



Bail Factsheet (NSW)

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What is bail?

Bail is the ‘authority to be at liberty’. It is a promise that you will attend court on your next court date, so that instead of being held in prison you can go home during this period. If you are granted bail, you must abide by any rules the police or court sets for you. These may include rules such as not participating in certain activities or going near certain areas.

What happens when I get arrested?

You will typically be taken to a police station. There, the police will decide what offence(s) to charge you with. Once they do that, they must decide whether to release you without bail, with certain bail conditions or whether to refuse bail.

In practice, you are generally able to speak to a lawyer before they decide whether to grant you bail or not. We encourage you to contact a lawyer at that stage as they **might** be able to speak to the police about bail and advocate on your behalf for the granting of police bail and what conditions are to be imposed.

If the police grant you bail but you are unhappy with the conditions or wish to change them, you should keep a copy of them and contact a lawyer to discuss your options as soon as possible.

When can the Court hear a bail application?

Bail applications must be heard as soon as reasonably practicable.¹ The Court must hear any release application or variation application on a first appearance at Court.² The Court cannot decline to hear the application because the prosecutor has not been given notice but may adjourn the hearing if

¹ *Bail Act 2013 (NSW) s 71.*

² *Bail Act 2013 (NSW) s 72(1).*

the Court considers it necessary in the interest of justice. This may happen, for example, where the matter is serious, and the prosecutor must check where witnesses are to inform the Court of any risks to those witnesses.

What kind of bail applications can be made at Court?

There are three kinds of bail applications that can be made to a Court or authorised justice:

1. Release application: this is an application for bail to be granted or dispensed with.³ It can only be made by the accused. After hearing the application, the Court may grant, dispense with or refuse bail.⁴
2. Detention application: this is an application by the prosecutor for the refusal or revocation of bail for an offence, or for the grant of bail with bail conditions.⁵ These typically arise when there has been a breach of bail.
3. Variation application: this is an application to change your bail conditions.⁶ It can be brought by the accused, a prosecutor, a complainant in domestic violence proceedings, a person for whose protection an order can be made, and the attorney general.

How does the Court decide whether to grant me bail?

This depends on the offences you have been charged with. The process can be summarised as follows:

1. Does the offence have a right to release?
 - a. Certain offences have a right to release for which the Court can either release you without bail, dispense with bail or grant bail (with or without conditions).⁷
 - b. These include fine only offences.
2. If the offence does not have a right to release, is the offence a 'show cause' offence?
 - a. There are many show cause offences set out in the Act. These include:
 - i. Serious indictable offences punishable by imprisonment for life or for a term more than 5 years,
 - ii. Certain drug offences, and
 - iii. Serious indictable offence committed while on bail or on parole.

³ *Bail Act 2013* (NSW) s 49.

⁴ *Bail Act 2013* (NSW) s 49(3).

⁵ *Bail Act 2013* (NSW) s 50.

⁶ *Bail Act 2013* (NSW) s 51.

⁷ *Bail Act 2013*(NSW) s 21(2).

- b. While most offences arising from climate-change protests that we have seen are not show cause offences, it is important to be aware of this test.
3. If the offence is 'show cause', you will first have to *show cause* as to why your detention is not justified.⁸ The Court may consider a single powerful factor or a combination of factors in that assessment.⁹ There are no prescribed factors in the *Bail Act*. Some factors that the Courts have considered in the past include:
 - a. Whether the sentence is unlikely to attract a custodial penalty,
 - b. Any delay in proceedings and the length of time to be spent in custody,
 - c. Any issues with the prosecution case,
 - d. Your age,
 - e. Whether this is your first time in custody,
 - f. The lack of appropriate medical treatment in custody,
 - g. Whether you suffer from any mental illness,
 - h. Whether you have any family vulnerability or needs,
 - i. Your community ties and family support,
 - j. The strength of the bail proposal,
 - k. Your criminal record,
 - l. Any risk of failure to appear,
 - m. The need for protective custody, and
 - n. Whether you are facing minor offences.
4. If the offence is not a show cause offence, or if you have successfully shown cause as to why your detention is not justified, the Court must determine whether there is an unacceptable risk that you will:¹⁰
 - a. Fail to appear,
 - b. Commit a serious offence,
 - c. Endanger the safety of victims, individuals, or community, and / or
 - d. Interfere with witnesses or evidence.
5. In making that assessment, the Court can only consider the factors set out in the *Bail Act*, which include:¹¹
 - a. Your background, including criminal history, circumstances, and ties to the community,
 - b. The nature and seriousness of the offence,
 - c. The strength of the prosecution case,
 - d. Any history of compliance or non-compliance with bail conditions,
 - e. Whether you have any criminal associations,
 - f. The likelihood of a custodial sentence,

⁸ *Bail Act 2013* (NSW) s 16A(1).

⁹ *R v S* [2017] NSWCCA 189 at [63].

¹⁰ *Bail Act 2013* (NSW) s 17.

¹¹ *Bail Act 2013* (NSW) s 18.

- g. Any vulnerabilities you might have such as mental health diagnoses or physical impairments,
 - h. If you have a need to be free for a lawful reason such as the running of a business, and
 - i. Whether the offence is a serious offence.
6. Weighing up these factors, the Court may decide that the bail concerns can only be addressed by the imposition of conditions and release you on conditional bail. The Court may also find that no conditions are necessary and release you on unconditional bail. Finally, the Court can find that the bail concerns cannot be mitigated by the imposition of any bail conditions and remand you into custody.¹²

It is important to note that the rules of evidence do not apply in bail applications.¹³ This means that the Court can consider many things when deciding to grant bail that it would not otherwise be able to consider when determining whether you are guilty of an offence or what sentence to impose.

Likewise, a bail application is not a determination of your guilt. The Court may make comments as to the strength of the allegations against you but those are not determinative and cannot be used down the track if you disagree with the charges and / or allegations.

How does the Court decide what kind of conditions are imposed on me?

The conditions will depend on the offences charged and circumstances. They can only be imposed if the Court is satisfied that there are identifiable bail concerns and that conditions are:

- (a) Reasonably necessary to address those concerns,
- (b) Proportionate to the offence,
- (c) Appropriate to the concern,
- (d) No more onerous than necessary,
- (e) Reasonably practicable for you to comply, and
- (f) There are reasonable grounds to believe you will likely comply with them.

What kind of conditions can the Police or Court impose on me?

Under the *Bail Act*, different types of conditions can be imposed. These are:

1. Conduct requirements requiring you to do or refrain from doing anything,¹⁴ Some examples we have seen include not to go within 5 kilometres of a coal port, not to contact a specific person, and not to participate in any activities relating to a particular organisation.
2. Security to be provided, which can include by way of an agreement to forfeit a specified sum if you fail to appear, depositing a sum with the bail authority or acceptable security being

¹² *Bail Act 2013* (NSW) s 19(3).

¹³ *Bail Act 2013* (NSW) s 31.

¹⁴ *Bail Act 2013* (NSW) s 25.

deposited as security for the payment of money.¹⁵ This can only be imposed to address a bail concern that you will fail to appear.¹⁶

3. Character acknowledgements given by an acceptable person, other than yourself, to the effect that they are acquainted with you and that they regard you as a responsible person who is likely to comply with your bail acknowledgment.¹⁷
4. Pre-release requirements, such as an obligation to surrender your passport before you can be released from custody.¹⁸
5. Enforcement conditions, to ensure compliance with bail. Such a condition can only be made at the request of the prosecutor, and only if it is reasonable and necessary in the circumstances.¹⁹ For example, where a person has a bail condition not to consume alcohol, such a condition may be imposed that the person be breath tested by a police officer at certain times/places.

How do I enter bail?

If you have been granted bail by the police or Court, you must sign the bail acknowledgment. Otherwise, you will not be released.

If I have been refused in Court, can I apply for bail again?

Yes. However, you can only do so if there are grounds for a further application. These grounds are:²⁰

- (a) You were not legally represented when the previous application was dealt with and now have legal representation, or
- (b) Material information relevant to the grant of bail can be presented that was not presented to the court in the previous application, or
- (c) Circumstances relevant to the grant of bail have changed since the previous application was made, or
- (d) You are a child, and the previous application was made on a first appearance for the offence.

The grounds most used are (b) and (c). For example, if on your first bail application you did not have security but that has since become available, that could be a sufficient change in circumstance to allow the making of a further bail application.

What happens if the Local Court refuses to grant bail again?

¹⁵ *Bail Act 2013* (NSW) s 26(2).

¹⁶ *Bail Act 2013* (NSW) s 26(5).

¹⁷ *Bail Act 2013* (NSW) s 27(2).

¹⁸ *Bail Act 2013* (NSW) s 29.

¹⁹ *Bail Act 2013* (NSW) s 30.

²⁰ *Bail Act 2013* (NSW) s 74(3).

If you are bail refused in the Local Court, a further application can be made to the Supreme Court. This process takes longer and requires more work to be done. Further information on this specific process can be given on request.

Can I vary my bail if I am not happy with the conditions?

You can apply to the Court or an authorised justice to vary your bail conditions.²¹ To do so, you must give reasonable notice to the prosecution of the application.²² In practice, this is at least 3 days. You should also contact the officer-in-charge and / or prosecutors to discuss your proposal.

It is also important to remember that an interested person, including the police, can also apply to vary your bail conditions. In that case, they must provide you with reasonable notice.²³

While you can apply to vary your bail as soon as it has been granted, strategically, sometimes it can be advisable to wait for some weeks before doing so to demonstrate to the Court that you can comply with bail.

What happens if I am granted bail and then breach my conditions?

It is a condition of every grant of bail that you must appear at Court when called upon to do so. If you fail to appear, you are committing an offence of which the maximum penalty is 3 years imprisonment and a fine of up to \$3,300.²⁴

What happens if I have been convicted of an offence and the sentence proceedings are adjourned?

If the Court intends to sentence you to a term of imprisonment but adjourns the proceedings to do so, the prosecution can bring a detention application to remand you into custody pending the sentence. If you are already in custody, the Court must not grant you bail unless you can show special or exceptional circumstances justifying your liberty.²⁵

While we have not seen this take place yet in the context of climate activists, it is worth keeping in mind. This is especially relevant if you plead guilty to offences that have been committed in breach of bail, conditional release orders or community correction orders and where the Court may be considering imposing a term of imprisonment.

Am I still on bail after I have been sentenced?

No. Once you have been sentenced by a Court, you are no longer on bail.

²¹ *Bail Act 2013* (NSW) s 51.

²² *Bail Act 2013* (NSW) s 51(7).

²³ *Bail Act 2013* (NSW) s 51(6).

²⁴ *Bail Act 2013* (NSW) s 79.

²⁵ *Bail Act 2013* (NSW) s 22B.

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