

The Shopfront

YOUTH LEGAL CENTRE

Bail

1 What is bail?

Bail is an agreement entered into by a person accused of a criminal offence. By signing a bail undertaking, the accused person is *agreeing to appear at court on a particular date*.

The bail undertaking 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 person's court case is finalised.

2 What is the difference between being on bail and having bail dispensed with?

A Court Attendance Notice ("CAN") is a document telling the accused he or she has to appear at court on a certain date.

There are 4 types of CAN: a "bail" CAN and a "no bail" CAN.

- (a) A "bail" CAN is generally used where the police wish to set some bail conditions or to refuse bail entirely. This type of CAN will usually be used for more serious offences, repeat offenders, or if the police are concerned the accused may not turn up at court or may interfere with witnesses.
- (b) A "no bail CAN" is usually issued for less serious offences, where the police do not have serious concerns about the person failing to appear or re-offending.
- (c) A "field CAN" is similar to a no bail CAN but is issued on the spot (like an infringement notice) without the need to go to the police station.
- (d) A "future CAN" is similar to a no bail CAN but is sent to the defendant on a later date, often several weeks after the alleged offence. This procedure used to be known as a summons.

With a no bail, future or field CAN, bail is dispensed with. This means that the accused does not have to sign a bail undertaking and does not have to abide by any conditions during the period leading up to the court date. A person on a no bail, future or field CAN cannot be charged with fail to appear or arrested for breach of bail (although matters can be dealt with in their absence, and warrants may be issued, if they do not turn up at court).

The law says that juveniles should be given no bail, future or field CANs unless the alleged offence is serious or violent, or there are real concerns that they are unlikely to appear at court.

3 Who makes the decision about bail?

With a no bail, future or field CAN, bail is dispensed with and the accused person is at liberty until their court date.

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

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 person *must be taken to court as soon as possible*. Sometimes this will be the same day, but usually 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 Saturdays and Sundays at Parramatta (for adults and children), as well as in some country areas.

4 How is the decision about bail made?

The *Bail Act* guides police and courts in their decisions. The police or the court must consider factors such as the likelihood of the accused person turning up at court, the risk of re-offending while on bail, and the risk of interference with victims or witnesses.

For some offences there is a presumption in favour of bail, meaning that bail should be granted unless there is a good reason not to. Some offences (usually very serious ones) carry a presumption against bail, which means that bail is very hard to get. For some offences, there is no presumption either way.

Amendments to the law in recent years have made bail harder and harder to get (eg “repeat offenders” don't have a presumption in favour of bail, even for relatively minor offences).

A further amendment was made to the Act in late 2007, preventing an accused person from making more than one bail application unless they were able to show the court that new facts or circumstances had arisen since the last bail application. This amendment (section 22A), together with tougher police enforcement of bail conditions, resulted in a large increase in the number of juveniles on remand.

Section 22A was amended in November 2009 to allow an accused person to make another bail application if “information relevant to the grant of bail is to be presented in the application that was not presented to the court in the previous application”. This means there does not have to be a change of circumstances, just new information to present to the court.

5 Bail conditions

The *Bail Act* says that bail should be *unconditional* unless conditions are necessary to help ensure the accused person appears at court, to protect victims or witnesses, to reduce the risk of re-offending, or for the promotion of effective law enforcement.

If conditions are imposed, they should not be more onerous (strict) than necessary. The more serious the alleged offence or the accused person's record, the stricter the bail conditions will be.

Common bail conditions include:

- reporting to the nearest police station (daily, weekly or on certain days of the week);
- residing at a certain address;
- attending counselling, rehab, courses etc;
- not contacting the victim of the offence or other witnesses;
- not hanging around with co-accuseds;
- keeping away from a certain area;
- curfew (eg not to leave home between 8pm and 8am, except with a parent); and
- 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).

6 What if the accused person wants to vary their 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; a person may be unable to report to the police station because they are entering a full-time rehabilitation program; a person may be unable to meet their curfew conditions because they have obtained a job in the evenings. Some young people have bail conditions which they are able to comply with but they are oppressive and out of proportion to the seriousness of the alleged offence.

A person who wants to *change the police station they report to* can sometimes go to the court where their case is listed and do this over the counter. 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 counter. You may have to come back a couple of days later to appear in front of the magistrate. It is much quicker and easier to get your bail varied if you have a lawyer to help you.

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. It's best to tell your lawyer a couple of days before, so they can ask the police if they agree to the variation.

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

For all but the most serious offences, the Local and Children's Courts have the power to *find an accused person guilty in their absence*. This often happens in the Local Court.

If a court finds the person guilty in their absence, they can *impose a fine* or *dismiss the charge without penalty*. If the court is thinking of imposing a different kind of penalty (eg, bond, community service, imprisonment) they must either *adjourn* the case or issue a *warrant* to get the accused person to court.

Instead of finding a person guilty in their absence the court may decide to *adjourn* the matter or issue a *warrant*. The Children's Court is more likely to adjourn the matter to give the young person another chance to turn up.

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

If the accused person knows in advance that they will be *unable to go to court* (eg, 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 person can't get to court on the day (eg, 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).

If the accused person has failed to appear at court, it's a good idea to ring up 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.

8 What happens if the accused person breaches their bail?

It is not an offence to breach bail conditions (other than by failing to appear at court). However, breach of bail can lead to *instant arrest* by the police. The accused person will then be taken to court, where the magistrate will decide whether to revoke the bail or let them out on bail again.

If an accused person has breached their bail conditions (eg, if their 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 pick the accused person up for breach of bail.

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 turn up to court. In most cases the surety or acceptable person will also be required to *deposit cash up front* or to *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.

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 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 person's bail conditions will require them to reside at a certain place (refuge, rehabilitation program, parent's house, etc). The court usually won't impose this condition unless satisfied that the accused person 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 have the accused person bailed to live at a particular address, it is usually preferable to have them bailed to *reside as approved* by Juvenile Justice, DOCS or Probation & Parole. This means the accused person doesn't have to apply for a bail variation every time they change address, as long as they keep their Probation or Juvenile Justice Officer informed.

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 person 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 to get legal advice so they can apply to vary the conditions.

The Shopfront Youth Legal Centre Updated March 2010

Shopfront Youth Legal Centre
356 Victoria Street
Darlinghurst NSW 2010
Tel: 02 9322 4808
Fax: 02 9331 3287
www.theshopfront.org
shopfront@freehills.com

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

This document was last updated in March 2010 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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