

# The Shopfront

## YOUTH LEGAL CENTRE

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### Bail

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#### 1 What is bail?

Bail is an agreement entered into by a person accused of a criminal offence (“the **accused**” or “the **defendant**”).

By signing a **bail acknowledgement**, the accused is agreeing to appear at court on a particular date. The bail acknowledgement may also require the accused person to comply with certain **conditions**.

It is important to understand the difference between bail and a bond. A bond is a sentencing option imposed after a person has been found guilty of an offence. **Bail is not a punishment and only continues until the accused’s court case is finalised.**

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#### 2 Does bail apply in all criminal cases?

All criminal cases start with a **Court Attendance Notice (“CAN”)**, which is a document telling the accused that he or she has to appear in court on a certain date.

However, not all CANs require the accused to sign a bail acknowledgement. There are basically two types of CAN:

##### 2.1 Bail CAN

A **bail CAN** means that the accused is either:

- (a) required to **sign a bail acknowledgement** (which often involves some bail conditions); or
- (b) **refused bail** (and remanded in custody).

A bail CAN is normally used for more serious offences, for repeat offenders, or if the police are concerned that the accused might not appear at court, may interfere with witnesses or may commit more offences.

##### 2.2 Field, future or no bail CAN

Other types of CANs require the accused to attend court, but they do not have to sign a bail acknowledgement or stick to any conditions. There are 3 types:

- (a) A **field CAN** is issued on the spot, without the need for the accused to be arrested or go to the police station. It is a small yellow piece of paper that looks a bit like an infringement notice.
- (b) A **future CAN** is sent to the defendant on a later date, often several weeks after the alleged offence. This procedure used to be called a summons.
- (c) A **no bail CAN** is similar to a field or future CAN but is usually issued at the police station.

The law says that arrest should be a last resort. Accused persons (and juveniles in particular) should be given future, field or no bail CANs unless the alleged offence is serious or there are real concerns that they may fail to appear, interfere with witnesses or commit more offences.

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### 3 Who makes the decision about bail?

#### 3.1 Police

Most criminal proceedings are commenced by the **police**, and they are the ones who make the initial decision about bail.

If the police decide to issue a future, field or no bail CAN, the accused person is at liberty, without any conditions, until their court date.

If the police decide to commence proceedings with a **bail CAN**, they will have to decide whether the accused gets bail, and if so, on what conditions. This decision is not made by the arresting officer but by the **custody manager**, who is a senior officer at the police station.

#### 3.2 Court

If the accused person is **refused bail by the police** (or granted bail on conditions they can't meet, such as requiring someone to put up money they don't have) the accused **must be taken to court as soon as possible**.

Sometimes this will be the same day, but often it will be the next day. An adult will have to spend a night in a police cell, but a person under 18 must be taken to a juvenile detention centre. Bail courts sit on weekends and public holidays at Parramatta, as well as in some regional areas.

#### 3.3 If the court refuses bail

If the accused is still refused bail by the court, he or she can make another application, but there are some restrictions.

Generally, you cannot make another bail application to the same court unless there has been a **change in circumstances**, or you have some **new information** to present to the court since the last bail application. If you are a juvenile, you get to make two bail applications before these restrictions kicks in.

If you have been refused bail by the Local, Children's or District Court, you can apply for bail to the **Supreme Court**. However, a Supreme Court bail application will usually take 4 – 6 weeks to be listed.

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### 4 How is the decision about bail made?

The *Bail Act 2013* (NSW) guides police and courts in their decisions.

#### 4.1 Unacceptable risk

Generally, the police or the court must consider whether there is an **"unacceptable risk"** that the accused will, if released:

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

## 4.2 Show cause

For some offences, it is harder to get bail because the *Bail Act* says that the accused must first “**show cause**” as to why “his or her detention is not justified”.

***The show cause requirement does not apply if the accused was under 18 at the time of the alleged offence.***

Most “show cause” offences are serious ones - examples include murder/manslaughter, sex offences against children, and offences involving commercial quantities of drugs. **From 1 July 2024**, certain domestic violence offences committed against an intimate partner (such as sexual assault, strangulation or causing grievous bodily harm with intent, and the new offence of coercive control) are now “show cause” offences.

If the accused is **already on bail (for anything) and is charged with a “serious indictable offence”** (anything with a maximum penalty of 5 years imprisonment or more – this includes many quite minor offences, including shoplifting), **they will also have to show cause.**

The *Bail Act* does not say what “show cause” means. It could involve a range of factors including long delays in the court proceedings, serious health problems, a very weak case against the accused, or the fact that the accused is unlikely to receive a sentence of imprisonment if found guilty.

## 4.3 Special or exceptional circumstances: appeals to Court of Criminal Appeal or High Court

A person appealing to the Court of Criminal Appeal or High Court cannot be granted bail unless there are **special or exceptional circumstances** (*Bail Act* section 22).

## 4.4 Exceptional circumstances: terrorism offences

A person cannot be granted bail for a terrorism offence unless **exceptional circumstances** exist (*Bail Act* section 22A).

## 4.5 Special or exceptional circumstances: convicted offenders who will be sentenced to imprisonment

Section 22B applies to accused people who have been found guilty or entered a plea of guilty, and who **will be sentenced to full-time imprisonment.**

If this is the case, the court must refuse bail unless there are “**special or exceptional circumstances**”.

Full-time imprisonment **does not include a juvenile control order.** Therefore, this section will not apply to children unless they are being dealt with in a higher court “according to law” for a serious offence.

## 4.6 “High degree of confidence”: children charged with break and enter, vehicle theft, etc

Section 22C commenced on 21 March 2024 and is due to lapse after 12 months.

It applies to children aged 14 and over, who are **already on bail for a “relevant offence”** (generally motor vehicle theft offences and serious break and enter offences) and who are **charged with another “relevant offence”**.

Bail may be granted only if the decision-maker has a “**high degree of confidence**” **that the accused will not, if released on bail, commit a “serious indictable offence”** (this means an offence punishable by imprisonment for 5 years or more, and it actually includes some relatively minor offences like stealing, fraud and property damage).

The first “relevant offence” and any other “relevant offences” must have allegedly been committed on or after 21 March 2024.

#### 4.7 Factors that the police or the court must consider

When deciding whether to grant bail, or what conditions to impose, the police or court may consider a number of matters including:

- the accused person's background, including criminal history, circumstances and "community ties" (e.g., family, housing, job, relationships),
- the nature and seriousness of the alleged offence,
- the strength of the case against the accused person,
- whether the accused person has a history of violence,
- whether the accused has engaged in behaviour that may constitute domestic abuse, such as behaviour that is physically abusive or violent, including strangulation and sexual assault, animal abuse and stalking,
- any involvement with terrorism or violent extremism,
- whether the accused person has previously committed a serious offence while on bail,
- whether the accused person has a pattern of non-compliance with bail, apprehended violence orders, parole orders or good behaviour bonds,
- the length of time the accused person is likely to spend in custody if bail is refused,
- the likelihood of a custodial sentence being imposed if the accused person is found guilty,
- any special vulnerability or needs of the accused person (including because of youth, being Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment),
- the need for the accused person to be free to prepare for court, to get legal advice or for any other lawful reason.

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## 5 Bail conditions

### 5.1 Restrictions on imposing conditions

The *Bail Act* says that bail should be **unconditional** unless conditions are necessary to deal with a "**bail concern**".

This basically means that conditions should only be imposed if they will help reduce the risk that the accused will fail to appear, commit serious offences while on bail, interfere with witnesses or evidence, or endanger people's safety. If conditions are imposed, they should not be more onerous (strict) than necessary.

### 5.2 Common bail conditions

Common bail conditions include:

- **good behaviour** (not to commit any offences while on bail);
- **residential** (to live at a particular address);
- **curfew** (not to leave home between certain times, e.g., 8pm and 8am);
- **reporting** to the nearest police station (daily, weekly or a few days per week);
- attending **counselling, rehab, courses**, etc.;
- **non-association** (i.e., not hanging around certain people, usually co-accused);

- **place restriction** (keeping away from a certain area);
- **not contacting the victim** of the offence or prosecution witnesses;
- **surety or acceptable person** (a friend or relative agrees to put up money, which they will lose if the accused person fails to appear at court). These sorts of conditions are not very common for young people and, if they are imposed, the amount of money involved is usually relatively small.

### 5.3 Curfew checks and enforcement conditions

It is common for police to do “**curfew checks**” on young people who have residential and curfew conditions. This usually involves coming to the person’s home in the middle of the night, knocking on the door and asking the person to come to the front door to prove they are at home.

Just like anyone else (e.g., salespeople), police have an “**implied licence**” to come and knock on the front door, unless the people who live in the house make it very clear that they are not welcome (e.g., by putting a sign up on the front gate, or writing to the local police station).

However, police have no power to enter private property just to check that someone is at home in accordance with their curfew. **Unless there is an enforcement condition in place, there is no obligation to answer the door or to let the police in.**

A court can impose an **enforcement condition** on the accused’s bail if the police ask for it. An example of an enforcement condition is “to present at the front door if requested to do so by police between 8pm and 8am”. The *Bail Act* says that enforcement conditions must be reasonable, and the court may set limits on how often the police are allowed to do curfew checks.

### 5.4 Electronic monitoring

In June 2024, a new law was passed which will require any adult granted bail for certain **serious domestic violence offences** (such as sexual assault or causing grievous bodily harm with intent) against an intimate partner to have electronic monitoring. The only exception is if the court or police are satisfied that sufficient reasons exist, in the interests of justice, to warrant not imposing an electronic monitoring condition. The costs of the electronic monitoring will be covered by the government. ***This law has still not come into force as of 1 July 2024.***

**In other situations**, an accused person might volunteer to have an electronic monitoring device installed, in the hope that this will increase their chances of getting bail. In this case the accused must organise and pay for the electronic monitoring (which is very expensive).

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## 6 What if the accused person wants to vary their bail conditions?

### 6.1 The need to vary bail conditions

Young people often find that they can no longer stick to their bail conditions. A person who is bailed to reside at a certain address may need to move house; they may be unable to report to the police because they are entering a full-time rehabilitation program; or they may need to change their curfew because they have got a job in the evenings.

Some young people have bail conditions which they are able to comply with, but they are too strict, and are out of proportion to the seriousness of the alleged offence.

## 6.2 How to arrange a bail variation

A person who wants to change the police station they report to can sometimes vary their reporting station over the counter at the court where their case is listed.

Most other types of bail variations (eg, reducing the number of days you report, getting rid of curfews) must be dealt with by a magistrate.

You can have a bail variation application listed by filling in a form at the court registry or having your lawyer lodge it for you. You will probably have to come back a couple of days later to appear in front of the magistrate. It is usually easier to get your bail varied if you have a lawyer to help you.

## 6.3 If your court date is coming up

If you don't need your bail varied urgently, or if your court date is only a couple of days away, you can wait until your court date and ask for the bail to be varied then.

If possible, tell your lawyer a couple of days before, so they can ask the police if they agree to the variation. The police don't have to agree but they do need to be consulted.

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# 7 What happens if the accused person fails to appear at court?

## 7.1 Being dealt with in your absence

For all but the most serious offences, Local and Children's Courts have the power to **convict** an accused (find them guilty) in their absence. This often happens in the Local Court; the Children's Court is more likely to adjourn the matter to give the young person another chance to turn up.

If a court finds the person guilty in their absence, they can impose a **fine** or **dismiss the charge without conviction or penalty** (for adults, this is known as a section 10 or 10A; for children, section 33(1)(a)).

This applies to people on a field, future or no bail CAN as well as those on bail.

## 7.2 Adjournments and warrants

Instead of finding the accused guilty in their absence, the court may decide to **adjourn** the matter or issue a **warrant**.

If the court has found the accused guilty but is thinking of imposing a more serious penalty than a fine (eg. bond, community service, imprisonment) they must either **adjourn** the case or issue a **warrant** to get the accused person to court.

## 7.3 The offence of failure to appear

If a person on bail fails to appear, they also risk being charged with the offence of "fail to appear". The most common penalty for this offence is a fine.

It is not an offence to fail to appear if you are on a future, field, or no bail CAN.

## 7.4 Forfeiture of bail money

If someone has signed you out on bail (as a surety or acceptable person), they stand to lose their money if you fail to appear. This does not always happen, but they might have to convince the court why they should get their money back.

## 7.5 If you can't make it to court

If the accused knows in advance that they will be unable to go to court (e.g., because they are about to go to detox, have an important exam, etc.) they may be able to have the matter adjourned or re-listed. It is best to get legal advice about this.

If the accused can't get to court on the day (e.g., is sick or has just gone into detox) it is usually possible to get an adjournment if a medical certificate is faxed to the court. The medical certificate should specify that the accused person is *unfit to attend court* (rather than just unfit for work).

### 7.6 If you have failed to appear

If the accused person has failed to appear, it's a good idea to call the court and find out what happened. The court will not demand to know the person's whereabouts or send the police around to arrest them.

A person who has been dealt with in their absence and/or had a warrant issued should get legal advice about their options – there is usually something that can be done.

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## 8 What happens if the accused person breaches their bail?

### 8.1 Breach of bail is not an offence

Although failure to appear at court is an offence, **is not an offence to breach bail conditions**.

### 8.2 How police deal with a breach of bail

Even though breach of bail is not an offence, it can lead to instant **arrest** by the police. If they arrest you, they have to take you to court as soon as possible.

The police have a few **alternatives to arrest**, including taking **no action**, giving a **warning**, or issuing an **application notice** requiring you to attend court.

When deciding what action to take, the police must consider things like the seriousness of the breach, whether you have a reasonable excuse for the breach, and your personal circumstances (e.g., your age, health, any work or childcare responsibilities).

### 8.3 How the courts deal with a breach of bail

If the accused is arrested or given a CAN for breach of bail, the magistrate at court will decide whether to **revoke** the bail or let the accused out on bail again.

### 8.4 If you have breached (or think you are about to breach) your bail

If an accused person has breached their bail conditions (eg. if the bail conditions say they are supposed to be in rehab, but they have left the program) it is a good idea to make a bail **variation application** as soon as possible, before the police get the chance to arrest the accused for breach of bail.

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## 9 What do I do if I am asked to sign someone out on bail?

An accused person's bail conditions may require another person to sign as a **surety** or **acceptable person**. This means they have to sign an agreement saying they know the accused person and believe they are reasonably likely to appear at court.

The surety or acceptable person may be required to **deposit cash** up front or **agree to forfeit a sum of money** should the accused person fail to appear.

Youth/social/welfare/health workers are generally prohibited by their employers from signing clients out on bail. If a client asks you to do this, the answer should be a polite "no" with an explanation as to why.

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## 10 If an accused person is bailed to live at our refuge or participate in our program, what are our obligations?

Unless you sign as a surety or acceptable person, or you give a personal undertaking to the court that you will do certain things, you have **no obligations** to ensure the accused person complies with their bail conditions.

Often an accused's bail conditions will require them to **reside** at a certain place (refuge, rehabilitation program, parents' house, etc.). The court usually won't impose this condition unless satisfied that the accused can actually live at the particular place.

If you have told the accused person that they can stay at your refuge, and bail conditions have been set accordingly, then you probably have a moral obligation to carry through with your promise. However, you have no legal obligation to keep accommodating the accused person or to ensure they comply with their bail conditions. If the accused person breaks the rules, you can kick them out. **The legal obligation is upon the accused person and not upon you.**

Rather than be bailed to live at a particular address, it is usually better to be bailed to **reside as directed** by Youth Justice or DCJ, - or it may be appropriate in some cases to propose a condition to **advise police of any change of address within 24 hours**. This allows for flexibility and means the accused doesn't have to apply for a bail variation every time they change address, as long as they keep the court (or police, or Youth Justice, etc) informed.

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## 11 What do I do if I think a client has breached their bail conditions?

**You have no obligation to report a client to the police for breaching their bail conditions.** The only exception is if you have given an **undertaking** to the court to notify the police in the event of a breach. These types of undertakings are sometimes given by drug rehabilitation programs, who will tell the police if the accused leaves the program.

If a client has breached their bail or is finding it difficult to comply with their bail conditions (eg. they are supposed to be living somewhere else, or they are supposed to keep out of Kings Cross but need to go there to get their methadone) you should help them get legal advice so they can apply to vary the conditions.

### **The Shopfront Youth Legal Centre Updated July 2024**

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*The Shopfront Youth Legal Centre is a service provided by Herbert Smith Freehills, in association with Mission Australia and The Salvation Army.*

*This document was last updated in July 2024 and to the best of our knowledge is an accurate summary of the law in New South Wales at that time.*

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