared in court*".

The amendment still permits the judicial officer before whom the accused appears to require the accused to enter into a bail undertaking if that is considered necessary to secure the next appearance. Any subsequent failure to appear may lead to the accused's charge being dealt with in their absence, if the charge is a simple offence, or a warrant being issued.

With respect to the transitional provision of clause 6(2) the section covers appearances in response to matters which are currently adjourned but still awaiting disposition when the legislation commences. It will apply to matters that have been commenced prior to this legislation coming into effect.

7. Section 5 amended

Section 5 of the Act is pivotal in that it states the philosophy of the Act. An accused (this is qualified for a child accused) does not have a right to bail but a

right to have bail considered. The amendments proposed herein are simply consequential amendments arising from the substantial amendments to section 7 of the Act (ie the manner of dealing with an accused charged with the offence of wilful murder or murder). See clause 9 and the explanatory notes for the new sections 7B, 7C and 7E.

8. Section 7 amended

Section 7 is also one of the pivotal sections of the Act. Essentially, the section deals with the duty imposed on judicial officers to consider bail and the conditions whereby this duty is to be exercised.

Section 7 has undergone significant amendment to deal with the changes to a bail decision in murder and wilful murder cases. The amendments under this clause are consequential in nature to reflect the substantive changes contained in clause 9. Basically, section 7 is being amended to remove the requirement that persons charged with murder or wilful murder must be taken before a Supreme Court Judge, whether or not they are applying for bail.

A further problem with the section as it currently stands is that section 7(1) applies, inter alia, to persons in custody during the period of their trial. The section currently requires the presiding judicial officer, where an accused has been refused bail for his appearance for trial for an offence and the trial extends beyond one day, to consider bail afresh on every occasion that the trial is adjourned. The detention of a person in custody during trial is pursuant to an order of the presiding judicial officer.

The detention of an accused during his trial at the court arises from the original arrest, and subsequent surrender at the Court. In the case of a person remanded in custody pending their trial, that custody will continue unless and until an order is made that the accused be granted bail. Any order to remand an accused in custody, therefore (ie to a subsequent day in the case of an adjourned trial) amounts to an order for detention under section 7(1).

The amendment will overcome the unnecessary inconvenience of the current situation. It will remove the current obligation of a judicial officer to consider bail afresh on every occasion that the trial is adjourned. The amendment will therefore remove the onus on the judicial officer to 'go through the motions' (eg. at the conclusion of each day's proceedings in a multiple-day trial) whilst retaining the right of the accused to apply for bail.

Basically, the deletion of the phrase '*including detention during the period of his trial*' from section 7(1) facilitates the amendments in clauses 9, 22 and 27 which deal with bail during trial. It will clarify the position that bail need not be considered afresh at every adjournment unless the accused makes an application. As a result, it will avoid time consuming and unnecessary bail considerations at the conclusion of every day of a continuing trial.

Section 7(5) provides that the operation of section 7 (ie the duty on a judicial officer to consider bail) is subject to sections 9,10,12 & 16(2) and clause 3A of

Part C of Schedule 1. The new section 7A (see clause 9) provides for the power to dispense with the requirement for a bail undertaking. An explanation of new section 7A is below (clause 9). In effect, the duty to consider bail includes the power to dispense with bail in appropriate circumstances.

As an aside, section 7(5) has not been renumbered in spite of sub-sections (2), (3) and (4) being repealed. As a general rule provisions are not renumbered if a preceding provision is repealed, as to do so would necessitate the amendment of any cross-references to the provision appearing in the Act or other legislation.

9. Section 7A replaced by sections 7A to 7F, related amendments to sections 8 and 21 and transitional provisions.

Section 7A

The Doig Report panel considered that "*there may be cases where by the nature of the offence or the circumstances of the accused, the Court should be given discretion to dispense with bail*". The amendment introduces the option of dispensing with bail, for judicial officers only, in the case of very trivial offending. The amendment does not prescribe the level of offending at which bail may be dispensed with, except that new section 13A(2)(b) (clause 14) provides that a release on an undertaking may be dispensed with if the judicial officer is of the view that "*in the circumstances the completion of bail papers is an unnecessary imposition*". The criteria therefore is that the level of offending is too trivial to warrant the effort of preparing bail documentation.

Following a dispensation of bail an offender is at liberty until the next court appearance. If there is no appearance then a bench warrant can issue.

New section 59A (see clause 36) provides for a reconsideration of the decision to dispense with bail if there are reasonable grounds to believe that the accused will not appear at the next appearance. This is a safety net provision.

Section 7B

The Supreme Court has exclusive jurisdiction to deal with an application for the grant of bail for any charge of murder and/or wilful murder (see section 15). The current provisions of the Act require that persons charged with murder or wilful murder are required to be brought, as soon as practicable, before a judge of the Supreme Court or, in the case of a child, before a judge of the Children's Court, to be considered for bail. These requirements expose the State to considerable expense in the transfer of an accused from remote areas of the State to Perth for consideration of bail.

In the majority of these cases, the accused or their legal counsel do not seek bail. A person charged with a crime punishable with strict security life imprisonment or a crime of murder is not to be granted bail except in exceptional circumstances (see enshrinement of that principle in clause 41 and the new Schedule 1 Part C clause 3C). Therefore, an accused will often

appear before a court for a bail consideration notwithstanding that bail is not to be granted.

Following this amendment, only an accused in these circumstances who applies for bail will be considered. In view of the requirement of exceptional circumstances, those who are unable to satisfy the criteria are not likely to apply. Although an accused will no longer automatically be brought before a Supreme Court Judge for a consideration of bail, this provision ensures that their fundamental right to have bail considered is protected. To ensure that an accused is made aware of the right to apply for bail, the judicial officer before whom they first appear (usually JP's or a Magistrate sitting as a court of summary jurisdiction) is obliged to advise them accordingly.

The procedure for a child accused of murder or wilful murder is treated separately. They are to be dealt with under proposed section 7C. The amendments still require that a child be taken before a judge of the Children's Court for consideration of bail, irrespective of whether or not an application for bail has been made.

The definition in sub-section (1) preserves exclusive jurisdiction for dealing with the offences of murder and wilful murder in the Supreme Court (cross refer to section 15).

Sub-section (5) means that when a Supreme Court Judge has considered bail and bail has been refused, there is no requirement to consider bail on every subsequent appearance unless the conditions of sub-section (6) are satisfied.

Sub-section (6) supports sub-section (5) and eliminates unnecessary bail considerations. It protects an accused's right to apply if circumstances have changed, etc. but eliminates unnecessary considerations which frustrate the resources of the Court. An accused cannot make repeated applications unless sub-section (6) applies.

Sub-section (7) facilitates confirmation of bail terms on subsequent appearances before other judicial officers (eg, appearance before a judge at a status conference). If the bail terms are to be waived or revoked, then the accused must be brought before a Supreme Court Judge. The provision simply facilitates administrative efficiency when bail is to continue on the same terms.

Considerable expense to the State is incurred when an accused is transferred from remote areas to Perth to appear before a Supreme Court Judge for a consideration of bail. Under sub-section (8), when an application is made it will be dealt with in the absence of the accused unless the Judge otherwise orders. This will avoid unnecessary, disruptive and expensive prison transfers. The extended use of video facilities will assist here. This is dealt with under the new section 66B (see clause 40).

Section 7C

The Doig Report panel recommended that the amendments relating to the release on bail of adult offenders charged with murder or wilful murder should not apply to children charged with similar offences. A child charged with these offences must be considered for release on bail by a judge of the Children's Court, irrespective of whether the child has or has not applied for release on bail. However, as with adults, once a child's bail application has been considered and refused, release on bail need not be considered on every subsequent appearance unless the accused can show:

- circumstances have changed and new facts have been discovered, or
- the child failed to adequately present the case for bail on that occasion.

In any event a bail reconsideration may only be heard by a judge of the Children's Court.

Section 7D

The section is self-explanatory. It means that once a bail decision is made, the decision can be adopted at subsequent appearances by other judicial officers. The section essentially restates what was previously section 7(4). It is also designed to facilitate the administration of the new sections 7B and 7C.

Section 7E

Refer also to the comments for clause 8.

This amendment puts into effect the recommendation of the Doig Report panel and continued submissions by senior judicial officers.

The effect of the amendment is that where an accused has been refused bail a judicial officer is not under a continuing obligation to consider bail afresh for every adjournment. The obligation to consider bail during a trial (where the accused is detained in custody) will only occur where the accused makes an application. If unrepresented, then it is anticipated that the judicial officer will invite an application for bail if it is considered appropriate.

In matters before the superior courts, a requirement that bail be considered in every case is inappropriate. The fact that the accused has been refused bail will usually of itself reflect the seriousness of the offences alleged to have been committed.

In order to avoid ambiguity a definition of "*trial*" is provided for the purposes of the section. By necessity this definition is not as broad as the definition of '*trial'* in section 3(1) of the Act.

Section 7F

The current section 7A is to be redesignated as section 7F in light of the insertion of the new sections 7A, 7B, 7C, 7D and 7E and is appropriately amended to account for changes in the criminal procedure legislation.

The current section 7A(2) is now expanded to include the State DPP as well as the Commonwealth DPP and the State Solicitor – previously the State DPP was not included.

Sub-clause 9(3)
Section 21(2) requires consequential amendment because of the expansion of the parties in the current s 7A(2). Section 21(2) refers to the parties to proceedings in a case for bail, and makes reference to the parties mentioned in the current s 7A(2). It also now includes the State DPP.

Transitional Provisions – Sub-clauses 9(4) – (10)

Sub-clause 9(4)
Amendments relating to dispensing with bail (new section 7A) are effective on or after the commencement date, irrespective of when the offence was committed or charges laid.

The new s.7A, which deals with dispensing with bail, will apply to all appearances for an accused (whether it is an initial appearance or a subsequent appearance) prior to any conviction. Hence, it will apply to those accused already 'in the system' or, more correctly, proceedings that have already been commenced when this legislation takes effect.

Sub-clauses 9(5), (6) & (7)
Provide specially for adult accused on charges of murder or wilful murder to make application for bail on or after commencement day. It applies to all accused in this category in custody, irrespective of when the offence was committed or charges laid.

If an accused is in custody for murder on commencement then the accused will have the right conferred by s.7B(3) to apply for bail (subject to the constraints in s.7B(5)). In other words s.7B(3) will apply to an accused in custody irrespective of when the accused was first detained.

If an accused has already had an initial appearance for the offence then obviously s.7B(4) can have no application. Clause 9(6) makes this clear.

A further provision has been inserted to deal with the situation where an accused in custody has been refused bail before the commencement of s.7B. In such a situation the reference in s.7B(5)(a) to an application under sub-section (3) does not work. The consideration of the accused's case for bail would have occurred under the former provisions of the *Bail Act*. An additional transitional provision (clause 9(7)) has been included to cover this situation. Therefore, an accused in such cases will be deemed to have made an

application under section 7B(3) for the purposes of determing the applicability of section 7B(5).

Sub-clause 9(8)
Section 7C relates to child accused on murder or wilful murder charges who must be considered for release on bail at their next appearance on or after commencement day, irrespective of when the offence was committed.

Sub-clause 9(9)
Section 7D provides that a previous decision may be adopted unless circumstances have changed, and the section applies to any subsequent consideration of bail on or after the commencement date.

The new s.7D applies to people who are currently on bail and who may have further appearances prior to final disposition when this legislation commences. It achieves this when it refers to '*any subsequent consideration of bail*'. It continues the effect of what was previously section 7(4).

Sub-clause 9(10)
Pursuant to section 7E(1) an accused who has been refused bail need not be reconsidered for bail on each day of a trial unless the accused applies. The amendment applies to all trials as of commencement, whether or not the trial commenced prior to commencement date.

Sub-clause 9(11)
Where notice of appeal is required under the new s.7F(2), the notice can now go to the State DPP, rather than only the Commonwealth DPP or the State Solicitor. That option will be open when an application for bail is made on or after the commencement day.

While the new section 7F is basically a restatement of section 7A there will be a question over the status of applications pending under the repealed s.7A. The transitional provision attempts to remove any doubts with respect to those applications. It is not intended to affect the right to apply for bail pending appeal by replacing section 7A with section 7F. Proceedings on an application for bail under section 7A can be continued despite the repeal of that section (see the general savings provisions in the *Interpretation Act 1984* section 37(1)).

10. Section 9 amended and transitional provision

Section 9 provides for the deferment of a decision on bail for the purposes of obtaining further information. The amendment enables information to be obtained from a community corrections officer, in addition to a police officer, pursuant to section 24A (1) or (2).

The amendment applies to any consideration of bail made on or after the commencement day irrespective of when the application for bail was made. It will apply then to both existing and new considerations.

11. Section 11 amended and transitional provision

Section 11(1) refers to the rights of an accused following the grant of bail. Under that section, the right to be at liberty is subject to the requirements of sections of the *Bail Act* set out in s.11(1)(e), which includes s.14(3), 17A, 46, 54 and 55. The amendment also includes s.50F in section 11(1)(e), which provides for the power of the CEO to revoke bail in the case of home detention bail.

The amendments to section 11 facilitate a mainly administrative change.

- Currently, a person may not be released from custody following a grant of bail until a certificate issued pursuant to section 11(2) is signed by one of the persons authorised to sign the certificate.

  A person in charge of a prison is not authorised to sign a section 11(2) certificate. This requirement has caused considerable delay in the release from custody of persons who are otherwise entitled to be released. In some cases a Justice of the Peace is required to attend a lockup, remand centre or court custody centre to release persons to bail. In superior court matters the Judge's associate has to be contacted to sign the certificate authorising release (this forms part of the bail undertaking – Form 6). The problems particularly arise where the accused becomes entitled to be released on a weekend or late at night.

- The proposed amendment will allow the certificate to authorise release to be signed by any of those persons mentioned in section 29 of the Act. Section 29 sets out a number of persons authorised to complete a bail undertaking. This list includes a person in charge of a lockup or prison.

  The certificate to authorise the release of an accused from custody will not be signed until the person mentioned in section 29 is satisfied that the requirements of the Act have been met. This safeguard remains.

Whilst provisions relating to deemed extensions of bail are now inserted in the Act (see new s.31A) it is not necessary to make specific reference to these in s.11(1)(c). At present it refers to section 31(3) which relates to deemed extensions where there is a different time and/or place inserted. The powers in s.31A can only be exercised in conjunction with the power in s.32(2)(a) so the reference to s.31(3) in s.11(1)(c) is all that is required.

Because all bail extensions relate to a new time or a new time and place then, by necessity, s.31(3) is the critical reference point for s.11(1)(c).

The amendments to section 11 apply to an accused not released under a certificate issued prior to commencement day. The relevant certificate is to be

treated as a certificate issued under new subsection (3) where it was issued prior to the commencement date.

12. Section 12 amended

Section 12 enables a postponement of the bail consideration or a postponement of the release on bail in certain circumstances. New section 7A(2) (see clause 9) provides for the right to be at liberty following a dispensation with bail. This amendment provides for the necessary inclusion of reference to the new section 7A(2) in section 12.

13. Heading to Part III replaced

The clause is self-explanatory. The change of heading is consequential to the inclusion of the power to dispense with bail. Because a judicial officer may now grant, refuse or dispense with bail, the new heading reflects the overall jurisdiction. Pursuant to section 32 of the *Interpretation Act*, headings to Parts are part of the written law.

14. Sections 13A and 13B inserted

The jurisdiction to dispense with bail is exercised similarly to the jurisdiction to grant or refuse bail. Part A of Schedule 1 guides the exercise of this jurisdiction – See 1st column of Part A of Schedule 1 clauses 2 and 3.

Bail may only be dispensed with by a "Court", that is a Magistrate, a District Court judge, a Supreme Court judge, or a Children's Court judge.

The criteria for dispensing with a release on bail is that the judicial officer must decide that the completion of bail papers are an "unnecessary" exercise. The amendment recognises that the risks associated with the failure of the accused to appear are sometimes not commensurate with the administrative burdens associated with releasing on bail.

The notice provisions are a safeguard to ensure that sufficient information is provided to an accused when bail is dispensed with. The information would usually be contained on an undertaking which, of course, will not be in existence in these cases.

Section 13B deals with notice provisions where bail is dispensed with. It maintains a fundamental tenet of the legislation that sufficient information be provided to all parties regarding bail decisions. This was lacking in previous legislation. The notice provisions are consistent throughout the Act.

Under section 13B(1), an accused will usually be given their notice personally. A standard form will be designed and used at all courts. The reference to "*post*" and "*electronic communication*" is a "catch-all". It is believed that these modes of service will adequately cover all situations.

Section 13B(2) facilitates proof of service and acts as a safeguard for the accused, prosecution and the Court. Section 13B(3) is essentially a deeming provision. The onus is on the intended recipient to show that they did not receive the notice. The file will become the principal source for a record on any notification with respect to dispensations of bail. The new section 3A(2) will deal with when electronic communications are deemed to be received.

In each case a bail dispensation form will be produced and this will form the basis of the file record. Service details will be endorsed on this form.

Section 13B(4) contains evidentiary provisions which are similar to other sections of the Act. This will be relevant to non-appearances and prosecutions.

15. Section 14 amended and transitional provisions

The amendments to section 14(1)(b) are consequential to the amendment introducing the power to dispense with bail. The jurisdiction of a Judge now includes the power to dispense with bail.

Section 14 is a pivotal section of the Act and one of the most important in terms of the Doig Report recommendations.

Section 14 currently allows a party (accused or prosecutor) to seek a review of a bail decision in the Supreme Court. This arose as a result of the Supreme Court having jurisdiction in relation to all bail cases. Prior to the introduction of the *Bail Act*, section 573 of the *Criminal Code* provided that a Supreme Court Judge could admit to bail any person committed for trial or sentence or reduce the amount of bail or modify the conditions upon which bail had been granted. Where the person had been committed to the District Court for trial this power had been exercised by a judge of the District Court under section 42(1) of the *District Court of Western Australia Act*.

At present, a party who has been committed for trial in the District Court or is awaiting trial in the Children's Court, and who is dissatisfied with the bail decision of that court, may have that decision reviewed afresh by a judge of the Supreme Court.

The process is not an appeal and the applicant is not required to show new facts and circumstances or that the applicant failed to adequately present the case at the previous application, as would be the case if a subsequent application was made to the court which had initially granted or refused bail.

In essence, the legislation currently allows the applicant to 'shop' for a different decision from a court other than the one that will have the ultimate carriage of the matter. This is certainly not within the spirit of the legislation.

Section 14 was originally intended for a single Judge of the Supreme Court to be the final step for anyone seeking a review of bail. It was inserted as part of

the desire to limit bail shopping. Anyone aggrieved by the decision of a judicial officer whose jurisdiction was inferior to that of a Supreme Court Judge could seek a review before a Supreme Court Judge. There was no formal appeal process put into the Act on the basis that this review would be the last step. The discovery of an avenue of appeal to the Full Court by way of s.58 of the *Supreme Court Act* was entirely unintended and meant that s.14, by default, became another step in the process of seeking a further review. The 'creation' of this appeal process also meant that bail shopping had again become an issue in that an applicant who was unsuccessful pursuant to s.14 could still lodge an appeal by way of s.58 *Supreme Court Act.*

The original Cabinet Minute authorising the amendments to the *Bail Act* recommended by the Doig Report specifically indicated that a formal appeal process had to be created. This process occurs in clause 16 which is to follow.

Section 14 is substantially amended to create co-extensive jurisdiction (for the purposes of granting, refusing, revoking, varying or dispensing with bail) between a judge of the Supreme Court, District Court, and Children's Court. The heading to section 14 has also been changed to accommodate the changes.

Section 14 as amended by clause 15 will achieve the objectives of Doig – that is to give concurrent jurisdiction to a judge of the District Court (which has been necessarily amended to include a judge of the Children's Court) when dealing with reviews of bail. Obviously there will be no reviews from the District Court and Children's Court to the Supreme Court once this provision takes effect. Once a person has appeared before a judge of either of those courts then they can only appeal if they are aggrieved by a decision (includes prosecutor and accused) (unless they utilise Schedule 1 Part B clause 4).

The proposed amendments will mean that when a bail decision is made by either the District Court or the Children's Court neither the accused or the prosecutor can apply to the Supreme Court and ask for a review of that decision. Any application to review will be to the court that made the decision and new facts and circumstances or failure to adequately present a case will need to be shown (as required by Schedule 1 Part B clause 4).

The new section 14(4)(a) provides that a judge of the District Court or a judge of the Children's Court will have concurrent power with a judge of the Supreme Court to review bail where a person is committed before either of those courts. Thus, the three jurisdictions are co-extensive for the purposes of bail. In the case of the District Court, in particular, the finality of a bail decision in that court accords with the view that to the extent that the Court exercises its jurisdiction, then it is exclusive (refer to section 42(1) of the *District Court of Western Australia Act 1969).*

It will allow a judge of the District Court or Children's Court, in appropriate cases, to review bail decisions. A judge of the Supreme Court does not have jurisdiction under section 14 as amended to revoke or vary bail granted by a judge of the District Court or the Children's Court because of the meaning given to "*any other judicial officer*" in new subsection (4).

If an applicant remains aggrieved then there will be a right of appeal to the Court of Appeal. The appeal is confined to those issues that were relevant to the decision in dispute. The object again is to discourage any attempt to 'bail shop'.

The transitionals are in sub-clauses (5), (6), (7) and (8).

Where a child accused is charged with an offence on or after the commencement day, and a bail decision is made for which the child accused seeks a review, the review will be by a judge of the Children's Court.

Where an accused is committed to the District Court by a court of summary jurisdiction on or after the commencement day, and a bail decision is made for which the accused seeks a review, the review will be by a judge of the District Court.

The distribution of powers set out in the amended s.14(4)(b) will apply to "*any other judicial officer*" exercising the powers set out in s.14(1) at any time on or after the commencement day.

Because of the changes to section 14 the heading to the section is also to be changed.

16. Sections 15A and 15B inserted and transitional provision

The proposal for a right of appeal from a bail decision was made as a result of the decision in *Lim v Gregson* (1989) WAR 1 and subsequent decisions. Whether the *Bail Act* facilitated appeal from a bail decision was unclear. In *Lim v Gregson* it was held that there was a right of appeal, under section 58(1)(b) of the *Supreme Court Act* (*SCA*) from a decision of a judge to the Full Court in relation to the grant or refusal of bail.

Since the Act is intended to codify the law in relation to bail it is appropriate that an appeal process is provided for in the Act itself. The amendments create a formal process of appeal to the Court of Appeal from a bail decision of a judge of the District Court, Children's Court or the Supreme Court.

An appeal should only be from a decision of a judge. If a person is dissatisfied with the decision of an authorised officer, police officer, Justice of the Peace or magistrate, he/she can seek a review before a judge. Therefore, it is appropriate that the appeal process is confined to the decisions of judges.

The proposed appeal process is set out in the new sections 15A and 15B. It has always been proposed that any such appeal would be by way of strict appeal (ie it will be confined to the material and evidence that was before the Judge whose decision is the subject of appeal). The decision was taken to make it a strict appeal so as to maintain the objective of the Act to limit bail shopping, and on the basis that if an accused is alleging that new facts have

been discovered or there are new or changed circumstances or that they failed to adequately present their case, then they can seek a further review before a single judge pursuant to section 14(2a).

An accused will not be able to lodge an appeal without having at least one substantive bail application dealt with by a judge of either the Children's, District or Supreme Court. Given that it is intended that they first exhaust the section 14 review process then this will usually translate to at least 2 such prior applications.

Prior to the creation of the Court of Appeal on 1 February 2005 by way of the *Acts Amendment (Court of Appeal) Act 2004* it had been proposed to amend the *Supreme Court Act* in the Bail Amendment Bill by closing the avenue of appeal that exists under section 58(1)(b) *SCA* for bail decisions and to provide for any appeals process in the *Bail Act* itself. This is appropriate in view of the *Bail Act's* role as a code with respect to bail.

On 1 February 2005, s.58 *SCA* was amended so that references to the Full Court were replaced by the Court of Appeal. However, in all other respects section 58(1)(b) remains unchanged and whereas an appeal against the bail decision of a judge could previously have been made to the Full Court, it can now be made to the Court of Appeal. The change does not appear to have affected existing rights of appeal (per *Samuels v State of Western Australia* [2005] WASCA 193). It appears that such an appeal would continue to be conducted as a rehearing de novo. This effectively continues the position as identified in *Lim v Gregson*.

Given that appeals from bail decisions made by a judge prior to conviction or final disposition do not fit within the scope of sections 23 and 24 of the *Criminal Appeals Act 2004* then such a bail decision would constitute a civil appeal. The *Supreme Court (Court of Appeal) Rules 2005* appear to apply.

There has been at least 1 bail related appeal to the Court of Appeal since it came into being. This is the matter of *Mercanti v The State of Western Australia* 2005 [WASCA] 254. This decision confirms that it is still possible to lodge a bail related appeal to the Court of Appeal by way of section 58(1)(b) *SCA*. It also demonstrates that there has not been a significant level of appeal activity on bail decisions to the Court of Appeal since 1 February 2005 when the Court came into being. Most accused prefer to reapply under section 14(2a) saying that circumstances have changed, as opposed to lodging an appeal.

Given that an appeal process for bail decisions still exists under section 58(1)(b) *SCA* in similar terms to that identified in *Lim v Gregson* and given that such continue to be treated as civil appeals, then it is necessary to make a consequential amendment to s.58. This is dealt with in clause 46 of this Bill. Accordingly, the need to direct such appeals to the criminal side of the Court of Appeal remains an issue. The proposed amendments to insert sections 15A and 15B into the *Bail Act* are intended to clarify the procedure for conducting

such appeals and ensure that they are appropriately dealt with as criminal matters.

The proposed sections 15A and 15B will impose a stricter criteria for considering appeals against bail decisions made prior to the final disposition of a charge than is currently the case. Rather than such appeals being dealt with as a rehearing de novo they will be by strict appeal based on the material and evidence that was before the judge at first instance. The provisions are designed to limit speculative and spurious applications.

The reason for inserting the criteria of first needing to obtain leave to appeal is based on the following grounds:

(i) to maintain consistency with other criminal appeals and also with post-conviction bail appeals on the basis that the latter fall within the umbrella of Part 3 of the *Criminal Appeals Act*.

(ii) to weed out those appeals without any merit or real prospect of success as discussed in *Samuels v Western Australia* [2005] WASCA 193.

(iii) that leave is currently required for any appeals to the Court of Appeal pursuant to section 58(1)(b) of the *Supreme Court Act*. In respect to appeals against bail decisions, at least, this is confirmed by the decision in *Mercanti*.

It is possible for this leave process to be dealt with by a single judge and it can also be done on the papers.

17. **Section 26 amended**

Section 26 has been amended to ensure that when bail is granted to an accused who has committed a Schedule 2 offence whilst already on bail or an early release order for another Schedule 2 offence, then the officer who grants bail must provide reasons for the decision. The amendment recognises the sensitive nature of decisions to grant bail in such circumstances and ensures that the decision – making in such cases is apparent from the face of the record.

The specific amendment was promoted by the DPP and was partially motivated by previous instances where judicial officers had not released their reasons for decisions in such cases. The position will now be that where an authorised officer, a justice or a judicial officer finds that exceptional circumstances have been established justifying a release on bail in such cases, they will be required to provide reasons for the decision to grant bail. This will be done by completing the *Form 5 Bail Record Form*. A copy of the transcript can be attached to this form if it will assist for administrative purposes.

Whilst the existence of a new right of appeal carries with it a duty on every subordinate judicial officer to give reasons in any event, the requirement to state reasons will operate as a safeguard against indiscriminate and arbitrary decision making. It will also allow the relevant officer's decision – making processes to be examined.

The effect of section 26(3) is that it will be the accused and the prosecutor who are entitled to a copy of the record made under section 26(2).

18. Section 28 amended, related amendments to sections 35, 49, 51 and 58 and Schedule 1, and transitional provisions

Frequently, time set aside for trials is lost because an accused will telephone the Court on the morning of the hearing to say that they will not be attending. Currently section 28(2)(b)(i) causes administrative problems arising from the need to make a record of the call, establishing the authenticity of the caller and subsequently requiring evidence establishing the reasons for any genuine non-appearance. The problems with verification should be apparent from the wording. In essence, the provision currently facilitates the postponement of trials or appearances. Any provision similar to the current section 28(2)(b)(i) which caters for an accused who does not appear, whether or not they can later justify their non-appearance, will have an adverse effect on court listings.

Accordingly, section 28(2)(b) in its current form is unnecessary and is now deleted. A new section 28(2)(b) is inserted in its place. Even though an accused may have advised a court of the inability to attend, this should not:

(1) prevent the accused from being arrested on a bench warrant;

(2) protect the accused from prosecution under section 51 for breach of the bail undertaking;

Should a court be called on to deal with an offence under section 51, one of the elements that must be satisfied is that an accused failed to comply with a bail undertaking without reasonable cause. The accused can explain the reasons for a non-appearance at this stage. If they have a reasonable cause for the non-appearance then the court is able to take it into account.

The section now clarifies that if an accused fails to appear in response to a bail undertaking the accused is still required to appear and will also be subject to the offence provisions of the Act.

The amendment in sub-clause (2) to section 49 is a necessary consequential amendment arising from the amendment to section 28(2)(b).

The amendments effected by sub-clause (3) are consequential amendments to other sections of the *Bail Act* reflecting the changes to s.28(2)(b) made by this clause. Section 35(1) of the *Bail Act* relates to surety undertakings, and is one

of the sections thus amended. There are no other references to s.28(2)(b)(ii) in the Act, other than those referred to in the Table in sub-clause (3).

Section 28 relates to bail undertakings generally. The amendment in sub-clause (1) deletes the requirement in s.28(2)(b) that the accused notifies of their failure to attend. That amendment to s.28 will apply to undertakings in force on or after commencement day, whether the undertaking was entered into prior to commencement day or after (as per sub-clause (4)).

The transitional provision in sub-clause (5) preserves the validity of surety undertakings entered into prior to the commencement day and that remain in force on or after the commencement day.

The net effect of the transitionals is that bail and surety undertakings in existence at commencement will continue and will be deemed to be enforceable. This raises the point about existing rights being subject to change upon the commencement of the legislation. The only alternative to this is to require everyone on current bail and surety undertakings to enter into fresh undertakings. This would be very difficult to achieve in practice.

19. Section 29 amended

Section 29 specifies those persons before whom a bail undertaking may be entered into once an accused has been granted bail.

The amendment authorises an officer in charge of a lock-up or prison to sign the certificate to release which is part of the bail undertaking (Form 6) (see section 11(3)). Also, the amendment allows officers in charge of court custody centre to sign the certificate of release, where the CEO has approved that person for the purposes of signing the certificates.

A new paragraph (b) has been included and the subsequent paragraphs have been renumbered. Given the new definition of '*registrar*' in section 3 it has been possible to roll the provisions that are currently section 29(b) to (e) into the new s.29(b).

The definition of '*coroner's registrar'* in sections 3 and 12 of the *Coroners Act 1996* is sufficient to cover registrars of the Magistrates Court when coronial matters are heard at regional courts.

The approach in section 29(b) is to have one paragraph alone that refers to a registrar of a court. As far as the Magistrates Court is concerned the reference is limited to the Principal Registrar and a registrar.

If a deputy registrar is to exercise the powers therein (except where sections 11(3) and 36 are concerned) then it will be pursuant to a delegation under s.66A. Deputy Registrars of the Magistrates Court will then only be able to exercise the powers under s.29 provided they are specifically delegated to do so as per s.66A.

Section 66A has been amended (see clause 39) to prevent a delegation of the powers under the new section 11(3) and the new section 36 from a registrar to a deputy registrar of the Magistrates Court. The new s.11(3) allows a person referred to in s.29 to sign a certificate to authorise release and the new s.36 extends this to approving sureties. It is not appropriate for these powers to be given to deputy registrars of the Magistrates Court. There are also many more registrars of the Magistrates Court than for higher courts. The powers conferred by sections 11(3) and 36 are expressed to be non-delegable.

In relation to paragraph (f), the reference is to the CEO of the agency assisting in the administration of the *Court Security and Custodial Services Act*. There is no reference to the Department of the Attorney General for the reasons discussed under the new definition of '*approved*' in clause 4.

As there is no transitional for this provision it will apply from the date of commencement. Given the nature of the section this is logical.

20. Section 30 amended

Section 30(1)(a) is replaced by a more plain english style of drafting. There is no change to the intent or requirements of the provision. The intent of the provision has always been to ensure that an accused understands a bail undertaking before they enter into it.

21. Section 31 amended and transitional provision

The amendments to section 31 pursuant to this clause are purely of an administrative nature to facilitate the proper giving of notice where a different time or place for appearance is substituted.

Basically, notice will be given and it will be given by an officer of the Court. These amendments allow respective courts to properly accommodate the giving of notices according to their own administrative structures.

In relation to the new subsection (5), recognition is given to the creation of criminal registries within the superior courts since the enactment of the *Bail Act*. At the time of the Doig Review Panel's deliberations the giving of notices was still, in part, handled by the Crown Prosecutor's Office (now evolved as the DPP). This situation no longer occurs and the different Courts are now given flexibility with respect to how the notice provisions are satisfied.

It is important to note that these amendments in no way dilute the requirement to give notice, which is a cornerstone of the *Bail Act* (ie the provision of relevant information to those involved in the bail process). This provision acknowledges that administrative structures within the courts may vary and that individual officers move to different positions. The chief judicial officers of the Supreme and District Court respectively are empowered to nominate the position or officer to issue notices.

The transitional in sub-clause (3) means that the amended section 31 will also cover committals which are currently in the system at the time of commencement. This is the effect of the use of the term '*any adjournment or committal*'. Hence, there are 2 limbs to the transitional in that '*any adjournment*' covers matters already before the court at the time of commencement and '*committal*' covers any new committal after the commencement of the provision.

22. Section 31A inserted and transitional provision

Section 31A is new and is inserted to deal with the amendment of bail conditions during trial.

Because section 34(c) of the Act provides that a bail undertaking ceases to have effect once an accused appears in response to it there is the recurring problem that a person bailed to appear at trial must have bail reconsidered afresh if the trial is adjourned to a subsequent date. This includes a subsequent day of trial.

The object of the amendment under this clause is to make it clear that an accused's bail can be extended orally to successive days of a trial and the conditions upon which the accused has been released to bail can be changed. Any such change must be endorsed on the undertaking or proper written notice provided in order to bring any changes to the notice of the accused.

The court officer is also required to endorse the original copy of the undertaking retained by the court so that at a subsequent appearance the court is aware that proper notification was made. There is no need to complete a fresh undertaking.

With respect to the definition of '*trial*' in sub-section (1), it is also relevant to note the insertion of the new section 7E (clause 9) and the comments made for that particular amendment. Pursuant to section 7E(1) an accused who has been refused bail need not be reconsidered for bail for each day of a trial unless they make application.

It will be the case that unless the addition, variation or cancellation of a condition of an accused's bail during trial is deemed to be of a '*minor nature*' pursuant to section 31A(4), then a new surety undertaking will be required. While a surety can now agree to their undertaking extending throughout the duration of a trial (new section 44(2)), it will not be deemed to be extended unless there are either:

(i) no changes to the accused's conditions; or

(ii) any changes (ie variations, cancellations or additions) that are certified under section 31A(4) to be of a '*minor nature*'.

If any changes are not of a minor nature then a new surety undertaking is required.

In relation to sub-section (3), it is often the case that an accused does not bring their undertaking to court. In such circumstances the accused would be required to complete a new undertaking once the power in subsection (2) has been exercised. The new sub-section (3) allows '*an officer of the court*' to issue a notice to the accused advising them of the changes to their bail conditions pursuant to sub-section (2). This notice will take the place of the endorsement on the accused's undertaking where the latter is not available. It will always be necessary to have an endorsement on the court's copy of the undertaking.

The object of sub-section (4) is to ensure that additions, variations or cancellations of a '*minor nature*' do not require the surety, if there is one, to attend to re-sign new papers. The presiding judicial officer will have a discretion in determining whether the changes are of a minor nature. The proposed section 31A links to the proposed section 44 (see clause 27). If the changes to conditions are expressed to be of a minor nature then the surety undertaking is deemed to be extended.

Sub-section (6) is self explanatory. It facilitates prosecution in the event of non-compliance with the amended or changed conditions. The evidentiary provision in sub-section (6) has been simplified so that it only refers to the certificate under sub-section (3)(b). This certificate will cover all relevant matters, namely: the nature of the amendment, the endorsement of the accused's undertaking or the giving of notice to the accused, and any statement that the amendment is of a minor nature.

The transitional in sub-clause (2) will mean that the new section 31A will apply to all trials, irrespective of whether or not they commenced prior to the commencement date. It will apply to trials which are part-heard at the time of commencement.

23. Section 32 amended and transitional provision

The amendments in this clause complement those made in clause 21 (relating to section 31 of the *Bail Act*) and clause 5 (new section 3A re electronic communication).

The amendments are purely administrative in nature and deal with the manner in which notice is to be given to an accused where a different time and/or place for appearance is substituted. Where section 31 requires written notice to be given, these provisions deal with the manner in which it shall be given.

The provisions also provide for the proper keeping of records so that any notices sent by post or electronic communication will be recorded. The keeping of a register for the purposes of this section is different from the decision not to keep one for bail dispensations.

The requirement to send all notices by registered post has been removed. This represents a large cost to court administration. The cost of sending notices by registered post is expensive and requires the addressee to call at a Post Office during business hours to collect it. This is not always possible or convenient and in some cases adequate notice of the postponed hearing has not been achieved. There are also instances where addressees will avoid collecting a registered post item as they anticipate that it will not be good news. The Doig Review Panel firmly believed that notices be sent by ordinary post provided that the Court maintain a record of such postings. This object has been achieved in the new sub-sections (1)-(3a) of section 32.

At present section 32(4) requires the judicial officer to personally endorse an accused's bail undertaking where a different time and place of hearing is involved. This is an unnecessary burden to place on a judicial officer (especially a judge or magistrate) and is more appropriately carried out by a court officer. This, in any event, is a more accurate reflection of the administration of this process. It is proper to delegate this function to a Court officer in view of the officer's experience. It is an unnecessary and inappropriate administrative burden to place on a judicial officer's time. The amendment rectifies this anomaly.

The transitional in sub-clause (4) has the effect of applying the amended section 32 to undertakings in force as at the commencement date as well as new undertakings.

24. Section 36 replaced, related amendments to sections 3, 37, 39, 40, 41 and 42 and transitional provisions.

The present wording of section 36 has caused problems in practice. Essentially, as presently worded, it has been very difficult and cumbersome to administer, often causing accused persons to be held in custody longer than necessary (especially given that approval by the prosecution is required in all cases).

In every case notice has to be given to the prosecutor to allow the prosecution reasonable time to make representations as to the suitability of an applicant to be surety. This process is allowed to take up to 24 hours and is the cause of considerable delay in releasing persons from custody. Generally the delay is caused by not being able to contact a prosecutor authorised to approve a surety. In practice, the requirement to obtain the approval of the prosecutor in all cases has been difficult to administer and has resulted in the requirement being overlooked. The court will generally make it a specific order where it considers it to be necessary.

Section 39 clearly sets out the range of matters which must be taken into account in determining whether an applicant is suitable to be a surety and section 38 clearly sets out those who are ineligible to be a surety.

It is therefore appropriate that prosecutors only need to be notified when the Court so orders. It is anticipated that a court will often direct that a prosecutor be notified, for example, in the case of serious offences.

Prosecutors will need to be vigilant to ensure that in appropriate cases the Court directs that a surety application be referred to a prosecutor before approval is given. In every other case persons authorised to approve sureties will be guided by sections 38 and 39 in determining whether a surety should be approved.

It is entirely appropriate that those persons who are entrusted under section 29 to complete a bail undertaking also be permitted to approve an application by a person to be a surety, with some exceptions. This will, inter alia, overcome problems which occur at prisons where a Justice of the Peace has to be obtained out of normal working hours. Note from the list that those persons listed under section 29 are in positions of responsibility.

The power to approve sureties cannot be exercised by a deputy registrar of the Magistrates Court or Children's Court. This matter was discussed in detail with respect to the amendments to section 29 (clause 19). Where the Magistrates Court or Children's Court is concerned, the power to approve sureties will only reside in the principal registrar or a registrar. Given that s.66A(1) could be utilised to enable a registrar to delegate the power in s.36(1) to a deputy registrar or other officer of the court then s.66A(1) is amended to exclude the power to delegate this particular function (see clause 39).

A safeguard is retained in that the Court still has power to direct notification be given to the prosecutor (in which case the present procedure will apply) and also to specifically direct who shall approve the surety. It is the case in practice that for serious matters the Court will often seek an appearance of a prospective surety to give evidence in order to assess suitability.

Whilst a deputy registrar is excluded in relation to the proposed definition of "*registrar*", in the country little impact will occur as the person who is likely to hold an appointment as a deputy registrar under the *Magistrates Court Act* is also likely to be "*an authorised police officer*". Under section 36, an authorised police officer may approve a surety and that could also be after a grant of bail by the court, if the judicial officer so orders an authorised police officer to do so. The most likely order is that the surety be approved by a JP.

The amendments to section 36 proposed by clause 24 also introduce the concept of a 'surety approval officer'. This is a generic term that has been created to describe anyone of those persons authorised to approve a surety pursuant to section 36(1). The term is inserted into section 3(1) which is the definition section for the principal Act.

The term has been inserted so as to provide clarification for those sections that deal with surety – related matters and contain a reference to an '*officer'* or '*an officer referred to in section 36(1)'*. This is no better demonstrated than in

sub-clause (3) which amends section 41 to insert references to a '*surety approval officer*'.

Sub-clauses (4) and (5) amend the sections mentioned to reflect the changes in terminology consequential to the amendment to section 36 and the introduction of the concept of a '*surety approval officer*'. The application of the list in section 29, which contains some persons who are not officers, means that references to '*officers*' in other sections of the *Bail Act* relating to the approval of sureties was not entirely consistent. The amendments in both tables are necessary consequential amendments. The change from '*officer*' to '*surety approval officer*' in each of the sections referred to will also cover an '*authorised community services officer*' as specified in section 36(1)(c).

The transitional provisions are in sub-clauses (6) and (7). The amended s.36(1) provides a revised list as to who may approve a surety. The amendment applies to any approval that is to be made as of commencement day and later, irrespective of when the matter first came before the court. It will apply to existing and new matters (sub-clause (6)).

The amended s.36(2) relates to the authority of the judicial officer granting bail to order notice to a prosecutor and to nominate the officer who may approve a surety. The amendment applies to a grant of bail as of commencement date (sub-clause (6)).

25. Section 37 amended

Section 37 deals with the information and forms that must be given to potential sureties. The new section 37(3) permits transmission of the documents required to be given to be sent by electronic transmission where the proposed surety is interstate. The amendment facilitates the administration of the new section 43A (see clause 26 and commentary).

The revised section 37(3) will cover both interstate and intrastate sureties. The new section 3A will apply to any communications sent electronically under this provision.

There must be compliance with section 37(3) before section 43A can be applied.

There is no transitional provision for this clause as section 37 is not about bail decisions but the procedure for approval of a surety. If a person is in the process of deciding whether or not to approve a surety on commencement and the relevant documentation has not been sent to the surety, the person can rely on new section 37(3) and send the documentation by electronic communication.

26. Section 43A inserted

This provision is new to the *Bail Act*.

Currently, a person resident interstate who is prepared to accept the obligations of a surety and who is not present in Western Australia when an accused seeks to be released on bail, or in circumstances where a surety undertaking must be re-signed, must access a Justice of the Peace in the surety's home state or territory who has authority to act as a Justice of the Peace for Western Australia. There are a limited number of such Justices and distance from the nearest such Justice may also present problems.

The amendment provides that the processes of approving interstate sureties may be completed using electronic communication and video link facilities. Essentially, the new provision expedites the process whereby interstate sureties may be approved.

The new section 43A is inextricably linked to section 36. A *'relevant official'* as defined for the purposes of the section must be a person who falls within section 42.

There has been no transitional provision inserted for this clause. This is deliberate. The new provision will apply to surety considerations arising from bail decisions made prior to commencement. The new section will cover those situations where a grant of bail with a surety condition has been made prior to the commencement of the amendment Bill but the requirement to consider the surety occurs after commencement.

27. Section 44 replaced and transitional provisions

The new section 44 also cross refers to sections 31 and 31A. The Doig Review Panel received considerable comment relating to the unnecessary delays caused by completion of forms for revised undertakings when different times and places were set for subsequent appearances. In the main, a surety is not usually opposed to the extension of their undertaking to the substituted time and place. The Review Panel heard that a surety should be given the option of consenting to an extension of their undertaking in these circumstances when the initial undertaking is given. The Review Panel recommended accordingly. This amendment accords with the recommendation, but provides some safeguards to the surety in that the surety must receive notice of the different time and place. The section provides that enforcement of the surety undertaking may only be initiated when the surety has opted for the extension of the undertaking and has received notification of the substituted time and place of the trial (if such notice is requested).

Sub-sections (4) and (5) apply to additions, variations and cancellations of a minor nature to bail conditions. Provided the judicial officer endorses or causes to be endorsed on a bail undertaking, in accordance with section 31A(5) (ie that the addition, variation or cancellation is of a *'minor nature'*) then a related surety undertaking is deemed to be extended without a new undertaking having to be completed.

The new section 44(6) requires some explanation. Currently the *Bail Act* allows a surety to elect not to appear on each occasion on which the accused is required to appear. In those circumstances the surety may also require that the court notify them of any adjourned date. The Chief Magistrate identified difficulties associated with the issue of continuing sureties in circumstances where:

(i) an accused on multiple charges elects to have one or more but not all of those charges dealt with and the remainder are adjourned;

(ii) an accused elects to proceed on indictment on some but not all of the charges, or

(iii) the prosecution withdraws one or more of the charges.

In such circumstances the surety currently must be present to enter into a new undertaking, albeit that changes to the composition of the charges do not represent any appreciable change in the accused/surety relationship. This may result in the accused being kept in custody pending the surety being contacted and new papers completed. This is a particular problem when the surety is not readily available.

The amendment has been drafted so that the obligation and liability to forfeiture of a continuing surety is unaffected in the above circumstances. In all cases, the objective is to avoid the attendance of a surety to complete new papers where the number of charges has effectively been reduced and there is no change to any bail conditions. If the bail conditions are changed in any way then the surety must complete new papers.

The new provision relating to the deemed extension of surety undertakings where the number of charges are reduced because they have been dealt with or withdrawn will apply to both existing surety undertakings and those entered into on or after commencement day.

28. Section 45 amended and transitional provision

Section 45 of the Act complements section 44 in that it deals with the giving and proof of notices where a surety undertaking is extended to an adjourned appearance.

The amendments to section 45 are purely administrative in nature and take into account the recommendations of the Doig Review Panel which are intended to remove the current administrative problems. The section has been amended in a similar manner to that proposed for sections 31 and 32 (see clauses 21 and 23). Essentially, this amendment mirrors for sureties what sections 31 and 32 now do for an accused.

Note that in urgent cases there is provision for service by electronic communication. The new section 3A is again relevant. The amendment also adopts ordinary post for written notices as opposed to registered post.

Refer again to the commentary under clauses 21 and 23.

The amendment ensures that notice continues to be given and that proper records be kept of such notification.

It should also be noted that the current surety undertaking form (Form 8) has been redesigned to make it more user-friendly. Form 8 has been heavily criticised for being convoluted, primarily due to the volume of information included on the form to accord with the Act. Whilst the retention of this information is necessary to comply with the objects of the Act the layout has been improved.

As with an identical provision now inserted into section 31 the chief judicial officers of the Supreme and District Courts are able to determine who should be responsible for giving notice to sureties for proceedings before the respective Courts.

Clause 28 substantially amends section 45 of the Act relating to notices for the purposes of section 44. The amendment applies to all notices given or sent as of the commencement date, irrespective of the date of the undertakings. The transitional in sub-clause (6) will apply to existing undertakings as well as new ones.

29. Section 48 amended

The amendment to section 48(5) is necessary in view of the amendments to section 49 (see clause 30). It is now proposed to deal with the procedure for forfeiture of sureties in the *Bail Act Regulations*. The procedure for section 48 (5) is in line with what is proposed for section 49(2).

The amendment to section 48(5) proposed by this clause is really a consequential amendment.

30. Section 49 amended, related amendment to section 67 and transitional provisions

The current section 49(1)(a) allows the registrar of the court before which the accused failed to appear, to make application for payment by the surety of the undertaking that they gave to secure the accused's appearance.

It fails to recognise that in the superior courts, such proceedings are commenced by application and also fails to recognise the expanded role of the DPP in summary proceedings. Provision has therefore been made to enable the DPP to proceed by way of application in courts of summary jurisdiction where the matter is being prosecuted by the DPP.

It is more expedient for the process of bringing an application against a surety to be undertaken by the registrar, than by the judicial officer before whom the accused failed to appear to show cause why the surety undertaking should not be forfeited. The section has therefore been amended to enable both the judicial officer and a person authorised by the judicial officer to commence proceedings against the surety. Overall, it is a more flexible approach to commencing the process of recovering a surety and also recognises the expanded role of the DPP, which was not the case when the *Bail Act 1982* was originally drafted and enacted.

A proceeding to recover money under a surety undertaking is not a proceeding for an offence and can even occur when the accused has not been charged with the offence of breach of bail undertaking. As the money is a debt to the State this section must allow the court administrators to enlist the services of the State Solicitor (where the DPP is not involved) for court appearances. This tends to be the present arrangement, at least in the metro area. It would not be appropriate for a registrar of the court, for example, to conduct a defended hearing. The present arrangements whereby the services of the State Solicitor are utilised when required will be able to continue.

The operation of this section in practice is causing problems and the utilisation of the procedure under the relevant criminal legislation to conduct forfeiture proceedings is not considered appropriate for what is essentially a civil proceeding. A surety has not committed an offence, they have undertaken that an accused will appear at the time and place specified in the bail undertaking. If they don't appear then the surety agrees to forfeit a sum of money.

The reference in the new section 49(1)(a) to an 'application' foreshadows use of an application procedure. This is entirely appropriate given that enforcements of surety undertakings are not in themselves proceedings for an offence. The problem arises from the position that these proceedings are civil in nature and therefore it needs to be questioned whether it is appropriate for actions for breach of surety undertaking to be governed by the *Criminal Procedure Act*, an Act which is solely concerned with prosecutions for offences.

The Chief Magistrate, among others, raised concerns with the provisions of sub-section 49(2). Under this sub-section, an application by a registrar to a judicial officer for an order for forfeiture of money under a surety's undertaking must be made, and proceedings on it are to be conducted, "*in accordance with regulations made under the Criminal Procedure Act 2004*" where the application is made in a court of summary jurisdiction (see subsection 49(2)(a)).

Division 2 of Part 4 of the *Criminal Procedure Regulations 2005* deals with applications to courts of summary jurisdiction. Regulation 13 provides that Division 2 of Part 4 "*applies to and in respect of any application that may be made to a court of summary jurisdiction in a prosecution*".

The surety, him or herself, has not necessarily committed an offence for an application for forfeiture of money under the surety's undertaking to be initiated. It is the accused's failure to comply with section 28(2)(a) or (b) of the *Bail Act* (that is, it is the accused's failure to appear) that triggers the application and, hence, the surety's potential liability to pay.

As such, an application for forfeiture of money under a surety's undertaking pursuant to sub-section 49(1) of the *Bail Act* is not an application in a prosecution and, therefore, cannot fall within the provisions of Division 2 of Part 4 of the *Criminal Procedure Regulations 2005*.

Consequently, there are currently no provisions governing how an application under section 49(1) is to be made and how the proceedings on it are to be conducted. This will now be overcome by including appropriate regulations in the *Bail Regulations 1988* and amending sub-section 49(2)(a) of the *Bail Act* accordingly.

To this end sub-section 49(2)(a) of the *Bail Act* has been amended to provide that an application under sub-section 49(1) must be made, and proceedings on it are to be conducted in a court of summary jurisdiction, in accordance with the *Bail Regulations 1988*. Appropriate regulations in the *Bail Regulations 1988* will be drafted to provide for the procedure for making and conducting an application under sub-section 49(1) of the *Bail Act.*

Similarly, with the Supreme and District Courts the reference to '*rules of court made under the Criminal Procedure Act 2004*' has been removed and this will allow both jurisdictions to deal with the procedure for forfeiture applications under their relevant civil rules of court. The Supreme and District Courts are subject to the peculiar provision that is sub-section (4). Any amendment to invoke civil procedure in these jurisdictions needs to be done without prejudicing the ability to apply this provision.

With respect to the deletion of section 49(1)(b), provision has not been made for the lodgement of an application at a particular court. Under the new paragraph (a) the application is made to an '*appropriate judicial officer*'. This term is defined in section 3 of the Act.

Because of the definition of '*appropriate judicial officer*' in section 3, any application pursuant to s.49(1)(a) for a forfeiture of a surety undertaking can be made to the court at which the accused failed to appear. If the accused is subsequently arrested and committed to a higher court, the proceedings for forfeiture of the surety can still be initiated or continued at the court where the accused was originally meant to appear. Hence, if an accused fails to appear at Bunbury Magistrates Court, the surety proceedings can be initiated at that location (or even a registry of the Magistrates Court near to where the surety resides) and be continued in that jurisdiction in spite of whichever jurisdiction the accused is finally dealt with in.

Sub-clause (3) includes a necessary consequential amendment to section 67(2)(a). This will facilitate regulations to the *Bail Act* which deal with applications for forfeiture of surety.

The procedure under section 48(5) has been appropriately amended (see clause 29) to be in line with what is proposed for section 49(2).

The transitionals are contained in sub-clauses (4) and (5). Sub-clause (4) applies the new procedure under section 49 to a breach of undertaking that may have occurred prior to commencement. To this end the section will have a retrospective effect. Section 49, then, will apply to proceedings against sureties for non-appearances of accused prior to the legislation taking effect but which are yet to be commenced. If proceedings have already been commenced then sub-clause (5) will apply. Such proceedings will continue according to the current procedure. There will be a period where there are parallel proceedings until proceedings under the old provisions have been concluded.

31. Sections 51A inserted and transitional provisions

This is the new section relating to the procedure for prosecutions for an offence under section 51 in a court of summary jurisdiction.

Since the commencement of the Act, it has never been clearly stated whose responsibility it is to commence proceedings for the offence of failure to appear and thereafter conduct the prosecution.

The insertion of new section 51A(2) and (3) leaves no doubt as to whose responsibility it is to commence proceedings and to issue a certificate under section 64 of the Act to the Commissioner of Police as to the accused's failure to appear at court as required by their undertaking.

Under sub-section (2) the prosecution can be commenced by the prosecutor in the proceedings in which the accused failed to appear (ie any of the persons referred to in the *Criminal Procedure Act* s.20(3)) or a police officer.

The transitional provisions in sub-clauses (2) and (3) are self-explanatory. The new section 51A is to have a retrospective effect and will apply to offences committed, but yet to be prosecuted, prior to the commencement of the new provisions. The effect of sub-clause (3) is that any proceedings currently on foot will not be affected. The effect of this style of transitional is discussed in relation to the amendments to section 52 (clause 32).

32. Section 52 amended and transitional provisions

Section 52 is amended to clarify the responsibility for commencing and conducting prosecutions before the superior courts under section 51 and also to deal with necessary procedural aspects.

The amendment to section 52(3) to refer to a police officer is derived from the commentary at page 56 of the Doig Report. When accused are first apprehended on a bench warrant from either the District or Supreme Court their first contact in most cases will be with a police officer. The Doig Report refers to a police officer charging them with the offence at this stage, albeit that it will be prosecuted by the DPP in the superior courts. A prosecution commenced by a police officer in such circumstances will be conducted by the DPP before the superior court. This is the effect of the new section 52(3c). The intention is to allow police officers to commence such proceedings but not necessarily to conduct them before the superior court. The DPP is already empowered by other legislation to take over such prosecutions where they are before a superior court.

The reason for referring to the DPP as the responsible prosecutor for dealing with a breach of bail offence when section 52 applies is to clarify who has responsibility for conducting such prosecutions.

It does not matter which jurisdiction an accused has failed to appear in – a certificate under s.64 is still required. This is generally an endorsement on the reverse side of the court's copy of the bail undertaking that the accused failed to appear and which is signed by the presiding judicial officer. A certified copy of this undertaking is attached to the warrant for arrest and forms the primary evidence of the offence of failing to appear when the accused is finally apprehended.

Previously, there was no equivalent to section 51A(3) in section 52. Such a provision has now been included. The certificate is still to be given to the Commissioner of Police as the command in the warrant is to all police officers in the State. The drafting with respect to who is to issue the certificate is to use a similar provision to the proposed section 31(5) so that it will be an officer of the court (by name or office) specifically authorised by either the Chief Justice or Chief Judge as the case may be.

Given that the certificate of non-appearance follows the warrant it is only appropriate for a police officer to be able to **commence** such a prosecution, albeit that it relates to a non-appearance in either the District or Supreme Courts. The new section 52(3c) ensures that a prosecution commenced by a police officer is to be conducted by the DPP.

The transitional provisions in sub-clauses (3) and (4) are really in the same terms as those prepared for the amendments to section 49 (see clause 30). The comments made there are also applicable here and also to the transitionals for the new section 51A (see clause 31).

Irrespective of when the breach may have occurred, if proceedings have not already been commenced then they are to be conducted according to the amended section 52. To this end the transitional will mean that the amended section 52 will have a retrospective effect. Given that the revised section 52 does not impose additional penalties but seeks to clarify responsibility for

conducting prosecutions then there is no additional hardship to be retrospectively imposed.

33. Section 54 amended, related amendment to section 46 and transitional provision

Sub-section (1a) is pivotal as it now formalises the replacement of "*police officer*" in the pertinent parts of section 54 with the wider term "*relevant officer*". This term is defined to include, where appropriate, the DPP and the State Solicitor and recognises that the decision to apply to revoke or vary bail rests with them in certain cases. This essentially will reflect the practice that has now evolved since the creation of the State DPP.

The definition of '*relevant officer'* that has been inserted takes in the section 3 definition of '*prosecutor*'. This definition is capable of being interpreted as including those authorised to conduct prosecutions pursuant to sections 20 and 80 of the *Criminal Procedure Act*.

The amendments to section 54, and the insertion of section 54A (clause 34), are very important for the proper administration of applications to revoke or vary bail. Such applications are numerous and the section as it currently stands does not easily accommodate the changed circumstances in the conduct of prosecutions in this State nor does it comfortably deal with the position between the order for committal being made and the first appearance in the relevant superior court (Supreme or District).

Many circumstances can arise where it is necessary to apply to revoke or vary an accused's bail. However, the Act currently contemplates only a police officer as having the power to bring an accused before an appropriate judicial officer for the purposes of variation or revocation.

The amendments to section 54 recognise the wider responsibility for conducting criminal prosecutions that now exist in this State from when the Act was first proclaimed. The amendment now takes into account the roles of the DPP and, to a lesser extent, the State Solicitor in conducting prosecutions, and that it is no longer appropriate to rely on the sole discretion of a police officer to bring an application to revoke or vary bail, especially when the prosecution is being conducted by another prosecuting authority.

While the amendments recognise the roles of the proper prosecuting authorities, the proposed sub-section (5) provides a safeguard by allowing a police officer to take action due to the "*urgency*" of the situation. The exact terms of how the police will take action in such "*urgent*" cases can be negotiated with the relevant prosecuting authorities and dealt with in the form of standing orders, if need be.

The transitional in sub-clause (6) applies the amended section 54 to an accused who is on bail at the time of commencement and it also provides that proceedings already on foot at the time of commencement will not be affected.

Therefore, the need to complete new paperwork or commence new proceedings is negated.

34. Section 54A inserted

The new section 54A complements the amended section 54 and redresses a longstanding problem which has existed since the Act was proclaimed.

It is currently the case that when an accused is committed to either the District or Supreme Court but has not yet appeared in the superior court, any application to revoke or vary bail must be dealt with by the relevant superior court and cannot be considered by the court which ordered the committal (usually a magistrate sitting as a court of summary jurisdiction). This is due to the operation of the section 3 definition of "*appropriate judicial officer*" which limits jurisdiction to the court to which the accused has been bailed to appear.

In effect, the court of summary jurisdiction that imposed conditions on bail when committing an accused currently has no power to revoke or vary bail after making the order for committal. This has caused great difficulties, particularly in the country when there is no superior court circuit in proximity as the authority to revoke or vary can only be exercised in such cases by a judge of the District or Supreme Courts. There has been occasion when such an application required transportation to Perth for hearing.

Circumstances often arise where it is necessary to make an urgent application to revoke or vary bail and in many cases the court best able to assess the merits of any such application is the court which imposed the conditions in the first place.

In any event, such applications have a tendency to frustrate the resources of the superior courts when they are conducted prior to an indictment being formally presented or where an accused is yet to appear in the superior court and especially where the accused resides in a country location.

Hence, the amendment recognises the need to modify the current section 54 to enable the court that imposed the initial bail conditions to be able to deal with any application for revocation or variation of those conditions. The proposed new section 54A empowers a court that set bail conditions to be able to deal with any application for revocation or variation of those conditions, as well as the court to which the accused has been committed to appear. This will allow urgent applications, of which there are many, to be dealt with by a court with jurisdiction.

The relevant procedure that applies for section 54 will also apply to section 54A. This is the effect of section 54A(2). The provisions of section 54A operate as an extension of section 54 – the reference to '*under section 54*' in section 54A(2) makes this clear. Also, there is no need to refer to section 54A in section 55(1) as the accused is brought before the judicial officer pursuant to section 54.

Note also that in the proposed sub-section (4), the judicial officer in the lower court is given discretion as to whether they will exercise jurisdiction. The officer may decide, in the circumstances, that it is appropriate for the accused still to appear before the relevant superior court for the hearing of the application to revoke or vary.

The absence of transitional provisions for the amended section 54 and the new section 54A has the effect of applying the provisions of the amended s.54 and the new s.54A to committals which have occurred prior to commencement (provided that the accused has not already appeared before the District or Supreme Courts). The amended section 54 and the new section 54A will apply to existing actions where either no application has been made or an accused has not been arrested. The amended section 54, in particular, will apply to such actions from commencement

35. Section 56 repealed

The new section 59B replaces this section. See the notes on clause 36.

36. Sections 59A and 59B inserted and related amendments to sections 16 and 58

Section 59A is a safeguard to ensure that although bail is dispensed, the order may be revoked and an accused may be placed on an undertaking or placed in custody for the purposes of the next appearance. The provision mirrors the existing section 54 which allows bail to be revoked or varied. The object of the section is to allow for an accused to be brought back before a court (even though bail has been dispensed with) where there is sound reason to believe that the accused will not appear at the next appearance. It may be that new information comes to hand, as an example. This section will give protection to those involved in the bail decision process as they will be aware that there are safeguards supporting a decision to dispense with bail. Properly applied in view of the criteria set out in Part C of Schedule 1, a dispensation will only be granted when the level of offending is at a very trivial level.

Section 59A(2) provides that a police officer can arrest without warrant or else utilise the summons process. It allows urgent action to be taken. The prosecutor initiates the action.

Section 59(A)(4) is self-explanatory. It outlines the powers that the judicial officer has and retains discretion as to the orders that can be made. Section 59A(5) reflects the like provision in section 54 and allows for situations where urgent action is necessary.

Section 59B is the former section 56 (repealed in clause 35). It has been amended to include those circumstances where bail has been dispensed with. The section preserves the power of a Court to issue a bench warrant for non-appearance in response to a bail undertaking or a notice given when bail is dispensed.

Sub-clause (2) makes consequential amendments to sections 16 and 58 to replace references to section 56 with section 59B.

There is no transitional for the new sections 59A and 59B. They apply from day 1 of commencement, that is a given. On that basis there does not appear that there will be any gap between the repealed section 56 and the new section 59B.

37. Section 60 amended

There are 2 limbs to the amendments to section 60.

(i) the reference to '*place of residence, employment, or business*' as it appears in a bail or surety undertaking does not accurately reflect the information set out in these undertakings. The forms prescribed in the regulations simply refer to an address without further elaboration. The amendment is to replace '*place of residence, employment, or business*', with the '*residential address*' of an accused or surety. It is not realistic to expect accused and sureties to advise of changes to employment addresses or the fact that they have changed business address;

(ii) there is a consequential amendment to accommodate the new power to dispense with bail. An accused must still notify the court of any change of residential address even though bail is dispensed. This is necessary for the service of notices and preserves an obligation on the accused to keep the court informed of pertinent information. An accused will be informed of this obligation on the notice issued pursuant to section 13A(3).

38. Section 61 amended

The need for this particular amendment arises from the way the paragraph is structured – "*or by reason of section 16*" is tacked on at the end which results in some confusion as to the intended meaning. It appears what the paragraph is trying to say is "*is not empowered by this Act, or by reason of section 16, to grant bail for the offence*". However, it seems that a reference to section 16 is unnecessary in the first place. If a person arrests someone pursuant to a warrant then section 16(1) applies and the person is not empowered by the Act to grant bail for the offence.

The amendment more correctly conveys the intent of the section.

39. Section 66A amended

The amendment to section 66A supports the amendments to sections 11, 29 and 36 (refer to clauses 11, 19 and 24 respectively). The amendment is necessary to prevent the powers under the new sections 11(3) and 36 from being delegated by a registrar of the Magistrates Court to a deputy registrar.

The previous discussions set out the reasons for this. See particularly the discussion in relation to section 29 (clause 19).

40. Section 66B inserted and transitional provision

This new section in the Act will provide for any consideration of bail by a judicial officer or authorised officer to be heard by way of video-link or if a video-link is not reasonably available, audio-link. A discretion remains with the authorised officer or presiding judicial officer to require attendance in person if they consider it appropriate.

Due to the constantly changing nature of legislation and the changing methods of dealing with offenders a general provision in the *Bail Act* itself is the most appropriate way to proceed. It also serves to insert a general rule into the *Bail Act* that such a manner of dealing with bail proceedings (ie by video or audio link) is now within the philosophy of the Act. This general power is entirely appropriate to be in the specific Act that deals with bail procedure.

The inclusion of this section complements the nature of the *Bail Act* as a code, and does not derogate from like provisions in the *Criminal Procedure Act*. The drafting of this provision is clear, and given the inclusion of the new appeal provisions, supports the conduct of proceedings in relation to bail at all levels within the *Bail Act* (among other things). The intention has been to cast the provision in very wide terms so that it will apply to all bail-related proceedings. To this end it will extend to proceedings for variations, revocations and appeals.

The amendments will apply to all offences and adults and children alike. They will apply to remands and adjournments as well as bail matters. The amendment will also allow bail hearings to utilise the technology in the case of persons charged with breaching a violence restraining order and who therefore must appear before a magistrate.

The amendments to the *Bail Act* by way of section 66B are designed to provide flexibility in the arrangements that can be made to deal expeditiously with bail applications instead of there being delay and sometimes, particularly in outback areas, long journeys in police divisional vans, etc.

Sections 77 and 141 of the *Criminal Procedure Act* have a wider application; they are there to allow for video or audio link appearances of accused in all but the trial and sentence of the accused, including in certain circumstances, the first appearance. On the first appearance the accused must appear in person unless the court orders otherwise.

Bail will be an issue at each of those appearances contemplated by section 77 and section 141. The next step is to go to the *Bail Act* to learn what can and perhaps cannot be done on video-link or audio-link when it comes to bail. (Note: quite appropriately there is no mention of bail in s.77 and s.141 of the *Criminal Procedure Act* because they are about appearances generally).

It appears that the *Bail Act* offers no impediment to there being a bail application in any circumstances where audio or video-link is being utilised. The *Bail Act* does not include anything that would be an impediment to a court that is exercising its criminal jurisdiction. Nothing in the *Bail Act* interferes with a court's consideration of whether to hold an appearance by way of video or audio-link. The *Bail Act* is self-contained on this issue. In circumstances where another Act, in this case the *Criminal Procedure Act* is presiding over a relevant appearance, the *Bail Act* allows a bail application to go ahead by way of a video or audio-link.

Some overlapping will occur between a widely cast provision relating to video/audio links such as the new section 66B in the *Bail Act* and existing provisions in the *Criminal Procedure Act.* There will not necessarily be a conflict as opposed to a duplication. Obviously the *Criminal Procedure Act* has a wider application than to just bail proceedings and covers dealing with charges, etc. There have been concerns expressed by the judiciary with respect to the extent of the application of the provisions in the *Criminal Procedure Act* to bail proceedings.

The new provision relating to video and audio links is inserted as a general provision in the Act (it is inserted in Part VIII of the Act). There are two aspects to this approach:

(i) the intention of the *Bail Act* to operate as a Code (per section 4);
(ii) the flexibility to accommodate changes in the laws affecting persons.

The provision will accommodate appearances before the Court of Appeal and appearances as a result of supervision whilst on post-conviction bail programmes (eg. Drug Court, Family and Domestic Violence and the Aboriginal offender programmes now operating in various parts of the State, especially the Pilbara and Kalgoorlie). It also covers pre-conviction situations where offenders are undergoing programmes that have a form of supervision.

It is also sufficiently wide enough to cover proceedings for forfeiture of surety undertakings.

The transitional provision in sub-clause (2) is self-explanatory. The new section 66B will apply to any appearance from commencement day, irrespective of when the proceedings may have been initiated. The section therefore facilitates the immediate utilisation of the new provision.

41 Schedule 1 amended and transitional provisions

Sub-clauses (1) and (2) - Schedule 1 Part A amended

This amendment is necessary given the creation of the new power to dispense with bail. Amendments are made to both the description of the Schedule and the heading to Part A.

There has been no need to amend Part A clause 3 to accommodate the new section 54A which deals with the situation between committal and first appearance before the District or Supreme Court. Clause 3 deals with who has jurisdiction to grant bail for the initial appearance in a superior court following committal. The new section 54A is concerned with the variation or revocation of bail that has been granted for such an appearance.

Sub clauses (3), (5) and (6) - Schedule 1 Part B amended and transitional provisions

This amendment corrects an anomalous situation which currently exists in clauses of Part B to Schedule 1. This part of the Act was designed to prevent "*bail shopping*". However, in its present form Clause 3 is anomalous in that while it prevents bail shopping among judicial officers, the same does not apply to authorised officers.

As a result the clause has been appropriately redrafted to provide that where bail for an initial appearance is refused by an authorised officer, the power to grant bail for that appearance ceases to be vested in any authorised officer but that a further application may be made to a Justice of the Peace to grant bail. Where a Justice of the Peace refuses bail for an initial appearance by an accused, the power to grant bail for that appearance ceases to be vested in any Justice of the Peace.

This clause complements the new sections 15A and 15B which set out the substantive appeal provisions to apply under the Act.

Basically, the clause recognises the hierarchical nature of the bail decision-making process and confirms that the Court of Appeal has the supreme supervisory role in relation to bail decisions. It would be inappropriate for a single judicial officer to vary a bail decision made by the Court of Appeal.

There are a number of amendments to the clauses in Part B of Schedule 1 to reflect the introduction of the new power to '*dispense*' with bail. The amendments to clause 1 of Part B reflect the change to the *Bail Act* to give co-extensive jurisdiction to Judges of the Supreme, District and Childrens' Courts when making bail decisions. It is intended, among other things, to prevent bail shopping.

A new clause 1A has been inserted to accommodate the creation of the new appeal provisions under sections 15A and 15B. Once the Court of Appeal has made a decision then it is intended that the new clause 1A will operate to prevent any judicial officer (including the Court of Appeal) from being able to exercise bail powers in respect to that particular appearance. This would also exclude access to Schedule 1 Part B clause 4. Once, however, the appearance

that was the subject of appeal passes then that particular power is available again. If a further appeal relates to another appearance it will presumably relate to another bail decision. It will be from that decision that the further appeal will occur. If the later decision involves demonstrable error then it should be subject to appeal on the same basis as an earlier appeal under section 15A.

Each subsequent appearance after the one on which the Court of Appeal has decided can open itself to a fresh appeal or application under Schedule 1 Part B clause 4. However, once the Court of Appeal has made a decision with respect to a **particular appearance** then the effect of the new clause 1A is to stop any further applications in relation to that appearance. The drafting is intended to achieve this result.

The definition of '*judicial officer'* in section 3 of the Act has been amended to include reference to the Court of Appeal.

The transitional provisions in sub-clauses (5) and (6) indicate that the revised clauses to Part B of Schedule 1 will apply to both existing and new matters. The amendments operate from the commencement date and can apply to actions already progressing through the system, irrespective of when the offence was committed or charges laid.

Sub-clauses (4), (7), (8) and (9) - Schedule 1 Part C amended and transitional provisions

There are a number of amendments to Part C of Schedule 1 and they are not all linked.

The amendment in **clause 41(4)(a)** is consequential to the inclusion of the **power to dispense with bail**. The undesignated heading has now been removed altogether. The status of such headings is unclear and can cause problems in electronic versions of legislation..

Clause 41(4)(e) inserts a new clause 3C relating to **bail in murder cases**. The provisions will enshrine in legislation the decision in *Lim v Gregson* (1989) WAR 1, which requires a person charged with murder or wilful murder to satisfy the court that there are exceptional reasons why that person should not be kept in custody.

This provision supports the new section 7B (see clause 9) which recognises that the prospects of a person being granted bail where the offence is one of murder or wilful murder are remote. The situation will now be that upon an accused's initial appearance in court they will be advised of their right to apply for bail without the need for an automatic consideration in every case.

This amendment sends a clear message that where the accused has been charged with the crime of murder of wilful murder then they will not be granted bail except in exceptional circumstances. For these types of offences the presumption in favour of bail is reversed.

The amendments proposed by **clause 41(4)(f)** are significant in the manner that new clauses 4 and 4A are inserted into Part C of Schedule 1. These are amendments relating to **bail after conviction**.

The current provision in the Act provides that unless the court considers that there is a strong likelihood that a non-custodial sentence will be imposed, or there are exceptional reasons why the accused should not be kept in custody, the convicted accused awaiting sentence will remain in custody. Under the amendment, factors such as the offender's bail history on the relevant charge, the likelihood of a non-custodial sentence and whether or not the accused is undergoing or has been accepted onto a recognised therapeutic programme can be considered.

The Supreme Court has recognised that strict adherence to the current provision has the potential to discourage accused persons communicating their intention to plead guilty at an early stage of proceedings: see *Gray v The Queen, Unreported, S.Ct of WA; Library No.970243; 8 May, 1997.*

Similarly the Law Reform Commission, in its *Final Report on the Review of the Criminal and Civil Justice System in Western Australia* published in September 1999, recognised the benefits that accrue to effective case flow management when such a discouragement to early decision-making is removed. At recommendation 285 the Commission said as follows:

> *"in order to encourage early pleas of guilty, adjournment for sentencing should be made more attractive to accuseds by removing the presumption against granting bail after conviction under the Bail Act 1982 (WA) Schedule 1, Part C, clause 4".*

It is relevant to the current amendment that the Report concluded that post-conviction bail was of particular relevance to the Drug Court noting that "*the coercion involved in post-conviction release pre-sentence is vital to the success of the Drug Court*".

The proposed clause 4(1) to Part C of Schedule 1 achieves what Recommendation 285 envisages. It accommodates the use of post-conviction bail to facilitate various sentence diversion programs that are becoming more common, and encourages early pleas of guilty by removing the presumption against post-conviction bail.

The amendment will also reflect a course regularly adopted by judicial officers; see for example *Keed v The Queen* (2000) WASCA 236, where Miller J and Wallwork J indicated that it may be appropriate in certain circumstances to allow a convicted offender to remain on bail pending sentence as an exercise in mercy.

Importantly, the new clause 4 is subject to clauses 3A and 3C. Clause 3A is based on the need to show '*exceptional circumstances'* for bail to be granted,

rather than the likelihood of an imposition of a 'non-custodial sentence' (as the current clause 4(a) requires). Clause 3A relates to serious offences as prescribed in Schedule 2 and it is consistent with the intention of the Act to extend the coverage of clause 3A to accused on bail awaiting sentence. The new clause 4A requires exceptional reasons to be demonstrated before a person in custody awaiting the disposal of an appeal can be granted bail.

To this end the new clauses 4 and 4A acknowledge that certain types of offending will preserve the presumption against the grant of bail in relation to the post-conviction arena. Further, a child is described as having the same right to bail as a child referred to in clause 2(2). That right is subject to clauses 3A and 3C by virtue of clause 2(3)(a).

The amendments proposed by **clause 41(h) and (i) are** very important. The amendment in clause 41(4)(h) is in the same terms as that for clause 41(4)(a). The undesignated heading has been removed as its exact status is not clear.

In fixing the times of **bail of an accused for his initial appearance (clause 41(i))** in court for an offence, a justice, or an authorised officer is restricted to a maximum of 7 days commencing on and including the day on which the accused was arrested for the offence. The restriction of 7 days has caused considerable problems in remote areas of the State where, given the circuit schedule of the Magistrate for the region, an accused may have to appear more than once before being listed before a Magistrate. An extension of the period to 30 days will enable accused in remote areas of the State to appear for their initial appearance before a Magistrate. Where a plea of guilty is entered, it could be disposed of at the initial appearance. It also has the added advantage of giving an accused more time to seek legal advice before appearing in court and less room for using the excuse that they haven't had time to get advice.

This amendment addresses two of the issues raised in the report of the Royal Commission into Aboriginal Deaths in Custody. First, in relation to Aboriginal accused in custody in regional areas, the large distances that often need to be travelled to and from their community within the 7 day period have given rise to a perceived risk of non-attendance, so much so that those accused are sometimes kept in custody. The extension of the time to 30 days could help alter that perception, so that less accused are kept in custody.

Secondly, given that all initial appearances should be dealt with by a Magistrate under the amended provision, the amendment addresses another of the key issues raised in the recommendations of the Royal Commission. It ensures that accused who have committed offences sufficiently serious to warrant arrest are more likely to appear before a magistrate at first instance.

The **transitional** in sub-clause (7) relates to the new clause 3C and will apply to existing considerations. In reality, though, the '*exceptional circumstances*' criteria are generally applied to these types of proceedings already. There is a body of case law on bail for murder cases and other serious offences to suggest that there is a presumption against the granting of bail. The provision will apply to any considerations of bail for the offences in clause 3C after

commencement, whether or not the person was arrested prior to commencement.

The **transitional** in sub-clause (8) will apply the new clauses 4 and 4A to proceedings that have occurred prior to commencement.

The **transitional** in sub-clause (9) which relates to clause 7 of Part C is really the only way that this provision could operate. Otherwise, there would be the farcical situation of undertakings in force at commencement being recalled for a new date to be fixed. This would be very messy.

42. Schedule 2 amended and transitional provision

An accused on bail or an early release order for a Schedule 2 offence who allegedly commits a further Schedule 2 offence, must satisfy the court that there are exceptional reasons why bail should be granted on that second offence. The Schedule currently does not include the offence of attempted murder. There seems to be no valid reason why attempted murder is not included, particularly given that the offence of manslaughter and other offences that carry a lesser penalty are included. Of its own nature, attempted murder is a very serious offence. Therefore, attempted murder is included in Schedule 2 by the amendment.

The transitional provision is in sub-clause (3). Where an accused has been charged with attempt to murder under section 283 of the *Criminal Code*, the offence will be considered a "*Schedule 2 offence*" when bail is being considered on or after commencement day, regardless of when the offence was committed or charges were laid.

The clause also amends the heading to Schedule 2 to ensure that it conforms to current drafting styles. There is no change to the effect of the heading.

43. Amendment of various references to prescribed forms

The amendments proposed under this clause support the intention to ensure that most forms will be approved as opposed to prescribed. The only forms which are to be prescribed are the Form 6 (Bail Undertaking) and Form 8 (Surety Undertaking). References to a form being prescribed are removed where the form referred to by the affected section will now be approved. The sections referred to in this clause have been amended to change any reference to '*prescribed*" to '*approved*'.

44. Transitional Regulations

This clause provides for transitional regulations to be made if necessary. The purpose of the clause is to cater for any unseen requirement that may arise in the event that an issue has not been sufficiently covered by this Bill. It is a standard provision, although given the extensive transitional provisions in the Bill there will probably only be limited scope for transitional regulations to be made under it.

PART 3 – Consequential Amendments to other Acts

45. Criminal Procedure Act 2004 amended

As part of the consequential amendments to other legislation resulting from the amendments to the *Bail Act* it is necessary to amend Schedule 4 of the *Criminal Procedure Act*. Clause 3(3) of Schedule 4 is to be amended to include reference to the new section 31A *Bail Act*. This will mean that section 31A *Bail Act* will apply to witness undertakings during the course of a trial. Given that clause 2(5) allows conditions to be imposed on a witness undertaking then it is appropriate for section 31A *Bail Act* to apply. The result of this amendment is that section 31A will apply to accused and witnesses alike during the course of a trial.

Similarly, clause 4(3) of Schedule 4 is amended to include reference to the new section 51A *Bail Act.* This means that the procedure to deal with witnesses who breach their bail undertaking in courts of summary jurisdiction is the same as for accused. It also clarifies responsibility for prosecution. Section 52 *Bail Act* is to remain, albeit in an amended form, so the position with respect to proceedings in the higher courts is covered for the purpose of clause 4(3).

46. Supreme Court Act 1935 amended

This consequential is necessary to complement the new appeal provisions in the *Bail Act* (clause 16 of the Bill which introduces new sections 15A and 15B). The discussion under that clause also needs to be taken into account.

Originally, the *Bail Act* did not provide for the right of appeal. The decision of *Lim v Gregson* established that section 58 of the *Supreme Court Act* enables an appeal to the Full Court against a bail decision. The appeal is by way of re-hearing. *Lim v Gregson* was followed in subsequent cases.

A specific appeal process has now been inserted in the *Bail Act* (see clause 16 and the new sections 15A & 15B) and it would be inappropriate for the present avenue of appeal as a civil matter to the Court of Appeal to remain. Accordingly the amendment provides that section 58 of the *Supreme Court Act 1935* no longer facilitates an appeal against a bail decision as defined in the new section 15A(1).