

## **BAIL AMENDMENT BILL 2022 (WA)**

### **EXPLANATORY MEMORANDUM**

#### **Overview of the Bill**

The Bail Amendment Bill 2022 (WA) (**Bill**) will amend the *Bail Act 1982* (WA) (**Bail Act**). The Bill seeks to protect the safety and welfare of child victims of alleged sexual offences by:

- ensuring that a person charged with a serious offence, as defined under section 3(1) of the Bail Act, cannot be released without bail by an authorised officer or justice under section 6A and providing for the consistent use of the term ‘serious offence’ across the Bail Act;
- highlighting the capacity of judicial officers or authorised officers (collectively referred to in this Explanatory Memorandum as ‘**bail decision makers**’) to give specific consideration to deferring bail under section 9 in order to inform protective bail conditions in cases involving alleged sexual offences against persons who are under 18 at the time bail is considered;
- requiring bail decision makers to have regard to the conduct of the accused towards any alleged victim of an offence for which the accused is currently awaiting trial, in addition to any victim of an offence for which the accused has previously been convicted, since the time of the relevant offending. This requirement will also extend to an examination of the accused’s conduct towards any family member of such victims or alleged victims where applicable;
- requiring bail decision makers to take into account several additional bail considerations that are specific to bail in cases involving alleged sexual offences against child victims. These additional considerations seek to address the potential effect the release of an accused may have on the safety or welfare of a child victim of an alleged sexual offence;
- requiring prosecutors to inform bail decision makers of any safety or welfare concerns expressed by a child victim in relation to the release of the accused and the reasons for those concerns, so far as practicable;
- requiring bail decision makers to have regard to those safety or welfare concerns when determining bail for an accused;
- requiring judicial officers to consider the fact that a person has been convicted of an offence and any sentence that is likely to be imposed when determining bail for an accused awaiting sentencing; and
- expanding the list of serious offences under Schedule 2 to the Bail Act to include sexual offences against children and several other offences in the Western Australian and Commonwealth statute books. This will mean that a broader category of accused persons who have allegedly committed a serious offence while already on bail or an early release order for another serious offence will bear the onus of satisfying the court that there are exceptional reasons as to why they should not be kept in custody. Schedule 2 also applies in regard to the amended section 6A.

#### **Clause 1 – Short title**

Clause 1 provides that the Bill, once enacted, will be known as the *Bail Amendment Act 2022* (**Amendment Act**).

#### **Clause 2 – Commencement**

Clause 2 provides for the commencement of the Amendment Act.

Sections 1 and 2 of the Amendment Act will come into effect on the day the Amendment Act receives Royal Assent, defined as the '**assent day**'.

Sections 9 and 10, which insert the amendments to clause 4 Part C of Schedule 1 and Schedule 2 of the Bail Act respectively, will come into operation on the day after assent day. This means that Schedule 2 will be immediately expanded and be applicable in regard to decisions under clause 3A of Schedule 1, Part C. In addition, the amended considerations for bail after conviction for accused awaiting sentence will also commence the day after assent.

The rest of the Amendment Act will come into operation 28 days after assent day. These provisions relate, in general, to the new provisions dealing with bail decision making where there are child victims of alleged sexual offences.

The delay in commencement is to ensure that any required administrative arrangements are put in place before the amendments take effect. This may include updates to the Western Australia Police Force Bail Manual, and the development of any policies and procedures that may be identified as being required.

### **Clause 3 – Act amended**

Clause 3 provides that the Amendment Act amends the Bail Act.

### **Clause 4 – Section 3 amended**

Section 3(1) of the Bail Act provides for the definition of key terms.

Clause 4 amends section 3(1) by inserting the new defined term '**sexual offence**'. The term is used to identify the category of offences to which the proposed amendments under section 9 (inserted by clause 6), as well as new clauses 3AA and 3AB (inserted by clause 8), will apply.

The definition is intended to capture any offence listed under Schedule 2 of the Bail Act that is of a sexual nature, regardless of whether it is an offence under Commonwealth or Western Australian legislation, and whether or not the offence has been repealed.

The proposed definition also captures any offence of conspiracy, attempt or incitement to commit an offence as well as an offence of becoming an accessory after the fact.

### **Clause 5 – Section 6A amended**

Section 6A of the Bail Act provides that an authorised officer or justice, who is considering an accused's case for bail for an initial appearance in a summary court on a charge of an indictable offence that is not a serious offence may order that the accused be served with a summons under the *Criminal Procedure Act 2004*, and released, in respect of the charge unless satisfied — (a) that there are reasonable grounds to suspect the accused would not obey the summons if served with it; or (b) that not releasing the accused is justified under subsection (4) or for any other reason. Subsection (4) relates to matters such as whether the accused would commit an offence or endanger another person's safety.

As a result, an accused person may be released on their own recognisance with no conditions, save returning to court at some point in the future.

The term '**authorised officer**' is defined under section 3(1) of the Bail Act to mean an authorised police officer or an authorised community services officer.

An '**authorised police officer**' is defined to mean any of the following people:

- a police officer who holds the rank of sergeant, or a higher rank;

- the police officer who is for the time being in charge of a police station; and
- any of the following officers who are for the time being in charge of a lock up:
  - a police officer;
  - a special constable appointed under the *Police Act 1892* (WA) Part III, provided they meet certain requirements; and
  - a police auxiliary officer appointed under the *Police Act 1892* (WA) Part IIIB, provided they meet certain requirements.

An ‘**authorised community services officer**’ is defined to mean any of the following people:

- the Chief Executive Officer (CEO) or a delegate of the CEO of the Public Sector agency principally assisting the Minister administering Part 8 of the *Sentence Administration Act 2003* (WA) (that Minister is the Minister for Corrective Services, which means that the relevant Public Sector agency is currently the Department of Justice);
- a registrar of the Children’s Court of Western Australia;
- a superintendent of a detention centre under the *Young Offenders Act 1994* (WA) (YOA); and
- the officer for the time being in charge of any detention centre under the YOA.

The term ‘**justice**’ is defined under section 5 of the *Interpretation Act 1984* (WA) to mean a justice of the peace appointed under the *Justices of the Peace Act 2004* (WA).

Currently, under the Bail Act, the term ‘**serious offence**’ is defined for the purposes of section 6A as being an indictable offence which attracts a penalty of imprisonment for five years or more. This differs from the definition of ‘**serious offence**’ under section 3(1), which is defined to mean an offence against section 51(2a); that is, failing to comply with certain bail undertakings, and an offence described in Schedule 2. The effect of this is that some sexual offences against children, now proposed to be included under Schedule 2 (see clause 10 of the Bill), would not be considered serious for the purpose of section 6A. This means that a person accused of a section 6A serious offence – for example, section 321(4) of the *Criminal Code Compilation Act 1913* (WA) (**Criminal Code**), indecent dealing with a child over 13 and under 16, could potentially be released without bail.

In addition, the term ‘serious offence’ has different meanings for different sections of the Bail Act. Clause 5 of the Bill resolves this by deleting the definition of serious offence from section 6A(1). The end result is that the definition under section 3(1) of the Bail Act will apply to section 6A, and accused persons charged with any serious offence defined in section 3(1) as read with Schedule 2, will be prevented from being released without bail by an authorised officer or justice.

#### **Clause 6 – Section 9 amended**

Section 9 of the Bail Act currently allows a bail decision maker to defer consideration of a bail decision for up to 30 days in certain circumstances, including where the decision maker thinks that it is necessary to consider what conditions should be imposed to enhance the protection of an alleged victim who the officer reasonably believes to be in a family relationship with an accused: section 9(1)(c).

Clause 6 of the Bill amends section 9 by deleting existing section 9(1)(c) and replacing it with a new provision that retains the family relationship considerations, but now also expressly provides for circumstances where the offence charged is a sexual offence and the alleged victim is a person under the age of 18 years at the time bail is to be considered.

The intended effect of this amendment is to highlight to a bail decision maker that they may wish to consider deferring bail in order to inform protective bail conditions in such cases. It does not intend to alter the application of section 9 more generally.

This clause also amends section 9(1)(a) by replacing “he” with “the officer” and section 9(2) by deleting “he is” for the purposes of removing the gendered language from the provision.

### **Clause 7 – Schedule 1 Part C clause 1A inserted**

#### 1A – Terms used

Clause 7 inserts new clause 1A into Part C Schedule 1 to the Bail Act. New clause 1A sets out a range of new defined terms which are required to support the proposed amendments to clause 3.

**‘Child victim’** is defined to mean a person against whom a relevant offence (defined below) is alleged to have been committed and who is under 18 years of age when the discretion to grant bail is to be exercised.

The term is used under two new provisions, clauses 3AA and 3AB, inserted by clause 8 of the Bill, which apply specifically to cases involving child victims in circumstances where the relevant offence is a sexual offence.

This definition narrows the effect of the new provisions to cases involving victims of alleged sexual offences who are under 18 years of age when the discretion to grant bail is to be exercised.

**‘Family member’** has the meaning given in section 4(3) of the *Restraining Orders Act 1997* (WA) (ROA), which describes a person as a family member of another person if the persons are in a family relationship. **‘Family relationship’** is broadly defined in the ROA to include current and former spouses, partners, siblings, children, parents, grandparents and step family relationships, as well as other relatives and members of intimate or family-type relationships. This is consistent with the way the existing definition of family relationship located in section 3(1) of the Bail Act is drafted.

The term is used in a new bail consideration, clause 3(c), inserted by clause 8 of the Bill, which addresses the conduct of the accused towards victims, alleged victims and any family member of a victim or alleged victim.

**‘Pending offence’** is defined to mean an offence for which the accused is awaiting trial at the time the discretion to grant bail is to be exercised, whether or not the discretion arises in the course of proceedings relating to that offence.

**‘Relevant offence’** is defined to mean an offence for which an accused is currently in custody awaiting a court appearance before conviction, in proceedings relating to which the discretion to grant bail arises.

The terms pending offence and relevant offence are used under new clauses 3, 3AA and 3AB, which are discussed in greater detail below. These clauses set out matters a bail decision maker must have regard to when considering clause 1(a) or in the case of clauses 3AA or 3AB - clause 1(a)(iii). The terms delineate the bail matters that either must be considered within the broader context of an accused’s alleged offending or considered strictly in relation to the offence/s directly relevant to bail proceedings. Notably, both terms confine the scope of the relevant provisions to bail decision making where an accused has not yet been convicted. Clause 4 of Part C Schedule 1 to the Bail Act deals with bail after conviction for accused persons waiting to be sentenced.

## **Clause 8 – Schedule 1 Part C clause 3 replaced**

### 3 – Matters relevant to cl. 1(a)

Existing clause 3 of Part C Schedule 1 to the Bail Act provides that a bail decision maker must take various matters into account when considering whether, if an accused is not kept in custody, they may do any of the things mentioned in clause 1(a). Those things are:

- failing to appear in court in accordance with a bail undertaking;
- committing an offence;
- endangering the safety, welfare, or property of any person;
- interfering with witnesses or otherwise obstructing the course of justice, whether in relation to the accused themselves or any other person.

The provisions of clause 1(a) are in the form of questions which require consideration of whether an accused will appear at a future court date, commit an offence, endanger the safety or welfare of others, interfere with witnesses or obstruct justice.

Proposed new clause 3, inserted by clause 8, replaces current clause 3. New clause 3 will preserve the matters that must currently be taken into account when determining bail, with the addition of a new bail consideration under clause 3(c) and new clauses 3AA and 3AB.

Consequently, the existing paragraphs have been restructured under new clause 3 and redrafted to eliminate gendered language and employ consistent terminology.

The key changes proposed by clause 8 of the Bill are discussed in greater detail below.

Proposed clause 3(c) requires a bail decision maker to have regard to the conduct of the accused towards victims, alleged victims and their family members since the time the offence was committed or alleged to have been committed. As previously mentioned, this is in the context of considering whether the accused, if not kept in custody, may do any of the things mentioned in clause 1(a).

This additional matter at clause 3(c) is to be considered in relation to any pending offence, as well as any offence for which the accused has previously been convicted. Extending it to matters involving past convictions as well as pending offences ensures that any relevant conduct is taken into account in assessing the risks which might flow from the release of the accused person on bail. It is intended that such an assessment would involve consideration of, amongst other things, grooming, coercive or controlling conduct towards alleged victims, victims and their family members, since the offence was or is alleged to have been committed.

Unlike proposed new clauses 3AA and 3AB, this consideration of the accused's conduct towards alleged victims, victims and family members is not restricted only to sexual offences against child victims. The conduct of an accused person is directly relevant to the considerations under clause 1(a) for a wide range of offences, including family violence and stalking. As such, it is appropriate to introduce this consideration as one of broad application.

### 3AA. – Additional relevant matters in cases of sexual offences against child victims

New clause 3AA proposes to introduce several additional considerations specific to bail in cases involving alleged sexual offences against child victims. These, along with the provisions set out under new clause 3AB, require a bail decision maker to turn their mind to matters

relevant to assessing what effect the release of an accused may have on the safety or welfare of such victims.

Clause 3AA(1) provides that its application is restricted to circumstances where the relevant offence is a sexual offence against a child victim (as defined under proposed clause 1A) and the accused is not a child.

The term '**child**' is defined under section 3(1) of the Bail Act to have the same meaning as the term '**young person**' under the YOA. Section 3 of the YOA defines a young person as:

- a person who has not reached the age of 18 years; or
- a person to whom the YOA applies because of section 4.

Section 4 of the YOA provides that if a person commits or allegedly commits an offence before reaching the age of 18 years, they will continue to be treated as if they were a young person under the YOA in relation to that offence, including any orders made in dealing with that person for that offence.

Consequently, proposed new clauses 3AA and 3AB (outlined below) will not apply in bail decisions involving cases where the accused was a child at the time the offending is alleged to have occurred.

Clause 3AA(2) provides that, in applicable circumstances, the bail decision maker must have regard to specific matters in considering whether the accused, if not kept in custody, may endanger the safety or welfare of a child victim under clause 1(a)(iii).

These additional matters, outlined under proposed clause 3AA(3), direct the bail decision maker to have regard to:

- the ages of the child victim and the accused;
- whether the parties are in a family relationship;
- the living arrangements for both parties;
- the importance of safety, stability and continuity for the child victim; and
- the physical and emotional wellbeing of the child victim.

Proposed clause 3AA(3) draws on relevant language from the *Children and Community Services Act 2004* (WA), in particular, sections 8(1)(g) and 9(e) of that Act, which address the importance of safe, secure and stable living arrangements for children.

The note to new clause 3AA draws attention to section 15AAA of the Commonwealth *Crimes Act 1914* (Cth) (**Crimes Act**), which provides a presumption against bail for persons charged with or convicted of certain Commonwealth child sex offences. It confirms that in proceedings for a relevant Commonwealth child sexual offence, the bail authority, as defined under the Crimes Act, must apply the test provided for under section 15AAA(1). This is similar to the note to existing clause 3E in the Bail Act, inserted by the *Bail Amendment (Persons Linked to Terrorism) Act 2019* (WA), which deals with similar Commonwealth bail provisions in relation to terrorism-linked Commonwealth offences.

### 3AB. – Concerns of child victims

New clause 3AB introduces an obligation on prosecutors to inform a bail decision maker of any safety or welfare concern raised by a child victim, family member or police officer investigating the relevant offence, and, as far as practicable, the reasons for those concerns. Bail decision makers are required to have regard to the information provided in relation to those concerns when exercising their jurisdiction to grant bail.

Clause 3AB(1) ensures that these obligations apply not only to circumstances where a child victim expresses concern to a prosecutor, but also where a family member or police officer investigating the offence informs a prosecutor that a child victim has expressed that concern.

Clause 3AB(2) provides that a prosecutor must inform the bail decision maker about the child victim's expression of concern and, so far as practicable, the reasons for it.

Clause 3AB(3) provides that when the information is raised, the bail decision maker is obliged to have regard to it when considering whether the accused, if not kept in custody, may endanger the safety or welfare of the child victim under clause 1(a)(iii).

The child victim should not have to participate in the proceedings and testify as to their concerns; all that the bail decision maker is required to consider is the information given to them by the prosecutor about the concerns raised by the child victim, their family member or a police officer investigating the offence.

### **Clause 9 – Schedule 1 Part C clause 4 amended**

Clause 4 of Part C Schedule 1 to the Bail Act deals with the decision to grant bail to a person who is in custody waiting to be sentenced or otherwise dealt with for an offence of which they have been convicted. As currently drafted, the clause refers simply to a judicial officer's discretion to grant bail having regard to the questions set out in clause 1, as well as any other matters the judicial officer deems relevant. As such, the Bail Act does not expressly require the judicial officer to consider a person's conviction for the offence or the likely penalty.

Clause 9 amends clause 4(1) by deleting the existing direction as to how the discretion to grant bail must be exercised and inserting a requirement for the judicial officer to consider:

- the fact that the accused has been convicted of the offence and the probable method of dealing with the accused for it (such as any sentence that is likely to be imposed) and for any pending offence;
- the questions set out in clause 1; and
- any other considerations that the judicial officer considers relevant.

### **Clause 10 - Schedule 2 amended**

Clause 3A of Part C Schedule 1 to the Bail Act provides that bail must be refused for an accused who is in custody having been charged with a serious offence while on bail or an early release order for another serious offence, unless the accused can satisfy the bail decision maker that there are exceptional reasons why they should not be kept in custody.

As previously outlined in this Explanatory Memorandum, the term serious offence is defined under section 3(1) of the Bail Act to mean an offence against section 51(2a) and an offence described in Schedule 2. Clause 5 of this Bill will delete the section 6A definition of serious offence so that only the section 3(1) definition applies.

Clause 10 amends Schedule 2 by adding, under item 1, several offences from the Crimes Act and the Criminal Code to the list of serious offences.

These additional offences include sexual offences against children and several other offences in the Western Australian and Commonwealth statute books, including murder and manslaughter of an Australian citizen or resident. The practical effect of this expansion is that the test under clause 3A, where relevant, will now apply to a broader category of accused persons. For example, a person in custody charged with an offence of indecent dealing with a child under 13, who was on bail for another serious offence at the time of the alleged

commission of the offence, will now bear the onus of satisfying the bail decision maker that there are exceptional reasons as to why they should not be kept in custody.