Bail

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Introduction

If a person is charged with any criminal offence they may be taken into custody, either at a police station or, before the charge is heard, in a court. After the defendant (the person against whom the charge has been laid) is taken into custody, a decision is made about their release on bail.

Bail is a written undertaking in the nature of a promise or agreement to appear in court when required to do so. There may be certain conditions imposed on the grant of bail to a defendant. An example is payment of money by the defendant or the requirement that another person (a surety) guarantee the defendant's appearance in court by agreeing to forfeit a sum of money if the defendant does not comply with any of the bail conditions. Other conditions may also be attached to a grant of bail (e.g. reporting to the police and staying away from witnesses). If a defendant is granted bail, they are free to leave the police station or courthouse and do not have to remain in custody until the hearing of the charge. However, bail can be varied or withdrawn at any stage by the court.

Right to Apply for Bail

Every person who has been arrested or charged with a criminal offence has the right to apply for bail. In Queensland, bail can be granted by:

- an authorised police officer
- the Magistrates Court (usually the first court before which a defendant is brought)
- the District Court, Supreme Court or Court of Appeal.

Bail can be granted at any time after a person has been charged with an offence. Bail may even be granted once a person has been convicted of an offence, if an appeal against conviction or sentence has been lodged.

Bail and custody of children is dealt with in pt 5 of the *Youth Justice Act 1992* (Qld).

Police Bail

When a person is arrested for an offence, they should be taken to a court as soon as possible. If that is not practicable, the defendant is taken to and held at the police watch-house. Section 7 of the *Bail Act 1980* (Qld) (Bail Act) gives particular police officers power to grant bail in certain circumstances. The police officer in charge or the watch-house manager at that particular time are authorised to grant bail. The prescribed police officer has a duty to investigate whether bail should be granted (s 7 Bail Act, s 394 *Police Powers and Responsibilities Act 2000* (Qld) (PPR Act)), and that decision is subject to the provisions of ch 15 pt 2 of the PPR Act, which permit detention for the purposes of questioning and investigating matters. Police bail cannot be granted to persons charged with the most serious offences (e.g. murder). Only the Supreme Court can grant bail for these offences (s 13 Bail Act). Alternatively to a grant of bail, the prescribed police officer may issue a notice to appear (s 7 Bail Act). In other particular cases, a person may be released without bail on certain conditions (e.g. where the person is charged with being drunk in a public place (s 378 PPR Act) and in the case of minor drug offences (s 379 PPR Act).

In most cases, police will be able to take a defendant before a Magistrates Court within 24 hours of arrest. In these circumstances, it is up to the prescribed police officer whether or not bail is granted.

There is no right to bail. However, if it is not practicable to bring a defendant before a Magistrates Court within 24 hours of arrest, the presumption is that bail will be granted (s 7 Bail Act). Nevertheless, bail may be refused if the prescribed police officer is satisfied that there is an unacceptable risk in granting bail (e.g. that the defendant will not appear in court). The prescribed police officer refusing to grant bail in these circumstances is required to note the reasons for the refusal of bail on the papers relating to the defendant (i.e. the charge sheet or warrant). However, the failure to note these reasons for refusal does not, in itself, render the custody unlawful.

In most cases, a person released from police custody after being granted bail will be required to sign a bail undertaking (Form 7). The defendant will also receive a notice in the prescribed form (Form 8) (both forms are available from the Queensland Courts website) setting out their obligations and the consequences of failing to comply with those conditions.

The bail undertaking will include:

- a promise by the defendant to appear at a particular court at a specified time
- the conditions of bail regarding the defendant's conduct while on bail, for example obligations to report to a police station regularly, not to contact the person making the allegations (the complainant) and to live at a particular address
- an acknowledgement that if the defendant fails to appear or to observe any condition imposed, then a certain sum of money will be payable to the Crown, and that the person will have committed an offence and be liable to imprisonment for a period of up to two years.

Dealing with police

In dealing with the police at the watch-house or police station, defendants should remember certain things:

- All conversations with police at any stage will be treated as being on the record and can be used against the defendant.
- Bail will not be granted unless a defendant gives the police their correct name and address, and the name of a person who can verify these details. Defendants should not give any other information nor make any comment about the alleged offence to the police.
- Care should be taken in discussing the circumstances leading to the charge with anybody else (including other civilians). Sometimes undercover police are put into the holding cell with tape recorders in the hope that defendants might make admissions. Other prisoners sometimes give evidence in the hope that their own charges might be dropped or their sentences reduced.
- If defendants have been injured, threatened, badly treated by police or are in need of medication, they should make a formal complaint and ask to be examined by a Government Medical Officer. If a police officer is not being cooperative, defendants should politely ask to speak to the senior officer.

- It is important to stay calm and remain polite.
- If it has not been possible for the defendant to make contact with a lawyer, they should call a trustworthy person to let them know where they are and ask for a lawyer.

Cash Bail

When a person has been arrested for certain non-indictable offences (e.g. a minor or street offence resulting in a charge that will not be tried before a judge and jury), cash bail may be granted by a prescribed police officer (s 14 Bail Act). This option is available where the defendant cannot be taken promptly before a Magistrates Court. It does not apply to certain offences listed in the schedule to the Act, which include drink driving (s 79 *Transport Operations (Road Use Management) Act 1995* (Qld)) and certain offences under the *Racing Act 2002* (Qld). In these circumstances, the defendant must deposit money as security for the court appearance, and the police officer will give the defendant a notice in the prescribed forms (Forms 2 and 3) advising of the time, date and place of the next appearance. On being granted this type of bail, the person pays the amount of money required and is released immediately. As no written undertaking is required of the defendant if cash bail is granted, the sole consequence of failing to appear is the forfeiting of the deposited cash. There is no criminal conviction recorded against that person's name.

It is also possible for the Magistrates Court to grant cash bail to a defendant for certain non-indictable offences (s 14A Bail Act).

Court Bail

The power of a court to grant bail is set out in s 8 of the Bail Act. Courts of all jurisdictions have power to grant bail in particular circumstances. Section 10 of the Bail Act gives the Supreme Court power to grant bail at any stage to any person in respect of any offence.

The Magistrates Court

Magistrates have the power to grant bail for most offences (s 8 Bail Act). Magistrates also have the power to enlarge (continue on the same conditions), vary or revoke bail that has already been granted. These latter powers may be exercised in relation to bail granted by the police or bail granted by other magistrates.

The starting point is that bail shall be granted or enlarged by magistrates (s 9 Bail Act). This presumption in favour of granting bail is subject to other sections of the Bail Act, particularly the exceptions set out in ss 13, 16(1) and 16(3).

Section 13 of the Bail Act provides that only the Supreme Court may grant bail to persons charged with offences under the *Criminal Code Act 1899* (Qld) (Criminal Code) that carry sentences on conviction of imprisonment for life (i.e. murder), which cannot be mitigated or varied under the Criminal Code or any other law. This also applies to indefinite sentences for violent offences under pt 10 of the *Penalties and Sentences Act 1992* (Qld).

Section 16(1) of the Bail Act provides that bail should be refused if the court (or the prescribed police officer) is satisfied that there is an unacceptable risk that the defendant, if released on bail, would fail

to appear and surrender into custody, or would commit an offence, endanger the safety or welfare of members of the public or interfere with witnesses. In assessing whether the defendant presents such an unacceptable risk, s 16(2) of the Bail Act states that regard should be given to all relevant matters, including the nature and seriousness of the offence charged, the character, antecedents, associations, home environment, employment and background of the defendant, the history of any previous grants of bail to the defendant or the strength of the evidence against the defendant. Bail may also be refused under s 16(1) of the Bail Act if the court (or prescribed police officer) is satisfied that the defendant should remain in custody for their own protection.

Section 16(3) of the Bail Act specifies offences for which the court (or prescribed police officer) should refuse bail, unless the defendant shows cause (i.e. gives good reasons) why their detention in custody is not justified. The offences specified in s 16(3) are those where the defendant is charged with:

- an indictable offence that was committed while the defendant was out on bail, or when the defendant had already been charged and was awaiting committal for or trial of an earlier indictable offence
- an offence referred to in s 13 of the Bail Act
- an indictable offence where the defendant is alleged to have used, or threatened to use a firearm, offensive weapon or explosive substance
- an offence against the Bail Act
- an offence under ss 24 or 38 of the *Criminal Organisation Act 2009* (Qld)
- an offence against s 359 of the Criminal Code with a circumstance of aggravation.

If bail is granted for these offences, then the reasons for granting it must be stated. Reasons sufficient to show why bail should be granted are hard to define and will depend on the circumstances of each particular case. Some relevant reasons might be:

- jeopardy to the physical or mental health of the defendant
- specific responsibilities such as children and employment difficulties
- that the prosecution does not oppose the grant of bail
- the age of the defendant.

In seeking bail from a magistrate, the following matters should be noted:

- Bail will almost always be granted if it is not opposed by the police prosecutor.
- If the arresting officer has indicated that bail will not be opposed, then care should be taken to ensure that this fact is noted on the relevant papers and drawn to the attention of the prosecutor.
- If bail is being opposed, details should be obtained of the specific concerns of police so that they can be addressed at the bail hearing.

The District Court and the Supreme Court

After committal

Section 8(1)(a)(iii) of the Bail Act makes provision for bail to be granted after the defendant is committed (ordered) to stand trial (s 20). When a person has been on bail and is then ordered to stand trial in the District Court or the Supreme Court, or has been committed for sentence, they will need to apply for bail once again. If bail is granted, a fresh undertaking will normally need to be entered into. It may therefore be necessary for any surety to be at court if it is expected that a person will be committed for sentence or ordered to stand trial.

When bail has been granted by a Supreme Court judge under s 10(1) of the Bail Act, it is usually granted until the commencement of the trial. If so, there is no need for another bail application or undertaking after the committal.

Before trial

When the trial process of a person has commenced in the Supreme Court or the District Court (upon presentation of the indictment), a judge of that court has power to grant, enlarge, vary or revoke the bail of the accused (ss 8(1)(b), 10, 27 Bail Act).

During trial

Once the trial commences, the trial judge has the authority to grant bail, vary the conditions attached to the grant of bail or revoke bail. A decision about bail for the duration of the trial made by a trial judge is final and cannot be appealed (s 10(3) Bail Act).

The trial judge is empowered to grant bail overnight and during other adjournments of the trial. In appropriate circumstances, bail is also available up until the return of the verdict.

Bail after verdict and sentence

Bail may be granted after conviction if the person convicted lodges an appeal. A formal application is required.

Since the presumption of innocence no longer applies after conviction, bail pending an appeal is more difficult to obtain and will usually only be granted in exceptional circumstances.

Where an appeal against a magistrate's decision is made to the District Court (s 222 *Justices Act 1886* (Qld)), bail can be granted by the Magistrates Court under s 8(1)(ia) of the Bail Act.

Relevant factors considered by the courts when deciding whether to grant bail pending an appeal include:

- the nature of the offences being appealed against and the sentences imposed
- the prospects of success on the appeal
- the length of the sentence imposed (i.e. if the sentence is short, there is a real risk that a substantial portion of that custodial sentence will have been served by the time the appeal is determined).

Bail after appeal

If an appeal against conviction is successful and even when a new trial has been ordered, the Court of Appeal has power to grant bail immediately.

Procedure for Obtaining Bail

As stated above, the Supreme Court always has the general power to entertain applications to grant, enlarge, vary or revoke bail in any circumstance, whether or not the person has already appeared before the Supreme Court.

To apply for bail in the Supreme Court, a number of forms must be completed. These are:

- an application for bail
- an affidavit in support of the application (a signed written statement that is sworn under oath) with any exhibits such as supporting letters attached to it with exhibit markings
- a draft order for bail.

At the time of the court appearance, applicants for bail should only talk about their application for bail and not try to argue whether they are guilty or not guilty of the charges against them. Applicants should try to address any concerns raised by the Crown about granting bail in their case. Applicants cannot be examined or cross-examined by the court or any other person about the offence itself at the bail application (s 15(1)(b) Bail Act).

Legal Aid Queensland and the Prisoners' Legal Service have produced a *Bail by Mail* self-help kit, which provides a guide to applying for bail or varying bail and completing bail forms.

Criteria for Granting Bail

When deciding whether to grant bail, a police officer or the court will consider whether there is an unacceptable risk (s 16 Bail Act) that the defendant would:

- fail to appear and surrender into custody
- commit another offence
- endanger the safety or welfare of the alleged victim or any members of the public
- interfere with witnesses or otherwise obstruct the course of justice.

In considering the question of whether there is an unacceptable risk with respect to any of the above matters, regard is had to all matters appearing to be relevant (s 16(2) Bail Act). These include:

- the nature and seriousness of the offence
- the character, antecedents, associations, home environment, employment and background of the defendant
- previous bail history (if any) of the defendant
- the strength of the evidence against the defendant

- if the defendant is an Aboriginal or Torres Strait Islander person, any submissions made by a representative of a community justice group in the defendant's community.

A defendant seeking release should set out in their affidavit any evidence that addresses these concerns. Evidence that the defendant has a job or a good employment record, has a permanent place to live and/or owns a house, has lived in the area for a long time, is married and has dependants, is undertaking studies or has convincing character referees will show the court that the defendant would be unlikely to abscond if released on bail.

While the courts will allow hearsay evidence, it is better to have direct affidavit material from the people who can give the relevant evidence. It is also permissible to obtain letters in support (e.g. from the person the defendant proposes to live with, from any person willing to act as surety expressing that willingness, from a potential employer or from a doctor attesting to a medical condition) and attach those letters as exhibits to the affidavit.

Bail Conditions

The conditions that may be imposed upon a person who has been granted bail are contained in s 11 of the Bail Act. The conditions imposed are not to be more onerous for the person granted bail than are necessary, having regard to the nature of the offence, the circumstances of the defendant and the public interest (s 11(1)).

The most frequent bail conditions include:

- reporting conditions, which require the defendant to report to a police station on certain days during specified hours
- conditions designed to prevent any contact between a defendant and the complainant (the alleged victim) or witnesses
- financial conditions, where the defendant may be required to deposit money or other security, or to find a surety or sureties who agree to forfeit a sum of money should the defendant fail to comply with the bail undertaking
- residential conditions, requiring the defendant to reside at a particular address or with a certain person
- curfews (for young offenders), which means they will not be permitted to be out after a certain time
- condition of non-consumption of alcohol or drugs
- condition of attendance at alcohol or drug rehabilitation programs, or participation in a program prescribed by the *Bail (Prescribed Programs) Regulation 2006* (Qld).

Sureties in Bail Applications

Sometimes a condition of bail requires someone other than the defendant to deposit or promise money that will be forfeited if the defendant breaches bail. Sureties must be 18 years of age or over and cannot have been convicted of a serious (indictable) offence (s 21 Bail Act). A surety will be required

to swear an affidavit of justification in the prescribed form (Form 11) to satisfy the court that they have sufficient means to pay if the defendant breaches the bail conditions. A surety will also need to provide proof of the source of the money or property. A person will not be accepted as a surety if it would be ruinous or injurious to that person or their family if the undertaking was forfeited (s 21(8) Bail Act).

It is an offence to indemnify a surety against any liability they may incur as a surety in relation to their obligations under the bail undertaking (s 26 Bail Act).

Breach of Bail Undertaking

If a defendant fails to appear before the court in accordance with their undertaking or otherwise does not comply with their bail conditions, then bail can be revoked and the defendant may also be charged with a breach of bail.

A breach of any of the conditions of a bail undertaking will result in a warrant being issued for the defendant's arrest. A breach of a bail condition may also lead to a conviction for a breach of bail (s 29 Bail Act). Defendants should be aware that a conviction for a breach of bail will work against them in being granted bail for any future offences. Judges or police authorised to grant bail would be much more reluctant to do so when defendants have previously shown they are not able to comply with bail conditions, particularly in circumstances where defendants have failed to appear before the court in accordance with a bail undertaking.

It is important for defendants to note that most bail undertakings usually include a condition not to commit further offences. Any offence, no matter how minor, can constitute a breach of bail. If a defendant commits an offence and thereby breaches the condition not to commit further offences, they are then liable to be charged with two offences:

- the offence that constitutes the breach of the bail undertaking
- the offence of breach of bail.

The most serious breach of a bail undertaking is the failure to appear before the court at the appointed time. Police have the power to arrest without warrant any defendant who has left the court precincts without entering into a required undertaking or fulfilling a necessary condition, who has failed to appear or broken any condition of bail, or who the police believe, on reasonable grounds, is likely to break the conditions for appearance or any other condition of the bail undertaking (s 367 PPR Act). Provision also exists under the Bail Act for a court to issue a warrant for arrest for those matters (ss 27A, 28, 28A).

Where a defendant on bail fails to appear before the court in accordance with the undertaking, the court may declare the undertaking to be forfeited (s 31 Bail Act). Where the undertaking contains the deposit of money or other security as a condition of bail, that deposit or other security may also be forfeited (s 32 Bail Act).

Defendants who have failed to appear and who are arrested or surrender themselves into custody are taken before a Magistrates Court and called upon to present a reasonable excuse (show cause) for their non-appearance. If they offer no excuse, they are then sentenced for the offence of failure to

appear in accordance with their undertaking (s 33 Bail Act). If the defendant advises the magistrate that they have an excuse, they will be remanded, either in custody or on bail, to the court that issued the warrant. The maximum penalty for the offence of failure to appear is a $4400 fine or two years imprisonment (s 29 Bail Act). If a court imposes a custodial sentence, the sentence is cumulative to any other custodial sentence that may be imposed on the defendant (s 33 Bail Act).

Appeal Against Refusal of Bail

Sections 19B to 19D of the Bail Act are concerned with the review of certain bail decisions. Under s 19B, either the Crown or the defendant may apply in certain circumstances for a review of a bail decision. A decision by a police officer or a justice who is not a magistrate may be reviewed by a magistrate. Any other decision may be reviewed by a single judge of the Supreme Court. The review mechanism does not apply to decisions of the Supreme Court, a decision about bail made under s 10(2) of the Bail Act (a bail decision during a trial) or a decision by a magistrate acting as a reviewing court. However, it is possible for the defendant or prosecution to review a magistrate's decision (s 19C Bail Act) with the leave (permission) of the Supreme Court. The review provisions do not limit a person's right to make successive bail applications, applications against bail conditions or applications for bail under s 19 of the Bail Act following a refusal of bail.

If bail is refused by a magistrate either before or after the committal of a defendant to the relevant court, an application may be made to a single judge of the Supreme Court for bail. Before making such an application, a person should obtain legal advice and assistance. Strictly speaking, this is not an appeal but a fresh application.

After committal proceedings, a defendant in custody may apply for bail to the District Court or the Supreme Court (the court to which they have been committed for trial). A special application for bail may be made to either court at any time.

In *R v Hughes* [1983] 1 Qd R 92, the Full Court of the Supreme Court reaffirmed the right of an accused person who was refused bail by one judge to apply to another judge. In practical terms, any application to a second or subsequent judge must show some material change in the circumstances surrounding the original application. The finality of a decision by a trial judge under s 10(2) of the Bail Act in relation to a grant of bail to a defendant for the duration of the trial should be noted.

Legal Notices

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