



ATSILS
Aboriginal and
Torres Strait Islander
Legal Service (Qld) Ltd

Legal Fact Sheet Arrest and Bail



Need to know more about your legal rights when it comes arrest and bail?

- ***IMPORTANT:** Contact us before you make a statement or plead guilty (even if the police tell you to).*
- *Our organisation is available to provide legal assistance and advice 24 hours a day – 7 days a week.*

This fact sheet explains:

- Arrest and bail regarding juveniles (children aged 16 and under) including: Bail Conditions; At Large; and the Supreme Court and Children's Court of Queensland.
- Arrest and bail regarding adults including: When only the Supreme Court may grant bail; Watchhouse Cash Bail; Refusal of Bail; Show Cause; Unrecorded Juvenile Convictions; Sureties; Being granted bail; and Breaching a bail condition.
- How to obtain legal advice?

ATSILS is a non-profit, Aboriginal and Torres Strait Islander community-based organisation with 25 locations across Queensland. We provide innovative and professional legal services covering criminal, civil and family law areas.

Freecall 24/7  1800 012 255

Last Updated: February 2023



1. Introduction

It is important for our clients to have an appreciation of their rights when it comes to such things as being arrested or being granted bail.

However, in the event that you do come to the attention of the police, *our Organisation is available to provide legal assistance and advice 24 hours a day – 7 days a week*. We always recommend that prior to providing a formal statement to the police you should ask them to contact our Organisation on your behalf. We can then advise you of your legal rights in a way which will allow you to make an informed decision as to the option which is in your best interests.

Contacting Us

Aside from our regional office telephone numbers (which should be known to the local police) we can also be contacted 24 hours a day, 7 days a week on our free call hotline **1800 012 255**.

2. Juveniles (children aged 16 or under):

The principles outlined in the Youth Justice Act make it clear that a child should only be detained in custody as a last resort; in a facility suitable for a child; and for the least amount of time which is justified in the circumstances.

Arrest

The police should only arrest a child (without a warrant) for either a “serious” offence; or for questioning a child in relation to an “indictable offence”; or for other offences where:

- The officer believes on reasonable grounds that such is necessary to prevent a repetition or continuation or the commission of another offence; or
- To prevent fabrication of evidence; or
- To obtain or prevent loss or destruction of evidence; or
- To ensure the child’s appearance before the court; or
- The child (at the time of the offence) is now an adult; or
- The child has escaped or is unlawfully at large.
- There are also some Bail Act provisions which provide for an arrest without a warrant.

Bail

Whilst generally the onus is on the Police to demonstrate why the bail of a child should be refused by a court, in certain circumstances including where a child is alleged to have committed particular indictable offences whilst already on bail, they may have to ‘show cause’ why they should not be kept in custody.

In deciding whether to grant bail and if so, upon what conditions – the police or the court must consider:

- Whether the child is a risk of not attending court;
- Whether the child is likely to commit further offences;
- The nature and seriousness of the offence(s) alleged;
- The strength of the evidence against the child;
- Whether the child would endanger anyone’s safety or welfare or interfere with a witness (or otherwise obstruct the course of justice);
- The child’s character, home environment, employment or other relevant background information;
- The child’s criminal history – including the history of previous grants of bail;
- Whether the child should be kept in custody for their own safety because of the alleged offence;
- Any other relevant considerations.

Bail Conditions

Special bail conditions can be imposed upon a child (e.g. to address identified risks). However, any such conditions must not be more onerous than the situation necessitates. The imposition of a curfew, residential or reporting conditions would be obvious examples.

Note: Unlike an adult, it is not an actual offence for a child to breach a bail *condition* – although it is an offence to fail to *appear* in court whilst on a bail undertaking. However, breaching a bail condition (whilst not strictly an offence) does justify the child’s arrest – as well as placing the child at risk of having their bail revoked and thus being remanded in custody.

Note: Occasionally an investigating officer will be mistaken and seek to charge a child with breach of a bail condition. If this occurs, the unrepresented defendant or legal representative must be alert to the mistake and seek to have the so-called charge struck out by the presiding magistrate. Sometimes you will see such non offences on a child’s criminal history – so mistakes do happen.

At Large

The police or the Court may also release a child into the custody of a parent or allow them to go “at large” (i.e. released without the need to sign a formal bail undertaking). It should be noted that a child released under such conditions may still have a warrant issued for their arrest if they subsequently fail to turn up to court (although, no Bail Act offence is committed). The same applies to a release upon a Notice to Appear.

Supreme Court and Children’s Court of Queensland

Bail applications for a child may be made to the Supreme Court in the same manner as for an adult (see below). However, a Children’s Court judge has a very similar jurisdiction to a Supreme Court judge when it comes to granting; varying or revoking bail – including for murder charges.

3. Adults

Arrest

It is lawful for a police officer, without warrant, to arrest an adult the police officer reasonably suspects has committed or is committing an offence if it is reasonably necessary for one of a number of reasons outlined in legislation – these reasons provide wide powers of arrest.

When only the Supreme Court may grant bail

Where upon conviction a mandatory sentence of life imprisonment applies; or in the alternative, an indefinite sentence applies – only the Supreme Court can grant bail

Watchhouse Cash Bail

A police officer can grant bail from a watchhouse for *non-indictable offences* which involves the acceptance of the deposit of a sum of money as security for the person’s subsequent appearance in court (referred to as “cash bail”). If the person subsequently fails to appear in court – the deposited money (which is generally a very small amount) will be forfeited by the presiding magistrate – who can then deal with the charge in the absence of the person (with no conviction being recorded). However, if that person appears in court – the magistrate will order a refund of the amount (unless an order is made to allocate the deposit against any financial penalty awarded by way of subsequent sentencing).

Procedure upon Application for Bail

The court may (subject to the point below) make such investigations on oath or otherwise of and concerning the defendant as the court thinks fit;

But, the defendant shall not be examined by the court (or any other person) as to the offence with which the defendant is charged;

The prosecutor may submit, in addition to other relevant evidence, evidence by affidavit or otherwise to prove that the defendant:

Has been convicted previously of an indictable offence;

Has been charged with and is awaiting trial on an indictable offence;

Has failed previously to appear in accordance with the defendant's undertaking and surrender into custody.

The prosecutor may also outline the circumstances of the offence particularly as they relate to the probability of conviction of the defendant (i.e. the strength of their case).

For Indigenous Australian defendants – the court may also take into account any submissions made by a representative of a Community Justice Group.

Refusal of Bail

A Court (or police officer) is required to refuse bail if satisfied that there is an *unacceptable risk* that the defendant:

- Would fail to appear; or
- Would, whilst on bail:
 - Commit an offence; or
 - Endanger the safety or welfare of the alleged victim; or
 - Interfere with a witness or otherwise obstruct the course of justice; or
 - Another ground for refusal of bail is if the defendant should remain in custody for their own protection (e.g. self-harm or retaliation).

If there has been insufficient time to allow the gathering of information to allow an assessment to be made – then the defendant is required to be remanded in custody pending the obtaining of further information.

In deciding whether there is an *unacceptable risk* of the issues outlined above the court or police officer shall have regard to all matters appearing to be relevant, including:

- The nature and seriousness of the offence;
- The character, antecedents, associations, home environment, employment and background of the defendant;
- The history of any previous grants of bail;
- The strength of the evidence;
- Any submissions by a Community Justice Group.

Show Cause

Where the defendant is charged:

- With an indictable offence that is alleged to have been committed whilst the defendant was at large or on bail for another indictable offence; or
- With an offence where on conviction the offender would be subject to a mandatory life sentence or an indefinite sentence; or
- With an indictable offence where it is alleged that a firearm, offensive weapon or explosive substance was used (or threatened to be used);
With certain prescribed offences including offences involving aggravated acts of Domestic Violence; or
- With an offence against the *Bail Act* (e.g. a failure to appear).

Then bail shall be refused unless the defendant shows cause why his or her detention is not justified. That is, the onus of justifying bail rests upon the defendant in these situations (rather than the onus being upon the prosecutor to show that bail is not justified).

Unrecorded Juvenile Convictions

May be taken into account when considering the issue of granting bail.

Sureties

Every surety to a bail undertaking must be a person who:

- Is at least 18 years of age;
- Has not been convicted of an indictable offence;
- Is not an involuntary patient under the *Mental Health Act* or a person for whom a guardian or administrator has been appointed;
- Is not an insolvent under administration;
- Has not been, and is not likely to be charged;
- Is worth no less than the amount of bail in real or personal property.

A person who enters into an undertaking as a surety becomes bound, upon its forfeiture, to pay to the Crown the sum of money involved.

Prior to the bail undertaking being broken – a surety may apply to the court for a discharge of the surety. If the court discharges the surety of his or her former obligation – it may then issue a warrant for the arrest of the person on bail.

It is an offence to indemnify a surety against liability. For example, a defendant should not request another person to act as a surety on their behalf (in order to obtain bail) and at the same time promise that person that they will compensate them for any loss.

Being granted bail – but leaving court without signing the bail undertaking

In such instance the court may issue a warrant for the defendant's arrest.

Breaching a bail condition

Whilst it is an offence punishable by imprisonment (which is frequently imposed) to fail to turn up to court in accordance with a bail undertaking – it is also an offence (for an adult) to breach a bail condition (e.g. not reporting to a police station). Breaching a bail condition is also a very serious offence – punishable by up to 2 years imprisonment.

4. Obtaining Legal Advice

ATSILS provides innovative and professional legal services for Aboriginal and Torres Strait Islander people across Queensland.

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This Factsheet is not intended to provide legal advice and has been provided for the purpose of providing information only. Whilst all reasonable care has been taken in the preparation of this information, no liability is assumed for any errors or omissions.