BENCHBOOK

MAGISTRATES COURT OF QUEENSLAND

BAIL

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CHAPTER 1 – INTRODUCTION TO BAIL

Bail in brief

A person charged with an offence may be released on bail under the provisions of the *Bail Act 1980*. This Act "*provides an exhaustive statement of the manner in which the discretion to grant bail is to be exercised*".[1] There is no common law right of a person charged with a criminal offence to be released on bail pending resolution of the charge.[2] However, the *Bail Act* is founded on concepts derived from the English common law which give effect to the presumption of innocence by minimising restrictions on the liberty of charged persons up until the time of conviction.

The term 'bail' is not defined in the *Bail Act 1980* but usually refers to the release from custody of a person subject to their giving an undertaking to return to court and to comply with other conditions.

After being arrested and charged a person may be granted bail by an authorised police officer if it is not practicable to take them promptly before a court. Once a charged person has been brought before a court it becomes the obligation of the court to consider bail.

Under the *Bail Act 1980*, a person awaiting resolution of a charge is prima facie entitled to be granted bail.[3] The court has a duty to grant bail unless satisfied there is an unacceptable risk the person will fail to appear or will offend while released on bail.[4]

In addition, for certain specified charges an adult defendant must "show cause" why detention is not justified.[5]

Failure to appear when required and failure to comply with bail conditions are criminal offences.[6]

The *Youth Justice Act 1992* contains the core provisions for the grant of bail to a child charged with an offence, but many *Bail Act 1980* provisions also apply in relation to a child.[7]

The *Bail Act 1980* applies not only to offences charged under State law but also to relevant Commonwealth offences.[8]

[1] *R v Hughes* [1983] 1 Qd R 92 at 96.
[2] *Chau v DPP* (1995) 37 NSWLR 639.
[3] *Bail Act 1980*, s.9.
[4] *Bail Act 1980*, s.16.
[5] *Bail Act* 1980, s.16(3).
[6] *Bail Act 1980*, ss.29, 33.
[7] Sections 7, 11, 16, and 16A of the *Bail Act* 1980 do not apply in relation to children.
[8] *Judiciary Act 1903* (Cth), s.68(1).

1.1 What is bail?

In Queensland, the law relating to bail is contained in the *Bail Act 1980*. This Act "*provides an exhaustive statement of the manner in which the discretion to grant bail is to be exercised*".[9]

Usually, a person obtains bail by entering into an "undertaking"[10] to appear at court at a later date when required. The undertaking may also contain other conditions including the provision of a surety; that is a promise by another person to pay a nominated sum of money if the defendant absconds.[11]

Magistrates and police may also grant cash bail to those charged with lesser non-indictable offences, where in lieu of entering into an undertaking the person makes a deposit of money as security they will appear in future.[12] If the person fails to appear as required, the money will be forfeited. Cash bail is frequently granted by watch-house managers in relation to minor non-indictable offences in expectation that the defendant will fail to appear and therefore forfeit bail.

1.2 Who has the power to grant bail?

The *Bail Act 1980* empowers each of the following to grant bail although the scope of the power given to each differs as between them:

- an Officer-In-Charge of a police station or police establishment or a watch-house manager;[13]
- a Magistrates Court;[14]
- the District Court;[15]
- the Supreme Court or a judge of the Supreme Court;[16] and
- the Court of Appeal.[17]

1.3 Who may be given bail?

An Officer-In-Charge of a police station or a watch-house manager may grant bail to a person in their custody after arrest in connection with an offence or under a court issued warrant[18] if they are satisfied it is not practicable to bring the person before a court promptly.[19]

Section 8 of the *Bail Act 1980* provides that a court may grant bail to a person held in custody on a charge or in relation to an offence if:

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[9] *R v Hughes* [1983] 1 Qd R 92 at 96.
[10] *Bail Act 1980*, s.6 defines an undertaking as a promise in writing signed by the defendant and his surety.
[11] *Bail Act 1980*, ss.21 and 32A.
[12] *Bail Act 1980*, ss.14-14A.
[13] *Bail Act 1980*, s.7(1)(a).
[14] *Bail Act 1980*, s.8(1).
[15] *Bail Act 1980*, s.8(1).
[16] *Bail Act 1980*, ss.8(1) and 13.
[17] *Bail Act 1980*, ss.8(1) and 8(5).
[18] A warrant issued under the *Penalties and Sentences Act 1992*, s.33AC.
[19] *Bail Act 1980*, s.7.

- The person is awaiting a criminal proceeding to be held by that court in relation to that offence; or
- The court has adjourned the criminal proceeding; or
- The court has committed or remanded the person in the course of or in connection with a criminal proceeding to be held by that court or another court in relation to that offence.[20]

A Magistrates Court may also grant bail to a person awaiting an appeal to the District Court under s.222 of the *Justices Act 1886*.[21]

The Supreme Court has broader powers. The Supreme Court or a judge of the Supreme Court may grant bail to a person in custody on a charge or in connection with a criminal proceeding whether or not the person has appeared before the Supreme Court in connection with that charge or proceeding.[22]

A court's power to grant bail is accompanied by the power to enlarge, vary, or revoke bail previously granted.[23]

1.4 Alternatives to bail

Most persons arrested and charged will initially be granted police bail. For lesser offences this may be cash bail. However, there are other avenues available to police which do not require the grant of bail.

An alternative to arrest is to proceed by way of complaint and summons under the *Justices Act 1886*.[24] As the person is not taken into police custody there is no need to consider bail. Where a defendant charged by complaint and summons with a summary offence or an indictable offence capable of being dealt with summarily fails to appear as required the court may issue a warrant or hear and determine the matter in the defendant's absence.[25]

More frequently police will utilize the Notice to Appear process under the *Police Powers and Responsibilities Act 2000.*[26] This involves the police officer serving a person reasonably suspected of having committed an offence with a notice specifying the time and place they are required to appear in court. The Notice to Appear must state the offence alleged and is deemed to be a complaint under the *Justices Act 1886*.[27] The officer lodges a copy with the court. Issuing a Notice to Appear avoids the need to take the person into police custody and is more convenient than the complaint and summons process.

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[20] *Bail Act 1980*, s.8 and *R v Hughes* [1983] 1 Qd R 92 at 98 where it was held that the Supreme Court is included in the courts described in s.8.
[21] *Bail Act 1980*, s.8(a)(ia).
[22] *Bail Act 1980*, s.10(1).
[23] *Bail Act 1980*, ss.7(8), 8(1)(b) and 10(1).
[24] *Justices Act 1886*, ss.42-58.
[25] *Justices Act 1886*, ss.142 and 142A; *Justices Act 1886*, s.4, definition 'simple offence'; *Acts Interpretation Act 1954*, s.44.
[26] *Police Powers and Responsibilities Act 2000*, s.382-390.
[27] *Police Powers and Responsibilities Act 2000*, s.384(1)(a) and s.388(1).

An authorised police officer also has power to release into care without bail persons charged with drunkenness and to release without bail to attend drug diversion persons charged with minor drug offences.[28]

The Magistrates Court may release without bail persons charged with offences other than indictable or scheduled offences on condition they appear when required.[29]

1.5 Persons in custody

A bail application may be made to a court by a person held in police custody. Also, a person required to appear under a bail undertaking[30], a Notice to Appear or a complaint and summons will, upon presenting him or herself to the Magistrates Court, come within the custody of the court. It is then necessary for the court when adjourning the matter to consider whether the person should be released from custody.[31]

If the court declines to grant bail or otherwise release the person under the provisions of the *Bail Act 1980* the person must be remanded in custody.[32]

[28] *Bail Act 1980*, s.14(1B).
[29] *Bail Act 1980*, s.14A(1)(b).
[30] It is a standard condition of all undertakings for indictable offences that the defendant not depart from the court unless bail has been enlarged: *Bail Act 1980*, s.20(3)(a)(ii).
[31] The Magistrates Court may release a person on a bail undertaking, give cash bail or release them without bail under either ss.11A or 14A of the *Bail Act 1980*.
[32] *Bail Act 1980*, s.8(2).

CHAPTER 2 – MAGISTRATES COURT BAIL

Power to grant bail (*Bail Act 1980*, s.8)

A Magistrates Court has power to grant bail to a person in custody charged with an offence if:

- The person is awaiting a criminal proceeding in that court in relation to that offence; or
- The court has adjourned the criminal proceeding; or
- The court has committed or remanded the person in the course of or in connection with a criminal proceeding to be held by that or another court in relation to that offence; or
- The person is awaiting an appeal to the District Court under s.222 of the *Justices Act 1886.*[33]

Only the Supreme Court can grant bail where the punishment is mandatory life imprisonment or an indefinite sentence.[34]

Duty to grant bail (*Bail Act 1980*, s.9)

The court has an obligation, subject to the Act, to grant bail or enlarge bail where the person is before the court charged with an offence but has not been convicted.[35]

Bail can only be 'enlarged' in circumstances where bail has previously been granted.

When bail should be refused (*Bail Act 1980*, s.16(1))

The presumption in favour of granting bail in s.9 applies unless the court is satisfied:

(1) there is an **unacceptable risk** that the defendant if released would:
- fail to appear or surrender into custody;
- commit an offence;
- endanger the safety or welfare of a victim or anyone else;
- interfere with witnesses or obstruct the course of justice; or

(2) the defendant should remain in custody for his or her protection.[36]

Assessing unacceptable risk (*Bail Act 1980*, s.16(2))

The obligation in s.9 to grant bail requires (unless the defendant is in a 'show cause' situation) that bail be granted unless the court is positively satisfied there is an unacceptable risk.

[33] *Bail Act 1980*, s.8.
[34] *Bail Act 1980*, s.13. This includes the offence of murder (s.305 *Criminal Code*) and a repeat serious child sex offence (s.161E *Penalties and Sentences Act 1992*) and offences for which an indefinite sentence may be imposed.
[35] *Bail Act 1980*, s.9.
[36] *Bail Act 1980*, s.16(1).

The Act requires the court in assessing unacceptable risk to have regard to all relevant matters including:

- the nature and seriousness of the offence;
  the character, antecedents, associations, home environment, employment, and background of the defendant;
- the history of previous grants of bail to the defendant; and
- the strength of the evidence against the defendant.[37]
- if the defendant is an Aboriginal or Torres Strait Islander person – any submissions made by a representative of the community justice group in the defendant's community[38]
- if the defendant is charged with a domestic violence offence or an offence against the *Domestic and Family Violence Protection Act 2012,* s.77(2) – the risk of further domestic violence or associated domestic violence being committed by the defendant[39]
- any promotion by the defendant of terrorism[40]
- any association the defendant has or has had with (i) a terrorist organisation within the meaning of the *Criminal Code (Cwlth)* s.102.1(1) or (ii) a person who has promoted terrorism[41]

In assessing risk, the court is not permitted to have regard to the effect on risk of imposing a condition the defendant wear a tracking device.[42]

Procedure upon application for bail (*Bail Act 1980*, s.15)

Under s.15 of the *Bail Act 1980,* the ordinary rules as to the admissibility of evidence are relaxed for bail application proceedings.[43] A court is given a broad discretion under s.15 to receive evidence it considers credible or trustworthy.[44] The court can receive evidence of previous convictions, other charges, previous failures to appear and the circumstances of the offence charged.[45]

Importantly, the defendant cannot be examined or cross-examined as to the offence charged nor any inquiry made of him or her as to that offence.[46]

[37] *Bail Act 1980*, s.16(2).
[38] *Bail Act 1980,* s.16(2)(e) including for example, about (i) the defendant's relationship to the defendant's community; or (ii) any cultural considerations; or (iii) any considerations relating to programs and services in which the community justice group participates.
[39] *Bail Act 1980,* s.16(2)(f).
[40] *Bail Act 1980,* s.16(2)(g).
[41] *Bail Act 1980,* s.16(2)(h).
[42] *Bail Act 1980*, s.16(2A) .
[43] *Director of Public Prosecutions (Qld) v Filippa* [2005] 1 Qd R 587; [2004] QSC 470 at [5].
[44] *Bail Act 1980*, s.15(1)(e).
[45] *Bail Act 1980*, s.15(1)(c).
[46] *Bail Act 1980*, s.15(1)(b).

When a defendant must 'show cause' (*Bail Act 1980*, s.16(3))

A defendant charged with any of the following offences must 'show cause'[47]:

- an indictable offence alleged to have been committed while the defendant was at large, with or without bail, prior to trial for another indictable offence;[48]
- the offence of murder or a repeat serious child sex offence.[49] (Only a Supreme Court judge, or for a child a Childrens Court judge, may grant bail to a defendant falling in this category);
- an indictable offence alleged to have involved the use or threat to use by the defendant of a firearm, offensive weapon, or explosive substance;[50]
- an offence against the Bail Act;[51]
- an offence of contravening a control order under Part 9D (Serious and Organised Crime) of the *Penalties and Sentences Act 1992;*[52]
- an offence of making a threat to a law enforcement officer investigating a criminal organisation;[53]
- an offence of contravening a public safety order under the *Peace and Good Behaviour Act 1982;*[54]
- an offence of choking, suffocation, or strangulation in a domestic setting;[55]
- an offence punishable by at least seven years imprisonment if also a domestic violence offence;
- certain *Criminal Code offences* if the offence is also a domestic violence offence;[56]
- an offence of contravening a domestic violence order[57] if a specified circumstance applies.[58]

If a defendant charged with any of those offences fails to show cause as to why detention in custody is not justified the court must refuse to grant bail.

Onus of proof

Ordinarily the *court* has a duty to grant bail unless there is material positively satisfying the magistrate there is an unacceptable risk the defendant will fail to appear or will reoffend. The burden of proof is reversed if the defendant is charged with a 'show cause' offence. Once the defendant is in a show cause situation the onus falls on him or her to demonstrate why bail should be granted.

[47] *Bail Act 1980*, s.16(3).
[48] *Bail Act 1980*, s.16(3)(a).
[49] *Bail Act 1980*, s.16(3)(b); s.13; s.305 *Criminal Code*; s.161E *Penalties and Sentence Act 1992.*
[50] *Bail Act 1980*, s.16(3)(c).
[51] *Bail Act 1980*, s.16(3)(d).
[52] *Bail Act 1980*, s.16(3)(e); *Penalties and Sentences Act 1992*, s.161ZI.
[53] *Bail Act 1980*, s.16(3)(f); *Criminal Code,* s.359(2).
[54] *Bail Act 1980*, s.16(3)(e); *Peace and Good Behaviour Act 1982*, s.32.
[55] *Bail Act 1980*, ss.16(3)(g) and 16(7); *Criminal Code* s.315A.
[56] *Bail Act 1980*, ss.16(3)(g) and 16(7); *Criminal Code* ss.75, 328A, 355, 359E or 468.
[57] *Bail Act 1980*, ss.16(3)(g) and 16(7); *Domestic and Family Violence Protection Act 2012*, s.177(2).
[58] Specified circumstances: (a) Use, threatened use or attempted use of unlawful violence; (b) previous conviction for violence within five years; or (c) previous conviction under s.177(2) within second years.

Application for bail conducted remotely ((*Bail Act 1980,* s.15A and *Justices Act 1886,* ss. 23EC and 178C)

Section 15A of the *Bail Act 1980* and s.23EC of the *Justices Act 1886* in combination permit a bail application to be heard 'remotely' by audio or video link.

See Practice Direction No.3 of 2015 – Proceedings using video link facilities and audio link facilities.

2.1 Power of court to grant bail (*Bail Act 1980*, s.8)

The power of a court to grant or enlarge bail is limited to persons in custody in respect of an offence or alleged offence where the person is awaiting or part-heard in a criminal proceeding for that offence in that court.[59] The power of the Magistrates Court to grant bail also extends to persons committed or remanded in connection with a criminal proceeding to be held by another court[60] or awaiting an appeal to the District Court.[61]

Person in custody

For a person to be granted bail, they must be presently in custody. A person may be brought before the Magistrates Court in police custody. More often, persons before the court on criminal charges will appear under a bail undertaking [62], a Notice to Appear or a complaint and summons. Upon presenting themselves to the court, they fall within the custody of the court and are not free to leave. Where a charged person is in custody before the court, there is an obligation on the court to consider whether the person should be released from custody.[63] If the court declines to grant bail or otherwise release the person under the provisions of the *Bail Act 1980,* the person must be remanded in custody.[64]

Subject to provision to the contrary in the *Bail Act 1980* or other legislation, a court may enlarge bail in the absence of the defendant.[65]

Which court should consider application?

Bail applications will ordinarily be brought before and considered by the court with present jurisdiction to deal with the matter. That will be the Magistrates Court up until committal for trial and thereafter by the trial court, either the District or Supreme Court. Bail applications can also be brought before a judge of the Supreme Court at any time as that court has power to grant bail

[59] *Bail Act 1980*, s.8(1)(a)(i); The proceeding must fall within the jurisdiction of the court: *Re Grove's Application* [1973] Qd R 310.
[60] *Bail Act 1980*, s.8(1)(a)(iii).
[61] *Bail Act 1980*, s.8(1)(a)(ia).
[62] It is a standard condition of all undertakings for indictable offences that the defendant not depart from the court unless bail has been enlarged: *Bail Act 1980*, s.20(3)(a)(ii).
[63] The Magistrates Court may release a person on a bail undertaking, give cash bail or release them without bail under either s.11A or s.14A of the *Bail Act 1980*.
[64] *Bail Act 1980*, s.8(2).
[65] *Bail Act 1980*, s.8(3).

irrespective of which court is dealing with the criminal proceeding.[66] In addition, only the Supreme Court, or a Childrens Court judge for a child, can grant bail on a charge of murder or of a repeat serious child sex offence.[67]

Application after committal

Bail applications are often brought in the Magistrates Court in the period between committal for trial or sentence and commencement of the proceeding in the District or Supreme Court. Section 8(1) of the *Bail Act 1980* extends jurisdiction to a court that "*has committed … the person … in connection with a criminal proceeding to be held … by another court in relation to that offence; and … may enlarge, vary or revoke bail so granted*." The plain words of this provision empower the Magistrates Court to grant bail in the period after committal.[68] Such an application may be brought in the higher court but where a defendant chooses to bring the application before a Magistrates Court, the magistrate would usually not decline to exercise the jurisdiction granted by s.8(1) unless the Supreme or District Court has already commenced conduct of the proceeding. This may be taken to have occurred once the defendant has been arraigned upon the indictment,[69] but may also occur where the trial court entertains a pre-trial application (including a bail application) in exercise of its powers under s.590AA of the *Criminal Code*.

2.2 Duty of court to grant bail (*Bail Act 1980*, s.9)

A court is under a positive obligation to grant bail to a person in custody, subject to provision to the contrary in the *Bail Act 1980*.[70] This obligation applies to persons who have not been convicted.[71] The distinction reflects the principle that, until convicted, a person is presumed to be innocent.[72] The section does not extend to persons awaiting sentence or appeal following conviction.

Bail can only be 'enlarged' in circumstances where bail has previously been granted.

2.3 When bail should be refused (*Bail Act 1980*, s.16(1))

The duty to grant bail contained in s.9 is subject to the requirements of s.16 of the *Bail Act 1980*. Under s.16(1), a court must refuse to grant bail if satisfied:

> *"(a) that there is an unacceptable risk that the defendant if released on bail—*
> *(i) would fail to appear and surrender into custody; or*
> *(ii) would while released on bail—*
> *(A) commit an offence; or*

[66] *Bail Act 1980*, s.10(1).
[67] *Bail Act 1980*, s.13.
[68] So held in *CDPP v Templin* [2013] QMC 4 at [24]-[27]; This interpretation is consistent with the insertion of s.8(1)(a)(ia) in the *Bail Act 1980* in 2003, giving the Magistrates Court power to grant bail to persons awaiting an appeal to the District Court under s 222 of the *Justices Act 1886*.
[69] Under s.597C(3) of the *Criminal Code,* the trial is deemed to commence upon arraignment of the defendant.
[70] *Bail Act 1980*, s.9.
[71] *Bail Act 1980*, s.9.
[72] *Clumpoint v Director of Public Prosecutions (Qld)* [2005] QCA 43 at [31].

> *(B) endanger the safety or welfare of a person who is claimed to be a victim of the offence with which the defendant is charged or anyone else's safety or welfare; or*
> *(C) interfere with witnesses or otherwise obstruct the course of justice, whether for the defendant or anyone else; or*
> *(b) that the defendant should remain in custody for the defendant's own protection."*

The reference in s.16(1)(a)(ii)(B) to endangering the welfare of a person is not limited to natural persons and can extend to endangering the economic welfare of a corporation.

Section 16 does not apply to a child.[73] See instead the *Youth Justice Act 1992*, ss.48, 48AAA and 48AA.

2.4 Assessing unacceptable risk (*Bail Act 1980*, s.16(2))

In assessing unacceptable risk, the court must have regard to all relevant matters including, where relevant, the following matters listed in s.16(2):

> *"(a) the nature and seriousness of the offence;*
> *(b) the character, antecedents, associations, home environment, employment, and background of the defendant;*
> *(c) the history of any previous grants of bail to the defendant;*
> *(d) the strength of the evidence against the defendant;*
> *(e) if the defendant is an Aboriginal or Torres Strait Islander person—any submissions made by a representative of the community justice group in the defendant's community, including, for example, about—*
> *(i) the defendant's relationship to the defendant's community; or*
> *(ii) any cultural considerations; or*
> *(iii) any considerations relating to programs and services in which the community justice group participates;*
> *(f) if the defendant is charged with a domestic violence offence or an offence against the Domestic and Family Violence Protection Act 2012, section 177(2) - the risk of further domestic violence or associated domestic violence, under the Domestic and Family Violence Protection Act 2012, being committed by the defendant[74]."*

An exception is that the court may not have regard to the effect on risk of imposing a condition the defendant wear a tracking device.[75]

When assessing unacceptable risk, the following considerations described by Thomas J in *Williamson v Director of Public Prosecutions*[76] should be borne in mind:

> *"No grant of bail is risk-free. The grant of bail, however, is an important process in civilised societies which reject any general right of the executive to imprison a citizen upon mere*

[73] *Bail Act 1980*, s.16(1AA).
[74] Under s.15(1)(c), the court has power to receive and take into account evidence relating to the risk of further domestic violence.
[75] *Bail Act 1980*, s.16(2A).
[76] [2001] 1 Qd R 99, per Thomas J at [22].

> *allegation or without trial. It is a necessary part of such a system that some risks have to be taken in order to protect citizens in those respects."*

An assessment of risk under s.16 may consider not only the risk of reoffending but also the seriousness of the consequences if reoffending occurs.[77]

Assessment of risk involves a balancing exercise in the exercise of the discretion.

Section 16(2)(e) requires the court, when assessing risk in respect to an Indigenous defendant, to have regard to any submissions from a community justice group representative. In appropriate cases it would be desirable that the magistrate ensure a representative is available to provide that input.

2.5 Procedure upon application for bail (*Bail Act 1980*, s.15)

Under s.15 of the *Bail Act 1980*, the ordinary rules as to the admissibility of evidence are relaxed for bail application proceedings.[78] A court is given a broad discretion under s.15 to receive evidence it considers credible or trustworthy.[79] Matters agreed between the parties may be taken into account.[80] The court can receive evidence of previous convictions, other charges, previous failures to appear and the circumstances of the offence charged.[81] The court can also have regard to a previous finding of guilt, as a child, without a conviction being recorded.[82]

If the defendant is an Aboriginal or Torres Strait Islander person, the court may receive submissions from a representative of a Community Justice Group.[83]

NOTE - Importantly, the defendant cannot be examined or cross-examined as to the offence charged nor any inquiry made of him or her as to that offence.[84]

2.6 When a defendant must 'show cause' (*Bail Act 1980*, s.16(3))

A defendant charged with an offence listed in s.16(3) must be refused bail unless he or she shows cause why their detention in custody is not justified. This provision places the onus of proof on the defendant on the balance of probabilities and sets aside the presumption in favour of bail in s.9.

Section 16(3)(d) provides that in circumstances where a defendant is charged with an offence against the *Bail Act 1980* (for example, failing to appear in accordance with an undertaking pursuant to s.33), the defendant will be in a 'show cause' situation with respect to bail. Circumstances may arise where a defendant is brought before the court facing a charge of failing to appear in addition to further charges. If the defendant pleads to the failing to appear charge

[77] *Fountain v Director of Public Prosecutions* [2002] 1 Qd R 167 at 168-169.
[78] *Director of Public Prosecutions (Qld) v Filippa* [2005] 1 Qd R 587; [2004] QSC 470 at [5].
[79] *Bail Act 1980*, s.15(1)(e).
[80] *Bail Act 1980*, s.15(1)(e).
[81] *Bail Act 1980*, s.15(1)(d).
[82] *Bail Act 1980*, s.19A.
[83] *Bail Act 1980*, s.15(1)(f).
[84] *Bail Act 1980*, s.15(1)(b).

and is sentenced, the defendant cannot be said to be 'charged' with an offence against the *Bail Act 1980.* Accordingly, depending on the nature of the remaining charges, the defendant may no longer be in a show cause position with respect to bail. However, if a bail application is subsequently made, the Magistrate may take into account the defendant's conviction for failing to appear in accordance with an undertaking.

When a defendant is in a show cause situation, if the Crown case is strong, the application must be 'somewhat special', 'abnormal' or of an 'extraordinary nature' to discharge the onus.[85]

The magistrate is obliged, in exercising the discretion, *'to balance competing considerations and to weigh the relative importance which the different factors bear in the context of the decision which needs to be made. That exercise of discretion is not an empirical exercise; there are no bright lines drawn to determine conclusively when on important factor outweighs another'*. [86]

A magistrate ***must*** consider the factors in s.16(2) regarding the existence of risk that may or may not justify continued detention. Failure to do so will result in appealable error.[87] Section 16(2) factors are as follows and must be considered:

- the nature and seriousness of the offence (s.16(2)(a));
- the character, antecedents, associations, home environment, employment, and background of the defendant (s.16(2)(b));
- the history of any previous grants of bail to the defendant (s.16(2)(c));
- the strength of the evidence against the defendant (s.16(2)(d));
- if the defendant is an Aboriginal or Torres Strait Islander person – any submissions made by a representative of the community justice group in the defendant's community, including for example, about –
    - the defendant's relationship to the defendant's community;
    - any cultural considerations; or
    - any considerations relating to programs and services in which the community justice group participates. (s.16(2)(e));
- if the defendant is charged with a domestic violence offence or an offence against the *Domestic and Family Violence Protection Act 2012*, s.177(2) – the risk of further domestic violence or associated domestic violence, under the *Domestic and Family Violence Protection Act 2012* being committed by the defendant.

A magistrate should consider the 'important factors' concerning the risk of flight, interference with witnesses and further offending in determining whether or not the defendant is able to discharge the onus and show cause.[88]

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[85] *R v Iskandar* (2001) 120 A Crim R 302 at 305 [14] per Sperling J, approved by P Lyons J in *Turbill* and cited by Chesterman JA in *Sica v DPP* [2010] QCA 18 at [54] referring to the abnormal or extraordinary nature of the grant of bail in cases to which s.16(3) applies.

[86] *Lacey v DPP* [2007] QCA 413 at [13].

[87] In *Sica v DPP* [2010] QCA 18, the Court of Appeal found error by the primary judge who refused bail in a show cause situation (involving charges of murder), by not specifically referring to the $900,000 surety offered by the defendant's parents, the defendant's age and antecedents, and personal circumstances. The Court of Appeal stated: *'the fact that the primary judge did not expressly mention these factors does not, of course, mean they were overlooked, but it is surprising that if taken into consideration they were not mentioned. A failure to consider them would amount to an error of fact as described in House.'*

[88] *Lacey v DPP* [2007] QCA 413 per Chesterman JA at [17]; See also *Ex parte Taylor* [2009] QSC 131.

The circumstance concerning a lengthy detention prior to the trial date if bail is not granted was considered in *Lacey v DPP (Qld)*,[89] describing such as '*an important factor to consider when determining whether the appellants have shown cause under s.16(3)*'.[90]

The court noted that where the time in custody on remand is likely to exceed the custodial sentence post-conviction, the relative importance of time may outweigh the other relevant factors. However, the Court in *Lacey* indicated that *'s.16(3) of the Bail Act cannot be read as if its operation was conditioned by guarantee of a trial within a given timeframe'*.

That approach was endorsed by Chesterman JA in the Court of Appeal in *Keys v Director of Public Prosecutions* [91] stating with respect to the length of time that might pass before the appellant is tried: '*This is always an important factor as is recognised by this Court in Lacey but it is not a factor which outweighs all others as that authority explains'*.[92]

The strength of the Crown case (*Bail Act 1980*, s.16(2)(d)) will be the prime, but not the exclusive consideration.[93] If the Crown case is strong *'[c]ountervailing circumstances common to applications for bail in the generality are to be accorded less weight than in the ordinary case'*.[94] But s.16(2) does not require the court to take into account the strength of the Crown case in circumstances where the strength of the case is difficult to determine. Rather, as Chesterman JA indicated in *Sica v DPP*,[95] "*It requires only that, to the extent the strength of the case is apparent, it must be taken into account*".

A magistrate should consider whether or not any risk associated with a grant of bail can be cured by the imposition of **special conditions**. [See Chapter Three – Conditions of Bail].

A magistrate must conclude either that the defendant has or has not shown cause why their detention in custody is not justified. If the defendant has shown cause and the defendant is released on bail, the court *must* include a statement of reasons for granting bail.

A 'show cause' situation arises under s.16(3)(c) where a defendant is charged with an indictable offence "*in the course of committing which the defendant is alleged to have used*" an offensive weapon. It was held in *Williamson v Director of Public Prosecutions*[96] that the section applied to a defendant who was alleged to be a party under ss.7 or 8 of the *Criminal Code* although he did not personally use the weapon.[97]

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[89] [2007] QCA 413 at [14].
[90] Thomas JA in *Williamson v DPP* [1999] QCA 356 at [22] stated: *'The length of incarceration before trial is an important factor when a defendant attempts, as the appellant must, to show that his detention in custody is not justified'*. See also Sperling J in *R v Cain (No 1)* (2001) 121 A Crim R 365 at 367 and Jerrard JA in *DPP v Bakir* [2006] QCA 562 concerning the need to balance civil rights in the detention of persons who have not been convicted, with civil responsibility.
[91] *Keys v Director of Public Prosecutions (Qld)* [2009] QCA 220.
[92] See also Thomas JA in *Williamson v DPP* [2001] 1 Qd R 99 at 104 [23].
[93] *Re Turbill* [2009] QSC 197 and Sperling J in *R v Iskandar* (2001) 120 A Crim R 302 at 305 [14].
[94] Sperling J in *R v Iskander* (2001) 120 A Crim R 302 at 305 [14]; cited *Sica v DPP (Qld)* [2010] QCA 18 at [53]-[54].
[95] [2010] QCA 18 at [51].
[96] [1999] QCA 356.
[97] [2001] 1 Qd R 99, per Thomas J at [14]-[16].

A defendant who is charged with committing a Queensland offence while on bail for an indictable offence in another Australian jurisdiction will be required to show cause under s.16(3)(a).[98] The *Acts Interpretation Act 1954* defines an "indictable offence" as including "*…an act or omission committed outside Queensland that would be an indictable offence if it were committed in Queensland*."[99]

2.7 Comprehensive table of 'show cause' provisions in *Bail Act 1980*, s.16(3)

Legislative basis	Circumstance of offence charged
s.16(3)(a)	Where the defendant is charged with an indictable offence that is alleged to have been committed while the defendant was at large with or without bail between the date of the defendant's apprehension and the date of the defendant's committal for trial or while awaiting trial for another indictable offence.
s.16(3)(b)	Where the defendant is charged with an offence to which s.13 applies (murder of a repeat serious child sex offence). Only the Supreme Court may grant bail to defendants falling in this category, see 20.1-20.2.
s.16(3)(c)	Where the defendant is charged with an indictable offence in the course of committing which the defendant is alleged to have used or threatened to use a firearm, offensive weapon, or explosive substance.
s.16(3)(d)	Where the defendant is charged with an offence against the *Bail Act 1980;*
s.16(3)(e)	Where the defendant is charged with an offence against the *Penalties and Sentences Act 1992,* s.161ZI (Contravention of a Control Order) or the *Peace and Good Behaviour Act 1982,* s.32 (Contravention of a Public Safety Order);
s.16(3)(f)	Where the defendant is charged with an offence against the *Criminal Code*, s.359 (threats) with a circumstance of aggravation as mentioned in s.359(2) (threat made to a law enforcement officer or person assisting a law enforcement officer, when or because the officer is investigating the activities of a criminal organisation);
s.16(3)(g)	Where the defendant is charged with a '*relevant offence'* as defined in s.16(7)[100] as: (a) An offence against the *Criminal Code,* s.315A (Choking, suffocation, or strangulation in a domestic setting); (b) An offence punishable by a maximum penalty of at least seven years imprisonment if the offence is also a domestic violence offence (as defined in the *Criminal Code*, s.1);[101]

[98] *Re Kelly* [2015] QSC 299 at [7]-[10].
[99] *Acts Interpretation Act 1954*, Schedule 1.
[100] Section 16(7) was inserted into the Bail Act as a consequence of the *Bail (Domestic Violence) and Another Act Amendment Act 2017* and came into force on 30 March 2017.
[101] Section 1 of the *Criminal Code* defines 'domestic violence offence' to mean 'an offence against an Act, other than the *Domestic and Family Violence Protection Act 2012*, committed by a person where the act done, or omission made, which constitutes the offence is also: a) domestic violence or associated domestic violence, under the

	(c) An offence against the *Criminal Code,* s.75 (threatening violence), s.328A (female genital mutilation), s.355 (deprivation of liberty), s.359E (stalking) or s.468 (injuring animals) if the offence is also a domestic violence offence (defined the *Criminal Code ,* s.1);[102] (d) An offence against the *Domestic and Family Violence Protection Act 2012*, s.177(2) (Contravention of a Domestic Violence Order) if: i) The offence involved the use, threatened use, or attempted use of unlawful violence to person or property; or ii) The defendant, within 5 years before the commission of the offence, was convicted of another offence involving the use, threatened use or attempted use of unlawful violence to person or property; or iii) The defendant, within two years before the commission of the offence, was convicted of another offence against the *Domestic and Family Violence Protection Act 2012*, s.177(2).

2.8 Applications for bail conducted remotely (*Bail Act 1980,* s.15A and *Justices Act 1886,* ss. 23EC and 178C)

Section 15A of the *Bail Act 1980* permits a court in a different locality to hear a bail proceeding in substitution for the court which has jurisdiction to hear that proceeding if the first court has been nominated for the purpose by practice direction.

A Magistrates Court practice direction issued in accordance with s.15A nominates, for designated locations, alternative courts to hear proceedings by video link or audio link. See Practice Direction No.3 of 2015 – Proceedings using video link facilities and audio link facilities.

Section 23EC of the *Justices Act 1886* provides that where a Magistrate has jurisdiction to hear a proceeding and the court is authorised to conduct the proceeding using video link facilities or audio link facilities (e.g. authorised under s.178C), and a practice direction has been issued by the Chief Magistrate providing for the proceeding to be conducted by an alternative court (in a different locality jurisdiction) by video or audio link facilities, the alternative court may conduct the proceeding.

See Practice Direction No.3 of 2015 – Proceedings using video link facilities and audio link facilities.

Section 178C of the *Justices Act 1886* allows a court with jurisdiction to hear a criminal proceeding (including a bail proceeding) to hear the matter by video or audio link if the defendant is in prison or in another location but represented by a lawyer. The section provides that where a defendant is in custody and is required or entitled to be present before a Magistrates Court for a proceeding relating to the person's bail, and where the prison has audio or video link facilities, the proceeding

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Domestic and Family Violence Protection Act 2012, committed by the person, or; b) a contravention of the *Domestic and Family Violence Protection Act 2012*, s.177(2). Be aware that where the person is charged with contravention of s. 177(2) but no other offence, that offence will not be a "domestic violence offence" within the meaning of s. 1 of the *Criminal Code*: *Queensland Police Service v JSB* [2018] QDC 120 at [38]-[40].

[102] *Bail Act 1980*, s.16(7)(c).

must be conducted using the video link facilities, unless the primary court, in the interests of justice, otherwise orders.

Section 178C of the *Justices Act 1886* also provides that where the defendant is required or entitled to be present before a Magistrates Court for a proceeding relating to the person's bail, but who is not held in custody but who is represented by a lawyer and present at another place that the presiding magistrate considers suitable for the conduct of the proceeding and where video or audio link facilities are available, the primary court may, in the interests of justice, order the proceedings to be conducted by video or audio link.

Accordingly, in appropriate circumstances, a court with jurisdiction may be constituted in one place and the defendant may appear by video or telephone from outside that court's district. Furthermore, if a practice direction so provides, an alternative court lacking locality jurisdiction may hear a proceeding by video or telephone in place of the court with jurisdiction to hear the matter.

CHAPTER 3 – CONDITIONS OF BAIL

Unnecessarily onerous conditions prohibited (*Bail Act 1980*, s.11(1))

Section 11(1) of the *Bail Act 1980* provides that the court shall not impose conditions that are more onerous for the defendant than the court considers are necessary having regard to the nature of the offence, the circumstances of the defendant and the public interest.

Court is required to consider conditions for release on bail in particular sequence (*Bail Act 1980*, s.11(1))

Section 11(1) provides that a court shall consider the conditions for the release of a person on bail upon their own undertaking, in the following sequence:

(a) without sureties and without deposit of money or other security;
(b) with a deposit of money or other security of stated value;
(c) with a surety or sureties of stated value;
(d) with a deposit of money or other security of stated value and a surety or sureties of stated value.

Mandatory conditions of undertaking relate to the following categories of bail

1) Bail pending the examination of witnesses before a magistrate or Childrens Court or any justice or justices conducting an examination of witnesses in relation to an indictable offence (s.20(3));
2) Bail following committal for trial (s.20(3A));
3) Bail after defendant committed for trial or when pending appeal against conviction and or sentence (s.20(2);
4) Bail in circumstances not provided for by ss.20(3), (3A) or (3B) - (s.20(3C));
5) Bail subject to a passport surrender condition (s.20(3D) and s.11AA).

Discretionary special conditions (*Bail Act 1980*, s.11(2))

A bail undertaking may contain 'special conditions' but *only if* the court considers that such conditions are necessary to:

(a) ensure a defendant appears in accordance with the undertaking and surrenders into custody; or
(b) ensure a defendant on bail does not
    (i) commit an offence; or
    (ii) endanger the safety or welfare of members of the public; or
    (iii) interfere with witnesses or otherwise obstruct the course of justice.

Special conditions must not be more onerous than necessary having regard to the nature of the offence, the circumstances of the defendant and the public interest (s.11(5)).

In considering whether to impose special conditions under s.11(2), s.11(3A) requires the court or police officer to consider the effect any condition would have the defendant's ability to carry out responsibilities for:

(a) a person with whom the defendant is in a family relationship and for whom the defendant is the primary caregiver; or
(b) a person with whom the defendant is in an informal care relationship; or
(c) if the defendant is pregnant – the child of the pregnancy.

Discretionary special conditions provided for in the *Bail Act 1980* include:

1) Licensed premises (ss.11(3), 11(4AA(b)) and 11(4);
2) Passport surrender (s.11(4A));
3) Examination of defendant's physical and or mental condition (s.11(6));
4) Wearing of a tracking device (ss.11(9B) and 11(9C));
5) Participation in rehabilitation, treatment, or other intervention course (ss.11(9) and 11(AB));
6) Bail granted by Supreme Court before or during committal proceedings (s.20(3B)).

Standardised bail conditions

For Standardised Bail Conditions - see Annexure A.

Special conditions involving a surety

Prior to accepting a surety as a condition of bail, the justice:

- shall require an Affidavit of Justification in the approved form (Form 11) from the proposed surety (s.21(4));
- must be satisfied of the pre-conditions set out in s.21(1); and
- shall have regard to the matters set out in s.21(3);
- must be satisfied as to the sufficiency of means of any proposed surety.

Discharge from liability of a surety with respect to bail undertaking (*Bail Act 1980*, ss.23 and 24)

Section 23 provides that at any time prior to a condition of an undertaking being broken or the defendant's arrest pursuant to s.367 of the *Police Powers and Responsibilities Act 2000* (relating to failure to comply with an undertaking), a surety may apply to the court before which the defendant is required to appear in accordance with an undertaking, for discharge from liability with respect to the undertaking.

Upon such application, s.23(2) provides that a court may make *'such order as it thinks fit, including an order that the surety be discharged from liability with respect to the undertaking'*.

3.1 Unnecessarily onerous conditions prohibited (*Bail Act 1980*, s.11(1))

Section 11(1) provides that any conditions shall not be more onerous for the person than those that in the opinion of the court or police officer are necessary having regard to:

a) the nature of the offence,
b) the circumstances of the defendant; and
c) the public interest.

In *Clumpoint v Director of Public Prosecutions (Qld)*[103], a condition requiring the defendant's banishment from Palm Island following riots, whilst directly related to the nature of the offence, with the passage of time and in light of the defendant's personal circumstances and taking account of the public interest, was considered by the Court of Appeal to be *'more onerous than necessary'*, stating:

> *'… it deprives him of the companionship and support of his wife, his ability to be a father to his children, his employment and financial independence and the right to live in his own home which he has built in his chosen community. Apart from actual imprisonment, it is difficult to imagine a more onerous bail condition.'*

Section 11 does not apply to a child. [104] Instead see *Youth Justice Act 1992*, s.52A.

3.2 The court is required to consider conditions for release on bail in particular sequence (*Bail Act 1980*, s.11(1))

Section 11(1) provides that a court shall consider the conditions for the release of a person on bail in the following sequence:

(a) upon own undertaking without sureties and without deposit of money or other security;
(b) upon own undertaking with a deposit of money or other security of stated value;
(c) upon own undertaking with a surety or sureties of stated value;
(d) upon own undertaking with a deposit of money or other security of stated value and a surety or sureties of stated value.

3.3 Mandatory conditions of an undertaking (*Bail Act 1980*, s.20)

Section 20 of the *Bail Act 1980* provides that, with the exception of s.14 and s.14A (cash bail – see Chapter 10), all defendants granted bail ***must*** enter into an undertaking in the approved form.[105] **Form 7** - *Undertaking as to Bail* is used for this purpose.

An ***undertaking*** is defined in s.6 of the Act to mean: *a promise in writing with respect to bail signed by a defendant or by a defendant and the defendant's surety or sureties that the defendant will appear at a hearing or an adjourned hearing or upon the defendant's trial or an appeal and*

[103] [2005] QCA 43 at [31].
[104] *Bail Act 1980*, s.11(1AA).
[105] *Bail Act 1980*, s.20(1) – See **Form 7** and **Form 10** at 3.1.8 below.

surrender into custody and comply with such other conditions as are imposed for the defendant's release on bail.

Accordingly, all bail undertakings must include the following mandatory conditions:

- to appear and surrender into custody of the relevant court at a hearing or an adjoined hearing or trial or appeal; and
- to comply with such other conditions as are imposed.

Form 7 includes an additional condition that the defendant '*must not depart from the Court unless bail is enlarged*'.

The nature of any additional mandated conditions of any bail undertaking will vary depending on the defendant's circumstances.

The *Bail Act 1980* sets out mandated conditions that will be applicable in particular circumstances as follows:

TABLE 3.3.1: Bail pending examination of witnesses before a Magistrate or Childrens Court of any justice or justices conducting an examination of witnesses in relation to an indictable offence

Section	Circumstances	Mandated condition
20(3)	When a defendant is granted bail requiring attendance before a Magistrates Court, Childrens Court or any justice or justices conducting an examination of witnesses in relation to an indictable offence.	The undertaking *must* contain conditions: (i) that the defendant must surrender into custody as required; (ii) that the defendant must not depart from the court unless the bail is enlarged; (iii) whether or not the defendant is represented, that the defendant must obey the directions of the court in relation to any further appearance, whether the directions are given to the defendant personally or to the defendant's lawyer; and (iv) such further conditions as are imposed under ss.11(2, (3), (6) or (9) or 11AB of the *Bail Act 1980*, or the *Youth Justice Act 1992,* s.52A. **Note -** Section 20(3AA) provides that despite subsection (3), the defendant need not surrender into custody or appear personally if the defendant is represented by a lawyer unless: (a) the court directs otherwise; or (b) a charge is being heard and determined, an examination of a witness is being conducted or a penalty is being imposed.

TABLE 3.3.2: Bail following being committed for trial

Section	Circumstances	Mandated condition
20(3A)	When a defendant has been granted bail following being committed for trial.	The undertaking *shall be* subject to conditions that the defendant: i. shall appear or be represented before the court to which the defendant is committed for trial, at a time and in accordance with a notice given pursuant to s.27; and ii. if the notice states that it is intended to ask the court to proceed with the trial at the time stated in the notice, shall surrender into custody, and not depart from the court unless the bail is enlarged; and iii. shall obey the directions of the court, whether given to the defendant personally or to the defendant's lawyer, with respect to any further appearance, and if directed to appear personally, shall surrender into custody, and not depart from the court unless the bail is enlarged; and iv. shall notify the director of public prosecutions or, as the case may be, deputy director of public prosecutions in writing forthwith of any change of address for service of notices or residential address other than that arising from the defendant's surrender into custody.

TABLE 3.3.3: Bail after defendant committed for trial or when pending appeal against conviction and or sentence

Section	Circumstances	Requirement of undertaking
20(2)	When a defendant is granted bail who has been: (a) committed for trial, or	The undertaking *must* contain: (i) the defendant's residential address; and (ii) an address for service of notices.[106]

[106] Section 20(2A) of *the Bail Act 1980* provides that 'for subsection (2) the defendant's address for service of notices may be the same as the defendant's residential address'. In *Turner v Commonwealth Director of Public Prosecutions* [2017] QCA 30, the undertaking in question did not contain a separate address for service of notices as required by s.20(2). McMurdo P (with whom Fraser JA and McMeekin J separately agreed) at [50] stated '*as s.20(2A) provides that a defendant's address for service of notices may be the same as the defendant's residential address, where, as here, only the residential address is included in the undertaking, that address must be taken to be the address for service of notices….*'. Additionally McMurdo P indicated that s.20(3A)(iii) does not require directions to be given to the defendant 'in person' because the word 'personally' as it appears for the first time in s.20(3A)(iii) requires personal service only in the sense of referring to an individual person in their own right, that is, '*distinguishing directions given to a defendant in their own right from those given to them through their lawyer or agent*'. Directions, referred to in s.20(3A)(iii) while required to be given to the defendant 'personally' did not require the defendant to be served 'in person'.

	(b) convicted and has appealed against the conviction and or sentence	

TABLE 3.3.4: Bail in circumstances not provided for by *Bail Act 1980*, ss.20(3), (3A) or (3B) – (s.20(3C))

Section	Circumstances	Mandated condition
20(3C)	When bail is granted in circumstances not provided for by ss.20(3), (3A) or (3B) (re s.13 circumstances - see below)	The undertaking *shall* be subject to: (a) the condition that the defendant notify the Director of Public Prosecutions or, as the case may be the Deputy Director of Public Prosecutions in writing forthwith of any changes of address for service of notices or residential address other than that arising from the defendant's surrender into custody; and (b) such further conditions as are imposed by the court granting bail.

TABLE 3.3.5: Bail subject to an undertaking containing a passport surrender condition

Section 11AA of the *Bail Act 1980* provides that where an undertaking includes a passport surrender condition, the court *must* order that the person be detained in custody until the passport is surrendered. Once the passport has been surrendered, pursuant to s.20(3D), the defendant is then released on an undertaking that *must* state the defendant has surrendered the defendant's current passport.

Section	Circumstances	Mandated conditions
20(3D)	When bail is granted subject to a 'passport surrender condition', (defined in s.20(10) to mean *'a special condition under s.11(2) that includes a requirement that the defendant surrender the defendant's current passport*'.)	The undertaking *must* include: i) a statement that the defendant has surrendered the defendant's current passport. Note of caution: The standardised bail conditions refer to a condition to surrender passport but do not specifically include a statement that the defendant has surrendered the defendant's current passport.

3.4 Discretionary special conditions of an undertaking (*Bail Act 1980*, s.11(2))

The *Bail Act 1980* provides the magistrate with very broad powers to impose special conditions, as the magistrate sees fit, provided the magistrate considers the imposition of the special condition or conditions is or are necessary to secure the defendant's future appearance, and to ensure the defendant, whilst on bail, does not commit an offence, endanger the safety or welfare of members of the public or interfere with witnesses or otherwise obstruct the course of justice.[107]

In considering whether to impose special conditions under s.11(2), s.11(3A) requires the court or police officer to consider the effect any condition would have the defendant's ability to carry out responsibilities for:

(a) a person with whom the defendant is in a family relationship and for whom the defendant is the primary caregiver; or
(b) a person with whom the defendant is in an informal care relationship; or
(c) if the defendant is pregnant – the child of the pregnancy.

Examples of responsibilities –

- *transporting a child to an appointment, childcare or school*
- *attending a medical appointment in relation to a pregnancy*
- *cultural obligations to a family member.*

'Family relationship' is defined in s.6 of the *Bail Act 1980* to have the meaning given by the *Domestic and Family Violence Protection Act 2012*, s.19.

'Informal care relationship' is defined in s.6 of the *Bail Act 1980* to have the meaning given by the *Domestic and Family Violence Protection Act 2012*, s.20.

3.4.1 Special conditions must not be more onerous than necessary

Any special conditions imposed pursuant to s.11(2) *must not be more onerous than are necessary* having regard to the nature of the offence, the circumstances of the defendant and the public interest.[108]

3.5 Discretionary special conditions specifically provided for in the *Bail Act 1980*

TABLE 3.5.1: Special Condition – Licensed premises (*Bail Act 1980*, ss. 11(3), 11(4AA(b)) and s.11(4))

Section	Circumstances	Discretionary special condition
11(3)	Entering, remaining, or attending licensed	The undertaking *may* be subject to special conditions prohibiting a person from doing or attempting:

[107] *Bail Act 1980*, s.11(2). See *DPP v Bakir* [2006] QCA 562 regarding special conditions imposed in circumstances involving charges including of attempted murder, to reduce the risk of interfering with witnesses to an acceptable level.
[108] *Bail Act 1980*, s.11(5).

	premises/event in pubic where **liquor** will be sold	(a) entering or remaining in a stated licensed premises or a stated class of licensed premises; (b) entering or remaining in, during stated hours, a stated area that is designated by its distance from, or location in relation to, the stated licensed premises or stated class or licensed premises mentioned in a special condition imposed under (a) above; (c) attending or remaining at a stated event, to be held in a public place, at which liquor will be sold for consumption. Examples are provided for in the legislation at s.11(3) as follows: • a special condition that prohibits a person from entering or remaining in, between the hours of 10pm and 6am, an area that is within 10 metres of stated licensed premises mentioned in a special condition imposed under paragraph (a); • a special condition that prohibits a person from entering or remaining in, between the hours of 11pm and 5am, a stated street, or an area abutting several stated streets, that is located near stated licensed premises mentioned in a special condition imposed under paragraph (a); • a special condition that prohibits a person from entering or remaining in, between the hours of 11pm and 5am, the safe night precinct under the *Liquor Act 1992* in which the stated licensed premises mentioned in a special condition imposed under paragraph (a) are located
11(4AA)(b)	To give practical effect to a 'special condition' imposed pursuant to s.11(3) (above)	The court may impose a condition that requires the person to report to a police station within 48 hours after bail is granted to be photographed under the *Police Powers and Responsibilities Act 2000,* Chapter 19, Part 5B.
11(4)	Where the offence for which bail is being considered involves:	The court or authorised police officer *must consider* the imposition of a special condition as set out in s.11(3) (see above).

	(a) the use, threatened use or attempted use of unlawful violence to another person or property; and (b) having regard to the evidence, the court or police officer is satisfied that the alleged offence was committed in a licensed premises or in a public place in the vicinity of licensed premises.	

TABLE 3.5.2: Special Condition – Passport surrender

Section	Circumstances	Discretionary special condition
11(4A)	Where the defendant is not an Australian citizen or permanent resident. (s.11(10) of the *Bail Act 1980* defines 'Australian citizen' and 'permanent resident')	The court or authorised police officer must consider the imposition of special conditions: (a) requiring the person to surrender the person's current passport; and (b) prohibiting the person from applying for a passport. (See mandatory conditions ss.203D and 11AA above that are triggered by a discretionary decision to impose a special condition requiring a passport surrender.)

TABLE 3.5.3: Special Condition – Examination of defendant's physical and or mental condition

Section	Circumstances	Discretionary special condition
11(6)	Where a court grants bail on an adjournment of a hearing or while the defendant is awaiting trial and considers that an examination of the defendant's physical or mental condition ought to be made	A special condition requiring examination of the defendant's physical or mental condition may be made, provided the examination is one that the defendant could lawfully be required to undergo if the defendant were remanded in custody (s.11(7)). The Court must also arrange for a statement containing the reasons for the investigation and the information before the Court about the defendant's physical or mental condition, to be given to the institution place or doctor (s.11(8)).

TABLE 3.5.4: Special Condition – Wearing of a tracking device

Section	Circumstances	Discretionary special condition
11(9B)	In accordance with s.11(2)	A special condition that the defendant wear a tracking device whilst released on bail.
11(9C)	Where a court imposes a special condition under s.11(9B)	The Court may impose any other condition the court considers necessary to facilitate the operation of the tracking device. 'Tracking device' is defined in s.11(10). Examples of such special conditions are set out in s.11(9C).

TABLE 3.5.5: Special Conditions – Participation in rehabilitation, treatment, or other intervention course

Section	Circumstances	Discretionary special condition
11(9)	In accordance with s.11(2)	A Magistrates Court may impose a condition that the defendant participate in a rehabilitation, treatment or other intervention program or course, having regard to: (a) the nature of the offence; (b) the circumstances of the defendant, including any benefit the defendant may derive from participation; (c) the public interest. ;[109]
11(AB)	If the defendant consents to completing a Drug and Alcohol Assessment Referral (DAAR) course	The court may impose a condition for the person's release that the person complete a DAAR course by a stated day.[110] In deciding whether to impose the condition, the Court must have regard to: (a) the nature of the offence; (b) the person's circumstances, including any benefit the person may derive by completing a DAAR course; and (c) the public interest.[111]

[109] A breach of the conditions imposed pursuant to s.11(9), or s.11(AB) is not an offence under s.29 – see *Bail Act 1980*, s.29(2)(c). Additionally, upon breach of s.11(9) or s.11(AB) the court has the power to vary or rescind the condition, but cannot revoke bail - *Bail Act 1980*, s.30(6) .
[110] *Bail Act 1980*, s.11(AB)(2).
[111] *Bail Act 1980*, s.11(AB)(3).

		The court cannot impose the condition if the defendant has: (a) completed two DAAR courses within the previous five years; or (b) is under 18 years old; or (c) s.11A applies (regarding a defendant who appears to have an impairment of mind).[112]

TABLE 3.5.6: Special Condition – Bail granted by Supreme Court before or during committal proceedings (*Bail Act 1980*, s.20(3B))

Section	Circumstances	Discretionary special condition
20(3B)	When bail is granted by the Supreme Court pursuant to s.13 of the Act, prior to the commencement of or during the examination of witnesses in relation to the indictable offence in respect of which the defendant has been so granted bail.	The undertaking *may* be subject to a condition that: (i) if the defendant is committed for trial the bail shall be enlarged (in which case the undertaking shall be subject to the mandatory conditions that apply to a defendant granted bail following committal, as set out in s.20(3A)(a)(see above)).

3.6 Standardised Bail Conditions

Standardised Bail Conditions are set out in Annexure A.

3.7 Special conditions involving a surety

3.7.1 Assessing the suitability of a surety

The *Bail Act 1980* requires that prior to accepting any person as a surety, the justice *must* be satisfied of the preconditions set out in s.21(1) as follows:

(a) has attained the age of 18 years old,
(b) has not have been convicted of an indictable offence,
(c) is not:
    i. an involuntary patient under the *Mental Health Act 2016*;
    ii. a forensic disability client within the meaning of the *Forensic Disability Act 2011*; or
    iii. a person for whom a guardian or administrator has been appointed under the *Guardian and Administration Act 2000*.

[112] *Bail Act 1980*, s.11(AB)(4).

(d) has not be an insolvent under administration,
(e) has not been, and is not likely to be charged; and
(f) is worth not less than the amount of bail in real or personal property.[113]

Section 21(3) provides that in considering the suitability of a person as a surety, regard ***shall*** be had to:

(a) the person's financial resources;
(b) the person's character and antecedents;
(c) the person's proximity to the defendant (whether by kinship, place of residence or otherwise).

Section 21(4) provides that *'before accepting a person as a surety, a justice shall satisfy himself or herself as to the sufficiency of means of the person and shall require that person to make before the justice an affidavit of justification in the approved form'* (see Form 11).

Section 21(5) provides that when considering a proposed surety's sufficiency of means, a Justice before whom an affidavit of justification is sworn, shall ask all questions that appear to the Justice to be necessary.

Section 21(6) provides that in order to satisfy a Justice of a surety's sufficiency of means, a proposed surety may deposit the amount of their surety in money with the proper officer of the court granting bail.

In circumstances where a surety produces to a justice any property (for example jewellery) or document (for example a Title Deed) in order to satisfy the justice that the surety owns or has an interest in any real or personal property, s.21(6) provides that the Justice shall record on the affidavit of justification, details of the property or document cited, and return the property or document to the proposed surety.

In accordance with s.21(8), a Justice may not accept a surety if it appears to the Justice before whom the affidavit of satisfaction is sworn, that it would be ruinous or injurious to the person or the person's family if the undertaking were forfeited.

Where it becomes apparent that a surety has sworn an affidavit of justification that is false in a material particular, the court may, pursuant to s.21(7), revoke the defendant's bail and issue a warrant for the defendant's arrest. (Section 29A of the *Bail Act 1980* sets out the procedure in respect of defendant's apprehension pursuant to s.21(7). In accordance with that provision, the defendant shall be brought forthwith before a Magistrates Court (or as the case may be, the Childrens Court)). The magistrate has the power pursuant to s.29A(2) to vary the defendant's bail.

3.7.2 Discharge from liability with respect to bail undertaking (*Bail Act 198*0, ss.23-25)

Section 23 provides that at any time prior to a condition of an undertaking being broken or the defendant's arrest pursuant to s.367 of the *Police Powers and Responsibilities Act 2000* (relating

[113] *Bail Act 1980*, s.21(1).

to failure to comply with an undertaking), a surety may apply to the court before which the defendant is required to appear in accordance with an undertaking, for discharge from liability with respect to the undertaking.

Upon such application, s.23(2) provides that a court may make *'such order as it thinks fit, including an order that the surety be discharged from liability with respect to the undertaking'*.[114]

Section 23(3) provides that where a court discharges a surety, the court may issue a warrant directing that the defendant be committed to prison until such time as a further surety or other security is provided or until such time as required to appear before the court as stated in the undertaking.[115] (See Form 14 – Warrant to Apprehend Defendant on Application by Surety for Discharge from Liability with Respect to Undertaking as to Bail)

Section 24 provides that a surety may bring a defendant to court at any time and that a court may then discharge the surety from liability with respect to a bail undertaking and call upon the defendant to provide a further surety.[116] If a defendant is unable to provide a further surety, the defendant may be committed to prison. The defendant may then apply for bail pursuant to s.24(3).

Section 25 provides that in the event of the death of a surety, the surety's estate is not subject to any liability with respect to the undertaking. A defendant in such circumstances may be required to provide a further surety.

3.7.3 Offence of indemnifying surety (*Bail Act 1980*, s.26)

It is an offence to indemnify or agree to indemnity any person with respect to liability that may be incurred as a surety.[117] Form 11 (Affidavit of Justification of a Surety) includes a statement confirming that the surety has not been indemnified as to bail.

See also Chapter Eight below regarding forfeiture of undertaking, deposit, or other security (including surety) upon non-attendance (ss.31, 32, 32B).

3.8 Forms

- Form 7 *'Undertaking as to Bail'* – s.20(1)
- Form 8 *'Notice to defendant of Undertaking as to Bail' - s.20(5)(b)*
- Form 9 *'Undertaking as to Bail Following Committal for Trial or for Sentence'* - s.20(2)
- Form 10 *'Undertaking as to bail following grant of bail by judge of the Supreme or District Court or Court of Appeal'* – s.20

Care should be taken to ensure all necessary additional mandatory conditions as required by s.20 and the circumstances of the application, as set out above, are included.

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[114] Relevant considerations will include whether the surety has taken all reasonable steps to ensure the attendance of the defendant and any financial hardship arising since the undertaking was given: *Director of Public Prosecutions (Cth) v Turner & Anor* [2016] QSC 107 [72]-[79].
[115] Discussed in *Ex Parte Doueihi* [1986] 2 Qd R 352 at 356 per Williams J.
[116] Discussed in *Ex Parte Doueihi* [1986] 2 Qd R 352 at 355 per Williams J.
[117] See *Ex Parte Doueihi* [1986] 2 Qd R 352 at 361 per Williams J.

CHAPTER 4 – VARIATION OR REVOCATION OF BAIL

Power to vary or revoke bail previously granted upon application by complainant, prosecutor, or Crown (s.30)

Upon application by the Crown, a prosecutor, or a complainant to revoke or vary bail:

- the court that granted bail,
- the court before which an indictment is presented; and
- the Supreme Court

are empowered by virtue of s.30 to vary or revoke bail, if the court is of the opinion that it is *necessary or desirable in the interest of justice to do so*.

Power to vary bail previously granted upon application by the defendant (s.19(1))

Upon application by the defendant to vary bail conditions, a magistrate should consider:

1. whether the conditions of bail imposed originally are still necessary to secure the defendant's compliance with the matters set out in ss.11(2)(a) and (b); and

2. whether those conditions at the time of the application to vary bail, are more onerous than necessary having regard to the nature of the offence, the defendant's circumstances, and the public interest.

Caution: A magistrate will fall into error if the magistrate approaches an application to vary bail by applying the test under s.16 as to whether there exists an unacceptable risk. A different test applies on an application to vary bail already granted to the defendant.

4.1 Exclusive jurisdiction of trial judge to enlarge, vary or revoke bail previously granted (*Bail Act 1980*, s.10)

By virtue of ss.10(2) and (3), a trial judge (in the District and Supreme Court) has exclusive jurisdiction to enlarge, vary or revoke bail, which is not reviewable once the proceeding has commenced.

In *R v Wren*,[118] the Court of Appeal noted that:

> '*Whilst at first glance ss.10(2) and 10(3) might seem limited to applications for bail in jury trials, upon analysis those subsections are of wide application and include a case such as the present where there has been a plea of guilty and an application is made for bail in the course of the sentencing procedure*'.

[118] [2000] 1 Qd R 577 at [3].

4.2 Application by complainant, prosecutor or person acting on behalf of Crown for variation or revocation of bail previously granted (*Bail Act 1980*, s.30)

Section 30 of the *Bail Act 1980* names the parties that may bring an application to vary or revoke bail previously granted. Judicial officers are not empowered by that section to vary or revoke bail.

Section 30(1) of the *Bail Act 1980* provides that:

> *Bail granted to a defendant on an undertaking may be varied or revoked, on the application of a complainant, prosecutor or person appearing on behalf of the Crown[119], by –*
>
> *(a) the court that granted bail; or*
> *(b) the court before which an indictment has been presented; or*
> *(c) the Supreme Court[120]*
>
> *if the court is of the opinion that it is necessary or desirable in the interests of justice to do so.*

Similarly, s.30(1A) provides that:

> *Bail granted to a defendant on an undertaking by a police officer authorised by this Act or the Youth Justice Act 1992 to grant bail, may be varied or revoked on application of the complainant, prosecutor or person appearing on behalf of the Crown, by:*
>
> *(a) If the defendant is required to appear before the Childrens Court - the Childrens Court; or*
> *(b) a Magistrates Court;*
>
> *if the court is of the opinion that it is necessary or desirable in the interests of justice to do so.*

The application may be made ex parte (s.30(2)) either:

(a) after notice of intention to make the application has been given to the defendant and the defendant's surety or sureties; or
(b) without giving notice pursuant to paragraph (a) if the defendant:
    i. has absconded or if the court is satisfied that the defendant is likely to abscond; or
    ii. has broken, or if the court is satisfied that the defendant is likely to break, a condition of the defendant's undertaking.

Section 30(2)(b)(ii) was considered in the case of *The Queen v Bellino*[121] where the Court of Appeal upheld the trial judge's decision to revoke the defendant's bail during the course of a trial. In that

[119] 'Crown' is not defined in the *Bail Act 1980* but in *Director of Public Prosecutions (Qld) v Foy* [2006] QSC 45, the Court held that '*Crown*' included the Director of Public Prosecutions.
[120] Section 10 provides that the Supreme Court may *'enlarge, vary or revoke bail granted to a person in or in connection with a criminal proceeding whether or not the person appeared before the Supreme Court in or in connection therewith'*.
[121] [1993] QCA 390.

case, the trial judge had concerns relating to the continuing disruption of the trial and the risk of the trial not being able to be completed in the event that bail was not revoked after the defendant failed to attend trial and then failed to sufficiently account for how he had occasioned a broken jaw during the course of the trial.

In circumstances where an application to revoke or vary bail is brought *ex parte* and without notice pursuant to s.30(2)(b), the court may:

a) order that notice of the application be given to the defendant and the defendant's surety/ies notifying that if the defendant fails to surrender into custody in accordance with the notice a warrant may issue for the apprehension of the defendant; or
(b) forthwith issue a warrant to apprehend the defendant and bring the defendant before the court to show cause why the defendant's bail should not be varied or revoked.[122]

Section 30(4) provides that if the defendant has been given notice pursuant to s.30(2)(a) or s.30(3)(a), and:

(a) fails to surrender into custody, the court may issue a warrant for the defendant's apprehension;[123]
(b) surrenders into custody and fails to satisfy the court that it is not necessary or desirable in the interest of justice that the defendant's bail be varied or revoked, the court may –
(i) vary the bail in such manner as it thinks fit; or
(ii) revoke the bail; or
(c) surrenders into custody and satisfies the court that it is not necessary or desirable in the interests of justice that the defendant's bail be varied or revoked the court may order that the defendant be released from custody on the defendant's original undertaking.

Section 30(5) provides that a surety/ies to whom notice has been given under s.30(2)(a) or s.30(3)(a), shall be entitled to appear at the hearing of the application and to give evidence. The court may, if it thinks fit, adjourn the hearing to allow the surety/sureties to do so.

Section 30(6) provides that if the only ground for making an application to vary or revoke is that he defendant has broken or is likely to break, a condition of the defendant's undertaking imposed under s.11(9) (participation in rehabilitation, treatment or other intervention program or course) or s.11AB (completion of DAAR course), the court may vary the defendant's bail, including by rescinding the condition imposed under ss.11(9) or 11AB but *may not revoke* the bail.

Section 30 appears in Part 4 of the *Bail Act 1980* and accordingly, proceedings pursuant to s.30 do not have the benefit of the relaxation of the procedural rules and admissibility of evidence as

[122] *Bail Act 1980*, s.30(3) and Form 19.
[123] Form 20.

a consequence of s.15 of the *Bail Act 1980* in respect of the release of persons on bail under Part 2 of the Act.[124]

4.2.1 Test to be applied for application to vary or revoke bail previously granted (*Bail Act 1980,* s.30)

In considering an application for variation or revocation of bail pursuant to s.30, the court must be satisfied, in accordance with the wording of s.30, that it is necessary or desirable in the interests of justice to do so.

There is an absence of authority as to what considerations should be taken into account under s.30 in determining if it be "necessary or desirable in the interests of justice" to vary or revoke bail. As a Crown application under s.30 seeks to vary bail previously granted, by analogy the reasoning adopted in *Clumpoint v Director of Public Prosecutions*[125] on an application by a defendant to vary bail would seem applicable. In that case it was held the focus should be on the adequacy of the conditions previously imposed and on ensuring the conditions are not more onerous than necessary. (See discussion in 4.3.1 below.)

An obiter comment by the Court of Appeal in *Clumpoint* assumed that a Crown application under s.30 would have to demonstrate materially changed circumstances.[126]

4.2.2 Forms

- Form 19 - Warrant to apprehend defendant on application for revocation or variation of bail (s.30(3))
- Form 20 - Warrant to apprehend defendant on application for revocation or variation of bail (s.30(4))

4.3 Application by a defendant for variation of bail previously granted (*Bail Act 1980*, s.19(1))

Section 19(1) provides:

> *A defendant held in custody in relation to an offence who has been refused bail or having been granted bail feels aggrieved by the amount fixed or any condition imposed for the defendant's release from custody may make application to a court empowered by section 8 to grant bail to the defendant for an order granting or varying bail.*[127]

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[124] Per Douglas J in *Director of Public Prosecutions (Qld) v Filippa* [2005] 1 Qd R 587: *'Section 15 relaxes the ordinary procedural rules and rules about the admissibility of evidence in respect of proceedings about the release of person under that part. That relaxation of the rule does not apply to an application to vary or revoke bail under s.30 of the Act which appears in Pt 4'*.

[125] *Clumpoint v DPP (Qld)* [2005] QCA 43 at [18].

[126] *Clumpoint v DPP (Qld)* [2005] QCA 43 at [32].

[127] *Bail Act 1980*, s.19(1). The common law right to successive bail applications was previously codified in Queensland in the form of s.555 of the *Criminal Code*. However, that codification was repealed by the *Bail Act 1980*. The common law right has been held to have survived the repeal of s.555 of the *Criminal Code* - see *R v Hughes* [1983] 1 Qd R 92 and *Ex Parte Edwards* [1989] 1 Qd R 139), particularly on the basis that s.10(2) and (3) state that a decision of a trial judge concerning bail is final, which suggests that outside the confines of a trial, the decision on bail is not final.

Pursuant to s.8, such courts include:

(i) a court, before which the person is awaiting a criminal proceeding;[128]
(ii) the Magistrates Court when the person is awaiting a s.222 appeal to the District Court;[129]
(iii) a court that has adjourned the criminal proceeding;[130] or
(iv) the court has committed or remanded the person in connection with a criminal proceeding to be held by that court or another court in relation to that offence.[131]

On an application under s.19(1), the court may grant bail, vary bail, or refuse the application.[132]

4.3.1 Two stage test to be applied upon application by defendant to vary bail previously granted

Section 8(1)(a) of the *Bail Act 1980* provides that a court may, subject to the provisions of the Act, *'enlarge, vary or revoke bail'* (s.8(1)(b)).

Section 9 of the *Bail Act 1980* emphasises the presumption of innocence by providing, subject to the other provisions of the Act, a presumption in favour of enlarging or varying bail already granted to the person.

Section 11 of the Act provides that a court *'shall not make the conditions for a grant of bail more onerous for the person than those that in the opinion of the court … are necessary having regard to the nature of the offence, the circumstances of the defendant and the public interest'*.

Accordingly, as a consequence of the operation of ss.8, 9 and 11 of the *Bail Act 1980*, where a defendant has previously been granted bail and an application is subsequently made by the defendant to vary the bail, a court should consider:

A) whether the conditions of bail imposed on the defendant are still necessary to secure the defendant's compliance with s.11(2)(a) and (b); and
B) whether those conditions are presently more onerous than necessary.

As the Court explained in *Clumpoint v Director of Public Prosecutions (Qld)*:[133]

> *'The learned primary judge did not approach the application to vary bail by considering s.9 and s.11 but instead considered whether he ought to refuse bail under s.16. This approach was wrong in law. Because Mr Clumpoint had already been granted bail the question was not whether bail ought to be refused under s.16 but whether the conditions of bail imposed*

[128] *Bail Act 1980*, s.8(1)(a)(i). In the case of an appeal pending before the Court of Appeal, s.8(5) of the *Bail Act 1980* provides that: *'The powers of the Court of Appeal with respect to bail may be exercised by a judge of the Supreme Court in the same manner as they may be exercised by the Court of Appeal, but, if the judge refuses an application with respect to bail, the person making the application may apply to the Court of Appeal and that court shall hear and determine the application.'*
[129] *Bail Act 1980*, s.8(1)(a)(ii).
[130] *Bail Act 1980*, s.8(1)(a)(iii).
[131] *Bail Act 1980*, s.8(1)(a)(iv).
[132] *Bail Act 1980*, s.19(2).
[133] [2005] QCA 43 at [18].

> *on [the defendant] when he was released on bail were still necessary to secure the defendant's compliance with the matters set out in s.11(2)(a) and (b) and whether those conditions at the time of the application to vary bail were by that time more onerous than necessary having regard to the nature of the offence, [the defendant's] circumstances and the public interest (s.11(2A)) [now s.11(5)].'*[134]

4.3.1.1 Stage One - Whether the conditions are still necessary to secure the defendant's compliance with *Bail Act 1980*, s.11(2)(a) and (b)

In accordance with s.11(2)(a) and (b), upon an application to vary bail, the court should consider whether the conditions are presently necessary to:

(a) ensure a defendant appears in accordance with the undertaking and surrenders into custody; or
(b) ensure a defendant on bail does not
  (iv) commit an offence; or
  (v) endanger the safety or welfare of members of the public; or
  (vi) interfere with witnesses or otherwise obstruct the course of justice.

4.3.1.2 Stage Two – Whether the conditions are presently more onerous than necessary (*Bail Act 1980*, s.11(5))

In accordance with s.11(5), the court should also consider whether the conditions are more onerous than necessary having regard to the nature of the offence, the circumstances of the defendant and the public interest.

In *Clumpoint v Director of Public Prosecutions (Qld),*[135] the defendant was granted conditional bail following being charged with offences relating to riots on Palm Island, including a condition that he not visit Palm Island. The defendant sought a variation to the bail conditions to permit him to return to his family and home on Palm Island which was refused by the magistrate. He then applied to a Supreme Court judge who similarly refused the application to vary. The defendant then appealed the decision of the Supreme Court judge to the Court of Appeal. The Court of Appeal held that the primary judge had been wrong to approach the application to vary bail by considering s.16 in the context of whether bail ought to be refused because of an unacceptable risk. This is because the defendant had been granted bail previously and, in those circumstances, the correct approach involved a consideration of the presumption in favour of bail in s.9 and the utility of the conditions imposed pursuant to s.11 (and not 'unacceptable risk' as per s.16).

The Court of Appeal concluded that in the present circumstances the conditions preventing the defendant from living on Palm Island were, at the time of the application, more onerous than necessary.

In *Commonwealth DPP v Groves*[136] the Commonwealth DPP sought a stay of a decision of a judge varying bail by removing a condition requiring the surrender of the defendant's passport. The Court of Appeal held the judge had correctly considered the flight risk in the context of '*the*

[134] *Clumpoint v Director of Public Prosecutions (Qld)* [2005] QCA 43 at [18].
[135] [2005] QCA 43.
[136] [2012] QCA 122.

onerousness of the existing conditions and whether they were necessary'. Holmes JA stated '*the question of whether the variation should be allowed inevitably turned on whether the existing conditions were rendered necessary by the risk of flight'*.[137]

In *Berg v DPP (Qld)*[138], the Court of Appeal upheld the decision of the primary judge refusing to vary a bail condition requiring once-weekly reporting notwithstanding that it was argued that the condition adversely affected the defendant's mental condition and was thereby more onerous than necessary. The Court of Appeal found that in the absence of medical evidence to support the contention, there had been no error in the primary judge's decision.

In *Crinis v Commissioner of Queensland Police Service*,[139] a condition had been imposed which had the effect of preventing the defendant from initiating civil proceedings against certain individuals. The Court of Appeal held this to be an extreme measure and varied the condition.

4.4 Deeming provisions relating to variation of bail previously granted

4.4.1 Varying bail when summary charge is transmitted from court of summary jurisdiction to another court (*Bail Act 1980*, s.34A)

Where a complaint or bench charge sheet is transmitted to a registrar of another court under s.652(4) of the *Criminal Code,* the summary bail is continued and is taken to have been granted by the receiving court on the conditions imposed by the court of summary jurisdiction, but is taken to be varied to require the defendant to appear before the receiving court for the hearing of the summary matters on the day set by the receiving court for hearing of the charge on indictment.

4.4.2 Varying bail when summary charge is transmitted from receiving court back to the court of summary jurisdiction (*Bail Act 1980*, s.34B)

Where summary matters are remitted back to a court of summary jurisdiction (after having been transmitted pursuant to s.34A), summary bail is taken to have been granted by the court exercising summary jurisdiction on the conditions that applied to it under s.34A, but varied to require the defendant to appear before the court of summary jurisdiction for the hearing of the summary charge on the day set by the receiving/higher court on the day it gives the direction remitting the summary matters (which must not be earlier than one month after the day it gives the direction and makes the order).

4.4.3 Varying bail on registry committal (*Bail Act 1980*, s.34BA)

Where a defendant on bail proceeds by way of registry committal pursuant to the *Justices Act 1886*, the bail is continued and is taken to have been granted by the receiving court on the same conditions that applied immediately before the registry committal but varied to require the defendant to appear before the receiving court as required by the receiving court (s.34BA(1)(2) and (3)).

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[137] At page 5.
[138] [2009] QCA 213.
[139] *Crinis v Commissioner of Queensland Police Service* [2018] QCA 150 at [23] – [26].

If at the registry committal stage, the clerk of the court amends the charges pursuant to s.115(6) of the *Justices Act 1886*, summary bail is taken to be granted for the charges on which the defendant is committed for trial or sentence under the registry committal (s.34BA(4)).

Section 34BA(5) states that an undertaking that includes any promise of a surety for the purposes of summary bail, is taken to have been given to the receiving court.

4.4.4 Varying bail for charge of an indictable offence referred to clerk of the court under *Justices Act 1886*, s.23EB to be managed by way of ex officio indictment

Where a defendant on bail proceeds by way of ex-officio indictment pursuant to s.23EB of the *Justices Act 1886*, the bail applying to the defendant in relation to the charge is continued and is taken to have been granted by the receiving court in which the indictment has or is to be presented, on the same conditions, except varied to require the defendant to appear before the receiving court as required by the receiving court (ss.34BB(1)(2) and (3)).

Section 34BB(4) states that where a matter proceeds by ex-officio indictment and the bail undertaking includes a promise of a surety, the promise is taken to have been given to the receiving court.

Section 34BB(5) provides that if the matter does not proceed by way of ex-officio indictment and the charge is referred back to the Magistrates Court and the ex-officio indictment has not been presented, then bail is taken to be varied to require the defendant to appear at the time and place advised by the clerk.

4.4.5 Continuation of undertaking and sureties where defendant arrested on another charge (*Bail Act 1980*, s.34)

If a defendant on bail is arrested on another charge, the undertaking, and sureties to which the bail relates continue to apply until the defendant is sentenced or discharged on the offence for which he or she has bail. [140] This does not prevent the person arrested on another charge being committed to prison or granted bail on that charge.[141]

[140] *Bail Act 1980*, s.34(1).
[141] *Bail Act 1980*, s.34(2).

CHAPTER 5 – YOUTH BAIL

Bail under the *Youth Justice Act 1992*

The *Youth Justice Act 1992* sets out the core provisions for the grant of bail to a child charged with an offence.[142] Subject to the *Youth Justice Act 1992*, the *Bail Act 1980* applies in relation to a child.[143]

The *Youth Justice Act 1992* provisions for youth bail differ in important respects to the *Bail Act 1980* provisions for adult bail. The Charter of Youth Justice Principles requires that a child should be detained in custody whether on arrest, remand, or sentence only as a last resort: see Principle 18. The provisions in ss.48, 48AAA and 48AA of the *Youth Justice Act 1992* relating to when the court or a police officer must release the child find no equivalent in the *Bail Act 1980* as it relates to adults.

Jurisdiction of the Childrens Court

Proceedings in respect of children charged with criminal offences are heard in the Childrens Court. A child must be brought before the Childrens Court within 24 hours of arrest or as soon as practicable on the next day the court can practicably be constituted.

Who is treated as a child?

A person who at the time of their alleged offending had not turned 18 will be dealt with under the youth justice system as a child. Therefore, a person who is alleged to have committed an offence as a child but has since become an adult must be treated as a child for the purposes of the *Youth Justice Act 1992.*[144]

Power of court regarding bail (*Youth Justice Act 1992*, s.48(1))

The *Youth Justice Act 1992* provisions apply if a court or police officer is deciding whether to release a child in custody in connection with a charge of an offence or keep the child in custody[145].

The court's power to release a child

The court has the power to release a child by:

a. granting or enlarging bail with or without conditions; or
b. releasing the child without bail.

A child can be released as a consequence of one of the following:

1. the duty to release where no statutory prohibition or unacceptable risk (*Youth Justice Act 1992* s.48(1)-(4):

[142] *Youth Justice Act 1992*, Part 5.
[143] *Youth Justice Act 1992*, s.47(1); Note that ss.7, 11, 16 and 16A of the *Bail Act 1980* do not apply to a child.
[144] *Youth Justice Act 1992*, ss.132-134.
[145] *Youth Justice Act 1992*, s.48(1).

i. by release on bail (s.8(1) *Bail Act 1980*), or
ii. by release without bail (s.55 *Youth Justice Act 199*2),

(in determining whether the circumstances point to an unacceptable risk, consider mandatory and discretionary factors as set out in *Youth Justice Act 1992,* s.48AA)

2. the exercise of a discretion to release despite there being an unacceptable risk (*Youth Justice Act 1992,* s.48AAA).
3. despite the child having been found guilty of a terrorism offence or being or having previously been subject to a Commonwealth control order, the court is satisfied that exceptional circumstances exist (*Youth Justice Act 1992,* s.48A(2) and (3)).

The court's power to refuse to grant or enlarge bail

The court has a power to refuse to release a child by refusing to grant or enlarge bail.

A child can be kept in custody as a consequence of one of the following:

1. satisfaction of an unacceptable risk of matters in s.48(2) *Youth Justice Act 1992* in circumstances where the discretion in s.48AA(1)(ba) is not exercised;
2. where court requires further information to assess whether unacceptable risk (*Youth Justice Act 1992,* s.48AAA(4) and (5));
3. where duty compels court in case of child with previous record of terrorism offences or who is or has been the subject of a Commonwealth control order unless exceptional circumstances exist (*Youth Justice Act 1992,* s.48A);
4. where duty compels court in case of endangered child (*Youth Justice Act 1992.* s.48AE).

Show cause/reverse presumption of bail (*Youth Justice Act 1992*, s.48AF)

Where a child has been charged with a prescribed indictable offence committed while on release into the custody of a parent, or at large with or without bail, for another indictable offence, a court or police officer must refuse to release the child from custody unless the child shows cause why the child's detention in custody is not justified.

Conditions of bail (*Youth Justice Act 1992,* s.52)

A child granted bail must under s.52(2) be released on their own undertaking, without sureties and without deposit of money or other security, unless the court is satisfied it would be inappropriate in all the circumstances.[146]

If the court decides not to release the child under s.52(2) it must consider the conditions for release in the following sequence:

(a) on the child's own undertaking with a deposit of money or other security of stated value;
(b) on the child's own undertaking with a surety or sureties of stated value;
(c) on the child's own undertaking with a deposit of money or other security of stated value and a surety or sureties of stated value.[147]

[146] *Youth Justice Act 1992*, s.52(2).
[147] *Youth Justice Act 1992*, s.52(3).

Restrictions on the imposition of conditions (*Youth Justice Act 1992,* s.52A(2))

Except in the case of a child convicted of terrorism offences or who is or has been subject to a Commonwealth control order, a court or police officer can only impose conditions (other than about appearing before a court or surrendering into custody) if satisfied that:

(a) there is an unacceptable risk the child will commit an offence, endanger another, interfere with a witness, or obstruct the course of justice; and
(b) the condition is necessary to mitigate the risk; and
(c) the condition does not, having regard to the following matters, involve undue management or supervision of the child – the child's age, maturity level, cognitive ability, and developmental needs;
    (i) the child's health including the child's need for medical assessment or medical treatment;
    (ii) for a child with a disability – the disability and the child's need for services and supports in relation to the disability;
    (iii) the child's home environment;
    (iv) the child's ability to comply with the condition; and
(d) the condition does not unduly restrict the child's ability to carry out the child's responsibilities for –
    (i) a person with whom the child is in a family relationship and for whom the child is the primary caregiver; or
    (ii) a person with whom the child is in an informal care relationship; or
    (iii) if the child is pregnant – the child of the pregnancy.[148]

Examples of responsibilities –
- *transporting a child of the child to an appointment, childcare or school*
- *attending a medical appointment in relation to a pregnancy*
- *cultural obligations to a family member.*

Any conditions imposed under s.52A(2) must state the period the condition has effect, taking into account the matters mentioned in s.52(2)(c) and ensure that the period is no longer than is necessary to mitigate the risk.[149]

GPS monitoring (*Youth Justice Act 1992,* ss.52A(2) and 52AA)

A court may impose a condition of bail that the child wear a GPS monitoring device as a condition of bail pursuant to s.52A(2) as part of a trial that will run until 29 April 2025.

A police officer must not impose on a grant of bail to the child a condition that the child must wear a monitoring device while released on bail.[150]

[148] *Youth Justice Act 1992*, s.52A(2)(a), (b), (c) and (d).
[149] *Youth Justice Act 1992*, s.52A(3)-(5).
[150] *Youth Justice Act 1992*, s.52A(5).

Onus of proof

Ordinarily the court is obligated to grant bail unless a statutory prohibition applies or the prosecution can point to material capable of positively satisfying the court there is an unacceptable risk the child will fail to appear or will reoffend if released and the court chooses not to exercise the discretion in s.48AAA(1)(ba) of the *Youth Justice Act 1992.*[151] The burden of proof is only reversed with respect to a child previously found guilty of a terrorism offence or who is or has been the subject of a Commonwealth control order. Then the child must establish exceptional circumstances exist in order to be granted bail.

Failure to appear (*Bail Act 1980,* s.33(1))

It is an offence for a child to fail to surrender into custody in accordance with their bail.[152] However, the mandatory cumulative sentence required where an adult is sentenced to imprisonment for breaching bail by failure to appear does not apply to a defendant who was a child when the offence was committed. [153]

Breach of a condition of an undertaking (*Bail Act 1980,* s.29; *Youth Justice Act 1992,* ss.59A and 59AA)

It is an offence for a child to breach a condition of an undertaking on which the child was granted bail.[154]A child may be arrested and brought before the court under s.367 of the *Police Powers and Responsibilities Act 2000* on reasonable suspicion the child has or is likely to contravene a condition of an undertaking.[155] Alternatively, a child may be issued with a notice requiring their appearance.[156] Police also have the power to take no action or issue a warning.[157]

The Magistrate may, if satisfied the child has broken or is likely to break a condition, revoke or vary the bail.[158]

Bail may not be revoked if the only condition breached is for participation in a rehabilitation or treatment program or a DAAR course.[159]

Section 59A of the *Youth Justice Act 1992* requires a police officer to consider other alternatives to arrest where the police officer reasonably suspects the child has contravened, is contravening or is likely to contravene a condition of bail, and the contravention is not an offence, other than an offence against the Bail Act 1980, s.29, and the grant of bail relates to a charge of an offence

[151] Section 48AE of the *Youth Justice Act 1992* provides that where a child is in custody in connection with a charge of an offence, a court or police officer must not release the child from custody if satisfied that the child's safety would be endangered if the child were released; and the factors endangering the child's safety arise from the circumstances of the offence; and in the circumstances there is no reasonably practicable way of ensuring the child's safety other than by keeping the child in custody.
[152] *Bail Act 1980*, s.33(1).
[153] *Bail Act 1980*, s.33(5).
[154] *Bail Act 1980*, s.29(2)(a).
[155] *Police Powers and Responsibilities Act 2000*, s.367(3).
[156] *Bail Act 1980*, s.30(2).
[157] *Youth Justice Act 1992*, s.59A
[158] *Bail Act 1980*, s.29A and s.30.
[159] *Bail Act 1980*, s.30(6).

other than a prescribed indictable offence; or an offence against the *Domestic and Family Violence Prevention Act 2012*, ss.177(2) or 178(2).[160]

Section 59AA provides that a police officer may consider alternatives to arrest where the child has contravened a condition of bail in relation to prescribed indictable offences and an offence against the *Domestic and Family Violence Protection Act 2012*, s.177(2) or 178(2).[161]

Confidentiality of proceedings before the Childrens Court

Proceedings in a Childrens Court constituted by a Magistrate are closed to members of the public.[162] Confidential information about a child dealt with under the *Youth Justice Act 1992* is protected from disclosure[163] and it is an offence to publish identifying information about such a child without authorisation.[164] The court also has power to restrict publication of the details of a bail application.[165]

5.1 Bail under the *Youth Justice Act 1992*

The *Youth Justice Act 1992* sets out the core provisions for the grant of bail to a child charged with an offence.[166] Subject to the *Youth Justice Act 1992*, the *Bail Act 1980* also applies in relation to a child.[167] A review of a sentence order under the *Youth Justice Act 1992* is an appeal for the purposes of the *Bail Act 1980*.[168]

The Charter of Youth Justice Principles contained in Schedule One to the *Youth Justice Act 1992* provides guiding principles for the administration of the *Youth Justice Act 1992* and importantly, Principle Eight requires that proceedings for children remanded in custody be given priority and Principle 18 provides for custody as a last resort:

> *8. The youth justice system should give priority to proceedings for children remanded in custody.*
>
> *18. A child should be detained in custody for an offence, whether on arrest, remand, or sentence, only as a last resort and for the least time that is justified in the circumstances.* [169]

[160] Note 1 to *Police Powers and Responsibilities Act* 2000, s.367(3)(a)(i) requires a police officer to consider matters outlined in s59A Youth Justice Act 1992 before arresting a child in particular circumstances under s.367(3) PPRA.
[161] Note 2 to *Police Powers and Responsibilities Act 2000,* s.367(3)(a)(i) requires a police officer to consider matters outlined in s59AA Youth Justice Act 1992 before arresting a child in particular circumstances under s.367(3) PPRA.
[162] *Childrens Court Act 1992*, s.20.
[163] *Youth Justice Act 1992*, ss. 287, 288.
[164] *Youth Justice Act 1992*, s.301.
[165] *Bail Act 1980,* s.12.
[166] *Youth Justice Act 1992*, Part 5.
[167] *Youth Justice Act 1992*, s.47(1); Note that ss.7, 11, 16 and 16A of the *Bail Act 1980* do not apply to a child.
[168] *Youth Justice Act 1992*, s.47(2).
[169] *Youth Justice Act 1992*, Schedule 1, item 17.

Section 48 of the *Youth Justice Act 1992* gives effect to the Charter by providing that a court or police officer must release a child in custody in connection with a charge unless required by the *Youth Justice Act 1992* or another Act to keep the child in custody.[170]

The burden of proof is only reversed with respect to a child previously found guilty of a terrorism offence or who is or has been the subject of a Commonwealth control order. Then the child must establish exceptional circumstances exist (see below).

5.2 Who is a child?

A person who at the time of their alleged offending had not turned 18 will be dealt with under the youth justice system as a child. Therefore, a person who is alleged to have committed an offence as a child but has since become an adult must be treated as a child for the purposes of the *Youth Justice Act 1992.*[171]

5.3 Jurisdiction of the Childrens Court

5.3.1 Generally

Proceedings in respect of children charged with criminal offences are heard in the Childrens Court.

The Childrens Court constituted by a Childrens Court Magistrate has jurisdiction to hear and determine all proceedings under the *Justices Act 1886* for determination of charges against children and has the same powers as a Magistrates Court in relation to those matters.[172]

Bail applications may also be heard by a Childrens Court judge.[173]

5.3.2 When must a child be brought before the Childrens Court?

In accordance with s.49(1) and (2) of the *Youth Justice Act 1992*, a child arrested on a charge of an offence who is in custody in connection with the charge, must be brought before the Childrens Court to be dealt with according to law –

(a) as soon as practicable and within 24 hours after the arrest; or
(b) if it is not practicable to constitute the court within 24 hours after the arrest, as soon as practicable on the next day the court can practicably be constituted.

However, pursuant to s.49(2A) of the *Youth Justice Act 1992*, if the child is being detained under Chapter 15, Part 2 of the *Police Powers and Responsibilities Act 2000,* the child must be brought before the Childrens Court to be dealt with according to law –

[170] *Youth Justice Act 1992*, s.48(1)-(2).
[171] *Youth Justice Act 1992*, ss.132-134.
[172] *Youth Justice Act 1992*, ss.64-65.
[173] *Youth Justice Act 1992*, ss.59 and 62 (Pursuant to s.59 of the *Youth Justice Act 1992*, a Childrens Court judge has the power to grant bail in relation to offences under s.13(1) of the *Bail Act 1980*.)

a) as soon as practicable and within 24 hours after the child's detention under that part ends; or
b) if it is not practicable to constitute the court within 24 hours after the child's detention under that part ends – as soon as practicable on the next day the court can practically be constituted'.

Chapter 15, Part 2 of the *Police Powers and Responsibilities Act 2000* relates to investigations and questioning for indictable offences and permits a police officer, by virtue of s.403, to detain a person for a reasonable time of not more than eight hours (unless an extension of not more than a further 8 hours is granted pursuant to s.406) to investigate or question the person about an indictable offence.

Pursuant to s.49(3), s.49(1) and (2) do not apply if the child is being dealt with in a way mentioned in the *Police Powers and Responsibilities Act 2000,* s.393(2)(c) (impounding a motorbike for motorbike noise direction offence under the *Road Use Management Act* s.80) or s.393(2)(d) (arrested under a warrant that requires the police officer to take the person before another body or to another place) or s.393(3)(b) (where the person escaped lawful custody while a prisoner of the court and is being taken to a police station or watch-house until they can be returned to the relevant court).

5.3.3 Confidentiality of proceedings in the Childrens Court

Proceedings in a Childrens Court constituted by a Magistrate are closed to members of the public[174]. This differs from proceedings in the Magistrates Court where the Act provides that proceedings be conducted in open court[175]. Confidential information about a child dealt with under the *Youth Justice Act 1992* is protected from disclosure[176] and it is an offence to publish identifying information about such a child without authorisation[177]. The court also has power to restrict publication of the details of a bail application.[178]

5.3.4 Childrens Court closed to the public (*Childrens Court Act 1992*, s.20)

The presence of members of the public is not permitted at proceedings of a Childrens Court constituted by a Childrens Court Magistrate. Under s.20 of the *Childrens Court Act 1992* the only persons who may be present are those falling in categories allowed as of right to be present or who may be permitted by a court to be present. For a criminal proceeding against a child a court may permit the presence of a representative of the mass media if that would not be prejudicial to the interests of the child.[179]

Section 20 does not apply to a Childrens Court constituted by a judge exercising jurisdiction to hear a charge on indictment.[180]

[174] *Childrens Court Act 1992*, s.20.
[175] *Magistrates Court Act 1921*, s.14A.
[176] *Youth Justice Act 1992*, ss. 287, 288.
[177] *Youth Justice Act 1992*, s.301.
[178] *Bail Act 1980*, s.12.
[179] *Childrens Court Act 1992*, s.20(3)(c).
[180] *Childrens Court Act 1992*, s.20(5)(b).

5.3.5 Information relating to a child is confidential

It is an offence for a person to publish identifying information about a child who is or has been dealt with under the *Youth Justice Act 1992* unless permitted by court order or authorised to do so by the Chief Executive of the responsible Department.[181]

It is an offence for a person involved in administration of the *Youth Justice Act 1992* (e.g., departmental employees, police officers etc.) to disclose confidential information about a child who is or has been dealt with under that Act unless disclosure is for an authorised purpose.[182]

A Childrens Court constituted by a judge may allow publication of identifying information about a child sentenced by the Court if publication is in the interests of justice.[183] This power does not apply to bail proceedings and is not available to a Court constituted by a Childrens Court Magistrate.[184]

5.3.6 Courts discretion to order restriction on publication of opposed bail applications (*Bail Act 1980*, s.12)

Section 12 of the *Bail Act 1980* provides that where an application for release on bail under the *Youth Justice Act 1992* is opposed, the court may, at any time during the hearing of the application, make an order prohibiting publication of evidence taken, information furnished, representations made by a party, or reasons given by the court for the grant or refusal of bail or release under s.11A (release of person with an impairment of mind) in whole or in part –

(a) if an examination of witnesses in relation to an indictable offence is heard - before the defendant is discharged; or
(b) if the defendant is tried or committed for trial – before the trial is ended.

- Section 12 only applies in circumstances where bail is being opposed.
- The discretion to restrict publication is not dependent on the nature of the offence and applies to indictable and non-indictable offences.
- An order made pursuant to s.12 should clearly indicate the temporal limits of the order.[185]
- The capacity to make an order pursuant to s.12 includes a discretion to vary, enlarge or terminate the order, enlivened by a change in circumstances, information or material which bears on the making of the order that was not available at the time the order was made.[186]
- Failure to comply with a non-publication order is an offence punishable by a maximum of 10 penalty units or imprisonment of six months (s.12(2)).

[181] *Youth Justice Act 1992,* s.301.
[182] *Youth Justice Act 1992*, ss.288, 289.
[183] *Youth Justice Act 1992*, s.234.
[184] *Youth Justice Act 1992*, s.234(4).
[185] *Queensland Newspapers Pty Ltd v Stjernqvist* [2006] QSC 200 at [25].
[186] *Queensland Newspapers Pty Ltd v Lacey* [2007] QSC 392.

Case law in respect to adult defendants indicates that an order under s.12 should only be made where reasonably necessary to secure the proper administration of justice[187] and the section is to be construed strictly.[188] Although these cases provide some guidance, where a proceeding involves a child, it will also be necessary to have regard to the level of confidentiality otherwise attaching to Childrens Court proceedings.

5.4 Power of court regarding bail

The *Youth Justice Act 1992* provisions apply if a court or police officer is deciding whether to release a child in custody in connection with a charge of an offence or keep the child in custody[189].

5.4.1. Child in custody

For a child to be granted bail they must be presently in the custody of the authorities. They may be brought before the Magistrates Court in custody. Often, a child before the court on criminal charges will appear under a bail undertaking, a Notice to Appear or a release notice. Upon presenting themselves to the court, they fall within the custody of the court and are not free to leave.

Where a child is in custody before the court there is an obligation on the court to consider whether the child should be released from custody. If the court declines to grant bail or otherwise release the child under the provisions of the relevant Acts the child must be remanded in custody.[190]

5.4.2 The court's power

The court has the power to:

i. release the child by:
   a. granting or enlarging bail with or without conditions; or
   b. releasing the child without bail; or

ii. refuse to release the child by:
   a. refusing to grant or enlarge bail.

5.4.2.1 Power to release a child in custody in connection with a charge of an offence

A child can be released as a consequence of the following:

1. the duty to release where no statutory prohibition or unacceptable risk (s.48(1)-(2)):
   i. by release on bail (*Bail Act 1980*, s.8(1)), or
   ii. by release without bail (*Youth Justice Act 1992*) s.55).

[187] *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 at 476-477 per McHugh JA.
[188] *Queensland Newspapers Pty Ltd v Stjernqvist* [2006] QSC 200 at [23].
[189] *Youth Justice Act 1992*, s.48(1).
[190] *Bail Act 1980*, s.8(2).

2. the exercise of a discretion to release despite there being an unacceptable risk (s.48AA(1)(ba)).[191]
3. where despite the child having been found guilty of a terrorism offence or being or having been subject to a Commonwealth control order, the court is satisfied that exceptional circumstances exist (s.48A(2)-(3).
4. A court may, instead of granting bail, release the child into the custody of a parent or permit the child to go at large without bail.[192] Accordingly, a child may be permitted by a Magistrate to go at large in relation to all offences, including indictable offences.

(In determining whether the circumstances point to an unacceptable risk, consider mandatory and discretionary factors as set out in *Youth Justice Act 1992,* s.48AA - see below.)

5.4.2.1.1 The duty to grant bail (*Youth Justice Act 1992*, s.48)

In circumstances provided for in ss.48 and 48AAA of the *Youth Justice Act 1992*, the court or police officer *must* release the child unless:

a) required by the *Youth Justice Act 1992* or another Act to keep the child in custody; [193]
b) satisfied that there is an unacceptable risk that the child will not surrender into custody as required;[194] or
c) satisfied that there is an unacceptable risk that the child will do any of the following while on release –
   a) commit an offence;
   b) endanger the safety or welfare of a person;
   c) interfere with a witness or otherwise obstruct the course of justice, whether for the child or another person.[195]

i. Statutory prohibition on release of a child

1. Terrorism offences or Commonwealth Control Order (*Youth Justice Act 1992,* s.48A)

In accordance with s.48A of the *Youth Justice Act 1992,* the court has a duty not to grant bail or release without bail a child previously found guilty of terrorism offences or who is or has been subject to a Commonwealth control order unless exceptional circumstances exist (*Youth Justice Act 1992,* s.48A).

[191] See *Youth Justice Act 1992*, s.48AA(4)(b) for factors the court or police officer may have regard to when making a decision to release a child despite being satisfied there is an unacceptable risk of a matter mentioned in *Youth Justice Act 1992*, s.48AAA(3)
[192] *Youth Justice Act 1992*, s.55.
[193] *Youth Justice Act 1992*, s.48(2).
[194] *Youth Justice Act 1992*, s.48AAA(3).
[195] *Youth Justice Act 1992*, s.48AAA(3).

A child with terrorism related history will be required to establish exceptional circumstances in order to obtain bail. Section 48A of the *Youth Justice Act 1992* provides:

> *(1) This section applies in relation to a child in custody in connection with a charge of an offence if the child—*
>
> *(a) has previously been found guilty of a terrorism offence; or*
>
> *(b) is or has been the subject of a Commonwealth control order.*
>
> *(2) Despite any other provision of this Act or the Bail Act 1980, a court must not release the child from custody unless the court is satisfied exceptional circumstances exist to justify releasing the child.*
>
> *(3) In considering whether exceptional circumstances exist to justify releasing the child, the court may have regard to any relevant matter;*
>
> *(4) If the court releases the child, the order releasing the child must state the reasons for the decision*.

2. Endangered child (*Youth Justice Act 1992,* s.48AE)

In accordance with s.48AE(1) and (2), a court or police officer must not release a child from custody if the court or police officer is satisfied:

- the child's safety would be endangered if released;[196] and
- the endangering factors arise from the circumstances of the offence;[197] and
- in the circumstances, there is no reasonably practicable way of ensuring the child's safety other than by keeping the child in custody.[198]

Section 48AE(3) provides that in determining whether it is satisfied of any of the matters in s.48AE above, the court or police officer must not decide it is satisfied only because the child will not have accommodation, or adequate accommodation, on release from custody or has no apparent family support.

ii. Unacceptable risk

In accordance with s.48AAA(3), a court may refuse to grant or enlarge bail if satisfied there is an unacceptable risk that the child will not surrender into custody as required[199] or will do any of the following while on release –

[196] *Youth Justice Act 1992,* s.48AE(2)(a).
[197] *Youth Justice Act 1992*, s.48AE(2)(b).
[198] *Youth Justice Act 1992***,** s.48AE(2)(c).
[199] *Youth Justice Act 1992*, s.48(4)(a).

i. commit an offence[200]
ii. interfere with a witness or otherwise obstruct the course of justice, whether for the child or another person.[201]

Section 48AAA(2) requires the court to keep the child in custody if satisfied if the child is released, there is an unacceptable risk that the child will commit an offence that endangers the safety of the community or the safety or welfare of a person and it is not practicable to mitigate the risk through conditions.

When assessing unacceptable risk, the following considerations described by Thomas J in *Williamson v Director of Public Prosecutions*[202] should be borne in mind:

> *"No grant of bail is risk-free. The grant of bail, however, is an important process in civilised societies which reject any general right of the executive to imprison a citizen upon mere allegation or without trial. It is a necessary part of such a system that some risks have to be taken in order to protect citizens in those respects."*

Section 48AA of the Act sets out both mandatory and discretionary considerations to be taken into account by a court or police officer when deciding:

(a) whether there is an unacceptable risk of a matter mentioned in s.48AAA(2);
(b) whether there is an unacceptable risk of a matter mentioned in s.48AAA(3);
whether to release the child despite being satisfied there is an unacceptable risk of a matter mentioned in s.48AAA(3);
(c) whether to release the child without bail or grant bail to the child;
(d) whether the child has shown cause under s.48AF(2) why the child's detention in custody is not justified.[203]

Mandatory considerations

Section 48AA(2) and (3) provide that the court or police officer *must* have regard to:

- any promotion by the child of terrorism;[204]
- any association with a terrorist organisation or a person promoting terrorism for the purpose of supporting them in promoting or carrying out terrorism;[205] and

[200] Other than an offence that engenders the safety of the community or the safety or welfare of a person: *Youth Justice Act 1992*, s.48AAA(3)(b)
[201] *Youth Justice Act 1992*, s.48(4)(b).
[202] [2001] 1 Qd R 99, per Thomas J at [22].
[203] *Youth Justice Act 1992*, ss.48AA(1).
[204] *Youth Justice Act 1992*, ss.48AA(2)(a). For the meaning of 'promotes terrorism' see s.48AB(1).
[205] *Youth Justice Act 1992*, ss.48AA(2)(b).

- the sentence order likely to be made if the child is found guilty.[206]

Discretionary considerations

Discretionary factors are set out in s.48AA(4) and provide that when making a decision as set out in s.48AA(1), the court *may* have regard to any of the following matters of which the court or police officer is aware:

- the nature and seriousness of the alleged offence;[207]
- the child's criminal history, other relevant history, associations, home environment, employment, and background of the child;[208]
- the history of previous grants of bail to the child;[209]
- the strength of the evidence against the child;[210]
- the child's age, maturity level, cognitive ability, and development needs;[211]
- whether a parent of the child, or another person, has indicated a willingness to the court or police officer that the parent or other person will do any of the following things:[212]
    - support the child to comply with the conditions imposed on a grant of bail;
    - notify the chief executive or a police officer of a change in the child's personal circumstances that may affect the child's ability to comply with the conditions imposed on a grant of bail;
    - notify the chief executive or a police officer of a breach of the conditions imposed on a grant of bail.
- if the child is an Aboriginal person or Torres Strait Islander – a submission made by representative of the community justice group in the child's community, including, for example, a submission about - ;[213]
    - the child's connection with the child's community, family, or kin; or
    - cultural considerations; or
    - considerations relating to programs and services established for offenders in which the community justice group participates.

  Where a representative of a community justice group in a child's community makes a submission to a court or police office pursuant to s.48AA(4)(e), if requested the representative must advise the court or police officer whether the member is related to the child or victim of the offence and whether there are circumstances giving rise to a

[206] *Youth Justice Act 1992*, ss.48AA(3).
[207] *Youth Justice Act 1992*, s.48AA(4)(a)(i).
[208] *Youth Justice Act 1992*, s.48AA(4)(a)(ii).
[209] *Youth Justice Act 1992*, s.48AA(4)(a)(iii).
[210] *Youth Justice Act 1992*, s.48AA(4)(a)(iv).
[211] *Youth Justice Act 1992*, s.48AA(4)(a)(v).
[212] Youth Justice Act 1992, s.48AA(4)(a)(vi)
[213] *Youth Justice Act 1992*, s.48AA(4)(a)(vii).

conflict of interest between a member of the community justice group and the child or the victim.[214]

- any other relevant matter.[215]

Other considerations

***Relevance of lack of adequate accommodation and/or family support to determination of unacceptable risk (Youth Justice Act 1992,* s.48AA(6))**

The court or a police officer must not decide it is satisfied there is an unacceptable risk of a matter mentioned in s.48AAA(2) or (3), or to refuse to release a child from custody, solely because the child has no apparent family support and/or the child will not have accommodation, or adequate accommodation, on release from custody.[216]

***Relevance of imposing conditions to determination of unacceptable risk (Youth Justice Act 1992,* s.48AA(5))**

In deciding whether there is an unacceptable risk of a matter mentioned in s.48AAA(3), the court or police officer may consider whether a condition could, under s.52A, be imposed on a grant of bail to the child and the effect on the risk of imposing a condition on a grant of bail to the child.[217]

5.4.2.1.2 Discretion to release despite an unacceptable risk (*Youth Justice Act 1992,* s.48AA(1)(ba))

Section 48AAA(1)(ba) provides that even where the court or police officer is satisfied that there is an unacceptable risk of a matter mentioned in s.48AAA(3) (that is, of the child:

- failing to appear; or
- committing an offence;[218] or
- interfering with a witness or otherwise obstructing the course of justice, whether for the child or another person)

the court or police officer may nevertheless release the child having regard to any of the following matters as set out in s.48AA(4)(b):

- principle 18 of the youth justice principles;[219]
- the desirability of strengthening and preserving the relationship between the child and the child's parents and family;[220]

[214] *Youth Justice Act 1992*, s.48AC.
[215] *Youth Justice Act 1992*, s.48AA(4)(a)(viii).
[216] *Youth Justice Act 1992*, s.48AA(6).
[217] *Youth Justice Act 1992*, s.48AA(5).
[218] Other than an offence that engenders the safety of the community or the safety or welfare of a person: *Youth Justice Act 1992*, s.48AAA(3)(b).
[219] *Youth Justice Act 1992*, s.48AA(4)(b)(i).
[220] *Youth Justice Act 1992*, s.48AA(4)(b)(ii).

- the desirability of not interrupting or disturbing the child's living arrangements, education, training, or employment;[221]
- the desirability of minimising adverse effects on the child's reputation that may arise from being kept in custody;[222]
- the child's exposure to, experience of and reaction to trauma;[223]
- the child's health, including the child's need for medical assessment or medical treatment;[224]
- for a child with a disability – the disability and the child's need for services and supports in relation to the disability;[225]
- if the child is an Aboriginal person or Torres Strait Islander – the desirability of maintaining the child's connection with the child's community, family, and kin;[226]
- if the child is under 14 years – the particular desirability of releasing children under 14 years from custody due to their vulnerability and community expectations that children under 14 years are entitled to special care and protection;[227]
- the likely effect that refusal to relate the child would have on – a person with whom the child is in a family relationship and for whom the child is the primary caregiver; or a person with whom the child is in an informal care relationship; or if the child is pregnant – the child of the pregnancy.[228]

In determining whether there is an unacceptable risk of a matter contained in s.48AAA(3), the court or police officer may consider whether a condition could, under s.52A, be imposed on a grant of bail and have regard to the effect on that risk of imposing the condition.[229]

5.4.2.2 Power of the court to refuse to grant or enlarge bail

A child can be kept in custody as a consequence of the following:

1. in accordance with s.48(4) of the *Youth Justice Act 1992* (unacceptable risk) in circumstances where the court does not exercise the discretion in s.48AA(1)(ba) (see above);
2. in accordance with the duty in s.48A of the *Youth Justice Act 1992* (terrorism/Commonwealth control order) (see above);
3. in accordance with the duty in s.48AE of the *Youth Justice Act 1992* (endangered child must not be released) (see above);
4. in accordance with s.48(5) and (6) of the *Youth Justice Act 1992* (insufficient information) (see below).

[221] *Youth Justice Act 1992*, s.48AA(4)(b)(iii).
[222] *Youth Justice Act 1992*, s.48AA(4)(b)(iv).
[223] *Youth Justice Act 1992*, s.48AA(4)(b)(v).
[224] *Youth Justice Act 1992*, s.48AA(4)(b)(vi).
[225] *Youth Justice Act 1992*, s.48AA(4)(b)(vii).
[226] *Youth Justice Act 1992*, s.48AA(4)(b)(viii).
[227] *Youth Justice Act 1992*, s.48AA(4)(b)(ix).
[228] *Youth Justice Act 1992*, s.48AA(4)(b)(x).
[229] *Youth Justice Act 1992*, s.48AA(5).

5.4.2.2.1 In accordance with *Youth Justice Act 1992,* s.48AAA(5) – insufficient information

Pursuant to s.48AAA(5) of the *Youth Justice Act 1992,* if the court has information that indicates there may be an unacceptable risk of a matter mentioned in s.48AAA(2) or (3), but does not have sufficient information to determine the matter, the court may remand the child in custody while further information about the matter is obtained.

5.4.2.2.2 Reasons must be stated in the order

Section 48B(1) provides that in the event that a court makes an order keeping or remanding a child in custody in connection with a charge of an offence, the order must state the reasons for the decision (subject, as per s.48B(4), to s.12 *Bail Act 1980* regarding non-publication orders).

Similarly, s.48B(2) provides that where a police officer decides to keep a child in custody in connection with a charge of an offence, the police officer must make a record of the reasons for the decision.

5.4.2.3 Show cause/reverse presumption of bail (*Youth Justice Act 1992,* s.48AF)

On 30 April 2021, amendments were passed to the *Youth Justice Act 1992* to create a presumption against bail for young people charged with a prescribed indictable offence, if the offence is alleged to have been committed while the young person was on bail or at large for another indictable offence.[230] Show cause applications for young people are different to adult show cause applications under s.16(3) of the *Bail Act 1980* as they are limited to circumstances where the subsequent offending includes a prescribed indictable offence, as defined in the Schedule 4 (Dictionary) of the Youth Justice Act 1992 to include:

- A life offence
- An offence, if committed by an adult, that would make the adult liable to imprisonment for 14 years or more
    - Exception: offence against s.9(1) of the *Drugs Misuse Act 1986* (possession) for which the maximum penalty is 15 years imprisonment
- An offence against the following Criminal Code provisions:
    - Section 315A – Choking, suffocation or strangulation in domestic setting.
    - Section 323 – Wounding
    - Section 328A – Dangerous operation of a motor vehicle
    - Section 339 – Assaults occasioning bodily harm.
    - Section 408A(1) – Unlawful use of motor vehicle - *if the offence involves a motor vehicle*
    - Section 408A(1) – to which s.408A(1A) applies
    - Section 412 – attempted robbery
    - Section 421(1) – entering or being in any premises with intent to commit an indictable offence in the premises.

A full list of prescribed indictable offences can be found at *Annexure C - Prescribed Indictable Offences triggering show cause under s.48AF Youth Justice Act 1992*.

[230] *Youth Justice Act 1992*, s.48AF (1).

Transitional provisions enable retrospective application of show cause provisions.[231] Show cause provisions apply whether the prescribed indictable offence[232] or the other indictable offence[233] was allegedly committed, or the child was charged or any step in the proceeding for the offence was taken, before or after the commencement of the amendments.

5.4.2.3.1 Show cause case law

Case law developed to support the interpretation of s.16(3) of the *Bail Act 1980* may assist with the interpretation of s.48AF of the *Youth Justice Act 1992.* Case law provides, that if the Crown case is strong, the application must be '*somewhat special'*, '*abnormal*' or of an '*extraordinary nature'* to discharge the onus.[234]

In *Lacey v DPP* [2007] QCA 413 at [13], the Court of Appeal stated the essence of judicial discretion [in assessing show cause]: *'is to balance competing considerations and to weigh the relative importance which the different factors bear in the context of the decision which needs to be made. That exercise of discretion is not an empirical exercise; there are no bright lines drawn to determine conclusively when on important factor outweighs another*'.[235]

Section 48AA(3) requires that where the decision is made by a court, the court must have regard to the sentence order or other order likely to be made for the child if found guilty.[236]

In making a decision regarding whether the child has shown cause why detention in custody is not justified, the court or police officer may have regard to any of the following matters of which the court or police officer is aware:[237]

- The nature and seriousness of the alleged offence;
- The child's criminal history and other relevant history, associations, home environment, employment and background;
- the history of a previous grant of bail to the child;
- the strength of the evidence against the child relating to the alleged offence;[238]
- the child's age, maturity level, cognitive ability and developmental needs;
- whether a parent of the child, or another person, has indicated a willingness to the court or police officer that the parent or other person will do any of the following things –

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[231] *Youth Justice Act 1992*, s.408.
[232] *Youth Justice Act 1992*, s.408(1).
[233] *Youth Justice Act 1992*, s.408(2).
[234] *R v Iskandar* (2001) 120 A Crim R 302 at 305 [14] per Sperling J, approved by P Lyons J in *Turbill* and cited by Chesterman JA in *Sica v DPP* [2010] QCA 18 at [54] referring to the abnormal or extraordinary nature of the grant of bail in cases to which s16(3) applies.
[235] *Lacey v DPP* [2007] QCA 413 at [13].
[236] See *Lacey v DPP (Qld)* where the court noted that where the time in custody on remand is likely to exceed the custodial sentence post-conviction, the relative importance of time may outweigh the other relevant factors. However, the Court in *Lacey* indicated that 's.*16(3) of the Bail Act cannot be read as if its operation was conditioned by guarantee of a trial within a given timeframe'*. That approach was endorsed by Chesterman JA in the Court of Appeal in *Keys v Director of Public Prosecutions (Qld)* [2009] QCA 220 stating with respect to the length of time that might pass before the appellant is tried: '*This is always an important factor as is recognised by this Court in Lacey but it is not a factor which outweighs all others as that authority explains.'*
[237] *Youth Justice Act 1992*, s.48AA(4).
[238] In *Sica v DPP*, Chesterman JA indicated at [51] that Bail Act 1980, s.16(2)(d) "*requires only that, to the extent the strength of the case is apparent, it must be taken into account*."

  - support the child to comply with the conditions imposed on a grant of bail;
  - notify the chief executive or a police officer of a change in the child's personal circumstances that may affect the child's ability to comply with the conditions imposed on a grant of bail;
  - notify the chief executive or a police officer of a breach of the conditions imposed on a grant of bail;
- if the child is an Aboriginal person or a Torres Strait Islander – a submission made by a representative of the community justice group in the child's community, including, for example, a submission about –
  - the child's connection with the child's community, family, or kin; or
  - cultural conditions; or
  - considerations relating to programs and services established for offenders in which the community justice group participates;
- any other relevant matters.

If a court releases the child, the order releasing the child must state the reasons for the decision.[239]

Additional provisions remain in the *Youth Justice Act 1992* requiring a court to be satisfied of exceptional circumstances in order to release the child from custody, if the child has been previously found guilty of a terrorism offence or is or has been the subject of a Commonwealth control order.[240] "Terrorism offence" and "Commonwealth control order" are defined in Schedule 4 of the *Youth Justice Act 1992*. See also s.48AA(2) which requires a court or police officer to have regard to specific matters regarding terrorism in the decision as to whether there is an unacceptable risk in relation to the matters in ss.48AAA(2) and (3) of the *Youth Justice Act 1992*, whether to release the child despite there being an unacceptable risk or whether to release the child without bail or to grant bail.[241]

5.5 Conditions of bail (*Youth Justice Act 1992,* s.52 and s.52A)

A child in custody in connection with a charge of an offence who is granted bail must, under s.52(2), be released on their own undertaking, without sureties and without deposit of money or other security, unless the court is satisfied it would be inappropriate in all the circumstances.[242]

If the court decides not to release the child under s.52(2) it must consider the conditions for release in the following sequence:

(a) on the child's own undertaking with a deposit of money or other security of stated value.
(b) on the child's own undertaking with a surety or sureties of stated value;
(c) on the child's own undertaking with a deposit of money or other security of stated value and a surety or sureties of stated value.[243]

[239] *Youth Justice Act 1992*, s.48AF(3).
[240] *Youth Justice Act 1992*, s.48A.
[241] *Youth Justice Act 1992*, s.48AB.
[242] *Youth Justice Act 1992*, s.52(2).
[243] *Youth Justice Act 1992*, s.52(3).

5.5.1 Restrictions on further conditions (*Youth Justice Act 1992,* s.52A)

Section 52A provides that where a child mentioned in s.52 is being released from custody, the court may impose any other condition on the grant of bail, other than a condition about appearing before a court or surrendering into custody, only if the court or police officer is satisfied-

(a) there is a risk of a matter mentioned in s.48(4)(b); and
(b) the condition is necessary to mitigate the risk; and
(c) the condition does not, having regard to the following matters, involve undue management or supervision of the child –
    (i) the child's age, maturity level, cognitive ability, health and developmental needs;
    (ii) the child's health, including the child's need for medical assessment or medical treatment;
    (iii) for a child with a disability-the disability and the child's need for services and supports in relation to the disability;
    (iv) the child's home environment;
    (v) the child's ability to comply with the condition.

Furthermore, any condition imposed pursuant to s.52A must state the period the condition has effect, and the condition will stop having effect at the end of the stated period.[244] The stated period must be no longer than necessary to mitigate the identified risk.[245]

Section 52A does not apply to conditions necessary to facilitate the preparation under s.151 of a pre-sentence report.[246]

The court or police officer is not permitted to impose a condition the child wear a tracking device.[247]

If the child is not an Australian citizen consideration must be given to a condition requiring surrender of the child's passport.[248]

A court that imposes a condition under s.52A must give reasons stating how the condition is intended to mitigate the identified risk.[249]

5.5.2 Conditional bail program

The Youth Justice Service offers a Conditional Bail Program in various localities throughout the State. The Conditional Bail Program can provide a high level of support to a young person on remand.

[244] *Youth Justice Act 1992*, s.52A(3).
[245] *Youth Justice Act 1992*, s.52A(4).
[246] *Youth Justice Act 1992*, s.52A(7).
[247] *Youth Justice Act 1992*, s.52A(5).
[248] *Youth Justice Act 1992*, s.52A(6).
[249] *Youth Justice Act 1992*, s.52B(1).

Where this option is considered necessary under s.52A, the Court will make a condition that the child participate in the Conditional Bail Program and carry out the lawful instructions of the officers of the Department. It may also be necessary to order that the child be released from the watch house only into the care of a person approved by the Youth Justice Service.

5.5.3 Breach of a condition of an undertaking

On 22 March 2023, s.29 of the *Bail Act 1980* was amended to make it an offence for a child to breach a condition of bail.[250]

Certain actions are available for contraventions of bail conditions by a child. Section 59A *Youth Justice Act 1992* specifies the powers available to a police officer if the officer reasonably suspects the child has contravened, is contravening or is likely to contravene a condition of bail, and the contravention is not an offence, other than an offence against the *Bail Act 1980,* s.29, and the grant of bail relates to a charge of an offence other than a prescribed indictable offence; or an offence against the *Domestic and Family Violence Prevention Act 2012*, ss.177(2) or 178(2). A police officer does have powers of arrest as specified in s.367 of the *Police Powers and Responsibilities Act 2000.* [251]

However before arresting a child, the police officer must consider other alternatives as specified in s.59A of the *Youth Justice Act 1992*:

> *(1) This section applies if—*
>
> *(a) a police officer reasonably suspects a child has contravened or is contravening a condition imposed on a grant of bail to the child; and*
>
> *(b) the contravention is not an offence, other than an offence against the Bail Act 1980, section 29; and*
>
> *(c) the grant of bail relates to a charge of an offence other than –*
>
> *(i) a prescribed indictable offence; or*
>
> *(ii) an offence against the Domestic and Family Violence Prevention Act 2012, section 177(2) or 178(2).*
>
> *(2) This section also applies if a police officer reasonably suspects a child is likely to contravene a condition imposed on a grant of bail to the child and the grant of bail relates to a charge of an offence other than an offence mentioned in subsection (1)(c)(i) or (ii).*
>
> *(3) Before arresting the child under the Police Powers and Responsibilities Act 2000, section 367(3)(a)(i) in relation to the contravention or likely contravention, a police officer must first consider whether, in all the circumstances, it would be more appropriate to do 1 of the following—*
>
> *(a) to take no action;*

[250] The *Strengthening Community Safety Act 2023*, assented to on 22 March 2023, amended s.29 of the *Bail Act 1980*. This applies to bail undertakings entered into after commencement: *Bail Act 1980*, s.50.

[251] See *Notes*: 1. For the matters a police officer must consider before arresting a child in particular circumstances under this subparagraph, see *Youth Justice Act 1992*, s.59A. 2. For the matters a police officer may consider before arresting a child in particular circumstances under this subparagraph, see *Youth Justice Act 1992*, s.59AA.

> *(b) to warn the child of the action a police officer may take under paragraph (c) or the Police Powers and Responsibilities Act 2000, section 367(3) in relation to a contravention of a condition imposed on the grant of bail;*
> *(c) if the contravention or likely contravention is in relation to a condition other than a condition for the child's appearance before a court—to make an application under the Bail Act 1980 to vary or revoke the bail.*
>
> *(4) For subsection (3), the circumstances the police officer must consider include the following—*
> *(a) the seriousness of the contravention or likely contravention;*
> *(b) whether the child has a reasonable excuse for the contravention or likely contravention;*
> *(c) the child's particular circumstances of which the police officer is aware;*
> *(d) other relevant circumstances of which the police officer is aware.*
>
> *(5) If a police officer considers that, in all the circumstances, it would be more appropriate to act as mentioned in subsection (3)(a), (b) or (c), then a police officer must do so.*

Section 59AA provides that a police officer may consider alternatives to arrest where the child has contravened a condition of bail in relation to prescribed indictable offences and an offence against the *Domestic and Family Violence Protection Act 2012*, ss.177(2) or 178(2). Before arresting a child, the police officer may consider other alternatives as specified in s.59AA of the *Youth Justice Act 1992:*

> *(1) This section applies if—*
> *(a) a police officer reasonably suspects a child has contravened or is contravening a condition imposed on a grant of bail to the child; and*
> *(b) the contravention is not an offence, other than an offence against the Bail Act 1980, section 29; and*
> *(c) the grant of bail relates to—*
> *(i) a charge of a prescribed indictable offence; or*
> *(ii) a charge of an offence against the Domestic and Family Violence Protection Act 2012, section 177(2) or 178(2).*
>
> *(2) This section also applies if a police officer reasonably suspects a child is likely to contravene a condition imposed on a grant of bail to the child and the grant of bail relates to a charge of an offence mentioned in subsection (1)(c)(i) or (ii).*
>
> *(3) Before arresting the child under the Police Powers and Responsibilities Act 2000, section 367(3)(a)(i) in relation to the contravention or likely contravention, a police officer may first consider whether, in all the circumstances, it would be more appropriate to do 1 of the actions mentioned in section 59A(3)(a) to (c).*
>
> *(4) For subsection (3), the circumstances the police officer may consider include the matters mentioned in section 59A(4)(a) to (d).*

An application under s.30 of the *Bail Act 1980* can be made by a complainant or prosecutor to vary or revoke bail by the court that granted bail, the court before which an indictment was

presented or the Supreme Court. If bail on an undertaking was granted by a police officer, the Childrens Court may vary or revoke bail on such an application.[252]

An application to vary or revoke bail may be made ex parte.[253]

If the police officer decides to arrest the child, the child must be brought before the Childrens Court[254] where the Magistrate may, if satisfied the child has broken or is likely to break a condition of bail, revoke or vary the bail.[255]

It is an offence for a child to fail to surrender into custody in accordance with an undertaking.[256] There are restrictions on the sentence that can be imposed if the failure to appear occurred when the defendant was a child (any jail sentence will not be mandatorily cumulative)[257] A court may issue a warrant for the arrest of a child who fails to surrender into custody as required.[258]

Section 57 of the *Youth Justice Act 1992* provides that the provisions of the *Bail Act 1980* relating to the issue of warrants for the arrest of defendants who fail to surrender into the custody of court as required when permitted to go at large without bail, apply to a child who fails to appear after being released into the custody of a parent, or permitted to go at large, without bail.

If a child is arrested pursuant to a warrant, the child must be brought promptly before a court to be dealt with according to law.[259]

In considering an application to vary or revoke bail, or dealing with a further bail application where the child is arrested on a warrant, the court is bound by the provisions of ss.48, 48AAA and 48AA of the *Youth Justice Act 1992* and in making a decision, the court may have regard to the history of any previous grants of bail to the child.[260]

Under s.367 of the *Police Powers and Responsibilities Act 2000,* a police officer may arrest a child, without warrant, on reasonable suspicion the child has or is likely to contravene a condition of the undertaking.[261] A police officer may also take no further action or issue a warning.[262] If arrested, the child must be brought forthwith before the court where the Magistrate may, if satisfied the child has broken or is likely to break a condition, revoke or vary the bail.[263] This does not apply if the only condition breached is for participation in a rehabilitation or treatment program or a DAAR course.[264]

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[252] *Bail Act 1980*, s.30(1A).
[253] *Bail Act 1980*, s.30(2).
[254] *Bail Act 1980*, s.29A(1)(c).
[255] *Bail Act 1980*, s.29A.
[256] *Bail Act 1980*, s.33(1).
[257] *Bail Act 1980*, s.33(5).
[258] *Bail Act 1980*, ss.28A(1)(b) and (ea).
[259] *Youth Justice Act 1992*, s.58.
[260] *Youth Justice Act 1992*, s.48AA(4)(a)(iii).

Before arresting a child under s.367, a police officer must consider whether it would be more appropriate to make application under the *Bail Act 1980* for variation or revocation of the child's bail.[265] An application for variation or revocation may be heard by a Magistrate if the bail was originally granted by a Childrens Court or a police officer.[266] The application will be made after the child and any surety has been given notice unless the child has absconded or broken a condition or the Court is satisfied either is likely.[267] The Court may order the issue of a notice or warrant and if the child surrenders the Court may revoke or vary bail or release the child on an undertaking.[268] If the only condition breached is for participation in a rehabilitation or treatment program or a DAAR course, the court may vary but may not revoke the bail.

5.6 GPS monitoring (*Youth Justice Act 1992*, ss.52A(2) and 52AA)

In April 2021, amendments were introduced to the *Youth Justice Act 1992* which allowed a court to impose the wearing of a GPS monitoring device as a condition of bail pursuant to s52A(2). Section 52AA(1) provides a court may impose on a grant of bail a condition that the child wear a monitoring device if:

(a) the child is at least 15 years old; and
(b) the offence in relation to which bail is being granted is a prescribed indictable offence; and
(c) the child has previously been found guilty of at least 1 indictable offence; and
(d) the court is in a geographical area prescribed by regulation; and
(e) the child lives in a geographical area prescribed by regulation; and
(f) the court is satisfied, in addition to being satisfied of the matters mentioned in section 52A(2), that imposing the monitoring device condition is appropriate having regard to the following matters:
    (i) whether the child has the capacity to understand the condition and any conditions under subsection (2);
    (ii) whether the child is likely to comply with the condition and any conditions under subsection (2) having regard to the personal circumstances of the child;
    Examples of personal circumstances for a child for subparagraph (ii) -
        - *whether the child has stable accommodation*
        - *whether the child has the support of a parent or another person to assist with compliance with the conditions*
        - *whether the child has access to a mobile phone to facilitate contact with any monitoring device monitoring service*
        - *whether the child has access to an electricity supply*
    (iii) whether a parent of the child or another person has indicated a willingness to the court to do any of the things mentioned in s48AA(4)(a)(vi);
    (iv) *any other matter the court considers relevant.*

'Prescribed indictable offence' for the purposes of s.52AA is defined in s.52AA(11) to mean:

(a) a life offence; or

(b) an offence of a type that, if committed by an adult, would me the adult liable to imprisonment for 14 years or more, other than an offence against the Drugs Misuse Act 1986, section 9(1) for which the maximum penalty is 15 years imprisonment; or
(c) an offence against any of the following provisions of the Criminal Code –
(i) section 315A;
(ii) section 323;
(iii) section 328A;
(iv) section 339;
(v) section 408A(1), if the offence involves a motor vehicle and the child charged with the offence was allegedly the driver of the motor vehicle;
(vi) section 408A(1) to which section 408A(1A) applies;
(vii) section 412.

Before a court can impose a monitoring device condition on bail, the court **must** order the chief executive to complete a Suitability Assessment Report (SAR).[269] The SAR will contain an assessment of the child's suitability for a monitoring device condition, having regard to the matters in s52AA(1)(f). The chief executive must complete the SAR within the period stated by the court or if no period was stated, as soon as practicable after the order was made.[270] The court **must** consider the SAR in determining whether to impose the condition.[271]

Monitoring devices are fitted in Queensland Police Service (QPS) watchhouses and monitored by Queensland Corrective Services (QCS) once fitted. Under s52AA(2)(a), if the court makes an order imposing a monitoring device condition, the court **must** consider making an order that the child be detained in custody until the monitoring device is fitted to the child. Where the court makes an order detaining the child in custody until the monitoring device has been fitted, the child may be detained in custody only for the purpose of fitting the monitoring device and for the least time that is justified in the circumstances.[272]

The court may also make any other conditions the court considers necessary to facilitate the operation of the monitoring device.[273]

If QCS identify an alert or notification from the monitoring device, they may contact the child directly on the child's mobile phone. QCS may also notify QPS or the chief executive about notifications and alerts from the monitoring device. If a child intentionally damages or removes their monitoring device, they may be subject to further charges such as wilful damage.

QPS are also responsible for the removal of monitoring devices and will do so when ordered by the court or bail otherwise lapses upon finalisation of the matter.

[269] *Youth Justice Act 1992*, s.52AA(3).
[270] *Youth Justice Act 1992*, s.52AA(4).
[271] *Youth Justice Act 1992*, s.52AA(5).
[272] *Youth Justice Act 1992*, s.52AA(2A).
[273] *Youth Justice Act 1992*, s.52AA(2)(b).

Section 405 of the *Youth Justice Act 1992* provides where a court makes a monitoring device condition pursuant to s52A(2) for a stated period, such a condition is taken to be effective until the end of the stated period even if:

(a) the court stops being in a geographical area prescribed under s52AA(1)(d);
(b) the child stops living in a geographical area prescribed under s52AA(1)(e);
(c) section 52AA expires.

Section 52AA(10) provides this section will expire four years after commencement. Therefore, the provisions of s52AA will cease to be in effect after 29 April 2025, subject to s405 of the *Youth Justice Act 1992*.

Note: The use of the word "tracking" device is not culturally appropriate for Aboriginal and Torres Strait Islander people, due to its associations with colonial era practices. The term "monitoring" device is the appropriate term and should be used when referring to these devices.

5.6.1 Prescribed locations for GPS monitoring devices

Pursuant to ss52AA(1)(d) and (e) of the *Youth Justice Act 1992*, a court may impose a GPS monitoring device condition if the court is in a prescribed location and the young person lives in a prescribed location. Section 4A of the *Youth Justice Regulation 2016* sets out the prescribed Childrens Court locations as follows:

(a) Beenleigh;
(b) Brisbane City;
(c) Caboolture;
(d) Coolangatta;
(e) Pine Rivers;
(f) Redcliffe;
(g) Southport; and
(h) Townsville.

If the court is not in one of the above prescribed locations, a GPS monitoring condition cannot be made.

For a full list of postcodes where the young person must reside for the purposes of s52AA(1)(e) of the *Youth Justice Act 1992*, see Schedule 1AA of the *Youth Justice Regulation 2016.* If the young person moves out of a prescribed postcode and into a location that is not prescribed, the GPS monitoring condition may need to be reconsidered as to whether it is still appropriate, as the condition will continue to be in effect even after the child is no longer living in the prescribed postcode.[274]

5.7 Failure to appear

It is an offence for a child to fail to surrender into custody in accordance with an undertaking.[275] A child charged with failure to appear will be dealt with under s.33 of the *Bail Act 1980* in the

[274] *Youth Justice Act 1992*, s.405(1)(b)(ii).
[275] *Bail Act 1980*, s.33(1).

same way as an adult with the following exception. Where a person is charged with breach of an undertaking by failure to appear, the provision requiring a sentence of imprisonment to be cumulative upon any other sentence imposed at the same time or being served at that time does not apply to a defendant who was a child when the offence was committed.[276]

[276] *Bail Act 1980*, s.33(5).

CHAPTER 6 – CHALLENGES TO A REFUSAL OR GRANT OF BAIL

A party aggrieved by a decision to refuse bail may challenge such decision by:

1. In circumstances where the defendant can demonstrate a material change in circumstances, making a further application for bail or variation (s.19(1));[277]
2. An application to the Supreme Court pursuant to s.10(1) of the *Bail Act 1980*;
3. An application to the Court of Appeal in its original jurisdiction;[278]
4. In the case of a decision by a police officer or justice, seeking a review (on a de novo basis) of the decision by a Magistrates Court constituted by a magistrate (s.19B(3)(a));[279]
5. In the case of a decision by a magistrate, seeking a review (on a de novo basis) of the decision by the Supreme Court constituted by a single justice (s.19B(3)(b));[280]
6. In the case of a decision of a magistrate on review, seeking a review (on a de novo basis) of the decision by the Supreme Court constituted by a single justice (s.19C);[281]
7. Appealing by way of s.222 *Justices Act* from a decision of a magistrate to a judge of the District Court (on a rehearing basis – the principles in *House v The King* (1936) 55 CLR 499 apply);
8. Appealing by way of Chapter 18 of the *Uniform Civil Procedure Rules* ('UCPR') from a decision of a single judge of the Supreme Court or District Court to the Court of Appeal (on a rehearing basis - the principles in *House v The King*[282] apply).

6.1 Further application for bail (*Bail Act 1980*, s.19)

Defendants charged with criminal offences and detained in custody have a right to file successive applications for bail before courts empowered by s.8 to grant bail.[283] This includes:

(i) a court, before which the person is awaiting a criminal proceeding;[284]

[277] *Bail Act 1980*, s.19; *Ex parte Edwards [1989]* 1 Qd R 139 at 142-143.
[278] *Scrivener v Director of Public Prosecutions* [2001] QCA 454 at [12] McPherson JA.
[279] *Bail Act 1980*, s.19B(3)(a).
[280] *Bail Act 1980*, s.19B(3)(b) and see also *The Queen v Brown* [2013] QCA 337.
[281] *Bail Act 1980*, s.19C.
[282] (1936) 55 CLR 499.
[283] *Bail Act 1980*, s.19(1). The common law right to successive bail applications was previously codified in Queensland in the form of s.555 of the *Criminal Code*. However, that codification was repealed by the *Bail Act 1980.* The common law right has been held to have survived the repeal of s.555 of the *Criminal Code* (see *R v Hughes* [1983] 1 Qd R 92 and *Ex Parte Edwards* [1989] 1 Qd R 139, particularly on the basis that s.10(2) and (3) state that a decision of a trial judge concerning bail is final, which suggests that outside the confines of a trial, the decision on bail is not final.
[284] *Bail Act 1980*, s.8(1)(a)(i). In the case of an appeal pending before the Court of Appeal, s.8(5) of the *Bail Act 1980* provides that: *'The powers of the Court of Appeal with respect to bail may be exercised by a judge of the Supreme*

(ii) the Magistrates Court when the person is awaiting a s.222 appeal to the District Court;[285]
(iii) a court that has adjourned the criminal proceeding;[286] or
(iv) the court has committed or remanded the person in connection with a criminal proceeding to be held by that court or another court in relation to that offence.[287]

However, the defendant must be able to demonstrate on the balance of probabilities, ***'a material change in circumstances'*** since the making of the previous bail application in order for a court to consider the merits of a subsequent application for bail.[288]

In *Ex Parte Edwards*[289], McPherson J explained:

> *'… the question is whether... it can be said that there has been **a material change in circumstances** (R v Slough Justices, ex parte Duncan); or to use the formula in O.45 r.1, facts have been discovered which, if discovered in time, "would have entitled the applicant to an order in his favour"… A persuasive and satisfying case is therefore required, and not one in which the differences disclosed by the additional material go only to matters of mere detail, or to considerations which, although not previously raised, would not have been likely to alter the balance to one favouring the granting of bail'.*

In *Sica v DPP (Qld)*,[290] a case involving murder charges, the Court of Appeal applied the principle that where "successive applications for bail are made following the refusal of an earlier application the subsequent application will only succeed where the applicant demonstrates that a material change in circumstances has occurred between the two applications".[291]

Examples of circumstances amounting to a change in circumstances include:

- the duration and circumstances of any delay;[292]
- an applicant's difficulties in accessing the brief in custody;[293]
- knowledge of the limits of the Crown case as may have been exposed by a committal hearing (the mere fact that a committal hearing has taken place would not of itself amount to a change in circumstances).[294]

Court in the same manner as they may be exercised by the Court of Appeal, but, if the judge refuses an application with respect to bail, the person making the application may apply to the Court of Appeal and that court shall hear and determine the application.'

[285] *Bail Act 1980*, s.8(1)(a)(ii).
[286] *Bail Act 1980*, s.8(1)(a)(iii).
[287] *Bail Act 1980*, s.8(1)(a)(iv).
[288] *Ex parte Edwards* [1989] 1 Qd R 139 at 142-143; *R v Hughes* [1983] 1 Qd R 92 at 93-94; *The Director of Public Prosecutions v Filippa* [2004] QSC 470 at [4]; *Sica v DPP (Qld)* [2010] QCA 18 at [17].
[289] [1989] 1 Qd R 139 at 144.
[290] [2010] QCA 18.
[291] *Sica v DPP (Qld)* [2010] QCA 18 at [17]; applying *Ex parte Edwards* [1989] 1 Qd R 139.
[292] *Re Tesic* [2015] QSC 205.
[293] *Re Tesic* [2015] QSC 205.
[294] *Ex parte Edwards* [1989] 1 Qd R 139 at 143 per McPherson J.

Examples of circumstances *not* amounting to a change of circumstances include:

- evidence contained in an affidavit of an applicant explaining matters predominantly within the defendant's knowledge at the time of the previous bail application;295
- the defendant's current willingness to reside interstate.296

On an application under s.19(1), the court may grant bail, vary bail, or refuse the application.[297]

Upon a further application for bail (as distinct from an application to vary bail previously granted) pursuant to s.19, the Court must consider:

1. Whether there has been a *material change in circumstances* justifying the reconsideration of the application for bail; and if so,
2. Whether the applicant presents an *unacceptable risk* pursuant to s.16; or
3. Whether the applicant, in a *show cause position*, has shown cause.

(Caution: In circumstances where a defendant brings an application to vary bail previously granted pursuant to s.19 the Court must apply a different test[298]. The Court must consider:

1. whether the conditions of bail imposed on the defendant are still *necessary to secure the defendant's compliance* with ss.11(2)(a) and (b); and
2. whether those conditions are presently *more onerous than necessary*.[299])

(See Chapter Four – Variation and Revocation of Bail))

6.2 Application to the Supreme Court (*Bail Act 1980*, s.10(1))

Section 10(1) of the *Bail Act 1980* provides:

> *'The Supreme Court or a judge thereof may, subject to this Act, grant bail to a person held in custody on a charge of an offence, or in connection with a criminal proceeding, or enlarge, vary or revoke bail granted to a person in or in connection with a criminal proceeding whether or not the person has appeared before the Supreme Court in or in connection therewith'.*

An application pursuant to s.10(1) is the most commonly used pathway to challenge or vary a decision of a magistrate refusing bail or a decision imposing bail conditions. This is not by way of appeal but is an application in the Supreme Court's original jurisdiction under the *Bail Act 1980*.

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[295] *Re Tesic* [2015] QSC 205.
[296] *Re Tesic* [2015] QSC 205. The court indicated at [35]: *'The applicant's expressed willingness to reside in New South Wales constitutes a change only to the intentions or desires of the applicant. There has been no material modification or adjustment to the surrounding factual matrix which has given rise to a "change of circumstances".*
[297] *Bail Act 1980*, s.19(2).
[298] *Clumpoint v Director of Public Prosecutions (Qld)* [2005] QCA 43.
[299] *Clumpoint v Director of Public Prosecutions (Qld)* [2005] QCA 43 at [18].

6.3 Application in the original jurisdiction of the Court of Appeal

In *Scrivener v Director of Public Prosecutions* [2001] QCA 454 at [12], McPherson JA confirmed that on the basis of *R v Hughes* [1983] 1 Qd R 92, an application for bail may be renewed before the Court of Appeal, not by way of appeal, but by way of an originating application in the court's original jurisdiction, but indicated that, '*for the reasons given in ex parte Edwards [1989] 1 Qd R 139 (141-143), however, an application to renew is ordinarily not likely to fare better in this Court than it did before a single judge, unless the applicant is in a position to show a material change in circumstances'*.

6.4 Application for review by a Magistrate of a decision of a police officer or justice who is not a Magistrate (*Bail Act 1980*, s.19B(3)(a))

Section 19B(3)(a) provides a party with a right to seek review of a decision of a police officer or justice who is not a magistrate, about release under Part 2 of the *Bail Act 1980*, to a Magistrates Court constituted by a magistrate.

- An application for review can be made by a defendant, complainant, prosecutor, or a person appearing on behalf of the Crown;
- A party seeking a review must take reasonable steps to inform the defendant of the time and place for the hearing of the application.[300]
- A hearing on a review may proceed in the defendant's absence if the reviewing court is satisfied that steps were taken to inform the defendant of the time and place;[301]
- A hearing of an application for review under s.19B is a rehearing de novo;[302]
- Additional or substitute evidence or information may be given;[303]
- The reviewing court may make any order it considers appropriate[304] subject to s.13, 16 and 17(1A) and the *Youth Justice Act 1992*, ss.48, 48AAA, 48AA(1)(ba), 48AE and 48A.[305]
- The person or court that made the decision under review must give the reviewing court any documents in their possession that may be relevant to the review;[306] and
- The reviewing court must decide an application as soon as is reasonably practicable.[307]

6.4.1 Stay of decision to grant bail pending application for review (*Bail Act 1980*, s.19CA)

Section 19CA provides that where:

(a) a decision has been made about release under ss. 19B and 19C of the *Bail Act 1980* or the *Youth Justice Act 1992,* Part Five, for a defendant charged with a relevant domestic violence offence[308]; and

[300] *Bail Act 1980*, s.19B(4).
[301] *Bail Act 1980*, s.19B(5).
[302] *The Director of Public Prosecutions v Filippa* [2004] QSC 470 at [15].
[303] *Bail Act 1980*, s.19B(6).
[304] *Bail Act 1980*, s.19B(6).
[305] *Bail Act 1980*, s.19B(7).
[306] *Bail Act 1980*, s.19B(8).
[307] *Bail Act 1980*, s.19B(9).
[308] Defined in the *Criminal Code*, s.1.

(b) the prosecutor or other person appearing on behalf of the Crown applies to a reviewing court for a review of the decision,

the decision about the defendant's release is **stayed** until the earlier of the following:

- an order is made by the reviewing court under s.19B(6) or s.19C(5);
- the application is discontinued, or;
- 4pm on the day that is three business days after the day on which the decision concerning release was made.[309]

The reviewing court that makes an order under s.19B or s.19C or seeks to give effect to an order made under s.19CA, may, in order to give effect to the stay, issue a warrant for the apprehension of the defendant directing that the defendant be brought before a stated court.[310]

6.5 Application for review by the Supreme Court of a decision of a Magistrate or District Court Judge (*Bail Act 1980*, s.19B(3)(b))

Section 19B(3)(b) provides a party with a right to seek review of a decision of a magistrate or District Court judge about release under Part 2 of the *Bail Act 1980* or Part 5 of the *Youth Justice Act 1992* to the Supreme Court constituted by a single justice.

An application for review can be made by a defendant, complainant, prosecutor, or a person appearing on behalf of the Crown:

- A party seeking a review must take reasonable steps to inform the defendant of the time and place for the hearing of the application.[311]
- A hearing on a review may proceed in the defendant's absence if the reviewing court is satisfied that steps were taken to inform the defendant of the time and place;[312]
- A hearing of an application for review under s.19B is a rehearing de novo;[313]
- Additional or substitute evidence or information may be given;[314]
- The reviewing court may make any order it considers appropriate[315] subject to ss.13, 16 and 17(1A) and the *Youth Justice Act 1992*, ss.48, 48AAA, 48AA(1)(ba), 48AE and 48A.[316]
- The person or court that made the decision under review must give the reviewing court any documents in their possession that may be relevant to the review;[317] and
- The reviewing court must decide an application as soon as is reasonably practicable.[318]

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[309] *Bail Act 1980*, s.19CA.
[310] *Bail Act 1980*, s.19D.
[311] *Bail Act 1980*, s.19B(4).
[312] *Bail Act 1980*, s.19B(5).
[313] *The Director of Public Prosecutions v Filippa* [2004] QSC 470 at [15].
[314] *Bail Act 1980*, s.19B(6).
[315] *Bail Act 1980*, s.19B(6).
[316] *Bail Act 1980*, s.19B(7).
[317] *Bail Act 1980*, s.19B(8).
[318] *Bail Act 1980*, s.19B(9).

6.6 Application for review by the Supreme Court of a decision of a Magistrate on a review (*Bail Act 1980*, s.19C)

Section 19C provides for the review by a justice of the Supreme Court, of a decision of a magistrate on review (as provided for in s.19B(3)(a)).

- Leave of the court is required to review the decision;[319]
- A defendant, complainant, prosecutor, or a person appearing on behalf of the Crown who makes an application for review pursuant to s.19C must take reasonable steps to inform the defendant of the time and place of the hearing of the application;[320]
- Additional or substitute evidence or information may be given.[321]
- A hearing of an application for review under s.19C is a rehearing de novo;[322]
- On the review, additional or substitute evidence or information may be given;[323]
- The court may make any order it considers appropriate subject to ss.16, and 17(1A) and, if the defendant is a child, the *Youth Justice Act 1992*, ss.48, 48AAA, 48AA(1)(d), 48AE and 48A [324]

6.7 Appeal from a decision of a Magistrate to a Judge of the District Court[325] (*Justices Act 1886*, s.222)

Pursuant to s.222 of the *Justices Act 1886,* an appeal from a decision of a magistrate to a judge of the District Court is by way of rehearing on the original evidence (and is not a rehearing de novo).[326]

As the appeal is "*against the exercise of judicial discretion conferred and circumscribed by the terms of s.16*"[327] the principles established in *House v The King* (1936) 55 CLR 499 have application.[328]

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[319] *Bail Act 1980*, s.19C(4).
[320] *Bail Act 1980*, s.19C(2).
[321] *Bail Act 1980*, s.19C(5).
[322] *The Director of Public Prosecutions v Filippa* [2004] QSC 470 considered the effect of s.19B(6) which is mirrored in s.19C(5), to conclude that the review should be conducted as a hearing de novo.
[323] *Bail Act 1980*, s.19C(5).
[324] *Bail Act 1980*, s.19C(5) and (6).
[325] An appeal is able to be brought from a decision under the Bail Act – see *Ex Parte Maher* [1986] 1 Qd R 303 and *Director of Public Prosecutions v Filippa* [2004] QSC 470.
[326] *Justices Act 1886*, s.222; In *McDonald v Queensland Police Service* [2017] QCA 255, Bowskill J stated: *'It is well established that, on an appeal under [Justices Act] s.222 by way of re-hearing, the District Court is required to conduct a real review of the trial, and the magistrate's reasons and make its own determination of relevant facts and issues from the evidence, giving due deference and attaching a good deal of weight to the magistrate's view. (Fox v Percy* [2003] 214 CLR 118 at [25]*; Row v Kemper* [2009] 1 Qd R 247 at [3]*; White v Commissioner of Police* [2014] QCA 121 at [6]*). Nevertheless, in order to succeed on such an appeal, the appellate must establish some legal, factual or discretionary error (Fox v Percy* [2003] 214 CLR 118 at [27]*; Teelow v Commissioner of Police* [2009] 2 Qd R 489 at [4]*; Commissioner of Police v Al Shakarji* [2013] QCA 319 at [7], [65]*; White v Commissioner of Police* [2014] QCA 121 at [8]*)'.*
[327] *Keys v Director of Public Prosecutions* (Qld) [2009] QCA 220 at [22].
[328] In both *Keys v Director of Public Prosecutions (Qld)* [2009] QCA 220 and *Sica v DPP* [2011] 2 Qd R 254; [2010] QCA 18, Chesterman JA outlined the nature of an appeal from a decision refusing bail.

Decisions regarding bail involve the exercise of a broad discretion coupled with the court's assessment concerning the existence or otherwise of an 'unacceptable risk' (necessitating 'an assessment of a risk according to an imprecise standard'[329]), and the need to form provisional assessments upon limited material regarding the strength of the Crown case and the applicant's character. Accordingly, such decisions are considered particularly *'unsusceptible to the appellate process. The scope for demonstrating error of the kind required by House is necessarily limited. The discretion has to be exercised within very broad parameters'*.[330]

6.8 Appeal from a decision of a single Judge of the Supreme Court or District Court to the Court of Appeal

An appeal lies to the Court of Appeal from a decision of a single judge of the Supreme Court or District Court refusing bail by virtue of Chapter 18 of the *Uniform Civil Procedure Rules ('UCPR'))*.[331]

An appeal pursuant to Chapter 18 of the *UCPR* is by way of rehearing on the original evidence (and is not a rehearing de novo).[332]

As the appeal is "*against the exercise of judicial discretion conferred and circumscribed by the terms of s.16*"[333] the principles established in *House v The King* (1936) 55 CLR 499 apply.[334]

Section 8(5) provides that the powers of the Court of Appeal with respect to bail may be exercised by a judge of the Supreme Court in the same manner as they may be exercised by the Court of Appeal, but if the judge refuses an application with respect to bail, the person making the application may apply to the Court of Appeal and that court shall hear and determine the application.

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[329] *M v M* (1988) 166 CLR 69 at 78 at [15].

[330] *Sica v DPP* [2011] 2 Qd R 254; [2010] QCA 18 per Chesterman JA at [16]. See also *SCT v Director of Public Prosecutions* [2017] QCA 131; *Fisher v Director of Public Prosecutions* [2011] QCA 54; *Le v Director of Public Prosecutions (Qld)* [2013] QCA 280.

[331] See r.745 *Uniform Civil Procedure Rules 1999.*

[332] *Uniform Civil Procedure Rules 1999* r.765(1) states that an appeal to the Court of Appeal is an appeal 'by way of rehearing' and as a consequence of *Uniform Civil Procedure Rules* reg.765(2) includes an appeal from a single judge of the Supreme Court to the Court of Appeal. See *Scrivener v DPP* [2001] QCA 454 at [10].

[333] *Keys v Director of Public Prosecutions (Qld)* [2009] QCA 220 at [22].

[334] In both *Keys v Director of Public Prosecutions (Qld)* [2009] QCA 220 and *Sica v DPP* [2011] 2 Qd R 254; [2010] QCA 18, Chesterman JA outlined the nature of an appeal from a decision refusing bail.

CHAPTER 7 – MAGISTRATES COURT BAIL PENDING s.222 JUSTICES ACT 1886 APPEAL TO THE DISTRICT COURT

Power to grant appeal bail

The Magistrates Court has power under s.8(1)(a)(ia) to grant bail to a person awaiting an appeal to the District Court under s.222 of the *Justices Act 1886,*

Test to be applied

When a Defendant seeks bail pending a s.222 *Justices Act 1886* appeal to the District Court following conviction, bail should be granted only in exceptional circumstances, and ordinarily only if the following two conditions are satisfied:

1. that there are strong grounds for concluding that the appeal will be allowed; and

2. that the sentence, or in all events the custodial part of it, is likely to have been substantially served before the appeal is determined.[335]

Exceptional circumstances may be demonstrated even though both those conditions are not satisfied but the prospects of success on appeal will always be an important consideration. The discretion should be exercised in light of those principles, but having regard to all relevant circumstances, in particular those referred to in s.16 of the *Bail Act 1980*.[336]

7.1 Power to grant appeal bail

The Magistrates Court has clear power to grant, enlarge, vary, or revoke bail in the period during which a s.222 appeal is pending in the District Court.[337] The District Court also has power to determine bail applications during this period.[338] It may be preferable that such applications are brought in the appeal court, especially where potential delay is an issue under consideration. For example, an appeal court may elect to list the matter for expedited hearing.[339] Nevertheless, where a party elects to bring an application before the Magistrates Court, the court would not ordinarily refuse to exercise its jurisdiction to determine the matter.

7.2 Test to be applied

The *Bail Act 1980* clearly distinguishes between bail involving persons '*clothed with the presumption of innocence and the grant of bail to a person after he has been convicted*'.[340] Section 9 applies to the former and subject to the provisions of the Act, creates a duty to grant

[335] *Hanson v DPP (Qld)* [2003] QCA 409*; Fuller v DPP (Qld)* [2008] QCA 303. See also *Re Chetcuti* [2017] QSC 196, *De Waal v Commissioner of Police* [2016] QDC 26 and *R v Martens* [2009] QCA 139.
[336] *R v Ogawa* [2009] QCA 201 at [8].
[337] *Bail Act 1980*, s.8(1)(a)(ia) and 8(1)(b).
[338] *Bail Act 1980*, s.8(1)(a)(i) (See Chapter 16).
[339] See *R v Kelley* [2018] QCA 18 at [4].
[340] *Ex parte Maher* [1986] 1 Qd R 303 at 307 per Thomas J.

bail to unconvicted persons. In contrast, the Act *does not* contain '*a positive expression of the duty to grant bail*'[341] in the case of a convicted person. Rather, s.8 provides only a *discretionary power* to grant bail to the convicted defendant pending a s.222 appeal.[342]

Notwithstanding the discretionary nature of the power to grant bail pending an appeal to the District Court, it was established by the High Court in *United Mexican States v Cabal* that:

> *'To stay an order of imprisonment before deciding the appeal is a serious interference with the due administration of criminal justice. As Thomas J pointed out in Ex parte Maher, to allow bail pending the hearing of an appeal after a person has been convicted and imprisoned:*
> - *makes the conviction appear contingent until confirmed;*
> - *places the Court in the invidious position of having to return to prison a person whose circumstances may have changed dramatically during the period of liberty on bail;*
> - *encourages unmeritorious appeals;*
> - *undermines respect for the judicial system in having a "recently sentenced person walking free";*
> - *undermines the public interest in having convicted persons serve their sentences as soon as practicable.*
>
> *Consequently, the doctrine of this Court is that in a criminal case an order granting bail will only be made if there are exceptional circumstances'.*[343]

As stated by Thomas J in *Maher*, *'the discretion is one that is not lightly to be exercised, and is one that requires factors of sufficient force to outweigh the public factors I have mentioned'.*[344] The public factors referred to by Thomas J are those mentioned by the High Court in the passage above from *United Mexican States v Cabal*.[345]

The High Court in *United Mexican States v Cabal* went on to say:

> *'The history of decisions of this Court shows that ordinarily it will grant bail in criminal cases only if two conditions are satisfied. First, the applicant must demonstrate that there are strong grounds for concluding the appeal will be allowed….. Second, the applicant must show the sentence, or at all events the custodial part of it, is likely to have been substantially served before the appeal is determined.'* [346]

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[341] *Ex parte Maher* [1986] 1 Qd R 303 at 308 per Thomas J.
[342] *Bail Act 1980*, s.8(1)(a)(ia).
[343] Joint judgment of Gleeson CJ, McHugh and Gummow JJ in *United Mexican States v Cabal* (2001) 209 CLR 165; [2001] HCA 60 at [39]; (2001) 183 ALR 646 at 656, quoting Justice Thomas in *Ex parte Maher* [1986] 1 Qd R 303. See also *Hanson v DPP (Qld)* [2003] QCA 409; *R v Fuller* [2008] QCA 303; *Ettridge v DPP (Qld)* [2003] QCA 410.
[344] *Ex parte Maher* [1986] 1 Qd R 303 at 310.
[345] (2001) 209 CLR 165; [2001] HCA 60 at [39].
[346] (2001) 209 CLR 165; [2001] HCA 60 at [41]; cited *Hanson v DPP (Qld)* [2003] QCA 409; *R v Fuller* [2008] QCA 303. *R v Ogawa* [2009] QCA 201. See also *Re Chetcuti* [2017] QSC 196 and *De Waal v Commissioner of Police* [2016] QDC 26.

In *Hanson v DPP (Qld)*, the Court of Appeal applied *Cabal* and commented that *'the prospect of success on appeal is an obviously important matter when determining whether or not …exceptional circumstances exist'*.[347]

While generally it will be necessary for the applicant to show strong grounds and that a substantial portion of the sentence may be served, it was explained in *R v Ogawa* that exceptional circumstances may still be found to exist although both those requirements are not satisfied.[348] The Court summarised the principles as follows:

> '*Ordinarily, in order to establish "exceptional circumstances" it will be necessary to show that "there are strong grounds for concluding that the appeal will be allowed" and that the appellant may be required to serve an unacceptable portion of his or her sentence before the appeal can be heard.*[349] *That statement of principle acknowledges that "exceptional circumstances" may be held to exist even though both of the above requirements are not satisfied.*[350] *Prospects of success on appeal, however, will always be an important consideration.*[351] *Of course, it is always necessary that the discretion to grant or withhold bail be exercised in the light of the principles stated earlier, with regard to all relevant circumstances, and in particular, those referred to in s 16 of the Bail Act 1980* (Qld).*'* [352]

[347] *Hanson v DPP (Qld)* [2003] QCA 409 at [11].
[348] *R v Ogawa* [2009] QCA 201 at [8]. See also *Re Chetcuti* [2017] QSC 196 and *De Waal v Commissioner of Police* [2016] QDC 26.
[349] *Hanson v DPP (Qld)* (2003) 142 A Crim R 241; *R v Fuller* [2008] QCA 303; and *Ettridge v DPP (Qld)* [2003] QCA 410.
[350] See e.g., *Ex Parte: Maher* [1986] 1 Qd R 303 at 312; *Marotta v The Queen* (1999) 73 ALJR 265 and *Chew v The Queen* [No 2] (1991) 66 ALJR 221.
[351] *In re Cooper's Application for Bail* [1961] ALR 584 and *R v Martens* [2009] QCA 139.
[352] *R v Ogawa* [2009] QCA 201 at [8].

CHAPTER 8 – FORFEITURE OF UNDERTAKING, DEPOSIT OR OTHER SECURITY (INCLUDING SURETY) UPON NON-ATTENDANCE

Section 11 of the *Bail Act 1980* provides the court with the power to grant bail upon a defendant's undertaking with or without security.

> ***Undertaking*** *means a promise in writing with respect to bail signed by a defendant or by a defendant and the defendant's surety or sureties that the defendant will appear at a hearing or an adjourned hearing or upon the defendant's trial or an appeal and surrender into custody and comply with such other conditions as are imposed for the defendant's release on bail.*[353]

Security for the defendant's appearance may be provided by way of a deposit of money or other security, including an undertaking by a surety as to payment of a sum of money.[354]

A surety to an undertaking must be a person other than the defendant.[355] Upon forfeiture of an undertaking the surety becomes bound to pay the sum of money specified in the undertaking.[356]

Consequently, a failure to appear in accordance with an undertaking may result in the forfeiture of the undertaking[357] and:

i. forfeiture of a deposit of money;
ii. forfeiture of any other security;
iii. forfeiture of a sum of money promised as security by a surety.[358]

Upon failure of a defendant to appear where a security has been provided, the Act provides for a two-stage approach:

Stage 1 - Automatic Declaration of Forfeiture of Undertaking under s.31

If the court is satisfied that a defendant has not appeared in accordance with an undertaking the court ***must*** declare the undertaking forfeited.[359]

i. Forfeiture of the undertaking is automatic.
ii. Notwithstanding the use of the word 'may' in s.31(1), the court has no discretion.[360]

[353] *Bail Act 1980*, s.6.
[354] *Bail Act 1980*, s.11.
[355] *Bail Act 1980*, s.21.
[356] *Bail Act 1980*, s.21(2).
[357] *Bail Act 1980*, s.31.
[358] *Bail Act 1980*, s.32.
[359] *Bail Act 1980*, s.31 but see *DPP (Cth) v Turner & Anor* [2016] QSC 107 per Flanagan J [9-12] and [33].
[360] Although s.31(1) provides that the court 'may forthwith declare the undertaking to be forfeited, that phrase has been judicially considered in *DPP (Cth) v Turner & Anor* [2016] QSC 107 per Flanagan J at [9]-[12] and [33] to require the ***automatic forfeiture*** of both the undertaking and any security in circumstances where the court is satisfied the defendant has failed to appear in accordance with an undertaking subject to a surety/ies (citing Jones J in *Baytieh v State of Queensland* [2001] 1 Qd R at [29]; [1999] QCA 466 at [29].

iii. Proof of fault on part of the defendant is ***not*** required.

Stage 2 – Discretion to Order Forfeiture under s.32

A court that declares an undertaking forfeited (upon satisfaction of the non-attendance of the defendant and pursuant to s.31) ***may*** order forfeiture of the deposit or other security.

i. The Court has a discretion to order the forfeiture or all or some of the security following a declaration.
ii. The Court has a discretion regarding the amount, time, and manner of payment.
iii. If the Court orders forfeiture of all or some of the security, the Court must comply with s.32A(1).

An order made under s.32 can be varied or revoked if it is against the interests of justice to require the amount to be paid.[361]

8.1 Generally

In order to manage the risk of releasing an offender on bail into the community, the *Bail Act 1980* provides for a defendant to be released subject to conditions relating to the provision of security for attendance.

Section 11 provides:

> *(1)A court or police officer authorised by this Act to grant bail shall consider the conditions for the release of a person on bail in the following sequence—*
>
> > *(a) the release of the person on the person's own undertaking without sureties and without deposit of money or other security;*
> >
> > *(b) the release of the person on the person's own undertaking with a deposit of money or other security of stated value;*
> >
> > *(c) the release of the person on the person's own undertaking with a surety or sureties of stated value;*
> >
> > *(d) the release of the person on the person's own undertaking with a deposit of money or other security of stated value and a surety or sureties of stated value …*

To ensure the effectiveness of sureties to address any risk that accompanies the grant of bail, in circumstances where the defendant fails to attend in accordance with an undertaking where a security has been provided, the court has the power to order forfeiture of the security whether provided by the defendant or a surety. The potential of the court to impose a serious and detrimental consequence on a third party by the ordering of forfeiture of any security given by a

[361] *Bail Act 1980*, s.32B(2)(a). See considerations set out by Jones J in *Baytieh v State of Queensland* [2001] 1 Qd R.

surety, is provided for by s.21(2) as follows, and is aimed at the court exerting 'moral pressure' on a defendant to comply with the conditions of the bail undertaking:

> *'a person who enters into an undertaking as a surety becomes bound, upon its forfeiture, to pay to Her Majesty the sum of money set forth in the undertaking with respect to that surety'.*

The importance of the ability of the court to apply moral pressure on a defendant to comply with a bail undertaking as a consequence of the court's power to forfeit the undertakings of sureties, was expressed in *R v Crown Court at Maidenstone; Ex parte Lever* [1995] 2 All ER 35 at 40 (as cited in *Baytieth* at [32]):

> *"In this case the sureties undertook a particularly heavy and onerous burden in assuming the responsibility of bringing this defendant to court for trial. Substantially to reduce their burden would be to alert those who might otherwise be constrained not to break that trust with their family, that a surety who has done his best will be relieved of his financial obligation and a defendant need not be concerned that the family will suffer if he absconds. That impression would destroy a crucial element in the use of sureties. The reducing of the financial obligation assumed by a surety must be the exception not the rule and be granted only in really deserving cases."* Hoffman LJ stated in that case – "*It follows that in one sense the system has unfairness built into it. It may result in persons entirely innocent having to suffer on account of the wrongdoing of another. The courts rely upon the moral pressure which this prospect should apply to the mind of the accused. But the pressure would evaporate if judges were not willing, as a general rule, to harden their hearts against a plea of lack of culpability when it turns out that the surety's trust in the accused was misplaced."*

8.2 Automatic declaration of forfeiture of undertaking (*Bail Act 1980*, s.31)

Section 31 of the *Bail Act 1980* provides the magistrate with the power to declare an undertaking forfeited.

Section 31 provides:

> *'(1) Where a defendant who has been released on bail fails to appear before the court in accordance with the defendant's undertaking and surrender into custody the court may forthwith declare the undertaking to be forfeited'.*

Notwithstanding the use of the word 'may' in s.31(1), proof of fault is ***not*** required. As Justice Flanagan stated in *DPP (Cth) v Turner & Anor* [2016] QSC 107, citing Justice Jones in *Baytieh v State of Queensland*, noted:

> *' … If the court is satisfied that the defendant has failed to appear in accordance with his or her undertaking then the forfeiture of both the undertaking and any deposit or other security is automatic'.*[362]

[362] See *DPP (Cth) v Turner & Anor* [2016] QSC 107 at [12]. See also [33].

Justice Flanagan continued:

> *'… the better view is that s.31(1) simply requires the Director to establish to the satisfaction of the Court that the defendant has failed to appear. Except in the clearest of cases where there is uncontroverted evidence as to the circumstances of such non-appearance, for example uncontroverted evidence that the defendant is dead, then explanations and excuses for non-appearance are best dealt with in the context of an application pursuant to s.32B of the Act.'*[363]

This was reasoned to be so notwithstanding the use of the word 'may' in s.32(1) and s.32, because of the operation of s.32B which allows for consideration by the magistrate of the interests of justice and provides the magistrate with a discretion to vary or revoke an order forfeiting a bail undertaking.

8.3 Discretion to order forfeiture and payment of deposit or other security (including where there is a surety) (*Bail Act 1980*, s.32)

Section 32 of the *Bail Act 1980* provides the magistrate with a discretion (in circumstances where an undertaking has been declared forfeited pursuant to s.31 and the undertaking contains a condition of bail requiring the making of a deposit of money or other security) to order that the deposit or other security be forfeited. Usually forfeiture under s.32 will, as with forfeiture of the undertaking, be automatic.[364]

If a court orders payment of a deposit of money or other security under s.32 for which there is a surety, in accordance with s.32A(1), the court must also do one of the following:

(a) order the surety pay the amount to the proper officer of the court immediately or within the time or by the instalments stated in the order; or
(b) order that the proper officer of the court give the particulars to SPER for registration under the State *Penalties Enforcement Act 1999*, s.34.[365]

The court has a discretion regarding the length of time ordered to pay the amount under s.32A(a).

The court has a discretion to impose a default period of imprisonment upon a surety of not more than two years for defaulting in paying the amount due.[366]

8.4 Variation or revocation of an order to pay an amount forfeited (*Bail Act 1980*, s.32B)

Section 32B provides the magistrate with the power to revoke or vary an order made pursuant to s.32 or s.32A to pay an amount forfeited.

A defendant or surety may apply in the approved Form to the court that made the order or in the case of a Magistrates Court, any magistrate, for an order revoking or varying the order.[367]

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[363] *DPP (Cth) v Turner & Anor* [2016] QSC 107 at [33].
[364] *DPP (Cth) v Turner & Anor* [2016] QSC 107 at [12].
[365] Discussed at *DPP (Cth) v Turner & Anor* [2016] QSC 107 at [39].
[366] *Bail Act 1980*, s.32A(2).
[367] *Bail Act 1980*, s.32B(1).

An application can only be made on the ground that it would be against the interests of justice to require the person to pay the amount ordered to be paid.[368]

The applicant bears a heavy onus of proving on the balance of probabilities that it would be against the interests of justice to require the person to pay the amount ordered to be paid.[369]

> *'It may be accepted that the circumstances will be rare in which it would be against the interests of justice to require the person indebted to pay any part of the amount ordered to be paid, given the importance of ensuring the integrity of the surety system'.*[370]

Justice Jones in *Baytieh* listed the matters he considered relevant to a determination of an application under s.32B:

1. *The onus of proof that relief from forfeiture is "in the interests of justice" is on the applicant (Cucu).*
2. *The surety's obligation is to pay, unless he or she proves circumstances which make it fair and just to be granted relief (Doueihi).*
3. *The steps which the surety took to ensure that the defendant would attend the Court (Southampton Justices, Ex parte Green).*[371]
4. *Any circumstances which ought to have alerted the surety that the defendant was likely to abscond (Doueihi).*
5. *The circumstances which caused the surety to enter into the undertaking to secure the defendant's release (Thomakakis v Sheriff (NSW) (1993) 33 NSWLR 36, 71 A Crim R 265).*
6. *The nature of the relationship between the surety and the defendant and the level of control the surety had over the defendant's behaviour (Cucu; see also R v Jordan [1966] Tas SR 178).*
7. *Whether the relationship is likely to persuade the defendant to return in the event that he or she absconds (Southampton Justices, ex parte Corker (1976) 120 SJ 214).*
8. *The assistance given by the surety in the attempts to re-apprehend the defendant (Cucu).*
9. *The extent of the financial impact of the forfeiture on the surety and his or her family (Cucu).*[372]

As was noted in *DPP (Cth) v Turner* [2016] QSC 107 at [79]*:*

> *''Whilst McMurdo P and Davies JA in Baytieh v State of Qld considered it unwise to attempt a definitive statement of the considerations which may be relevant to an*

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[368] *Bail Act 1980*, s.32B(2)(a).
[369] See *DPP (Cth) v Turner* [2016] QSC 107 at [50] and *Baytieh* para 33 quoting Kirby P in *Cucu v The District Court (NSW)* (1994) 73 A Crim R 240 at 242.
[370] Per McMurdo P, Davies JA in *Baytieh v State of Queensland* [2001] 1 Qd R 1 at [12], followed in *Henry v Director of Public Prosecutions (Qld)* [2003] QCA 2.
[371] *'It is well established that in considering an application for relief under s.32B of the Act an important consideration is whether the surety has taken all reasonable steps to ensure the attendance of the defendant at his trial'.*
[372] See also *Ex parte Doueihi* [1986] 2 Qd R 352 – the decision identifies some relevant considerations to which regard should be had regarding forfeiture (as stated at [31] of *Baytieh*).

> *application pursuant to s.32B, their Honours accepted that considerations of financial hardship of the applicant arising since giving the undertaking would be relevant'.*

An application for revocation or variation:

- must be made within 28 days after the relevant undertaking is forfeited or the longer time the court allows for payment of the amount (or within 28 days of the forfeiture order coming to the notice of the applicant);
- must briefly state the circumstances relied upon; and
- must be filed and served on the relevant party at least 14 days before the dates set for the hearing of the application.[373]

Upon hearing of an application, the court must decide the application and may:

a) vary the order; or
b) revoke the order; or
c) refuse the application.[374]

[373] See *Bail Act 1980*, ss.32B(2) and (3).
[374] *Bail Act 1980*, s.32B(7).

CHAPTER 9 - WARRANTS

Power to issue a warrant (*Bail Act 1980*, ss.27A, 27B, 28A(1), 28(C) and 19D)

A magistrate may issue a warrant:

1) when the defendant leaves the precinct of the Court without entering into an undertaking or fulfilling necessary conditions (ss.27A and 27B);
2) pursuant to s.28A(1) when the defendant fails to appear as required having been released:
   a) on bail by the Supreme Court or District Court to appear before the Magistrates Court; or
   b) on bail by a Magistrates Court or the Childrens Court, or by any justice or justices conducting a committal proceeding, upon the defendant entering into an undertaking; or
   c) on bail under s.7(3)(a) (bail granted by a police officer); or
   d) on bail upon the defendant making a deposit of money under s.14A; or
   e) on bail that has been continued under ss.34A(2), 34B(2), 34BA(2) or 34BB(2); or
   ea) on bail or without bail under the *Youth Justice Act 1992,* Part 5; or
   f) permitted to go at large without bail;
3) when a person released under s.11A with an impairment of mind fails to appear as required (s.28C); and
4) in order to give effect to a decision made by the Magistrates Court sitting in the capacity of a reviewing court (s.19D).

Section 28A (4) limits the circumstances in which a warrant may be issued for a defendant released to appear at a time to be determined or absent and unrepresented when the matter was adjourned.

Power to postpone the issue and enforcement of a warrant where defendant fails to appear (*Bail Act 1980*, s.33D)

Section 33D provides the magistrate with the power to postpone the issue and enforcement of a warrant.

Similarly, the *Police Powers and Responsibilities Act 2000* authorises a court to postpone enforcement (but not the issue) of a warrant upon failure to comply with a Notice to Appear.

Power upon surrender

When a defendant surrenders under a warrant having previously failed to appear, the magistrate may:

a) withdraw or cancel the warrant;
b) with the exception of a warrant issued pursuant to s.28C, convict the defendant of an offence of failing to appear (s.33).

9.1 Power to issue a warrant

9.1.1 Warrant for apprehension when defendant leaves the precinct of the court without entering into an undertaking or fulfilling necessary conditions (*Bail Act 1980*, ss.27A and 27B)

Section 27A provides the court with the power to issue a warrant for the defendant's arrest in circumstances where the defendant is granted bail and the defendant leaves the precincts of the court without entering into a required undertaking or without fulfilling required conditions prior to leaving the precincts of the court.

Pursuant to s.27A(3), a warrant issued pursuant to s.27A must:

(a) name the defendant; and
(b) state the reason under s.27A(1) for the issue (that is, leaving without entering an undertaking or leaving without fulfilling a required condition); and
(c) order all police officers to apprehend the defendant and bring the defendant before the court to be dealt with according to law.

Section 27B is in similar terms to s.27A but relates to circumstances where a magistrate grants bail using video link facilities or audio link facilities under the *Justices Act 1886,* Part 6A, and where the defendant leaves the precincts of the court without entering into the required undertaking or without fulfilling required conditions of an undertaking.

9.1.1.1 Where defendant surrenders

Whilst there does not appear to be any specific legislative provision in the *Bail Act 1980* regarding the power of the court to withdraw or cancel a warrant issued pursuant to s.27A or s.27B, s.24AA of the *Acts Interpretation Act 1954* states that the power to make any instrument or decision includes a power to amend or repeal. 'Repeal' of an instrument is defined to include 'to revoke or rescind'. 'Instrument' is defined to mean 'any document'. Accordingly, it is considered that a court has the power to withdraw or cancel such a warrant given the court has the power in s.27A and s.27B to issue such a warrant.

Additionally, pursuant to s.33 of the *Bail Act 1980*, a court may convict the defendant of failing to surrender (see further below at 9.3).

9.1.2 Other warrants for the apprehension of the defendant (*Bail Act 1980*, s.28A(1))

Section 28A(1) of the *Bail Act 1980* provides that where a defendant does not appear before a court that the defendant is required to appear before, that court may issue a warrant if the defendant was released:

a) on bail by the Supreme Court or District Court to appear before the Magistrates Court;
b) on bail by a Magistrates Court or the Childrens Court, or by any justice or justices conducting a committal proceeding, upon the defendant entering into an undertaking; or

c) on bail under s.7(3)(a) (bail granted by a police officer); or
d) on bail upon the defendant making a deposit of money under s.14A; or
e) on bail that has been continued under ss.34A(2), 34B(2), 34BA(2) or 34BB(2); or
ea) on bail or without bail under the *Youth Justice Act 1992,* Part 5[375]; or
f) permitted to go at large without bail.

Section 391 of the *Police Powers and Responsibilities Act 2000* mirrors s.28A(1). It provides that where a person fails to appear as required by a Notice to Appear issued by a police officer, the court before which the person was required to appear may a) hear and decide the complaint in the absence of the person,[376] or b) order that a warrant issue for the arrest of the person to be brought before the court to be dealt with according to law.

Section 28A(3) provides that a warrant issued pursuant to s.28A shall:

a) name or otherwise describe the defendant;
b) set out the court into the custody of which the defendant failed to surrender and the time and place of that failure; and
c) order the police officers to whom it is directed to apprehend the defendant and cause the defendant to be brought before a Magistrates Court or, as the case may be, the Childrens Court to be dealt with according to law.

Note –
A defendant may be granted bail before being brought before the court under paragraph (c) if the defendant shows cause under section 16(3) why the defendant's detention in custody is not justified.

Section 28A(4) provides that a court **shall not** issue a warrant under s.28A(1):

(a) where the defendant was released on bail or permitted to go at large without bail to appear at a time and place to be determined; or
(b) where the hearing was adjourned in the defendant's absence and the defendant was not represented by a lawyer;

Unless:

- the court is satisfied the defendant cannot be found, has absconded or is likely to abscond; or
- reasonable notice of the time and place of the hearing has been given to the defendant.

[375] Part Five of the *Youth Justice Act 1992* includes s.57 entitled: 'Warrants for arrest of child who fails to appear after release without bail' and provides that *'… the provisions of the Bail Act 1980 relating to the issue of warrants for the arrest of defendants who fail to surrender into the custody of the court before which they were required to appear after being permitted to go at large without bail, apply to a child who fails to appear after being released into the custody of a parent, or permitted to go at large, without bail*.'

[376] Summary offences and indictable offences capable of being dealt with summarily may be heard and decided in the absence of a defendant who fails to appear in response to a Notice to Appear: see *Police Powers and Responsibilities Act 2000,* s.388; *Justices Act 1886*, ss.142 and 142A; *Justices Act 1886*, s.4, definition 'simple offence'; *Acts Interpretation Act 1954*, s.44.

Section 28B states that a warrant issued under ss.28 or 28A(1)(a), (b), (c) or (e) to apprehend a defendant because of the defendant's failure to surrender, shall be sufficient authority for a police officer to apprehend the defendant upon any other charge in respect of which the defendant failed to surrender at the same court, time and place or sittings as the defendant was required to surrender into custody on the charge in respect of which the warrant was issued.

9.1.2.1 Where defendant surrenders

In accordance with s.28A(2), where a defendant for whose apprehension a warrant was issued under s.28A(1):

a) surrenders into the custody of the court that issued the warrant as soon as is practicable after the time for the time being appointed for the defendant to do so; and
b) satisfies the court that the failure to surrender into custody was due to reasonable cause,

the court may withdraw or cancel the warrant.

Section 28A(2) deals with the familiar circumstance where a defendant fails to appear at the appointed time, a warrant is then issued but the defendant presents soon after. It is arguable the power to withdraw or cancel under s.28A(2) may only be exercised by the Magistrates Court at the place where the warrant was issued. However, once the warrant has been executed, the person may be dealt with under s.33 of the *Bail Act 1980* for failing to appear by a Court at any place appointed for the holding of a Magistrates Court.[377] Under s.33(2) the defendant may advance a defence of reasonable cause for having failed to appear and surrender. (For how a court may deal with a person under s.33 of the Bail Act, see further below at 9.3.)

9.1.2.2 Management of substantive matter by the court other than the court that issued the warrant

In circumstances where the warrant has been executed and a Magistrate in a court that did not issue the warrant determines to deal with the person under s.33 of the *Bail Act 1980* for failing to appear, the Magistrate, may in some circumstances hear and determine the substantive and other outstanding offences.

Section 33A of the *Bail Act 1980* provides that the Magistrates court before which the defendant is brought on the warrant, may hear, and determine the substantive offence/s and any offence with which the defendant has been charged and not dealt with provided:

a) the defendant consents to the substantive or any other outstanding matters being dealt with
b) the offence is one which may be heard and determined by the court;
c) the court is satisfied that the defendant has not been dealt with for the substantive or other offence/s; and
d) the defendant pleads guilty.

[377] *Bail Act 1980*, s.33C(1).

Section 139(3) of the *Justices Act 1886* provides that *'When a defendant fails to appear to answer a complaint for a simple offence or breach of duty and a warrant is issued for the purpose of apprehending the defendant and bringing the defendant before the court, the matter may, with the defendant's consent, be dealt with before a Magistrates Court at a place within the district in which the defendant is apprehended under the warrant.'*

If the preconditions in either s.33A *Bail Act 1980* or s.139(3) *Justices Act 1886* are not met, whilst the Magistrate has the power in s.33 *Bail Act 1980* to deal with the defendant for the failing to surrender, the Magistrate will not have the power to deal with the substantive offence/s and according to s.33B(1), 'without further inquiry or examination, shall commit the defendant to be dealt with by the court that issued the warrant'. In those circumstances, in accordance with s.33B(2), a court *'may grant bail to the defendant or by its warrant commit the defendant to prison with a direction to the chief executive (corrective services) to cause the defendant to surrender into the custody of the court that issued the warrant referred to in s.33(1)(b) in accordance with the defendant's undertaking at the time and place for the time being appointed for the defendant to do so'.*

9.1.3 Warrant for the apprehension of a person released under s.11A with an impairment of mind (*Bail Act 1980*, s.28C)

Section 28C provides that where a person with an impairment of mind is released under s.11A (who may be an adult or a child) fails to surrender as required, the court may issue a warrant for their apprehension directing that they be brought before the court. The person will not be liable to any other penalty for their failure to appear.[378]

The warrant must state the name or describe the person, the name of the court, the time and place where the defendant was required to surrender and failed to do so, and must state that the defendant failed to surrender into the court's custody at the required time and place, and order the police officers to apprehend the person and cause the person to be brought before the court to be dealt with according to law.[379]

9.1.3.1 Where defendant surrenders

In accordance with s.28C(3), the court may withdraw and cancel a warrant issued pursuant to s.28C if:

a) the person surrenders as soon as is practicable after the stated time; and
b) the court is given a satisfactory explanation as to why the person failed to surrender into custody as required.[380]

A court has no power to convict the defendant of the offence of failing to surrender (s.28C(1)(b)).

(For more detailed consideration, see Chapter Eight – Forfeiture of Deposit or other Security upon non-attendance, and see Chapter 10 - Alternatives to Bail).

[378] *Bail Act 1980*, s.28C(1)(b).
[379] *Bail Act 1980*, s.28C(2).
[380] *Bail Act 1980*, s.28C(3).

9.1.4 Warrant for defendant where surety swore a false affidavit (*Bail Act 1980*, s.21(7))

Where it appears to the court that a surety has sworn a false affidavit of justification, the court may revoke the defendant's bail and issue a warrant for apprehension of the defendant[381] Once the defendant is brought before the court it may revoke the bail, release the defendant on the defendant's original undertaking or vary the bail.[382]

1.1.5 Warrant in aid of orders by reviewing courts (*Bail Act 1980*, s.19D)

Sections 19B and 19C of the *Bail Act 1980* provide for a reviewing court in particular circumstances, to review a decision relating to bail. (See further *Chapter 6 – Challenges to a Refusal of Bail*). Section 19D empowers a reviewing court that makes an order pursuant to s.19B or s.19C to issue a warrant for the apprehension of the defendant directing that the defendant be brought before a stated court, in order to give effect to the order.

1.1.5.1 Where defendant surrenders

Whilst there does not appear to be any specific legislative provision in the *Bail Act 1980* regarding the power of the court to withdraw or cancel a warrant issued pursuant to s.19D, s.24AA of the *Acts Interpretation Act 1954* states that the power to make any instrument or decision includes a power to amend or repeal. 'Repeal' of an instrument is defined to include 'to revoke or rescind'. 'Instrument' is defined to mean 'any document'. Accordingly, it is considered that a court has the power to withdraw or cancel such a warrant given the court has the power in s.19D to issue such a warrant.

Additionally, pursuant to s.33 of the *Bail Act 1980*, a court may convict the defendant of the offence of failing to surrender (see further below at 9.3).

1.1.6 Warrant for apprehension of defendant by Supreme or District Court (*Bail Act 1980*, s.28)

Section 28(1) provides that where a defendant who has entered into an undertaking requiring the defendant to appear before the Supreme Court or District Court, breaks a condition of the undertaking or if the court is satisfied that the defendant is likely to break any such condition, the court before which the defendant is required to appear (on application by the Director of Public Prosecutions or, the Deputy Director of Public Prosecutions or a person duly so authorised), may after giving notice to the defendants (or without such notice if the defendant cannot be located or is likely to abscond), issue a warrant for the apprehension of the defendant.

1.1.6.1 Committal to Supreme or District Court (*Bail Act 1980*, s.33B))

Where a person is before a Magistrates Court or Childrens Court for failing to appear and that court cannot deal with the defendant on the offence in respect of which he or she failed to

[381] *Bail Act 1980*, s.21(7).
[382] *Bail Act 1980*, s.29A(2).

appear, the court, "without further inquiry or examination", must commit the defendant to be dealt with by the court that issued the warrant.[383]

1.1.6.2 Where defendant surrenders

In accordance with s.28(2), where a defendant failed to surrender and a warrant issued pursuant to s.28(1), and:

a) the defendant surrenders to the court that issued the warrant as soon as is practicable after the time for the time being appointed for the defendant to do so; and
b) satisfies the court that the failure to surrender was due to reasonable cause,

the court may withdraw and cancel the warrant.

Similarly, in accordance with s.28(2A) and (2B), where a warrant issued because the defendant had broken a condition of the undertaking or on the ground that the defendant is likely to break a condition of the undertaking, and the defendant satisfies the court prior to the execution of the warrant that the breaking of the condition was due to reasonable cause, or that the defendant is not likely to break a condition of the undertaking, the court may withdraw and cancel the warrant.

Additionally, pursuant to s.33 of the *Bail Act 1980*, a court may convict the defendant of failing to surrender (see further below at 9.3).

(See Chapter 16 – Supreme and District Court Bail)

9.2 Postponing issue or enforcement of a warrant in circumstances of a defendant failing to appear (*Bail Act 1980*, s.33D)

The *Bail Act 1980*, s.33D states in respect of a person released on bail:-

> ***33D Postponing issue or enforcement of a warrant***
> *(1) This section applies if an application is made to the court for a warrant for the apprehension of a person who has failed to appear before the court.*
>
> *(2) The court may postpone the issue or enforcement of the warrant to allow the person a further opportunity to appear before the court.*

Similarly, the *Police Powers and Responsibilities Act 2000* authorises a court to postpone enforcement (but not the issue) of a warrant made under s.389(1)(b) of that Act due to failure to appear as required by a Notice to Appear. Section 389(5) provides:

> *Subsection 1(b) does not prevent a court postponing the enforcement of a warrant for the arrest of a person to allow the person a further opportunity to appear before the court.*

[383] *Bail Act 1980*, s.33B; This power is in addition to the jurisdiction conferred by the *Justices Act 1886*, s.101: *Bail Act 1980*, s.33C(2).

In the event of a failure to appear by a person on bail the magistrate may elect one of four possible options:

- Decline to issue a warrant,
- Postpone issuing a warrant (except where there was failure to comply with a Notice to Appear under the *Police Powers and Responsibilities Act 2000,*
- Issue a warrant, or
- Issue a warrant but make an order postponing enforcement.

As the issue of a warrant has the significant consequence of potentially depriving a defendant of his or her liberty and exposing the person to commission of an offence under s.33(1), a Magistrate will carefully weigh all relevant considerations in the exercise of the discretion to issue.

If the magistrate declines to issue a warrant the matter will be adjourned, and the defendant served with notice of the adjourned date. This is a course often taken by magistrates in respect of warrants issued under the *Bail Act 1980*. If there is a failure to appear on the adjourned date the prosecution may renew the application for a warrant.

A magistrate may order a warrant issue but postpone enforcement or alternatively, postpone issue to a later date. As there is no power under the *Police Powers and Responsibilities Act 2000* to formally postpone issue of a warrant, as opposed to postponing enforcement, (in contrast to the position under the *Bail Act 1980*) care must be taken to be aware whether the person was required to present under a Notice to Appear. In a busy court, in order to avoid error, it may be easier to routinely forgo using the option available under the *Bail Act 1980* of postponing issue in favour of using one of the other alternatives.

Upon issuing a warrant a magistrate who makes an order postponing enforcement to allow the person a further opportunity to appear will adjourn the matter to a future date for mention. If the person appears on the mention date the magistrate will cancel the warrant. If the person fails to appear on the mention date a magistrate may order that the warrant be enforced.

9.3 Power of the court upon surrender to convict of offence of failing to appear (*Bail Act 1980*, s.33)

With the exception of a warrant issued pursuant to s.28C (with respect to a person with an impairment of mind), where the defendant either fails to surrender as soon as is practicable or fails to satisfy the court that the failure was due to reasonable cause, the defendant commits an offence under s.33(1) of the *Bail Act 1980* of failing to appear in accordance with an undertaking.

In such circumstances, upon production of the warrant, the magistrate is required under s.33(3A) to 'then and there' call on the defendant to prove why the defendant should not be convicted of an offence of failing to appear. This statutory requirement must be given effect by calling on the defendant without delay. Under s.33(2) the defendant may advance a defence of reasonable cause for having failed to appear and surrender.

A Magistrates Court or Childrens Court located in any Magistrates Court district has jurisdiction to exercise the powers conferred by s.33 regardless of where the offence was committed.[384]

(For more detailed consideration see *Chapter 12 – Breach of Bail - Fail to Attend*, and *Chapter 8 – Forfeiture of Deposit or other Security upon non-attendance*)

9.3.1 Required declaration of forfeiture of undertaking and any security (*Bail Act 1980*, s.31)

When a court is satisfied that the defendant has not appeared in accordance with an undertaking that is the subject of a surety/ies, by virtue of s.31(1) the court *must* (except in the clearest of cases) declare any undertaking and any security and/or surety, forfeited.

(For more detailed consideration, see *Chapter 8 – Forfeiture of Deposit or other Security upon non-attendance*).

9.3.2 Discretion to order forfeiture of all or some of the security (*Bail Act 1980*, s.32)

A declaration of forfeiture of the defendant's bail security pursuant so s.31(1) (above) enlivens the discretionary power of the court to order the forfeiture to the Crown of all or some of the security (s.32).

(For more detailed consideration, see Chapter Eight – Forfeiture of Deposit or other Security upon non-attendance).

9.4 Power of the Magistrates court to deal with certain outstanding offences (*Bail Act 1980*, s.33A)

Section 33A provides that where a defendant has been dealt with by a Magistrates Court or, the Children's Court for failing to appear pursuant to s.33 of the *Bail Act 1980*, the court may deal with any outstanding offences provided the following preconditions are met:

a) the defendant consents to the court dealing with the offence in respect of which the defendant failed to surrender into custody, or any other offence with which the defendant has been charged and not dealt with; and
b) the offence is one which may be determined by the Magistrates Court; and
c) the court is satisfied that the defendant has not been dealt with for the offence, and
d) the defendant pleads guilty.

A Magistrates Court or Childrens Court located in any Magistrates Court district has jurisdiction to exercise the powers conferred by s.33A regardless of where the offence was committed.[385]

[384] *Bail Act 1980*, s.33C.
[385] *Bail Act 1980*, s.33C.

CHAPTER 10 – ALTERNATIVES TO BAIL ON UNDERTAKING

Alternatives to bail undertakings include:

1) Cash bail granted by the police (s.14(1A));
2) Release without bail by police (s.14(1B);
3) Release on issue of a Notice to Appear (s.7(3)(b));
4) Cash bail granted by a Magistrate (s.14A(1)(a));
5) Magistrate may permit to go at large (s.14A(1)(b);
6) Release of person with an impairment of mind (ss.11A and 11B).

10.1 Cash bail granted by police (*Bail Act 1980*, s.14(1) and s.14(1A))

In accordance with s.14(1) and (1A), where:

a) A person has been arrested in connection with a charge of an offence, other than an indictable offence or an offence mentioned in the schedule (being s.79 of the *Transport Operations (Road Use Management) Act 1995* regarding 'vehicle offences involving liquor or drugs' and ss.221, 223, and 225 of the *Racing Integrity Act 2016;* and
b) A defendant is in the custody of a police officer having not first appeared before a justice; and
c) The police officer is satisfied the defendant cannot be taken promptly before a court,

if the police officer considers it appropriate, the police officer may grant bail and release the defendant from custody upon the person making a deposit of money as security for their appearance before a court on a specified date, place, and time.

10.1.1 Action by court where person appears in accordance with bail

Where a person granted cash bail by a police officer attends court in accordance with the bail, the court shall order the amount of the deposit to be refunded unless the court orders that the deposit or part of it be applied towards:

a) payment of any penalty or costs; or
b) if the hearing is adjourned and the defendant is permitted to go at large, a security for the person's future appearance at an adjourned hearing (and in the event the defendant fails to appear at the adjourned date, the court shall order the forfeiture of the deposit (ss.14(5) and (6)).

10.1.2 Where failure to appear

Where a person granted cash bail fails to appear in accordance with the bail, the court or justice shall order the forfeiture of the deposit of money (s.14(5)) (unless the defendant's lawyer applies for an adjournment that is granted, in which case the court may order the deposit or part of the deposit be applied as security for the defendant's future appearance, or permit the defendant to

go at large without bail (s.14(7)). If the defendant fails to appear at the adjourned hearing, the court shall order the forfeiture of the deposit of money made (s.14(7A)).

Section 150A of the *Justices Act 1886* provides that where a defendant has been granted bail under s.14 of the *Bail Act 1980* and:

i) the defendant fails to appear, and the justices order forfeiture pursuant to s.14(5), or
ii) the defendant does not appear, but the defendant's lawyer applies for an adjournment; or
iii) the defendant appears in accordance with the bail,

the justices may, instead of dealing with the complaint under division 2 or 3 of the *Justices Act 1886* (that includes dismissing, adjourning, or hearing the matter in the absence of the defendant), order that the complaint is at an end and take no further action in relation to the complaint.

10.2 Grant of release without bail by police (*Bail Act 1980*, s.14(1B))

A police officer may release a person *without bail* where:

(a) a person charged with being drunk in a public place is released into the care of a person at a place of safety under s.378 of the *Police Powers and Responsibilities Act 2000*;
(b) a person charged with a minor drugs offence within the meaning of the *Police Powers and Responsibilities Act 2000*, schedule 6 signs an agreement to attend a drug diversion assessment program under s.379 of that Act.

10.3 Release on issue of Notice to Appear (*Bail Act 1980*, s.7(3)(b))

The alternative to bail most frequently utilised by police officers is the release of a defendant by issue of a Notice to Appear. If an officer is satisfied a person may be granted bail under the Act the officer has the option of issuing the person a Notice to Appear rather than placing them on bail.[386]

The power to issue a Notice to Appear is given in s.382 of the *Police Powers and Responsibilities Act 2000*. The notice requires the person to appear before a court of summary jurisdiction at a stated time and place.

Section 7 of the *Bail Act 1980* does not apply to a child[387]. However, a prescribed officer may release a child without bail by issuing a notice to appear or a release notice.[388]

[386] *Bail Act 1980*, s.7(3).
[387] *Bail Act 1980*, s.7(1)(d).
[388] *Youth Justice Act 1992*, s.51.

10.4 Cash bail granted by Magistrate (*Bail Act 1980*, s.14A(1)(a))

Section 14A(1)(a) provides that where a magistrate adjourns the hearing of a charge of an offence other than an indictable offence or an offence in the Schedule (being s.79 of the *Transport Operations (Road Use Management) Act 1995* regarding 'vehicle offences involving liquor or drugs' and ss.221, 223, and 225 of the *Racing Integrity Act 2016*, the magistrate may:

> *(a) grant bail and in lieu of the defendant entering into an undertaking, order that the defendant be released from custody on the making of a deposit of money with the clerk of the court as security for the defendant's surrender into custody.*

This power is not available for indictable offences and some other scheduled offences.

Where a person accepts a deposit of money from a defendant pursuant to s.14A(1)(a), that person must give notice to the defendant in the approved form that includes the particulars required under a regulation (s.14A(2)(a)).

10.4.1 Action by court where person appears in accordance with bail

Where a person granted cash bail by a magistrate, attends court in accordance with the bail, the court shall order the refund of the deposit of money paid unless:

a) it orders that the amount or a part thereof be applied in or towards payment of any penalty or costs imposed or awarded; or
b) where the hearing is adjourned and the defendant is permitted to go at large without bail, and the court orders the amount or part of the amount be applied as security for the defendant's surrender into custody (s.14A(4)). In the event the person fails to appear at the adjourned date, the court shall order the forfeiture of the deposit of money (ss.14A(3) and (4A)).

10.4.2 Where failure to appear

Where a defendant who has been given cash bail by a magistrate fails to appear, the Court

- Shall order the forfeiture of the deposit of money made by the person in connection with the bail[389] (unless the defendant's lawyer applies for an adjournment that is granted, in which case the court may order the deposit or part of the deposit be applied as security for the defendant's appearance, or permit the defendant to go at large without bail on the condition the defendant will surrender.[390] If the defendant fails to appear on the adjourned date in circumstances where the deposit or part of the deposit has been applied as security, the magistrate, if satisfied that the defendant was given reasonable notice of the time and place of the adjourned hearing, shall order forfeiture of the deposit held);[391] and
- May issue a warrant pursuant to s.28A(1)(d) for the apprehension of the defendant.

[389] *Bail Act 1980*, s.14(3).
[390] *Bail Act 1980*, s.14(5).
[391] *Bail Act 1980*, s.14(7).

10.5 Magistrate may permit defendant to go at large (*Bail Act 1980*, s.14A(1)(b))

Section 14A(1)(b) provides that where a magistrate adjourns the hearing of a charge of an **o**ffence other than an indictable offence or an offence in the Schedule (being s.79 of the *Transport Operations (Road Use Management) Act 1995* regarding 'vehicle offences involving liquor or drugs' and ss.221, 223, and 225 of the *Racing Integrity Act 2016*) a magistrate may permit the defendant to go at large without bail on the condition the defendant will surrender into custody.[392]

Note: This power is not available for indictable offences and some other scheduled offences referred to in the preceding paragraph.

Where a magistrate permits a defendant to go at large pursuant to s.14(1)(b), the clerk of the court *must* give the defendant a notice in the approved form that includes the particulars required under a regulation (s.14A(2)(b)). The approved form is Form No.5.

Section 14A(1A) (inserted into s.14A as a consequence of the *Justice Legislation (Links to Terrorist Activity) Amendment Act 2019*) states that the Magistrates Court must not permit the defendant to go at large without bail under subsection (1)(b) if bail must be refused under s.16A (relating to defendants convicted of terrorism offences or subject to Commonwealth control orders).

Where a defendant is permitted to go at large it would be advisable for the magistrate to tell the defendant to wait in the precincts of the Court whilst the notice is being prepared by the clerk.

10.5.1 Where failure to appear

If the defendant fails to surrender, the Court may issue a warrant pursuant to s.28A(1)(f) for the apprehension of the defendant.

10.6 Release of person with impairment of mind (*Bail Act 1980*, ss.11A and 11B)

'Person with an impairment of mind' is defined in s.11A(7) to mean *a person who has a disability that –*

- *a) is attributable to an intellectual, psychiatric, cognitive, or neurological impairment or a combination of these; and*
- *b) results in-*
  - *i. a substantial reduction of the person's capacity for communication, social interaction or learning; and*
  - *ii. the person needing support.*

Section 11A(1) provides that if a magistrate or police officer authorised to grant bail considers that a person:

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[392] His Honour Judge Marshall Irwin in "*Potential pitfalls for Magistrates – Speech delivered a the Queensland Magistrates' Conference, 2 August 2013"* [2013] Qld Judicial Scholarship 26 at [24] noted that in the event a magistrate erroneously permits a defendant to go at large pursuant to s.14A when charged with either an indictable offence or an offence specified in the Schedule, *'an issue arises as to what power the court has in the event the offender does not appear and surrender into custody when required to do so'*.

(a) held in custody on a charge of or in connection with an offence is, or appears to be, a person with an impairment of the mind; and
(b) the person does not, or appears not to, understand the nature and effect of entering into an undertaking under s.20; and
(c) if the person understood the nature and effect of entering into the undertaking, the person would be released on bail,

then a police officer or court may release the person without bail by either;

(a) releasing the person into the care of another person who ordinarily has the care of the person or with whom the person resides; or
(b) permitting the person to go at large (s.11A(2)).

A person's release is on condition the person will surrender, at the time and place stated in the required notice under s.11B (s.11A(3)).

Section 11B provides that if a person is released under s.11A, the police officer or court releasing them must give the person a notice in the approved form stating:

(a) the person's name and place of residence;
(b) the charge on which or the offence in connection with which the person was in custody; and
(c) if the person is released into the care of another person, the other person's name, and place of residence; and
(d) the court into whose custody the person is required to surrender as a condition of the release; and
(e) the time and place the person is required to surrender into the court's custody.

CHAPTER 11 - BREACH OF BAIL - GENERAL

Offence of breach of bail (*Bail Act 1980*, s.29)

It is an offence to breach any condition of an undertaking on which the defendant was granted bail requiring the defendant's appearance before a court.[393]

The prosecution must prove that:

a) The defendant entered into an undertaking on which he or she was granted bail requiring their appearance before a Court;[394] and
b) The defendant broke a condition of that undertaking.[395]

Multiple breaches

In circumstances where multiple breaches are proven, the magistrate must take particular care to ensure the requirements of both the Penalties and Sentences Act 1992 and s.16 of the Criminal Code are followed.

Breach of bail by a child

On 22 March 2023, s.29 of the *Bail Act 1980* was amended to make it an offence for a child to breach a condition of bail.[396] This applies to bail undertakings entered into after commencement. Certain actions are also available for contraventions of bail conditions by a child under sections 59A and 59AA of the *Youth Justice Act 1992*. A child may be arrested and brought before the court on reasonable suspicion the child has or is likely to contravene a condition of an undertaking.[397] An alternative is for the child to be issued with a notice requiring their appearance.[398]

Prosecution of offences (*Bail Act 1980*, s.35)

Prosecutions under the *Bail Act 1980* are brought by way of summary proceedings as provided in the *Justices Act 1886*.[399]

11.1 Offence of breach of bail (*Bail Act 1980*, s.29)

It is an offence to breach any condition of an undertaking on which the defendant was granted

[393] *Bail Act 1980*, s.29(1).
[394] *Bail Act 1980*, s.29(1).
[395] *Bail Act 1980*, s.29(1). See *DAY v Commissioner of Police* [2018] QDC 3; *QPS v JSB* [2018] QDC 120.
[396] The *Strengthening Community Safety Act 2023*, assented to on 22 March 2023, amended s.29 of the *Bail Act 1980*. This applies to bail undertakings entered into after commencement: s50 *Bail Act 1980*
[397] *Police Powers and Responsibilities Act 2000*, s.367(3); see also ss.59A and 59AA of the *Youth Justice Act 1992* for matters an officer must or may consider before arresting a child under s.367.
[398] *Bail Act 1980*, s.30(2).
[399] *Bail Act 1980*, s.35(1).

bail requiring the defendant's appearance before a court.[400]

This offence does *not* apply to:

a) a condition that the defendant surrender into custody;[401]
b) a condition to participate in a rehabilitation, treatment or other intervention program or course;[402]
c) a condition requiring completion of a DAAR course;[403] and
d) a defendant who is a child.[404]

The prosecution must prove that:

1. The defendant entered into an undertaking on which s/he was granted bail requiring his/her appearance before a Court;[405] and

   "***Undertaking***" means a promise in writing with respect to bail signed by a defendant or by a defendant and the defendant's surety or sureties that the defendant will appear at a hearing or an adjourned hearing or upon the defendant's trial or an appeal and surrender into custody and comply with such other conditions as are imposed for the defendant's release on bail.[406]

2. The defendant broke a condition of that undertaking.[407]

Usual conditions imposed in bail undertakings relate to:

a) Residency;
b) Curfew;
c) Reporting to a specific police station within certain times; and
d) No contact with the complainant,[408] named witnesses and on occasion, co-accused.

Suggested finding upon proof of breach pursuant to s.29:

"I am satisfied that you entered into an undertaking on [INSERT DATE]

requiring you to [INSERT CONDITION BREACHED].

The issue is whether you breached the condition requiring [INSERT]

The prosecution contends that [INSERT CONSIDERATION OF RELEVANT EVIDENCE].

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[400] *Bail Act 1980*, s.29(1).
[401] *Bail Act 1980*, s.29(2)(b), see s.33 (Chapter 10).
[402] *Bail Act 1980*, s.29(2)(c) and s.11(9).
[403] *Bail Act 1980*, s.29(2)(c) and s.11AB.
[404] *Bail Act 1980*, s.29(2)(a).
[405] *Bail Act 1980*, s.29(1).
[406] *Bail Act 1980*, s.6.
[407] *Bail Act 1980*, s.29(1). See *DAY v Commissioner of Police* [2018] QDC 3; *QPS v JSB* [2018] QDC 120.
[408] See *Osgood v Queensland Police Service* [2005] QDC 111 (per Bradley DCJ).

The defendant states [INSERT CONSIDERATION OF RELEVANT EVIDENCE].

Having heard the Parties, I am satisfied that you breached the relevant

condition by [INSERT CIRCUMSTANCES OF THE BREACH].

In those circumstances, the breach is proven. I find you guilty of the charge and will now proceed to hear submissions on sentence."

11.2 Sentencing for multiple breaches of bail

The Court will often have to sentence offenders charged with multiple breaches of bail. This calls for particular care to ensure appropriate sentences are imposed.

If an offender is to be sentenced to imprisonment, separate terms of imprisonment must be imposed for each offence.[409] In contrast, a single fine[410] or a single probation order[411] may be imposed for several offences.

Where there are multiple breaches of bail it is possible two or more of the offences will involve the same punishable acts or omissions.[412] Under s.16 of the *Criminal Code,* a person cannot be twice punished for the same act or omission. Where it arises, the Court of Appeal determined in *R v Robinson and Stokes; ex parte Attorney-General*[413] that, consistent with the High Court decision in *Pearce v The Queen*[414], the 'proper approach' to sentence is to impose punishment on one charge taking all the circumstances of that charge into account, to record the findings of guilt on other charges involving the same acts or omissions but to impose no separate punishment, not even a concurrent punishment, on each of those charges.[415]

Disciplinary penalties (even those imposed under authority of an Act) do not constitute 'punishment' within the meaning of s.16 of the *Criminal Code*.[416] Also, the better view is that the mere entry and recording of a conviction against a defendant, without more, does not amount to punishment within the meaning of s.16.[417] However, in the exceptional circumstance that under a statutory provision a form of penalty automatically follows upon the entry or recording of a criminal conviction (e.g. mandatory disqualification from driving), this may constitute 'punishment' under s.16, and a stay of proceedings should be ordered or the conviction not recorded (whichever is appropriate) on the secondary charge or charges.

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[409] *R v Crofts* [1999] 1 Qd R 386 at 387.
[410] *Penalties and Sentences Act 1992*, s.49.
[411] *Penalties and Sentences Act 1992*, s.97.
[412] *DAY v Commissioner of Police* [2018] QDC 3 at [30]; *Brown v Latter* [2016] QDC 38 at [21]-[28].
[413] [2000] 2 Qd R 413 at [16] and [49]; *Pearce v The Queen* (1998) 194 CLR 610, [1998] HCA 57 at [49].
[414] *Pearce v The Queen* (1998) 194 CLR 610, [1998] HCA 57.
[415] *R v Robinson and Stokes; ex parte Attorney-General* [2000] 2 Qd R 413, per McMurdo P at [16] and White J at [49]; *R v Elhusseini* [1988] QCA 184 at [40]; *R v Kolodziej* [2008] QCA 184; The option of granting a stay may not constitute appealable error (*Brown v Latter* [2016] QDC 38 at [21]-[28]), however Supreme Court authority appears to support as preferable the sentencing approach taken in *Robinson;* See also *Pearce v The Queen* (1998) 194 CLR 610 at [43]-[49]; *JWD v Commissioner of Police* [2019] QDC 29 at [19], [24] and [25].
[416] *R v NG* [2007] 1 Qd R 37 at [48] and [71].
[417] *Gioli (Commissioner of State Revenue) v Thompson & Anor* [2017] QDC 4; but see contra *R v Grannigan* [2004] QDC 268.

11.3 Breach by a child

On 22 March 2023, s.29 of the *Bail Act 1980* was amended to make it an offence for a child to breach a condition of bail.[418] This applies to bail undertakings entered after commencement.

Certain actions are also available for contraventions of bail conditions by a child. Section 59A of *Youth Justice Act 1992* specifies the powers available to a police officer if the officer reasonably suspects the child has contravened, is contravening or is likely to contravene a condition of bail, and the contravention is not an offence, other than an offence against the *Bail Act 1980,* se.29, and the grant of bail relates to a charge of an offence other than a prescribed indictable offence; or an offence against the *Domestic and Family Violence Prevention Act 2012*, s. 177(2) or 178(2). A police officer does have powers of arrest as specified in s.367 of the Police Powers and Responsibilities Act 2000.[419] However before arresting a child, the police officer must consider other alternatives as specified in s.59A of the *Youth Justice Act 1992:*

> *(1) This section applies if—*
>
> > *(a) a police officer reasonably suspects a child has contravened or is contravening a condition imposed on a grant of bail to the child; and*
> > *(b) the contravention is not an offence, other than an offence against the Bail Act 1980, section 29; and*
> > *(c) the grant of bail relates to a charge of an offence other than –*
> > > *(i) a prescribed indictable offence; or*
> > > *(ii) an offence against the Domestic and Family Violence Prevention Act 2012, section 177(2) or 178(2).*
>
> *(2) This section also applies if a police officer reasonably suspects a child is likely to contravene a condition imposed on a grant of bail to the child and the grant of bail relates to a charge of an offence other than an offence mentioned in subsection (1)(c)(i) or (ii).*
>
> *(3) Before arresting the child under the Police Powers and Responsibilities Act 2000, section 367(3)(a)(i) in relation to the contravention or likely contravention, a police officer must first consider whether, in all the circumstances, it would be more appropriate to do 1 of the following—*
>
> > *(a) to take no action;*
> > *(b) to warn the child of the action a police officer may take under paragraph (c) or the Police Powers and Responsibilities Act 2000, section 367(3) in relation to a contravention of a condition imposed on the grant of bail;*
> > *(c) if the contravention or likely contravention is in relation to a condition other than a condition for the child's appearance before a court—to make an application under the Bail Act 1980 to vary or revoke the bail.*

[418] The *Strengthening Community Safety Act 2023*, assented to on 22 March 2023, amended s.29 of the *Bail Act 1980*. This applies to bail undertakings entered into after commencement: s50 *Bail Act 1980*

[419] See *Notes*: 1. For the matters a police officer must consider before arresting a child in particular circumstances under this subparagraph, see the *Youth Justice Act 1992*, s.59A. 2. For the matters a police officer may consider before arresting a child in particular circumstances under this subparagraph, see *Youth Justice Act 1992,* s.59AA.

> *(4) For subsection (3), the circumstances the police officer must consider include the following—*
>
> > *(a) the seriousness of the contravention or likely contravention;*
> > *(b) whether the child has a reasonable excuse for the contravention or likely contravention;*
> > *(c) the child's particular circumstances of which the police officer is aware;*
> > *(d) other relevant circumstances of which the police officer is aware.*
>
> *(5) If a police officer considers that, in all the circumstances, it would be more appropriate to act as mentioned in subsection (3)(a), (b) or (c), then a police officer must do so.*

Section 59AA allows police to consider alternatives to arrest where the child has contravened a condition of bail in relation to prescribed indictable offences and an offence against the *Domestic and Family Violence Protection Act 2012,* s.177(2) or 178(2). Before arresting a child, the police officer may consider other alternatives as specified in s.59AA of the *Youth Justice Act 1992:*

> *(1) This section applies if—*
>
> > *(a) a police officer reasonably suspects a child has contravened or is contravening a condition imposed on a grant of bail to the child; and*
> > *(b) the contravention is not an offence, other than an offence against the Bail Act 1980, section 29; and*
> > *(c) the grant of bail relates to—*
> > > *(i) a charge of a prescribed indictable offence; or*
> > > *(ii) a charge of an offence against the Domestic and Family Violence Protection Act 2012, section 177(2) or 178(2).*
>
> (2) *This section also applies if a police officer reasonably suspects a child is likely to contravene a condition imposed on a grant of bail to the child and the grant of bail relates to a charge of an offence mentioned in subsection (1)(c)(i) or (ii).*
>
> (3) *Before arresting the child under the* Police Powers and Responsibilities Act 2000*,* section 367*(3)(a)(i) in relation to the contravention or likely contravention, a police officer may first consider whether, in all the circumstances, it would be more appropriate to do 1 of the actions mentioned in* section 59A*(3)(a) to (c).*
>
> (4) *For subsection (3), the circumstances the police officer may consider include the matters mentioned in* section 59A*(4)(a) to (d).*

An application under s.30 of the *Bail Act 1980* can be made by a complainant or prosecutor to vary or revoke bail by the court that granted bail, the court before which an indictment was presented or the Supreme Court. If bail on an undertaking was granted by a police officer, the Childrens Court may vary or revoke bail on such an application.[420]

[420] *Bail Act 1980*, s.30(1A).

An application to vary or revoke bail may be made ex parte.[421]

If the police officer decides to arrest the child, the child must be brought before the Childrens Court[422] where the Magistrate may, if satisfied the child has broken or is likely to break a condition of bail, revoke or vary the bail.[423]

It is an offence for a child to fail to surrender into custody in accordance with an undertaking.[424] There are restrictions on the sentence that can be imposed if the failure to appear occurred when the defendant was a child (any jail sentence will not be mandatorily cumulative).[425] A court may issue a warrant for the arrest of a child who fails to surrender into custody as required.[426]

Section 57 of the *Youth Justice Act 1992* provides that the provisions of the Bail Act 1980 relating to the issue of warrants for the arrest of defendants who fail to surrender into the custody of court as required when permitted to go at large without bail, apply to a child who fails to appear after being released into the custody of a parent, or permitted to go at large, without bail.

If a child is arrested pursuant to a warrant, the child must be brought promptly before a court to be dealt with according to law.[427]

In considering an application to vary or revoke bail, or dealing with a further bail application where the child is arrested on a warrant, the court is bound by the provisions of ss.48, 48AAA and 48AA of the *Youth Justice Act 1992* (above) and in making a decision, the court may have regard to the history of any previous grants of bail to the child.[428]

(See Chapter Five – Youth Bail for provisions dealing with failure to appear (at 5.5) and breach of a condition (at 5.6) by a child.)

11.4 Prosecution of offences (*Bail Act 1980*, s.35)

Prosecutions under the *Bail Act 1980* are brought by way of summary proceedings in accordance with the *Justices Act 1886*.[429] Proceedings may be taken even if more than a year has elapsed since the commission of the offence.[430]

[421] *Bail Act 1980*, s.30(2).
[422] *Bail Act 1980*, s.29A(1)(c).
[423] *Bail Act 1980*, s.29A.
[424] *Bail Act 1980*, s.33(1).
[425] *Bail Act 1980*, s.33(5).
[426] *Bail Act 1980*, ss.28A(1)(b) and (ea).
[427] *Youth Justice Act 1992*, s.58.
[428] Youth Justice Act 1992, s.48AA(4)(a)(iii).
[429] *Bail Act 1980*, s.35(1).
[430] *Bail Act 1980*, s.35(1).

CHAPTER 12 - BREACH OF BAIL – FAIL TO ATTEND

It is an offence to fail to surrender into custody in accordance with an undertaking.[431]

Failure to appear may also result in forfeiture of the undertaking and any deposit or surety (see Chapter Eight).[432]

Procedure

Proceedings for an offence of failing to appear shall be instituted and taken *without the laying of a complaint.*[433]

Upon production of the warrant, the court shall '*then and there call on the defendant to prove why the defendant should not be convicted of an offence against this section'*.[434]

The prosecution must prove that:

1. The defendant entered into an undertaking on which s/he was granted bail requiring his/her appearance before a Court;[435] and

   "Undertaking" means a promise in writing with respect to bail signed by a defendant or by a defendant and the defendant's surety or sureties that the defendant will appear at a hearing or an adjourned hearing or upon the defendant's trial or an appeal and surrender into custody and comply with such other conditions as are imposed for the defendant's release on bail.[436]

2. The defendant *failed to surrender into custody* in accordance with the undertaking.

   "Surrender into custody" means surrender into the custody of the court at the time and place for the time being appointed for the defendant to do so.[437]

   Production to the court of the warrant under which the defendant had been arrested shall be evidence, and, in the absence of evidence to the contrary, *conclusive evidence of*

   - *the undertaking;*
   - *the failure to surrender*; and
   - that the issue of the warrant was duly authorised by the decision or order of the court that issued the warrant.

3. *Without reasonable cause*; and

4. The defendant was *apprehended under a warrant* issued pursuant to s.28 or ss.28A(1)(a), (b), (c) or (d) of the *Bail Act 1980.*

[431] *Bail Act 1980*, s.33(1).
[432] *Bail Act 1980*, ss.31,32 and 32A.
[433] *Bail Act 1980*, s.33(3)(a); see also s.35(1).
[434] *Bail Act 1980*, s.33(3A). See *ARS v Queensland Police Service* [2018] QDC 103 per Fantin DCJ.
[435] *Bail Act 1980*, s.33(1)(a).
[436] *Bail Act 1980*, s.6.
[437] *Bail Act 1980*, s.6.

- Judicial notice shall be taken of the signature of the person who issued the warrant and that the person was duly authorised to issue the warrant.

Defence of Reasonable Cause – Two Prong Test

It is a defence for the defendant to prove on the balance of probabilities:

a) that the defendant had reasonable cause for failing to surrender into custody in accordance with the undertaking;[438] ***and***
b) that the defendant appeared as soon after the time for the time being appointed for the defendant to do so as is reasonably practicable.[439]

Sentence

Any sentence of imprisonment for a breach of an undertaking by failing to appear, must be cumulative upon any other sentence of imprisonment (including for multiple breaches of the *Bail Act 1980)* imposed at the same time as the breach sentence is imposed or which the defendant is serving at the time of the breach sentence is imposed. Any sentence of imprisonment imposed during the time the defendant is already serving for a breach (fail to appear) must take effect *after* the expiration of the deprivation of liberty of the breach sentence. [440]

It is an offence for a child to fail to surrender into custody in accordance with their bail.[441] However, the mandatory cumulative sentence required where an adult is sentenced to imprisonment for breaching bail by failure to appear does not apply to a defendant who was a child when the offence was committed. [442]

12.1 Failing to appear in accordance with an undertaking

It is an offence under s.33(1) of the *Bail Act 1980* to fail to appear in accordance with an undertaking.[443] In addition to the defendant being prosecuted for an offence, failure to appear will usually also require forfeiture of the undertaking and of any deposit or surety (see *Chapter 8*).[444]

A Magistrates Court or Childrens Court located in any Magistrates Court district has jurisdiction to exercise the powers conferred by s.33 regardless of where the offence was committed.[445]

On the hearing of a charge under s.33, in practical terms as a consequence of s.33(3)(b)(i), once the warrant has been produced, and the defendant admits to being the person named in the warrant and to having been apprehended pursuant to the warrant, the magistrate in the absence

[438] *Bail Act 1980*, s.33(3)(b)(i).
[439] *Bail Act 1980*, s.33(3)(b)(ii).
[440] *Bail Act 1980*, s.33(4)(a) and (b), discussed in *R v Shaw* [2012] QCA 304; and *Mallory v Commissioner of Police* [2017] QDC 54 *and Purcell v Bateup & Ors* [2009] QDC 430.
[441] *Bail Act 1980*, s.33(1).
[442] *Bail Act 1980*,s.33(5).
[443] Prosecution of Bail Act offences is by way of summary proceeding applying the provisions of the *Justices Act 1886*, subject to modifications made in ss.33 and 33A: *Bail Act 1980*, s.35(1).
[444] *Bail Act 1980*, s.31(1).
[445] *Bail Act 1980*, s.33C(1).

of evidence to the contrary can be satisfied of both the existence of the undertaking and the defendant's failure to surrender.

Upon production of the warrant the magistrate is required under s.33(3A) to **'then and there'** call on the defendant to prove why the defendant should not be convicted of an offence of failing to appear. This statutory requirement must be given effect by calling on the defendant without delay.

Many defendants will, when called upon, respond that they do not wish to show cause and may be convicted and sentenced immediately. However, where there are other outstanding charges, immediate sentencing will often be impracticable. In such cases, or where the defendant indicates that he or she wishes to show cause and defend the charge, but requires time to prepare, it will be necessary to adjourn the hearing of the charge or the sentence to a future date. If, after calling upon the defendant in accordance with s.33(3A), the magistrate immediately elects to defer the hearing or sentence to a later date, the matter may be adjourned to be heard by any magistrate in that locality jurisdiction of the Court. If the magistrate has entered upon hearing a defended charge or commenced to hear sentence proceedings before adjourning the matter, the magistrate will ordinarily retain carriage of the matter and adjourn it part heard before him or herself.

Following the defendant being called upon, the magistrate must then consider whether the defendant should be convicted of the offence. This will require consideration of any defence raised on the evidence. The defendant bears the onus of satisfying the court on the balance of probabilities either that he or she did surrender into custody in accordance with the undertaking or that under s.33(2) he or she had a reasonable cause for failing to surrender, and surrendered as soon as was reasonably practicable. The magistrate is required to examine the reasonableness of the explanation provided by the defendant.

Section 33(2) was considered by Kent QC DCJ in *Etienne v Commissioner of Police*[446] as follows:

> *'In my view, s.33(2) calls for an examination of the reasonableness of the defendant's cause for non-attendance. "Reasonable" is often regarded as synonymous with concepts such as: appropriate, fair, or moderate; logical; based on sound judgement; based on reason and not exceeding the limit prescribed by reason.'*

The following text is an example of wording that may be used by a magistrate at the conclusion of a breach (fail to appear) hearing pursuant to s.33 *Bail Act 1980*:

> *"In this matter, the warrant that was issued for the Defendant's arrest has been produced.*
>
> *The defendant accepts that s/he is the person named in the Warrant and that s/he has been apprehended pursuant to that warrant.*
>
> *Pursuant to the provisions of s.33(3(b)(i) unless evidence to the contrary is produced, I am able to be satisfied:*

[446] [2018] QDC 6.

- *of the Undertaking;*
- *of the Failure to Surrender into Custody; and*
- *that the Issue of the Warrant was duly authorised.*

Having called on the defendant to prove why he or she should not be convicted of an offence against s.33(1) of the Bail Act 1980, there is no evidence before me contrary to that established in accordance with s.33(3) by production of the warrant.

And having enquired if the defendant has a defence to the offence, as outlined in s.33(2) of Bail Act 1980, the defendant indicated s/he:

Either:

- *had no such defence; or*

- *had a defence and was heard regarding whether he attended or any reasons for failing to attend as required and regarding surrender at the first reasonably practicable time after the time appointed to do so.*

  The defendant states: [INSERT]
  The prosecution state:[INSERT]

It is accepted by both parties and/or I find it proved, that the defendant did not appear on the day as required, namely [INSERT DATE].

The remaining issues are whether the defendant had reasonable cause for failing to appear and appeared as soon as was reasonably practicable after the appointed date. [INSERT CONSIDERATION OF THE RELEVANT EVIDENCE, FOR EXAMPLE, ANY MEDICAL CERTIFICATE PRODUCED]

Having heard the Parties:

Either:

I am satisfied that the defendant has discharged the onus cast upon him or her pursuant to s.33(2) of the Bail Act 1980. Cause is shown. The charge is dismissed.

OR

I am not satisfied that the defendant has discharged the onus cast upon him or her pursuant to s.33(2) of the Bail Act 1980 and I find the defendant guilty of the charge."

12.2 Postponing issue or enforcement of a warrant in circumstances of a defendant failing to appear

Section 33D of the *Bail Act 1980* states in respect of a person released on bail:-

33D Postponing issue or enforcement of a warrant

(1) This section applies if an application is made to the court for a warrant for the apprehension of a person who has failed to appear before the court.

(2) The court may postpone the issue or enforcement of the warrant to allow the person a further opportunity to appear before the court.

Similarly, the *Police Powers and Responsibilities Act 2000* authorises a court to postpone enforcement (but not the issue) of a warrant made under s.389(1)(b) of that Act due to failure to appear as required by a Notice to Appear. Section 389(5) provides:

Subsection 1(b) does not prevent a court postponing the enforcement of a warrant for the arrest of a person to allow the person a further opportunity to appear before the court.

In the event of a failure to appear by a person on bail the magistrate may elect one of four possible options:

- Decline to issue a warrant,
- Postpone issue of a warrant,
- Issue a warrant, or
- Issue a warrant but make an order postponing enforcement.

If the magistrate declines to issue a warrant the matter will be adjourned, and the defendant served with notice of the adjourned date. This course is often taken by magistrates in respect of warrants issued under the *Bail Act 1980*. If there is a failure to appear on the adjourned date the prosecution may renew the application for a warrant.

Upon issuing a warrant a magistrate who makes an order postponing enforcement to allow the person a further opportunity to appear will adjourn the matter to a future date for mention. If the person appears on the mention date the magistrate will cancel the warrant. If the person fails to appear on the mention date a magistrate may order that the warrant be enforced.

12.3 Sentencing for failing to appear

A sentence of imprisonment for breach of an undertaking by failure to appear is, by operation of the Act, made cumulative on any other sentence imposed at the same time or being served at that time.[447] It is necessary for a magistrate to ensure that if imprisonment is imposed for an offence of failing appear in breach of an undertaking it is made cumulative upon other terms of imprisonment, and also, to ensure the total sentence imposed reflects the overall criminality of the offending in accordance with the totality principal.[448] Failure to give attention to the impact

[447] *Bail Act 1980*, ss.33(4)(a) and (b). These provisions do not apply if the defendant was a child when the offence was committed: s.33(5).
[448] *R v Shaw* [2012] QCA 304 at [52]; *Mill v The Queen* (1988) 166 CLR 59.

of a mandatory cumulative term of imprisonment may result in an overall sentence that is not "just and appropriate".[449]

Note: Where a court makes an order sentencing a defendant for failing to appear pursuant to s.33 and imposes a term of imprisonment either in the first instance or in default of payment of a fine, the term of imprisonment or the default imprisonment on a fine cannot be made concurrent and must be cumulative upon (i) any term of imprisonment imposed at the same time that the imprisonment or default term of imprisonment is imposed or (ii) any term of imprisonment which the defendant is serving at the time the imprisonment or default term of imprisonment is imposed.[450]

12.3.1 Sentencing a child for failure to appear (*Bail Act 1980,* s.33(5))

It is an offence for a child to fail to surrender into custody in accordance with an undertaking.[451] A child charged with failure to appear will be dealt with under s.33 of the *Bail Act 1980* in the same way as an adult with the following exception. Where a person is charged with breach of an undertaking by failure to appear, the provision requiring a sentence of imprisonment to be cumulative upon any other sentence imposed at the same time or being served at that time does not apply to a defendant who was a child when the offence was committed.[452]

Under s.367 of the *Police Powers and Responsibilities Act 2000,* a police officer may arrest a child, without warrant, on reasonable suspicion the child has or is likely to fail to appear or contravene a condition of the undertaking.[453] For matters a police officer must consider before arresting a child under s.367(3) see the *Youth Justice Act 1992*, s.59A. An alternative is for the child to be issued with a notice requiring their appearance.[454]

(See Chapter Five – Youth Bail for provisions dealing with failure to appear (at 5.5) and breach of a condition (at 5.6) by a child.)

[449] Thomas D, "Principles of Sentencing", (2nd ed, 1979), 56.
[450] Bail Act 1980, ss.33(4)(a) and (b). These provisions do not apply if the defendant was a child when the offence was committed: s.33(5).
[451] *Bail Act 1980*, s.33(1).
[452] *Bail Act 1980*, s.33(5).
[453] *Police Powers and Responsibilities Act 2000*, s.367(3).
[454] *Bail Act 1980*, s.30(2).

CHAPTER 13 – TRANSPARENCY AND RESTRICTION ON PUBLICATION

Section 14A(1) of the *Magistrates Court Act 1921* provides that the business of a Magistrates Court is to be conducted in open court. However:

- Section 14A(2) of the *Magistrates Court Act 1921* provides that a Magistrates Court may, if the interests of justice require, by order limit the extent to which the business of the court is open to the public.

- Section 70 of the *Justices Act 1886* provides that in any case in which in the opinion of the justices, the interests of public morality require that all or any persons should be excluded from the court, the justices may exclude such persons.

- Proceedings in a Childrens Court constituted by a Magistrate are closed to members of the public[455] (see Chapter Five at 5.10).

A court may make an order restricting publication of matters relating to bail applications:

Section 12 of the *Bail Act 1980* provides that *where a bail application is opposed*, a magistrate may, at any time during the hearing of an application, make an order prohibiting publication of representations made or reasons for the grant or refusal of bail or release under s.11A (release of intellectually impaired person) in whole or in part.

- Section 12 only applies in circumstances where bail is being opposed.

- An order should only be made where reasonably necessary to secure the proper administration of justice.[456]

- The discretion to restrict publication is not dependent on the nature of the offence and applies to indictable and non-indictable offences.

- Section 12 is to be construed strictly.[457]

- An order made pursuant to s.12 should clearly indicate the temporal limits of the order.[458]

- The capacity to make an order pursuant to s.12 includes a discretion to vary, enlarge or terminate the order, enlivened by a change in circumstances, information or material which bears on the making of the order that was not available at the time the order was made.[459]

[455] *Childrens Court Act 1992* (Qld), s.20.
[456] *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 at 476-477 per McHugh JA.
[457] *Queensland Newspapers Pty Ltd v Stjernqvist* [2006] QSC 200 at [23].
[458] *Queensland Newspapers Pty Ltd v Stjernqvist* [2006] QSC 200 at [25].
[459] *Queensland Newspapers Pty Ltd v Lacey* [2007] QSC 392.

- Failure to comply with a non-publication order is an offence punishable by a maximum of 10 penalty units or imprisonment of six months (s.12(2)).
- This section also applies to bail applications under the *Youth Justice Act 1992.*
- The Supreme Court has inherent jurisdiction to restrict publication of details of bail applications. That jurisdiction is extended by s.8 of the *Supreme Court of Queensland Act 1991.*

13.1 The business of the Magistrates Court is to be conducted in open court (*Magistrates Court Act 1921*, s.14A)

In accordance with the long-standing principle of open justice, s.14A(1)(b) of the *Magistrates Court Act 1921* provides that the business of a Magistrates Court is to be conducted in open court.

Proceedings in a Childrens Court constituted by a Magistrate differ in that the *Childrens Court Act 1992* requires they be closed to members of the public. *(See Chapter Five at 5.7).*

13.1.1 Discretion to limit the extent to which the business of the court is open to the public (*Magistrates Court Act 1921*, s.14A(2))

Section 14A(2) of the *Magistrates Court Act 1921*provides that subject to any Act, a Magistrates Court may, if the public interest or the interests of justice require, by order, limit the extent to which the business of the court is open to the public.

13.1.2 Discretion of Magistrate to close court if interests of public morality require (*Justices Act 1886* , s.70)

Section 70 of the *Justices Act 1886* provides that in any case in which in the opinion of the justices, the interests of public morality require that all or any persons should be excluded from the court, the justices may exclude such persons.

13.2 Reporting of court proceedings

A long-recognised principle of the administration of justice is that it ought to be carried out in public. The High Court in *Re Application by the Chief Commissioner of Police (Victoria)*[460] observed that:

> *'… the principle of open justice is deeply entrenched in our law. It is not an absolute principle. Subject to the Constitution, it may be modified by legislation… But the … limitations imposed by judicial orders on reportage of proceedings conducted in open court remain wholly exceptional in this country'.*

[460] (2005) 214 ALR 422 at 448-449 at [114].

Similarly, McHugh JA stated in *John Fairfax & Sons Ltd v Police Tribunal of New South Wales*:[461]

> *'The fundamental rule of the common law is that the administration of justice must take place in open court. A court can only depart from this rule where its observance would frustrate the administration of justice or some other public interest for whose protection Parliament has modified the open justice rule. The principle of open justice also requires that nothing should be done to discourage the making of fair and accurate reports of what occurs in the courtroom.'*

In *Kimber v Police Association*[462] (quoted by Ormiston J in *Moularis v Nankervis*,[463]) Lord Esher explained the rationale behind the principle:

> *'Under certain circumstances… publication may be very hard upon the person to whom it is made to apply, but public policy requires that some hardship should be suffered by individuals rather than that judicial proceedings should be held in secret. The common law, on the ground of public police, recognised that there may be greater danger to the public in allowing proceedings to be held in secret than in suffering persons for a time to rest under an unfounded charge or suggestion'.*

Kirby J in *John Fairfax Group Pty Ltd and Anor v Local Court of New South Wales and Others*[464] similarly stated:

> *'A significant reason for adhering to a stringent principle, despite sympathy for those who suffer embarrassment, invasions of privacy or even damage by publicity of their proceedings is that such interests must be sacrificed to the greater public interest in adhering to an open system of justice'.*

In *J v L & A Services Pty Ltd (No.2)*[465] the President and Lee J stated at p.33:

> *'Although there is a public interest in avoiding or minimising disadvantages to private citizens from public activities, paramount public interest [in the due administration of justice, freedom of speech, a free media and an open society require that court proceedings be open to the public and able to be reported and discussed publicly.'*

13.2.1 Courts discretion to order restriction on publication of opposed bail applications (*Bail Act 1980*, s.12)

Notwithstanding the well-established principle of open justice, s.12(1) of the *Bail Act 1980* (specifically provides that in circumstances where a bail application is opposed, the court may, at any time during the hearing of the application, make an order directing that the evidence taken, the information furnished, the representations made by or on behalf of either party, or the reasons given by the court for the grant or refusal of bail or release under s.11A (release of person

[461] (1986) 5 NSWLR 465 at 476-477.
[462] [1893] 1 QB 65 at 68-70.
[463] [1985] VR 369 at 375.
[464] (1992) 26 NSWLR 131 at 142.
[465] [1995] 2 Qd R 10 at p.33.

with an impairment of mind) or any part thereof or any of them, shall not be published by any means –

> (a) if an examination of witnesses in relation to an indictable offence is heard, before the defendant is discharged; or
> (b) if the defendant is tried or committed for trial – before the trial is ended.

The discretion to restrict publication is not dependent on the nature of the offence and applies to indictable and non-indictable offences.

This section also applies to bail applications under the *Youth Justice Act 1992*.

13.2.1.1 Strict construction of s.12 of the *Bail Act 1980*

In *Queensland Newspapers Pty Ltd v Stjernqvist*, Douglas J at [23] stated:

> *'Section 12(1), in allowing an order preventing the publication of such evidence, information, representations and reasons, derogates from the fundamental principles that the administration of justice should be carried out in public, and that, as a corollary, nothing should be done to discourage the publication to a wider public of fair and accurate reports of proceedings that have taken place in court. Accordingly, the section should be construed strictly.'*[466]

In that case, Douglas J held that an acting magistrate's order that '*the details of this proceeding including evidence information, submissions, decision, and reasons shall not be published by any means'* was '*significantly*' beyond the scope of the power afforded to a magistrate in pursuant to s.12(1) of the *Bail Act 1980*, thereby amounting to jurisdictional error upon judicial review.

13.2.1.2 An order pursuant to s.12 of the *Bail Act 1980* should only be made where reasonably necessary to secure the proper administration of justice

McHugh JA in *John Fairfax & Sons Ltd v Police Tribunal of New South Wales*[467] stated:

> *'Accordingly, an order of a court prohibiting publication of evidence is only valid if it is really necessary to secure the proper administration of justice in proceedings before it. Moreover, an order prohibiting publication of evidence must be clear in its terms and do no more than is necessary to achieve the due administration of justice. The making of the order must also be reasonably necessary to make an order prohibiting publication. Mere belief that the order is necessary is insufficient'.*

In *Friedrich v Herald & Weekly Times*,[468] the Full Court of the Supreme Court of Victoria stated:

> *'.. the issue remains whether there is a real or substantial risk that such publication will cause an interference with the administration of justice of a kind which might cause serious injustice'.*

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[466] [2006] QSC 200 at [23].
[467] (1986) 5 NSWLR 465 at 476-477.
[468] [1990] VR 995 at 1005.

13.2.1.3 Any order made pursuant to s.12 of the *Bail Act 1980* should clearly indicate the temporal limits of the order

Justice Douglas in *Stjernqvist* held that the failure of the acting magistrate to limit in the order the temporal effect of the order, was also erroneous, stating:

> *'It seems to me that an order of this nature should preferably be expressed in a self-contained form. It is intended to apply to publishers who were not parties to the proceedings before the court and they should be in a position to know, from the terms of the order, the precise limits that are imposed on the powers to publish that they would otherwise possess'.*[469]

For example (although an order pursuant to s.8 of the *Supreme Court of Queensland Act 1991* and not s.12 of the *Bail Act 1980*) in *Attorney-General for the State of Queensland v Fardon*, Bowskill J made an order for non-publication for a period of seven days from the date of the order.[470]

13.2.1.4 Capacity to vary, terminate and enlarge order restricting publication

In *Queensland Newspapers Pty Ltd v Lacey*[471] Martin J stated with respect to the power in s.12 of the *Bail Act 1980*:

> *'The capacity to make an order and the discretion to make such an order carries with it, in my opinion, the capacity to vary, enlarge or terminate that order as the circumstances require…The discretion to vary, terminate or enlarge is enlivened at least by a change in circumstances or by the provision of information or other material which bears upon the making of such an order which was not available at the time the order was made. That discretion, in my opinion, applies to the entirety of the section 12 process'.*[472]

13.2.1.5 Penalty for non-compliance with order restricting publication

A person who fails to comply with an order made pursuant to s.12 of the *Bail Act 1980*, restricting publication, without lawful excuse (the proof of which lies upon the person) commits an offence and is liable to a maximum penalty of 10 penalty units or imprisonment for six months (s.12(2)).

13.3 Inherent jurisdiction of Supreme Court to limit publication

Section 8 of the *Supreme Court of Queensland Act 1991* provides*:*

> *(1) The business of the court-*
> *(a) is taken to be conducted in court wherever it is conducted; and*
> *(b) is to be conducted in open court.*
> *(2) However, subject to any Act, the court may, if the public interest or the interests of justice require, by order limit the extent to which the business of the court is open to the public.*

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[469] *Queensland Newspapers Pty Ltd v Stjernqvist* [2006] QSC 200 at [25].
[470] [2019] QSC 2.
[471] [2007] QSC 392.
[472] [2007] QSC 392 at page 2.

In *Attorney-General (Qld) v Fardon*,[473] Bowskill J referred to the power in s.8 of the *Supreme Court of Queensland Act 1991*, as an extension of the common law power of the Supreme Court to prohibit publication of proceedings where the court considers this is necessary for the purpose of administering justice.

Justice Bowskill in *Fardon*[474] quoted McPherson J in *Ex Parte The Queensland Law Society Incorporated*, referring to the inherent power of the Supreme Court to limit publication as follows:

> *'… the power of the court under general law to prohibit publication of proceedings conducted in open court has been recognised and does exist as an aspect of the inherent power. That does not mean that it is an unlimited power. The only inherent power that a court possesses is power to regulate its own proceedings for the purpose of administering justice'.*[475]

13.4 Restriction on publication of information identifying party to domestic violence proceedings (*Domestic and Family Violence Protection Act 2012*, s.159)

Section 159 of the *Domestic and Family Violence Protection Act 2012* provides that a person must not publish information that identifies or is likely to lead to the identification of, a person as:

i) a party to a proceeding under that Act; or
ii) a witness in a proceeding under that Act; or
iii) a child concerned in a proceeding under that Act.

However, the information may be published if the court expressly authorises publication or other conditions in s.159(2) apply. *(See Chapter 18 – Domestic Violence Offences)*

[473] [2019] QSC 2 at [105].
[474] [2019] QSC 2 at [105].
[475] [1984] 1 Qd R 166 at 170. See also *Re A* [2018] QSC 184.

CHAPTER 14 – COSTS

A court may not make any order concerning costs in a bail proceeding (s.10B).

Section 10B of the *Bail Act 1980* provides:

> *(1) A court may not make any order concerning costs in a bail proceeding.*
>
> *(2) It does not matter whether the bail proceeding started, or the relevant offence was committed, before or after the commencement of this section.*
>
> *(3) In this section -*
>
> ***bail proceeding** includes –*
>
> *(a) an application under this Act; and*
>
> *(b) an application to grant, enlarge, vary, or revoke bail under another Act; and*
>
> *(c) an appeal to the Court of Appeal from an order made on an application mentioned in paragraph (a) or (b).*

CHAPTER 15 – POLICE BAIL

Prescribed officer may grant bail

If a person is arrested and in custody in connection with an offence or under a warrant there is a statutory requirement to take the person before a court as soon as is reasonably possible.[476] But if it is not reasonably practicable to take the person promptly before a court, a prescribed police officer has power to grant bail.[477] The officer is obligated to consider whether the person in custody should be granted bail or otherwise released.[478]

Once a defendant is brought before a court, all further bail decisions will be made by that or another court unless the defendant later comes into police custody after arrest for failure to appear, breach of bail or another offence.

Officer may release without bail

In addition to granting bail on an undertaking a prescribed police officer may, where appropriate, release an adult defendant in one of the following ways:[479]

- issue a notice to appear (s.7(3)(b));
- grant cash bail (s.14(1A));
- release without bail for drunkenness or minor drugs offences (s.14(1B);
- release without bail a person with an impairment of the mind (ss.11A and 11B).

A prescribed officer may release a child without bail by issuing a notice to appear or a release notice.[480] A child with an impairment of the mind may be released without bail under s.11A of the *Bail Act 1980*.

Appearance before court

The way in which the Magistrates Court deals with a defendant with police bail upon their appearance before the court or upon their failure to appear will vary depending upon the basis upon which the person was released from police custody.

15.1 Obligation to consider bail

An arresting officer is required to take an arrested person before a court as soon as is reasonably practicable or deliver the person into the custody of a watch-house manager or officer-in-charge.[481] The watch-house manager or officer-in-charge (prescribed officer) may not grant bail

[476] *Police Powers and Responsibilities Act 2000*, s.393; *Youth Justice Act 1992*, s.49.
[477] *Bail Act 1980*, s.7(3); *Youth Justice Act 1992*, s.49.
[478] *Bail Act 1980*, s.7(2); *Youth Justice Act 1992*, s.49.
[479] *Bail Act 1980*, ss.7, 11A, 11B and 14.
[480] *Youth Justice Act 1992*, s.51.
[481] *Police Powers and Responsibilities Act 2000*, s.393; *Youth Justice Act 1992*, s.49.

unless satisfied it is not practicable to take the person before a court promptly.[482] If the prescribed officer is so satisfied, the officer may grant bail or otherwise release the person.[483]

There is an obligation to release the person unless the Act requires they be kept in custody[484], for example because there is an unacceptable risk of offending or absconding or because it is a matter where the officer lacks jurisdiction.[485]

If the officer decides to keep the person in custody, written reasons for the decision must be given.[486]

15.2 Release on issue of a Notice to Appear (*Bail Act 1980*, s.7(3)(b))

The alternative to bail most frequently utilised by police officers is the release of a defendant by issue of a Notice to Appear. If an officer is satisfied a person may be granted bail under the Act the officer has the option of issuing the person a Notice to Appear rather than placing them on bail.[487]

The power to issue a Notice to Appear is given in s 382 of *the Police Powers and Responsibilities Act 2000*. The notice requires the person to appear before a court of summary jurisdiction at a stated time and place.[488]

15.2.1 Where failure to appear

Where a person fails to appear as required in the Notice to Appear, the court may:

(a) hear and decide the complaint in the absence of the person;[489] or
(b) order that a warrant issue for the arrest of the person to be brought before the court to be dealt with according to law.[490]

15.3 Cash bail granted by police (*Bail Act 1980*, ss.14(1) and 14(1A))

In accordance with ss.14(1) and (1A), where:

> (d) A person has been arrested in connection with a charge of an offence, other than an indictable offence or an offence mentioned in the schedule (being s.79 of the *Transport Operations (Road Use Management) Act 1995* regarding 'vehicle offences involving liquor or drugs' and ss.221, 223, and 225 of the *Racing Integrity Act 2016*); and

[482] *Bail Act 1980*, s.7(1); *Youth Justice Act 1992*, ss.49-50(1).
[483] *Bail Act 1980*, s.7(3); *Youth Justice Act 1992*, s.49.
[484] *Bail Act 1980*, ss.7(2)-(3); *Youth Justice Act 1992*, s.48(2)-(3).
[485] *Bail Act 1980*, ss.13 and 16; *Youth Justice Act 1992*, s.48(4).
[486] *Bail Act 1980*, s.7(5); *Youth Justice Act 1992*, s.48B.
[487] *Bail Act 1980*, s.7(3).
[488] *Police Powers and Responsibilities Act 2000*, s.384.
[489] Summary offences and indictable offences capable of being dealt with summarily may be heard and decided in the absence of the defendant: see *Police Powers and Responsibilities Act 2000,* s.388; *Justices Act 1886*, s.142A; *Justices Act 1886*, s.4, definition 'simple offence'; *Acts Interpretation Act 1954* (Qld) s.44.
[490] *Police Powers and Responsibilities Act 2000*, s.389.

(e) a defendant is in the custody of a police officer having not first appeared before a justice; and
(f) the police officer is satisfied the defendant cannot be taken promptly before a court,

if the police officer considers it appropriate, the police officer may grant bail and release the defendant from custody upon the person making a deposit of money as security for their appearance before a court on a specified date, place, and time.

15.3.1 Action by court where person appears in accordance with bail

Where a person granted cash bail by a police officer, **attends court** in accordance with the bail, the court shall order the amount of the deposit to be refunded unless the court orders that the deposit or part of it be applied towards:

(a) payment of any penalty or costs; or
(b) if the hearing is adjourned and the defendant is permitted to go at large, a security for the person's future appearance at an adjourned hearing.

15.3.2 Where failure to appear

Where a person granted cash bail under s.14 fails to appear in accordance with the bail, the court or justice shall order the forfeiture of the deposit of money (ss.14(5) and (6)) (unless the defendant's lawyer applies for an adjournment that is granted, in which case the court may order the deposit or part of the deposit be applied as security for the defendant's future appearance, or permit the defendant to go at large without bail (s.14(7)). If the defendant fails to appear at the adjourned hearing, the court shall order the forfeiture of the deposit of money made (s.14(7A)).

15.4 Grant of release without bail by police (*Bail Act 1980*, s.14(1B))

A police officer may release a person *without bail* where:

(a) a person charged with being drunk in a public place is released into the care of a person at a place of safety under s.378 of the *Police Powers and Responsibilities Act 2000;*
(b) a person charged with a minor drugs offence within the meaning of the *Police Powers and Responsibilities Act 2000*, Schedule 6 signs an agreement to attend a drug diversion assessment program under s.379 of that Act.

15.4.1 Where failure to appear

If a defendant who has cash bail or bail on an undertaking by the Magistrates Court or a police officer, bail under the *Youth Justice Act 1992*or was permitted to go at large without bail *fails to surrender*, the Court may issue a warrant pursuant to ss.28A(1)(ea) or (f) for the apprehension of the defendant.

15.5 Release of child without bail

A police officer may, instead of granting bail to a child, choose to release the child into the custody of the child's parents or to go at large.[491] Before releasing the child the officer must issue either a Notice to Appear under s.382 of the *Police Powers and Responsibilities Act 2000* or a release notice under s.52 of the *Youth Justice Act 1992*. [492]

15.5.1 Where failure to appear

The provisions of the *Bail Act 1980* relating to the issue of warrants for the arrest of defendants released without bail who fail to appear also apply to a child who fails to appear after been released without bail.[493]

15.6 Release of person with impairment of mind (*Bail Act 1980*, ss.11A and 11B)

'Person with an impairment of mind' is defined in s.11A(7) to mean *a person who has a disability that –*

> *(a) is attributable to an intellectual, psychiatric, cognitive, or neurological impairment or a combination of these; and*
> *(b) results in-*
> *(i) a substantial reduction of the person's capacity for communication, social interaction or learning; and*
> *(ii) the person needing support.*

These sections apply to both adult and child defendants.

Section 11A(1) provides that if a magistrate or police officer authorised to grant bail considers that a person:

(a) held in custody on a charge of or in connection with an offence is, or appears to be, a person with an impairment of the mind; and
(b) the person does not, or appears not to, understand the nature and effect of entering into an undertaking under s.20; and
(c) if the person understood the nature and effect of entering into the undertaking, the person would be released on bail then a police officer or court may release the person without bail by either;

then according to s.11A(2), the police officer or court may release the person without bail by –

(a) releasing the person into the care of another person who ordinarily has the care of the person or with whom the person resides; or
(b) permitting the person to go at large (s.11A(2)).

[491] *Youth Justice Act 1992* (Qld), s.51(2).
[492] *Youth Justice Act 1992* (Qld), s.51(3)-(4).
[493] *Youth Justice Act 1992* (Qld), s.57.

A person's release is on condition the person will surrender, at the time and place stated in the required notice under s.11B (s.11A(3)).

Section 11B provides that if a person is released under s.11A, the police officer or court releasing them must give the person a notice in the approved form stating:

(a) the person's name and place of residence;
(b) the charge on which or the offence in connection with which the person was in custody; and
(c) if the person is released into the care of another person, the other person's name, and place of residence; and
(d) the court into whose custody the person is required to surrender as a condition of the release; and
(e) the time and place the person is required to surrender into the court's custody.

CHAPTER 16 – SUPREME AND DISTRICT COURT BAIL

A judge may deal with a bail application in the following circumstances:

Upon Application:

i) to the Court of Appeal in its original jurisdiction;
ii) to the Supreme Court pursuant to s.10(1) of the *Bail Act 1980*;
iii) to the District Court or Supreme Court or Court of Appeal where the person is awaiting a criminal proceeding to be held by that court in relation to the offence (s.8(1)(a)(i) and s.19(1));
iv) to the District Court or Supreme Court or Court of Appeal where the court has adjourned the criminal proceedings (s.8(1)(a)(ii) and s.19(1));
v) to the District Court or Supreme Court or Court of Appeal where the court has committed or remanded the person in the course of or in connection with criminal proceedings to be held by that court or another court in relation to that offence (s.9(1)(a)(iii) and s.19(1));
vi) to the trial or sentencing judge in the District or Supreme Court (s.10(2) and (3)).

Upon Review:

i) of a decision by a magistrate by a single justice of the Supreme Court (s.19B(3)(b));
ii) of a decision of a magistrate on review by a single justice of the Supreme Court (s.19C).

Upon Appeal:

i) to the District Court from a decision of the Magistrates Court pursuant to s.222 of the *Justices Act 1886*;
ii) to the Court of Appeal by way of Chapter 18 of the *Uniform Civil Procedure Rules* ('UCPR') from a decision of a single judge of the Supreme Court or District Court.

A judge has the power to issue a warrant for the apprehension of a defendant who breaks a condition of a bail undertaking or who is considered likely to break such a condition (s.28(1)).

16.1 Generally

When a person is first charged, they will ordinarily appear before the Magistrates Court and bail will be dealt with by a magistrate. In most instances, it is only when an indictment has been presented that a bail hearing will be in the hands of a judge in either the District Court or the Supreme Court.

However, a judge may deal with bail upon application, upon review and upon appeal.

16.2 Upon application

16.2.1 On application to the Court of Appeal in its original jurisdiction

As discussed in Chapter Six, in *Scrivener v Director of Public Prosecutions* [2001] QCA 454 at [12] McPherson JA confirmed that on the basis of *R v Hughes* [1983] 1 Qd R 92, an application for bail may be renewed before the Court of Appeal, not by way of appeal, but by way of an originating application in the court's original jurisdiction.

16.2.2 On application to the Supreme Court pursuant to *Bail Act 1980*, s.10(1)

Section 10(1) of the *Bail Act 1980* provides:

> *'The Supreme Court or a judge thereof may subject to this Act, grant bail to a person held in custody on a charge of an offence, or in connection with a criminal proceeding, or enlarge, vary or revoke bail granted to a person in or in connection with a criminal proceeding whether or not the person has appeared before the Supreme Court in or in connection therewith'.*

An application pursuant to s.10(1) is the most commonly used pathway to challenge or vary a decision of a Magistrate refusing bail or a decision imposing bail conditions. This is not by way of appeal but is an application in the Supreme Court's original jurisdiction under the *Bail Act 1980.*

16.2.3 On application to the District, Supreme Court, or Court of Appeal when defendant awaiting a criminal proceeding (*Bail Act 1980*, s.8(1)(a)(i) and s.19)

Section 19(1) provides that a defendant held in custody in relation to an offence who has been refused bail or having been granted bail feels aggrieved by the amount fixed or any condition imposed for the defendant's release from custody may make application to a court empowered by section 8 to grant bail to the defendant for an order granting or varying bail.

Section 8(1)(a)(i) provides that a court may grant bail to a person held in custody on a charge of or in connection with an offence if the person is awaiting a criminal proceeding to be held by that court in relation to that offence. Section 8(1)(b) provides that subject to the Act, a court may enlarge, vary, or revoke bail so granted.

Criminal proceeding is defined in s.6 of the *Bail Act 1980* to include a hearing, trial, or appeal in relation to an offence.

Accordingly, a defendant remanded in custody may apply to the relevant court for bail in circumstances including where:

a) the defendant has been committed to the District or Supreme Court for trial or sentence;
b) an indictment has been presented in either the District or Supreme Court; or

c) the defendant has lodged an appeal and is awaiting the hearing.[494]

16.2.4 On application to the District, Supreme Court, or Court of Appeal when the court has adjourned the criminal proceeding (*Bail Act 1980*, s.8(1)(a)(ii) and s.19)

Section 19(1) provides that a defendant held in custody in relation to an offence who has been refused bail or having been granted bail feels aggrieved by the amount fixed or any condition imposed for the defendant's release from custody may make application to a court empowered by s.8 to grant bail to the defendant for an order granting or varying bail.

Section 8(1)(a)(ii) provides that a court may grant bail to a person held in custody on a charge or in connection with an offence if the court has adjourned the criminal proceeding (as defined in s.6 and set out above). Section 8(1)(b) provides that subject to the Act, a court may enlarge, vary, or revoke bail so granted.

16.2.5 On application to the District or Supreme Court, or Court of Appeal when the court has committed or remanded the person in connection with criminal proceedings to be held by that court or another (*Bail Act 1980*, ss.8(1)(a)(iii) and 19)

Section 19(1) provides that a defendant held in custody in relation to an offence who has been refused bail or having been granted bail feels aggrieved by the amount fixed or any condition imposed for the defendant's release from custody may make application to a court empowered by s.8 to grant bail to the defendant for an order granting or varying bail.

Section 8(1)(a)(iii) provides that a court may grant bail to a person held in custody on a charge or in connection with an offence if the court has committed or remanded the person in the course of a or in connection with a criminal proceeding to be held by that court or another court in relation to that offence. Section 8(1)(b) provides that subject to the Act, a court may enlarge, vary, or revoke bail so granted.

16.2.6 On application to the trial or sentencing judge in the District or Supreme Court (*Bail Act 1980*, ss.10(2) and 10(3))

Bail during the course of a jury trial

Section 10(2) of the *Bail Act 1980* provides that once a defendant has been given in charge to the jury in connection with a trial commenced in either the District or the Supreme Court, the trial judge alone has a discretion to grant, enlarge, vary, or revoke bail.

Section 10(3) of the *Bail Act 1980* provides that a decision made by a trial judge pursuant to s.10(2) is final and the defendant has no right to make a further application for bail in relation to the custody in which the defendant is then held or to appeal the decision.

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[494] See Chapter Seven for magistrate's power to grant bail pursuant to s.8(1)(a)(ia) where the defendant is awaiting an appeal to the District Court under s.222 of the *Justices Act 1986*. Where a s.222 appeal is pending in the District Court, the District Court should only grant bail in exceptional circumstances and ordinarily, only if the following two conditions are satisfied: 1) that there are strong grounds for concluding that the appeal will be allowed; and 2) that the sentence, or in all events the custodial part of it, it likely to have been substantially served before the appeal is determined. For more detail, see discussion in Chapter Seven.

Thus, a trial judge has exclusive jurisdiction with respect to bail, which is not reviewable once the proceeding has commenced and until the defendant is either discharged or sentenced.

In *R v Wren*, the Court of Appeal characterised s.10(2) as *'a legislative recognition of the desirability of orderly trials unimpeded by interlocutory appeals once proceedings commence before a trial judge'*.[495]

In *Wotton v Director of Public Prosecutions*,[496] the defendant sought to advance an argument that the 'decision' of the trial judge referred to in s.10(3), must be a lawful decision and not one infected by jurisdictional error such that an appeal avenue was available in circumstances where the trial judge did not properly address the considerations required by s.16 in refusing bail. Justice Helman referred to the decision in *Wren* and held at [99]:

> *'if there is any scope for the application of the principles as to jurisdictional error… it must be reserved for only the most exceptional cases – of which this clearly is not one – in which it is demonstrable that there has been the most blatant disregard of the ordinary rules concerning the granting or refusing of bail'.*[497]

Bail during course of a sentencing hearing

Because of the definition of 'trial' in s.6 of the *Bail Act 1980*, the scope of ss.10(2) and (3) extends beyond jury trials to include sentencing hearings.

Trial is defined in s.6 of the *Bail Act 1980* to mean a proceeding wherein a person is charged with an offence on indictment and includes a proceeding wherein a person is to be sentenced.

As recognised by the Court of Appeal in *R v Wren*:[498]

> *'Whilst at first glance ss.10(2) and 10(3) might seem limited to application for bail in jury trials, upon analysis those subsections are of wider application and include a case such as the present where there has been a plea of guilty and an application is made for bail in the course of the sentencing procedure'.*

Consequently, once the allocutus has been administered and the defendant pleads guilty, the sentencing judge is solely entrusted with the question of bail until such time as the accused is sentenced. No appeal lies to a judge of the Supreme Court pursuant to s.19 or the Court of Appeal. As the Court of Appeal stated in *R v Wren* at [8]:

> *'The wide powers of courts to entertain applications for bail conferred by ss8 and s.19 of the Bail Act must be read as subject to the limitation imposed by s.10'*.

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[495] *R v Wren* [2000] 1 Qd R 577 at [9] citing *Goldsmith v R* (1993) 67 ALJR 513.
[496] [2008] 1 Qd R 95.
[497] [2008] 1 Qd R 95 at 99.
[498] *R v Wren* [2000] 1 Qd R 577. *See also R v Edwards* [1989] 1 Qd R 139 per McPherson J.

16.3 Upon review

16.3.1 Application for review by the Supreme Court of a decision of a Magistrate or District Court Judge (*Bail Act 1980*, s.19B(3)(b))

Section 19B(3)(b) of the *Bail Act 1980* provides a defendant with a right to seek review of a decision of a magistrate or District Court judge about release under Part 2 of the *Bail Act 1980* or *Youth Justice Act 1992,* Part 5, to the Supreme Court constituted by a single justice.

An application for review can be made by a defendant, complainant, prosecutor, or a person appearing on behalf of the Crown. (For further details, see Chapter Six)

16.3.2 Application for review by the Supreme Court of a decision of a Magistrate on a review (*Bail Act 1980*, s.19C)

Section 19C of the *Bail Act 1980* provides for the review by a justice of the Supreme Court, of a decision of a magistrate on review (as provided for in s.19B(3)(a)). (For further details, see *Chapter Six*.)

16.4 Upon appeal

16.4.1 Appeal to the District Court from a decision of the Magistrates Court pursuant to s.222 of the *Justices Act 1886*.

Pursuant to s.222 of the *Justices Act 1886,* an appeal lies from a decision of a magistrate to a judge of the District Court by way of rehearing on the original evidence. (For further detail, see *Chapter Six*.)

16.4.2 Appeal from a decision of a Single Judge of the Supreme Court or District Court to the Court of Appeal

An appeal lies to the Court of Appeal from a decision of a single judge of the Supreme Court or District Court refusing bail by virtue of Chapter 18 of the *Uniform Civil Procedure Rules ('UCPR')*[499] (For further details, see Chapter Six.)

16.5 Warrants

16.5.1 Power of the District and Supreme Court to issue a Warrant for Apprehension of defendant (*Bail Act 1980*, s.28)

Section 28(1) of the *Bail Act 1980* provides that where a defendant who has entered into an undertaking requiring the defendant to appear before the Supreme Court or District Court, breaks a condition of the undertaking or if the court is satisfied that the defendant is likely to break any such condition, the court before which the defendant is required to appear (on application by the Director of Public Prosecutions or, the Deputy Director of Public Prosecutions or a person duly so

[499] See r.745 *Uniform Civil Procedure Rules 1999.*

authorised), may after giving notice to the defendants (or without such notice if the defendant cannot be located or is likely to abscond), issue a warrant for the apprehension of the defendant.

16.5.2 Power of the Court upon surrender to withdraw and cancel warrant (*Bail Act 1980*, ss.28(2), (2A) and (2B))

In accordance with s.28(2), where a defendant failed to surrender and a warrant issued pursuant to s.28(1), and:

a) the defendant surrenders to the court that issued the warrant as soon as is practicable after the time for the time being appointed for the defendant to do so; and
b) satisfies the court that the failure to surrender was due to reasonable cause,

the court may withdraw and cancel the warrant.

Similarly, in accordance with ss.28(2A) and (2B), where a warrant issued because the defendant had broken a condition of the undertaking or on the ground that the defendant is likely to break a condition of the undertaking, and the defendant satisfies the court prior to the execution of the warrant that the breaking of the condition was due to reasonable cause, or that the defendant is not likely to break a condition of the undertaking, the court may withdraw and cancel the warrant.

(For information relation to the consequences for failing to appear in accordance with an undertaking and the issuing of a warrant, see further Chapter 12 and Chapter Nine).

CHAPTER 17 - EXTRADITION

The *Service and Execution of Process Act 1992* (Cth)

The *Service and Execution of Process Act 1992* (Cth) sets out the procedure to be followed in the event of a person being brought before a magistrate in Queensland after being apprehended in Queensland upon a warrant issued in another State. The magistrate may remand the person in custody or on bail. The Queensland law of bail will apply to any grant of bail.

The *Extradition Act 1988* (Cth)

The *Extradition Act 1988* (Cth) codifies the law relating to the extradition of persons from Australia to Extradition Countries, including New Zealand. A magistrate will ordinarily remand a person in custody and must not remand a person on bail unless there are special circumstances justifying that course.

17.1 Interstate apprehension of person named in warrant (*Service and Execution of Process Act 1992* (Cth), s.82(1))

Section 82(1) of the *Service and Execution of Process Act 1992* (Cth) states that except where a person is in prison, a person named in a warrant issued in a State may be apprehended in another State.

17.2 Procedure following apprehension under s.82 (*Service and Execution of Process Act 1992* (Cth), s.83)

Section 83(1) of that Act provides that as soon as practicable after being apprehended, the person is to be taken before a magistrate of the State in which the person was apprehended.

Section 83(2) provides that the warrant or a copy of the warrant must be produced to the magistrate if it is available.

If the warrant is not available, s.83(3) provides that the magistrate may:

(a) order that the person be released; or
(b) adjourn the proceedings for such reasonable time as the magistrate specifies and remand the person on bail or in such custody as the magistrate specifies.

If the matter is adjourned pursuant to s.83(3)(b) but when it is resumed, the warrant or a copy of the warrant is not produced, s.83(4) provides that the magistrate may:

(a) order that the person be released; or
(b) if reasonable cause is shown, adjourn the proceeding for such further reasonable time as the magistrate specifies and remand the person on bail or in such custody as the magistrate specifies.

Section 83(5) provides that the total time of the adjournments referred to in paragraphs 3(b) and (4)b must not exceed five days.

If following a further adjournment pursuant to s.83(4)(b) the warrant or a copy of the warrant is not produced, pursuant to s.83(7), the magistrate must order that the person be released.

If following a further adjournment pursuant to s.83(4)(b) the warrant or a copy of the warrant is produced, pursuant to s.83(8) (but subject to subsections (10) and (14) and s.84), the magistrate must order:

(a) that the person be remanded on bail on condition that the person appear at such time and place in the place of issue of the warrant as the magistrate specifies; or
(b) that the person be taken, in such custody or otherwise as the magistrate specifies, to a specified place in the place of issue of the warrant.

Pursuant to s.83(11), the magistrate may suspend the order or adjourn the proceedings made under s.83(8)(b) for a specified period, and upon doing so, may remand the person (a) on bail or (b) in such custody as the magistrate specifies until the end of the suspended period (s.83(12)).

In proceedings under s.83 of the Act, in accordance with s.83(14):

(a) the magistrate may adjourn proceedings under s.83 and remand the person on bail, or in such custody as the magistrate specifies for the adjournment; and
(b) the magistrate is not bound by the rules of evidence;
(c) it is not necessary that a magistrate before whom the proceeding was previously conducted continue to conduct the proceeding.

17.3 Enquiry must be made to ascertain if defendant 'under restraint' (*Service and Execution of Process Act 1992* (Cth), s.84)

If a person is brought before a magistrate pursuant to s.83, the magistrate must make reasonable enquires of the person to ascertain if they are 'under restraint' and if so, in which State or States (s.84(1)).

The term 'person under restraint' is defined as including persons on bail, parole, or probation, or subject to a community-based order or other restriction on their movements imposed by law or a court.[500]

If a person is on bail in another State, the magistrate must make reasonable enquires to ascertain any reporting requirements (s.84(2)).

If a person is under restraint (but not subject to bail) the magistrate *must* adjourn the proceedings for not more than seven days, remand the person either on bail or in custody and notify the person in charge of the correction service of the State in which the person is under restraint, and when the proceeding is resumed, submissions may be made by the person informed or a supervisor of the person under restraint (s.84(4)).

[500] *Service and Execution of Process Act 1992* (Cth), s 3.

If a person under restraint is on bail, the magistrate *may* adjourn the proceedings for not more than seven days, but if the magistrate does adjourn the proceedings, the magistrate must remand the person on bail on condition to appear when the proceeding resumes, or alternatively, remand the person in custody. If a condition of the person's bail was to report, the magistrate, after adjourning must cause notice of the person's apprehension to be given to the person in charge of the corrective service of the State in which the person is required to report and the person notified or a supervisor of the person under restraint may make submissions to the magistrate upon the resumed hearing (ss.84(5) and (6)).

17.4 Procedure on remand on bail (*Service and Execution of Process Act 1992* (Cth), s.85)

In circumstances where a magistrate grants bail in accordance with ss.83(8)(a) or 83(12)(a), the magistrate must have prepared an instrument setting out the bail conditions (s.85(1)).

That instrument must be signed by both the magistrate and the person the subject of the order (s.85(2)) and the person must be given a copy (s.85(3)).

The magistrate must revoke the order and order the person be remanded in custody if the person refuses to sign the instrument or does not comply with a condition of bail (s.85(4)).

A magistrate before whom an application to execute an interstate warrant is brought, may make a determination in the following way:

'This is an Application to execute an interstate warrant and to return the defendant to the State of ……. the state in which the original warrant for the arrest of the defendant was issued on …….

A copy of the original warrant has been produced today to this Court by ……(name) and the copy of the warrant is now marked Exhibit 1. (see s.83(2))

- *The defendant admits he is the person named in the copy of the warrant and does not contest the validity of the warrant at this stage (s.82(1))*
- *It appears to me that the warrant is valid (see s.83(1))*
- *I am satisfied that the defendant is not a person under restraint (see s.84)*
- *I hear the parties on the issue of bail.*

I do order that the defendant:

a) in circumstances where bail is granted:

(i) Be remanded on bail on condition to appear before ***Magistrates/****Local Court at ……. in the State of ……. (with or without further specified conditions as follows…….); or*

(ii) Be allowed bail on his/her own undertaking.

OR

b) in circumstances where bail is refused:

(i) Be returned to the State of …….. in which the warrant was issued to appear in the Magistrates/Local Court at …… on the ……(date) and for

> *that purpose that he/she is delivered, together with Exhibit 1 and a record of these proceedings, into the custody of …… the person who brought the copy of the original warrant to Queensland.*

17.5 Review of the order made under s.83 (*Service and Execution of Process Act 1992* (Cth), s.86)

When an order has been made pursuant to s.83, the person to whom the warrant was directed may apply to the Supreme Court of the State in which the order was made, for review of the order (s.86).[501]

17.6 Law applicable to grant of bail (*Service and Execution of Process Act 1992* (Cth), s.88)

Section 88 of the *Service and Execution of Process Act 1992* (Cth) provides that despite s.68(1) of the *Judiciary Act 1903* (Cth) (concerning the jurisdiction of State and Territory courts in criminal cases), the law of a State with respect to the granting of bail applies in relation to the power contained in s.83 to grant bail to a person apprehended in that State.

Additionally, the law of a State with respect to bail and matters related to bail (including enforcement of bail) applies in relation to a person who has been remanded on bail in that State as if the person had been remanded on bail to appear before a court of that State (s.88(2)).

Section 88(3) provides that money received in proceedings for the enforcement of bail is to be retained by the State in which the bail condition, the breach of which led to the proceedings being brought, was imposed.

17.7 Extradition proceedings from Australia to extradition countries

The *Extradition Act 1988* (Cth) codifies the law relating to the extradition of persons from Australia.

That Act provides that a person who is arrested under an extradition arrest warrant shall be brought as soon as practicable before a magistrate or eligible Federal Circuit Court Judge in the State or Territory in which the person is arrested (s.15(1) and for extradition to New Zealand, s.32(1)).

A magistrate shall remand a person in custody (s.15(2), and in the case of extradition to New Zealand, s.32(2)) and shall not remand a person on bail unless there are special circumstances justifying such a grant of bail (s.15(6) and in the case of extradition to New Zealand s.32(3)).

In *United Mexican States v Cabal*[502], the High Court of Australia considered the meaning of 'special circumstances'. Gleeson CJ, McHugh, and Gummow JJ stated:

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[501] See *Abbott v Commissioner of Police* [2016] QSC 95 for an example of an application for review brought pursuant to s.86 of the *Service and Execution of Process Act 1992* (Cth) of a decision of a magistrate made under s.83.
[502] [2001] HCA 60; (2001) 209 CLR 165 at [61].

> *'First, the circumstances of the individual case are special in the sense that they are different from the circumstances that persons facing extradition would ordinarily endure when regard is had to the nature and extent of the extradition charges. This means that the circumstances relied on must be different in kind from the disadvantages that all extradition defendants have to endure. To constitute "special circumstances", the matters relied on "need to be extraordinary and not factors applicable to all defendants facing extradition". Secondly, there must be no real risk of flight. Absence of a real risk of flight is ordinarily a necessary but not a sufficient condition of bail. When there is a real risk of flight, ordinarily bail should be refused. Further, the risk of flight should be considered independently of the effect of the proposed bail conditions. In this area of law, the history and character of the defendant and the potential punishment facing the defendant are likely to be surer guides to the risk of flight than bail conditions — even rigorous conditions.'* [503]

[503] For a discussion of s.15(6) 'special circumstances', see also *Tsvetnenko v United States of America* [2019] FCA 206 where a Magistrate's decision to remand the applicant in custody rather than on bail was challenged by way of judicial review in the Federal Court of Australia. Considering *Cabel,* McKerracher J held that the risk of flight being low or very low is not of itself a 'special circumstance'.

CHAPTER 18 - DOMESTIC VIOLENCE OFFENCES AND BAIL

Show cause

In the context of domestic violence, a defendant will be in a show cause position in a bail application where charged with any of the following offences:

1. indictable offences where defendant used or threatened to use a firearm, offensive weapon, or explosive substance;
2. an offence against the *Bail Act 1980*;
3. an offence against the *Criminal Code* s.315A (choking, suffocation, or strangulation in a domestic setting);
4. an offence punishable by a maximum penalty of at least seven years imprisonment if the offence is also a domestic violence offence (as defined in s.1 *Criminal Code*);[504]
5. contravention of a Domestic Violence Order (s.177(2) *Domestic and Family Violence Protection Act 2012)* if:
   i) The offence involved the use, threatened use, or attempted use of the unlawful violence to person or property; or
   ii) The defendant, within five years before the commission of the offence, was convicted of another offence involving the use, threatened use or attempted use of unlawful violence to person or property; or
   iii) The defendant, within two years before the commission of the offence, was convicted of another offence against the *Domestic and Family Violence Act 2012*, s.177(2).

Conditions

When considering bail, regard should be had to:

a) whether the defendant is subject to any temporary or final domestic violence order under the *Domestic and Family Violence Protection Act 2012*; and
b) ensuring bail conditions are not inconsistent with any conditions of an existing domestic violence order under the *Domestic and Family Violence Protection Act 2012*.

In the context of domestic violence, the court may consider:

- A special condition that prohibits a person from associating with a stated person/persons;
- A special condition that prohibits a person from coming within a certain distance of any workplace, residence;
- A special condition that prohibits a person from contacting another/others;

[504] *Criminal Code* s.1 defines *'domestic violence offence'* to mean '*an offence against an Act, other than the Domestic and Family Violence Protection Act 2012, committed by a person where the act done, or omission made, which constitutes the offence is also: a) domestic violence or associated domestic violence, under the Domestic and Family Violence Protection Act 2012, committed by the person, or; b) a contravention of the Domestic and Family Violence Protection Act 2012, s.177(2).*

- A special condition imposing limitation on the use of social media;
- A special condition that the defendant participate in a rehabilitation, treatment or other intervention program or course (s.11(9));
- A special condition that the defendant, if eligible (see s.11AB), complete a Drug and Alcohol Assessment Referral course (s.11(9A);
- A special condition that the defendant wear a tracking device (s.11(9B)).
- Special conditions to facilitate the fitting and operation of the tracking device.[505]

Assessment of 'unacceptable' risk (*Bail Act 1980*, s.16)

In assessing the risk:

- the court *cannot* take into account the impact of a condition requiring the wearing of a tracking device.
- where a defendant is charged with:
  a) a domestic violence offence (defined in s.1 *Criminal Code*); or
  b) contravening a Domestic Violence Order pursuant to s.177(2) of the *Domestic and Family Violence Protection Act* 2012

  it is *relevant* to consider the risk of further domestic violence or associated domestic violence (s.16(2)(f)).

Section 15(1)(e) of the *Bail Act 1980* provides the power to receive and take into account evidence of the risk of further domestic violence or associated domestic violence.

Stay of release decision where review of decision relating to bail sought

If the prosecutor seeks a review of a decision relating to bail, the decision made concerning bail is stayed until the earlier of the following:

- an order is made by the reviewing court under ss.19B(6) or 19C(5);
- the application is discontinued, or;
- 4pm on the day that is three business days after the day on which the decision concerning release was made.[506]

18.1 Prima facie right to bail

As a consequence of the operation of s.9 and s.16 of the *Bail Act 1980*, (unless the charge/s before the court involves a charge that triggers the reverse onus provisions) there is a prima facie right to bail unless the court is satisfied that there is an unacceptable risk of the defendant, if granted bail, failing to attend or committing further offences, interfering with witnesses or for their own protection.

[505] Examples of such conditions are set out in s.4 of the *Bail (Domestic Violence) and Another Act Amendment Act 2017*.
[506] *Bail Act 1980*, s.19CA

18.2 Unacceptable risk – consideration of risk of future domestic violence

In assessing whether there is an unacceptable risk, the magistrate should have regard to those matters as set out in s.16(2), but in particular with regard to domestic violence, s.16(2)(f) provides that where a defendant is charged with:

i. a domestic violence offence (as defined in the *Criminal Code* s.1); or
ii. an offence against the *Domestic and Family Violence Protection Act 2012*, s.177(2) (Contravening a Domestic Violence Order),

it is relevant for a court to consider *'the risk of further domestic violence or associated domestic violence, under the Domestic and Family Violence Protection Act, being committed by the defendant.'* [507]

To that end, s.15(1)(e) of the *Bail Act 1980* provides the Court with the power to receive and take into account evidence relating to the risk of further domestic violence or associated domestic violence, provided the evidence is considered '*credible and trustworthy in the circumstances*'. Evidence of previous domestic violence which resulted in the defendant having been arrested or charged with an offence (without the matter proceeding to a 'not guilty' finding) may be taken into account if the evidence is considered by the court to be relevant to the risk of further domestic violence being committed by the defendant.[508]

Whilst each application will turn on its own unique characteristics, provided the evidence is 'credible and trustworthy in the circumstances', the following factors are some that may be considered when assessing the risk of further domestic violence or associated domestic violence:

- evidence of a current Domestic and Family Violence Protection Order against the defendant;
- evidence of a Domestic and Family Violence Protection Order having been made in the past against the defendant;
- evidence of the defendant having previously been convicted of a violent offence, an offence against the Domestic and *Family Violence Protection Act 2012*, an offence of stalking or an offence of making threats to injure or kill;
- evidence of previous domestic violence by the defendant if that evidence is considered relevant to the risk of further domestic violence;
- evidence the defendant previously contravened a bail condition or committing an indictable offence whilst on bail.[509]

Section 16(2A) provides that in assessing whether there is an unacceptable risk, a court must not have regard to the effect on the risk of imposing a condition requiring the wearing of a tracking device (a condition provided for in s.11(9B)).

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[507] Section 16(2)(f) was inserted as a consequence of the *Bail (Domestic Violence) and Another Act Amendment Act 2017* which came into force on 30 March 2017. See *Ackland v Director of Public Prosecutions (Qld)* [2017] QCA 75.
[508] A court may have regard to an unrecorded conviction or a charge that is relevant to an issue in criminal or civil proceedings before the court: *Criminal Law (Rehabilitation of Offenders) Act 1986*, s.5.
[509] For further examples, see the Judicial College of Victoria, 'Risk Indicators of Family Violence' at www.judicialcollege.vic.edu.au

18.3 Conditions

When considering bail, regard should be had to:

a) whether the defendant is subject to any temporary or final domestic violence order under the *Domestic and Family Violence Protection Act 2012*; and
b) ensuring bail conditions are not inconsistent with any conditions of an existing domestic violence order under the *Domestic and Family Violence Protection Act 2012.*

In the particular context of domestic violence offences, the court may consider:

- A special condition that prohibits a person from associating with a stated person/persons;
- A special condition that prohibits a person from coming within a certain distance of any workplace, residence;
- A special condition that prohibits a person from contacting another/others;
- A special condition imposing limitation on the use of social media;
- A special condition that the defendant participate in a rehabilitation, treatment or other intervention program or course (s.11(9));
- A special condition that the defendant, if eligible (see S.11AB), complete a Drug and Alcohol Assessment Referral course (s.11(9A);
- A special condition that the defendant wear a tracking device (s.11(9B)).
- Special conditions to facilitate the fitting and operation of the tracking device.[510]

18.4 Surety/security/deposit

The court has an obligation to consider appropriate conditions for release on bail as set out in s.11(1) of the *Bail Act 1980*, including the use of a security, surety and/or deposit.

Such conditions must not be more onerous for the defendant than is necessary having regard to the nature of the offence, the circumstances of the defendant and the public interest.

18.5 Domestic violence related offences where defendant in 'show cause' position

Certain domestic violence-related offences trigger the show cause provisions of the *Bail Act 1980*, meaning that there is no presumption in favour of bail – rather the onus is on the defendant, on the balance of probabilities, to show cause why the defendant's detention in custody is not justified.[511] Section 16(3)(g) (as set out below) specifically refers to domestic violence-related matters.

[510] Examples of such conditions are set out in s.4 of the *Bail (Domestic Violence) and Another Act Amendment Act 2017*.

[511] *Bail Act 1980*, s.16(3). Also note that on 30 March 2017 the *Bail (Domestic Violence) and Another Act Amendment Act 2017* came into force, introducing significant amendments to bail in circumstances of offences of domestic violence.

In such circumstances, **the strength of the Crown case** will be the prime, but not the exclusive consideration.[512] *'Countervailing circumstances common to applications for bail in the generality are to be accorded less weight than in the ordinary case'.*[513] *(See Chapter Two - Show Cause).*

18.6 Table of 'show cause' provisions

Legislative basis	Circumstance of offence charged
s.16(3)(a)	Where the defendant is charged with an indictable offence that is alleged to have been committed while the defendant was at large with or without bail between the date of the defendant's apprehension and the date of the defendant's committal for trial or while awaiting trial for another indictable offence.
s.16(3)(b)	Where the defendant is charged with an offence to which s.13 applies (murder of a repeat serious child sex offence). Only the Supreme Court may grant bail to defendants falling in this category, see Chapter 20
s.16(3)(c)	Where the defendant is charged with an indictable offence in the course of committing which the defendant is alleged to have used or threatened to use a firearm, offensive weapon, or explosive substance.
s.16(3)(d)	Where the defendant is charged with an offence against the *Bail Act 1980;*
s.16(3)(e)	Where the defendant is charged with an offence against the *Penalties and Sentences Act 1992*, s.161ZI (Contravention of a Control Order) or the *Peace and Good Behaviour Act 1982*, s.32 (Contravention of a Public Safety Order);
s.16(3)(f)	Where the defendant is charged with an offence against the *Criminal Code*, s.359 (threats) with a circumstance of aggravation as mentioned in s.359(2) (threat made to a law enforcement officer or person assisting a law enforcement officer, when or because the officer is investigating the activities of a criminal organisation);
s.16(3)(g)	Where the defendant is charged with a '*relevant offence'* as defined in s.16(7)[514] as: (a) an offence against the *Criminal Code,* s.315A (Choking, suffocation, or strangulation in a domestic setting); (b) an offence punishable by a maximum penalty of at least 7 years imprisonment if the offence is also a domestic violence offence (as defined in the *Criminal Code* , s.1);[515]

[512] *Turbill, An Application for Bail* [2009] QSC 197 and Sperling J in *R v Iskandar* (2001) 120 A Crim R 302 at 305 at [14].
[513] Sperling J in *R v Iskander* (2001) 120 A Crim R 302 at 305 at [14].
[514] Section 16(7) was inserted into the Bail Act as a consequence of the *Bail (Domestic Violence) and Another Act Amendment Act 2017* and came into force on 30 March 2017.
[515] Section 1 of the *Criminal Code* defines 'domestic violence offence' to mean 'an offence against an Act, other than the *Domestic and Family Violence Protection Act 2012*, committed by a person where the act done, or omission made, which constitutes the offence is also: a) domestic violence or associated domestic violence, under the *Domestic and Family Violence Protection Act 2012*, committed by the person, or; b) a contravention of the *Domestic and Family Violence Protection Act 2012*, s.177(2). Be aware that where the person is charged with contravention of s. 177(2) but no other offence, that offence will not be a "domestic violence offence" within the meaning of s. 1 of the *Criminal Code*: *Queensland Police Service v JSB* [2018] QDC 120 [38]-[40].

	(c) an offence against the *Criminal Code,* s.75 (threatening violence), s.328A (female genital mutilation), s.355 (deprivation of liberty), s.359E (stalking) or s.468 (injuring animals) if the offence is also a domestic violence offence (defined the *Criminal Code,* s.1);[516] (d) An offence against the *Domestic and Family Violence Protection Act 201*2, s.177(2) (Contravention of a Domestic Violence Order) if: (i) The offence involved the use, threatened use, or attempted use of unlawful violence to person or property; or (ii) The defendant, within five years before the commission of the offence, was convicted of another offence involving the use, threatened use or attempted use of unlawful violence to person or property; or (iii) The defendant, within two years before the commission of the offence, was convicted of another offence against the *Domestic and Family Violence Protection Act 2012*, s.177(2).

18.7 Prohibition on publication of material disclosing the identity of a party, witness or child concerned in domestic violence proceedings

Section 159 of the *Domestic and Family Violence Protection Act 2012* provides that a person must not publish information that identifies or is likely to lead to the identification of, a person as:

i) a party to a proceeding under that Act; or
ii) a witness in a proceeding under that Act; or
iii) a child concerned in a proceeding under that Act.

However, the information may be published if the court expressly authorises publication or other conditions in s.159(2) apply.

Additionally, a magistrate has a ***discretion*** to make an order directing that the evidence taken, the information furnished, the representations made by or on behalf of either party or the reasons given by the court for the grant or refusal of bail or release under s.11A of the Bail Act, shall not be published.[517] *(See Chapter 13 – Restriction on Publication)*

18.8 Stay of decision to grant bail pending application for review (*Bail Act 1980*, ss.19B, 19C and 19CA)

Sections 19B and 19C of the *Bail Act 1980* provide for a defendant, complainant or prosecutor or a person appearing on behalf of the Crown to apply to a reviewing court for a review of the decision relating to bail. *(See Chapter Six)*

Section 19CA provides that where:

(a) a decision has been made about release under Part 2 of the Act or the *Youth Justice Act 1992,* Part 5, for a defendant charged with a relevant domestic violence offence[518]; and

[516] *Bail Act 1980*, s.16(7)(c).
[517] *Bail Act 1980*, s.12.
[518] Defined in *Criminal Code*, s.1.

(b) the prosecutor or other person appearing on behalf of the Crown applies to a reviewing court for a review of the decision,

the decision about the defendant's release is stayed until the earlier of the following:

- an order is made by the reviewing court under s.19B(6) or s.19C(5);
- the application is discontinued, or;
- 4pm on the day that is 3 business days after the day on which the decision concerning release was made.[519]

The reviewing court that makes an order under s.19B or s.19C or seeks to give effect to an order made under s.19CA, may, in order to give effect to the stay, issue a warrant for the apprehension of the Defendant directing that the Defendant be brought before a stated court.[520]

[519] *Bail Act 1980*, s.19CA.
[520] *Bail Act 1980*, s.19D.

CHAPTER 19 – DRUG RELATED OFFENCES AND BAIL

Special bail conditions for drug charges

In the context of drug-related offending, the Court when granting bail, may consider:

- A special condition that the defendant participate in a rehabilitation, treatment or other intervention program or course (s.11(9));
- A special condition that the defendant, if eligible complete a Drug and Alcohol Assessment Referral (DAAR) course (s.11AB);
- A special condition that prohibits a person from associating with a stated person/persons;
- A special condition that prohibits a person from contacting another/others;
- A special condition imposing a curfew.
- A special condition prohibiting the use or possession of illegal drugs;
- A special condition requiring compliance with drug testing.

Standardised Bail Conditions attached (Annexure A)

19.1 Conditions

A magistrate may impose conditions where, in accordance with s.11(2), the magistrate considers that the imposition of special conditions is necessary to ensure that the defendant appears in accordance with their bail and surrenders into custody, and does not commit further offences, endanger the safety or welfare of others, or interfere with witnesses.

Section 11 applies only to adult defendants.[521]

Conditions imposed pursuant to s.11(2) shall not be more onerous than are necessary (See Chapter Three - Conditions).

Whilst a magistrate has a broad discretion to impose conditions that the magistrate considers necessary in accordance with s.11(2), the *Bail Act 1980* specifically refers to the following special conditions relating to drug-related offending:

19.1.1 Condition to participate in a rehabilitation, treatment or other intervention program or course (*Bail Act 1980,* s.11(9))

Pursuant to s.11(9), a magistrate may impose a condition that the defendant participate in a rehabilitation, treatment or other intervention program or course, having regard to:

(a) the nature of the offence; and
(b) the circumstances of the defendant, including any benefit the defendant may derive by participating in the program or course; and
(c) the public interest.

[521] *Bail Act 1980* (Qld), s.11(1AA).

If a defendant breaks a condition imposed pursuant to s.11(9), because of the operation of s.29(2)(c), the defendant does not commit an offence against s.29 but the court may, upon application being made under s.30, vary the defendant's bail, including by rescinding the condition imposed under s.11(9), but may not revoke the bail (s.30(6)).

19.1.2 Condition requiring completion of Drug Alcohol Assessment Referral (DAAR) course

Section 11(AB) (1) ….

> *(2) If a person consents to completing a DAAR course, the court may impose a condition for the person's release that the person complete a DAAR course by a stated day.*
>
> *(3) In deciding whether to impose the condition, the court must have regard to the following –*
>
> *(a) the nature of the offence in relation to which bail is proposed to be granted;*
> *(b) the person's circumstances, including any benefit the person may derive by completing a DAAR course;*
> *(c) the public interest.*
>
> *(4) However, subsection (2) does not apply if-*
>
> *(a) the person has completed 2 DAAR courses within the previous 5 years; or*
> *(b) the person is under 18 years; or*
> *(c) section 11A applies.*
>
> *(5) ….*

If a defendant breaks a condition imposed pursuant to s.11(AB), because of the operation of s.29(2)(c) the defendant does not commit an offence against s.29 but the court may, upon application being made under s.30, vary the defendant's bail, including by rescinding the condition imposed under s.11AB, but may not revoke the bail (s.30(6)).

19.1.3 Other conditions

Depending on the circumstances of the individual case, a magistrate may consider imposing any of the following conditions if the magistrate considers the condition to be necessary within the meaning of s.16(2) and the condition is not more onerous than necessary in accordance with s.16(5):

- A special condition that prohibits a person from associating with a stated person/persons;
- A special condition that prohibits a person from contacting another/others;
- A special condition imposing a curfew;
- A special condition prohibiting the use or possession of illegal drugs;
- A special condition requiring compliance with drug testing.

In order to avoid unnecessarily setting the defendant up to breach a condition of the bail, a consideration should be given to imposing conditions that the magistrate considers are both fit for any or all of the purposes in s.16(2) and which a drug-addicted defendant is likely to be able to comply with.

Further conditions are set out in the Standardised Bail Conditions – Annexure A.

19.2 Release without bail by police officer for minor drug offence – drug diversion (*Bail Act 1980*, s.14(1B)(b))

Section 14(1B)(b) provides that in circumstances where a person is charged with a minor drugs offence within the meaning of the *Police Powers and Responsibilities Act 2000*, Schedule 6, and signs an agreement to attend a drug diversion assessment program under s.379 of that Act, a police officer may release the person without bail.

CHAPTER 20 - LIMITS ON JURISDICTION

Only the Supreme Court or a judge of the Supreme Court may grant bail to a defendant charged with murder or a repeat chid sex offence.

Only a court (other than a court constituted by a justice or justices) may grant bail to a person who:

1. has previously been convicted of a terrorism offence; or
2. is or has been the subject of a Commonwealth control order (s.13(2) *Bail Act 1980*

20.1 Section 13(1) *Bail Act 1980*

Section 13(1) provides that only the Supreme Court or a judge of the Supreme Court may grant bail to a person charged with an offence under the *Criminal Code* if, on conviction, the sentencing court will have to decide which of the following sentences to impose:

> (a) imprisonment for life, which cannot be mitigated or varied under the *Criminal Code* or any other law; or
> b) an indefinite sentence under the *Penalties and Sentences Act 1992,* Part 10.

The legislation makes it clear that this provision applies to a child in circumstances where the sentencing court would have to decide between imprisonment for life and an indefinite sentence, if the child were an adult.[522]

As mandatory life imprisonment referred to in s.13(1)(a) may only be imposed on defendants convicted of murder or a repeat child sex offence, it follows that only persons charged with one of those offences will fall within the exclusive jurisdiction of the Supreme Court.

20.2 Murder and repeat serious child sex offence

Murder in s.305 of the *Criminal Code* and a repeat serious child sex offence in s.141 *Penalties and Sentences Act 1992* are the only offences that fall within s.13(1)(a).

Section 161D of the *Penalties and Sentence Act 1992* defines a 'serious child sex offence' as an offence against a provision mentioned in schedule 1A, or an offence that involves counselling or procuring the commission of an offence mentioned in schedule 1A, committed in relation to a child under 16 years and in circumstances in which an offender convicted of the offence would be liable to imprisonment for life. Schedule 1A offences include amongst others, rape (s.349), sexual assaults (s.352) and maintaining a sexual relationship with a child (s.229B).

Pursuant to s.161E of the *Penalties and Sentences Act 1992*, an offender is convicted of a repeat serious child sex offence if:

[522] *Bail Act 1980*, s.13(1)(b). Also note the *Youth Justice Act 1992*, s.59 for when a Children's Court judge may grant bail to a child despite s.13(1)(b) *Bail Act 1980*.

1. the offender is convicted of a serious child sex offence (the repeat offence) committed as an adult; and
2. before the offender committed the repeat offence, the offender was convicted of another serious child sex offence committed as an adult.

An offender convicted of a repeat serious child sex offence is liable to imprisonment for life which cannot be mitigated or varied, or an indefinite sentence under Part 10 of the Act.

A magistrate would need to be careful to ensure that the parties advise the court if the previous criminal history of the person includes an activating offence.

20.3 Section 13(2) and 13(3) of the *Bail Act 1980*

As a consequence of s.29(3) and s.29(4) of the *Justices of the Peace and Commissioners for Declarations Act 1991*, a justice of the peace (qualified) or a justice of the peace (Magistrates Court) when constituting a court has power to grant bail. (A justice of the peace (commissioner for declarations) does not have power to grant bail.) [523]

However, due to the operation of s.13(2) and s.13(3) of the *Bail Act 1980*, a Magistrates Court constituted by a justice or justices will not have jurisdiction to grant bail to a person who has previously been convicted of a terrorism offence or is or has been the subject of a Commonwealth Control Order.

Sections 13(2) and (3) were inserted into s.13 of the *Bail Act 1980* as a consequence of the *Justice Legislation (Links to Terrorist Activity) Amendment Act 2019* [524], and provides that:

> *(2) Only a court may grant bail to a person who –*
> *(a) has previously been convicted of a **terrorism offence**; or*
> *(b) is or has been the subject of a **Commonwealth Control Order**.*
>
> *(3) for subsection (2) –*
> ***convicted**, of an offence, means found guilty of the offence by a court, on a plea of guilty or otherwise, whether or not a conviction is recorded.*
>
> ***court** does not include a justice or justices.*

'**Terrorism Offence'** *is defined in s.6 of the Bail Act 1980:*

> *(a) A terrorism offence under the Crimes Act 1914* (Cwlth); *or*
> *(b) An offence against the repealed Crimes (Foreign Incursions and Recruitment) Act 1978 (Cwlth), sections 6 to 9; or*
> *(c) An offence against the Terrorism (Community Protection) Act 2003 (Vic), section 4B; or*
> *(d) An offence against the Crimes Act 1990 (NSW), section 310J; or*

[523] *Justices of the Peace and Commissioners for Declarations Act 1991*, s.29 and s.3, definition of 'procedural action or order'; see detailed discussion Chapter 29.
[524] The *Justice Legislation (Links to Terrorist Activity) Amendment Act 2019* was passed on 11 April 2019.

(e) An offence against the Criminal Law Consolidation Act 1935 (SA), section 83CA; or
(f) Another offence against a provision of a law of the Commonwealth or another State if the provision –
(i) Is prescribed by regulation; and
(ii) Is in relation to an activity that involves a terrorist act or is preparatory to the carrying out of an activity that involves a terrorist act.

Terrorist act see the *Police Powers and Responsibilities Act 2000*, s.211

For a detailed explanation of the types of offences subsumed by the definition, see Annexure B.

'Commonwealth Control Order' is defined in s.6 of the *Bail Act 1980* to mean:

'a control order as defined in the Criminal Code (Cwlth), *section 100.1(1)'.*

Section 100.1(1) of the Criminal Code (Cwlth) *states:*

- *Control order means an interim control order or a confirmed control order'.*
- *Interim control order means an order made under section 10.4.4, 104.7 or 104.9*
- *Confirmed control order means an order made under section 104.16*

Note: Justices should be aware that if anything in the material before them, suggests that the defendant may have committed offences of the kind contained within the definition of 'terrorism offence', then it would be prudent to confirm with the prosecutor whether the defendant had been convicted of a terrorism offence or been subject to or presently subject to a Commonwealth Control Order for the purposes of ss.13(2) and 13(3).

CHAPTER 21 – TERRORISM OFFENCES AND BAIL

Assessment of unacceptable risk (*Bail Act 1980*, ss.16(2)(g) and (h))

When making an assessment of 'unacceptable risk' pursuant to s.16, a magistrate may take into account:

16(2)(g) Any promotion by the defendant of terrorism (s.16(2)(g);
16(2)(h) Any association the defendant has or has had with-
(i) A terrorist organisation within the meaning of the Criminal Code (Cwlth), *section 102.1(1); or*
(ii) A person who has promoted terrorism (s.16(2)(h)).

Refusal of bail unless exceptional circumstances (*Bail Act 1980*, s.16A, *Crimes Act 1914* (Cth), s.15AA)

In circumstances where a defendant:

- is charged with, or convicted of, a terrorism offence; or
- has previously been convicted of a terrorism offence; or
- is or has been the subject of a Commonwealth Control Order; and
- the defendant is an adult,

then bail must be refused unless the court is satisfied that exceptional circumstances exist. Where the court is satisfied the defendant has made statements or carried our activities supporting, or advocating support for, terrorist acts within the meaning of Part 5.3 of the *Criminal Code* (terrorism), bail must also be refused unless exceptional circumstances exist.

Show cause (*Bail Act 1980*, s.16(3))

A defendant will be in a show cause situation if any of the circumstances in s.16(3) arise, for example, the alleged commission of an indictable offence in the course of which the defendant is alleged to have used or threatened to use a firearm, offensive weapon or explosive substance (s.16(3)(c)).

Lack of jurisdiction of Magistrates Court constituted by a Justice/Justices to grant bail in certain circumstances (*Bail Act 1980*, ss.13(2) and (3))

A Magistrates Court consisting of a Justice/Justices (as distinct from a magistrate) does *not* have jurisdiction to grant bail to a person who:

a) has previously been convicted of a terrorism offence; or
b) is or has been the subject of a Commonwealth Control Order (s.13(2) and (3)).

21.1 Assessment of unacceptable risk (*Bail Act 1980*, ss.16(2)(g) and (h))

Subject to s.16A (where exceptional circumstances are required - see below at 21.2), a magistrate has jurisdiction to grant bail in cases involving offences related to terrorism. In such circumstances, in assessing whether there is an unacceptable risk for the purpose of ss.16, 16(2)(g) and (h)[525] provide that the court or police officer shall have regard to relevant matters including:

> *(g) Any promotion by the defendant of terrorism;*
> *(h) Any association the defendant has or has had with-*
>
> *i. A terrorist organisation within the meaning of the Criminal Code* (Cwlth), *section 102.1(1); or*
> *ii. A person who has promoted terrorism.*

Section 16(2B)[526] provides:

> *For subsection (2)(g) and (h)(ii), a person has promoted terrorism if the person has-*
>
> *(a) carried out an activity to support the carrying out of a terrorist act; or*
> *(b) made a statement in support of the carrying out of a terrorist act; or*
> *(c) carried out an activity, or made a statement, to advocate the carrying out of a terrorist act or support for the carrying out of a terrorist act.*

Section 16(2C) provides:

> *To remove any doubt, it is declared that a reference in subsection (2B) to a terrorist act –*
> *(a) includes a terrorist act that has not happened; and*
> *(b) is not limited to a specific terrorist act.*

Section 16 does not apply in relation to a child.[527]

21.2 Refusal of bail unless exceptional circumstances (*Bail Act 1980*, s.16A, *Crimes Act 1914* (Cth), s.15AA)

Section 16A provides that in circumstances where a defendant has previously been convicted of a terrorism offence or is or has been the subject of a Commonwealth Control Order, and the defendant is an adult, then bail must be refused unless the court is satisfied that exceptional circumstances exist.[528]

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[525] Inserted as a consequence of the *Justice Legislation (Links to Terrorist Activity) Amendment Act 2019*, assented to on 11 April 2019.
[526] Inserted as a consequence of the *Justice Legislation (Links to Terrorist Activity) Amendment Act 2019*, assented to on 11 April 2019.
[527] *Bail Act 1980*, s.16(1AA); see instead *Youth Justice Act 1992* (Qld), s.48AA(2)
[528] Inserted as a consequence of the *Justice Legislation (Links to Terrorist Activity) Amendment Act 2019*, assented to on 11 April 20.

Section 15AA of the *Crimes Act 1914* (Cth) provides that unless there are exceptional circumstances that would justify bail, bail must be refused where the defendant is charged with, or convicted of, certain offences including:[529]

a) a terrorism offence; or
b) an offence, or ancillary offence,[530] against a provision of Division 80 (treason, urging violence and advocating terrorism or genocide).

Subsection (2A) provides that exceptional circumstances must exist where the defendant is:[531]

a) a person who is subject to a control order within the meaning of Part 5.3 of the *Criminal Code* (terrorism); and
b) a person who the bail authority is satisfied has made statements or carried our activities supporting, or advocating support for, terrorist attacks within the meaning of that part.

Where the defendant is under 18 years of age, in determining whether exceptional circumstances exist, the court must have regard to:[532]

a) the protection of the community as the paramount consideration; and
b) the best interests of the person as a primary consideration.

Where the court grants bail pursuant to s.15AA, the court must state its reasons and cause those reasons to be entered in the court's record.[533]

21.3 'Show cause' (*Bail Act 1980*, s.16(3)(c))

A defendant facing terrorism related charges (but who has not been previously convicted of a terrorism offence and who is not and has not been made the subject of a Commonwealth Control Order – see 21.2 above) may be in a show cause situation regarding an application for bail if the defendant is charged with any of the matters listed in s.16(3). Of most relevance in the context of defendant facing terrorism-related charges, is sub section (c):

> *An indictable offence in the course of committing which the defendant is alleged to have used or threatened to use a firearm, offensive weapon or explosive substance.*

21.4 Lack of jurisdiction of Magistrates Court constituted by a justices or justice to grant bail in certain circumstances (*Bail Act 1980*, ss.13(2) and (3))

As a consequence of ss.3 and 29(3) and 29(4) of the *Justices of the Peace and Commissioners for Declarations Act 1991,* a justice of the peace (qualified) or a justice of the peace (Magistrates

[529] *Crimes Act 1914* (Cth), s.15AA(2)
[530] *Crimes Act 1914* (Cth), s15AA(5): ancillary offence has the meaning given in the *Criminal Code*
[531] *Crimes Act 1914* (Cth), s.15AA(2A)
[532] *Crimes Act 1914* (Cth), s.15AA(3AA)
[533] *Crimes Act 1914* (Cth), s.15AA(3AAA)

Court) when constituting a court has power to grant bail. (A justice of the peace (commissioner for declarations) does not have power to grant bail.) [534]

However, due to the operation of s.13(2) and s.13(3) of the *Bail Act 1980*, a Magistrates Court constituted by a justice or justices will not have jurisdiction to grant bail to a person who has previously been convicted of a terrorism offence or is or has been the subject of a Commonwealth Control Order.

Section 13(2) and (3) were inserted into s.13 of the *Bail Act 1980*, as a consequence of the *Justice Legislation (Links to Terrorist Activity) Amendment Act 2019*[535], and provide that:

> *(2) Only a court may grant bail to a person who –*
> *(a) has previously been convicted of a terrorism offence; or*
> *(b) is or has been the subject of a Commonwealth Control Order.*
>
> *(3) for subsection (2) –*
> *convicted, of an offence, means found guilty of the offence by a court, on a plea of guilty or otherwise, whether or not a conviction is recorded.*
>
> *court does not include a justice or justices.*

'Terrorism Offence' *is defined in s.6 of the Bail Act 1980:*

> *(g) A terrorism offence under the Crimes Act 1914* (Cwlth); *or*
> *(h) An offence against the repealed Crimes (Foreign Incursions and Recruitment) Act 1978* (Cwlth), *sections 6 to 9; or*
> *(i) An offence against the Terrorism (Community Protection) Act 2003 (Vic), section 4B; or*
> *(j) An offence against the Crimes Act 1990 (NSW), section 310J; or*
> *(k) An offence against the Criminal Law Consolidation Act 1935 (SA), section 83CA; or*
> *(l) Another offence against a provision of a law of the Commonwealth or another State if the provision –*
> *(iii) Is prescribed by regulation; and*
> *(iv) Is in relation to an activity that involves a terrorist act or is preparatory to the carrying out of an activity that involves a terrorist act.*
>
> *Terrorist act* see the *Police Powers and Responsibilities Act 2000*, s.211

For a detailed explanation of the types of offences subsumed by the definition, see Annexure B.

'Commonwealth Control Order' is defined in s.6 of the *Bail Act 1980* to mean:

> *'a control order as defined in the Criminal Code* (Cwlth), *section 100.1(1)'.*

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[534] *Justices of the Peace and Commissioners for Declarations Act 1991*, s.29 and s.3, definition of 'procedural action or order'; see detailed discussion Chapter 29.
[535] The *Justice Legislation (Links to Terrorist Activity) Amendment Act 2019* was passed on 11 April 2019.

Section 100.1(1) of the Criminal Code (Cwlth) *states:*

- *Control order means an interim control order or a confirmed control order'.*
- *Interim control order means an order made under section 10.4.4, 104.7 or 104.9*
- *Confirmed control order means an order made under section 104.16*

Note: Justices should be aware that if anything in the material before them, suggests that the defendant may have committed offences of the kind contained within the definition of 'terrorism offence', then it would be prudent to confirm with the prosecutor whether the defendant had been convicted of a terrorism offence or been subject to or presently subject to a Commonwealth Control Order for the purposes of ss.13(2) and 13(3).

CHAPTER 22 – ORGANISED CRIME OFFENCES AND BAIL

Show cause

Pursuant to s.16(3), Defendants facing charges that relate to organised crime, may be in a 'show cause' scenario, including where:

- charged with an offence referred to in s.16(3) (see Table below); or
- charged with a breach of an *Organised Crime Control Order* (s.161ZL PSA);[536]or
- charged with a breach of a public safety order (s.32 *Peace and Good Behaviour Act 1982)*.[537]

Conditions

Conditions that may be appropriate in case of defendants charged with organised-crime-related matters, are provided as examples in s.16(2) of the Act as follows:

- a special condition that prohibits a person from associating with a stated person or person of a particular class; and

- a special condition that prohibits a person from entering or being in the vicinity of a stated place or a place of a stated class.[538]

Sections 16(3A-D) of the *Bail Act 1980* dealing with *participants in criminal organisation* have been repealed.

22.1 Legislative background

In 2013 s.16 of the *Bail Act 1980* was amended by the insertion of s.16(3A-D) to provide that persons alleged to have been a '*participant in a criminal organisation'* were put in a show cause position in relation to bail.[539] However, ss.16(3A-D) has since been repealed.[540]

When ss.16(3A-D) was repealed by the *Serious and Organised Crime Legislation Amendment Act 2016*, s.11(2) of the *Bail Act 1980* was amended to insert examples of special conditions that may be imposed by a court to '*to protect the public by preventing, restricting or disrupting their involvement in serious criminal activity'* as follows:

- a special condition that prohibits a person from associating with a stated person or person of a particular class; and

[536] *Bail Act 1980*, s.16(3)(e).
[537] *Bail Act 1980*, s.16(3)(e).
[538] These examples were inserted into s.16(2) when s.16(3A-D) was repealed by the *Serious and Organised Crime Legislation Amendment Act 2016*, in force from 9 December 2016.
[539] See *Neale, Re an Application for Bail* [2013] QSC 310 and *Joshua Shane Carew v The Director of Public Prosecutions* [2014] QSC 001.
[540] *Serious and Organised Crime Legislation Amendment Act 2016*

- a special condition that prohibits a person from entering or being in the vicinity of a stated place or a place of a stated class.[541]

In addition, s.16(3)(e) was inserted to provide that persons alleged to have breached an Organised Crime Control Order (pursuant to s.161ZL of the *Penalties and Sentences Act 1992*) or a public safety order (pursuant to s.32 of the *Peace and Good Behaviour Act 1982*) are in a show cause position in relation to any application for bail.

22.2 Conditions

The court is empowered by virtue of s.11(2) of the *Bail Act 1980* to impose '*special conditions as necessary*' to secure a person's attendance or to ensure the person does not, whilst on bail, commit offences, interfere with witnesses or engage the safety or welfare of others.[542] Such conditions '*must not be more onerous for the person than those that in the opinion of the court or police officer are necessary having regard to the nature of the offence, the circumstances of the defendant and the public interest*'.[543]

In the particular context of organised crime offences, the court may consider:

- a special condition that prohibits a person from associating with a stated person or person of a particular class; and
- a special condition that prohibits a person from entering or being in the vicinity of a stated place or a place of a stated class.[544]

See Standardised Bail Conditions at Annexure A.

22.3 Organised crime-related offences where defendant in 'show cause' position

Some organised crime-related offences involve a reverse onus of proof, meaning that there is no presumption in favour of bail – rather the onus is on the defendant, on the balance of probabilities, to show cause why the defendant's detention in custody is not justified.[545]

Accordingly, when considering any application for bail, it is necessary to consider the charges before the court to determine if the defendant is in a show cause position or whether he/she is entitled to the presumption in favour of bail.

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[541] These examples were inserted into s.16(2) when s.16(3A-D) was repealed by the *Serious and Organised Crime Legislation Amendment Act 2016*.
[542] *Bail Act 1980*, s.11(1)(c).
[543] *Bail Act 1980*, s.11(5).
[544] These examples were inserted into s.16(2) when s.16(3A-D) was repealed by the *Serious and Organised Crime Legislation Amendment Act 2016*.
[545] *Bail Act 1980*, s.16(3). Also note that on 30 March 2017 the *Bail (Domestic Violence) and Another Act Amendment Act 2017* came into force, introducing significant amendments to bail in circumstances of offences of domestic violence.

22.4 Table of 'show cause' provisions in s.16(3)

Legislative basis	Circumstance of offence charged
s.16(3)(a)	Where the defendant is charged with an indictable offence that is alleged to have been committed while the defendant was at large with or without bail between the date of the defendant's apprehension and the date of the defendant's committal for trial or while awaiting trial for another indictable offence.
s.16(3)(b)	Where the defendant is charged with an offence to which section 13 applies (murder of a repeat serious child sex offence). Only the Supreme Court may grant bail to defendants falling in this category, see 20.1-20.2.
s.16(3)(c)	Where the defendant is charged with an indictable offence in the course of committing which the defendant is alleged to have used or threatened to use a firearm, offensive weapon, or explosive substance.
s.16(3)(d)	Where the defendant is charged with an offence against the *Bail Act 1980*;
s.16(3)(e)	Where the defendant is charged with an offence against the *Penalties and Sentences Act 1992*, s.161ZI (Contravention of a Control Order) or the *Peace and Good Behaviour Act 1982*, s.32 (Contravention of a Public Safety Order);
s.16(3)(f)	Where the defendant is charged with an offence against the *Criminal Code*, s.359 (threats) with a circumstance of aggravation as mentioned in s.359(2) (threat made to a law enforcement officer or person assisting a law enforcement officer, when or because the officer is investigating the activities of a criminal organisation);
s.16(3)(g)	Where the defendant is charged with a '*relevant offence'* as defined in s.16(7)[546] as: (a) an offence against the *Criminal Code,* s.315A (Choking, suffocation, or strangulation in a domestic setting); (b) an offence punishable by a maximum penalty of at least seven years imprisonment if the offence is also a domestic violence offence (as defined in the *Criminal Code* , s.1);[547] (c) 'an offence against the *Criminal Code ,* s.75 (threatening violence), s.328A (female genital mutilation), s.355 (deprivation of liberty), s.359E (stalking) or s.468 (injuring animals) if the offence is also a domestic violence offence (defined the *Criminal Code ,* s.1);[548] (d) An offence against the *Domestic and Family Violence Protection Act 2012*, s.177(2) (Contravention of a Domestic Violence Order) if:

[546] Section 16(7) was inserted into the *Bail Act 1980* as a consequence of the *Bail (Domestic Violence) and Another Act Amendment Act 2017* and came into force on 30 March 2017.
[547] Section 1 of the *Criminal Code* defines 'domestic violence offence' to mean 'an offence against an Act, other than the *Domestic and Family Violence Protection Act 2012*, committed by a person where the act done, or omission made, which constitutes the offence is also: a) domestic violence or associated domestic violence, under the *Domestic and Family Violence Protection Act 2012*, committed by the person, or; b) a contravention of the *Domestic and Family Violence Protection Act 2012*, s.177(2). Be aware that where the person is charged with contravention of s. 177(2) but no other offence, that offence will not be a "domestic violence offence" within the meaning of s. 1 of the *Criminal Code*: *Queensland Police Service v JSB* [2018] QDC 120 [38]-[40].
[548] *Bail Act 1980* (Qld), s.16(7)(c).

	(i) The offence involved the use, threatened use, or attempted use of unlawful violence to person or property; or (ii) The defendant, within five years before the commission of the offence, was convicted of another offence involving the use, threatened use or attempted use of unlawful violence to person or property; or (iii) The defendant, within two years before the commission of the offence, was convicted of another offence against the *Domestic and Family Violence Protection Act 2012*, s.177(2).

CHAPTER 23 – WEAPONS OFFENCES AND BAIL

A defendant will be in a show cause position in a bail application where charged with an indictable offence where the defendant used or threatened to use a firearm, offensive weapon, or explosive substance (s.16(3)(c)).

23.1 'Show cause' (*Bail Act 1980*, s.16(3)(c))

A defendant will be in a show cause position in a bail application where charged with an indictable offence where the defendant used or threatened to use a firearm, offensive weapon, or explosive substance (*Bail Act 1980*, s.16(3)(c)).

In *Williamson v Director of Public Prosecutions (Qld)*[549] Thomas JA with whom McPherson JA and Derrington JA agreed, considered s.16(3)(c) in the context of a defendant who was a party to an armed robbery but who did not physically have possession of the offensive weapon used by the co-defendants. Thomas JA held that s.16(3)(c) should be construed in a broad sense consistent with the party provisions of the *Criminal Code* such that the defendant was in a show cause position with respect to bail.

'Firearm', and 'explosive' are defined in the dictionary in Schedule 2 to the *Weapons Act 1990* as follows:

> *firearm* means—
>
> *(a) a gun or other thing ordinarily described as a firearm; or*
> *(b) a thing ordinarily described as a weapon that, if used in the way for which it was designed or adapted, is capable of being aimed at a target and causing death or injury by discharging—*
> 1. *(i) a projectile; or*
> 2. *(ii) noxious, corrosive, or irritant liquid, powder, gas, chemical or other substance; or*
>
> *(c) a thing that would be a firearm mentioned in paragraph(a) or (b), if it were not temporarily inoperable or incomplete; or*
> *(d) a major component part of a firearm;*
> *but does not include—*
> *(e) an antique firearm, explosive tool, captive bolt humane killer, spear gun, longbow, or crossbow; or*
> *(f) a replica of a spear gun, longbow, or crossbow; or*
> *(g) a slingshot, shanghai or sword; or*
> *(h) a public monument.*
>
> *Example*— A replica of a gun capable of causing death or injury by discharging a projectile is a firearm. However, a replica of a gun not capable of causing death or injury by discharging a projectile is not a firearm.

[549] [2001] 1 Qd R 99.

explosive see *Explosives Act 1999*, schedule 2.

Schedule 2 of the *Explosives Act 1999* defines 'explosive' to include:

(a) a substance or a thing containing a substance, manufactured, or used with a view to produce –
(i) a practical effect by explosion; or
(ii) a pyrotechnic effect; and

(b) a substance or thing declared under a regulation to be an explosive.

Examples of explosives—
ammunition, detonators, gunpowder, nitro-glycerine, pyrotechnics (including fireworks)

offensive weapon is not defined but includes weapons such as a flick knife, club or bludgeon that has no innocent purpose, and also, instruments that are capable of being used both for a lawful and an offensive purpose, such as a walking stick or pitchfork in circumstances where the defendant intended to use the instrument for an unlawful purpose.[550]

[550] *R v Sutton* (1877) 13 Cox CC 648; *R v Williams* (1878) 14 Cox CC 59.

CHAPTER 24 – INDIGENOUS DEFENDANTS

Submission from the community justice group (*Bail Act 1980*, s.15(1)(f), s.15(2))

In circumstances where the defendant is an Aboriginal or Torres Strait Islander person, s.15 of the *Bail Act 1980* provides the court with the power to receive and take into account the submissions of a community justice group.

Assessment of unacceptable risk (*Bail Act 1980,* s.16(2)(e))

In assessing whether an unacceptable risk with respect to the matters set out in s.16(1) of the *Bail Act 1980*, where the defendant is an Aboriginal or Torres Strait Islander person, the court shall have regard to any submission of a community justice group.

Access to court file by representative of community justice group (*Bail Act 1980,* s.34C(2) and (3))

Section 34C(2) and (3) of the *Bail Act 1980* provides that where a defendant is an Aboriginal or Torres Strait Islander person, and subject to the court's direction, a representative of the community justice group in the defendant's community may inspect a court file, or a document in a court file, or obtain a copy of information from a court file or document, that may be relevant to the making of a submission pursuant to s15(1)(f) or s.16(2)(e).

Application for bail conducted remotely ((*Bail Act 1980,* s.15A; *Justices Act 1886,* ss. 23EC and 178C)

Section 15A Bail Act 1980 and s.23EC of the *Justices Act 1886* in combination permit a bail application to be heard 'remotely' by audio or video link.

See Practice Direction No.3 of 2015 – Proceedings using video link facilities and audio link facilities.

Remote Justices of the Peace (Magistrates Court)

Remote Justices of the Peace (Magistrates Court) can determine bail applications and have the power to:

a) determine bail for a person charged with an offence; and
b) adjourn the matter to another date.

In determining a bail application, a Remote Justice of the Peace has the same powers in relation to bail as any other justice of the peace (Magistrates Court) *(see Chapter 25 – Justices).*

The Murri Court

The Murri Court has jurisdiction to hear and determine bail applications in accordance with the *Bail Act 1980.*

See Practice Direction No.2 of 2016 (amended) – Queensland Murri Court

Aboriginal Children (s.48AA(5)(f) *Youth Justice Act 1992*)

A court considering bail in relation to an Aboriginal or Torres Strait Islander child must have regard to any submission of a Community Justice Group in the child's community.

24.1 Submission from the community justice group in bail applications (*Bail Act 1980*, ss.15(1) and (2))

Section 15 of the *Bail Act 1980* sets out the procedure to be followed upon an application for bail. In particular, s.15(1)(f) and (2) relate specifically to circumstances where the defendant is an Aboriginal or Torres Strait Islander person and provide for the admissibility of submissions of a community justice group.

'**Community justice group'** is defined in s.6 of the *Bail Act 1980* to mean:

> *(a) The community justice group established under the Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984, Part 4, Division 1, for the community of a defendant who is an Aboriginal or Torres Strait Islander person; or*
> *(b) A group of persons within the community of a defendant who is an Aboriginal or Torres Strait Islander person, other than a department of government, that is involved in the provision of any of the following –*
> *(i) Information to a court about Aboriginal or Torres Strait Islander defendants;*
> *(ii) diversionary, interventionist or rehabilitation activities relating to Aboriginal or Torres Strait Islander defendants;*
> *(iii) other activities relating to local justice issues; or*
> *(c) a group of persons made up of elders or other respected persons of the defendant's community.*

Sections 15(1)(f) and (2) provide:

> *(1) In a proceeding about the release of a person under this part or the Youth Justice Act 1992, Part 5 –*
> *…*
> *(f) if the defendant is an Aboriginal or Torres Strait Islander person – the court may receive and take into account any submissions made by a representative of the community justice group in the defendant's community, including for example, about –*
> *(i) the defendant's relationship to the defendant's community; or*
> *(ii) any cultural considerations; or*
> *(iii) any considerations relating to programs and services in which the community justice group participates.*

(2) If required by a court for subsection (1)(f), a representative of the community justice group in the defendant's community must advise the court whether –
a) any member of the community justice group that is responsible for the submission is related to the defendant or the victim; or
b) there are any circumstances that give rise to a conflict of interest between any member of the community justice group that is responsible for the submission and the defendant or victim.

24.2 Refusal of bail (*Bail Act 1980*, s.16 (2)(e))

Section 16 of the *Bail Act 1980* sets out the circumstances where bail may be refused. Section 16(2)(e) specifically provides that in assessing whether there is an unacceptable risk with respect to the matters set out in s.16(1)(a), the court or police officer shall have regard to all matters appearing to be relevant and in particular:

e) if the defendant is an Aboriginal or Torres Strait Islander person – any submission made by a representative of the community justice group in the defendant's community, including for example, about –
(i) the defendant's relationship to the defendant's community; or
(ii) any cultural considerations; or
(iii) any considerations relating to programs and services in which the community justice group participates.

'Defendant's community' is defined in s.6 of the *Bail Act* as follows:

***defendant's community**, in relation to a defendant who is an Aboriginal or Torres Strait Islander person, means the defendant's Aboriginal or Torres Strait Islander community, whether it is –*
(a) an urban community; or
(b) a rural community; or
(c) a community on DOGIT land under the Aboriginal Land Act 1991 or the Torres Strait Islander Land Act 1991.

Section 16(2)(i) also requires the court or police officer to have regard to:

i) the likely effect that refusal of bail would have on –
(i) a person with whom the defendant is in a family relationship and for whom the defendant is the primary caregiver; or
(ii) a person with whom the defendant is in an informal care relationship; or
(iii) if the defendant is pregnant – the child of the pregnancy.

'Family relationship' is defined in s.6 of the *Bail Act 1980* to have the meaning given by the *Domestic and Family Violence Protection Act 2012*, s.19.

'Informal care relationship' is defined in s.6 of the *Bail Act 1980* to have the meaning given by the *Domestic and Family Violence Protection Act 2012*, s.20.

24.3 Access to court files by representative of community justice group in defendant's community (*Bail Act 1980*, s.34C)

Section 34C(2) and (3) of the *Bail Act 1980* provides that where a defendant is an Aboriginal or Torres Strait Islander person, and subject to the court's direction, a representative of the community justice group in the defendant's community may inspect a court file, or a document in a court file, or obtain a copy of information from a court file or document, that may be relevant to the making of a submission pursuant to s15(1)(f) or s.16(2)(e) of the *Bail Act 1980* (as set out above).

Community justice group members are subject to an obligation to maintain the confidentiality of information gained. A breach of this obligation is an offence under the Act.[551]

Section 34C(4) provides that the court may make a direction under s.34C whether or not the representative has made an application to the court for the direction.

Section 34C(5) provides a non-exhaustive[552] list of matters the court may have regard to when making the decision whether to direct that information be made available or given to the representative being:

> (a) whether the representative would otherwise have access to the information;
> (b) whether the defendant consents to the information being made available or given to the representative.

24.4 Applications for bail conducted remotely (*Bail Act 1980,* s.15A; *Justices Act 1886,* ss. 23EC and 178C)

24.4.1 Generally

Section 15A of the *Bail Act 1980* provides:

> *(1) This section applies if—*
> *(a) a Magistrates Court (the original court) has jurisdiction under this Act or another Act to hear a bail proceeding; and*
> *(b) a practice direction made by the Chief Magistrate provides for a bail proceeding to be heard by an alternative court under this section.*
>
> *(2) The bail proceeding may be heard by the alternative court under an Act mentioned in subsection (1)(a) as if the alternative court—*
> *(a)had jurisdiction to hear the bail proceeding; and*
> *(b)were the original court for the purpose of that Act.*
>
> *(3) In hearing the bail proceeding, the alternative court may make any order for the disposition of the charge the court considers necessary.*

[551] *Bail Act 1980 (Qld)* s.34D.
[552] *Bail Act 1980 (Qld)* s.34C(6).

> *(4) In this section—*
> ***alternative court** means a Magistrates Court for a district or division outside the district or division in which the bail proceeding would otherwise be required to be heard.*

A Magistrates Court practice direction issued in accordance with s.15A nominates, for designated locations, alternative courts to hear proceedings by video link or audio link.

See Practice Direction No.3 of 2015 – Proceedings using video link facilities and audio link facilities.

24.4.2 Applications for bail conducted remotely by audio or video link

Section 23EC of the *Justices Act 1886* provides that where a Magistrate has jurisdiction to hear a proceeding and the court is authorised to conduct the proceeding using video link facilities or audio link facilities (e.g. authorised under s.178C of the *Justices Act 1886*, and a practice direction has been issued by the Chief Magistrate providing for the proceeding to be conducted by an alternative court (in a different locality jurisdiction) by video or audio link facilities, the alternative court may conduct the proceeding.

See Practice Direction No.3 of 2015 – Proceedings using video link facilities and audio link facilities. Section 178C of the *Justices Act 1886* allows a court with jurisdiction to hear a criminal proceeding (including a bail proceeding) to hear the matter by video or audio link if the defendant is in prison or in another location but represented by a lawyer. The section provides that where a defendant is in custody and is required or entitled to be present before a Magistrates Court for a proceeding relating to the person's bail, and where the prison has audio or video link facilities, the proceeding must be conducted using the video link facilities, unless the primary court, in the interests of justice, otherwise orders.

Section 178C of the *Justices Act 1886* also provides that where the defendant is required or entitled to be present before a Magistrates Court for a proceeding relating to the person's bail, but who is not held in custody but who is represented by a lawyer and present at another place that the presiding magistrate considers suitable for the conduct of the proceeding and where video or audio link facilities are available, the primary court may, in the interests of justice, order the proceedings to be conducted by video or audio link.

Accordingly, in appropriate circumstances, a court with jurisdiction may be constituted in one place and the defendant may appear by video or telephone from outside that court's district. Furthermore, if a practice direction so provides, an alternative court lacking locality jurisdiction may hear a proceeding by video or telephone in place of the court with jurisdiction to hear the matter.

24.5 Remote Justices of the Peace (Magistrates Court) program

The Remote Justices of the Peace (Magistrates Court) Program allows Justices of the Peace (Magistrates Court) to constitute a Magistrate Court in circumstances where a magistrate is not available, in discrete Queensland communities. The program's inception was a result of the Queensland Government's response to the recommendations of the 1991 *Royal Commission into Aboriginal Deaths in Custody*.

As part of the program, the Remote Justices of the Peace court is constituted by two Justices of the Peace (Magistrates Court) who are also respected Elders or Respected Persons from within the community.

Remote Justices of the Peace (Magistrates Court) can determine bail applications and have the power to:

a) determine bail for a person charged with an offence; and
b) adjourn the matter to another date.

In determining a bail application, a Remote Justice of the Peace has the same powers in relation to bail as any other Justice of the Peace (Magistrates Court) *(see Chapter 25 – Justices).*

Remote JP Courts currently operate in Cherbourg and Kowanyama, Lockhart River, Mornington Island, Aurukun, Bamaga and Pormpuraaw.

24.6 The Murri Court and bail

One of the published goals of the Murri Court is *'to encourage defendants' attendance and engagement with support services while on bail'*. To that end, matters may be referred to the Murri Court for an assessment of suitability, and if found to be suitable, matters relating to bail and sentencing may be dealt with in the Murri Court.

24.6.1 Referral

The referral of a defendant to the Murri Court may only be made with the defendant's consent and may occur as a result of the defendant's own referral, the defendant's legal representatives, upon a recommendation by the community justice group representative or at the instigation of the magistrate.

Prior to referring a defendant to the Murri Court, a Magistrate must first be satisfied that the following eligibility criteria are met:

a) the defendant identifies as an Aboriginal and/or Torres Strait Islander person or has a kinship or appropriate connection to an Aboriginal and/or Torres Strait Islander community, either in Queensland or elsewhere; and
b) the offence falls within the jurisdiction of the Magistrates Court or Childrens Court; and
c) a guilty plea is entered, or the defendant intends to plead guilty; and
d) the defendant is on bail or has been granted bail; and
e) the defendant consents to participate fully in the Murri Court process.

24.6.2 Procedure upon referral

Where the referring magistrate is satisfied the eligibility criteria (as set out above), there is a presumption in favour of adjourning the matter to Murri Court.

The referring court may adjourn the matter and grant bail to the defendant in accordance with the *Bail Act 1980* for a period between two and four weeks from the date of referral to allow sufficient time for the assessment to occur.

In determining whether to grant bail for the period of the assessment, the referring magistrate may consider any submissions made by a representative of the community justice group pursuant to s.16(2)(e) of the *Bail Act 1980*.

Where a magistrate decides not to refer a defendant to Murri Court, the magistrate will provide his or her reasons to the defendant and the matter will proceed as per usual court process.

24.6.3 Bail issued by a Murri Court Magistrate

Where a matter has been referred to the Murri Court and the defendant has been assessed as suitable and the Murri Court magistrate endorses the Murri Court Entry Report, the Murri Court magistrate may grant bail in accordance with the *Bail Act 1980* but should impose a condition under s.11(9) of the *Bail Act 1980* that the defendant participate in Murri Court.

Pursuant to s.16(2)(e) of the *Bail Act 1980* when considering whether to grant bail the Muri Court magistrate may have regard to any submissions made by a representative of the community justice group.

24.6.4 Breach of bail in the Murri Court

Where a defendant with matters before the Murri Court breaches the defendant's bail, the prosecutor, or the defendant's legal representative (if any) or the defendant, may make an application to the court to vary the defendant's bail.

If an application to vary the defendant's bail is not made to the court, the defendant's bail will be reviewed by the Murri Court magistrate at the next Murri Court progress mention.

Where the defendant commits further offences while on bail in Murri Court, the Murri Court magistrate may consider transferring any additional offences to the Murri Court in accordance with the *Justices Act 1886*.

See Practice Direction No.2 of 2016 (amended) – Queensland Murri Court

24.7 Aboriginal and Torres Strait Islander children (s.48AA(5)(f), *Youth Justice Act 1992)*

Section 48AA(5)(f) of the *Youth Justice Act 1992* provides that where a court or police officer is making a decision whether to release a child from custody, and if so, whether to do so without bail or to grant bail, the court must have regard to:

> *'(f) if the child is an Aboriginal or Torres Strait Islander person – any submissions made by a representative of the community justice group in the child's community, including for example, about -*
>
> *(i) the child's connection with the child's community, family, or kin; or*

(ii) cultural considerations; or

(iii) considerations relating to programs and services established for offenders in which the community justice group participates;'

Additionally, section 48AC of the *Youth Justice Act 1992* provides in respect of a representative of a community justice group making a submission to a court or police officer*:*

'(2) The representative must, if required by the court or police officer, advise the court or police officer whether—

(a) a member of the community justice group is related to the child or the victim of the offence with which the child has been charged; or

(b) there are circumstances that give rise to a conflict of interest between a member of the community justice group and the child or victim of the offence.'

CHAPTER 25 - COMMONWEALTH OFFENCES AND BAIL

Application of *Bail Act 1980* to Commonwealth offences

The *Bail Act 1980* applies to all persons charged with an offence against the laws of the Commonwealth and who appear before a magistrate in Queensland.

Magistrate's power in circumstances of suspected breach of bail conditions imposed on Commonwealth charge

Where a police officer arrests a person for a suspected breach of bail concerning conditions imposed relating to a Commonwealth charge, the magistrate has jurisdiction under the *Bail Act 1980* (in circumstances where the conditions were imposed in Queensland) or the *Crimes Act 1914* (Cth), s.3Y (in circumstances where the conditions were imposed in another State or Territory or by the Federal Court of Australia) to release the person unconditionally, to release the person with conditions or where appropriate, to remand the person in custody in order that a warrant for the person's apprehension is issued by the proper State or Territory, or Federal Court of Australia.

Bail not to be granted to various persons charged with, or convicted of, certain Commonwealth child sex offences (Crimes Act 1914 (Cth), s.15AAA)

Section 15AAA of the Crimes Act 1914 (Cth) creates a presumption against bail where a defendant is charged with certain Commonwealth child sex offences listed in s.16AAA and s.16AAB(2).

25.1 Application of *Bail Act 1980* to Commonwealth offences

As a consequence of ss.68, 79 and 80 of the *Judiciary Act 1903* (Cth) the *Bail Act 1980* applies to all persons charged with an offence against the laws of the Commonwealth and who appear before a magistrate in Queensland.

Section 68 of the *Judiciary Act 1903* (Cth) provides that 'the laws of a State or Territory . for holding an accused person to bail, shall apply to persons who are charged with offences against the laws of the Commonwealth…'.

Section 79(1) of the *Judiciary Act 1903* (Cth) provides that 'the law of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall except as otherwise provided by the Constitution, or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable'.

Section 80 of the *Judiciary Act 1903* (Cth) provides that the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised, shall apply to the extent that it is not inconsistent with the Constitution or laws of the Commonwealth.

25.2 Apprehension of defendant in Queensland on bail for Commonwealth offences (*Crimes Act 1914* (Cth) s.3Y)

A police officer may, without warrant, arrest a person who has been released on bail for a Commonwealth offence if the police officer believes on reasonable grounds that the person has contravened or is about to contravene a condition of bail, notwithstanding that the condition was imposed in a State or Territory other than Queensland.[553]

If a police officer makes such an arrest the person must be brought before a magistrate as soon as possible.[554]

If a police officer arrests a person in Queensland and the bail condition was imposed in Queensland, the person is to be dealt with in accordance with the *Bail Act 1980*. [555]

If a police officer arrests a person in Queensland in circumstances where the bail conditions were imposed in another State or Territory, the magistrate may:

(a) release the person unconditionally[556] (s.3Y(5) provides that an unconditional release does not affect the operation of the bail order, or the conditions of the bail imposed in the other State or Territory); or
(b) admit the person to bail on such recognisances as the court thinks fit to appear again before the same court at such time as the court orders;[557] or
(c) remand the person in custody for a reasonable time pending the obtaining of a warrant for the apprehension of the person from the State or Territory or Federal Court of Australia that imposed the bail condition.[558]

25.3 Bail not to be granted to various persons charged with, or convicted of, certain Commonwealth child sex offences (*Crimes Act 1914* (Cth), ss.15AAA, 16AAA and 16AAB(2))

The *Crimes Legislation Amendment (Sexual Crimes Against Children & Community Protection Measures) Act 2020* (Cth) amended the *Crimes Act 1914* (Cth) through the insertion of section 15AAA which creates a presumption against bail in relation to discrete offences listed in sections 16AAA and 16AAB(2) of that Act.

The presumption against bail applies to the following offences regardless of any previous convictions for child sexual abuse convictions:[559]

- Sexual intercourse with child outside Australia[560]
- Sexual activity (other than sexual intercourse) with child outside Australia;[561]

[553] *Crimes Act 1914* (Cth), s.3Y(1).
[554] *Crimes Act 1914* (Cth), s.3Y(2).
[555] *Crimes Act 1914* (Cth), s.3Y(3) as a consequence of *Judiciary Act 1903* (Qld) s.68.
[556] *Crimes Act 1914* (Cth), s.3Y(4)(a).
[557] *Crimes Act 1914* (Cth), s.3Y(4)(b).
[558] *Crimes Act 1914* (Cth), s.3Y(4)(c).
[559] *Criminal Code Act 1995* (Cth), s.16AAA
[560] *Criminal Code Act 1995* (Cth), ss.272.8(1) and 272.8(2)
[561] *Criminal Code Act 1995* (Cth), ss.272.9(1) and 272.9(2)

- Aggravated offence – sexual intercourse or other sexual activity with child outside Australia;[562]
- Persistent sexual abuse of child outside Australia;[563]
- Benefiting from, encouraging, or preparing for sexual offences against children outside Australia;[564]
- Aggravated offence of possessing, controlling, producing, distributing, or obtaining child abuse material outside Australia – offence involving conduct on three or more occasions and 2 or more people;[565]
- Aggravated offence of using a postal or similar service for child abuse material – offence involving conduct on three or more occasions and two or more people;[566]
- Conduct for the purposes of electronic service used for child abuse material;[567]
- Aggravated offence – offence involving conduct on three or more occasions and two or more people;[568]
- Using a carriage service for sexual activity with person under 16 years of age;[569]
- Aggravated offence of using a carriage service for sexual activity with person under 16 years of age – using a carriage service for sexual activity with person under 16 years of age.[570]

The presumption against bail applies to the following in circumstances where the defendant has been previously convicted of a child sexual abuse offence:[571]

- Sexual intercourse with young person outside Australia – defendant in position of trust or authority;[572]
- Sexual activity (other than sexual intercourse) with young person outside Australia – defendant in position of trust or authority;[573]
- Procuring child to engage in sexual activity outside Australia;[574]
- "Grooming" child to engage in sexual activity outside Australia;[575]
- "Grooming" person to make it easier to engage in sexual activity with a child outside Australia;[576]
- Preparing for or planning offence of benefitting from, encouraging, or preparing for sexual offences against children outside Australia'[577]

[562] *Criminal Code Act 1995* (Cth), s.272.10
[563] *Criminal Code Act 1995* (Cth), s.272.11
[564] *Criminal Code Act 1995* (Cth), ss. 272.18 and 272.19
[565] *Criminal Code Act 1995* (Cth), s273.7
[566] *Criminal Code Act 1995* (Cth), s.471.22
[567] *Criminal Code Act 1995* (Cth), s.474.23A
[568] *Criminal Code Act 1995* (Cth), s.474.24A
[569] *Criminal Code Act 1995* (Cth), ss.474.25A(1) and 474.25A(2)
[570] *Criminal Code Act 1995* (Cth), s.474.25B
[571] *Criminal Code Act 1995* (Cth), s.16AAB(2)
[572] *Criminal Code Act 1995* (Cth), ss.272.12(1) and 272.12(2)
[573] *Criminal Code Act 1995* (Cth), ss.272.13(1) and 272.13(2)
[574] *Criminal Code Act 1995* (Cth), s.272.14(1)
[575] *Criminal Code Act 1995* (Cth), s.272.15(1)
[576] *Criminal Code Act 1995* (Cth), s.272.15A(1)
[577] *Criminal Code Act 1995* (Cth), s.272.20(1)

- Possessing, controlling, producing, distributing, or obtaining child abuse material outside Australia;[578]
- Possession of child-like sex dolls;[579]
- Using a postal or similar service for child abuse material;[580]
- Possessing, controlling, producing, supplying, or obtaining child abuse material for use through a postal or similar service;[581]
- Using a postal or similar service to procure persons under 16;[582]
- Using a postal or similar service to "groom" persons under 16;[583]
- Using a postal or similar service to "groom" another person to make it easier to procure persons under 16;[584]
- Using a postal or similar service to send indecent material to persons under 16;[585]
- Using a carriage service for child abuse material;[586]
- Possessing or controlling child abuse material obtained and accessed using a carriage service;[587]
- Possessing, controlling, producing, supplying, or obtaining child abuse material for use through a carriage service;[588]
- Using a carriage service to procure persons under 16 years of age;[589]
- Using a carriage service to "groom" persons under 16 years of age;[590]
- Using a carriage service to "groom" another person to make it easier to procure persons under 16 years of age;[591]
- Using a carriage service to transmit indecent communication to persons under 16 years of age.[592]

In determining whether circumstances exist to grant bail the court must take the following into account:[593]

a) whether the person would be likely to fail to appear;
b) whether the person would be likely to commit a further offence;
c) whether the person would be likely to put at risk the safety of the community or cause a person to suffer any harm;
d) whether the person would be likely to conceal, fabricate or destroy evidence or intimidate a witness;
e) whether the person was aged 18 years or over when the offence was committed;

[578] *Criminal Code Act 1995* (Cth), s.273.6(1)
[579] *Criminal Code Act 1995* (Cth), s.273A.1
[580] *Criminal Code Act 1995* (Cth), ss.471.19(1) and 471.19(2)
[581] *Criminal Code Act 1995* (Cth), s.471.20(1)
[582] *Criminal Code Act 1995* (Cth), ss.471.24(1), 471.24(2) and 471.24(3)
[583] *Criminal Code Act 1995* (Cth), ss.471.25(1), 471.25(2) and 471.25(3)
[584] *Criminal Code Act 1995* (Cth), ss.471.25A(1), 471.25A(2) and 471.25A(3)
[585] *Criminal Code Act 1995* (Cth),471.26(10
[586] *Criminal Code Act 1995* (Cth), 474.22(1)
[587] *Criminal Code Act 1995* (Cth), s.474.22A(1)
[588] *Criminal Code Act 1995* (Cth), s.474.23(1)
[589] *Criminal Code Act 1995* (Cth), ss.474.26(1), 474.26(2) and 474.26(3)
[590] *Criminal Code Act 1995* (Cth), ss.474.27(1), 474.27(2) and 474.27(3)
[591] *Criminal Code Act 1995* (Cth), ss.474.27AA(1), 474.27AA(2) and 474.27AA(3)
[592] *Criminal Code Act 1995* (Cth), s.474.27A(1)
[593] *Crimes Act 1914* (Cth), s.15AAA(2)

f) where the person has pleaded guilty or has been convicted of the offence, whether the person would not be likely to undertake a rehabilitation program, or not be likely to comply with any bail conditions relating to rehabilitation or treatment, while released on bail.

Where the court grants bail pursuant to s.15AAA, the court must state its reasons and cause those reasons to be entered in the court's record.[594]

[594] *Crimes Act 1914* (Cth), s.15AAA(3)

CHAPTER 26 – JUSTICES

A Justice of the Peace (Qualified) or a Justice of the Peace (Magistrates Court) when constituting a court has power to grant bail (s.3, ss.29(3) and (4) *Justices of the Peace and Commissioners for Declaration Act 1991*.

In contrast, a Justice of the Peace (Commissioner for Declarations) *does not* have power to grant bail (s.29(5) *Justices of the Peace and Commissioners for Declarations Act 1991*.

However, a Justice or Justices do not have jurisdiction to grant bail to a person who has previously been convicted of a terrorism offence or is or has been the subject of a Commonwealth Control Order.

26.1 Categories of Justices

The Justices of the *Peace and Commissioners for Declaration Act 1991* provides that there are three types of Justices of the Peace:

1) Justice of the Peace (Qualified);
2) Justice of the Peace (Magistrates Court); and
3) Justice of the Peace (Commissioner for Declarations).

26.2 The powers conferred on a Justice of the Peace

26.2.1 Generally

Section 29 of the *Justices of the Peace and Commissioners for Declarations Act 1991* generally provides:

> *(1)(a) subject to subsections (3) and (5), a justice of the peace has the powers conferred on the justice of the peace by the Justices Act 1886 or any other Act.*

26.2.2 Justice of the Peace (Qualified)

In the case of Justices of the Peace (Qualified), s.29 (3) of that Act provides that:

> *'… a justice of the peace (qualified), in the exercise of any power to constitute a court for the purpose of a proceeding is limited to taking or making **a procedural action order'**.*

Section 3 of the *Justices of the Peace and Commissioners for Declaration Act 1991* defines a 'procedural action or order' to include 'the granting of bail'.

26.2.3 Justice of the Peace (Magistrates Court)

In the case of justices of the peace (Magistrates Court), s.29(4) similarly provides that:

> *'… a justice of the peace (Magistrates Court), in the exercise of any power to constitute a court for the purpose of a proceedings is limited to…(c) taking or making* ***a procedural action or order****'.*

As indicated above, s.3 of the *Justices of the Peace and Commissioners for Declaration Act 1991* defines a 'procedural action or order' to include 'the granting of bail'.

26.2.4 Justice of the Peace (Commissioner for Declarations)

In contrast, in the case of Justices of the Peace (Commissioner for Declarations) s.29(5) provides that:

> *'… a justice of the peace (commissioner for declarations) is limited to the exercise of the powers of a commissioner for declarations'.*

Section 29(8) states that a Commissioner for Declarations:

> *(a) has and may exercise all the powers conferred on a commission for declarations by any Act or law; and*
> *(b) may take any affidavit or attest any instrument or document that may be taken or attested under any Act or law.*

It is of note that s.29(8) does not include the power of the Commissioner for declarations to grant bail.

26.3 Other relevant provisions

Section 24 of the *Justices Act 1886* provides that a single justice may do all necessary acts preliminary to a hearing of a matter.

Section 35 of *the Justices Act* 1886 provides that when a person is apprehended offending against the laws and is brought before a justice, the justice may deal with the person according to law.

Because of s.19(2) of the *Justices of the Peace and Commissioners for Declarations Act 1991* a clerk of the court or registrar of a Magistrates Court (not being a police officer) who is also an admitted lawyer is a Justice of the Peace (Magistrates Court) or if not admitted as a lawyer is a Justice of the Peace (Qualified).

In contrast, by virtue of s.19(3) of the *Justices of the Peace and Commissioners for Declarations Act 1991,* every clerk 18 years or older employed as an officer of the public service in the office of the Supreme Court, District Court, or a Magistrates Court without further appointment, for the duration of their employment, is a commissioner for declarations.

26.4 Lack of jurisdiction by a justice or justices to grant bail in terrorism related circumstances (*Bail Act 1980*, ss.13(2) and (3))

Under s.13(2) of the *Bail Act 1980,* only a court may grant bail to a person who has previously been convicted of a terrorism offence or is or has been the subject of a Commonwealth Control Order. A court is defined as not including a justice or justices.[595]

(See Chapter 21 – Terrorism Offences and Bail at 21.4; See also: *Justices of the Peace handbook, Chapter 6.5 – Hearing a bail application)*

[595] *Bail Act 1980*, s.13(3).

CHAPTER 17 – COVID-19

The impact of COVID-19 in the context of bail has been considered in the following decisions both in Queensland and interstate.

27.1 Delay

***Re JMT* [2020] QSC 72**

In this case, Davis J considered the impact of COVID-19 on the exercise of the discretion to grant bail under the *Bail Act 1980*. In that matter the applicant, who was in a show cause position,[596] applied to the Supreme Court of Queensland for bail in relation to charges of murder and grievous bodily harm.[597] In was submitted that '*the current pandemic crisis is a factor mitigating against continued detention on remand*'[598] in the following ways:[599]

- Significant delay in finalisation;
- Prison lockdowns will increase the difficulty of prison life;[600] and
- Risk of transmission of the disease in prison to the applicant.[601]

At [36] Davis J noted, "*in the absence of agreement between the parties under s.15(1)(d) of the Bail Act, there must be an established factual basis upon which any submission as to the effect of COVID-19 on a bail application is made*."

While not directly relevant to risk, delay in the finalisation of a criminal proceeding is a relevant consideration to a grant of bail where the applicant is in a show cause position.[602] At [48] – [49] reference was made to the Court of Appeal decisions of *Lacey v DPP (Qld); Lacey v DPP* [2007] QCA 413; and *Sica v Director of Public Prosecutions* [2010] QCA 18[603] where delay was recognised as a relevant consideration.

At [53] Davis J noted that, "*delay caused by COVID-19 must be assessed and considered as a factor in accordance with the principles laid down by the Court of Appeal in cases such as Lacey and Sica*."

At [64] Davis J stated:

> "*by operation of ss 8, 9, 10, 16(1) and, in appropriate circumstances, s.16(3), the impact of the COVID-19 virus (however that may be relevant on the evidence to a*

[596] *Bail Act 1980*, s.16(3)(b).
[597] *Bail Act 1980*, s.13(1)(a), provides that only the Supreme Court of Queensland may grant bail to a person charged with an offence of murder, which carries a mandatory life sentence upon conviction.
[598] *Re JMT* [2020] QSC 72 at [24].
[599] *Re JMT* [2020] QSC 72 at [30].
[600] See *Corrective Services Act 2006*, s.263. At [66] Davis J noted that while it is "*not to say that conditions in prison are irrelevant to a consideration of bail*" the proper care and control of the applicant while he is in custody is the responsibility of the Chief Executive.
[601] There was no evidence of led at the application that COVID-19 was in the remand prison: see [36].
[602] *Williamson v Director of Public Prosecutions* [2001] 1 Qd R 99 at [23].
[603] In that decision Chesterman JA approved the passage in *Lacey* relating to delay.

> *bail application) cannot result in a successful application for bail where one of the s16(1) risks are "unacceptable".*"

At [69], Davis J summarised the impact of COVID-19 on the application of bail as follows:

1. The pandemic and any government's response to it may give rise to considerations relevant to s.16(1) risks;
2. The pandemic and any government's response to it may give rise to considerations relevant to bail but beyond the s.16(1) risks;
3. The pandemic and any government's response to it may give rise to considerations relevant to an applicant showing cause under s.16(3);
4. Any submission must be based on evidence or information admitted through s.15;
5. The pandemic and any government's response to it can only be factors to take into account in the broader consideration of the exercise of discretion;
6. Any consideration of the conditions on remand must be made in the context of the Chief Executive's primary responsibility for the welfare of prisoners; and
7. Whatever evidence is presented as to the pandemic and governments' response to it, s.16(1) prohibits the grant of bail where any one of the s.16(1) risks is "unacceptable".

***Lynch v Director of Public Prosecutions (No 2)* [2020] QSC 64**

In this decision, Martin J considered whether the applicant demonstrated a material change in circumstances.[604] At [9], the applicant referred to a number of matters in submitting there had been a change in circumstances, in particular:

1. The delay in a trial being listed for these matters as a result of the effect of the COVID-19 pandemic; and
2. The declaration of restrictions within prisons since the last application.

At [12], Martin J noted:

> "*a change that is material is one that is material to any circumstance relevant to the grant or refusal of bail. It need not be confined to a circumstance considered or relied upon by the judge who heard the first application*."

At [27], Martin J considered the delay to be a material change of circumstances, noting:

> "*when the first application was heard, the parties were entitled to proceed on the basis that the hearing of these charges would be listed in the ordinary course. That is no longer the case. It cannot be said when these matters might be heard but an additional delay of 12 months is not out of the question*."

In considering whether the "declaration of emergency" by the Commissioner of Queensland Corrective Services since the previous application for bail resulting in Stage Three restrictions were also a material change in circumstance, at [29] Martin J observed:

[604] See the decision of McPherson J in *Ex parte Edwards* [1989] 1 Qd R 139 for the test to be satisfied. See also *Fisher v Director of Public Prosecutions (Qld)* [2011] QCA 54; and *R v Slough Justices; Ex parte Duncan* (1982) 75 Cr App Rep 384 at 388.

> "*these are matters that do change the circumstances in which the applicant is held on remand. But restrictions on movement within a jail are not uncommon. Prisons can be placed in lockdown for many reasons and at any time. The difference at this time is that the length of the change in circumstances is unknown and the susceptibility of a prison population to infection is generally accepted to be higher than in the ordinary population*."

However, at [31] Martin J noted, in reference to the entitlement under s15(1)(e) of the *Bail Act 1980* to:

> "*receive and take into account evidence of any kind that it considers credible or trustworthy in the circumstances*" that "*it does not follow that there is no need for anything more than a statement from the bar table about the effects of, for example, Stage 3 restrictions. The court should be provided with a reasonable amount of detail (usually available to an applicant's representatives from public sources) of the extent and consequences of a change in prison conditions*."

See *Rakielbakhour v DPP (NSW)* [2020] NSWSC 323 for an example of the type of material that can be obtained and that is relevant.

At [35] – [36] the following interstate decisions were considered:

- *Re Tong* [2020] VSC 141: Martin J agreed with Tinney J in this decision, noting, "*while a "material change" is not the same as an "exceptional circumstance" his observation is relevant and may be adapted for these types of proceedings*."
- *Re Broes* [2020] VSC 128: Martin J agree with the observations of Button J at [56] and noted that the decision "*is not – nor does it purport to be – authority for the proposition that the delay currently being experienced is, by itself, sufficient to justify bail*.
- *R v Stott (No 2)* [2020] ACTSC 62: Martin J noted the reasoning in that decision "*which accepted that the change in listing procedures constitutes a material change – also satisfies me that the change in those listing procedures with the consequent unquantifiable delay in obtaining a trial should be taken into account when considering whether the defendant's detention in custody is not justified*."

Interstate decisions:

- *Re JB* [2020] VSC 184 – Delay caused by COVID-19 would make custody more onerous.
- *Re Sepehrnia* [2020] VSC 247 – Delay and onerous circumstances of custody did not establish exceptional circumstances.
- *Re El-Refei (No 2)* [2020] VSC 164 – Delay caused by COVID-19 may constitute 'new facts and circumstances'.
- *Re Bail application by Ashton* [2020] VSC 231 – Delay caused by COVID-19 alone does not provide a compelling reason to grant bail, however, may when considered with other factors.
- *Re Broes* [2020] VSC 128 – Delay caused by COVID-19 and lockdown may demonstrate exceptional circumstances.

- *Re Tong* [2020] VSC 141 - Delay caused by COVID-19 and lockdown may demonstrate exceptional circumstances (see also *Re Broes*).
- *Re Diab* [2020] VSC 196 – Delay caused by COVID-19 may establish exceptional circumstances, may make time in custody more difficult, consider how COVID-19 may cause an impediment to education and/or rehabilitation.
- *Re Taylor* [2020] VSC 146 – Delay caused by COVID-19 may demonstrate exceptional circumstances.
- *Re Guinane* [2020] VSC 208 – Delay caused by COVID-19 and onerous custodial conditions.
- *Re Velluto* [2020] VSC 188 – Delay caused by COVID-19 did not demonstrate exceptional circumstances.

27.2 Appeal bail

Re Young [2020] QSC 75

In this decision, Lyons SJA considered whether the applicant demonstrated exceptional circumstances in the context of COVID-19 given the application's age and an underlying medical condition in an application for bail pending appeal.

In the applicant for bail pending appeal, it was submitted that the applicant is at particular risk in the COVID-19 pandemic due to his age and health issues (heart disease) and that "*the genuine risk to the life of the applicant, because of the COVID-19 pandemic, reduces the weight that should be given to reasons why bail pending appeal is commonly rejected*".

Lyons SJA noted that bail would only be granted in exceptional circumstances pending appeal.[605] Reference was made to the decision of *R v Ogawa* [2009] QCA 201 where to Court of Appeal held that "*ordinarily, in order to establish exceptional circumstances, it is necessary to show strong grounds for concluding that the appeal will be allowed and the appellant may be required to serve and unacceptable portion of the sentence before the appeal can be heard*."

In considering the term "exceptional circumstances" the applicant referred to the decision of the Queen's Bench in *R v Kelly (Edward)* [2000] 1 QB 198 where Lord Bingham of Cornhill stated at (208):

> "*It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional, a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered*."

In dismissing the application for appeal bail, Lyons SJA took into account the relevant principles, the considerations in the *Bail Act 1980* and the current position in relation to Queensland prisons to deal with the COVID-19 pandemic, and was not satisfied "*that the dangers that are currently presenting to the applicant are such that would warrant this aspect of the application to overtake*

[605] *Ex-Parte Maher* [1986] 1 Qd R 303; *Hanson v DPP (Qld)* [2003] QCA 409; and *R v Fuller* [2008] QCA 303. In *Maher* the Court of Appeal adopted the principles set out by the High Court in *United Mexican States v Kabal* (2001) 209 CLR 165.

a consideration of the other principles and the other matters that I am required to take into account."

***Re Morant* [2020] QSC 79**

In this decision, Lyons SJA considered whether the applicant demonstrated exceptional circumstances in the context of COVID-19 given the application's age and an underlying medical condition in an application for bail pending the handing down of an appeal decision.

Lyons SJA noted that bail after conviction, where the applicant has been sentenced to a reasonably long term of imprisonment, should only be granted in exceptional circumstances.[606] Counsel for the applicant submitted that the COVID-19 pandemic is an exceptional circumstance.

It was submitted that the applicant's age of 71, underlying health conditions (an undefined lung condition) and that the applicant would be safer in his own community (Mt Tambourine) rather than in prison during the pandemic.

Lyons SJA considered the medical material on file, including the opinions of two medical practitioners, as well as a letter from the Commissioner for Corrective Services outlining the procedures undertaken to limit an exposure to COVID-19 in Queensland prisons.

In dismissing the application for appeal bail, Lyons SJA concluded:

> "*while I accept that COVID-19 is an exceptional development, it does not constitute exceptional circumstances for the purposes of an application for bail pending the handing down of a decision by the Court of Appeal which is expected within a short timeframe*."

27.3 Variation of bail conditions [607]

***Re CLA* [2020] QSC 85**

In this case, Lyons SJA considered an application to vary Supreme Court bail conditions that:

- the applicant be released on "unconditional bail" to permit a bridging visa application; and
- the court request the DPP apply for a Criminal Justice Stay Visa.

The application was brought in the contest of the COVID-19 pandemic. At the hearing the applicant tendered material in relation to the impact of COVID-19 in immigration detention centres. At [15], Lyons SJA noted:

> "*for the purposes of this application I accept the proposition that if a detainee at the CBITAC should contract COVID-19 it is likely to spread quickly due to the confined circumstances in which the detainees currently live*."

[606] *Ex-Parte Maher* [1986] 1 Qd R 303; and *Hanson v DPP (Qld)* [2003] QCA 409 at [5].
[607] See Chapters Three and Four

On the issue of delay, at [31] Lyons SJA noted:

> *"the applicant now seeks unrestricted bail on the basis that because of the COVID-19 outbreak, a trial date is unlikely to occur as jury empanelling has ceased. Unless the applicant applies for a 'judge alone' trial I accept that the trial currently listed for 15 June 2020 may not proceed*."

Lyons SJA did not release the applicant on "unconditional bail," and it was noted that the applicant is an unlawful non-citizen under s189 of the Migration Act and must be kept in immigration detention until a visa is granted and "*it is s 196 of the Migration Act which requires him to stay at his current address at the transit accommodation at Pinkenba until he is granted a visa, not his bail conditions*." Lyons SJA noted the applicant can apply for a bridging visa and varied the residential condition to allow for the applicant apply to the DPP in writing to live at another address.

27.4 Change of Circumstance [608]

- *Re Stott (No 2)* [2020] ACTSC 62 – COVID-19 pandemic was considered a change of circumstances.

27.5 Indigenous defendants [609]

- *Rakielbakhour v The Director of Public Prosecutions* [2020] NSWSC 323 – COVID-19 may be relevant to vulnerability as Aboriginal and Torres Strait Islanders are susceptible to COVID-19.
- *Thomas v Kitching* [2020] VSC 206 – Delay caused by COVID-19 may demonstrate exceptional circumstances, defendant was an Aboriginal woman who may be at greater risk of infection from COVID-19, hardship in custody due to COVID-19.
- *Re Kennedy* [2020] VSC 187 – Applicant was Aboriginal, vulnerable section of the community with poorer health outcomes, may be at greater risk of serious infection from COVID-19.

27.6 Youth bail [610]

- *Re JK* [2020] VSC 160 – Applicant is a child, bail pending retrial, COVID-19 pandemic commenced during bail application adjournment.
- *Re JF* [2020] VSC 250 – Educational opportunities restricted in youth justice centre due to COVID-19.

27.7 Prison conditions

- *Re McCann* [2020] VSC 138 – Consider the potential for spread of COVID-19 in the prison system.

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[608] See Chapter 6
[609] See Chapter 24
[610] See Chapter Five

- *Re Nicholls* [2020] VSC 189 – Applicant can health concerns (chronic asthma); lower risk of contracting COVID-19 in residential drug/alcohol rehabilitation program rather than prison; rehabilitation programs in prison suspended.
- *Lillyman v R* [2020] SASC 55 – In the absence of particular information about the current conditions at the prison in which the applicant is in custody and how the applicant is being treated, little weight can be placed on effects of COVID-19 as a consideration

27.8 Exceptional circumstances

- *Re Lado* [2020] VSC 132 – COVID-19 pandemic was not considered to be an exceptional circumstance.

CHAPTER 28 – FORMS

Forms relevant to bail

Form 05 - Notice to person permitted to go at large – Version 2 (s.14A(2))

Form 07 – Undertaking as to bail – Version 4, approved 28 May 2018 (s.20(1))

Form 08 – Notice to defendant of Undertaking as to Bail – Version 4 (s.20(5)(b)

Form 09 – Undertaking as to bail – Committal for Trial or Sent – Version 3 (s.20)

Form 10 – Undertaking as to bail following grant of bail by Judge of the Supreme or District Court or Court of Appeal – Version 4, approved 3 April 2018 (s.20)

Form 11 – Affidavit of justification.

Form 12 – Warrant to apprehend a defendant where surety gives false information.

Form 14 – Warrant to apprehend defendant on application by surety.

Form 15 – Warrant to apprehend defendant who has not appeared in accordance with undertaking.

Form 16 – Warrant to apprehend defendant for failure to surrender into custody.

Form 19 – Warrant to apprehend defendant on application for revocation or variation of bail.

Form 20 – Warrant to apprehend defendant on application for revocation or variation of bail.

Form 25 – Warrant of apprehension of person released under section 11A.

Form 26 – Warrant to apprehend defendant for failing to enter into undertaking.

Form 28 – Warrant to apprehend defendant for failing to enter into police bail undertaking.

Form 68 – Application by child applicant to vary bail – Version 1 approved 13 November 2018.

Form 69 – Application by the Director of Public Prosecutions to revoke or vary bail – Child - Version 1 approved 13 November 2018.

Form 70 – Application for bail pending sentence review –Child - Version 1 approved 13 November 2018.

For forms listed on the Queensland Courts website, see:

https://www.courts.qld.gov.au/about/forms

ANNEXURES

ANNEXURE A – STANDARDISED BAIL CONDITIONS

ANNEXURE B - TYPES OF OFFENCES SUBSUMED BY DEFINITION OF 'TERRORISM OFFENCE' IN SECTION 6 OF BAIL ACT 1980 (CHAPTERS 20 AND 21)

ANNEXURE C – PRESCRIBED INDICTABLE OFFENCES TRIGGERING SHOW CAUSE UNDER s48AF YOUTH JUSTICE ACT 1992

ANNEXURE A - Standardised Bail Conditions

1. Surety

   You are allowed bail on your own undertaking to appear in court when required

   [ ] with a cash deposit of money in the sum of $..... and/or

   [ ] with a security in the form of ……. to the value of $ ……. and/or

   [ ] with one surety in the sum of $..... or two sureties each in the sum of $.....

   Note: A "security" is a document that shows that you own something of value that you will lose (it will go to the State of Queensland) if you do not appear in court when you are required to.

   A "surety" is a person who agrees to give an amount of money to the State of Queensland if you do not appear in court when you are required to.

2. Residential condition

   You must live at (address).

   You cannot live at another address unless, before you move to the other address, you have the written permission of the Officer-in-Charge of (police station)/ Director of Public Prosecutions to live at the other address;

3. Curfew condition

   You are on a curfew.

   You must be at your bail address between (time) and (time)

   During these times, you must answer the door to a police officer when you are asked to.

4. Attend police station

   You must report to (police station) within 48 hours of your release on bail to be photographed.

5. Reporting condition

   You must report to the Officer-in-Charge of (police station) between (time) and (time) every (day/s) starting from (day and date) unless you have written permission from the

Officer in charge of Police (police station)/ Director of Public Prosecutions not to report on a certain day or days.

6. No contact conditions.

(a) *Complainant*

You must not contact or communicate with, or attempt to contact or communicate with, either directly or indirectly, (name of complainant/s).

(b) *Witnesses*

You must not contact or communicate with, or attempt to contact or communicate with, either directly or indirectly (name of witnesses).

(c) *Named person/s*

You must not contact or communicate with, or attempt to contact or communicate with, either directly or indirectly, (name of person).

(d) *Co-accused/s*

You must not contact or communicate with, or attempt to contact or communicate with, either directly or indirectly, your co-offenders (name of co-accused/s).

Note: "contact or communicate with" includes –

meeting;

speaking to;

telephoning;

sending a text or social media message to;

sending or delivering a written or typed note or letter to;

contacting on social media; or

getting in contact within any other way.

"directly" means you contacting or communicating, or attempting to contact or communicate;

"indirectly" means getting someone else to contact or communicate, or attempt to contact or communicate, for you.

7. Attend or remain

You must not go to (place or area).

8. Banning conditions

(a) You must not go to or enter (name of licensed premises/class of licensed premises).
(b) You must not go to or enter (licensed premises or stated class of licensed premises)

between (time) and (time).

(c) You must not go within (distance from/or location in relation to) of (licensed premises or stated class of licensed premises).

(d) You must not go to (stated event).

9. No drink/drugs

(a) *BAC*

At all times, your blood-alcohol content must be less than (BAC)

You must take part in any alcohol test required by a police officer (and/or other official) by providing a sample of your breath or urine when required to do so.

(b) *Nil alcohol*

You are not allowed to drink alcohol.

You must take part in any alcohol test required by a police officer (and/or other official) by providing a sample of your breath or urine when required to do so.

(c) *Nil drugs*

You are not allowed to use or possess illegal drugs.

You must take part in drug testing required by a police officer by providing a sample of your saliva, urine or blood when required to do so.

Note: If you must take part in drug testing, then the drug testing will happen in this way:

a) you will have to pay for it if it costs money;

b) your breath, saliva, urine, or blood or more than one of these may be tested; and

c) within seven days after the test, the test results will be sent to the Officer in Charge (police station)/the Bail Department at Director of Public Prosecutions located at 50 Ann Street, Brisbane 4001, GPO Box 2403, Email: DPP.SCBAIL@justice.qld.gov.au, Phone: 07 3239 6840 or Fax: 07 3006 8193. You do not have to arrange for the results to be sent to the Officer in Charge or the Bail Department.

10. Attend program

You must take part in (program) and obey the rules and conditions of the program.

You must report when you are told to report and obey the rules and conditions of the Murri Court Process.

11. Attend drug/alcohol rehabilitation program

You must take part in (program) and obey all the rules and conditions of the program.

You must sign a document called an "Authority" (one is attached) which allows the people running the program to contact the Officer in charge of (police station) if:

- you leave, or are asked to leave the program,
- your performance on the program is not satisfactory,
- you do not obey the rules and conditions of the program, or
- you breach a condition of bail.

12. Surrender of passport

You must not be released from custody until your current passport has been handed to the Registrar of the (Court type) at (location) and a document called a 'receipt for passport' has been given to you or the person handing in your passport for you.

You must not apply for a passport while you are on bail for this/these charge/s.

13. Leaving Australia

You must not leave or attempt to leave Australia unless, before you leave or attempt to leave, you have the written permission of the Officer-in-Charge of (police station)/ Director of Public Prosecutions to leave.

You must not enter or attempt to enter an international terminal, which includes an international airport or an international seaport. unless, before you enter or attempt to enter, you have the written permission of the Officer-in-Charge of (police station)/ Director of Public Prosecutions to enter.

14. Cannot depart from Queensland

You must not leave the State of Queensland unless, before you depart or attempt to depart, you have the written permission of the Officer-in-Charge of (police station)/ Director of Public Prosecutions to depart.

15. Medical examination

You must permit (Dr) to examine you and you must co-operate in the examination.

AUTHORITY

To:

_____

Address

_____

I, *APPL NAME* authorise

NAME OF REHAB

or their nominee to advise the ***Officer in Charge (police station)*** if:

- I leave the centre;
- I am asked to leave the centre for any reason;
- I fail to perform satisfactorily on any of the rehabilitation programs or submit to any alcohol and drug testing as directed by the NAME OF REHAB ;
- I fail to comply with any rules of the rehabilitation program or any directions given to me by the staff of NAME OF REHAB
- I fail to comply in any respect with my conditions of bail.

ANNEXURE B – Explanation of types of offences subsumed by the definition of 'Terrorism Offence' in s.6 *Bail Act 1980*

Section 6 *Bail Act* – 'Terrorism Offence'		
(a) A terrorism offence under the *Crimes Act 1914* (Cwlth)	Section 3 of the *Crimes Act 1914* (Cwlth) defines terrorism offence as: (a) an offence against Subdivision A of Division 72 of the *Criminal Code* or (aa) an offence against Subdivision B of Division 80 of the *Criminal Code*; or (b) An offence against Part 5.3 or Part 5.5 of the *Criminal Code*	Subdivision A of Division 72 of the *Criminal Code* is headed: 'International terrorist activities using explosive or lethal devices. Subdivision B of Division 80 of the C*riminal Code* is headed: 'Treason'. Part 5.3 of the *Criminal Code* is headed: 'Terrorism'. Part 5.5 of the *Criminal Code* is headed: 'Foreign Incursions and Recruitment'. Within Part 5.3, s.100.1(1) defines 'Terrorist Act' as follows ***terrorist act*** means an action or threat of action where: (a) the action falls within subsection (2) and does not fall within subsection (3); and (b) the action is done, or the threat is made with the intention of advancing a political, religious, or ideological cause; and (c) the action is done, or the threat is made with the intention of: (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory, or foreign country, or of part of a State, Territory, or foreign country; or (ii) intimidating the public or a section of the public.

	(c) an offence against either of the following provisions of the *Charter of the United Nations Act 1945*: (i) Part 4 of that Act; (ii) Part 5 of that Act, to the extent that it relates to the *Charter of the United Nations (Sanctions—*	(2) Action falls within this subsection if it: (a) causes serious harm that is physical harm to a person; or (b) causes serious damage to property; or (c) causes a person's death; or (d) endangers a person's life, other than the life of the person taking the action; or (e) creates a serious risk to the health or safety of the public or a section of the public; or (f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to: (i) an information system; or (ii) a telecommunications system; or (iii) a financial system; or (iv) a system used for the delivery of essential government services; or (v) a system used for, or by, an essential public utility; or (vi) a system used for, or by, a transport system. (3) Action falls within this subsection if it: (a) is advocacy, protest, dissent, or industrial action; and (b) is not intended: (i) to cause serious harm that is physical harm to a person; or (ii) to cause a person's death; or (iii) to endanger the life of a person, other than the person taking the action; or (iv) to create a serious risk to the health or safety of the public or a section of the public. Part 4 of the Charter of the United Nations Act 1945 is headed: 'Security Council decisions that relate to terrorism and dealings with assets. Part 5 of the Charter of the United Nations Act 1945 is headed: 'Offences relating to UN sanctions.

	Al-Qaida) Regulations 2008.	
(b) An offence against the repealed Crimes (*Foreign Incursions and Recruitment) Act 1978 (Cwlth),* ss 6 to 9.	Section 6 'Incursions into foreign States with intention of encouraging hostile activities. Section 7 'Preparations for incursions into foreign States for purpose of engaging in hostile activities' Section 8 'Recruiting persons to join organizations engaged in hostile activities against foreign governments' Section 9 'Recruiting persons to serve in or with an armed force in a foreign State'	
(c) An offence against the *Terrorism (Community Protection) Act 2003 (Vic),* s. 4B;	Section 4B 'Providing documents or information facilitating terrorist acts'	'Terrorist act' is defined in s.4 in identical terms to that used in Part 5.3 of the *Criminal Code* (Cwlth) as set out above.
(d) An offence against the *Crimes Act 1990 (NSW),* s.310J.	Section 310J 'Membership of terrorist organisation'	'Terrorist organisation' has the meaning given by s.102.1 *Criminal Code* (Cwlth) being: (a) An organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act; or (b) An organisation that is specified by the regulations for the purposes of this paragraph [Note that prior to nominating an organisation in the regulations the AFP Minister must be satisfied on reasonable grounds that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act; or Advocates the doing of a terrorist act.

		'Terrorist Act' under the *Criminal Code* (Cwlth) is defined above.
(e) An offence against the *Criminal Law Consolidation Act 1935 (SA),* s.83CA;	Section 83CA 'Information for Terrorist Acts' A person who without reasonable excuse collects or makes a record of information of a kind likely to be of practical use to a person committing or preparing a terrorist act; or has possession of a document or record containing information of that kind, is guilty of an offence.	
(f) Another offence against a provision of a law of the Commonwealth or another State if the provision – ii. Is prescribed by regulation; and iii. Is in relation to an activity that involves a terrorist act or is preparatory to the carrying out of an activity that involves a terrorist act.	*Terrorist act* – see the *Police Powers and Responsibilities Act 2000*, s.211.	'Terrorist act' as defined in s.211 of the *PPRA*: (1) An action is a 'terrorist act' if – (a) It does any of the following- i. Causes serious harm that is physical harm to a person. ii. Causes serious damage to property; iii. Causes a person's death; iv. Endangers the life of someone other than the person taking the action; v. Creates a serious risk to the health or safety of the public or a section of the public; vi. Seriously interferes with, seriously disrupts, or destroys an electronic system; and (b) It is done with the intention of advancing a political, religious, or ideological cause; and (c) It is done with the intention of – i. Coercing or influencing by intimidation, the government of the Commonwealth, a State, or a foreign country, or of

		part of a State or a foreign country; or ii. Intimidating the public or a section of the public.

ANNEXURE C – PRESCRIBED INDICTABLE OFFENCES TRIGGERING SHOW CAUSE UNDER s48AF YOUTH JUSTICE ACT 1992

Definition of "prescribed indictable offence" is contained in Schedule Four of the *Youth Justice Act 1992*. This list is subject to legislative amendments and the relevant legislation should be referred to when using this guide.

Legislation	Offence	Maximum penalty
(a) Life Offences		
Criminal Code Act 1899		
54A(4)	Demands with menaces upon agencies of government	Life imprisonment
61	Riot	
80	Piracy	
124(2)	Perjury	
131(2)	Conspiracy to bring false accusation	
213(3)(a)	Owner permitting abuse of children on premises	
215(3), (4), (4A)	Carnal knowledge of child under 16	
216(3)	Abuse of persons with an impairment of the mind	
219(3)(a)	Taking child for immoral purpose	
222	Incest	
229B	Repeated sexual conduct with a child	
305	Murder	
306	Attempted murder	
307	Accessory after the fact to murder	
310	Manslaughter	
311	Aiding suicide	
313	Killing unborn child	
314A	Unlawful striking causing death	
315	Disabling in order to commit indictable offence	
316	Stupefying in order to commit indictable offence	
317	Acts intended to cause GBH	
318	Obstructing rescue or escape from unsafe premises	
319	Endangering the safety of a person in a vehicle with intent	
349	Rape	
352(3)	Sexual assault	
411	Robbery	
412(3)	Attempted robbery	
415	Extortion	
417A(3)	Taking control of aircraft	
419	Burglary	

Legislation	Offence	Maximum penalty
421(3)	Entering or being in premises and committing indictable offences	
461	Arson	
467	Endangering the safe use of vehicles and related transport infrastructure	
469(1), (2)	Wilful damage - Destroying or damaging premises by explosion, sea walls and other property	
474	Communicating infectious diseases to animals	
Criminal Code Act 1995 (Cth)		
71.2	Murder of a UN or associated person	Life imprisonment
72.3	International terrorist activities using explosive or lethal devices	
80.1AA	Treason—assisting enemy to engage in armed conflict	
80.1AC	Treachery	
91.1	Espionage	
101.1	Terrorist acts	
101.6	Other acts done in preparation for, or planning, terrorist acts	
103.1	Financing terrorism	
103.2	Financing a terrorist	
119.1	Incursions into foreign countries with the intention of engaging in hostile activities	
119.4	Preparations for incursions into foreign countries for purpose of engaging in hostile activities	
119.5	Allowing use of buildings, vessels, and aircraft to commit offences	
(b) Offence where maximum penalty is 14+ years imprisonment - excluding s9(1) *Drugs Misuse Act 1986*		
Criminal Code Act 1899		
54A(1)	Demands with menaces upon agencies of government	14 years imprisonment
124(1)	Perjury	
131(3)	Conspiracy to bring false accusation	
210(2)	Indecent treatment of child under 16	
210 (3), (4), (5)	Indecent treatment of child under 16	20 years
213(3)(b)	Owner permitting abuse of children on premises	14 years
215(2), (3), (4)	Carnal knowledge of child under 16	
216(1)	Abuse of persons with an impairment of the mind	
217	Procuring young person etc. for carnal knowledge	
218	Procuring sexual acts by coercion etc.	
219(3)(b)	Taking child for immoral purpose	
228A(1)(a)	Involving child in making child exploitation material	25 years

Legislation	Offence	Maximum penalty
228A(1)(b)		20 years
228B(1)(a)	Making child exploitation material	25 years
228B(1)(b)		20 years
228C(1)(a)	Distributing child exploitation material	
228C(1)(b)		14 years
228D(1)(a)	Possessing child exploitation material	20 years
228D(1)(b)		14 years
228DA(1)(a)	Administering child exploitation material website	20 years
228DA(1)(b)		14 years
228DB(1)(a)	Encouraging use of child exploitation material website	20 years
228DB(1)(b)		14 years
228DC(1)(a)	Distributing information about avoiding detection	20 years
228DC (1)(b)		14 years
228I	Producing or supplying child abuse object	
228J	Possessing child abuse object	
229FA	Obtaining prostitution from person who is not an adult	
229H	Knowingly participating in provision of prostitution	
229HB	Carrying on business of providing unlawful prostitution	
229I(2)	Persons found in places reasonably suspected of being used for prostitution etc.	
238(4)	Contamination of goods	
309	Conspiring to murder	
317A	Carrying or sending dangerous goods in a vehicle	
320	GBH	
320A	Torture	
321	Attempting to injure by explosive or noxious substances	
322	Administering poison with intent to harm	
323A	Female genital mutilation	
328A(4)	Dangerous operation of a vehicle	
338A	Assaults of member of crew on aircraft	
340	Serious assault	
350	Attempt to commit rape	
351	Assault with intent to commit rape	
352	Sexual assault	
354A	Kidnapping for ransom	
398	Stealing – Wills, Vehicle,	
408C(2)	Fraud	
408C(2A)	Fraud	20 years
411	Robbery	14 years
412	Attempted robbery	
415	Extortion	

Legislation	Offence	Maximum penalty
417A(2)	Taking control of aircraft	
419	Burglary	
421	Entering or being in premises and committing indictable offences	
427(2)	UUMV for committing indictable offence	
433	Receiving tainted property	
462	Endangering particular property by fire	
463	Setting fire to vegetation	
469	Wilful damage – Wills, railways, aircraft,	
469A(1)	Sabotage and threatening sabotage	25 years
469A(2)	Sabotage and threatening sabotage	14 years
470	Attempts to destroy property by explosives	
510	Instruments and materials for forgery	
514	Personation	
536	Attempts to conceal indictable offences	
Drugs Misuse Act 1986		
5	Trafficking in dangerous drugs	25 years
6(1)(c)	Supplying dangerous drugs	20 years
6(1)(f)	Supplying dangerous drugs	15 years
7	Receiving or possessing property obtained from trafficking or supplying	20 years
8(1)(a)	Producing dangerous drugs	25 years
8(1)(b)(i)		20 years
8(1)(b)(ii)		25 years
8(1)(c)		20 years
8(1)(d)		
8(1)(e)		15 years
8A(1)(a)	Publishing or possessing instructions for producing dangerous drugs	25 years
8A(1)(b)		20 years
8A(b)		
9A	Possessing relevant substances or things	15 years
9B	Supplying relevant substances or things	
9C	Producing relevant substances or things	
9D	Trafficking in relevant substances or things	20 years
10(1)	Possessing things	15 years
10B	Possession of a prohibited combination of items	25 years
11	Permitting use of place	15 years
Weapons Act 1990		
65(1)(a)	Unlawful trafficking in weapons	20 years
65(1)(b)		15 years
Criminal Code Act 1995 (Cth)		
71.3	Manslaughter of a UN or associated person	25 years

Legislation	Offence	Maximum penalty
71.4	Intentionally causing serious harm to a UN or associated person	20 years
71.5 (aggravated)	Recklessly causing serious harm to a UN or associated person	19 years
71.8	Unlawful sexual penetration	15 years
71.9	Kidnapping a UN or associated person	
73.2	Aggravated offence of people smuggling (danger of death or serious harm etc.)	20 years
73.3	Aggravated offence of people smuggling (at least 5 people)	
82.3	Offence of sabotage involving foreign principal with intention as to national security	25 years
82.4	Offence of sabotage involving foreign principal reckless as to national security	20 years
82.6	Offence of sabotage reckless as to national security	15 years
82.7	Offence of introducing vulnerability with intention as to national security	
83.2	Assisting prisoners of war to escape	
83.3	Military-style training involving foreign government principal etc	20 years
91.1	Espionage	25 years
91.2		
91.3		
91.6		
91.8		
91.11	Offence of soliciting or procuring an espionage offence or making it easier to do so	15 years
91.12	Offence of preparing for an espionage offence	
92.2	Offence of intentional foreign interference	20 years
92.3	Offence of reckless foreign interference	15 years
92.7	Knowingly supporting foreign intelligence agency	
92.9	Knowingly funding or being funded by foreign intelligence agency	
92A.1	Theft of trade secrets involving foreign government principal	
101.2	Providing or receiving training connected with terrorist acts	25 years
101.4(1)	Possessing things connected with terrorist acts	15 years
101.5(1)	Collecting or making documents likely to facilitate terrorist acts	
102.2	Directing the activities of a terrorist organisation	25 years
102.4	Recruiting for a terrorist organisation	
102.5	Training involving a terrorist organisation	

Legislation	Offence	Maximum penalty
102.6	Getting funds to, from or for a terrorist organisation	
102.7	Providing support to a terrorist organisation	
115.1	Murder of an Australian citizen or a resident of Australia	
115.3	Intentionally causing serious harm to an Australian citizen or a resident of Australia	20 years
115.4	Recklessly causing serious harm to an Australian citizen or a resident of Australia	15 years
119.6	Recruiting persons to join organisations engaged in hostile activities against foreign governments	25 years
132.2	Robbery	15 years
132.3	Aggravated robbery	20 years
132.5	Aggravated burglary	17 years
(c) Other		
Criminal Code Act 1899		
315A	Choking, suffocation or strangulation in a domestic setting	7 years
323	Wounding	7 years
328A	Dangerous operation of a vehicle	200 penalty units or 3 years
339	Assaults occasioning bodily harm	7 years
408A(1) – If accused is the driver of a motor vehicle	UUMV	7 years
408A(1A)	UUMV – Use for facilitating indictable offence	10 years
408A(1B)	UUMV – Destroys vehicle	12 years
412	Attempted robbery	7 years, 14 years, or life