

The Children's Court of New South Wales

Bail guidelines

1. Introduction

1.1 The decision to refuse bail to a young person is a decision to deprive that young person of his or her liberty, in circumstances where he or she has not been found guilty of an offence. That decision can have enormous implications for the young person. There is significant evidence, both from Australia and overseas, that:

- (a) contact with the criminal justice system is harmful for young people, and increases the likelihood that a young person will reoffend;
- (b) for many of these young people, social interventions could be more effective in reducing recidivism and increasing positive life-time outcomes;
- (c) even a short period in custody (such as overnight) can significantly increase the likelihood that a young person will reoffend;
- (d) only a relatively small proportion of young people who are found guilty of an offence are given a sentence of full-time custody; and
- (e) the rate at which police refuse bail for young people is significantly higher than the rate at which the Children's Court and other courts refuse bail.

1.2 The decision to refuse bail to a young person, or to impose bail conditions, should not be made lightly, and must be made strictly by reference to the considerations in the *Bail Act 2013* (the Bail Act). These guidelines aim to assist a bail decision-maker in arriving at a bail determination that achieves an appropriate balance between the interests of the community and the interests of the Young Person.

Section 22C of the Bail Act

1.3 **Section 22C applies to bail decisions for a limited number of young people. Section 22C is addressed in Part 8 of these guidelines. Where it applies, the rest of these guidelines must be read subject to Part 8.**

2. General principles

2.1 Young people's limited capacity and the significant difficulties they face when in contact with an adversarial, adult-oriented criminal justice process mean that they are particularly vulnerable at the time a bail determination is made about them. It is therefore important that:

- the bail authority should make all reasonable attempts to ensure that the young person has adult support, including someone who can advocate for their interests, before the bail determination is made; and
- the bail authority should take special care to take into account the young person's vulnerability.

2.2 Bail should **only be refused** where there is an unacceptable risk that the young person, if released from custody, will:

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

In all other circumstances (unless the young person has been charged with a terrorism offence referred to in s22A of the Bail Act), bail must either be granted, conditionally or unconditionally, or dispensed with.

2.3 The **show cause** provisions in the Bail Act **do not apply** to bail determinations for young people.

2.4 Bail **cannot be refused** for the offences referred to in s21 of the Bail Act, including:

- Fine-only offences;

- Offences under the Summary Offences Act (except offences of obscene exposure, violent disorder or offences relating to knives, if the young person has previously committed a similar offence; or offences relating to laser pointers or loitering by convicted sex offenders); or
- Offences being dealt with by conference under the Young Offenders Act,

unless the young person has breached their bail for that offence.

2.5 Police **do have the power** to grant bail under s43(5) of the Bail Act to a person who has been arrested under a warrant to bring the person before court for sentencing.

2.6 Bail conditions can often be formulated which will adequately mitigate risks. The formulation of bail conditions should be approached creatively. However, bail conditions must be no more onerous than is necessary to address the bail concerns; they must be reasonably practicable for the young person to comply with; and there must be reasonable grounds to believe the young person is likely to comply with them.

3. Procedural steps

3.1 Young people may present to a bail authority as outspoken, aggressive and defiant. Such behaviours should not be taken as a sign that the young person is capable of properly advocating for his or her interests. Outwardly difficult behaviour is often a mask for more complex underlying needs. Many of the young people who come into contact with police have experienced:

- Unstable family environments;
- Intergenerational disadvantage and trauma, including violence, abuse and neglect;
- Housing instability, including out-of-home-care placements, homelessness and sleeping rough;
- Disengagement from education;

- Drug and alcohol addiction; and
- Physical, mental health and cognitive conditions and disabilities.

Many of these young people are subject to legal interventions when a social intervention would be more effective and appropriate.

- 3.2 Because there is often a high degree of instability in the lives of the young people who may be the subject of bail decisions, it can be difficult to identify and find suitable adult support for them. However, the more unstable a young person's life is, the greater their need for adult support at the time of a bail decision is likely to be. As well as family and adult friends, other support may be found amongst Youth Justice, Out of Home Care providers, other community service providers, and Family and Community services.
- 3.3 Where possible, all young people must also be given access to legal advice before a bail decision is made, for example from the Youth Hotline (Ph 1800 10 18 10) or the Aboriginal Legal Service Custody Notification Service.
- 3.4 A bail decision-maker should seek input from any support person or legal adviser before the bail decision is made. It may be that bail conditions are available of which the decision-maker was unaware, or more effective conditions could be tailored, with the input of those who have primary responsibility for the young person in the community.

4. The decision to grant or refuse bail

- 4.1 A bail decision-maker should only refuse bail if there is an unacceptable risk that any of the four bail concerns will be realised. In all other cases, bail must be granted or dispensed with. This is a purely risk-assessment approach.

Bail refusal is not a means to punish a young person, or ensure better compliance with bail conditions, parents or other aspects of community life.

- 4.2 In deciding whether any of the bail concerns presents an unacceptable risk, the bail decision-maker should consider the

“acceptability” of the risk in light of the young person’s personal circumstances. For example, there may be a high likelihood that a young person will not attend court, because the young person is too young to drive, there is no public transport and his or her parent is an unreliable transporter. But particularly where the proceedings are for a less serious offence, whilst the risk of the young person failing to appear is high, it may not necessarily be unacceptable.

Similarly, in assessing whether a risk is unacceptable, it is appropriate to have regard to the likely penalty if the offence is proved. Because the sentencing law as it relates to young people promotes rehabilitation over punishment, custodial sentences for young people are relatively rare. Care must be taken to ensure that young people who will not ultimately be sentenced to custody do not spend time on remand, even for short periods, unless it is absolutely necessary.

- 4.3 Before deciding to refuse bail, the bail decision-maker should thoroughly explore the availability of bail conditions which could mitigate risks. The consideration of bail conditions should be approached creatively and with the objective of avoiding bail-refusal if a safe alternative can be found. For example, can any risk to the safety of the victim be mitigated by the young person going to stay with relatives who live some distance away from the victim? Can the risk of further offending be mitigated by a condition requiring engagement with a community service provider?

5. Assessing bail concerns

- 5.1 The central task in the bail determination is to assess risk. However, it is not just any risk that must be assessed; it is limited solely to the four bail concerns identified in s17 of the Act. Bail cannot be refused for any other reason than that there is an unacceptable risk surrounding one of those four bail concerns.

Bail cannot be refused, for example, merely because:

- The child is at risk of self-harm, or harm from others;
- The child has nowhere to live;

- The child has a drug problem;
- The child has other unaddressed welfare issues;
- The child is not complying with parents, Family and Community Services or an Out-Of-Home Care provider; or
- The child is under the care of the Minister, but Family and Community Services do not have an authorised placement available for the child.

Such matters may plainly require a response, but that response must come from an appropriate agency, not through remand. **Bail refusal must never be used to cover a gap in the provision of welfare services.**

5.2 Failing to appear

When assessing whether the risk of failing to appear is unacceptable, it is important to bear in mind that the frequency of a person intentionally absconding to avoid the criminal process is relatively low, for both adults and young people. More usually, where a young person is at risk of failing to appear, this will be due to issues such as lack of driver's licence, lack of public transport, parental dysfunction, instability and disorganisation at home, homelessness, or drug dependency. Many of those factors may be ameliorated by appropriate bail conditions, or by connecting the young person with services available in the community.

Even where the risk of failing to appear is high, it will often be the case that a young person's whereabouts are generally well-known or easy to ascertain, particularly if the young person is connected with services.

It is important to take into account all of the above circumstances in deciding whether the risk of failing to appear is "unacceptable", particularly when the young person is unlikely to receive a full time custodial sentence. Whilst failures to appear may be frustrating, if they are not caused by a deliberate attempt to avoid the criminal process, then even a high risk may, in an appropriate case, be considered acceptable.

5.3 Committing a serious offence

Bail cannot be refused merely because a young person is likely to commit further offences. It can only be refused if there is an unacceptable risk that the young person will commit a further **serious** offence.

The Bail Act does not define "serious offence", but s18(2) sets out some matters which should be considered in deciding whether there is an unacceptable risk that a young person will commit a serious offence:

- whether the offence is of a sexual or violent nature or involves an offensive weapon;
- the likely effect of the offence on any victim and on the community generally,
- the number of offences likely to be committed or for which the person has been granted bail or released on parole.

Where a young person has been charged with a serious offence, a forecast needs to be made of the risk of committing another serious offence during the period of bail. In many cases, because of the added scrutiny on the young person during court proceedings, as well as the impact of bail conditions, that risk will in fact be relatively low.

5.4 Endangering the safety of victims, individuals or the community

Endangering the safety of victims, individuals or the community involves putting their safety at risk to an unacceptable degree. Endangering safety is generally a reference to the risk of causing direct physical or psychological harm. Property crimes, for example, are generally unlikely to endanger the physical safety of the community.

5.5 Interfering with witnesses or evidence

This bail concern is directed at preventing interference with the investigative and judicial processes. Interfering with witnesses or

evidence will often require a degree of sophistication that is unlikely to be exhibited by young people.

6. Bail Conditions

- 6.1 Bail conditions can often go a long way towards mitigating bail concerns, such that they are no longer unacceptable. However, "*Bail conditions are calculated to mitigate risk. Their imposition does not create an occasion for attempts at social engineering or paternalistic interventions in parenting decisions*": **R v Connor Fontaine (a pseudonym)** [2021] NSWSC 177.
- 6.2 Bail conditions are not a behaviour-management tool. They cannot be imposed, for example, to assist parents or Out Of Home Care providers in exercising their parental responsibilities. Nor can they be used to fill gaps in the provision of welfare services to a young person.
- 6.3 Section 20A of the Bail Act provides that bail **conditions can only be imposed** if there are identified bail concerns, and the proposed bail conditions are:
- Reasonably necessary to address the bail concern;
 - Reasonable and proportionate to the offence;
 - Appropriate to the bail concern in relation to which it is imposed;
 - No more onerous than necessary to address the bail concern;
 - Reasonably practicable for the young person to comply with; and
 - Such that there are reasonable grounds to believe that the condition is likely to be complied with. When considering this issue, it is important to think not only about each individual bail condition, but about the number of different conditions and the combined effect of all of them.
- 6.4 Careful thought should be given before imposing some commonly-seen bail conditions, for example:

- **Reporting** – this may only be imposed if there is an identified risk of failing to appear, and should involve the lowest frequency of reporting that is consistent with ensuring appearance at Court. In many cases, if reporting is required at all, once or twice per week will be sufficient.
- **Curfews** – because bail conditions are not a behaviour-management tool, curfews should only be imposed where there would otherwise be an unacceptable risk of endangering safety or committing further serious offences specifically within the hours of the proposed curfew. For example, a night-time curfew should not ordinarily be imposed if there is no evidence of serious offences having been committed, or likely to be committed, at night.

If it is appropriate to impose a curfew, then consideration should be given to the form of the curfew condition. If the bail concern is that the young person will commit further serious offences in public at night, then a form of curfew condition that requires the young person not to be in a public place between certain hours will generally be sufficient to mitigate the risk. It would be unnecessary to mandate that the young person be at home within those hours.

Similarly, careful thought should be given to the hours specified in the curfew; they should be set only by reference to the mitigation of risk. A curfew cannot be used as a substitute for what may be thought to be inadequate parenting. In modern life, young people often have legitimate reasons to be out late into the evening, with no increase in risk.

- **Condition to be of good behaviour** – the Bail Act is not concerned with the risk of committing further offences; only of the risk of committing further serious offences, or endangering the safety of the community etc. Thus, a general condition that a young person must not commit any offences is, on its face, inconsistent with the Bail Act, as it does not address any of the four bail concerns.

- **Sureties** – a condition that money be forfeited (either by the young person or by an acceptable person) can only be imposed to address a bail concern that a person will fail to appear. If failing to appear is not a bail concern, then a surety cannot be imposed (s26(5)). Further, a surety condition cannot be imposed unless it is unlikely that any other conduct conditions will ensure the person appears at Court (s26(6)).

6.5 A number of bail conditions cannot be imposed by police. They include:

- A requirement that accommodation be found for the young person before release (s28) – this may only be imposed by a Court or authorised justice; and
- An enforcement condition (s30) – these may only be imposed by a Court, and only at the request of the prosecutor. Examples of enforcement conditions include directions that a person undergo drug and alcohol testing, or that a person presents to the front door of a specified residence to confirm curfew compliance.

7 Breaches of bail

7.1 It is not unusual for young people to be defiant, and this may result in them breaching the conditions of their bail. It is important to remember, though, that a **breach of bail conditions is not an offence**. Similarly, the risk of committing further breaches of bail conditions is not itself a bail concern, and not a ground to refuse bail, unless the breach of bail conditions itself provides evidence that there is an unacceptable risk of one of the four bail concerns.

7.2 Under the Bail Act, a police officer who becomes aware of a potential breach of bail conditions must not arrest the person without warrant, unless he or she has first considered whether an alternative course of action is appropriate, such as a warning or the issue of a notice to appear at Court.

If a young person is arrested for breaching bail, the arresting police officer may also decide to discontinue the arrest and release the person.

7.3 If there is a risk of further breaches of bail conditions, then it may be appropriate to reconsider the bail conditions. As noted above, bail conditions may not be imposed under the Bail Act unless it is reasonably practicable for the young person to comply with them (s20A(2)(e)), and there are reasonable grounds to believe that the young person is likely to comply with them (s20A(2)(f)). Bail conditions must be no more onerous than is necessary to address the relevant bail concerns (s20A(2)(d)).

8. Section 22C of the Bail Act

8.1 Section 22C limits the circumstances in which bail may be granted to a young person who is:

- Aged between 14-18; and
- Already on bail for a “relevant offence”; and
- Charged with a new “relevant offence”.

A “*relevant offence*” is:

- A “motor theft offence” – this is any offence under s154A, 154C or 154F of the Crimes Act;
- A “serious breaking and entering offence” – this is any offence under part 4 div 4 of the Crimes Act which carries a maximum penalty of 14 years or more (including offences under s109, s110, s111(2), s111(3), s112, s113(2) and s113(3)); or
- An offence under s154K of the Crimes Act, if the underlying offence is a motor vehicle offence or a serious breaking and entering offence.

8.2 If section 22C applies, the young person must not be granted bail unless the bail authority has a high degree of confidence the young person will not commit a serious indictable offence (that is, any offence that has a maximum penalty of 5 years or more) while on bail.

8.3 When deciding whether there is a high degree of confidence, the bail authority must consider the effect of any conditions that could be imposed if bail was granted.

8.4 Despite the way the new test is worded, the onus under s22C is still on the prosecution to establish that bail should be refused.

Please note: These guidelines have been developed to highlight the considerations that are relevant to making a bail decision for a child consistent with the risk assessment required to be made under the Bail Act 2013. The guidelines are not directive and do not purport to refer to every matter which may be relevant under the Bail Act 2013.