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Bail in N.S.W.

This bulletin explains what bail is, what the rights of an accused person are with respect to bail, what the major provisions of the law in New South Wales are, and provides some research data about the way in which that law operates in practice.

What is Bail ?

A person waiting to be dealt with by the court may be released from custody provided he or she undertakes to attend court when required for the hearing of the charge. Such a release is called bail.

In appropriate circumstances a person may be released without giving any undertaking to appear in court. This is called dispensing with bail.

The Bail Act 1978

One of the reasons for introducing the *Bail Act* was that too often people were being held in custody because they could not afford the sum of money that they were required to deposit as a condition of bail.

The *Bail Act* introduced a system of bail under which bail may be granted with or without conditions. Where conditional bail is set, conditions of bail other than the requirement to deposit money, may be imposed. Money bail is set less often since the *Bail Act* commenced.

The new law tries to balance competing requirements. On the one hand, there is the need to allow for the release of persons, who have not been found guilty of a criminal offence. On the other hand, there are the needs to ensure that the accused person appears at court, and to protect the community from the commission of further crimes by alleged offenders.

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Police Bail

An accused person held in custody by the police must be given written information about bail procedures soon after being charged with an offence.

The authorised police officer must then make a decision whether to release the person, or to keep the person in custody until the court hearing.

In order to assist the person to fulfil any bail condition imposed by the police officer, or to seek a review of the decision to refuse bail, the officer generally must allow the person to contact a lawyer, or some other person.

If bail is refused, the accused person must immediately be given written information as to the right and means to have this decision reviewed and, as soon as practicable, must be brought before a court.

A recent study shows that police allow bail without conditions in the majority of cases (66.4%), and impose conditional bail less frequently (26.2.%). In only a minority of cases are accused persons refused bail by the police (7.3%). *(1)*

Court Bail

An application to a court for bail must be dealt with as soon as is reasonably practicable. The question of bail is usually considered on each occasion that a person charged with an offence appears before the court.

Where an accused person is refused bail by a magistrate, the magistrate usually may not adjourn the matter for any period longer than eight days.

In addition to the power to grant or refuse bail, a court may also dispense with bail. In 1985, as shown in Figure 1, the majority of people appearing before the Local Courts in New South Wales had been granted bail (64.9%). In almost a third of cases (28%) the requirement for bail had been dispensed with and only a minority had been refused bail (7.1%).*(2)*

The Right to Bail

The decision whether or not to grant bail depends, to a large extent, on the seriousness of the offence the person is alleged to have committed. There are three broad categories of offences.

1. If the crime is one which is not punishable by a gaol term (ie. is punishable by way of fine only), the person generally has a right

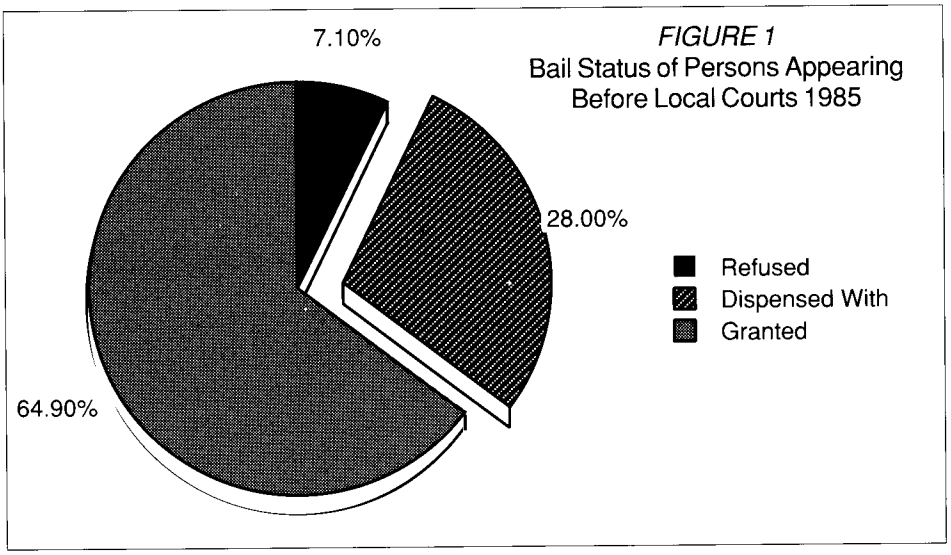


FIGURE 1
Bail Status of Persons Appearing Before Local Courts 1985

to be granted bail. This is because a person ought not to be held in custody for an offence that cannot be punished by a gaol sentence.

Offences that come into this category are relatively minor such as trespass, offensive behaviour and offences under by-laws and regulations. Conditions can still be attached to the grant of bail.

Even for these types of offences, bail may be refused where the person has breached an earlier bail undertaking, is incapacitated due to alcohol or drugs, is in need of physical protection or has been convicted of the offence and is appealing against the conviction.

2. For most other offences, the accused person is entitled to be granted bail unless: refusal of bail is justified in accordance with certain considerations set out in the Act, or the person has been convicted; or the person is serving a term of imprisonment for another offence and it is likely that any period of bail granted would expire before that term would be completed.

3. For certain serious offences there is no entitlement to bail. These offences are armed or violent robbery, serious drug trafficking offences, and prior offences in relation to bail. In these cases, the person may still be granted bail, but must show good reasons why bail should be granted. Where bail is granted conditions will often be very onerous.

A recent study of serious drug offenders for example, found that in a relatively high proportion of cases bail was refused by police (49.2%) and courts (33.9%). In particular, those offenders charged with importing prohibited drugs were highly likely to be refused bail by police (90%). *(3)*

A person who is serving a sentence of imprisonment, but who has lodged an appeal against conviction or sentence, may be granted bail, but where a person has been found guilty by a jury, bail will only be granted in exceptional or special circumstances.

Factors Guiding Bail Decisions

In those cases where there is no right to bail (i.e., those cases in 2 and 3 above), the decision whether to grant bail or not is based on three main factors which are set out in the Act: 1) the probability that the person will later appear in court; 2) the interests of the person; and 3) the protection and welfare of the community.

1. The probability of the person appearing at court is to be assessed by looking at the details and history of their residence, employment, and family ties; any prior criminal record; any previous breach of a bail undertaking; the circumstances of the offence; and the strength of the case against the person.

2. The interests of the person are to be taken into account by reference to the period, and conditions, of custody if bail were refused; the need to prepare a defence; the need to obtain legal assistance; and whether or not the person is incapacitated by alcohol or drugs, or is in danger of physical injury or in need of physical protection.

3. The protection and welfare of the community involves consideration of any previous failure by the person to observe a bail condition; the likelihood that the person will interfere with evidence, witnesses or jurors; and the likelihood that the person will commit a further offence while at liberty on bail.

Bail Conditions

As well as requiring an accused person to sign a bail undertaking, one or more conditions may be imposed on the grant of bail. A bail condition is only to be imposed if it is necessary to promote law enforcement and protect the community. Any person who cannot comply with the conditions of bail, will be held in custody.

The accused person may be required to sign an agreement as to his or her behaviour whilst on bail. For example, it may be required that the person report to police, not approach certain premises or persons, or not consume alcohol.

As an additional measure to ensure that the person appears at court, the person may have to sign an agreement to forfeit a sum of money if he or she does not attend court, to deposit security for such a sum of money, or deposit such a sum in cash.

A condition of bail may also be that another person must sign an acknowledgment that the accused is known by the person and is a responsible person likely to attend

court. The person can also be requested to sign an agreement to forfeit an amount of money if the accused person does not attend court or deposit a security or deposit such an amount in cash (this person is called a surety).

In general, the condition most commonly imposed by the police is that the accused agree to forfeit a specified sum of money if they fail to appear on bail (34.0%). In a further 24% of cases, bail conditions require that an acceptable person must acknowledge the accused to be a responsible person who was likely to appear on bail. *(4)*

Bail Undertakings

When a person signs a bail undertaking the person agrees to appear at court as specified in the bail notice included in the undertaking.

A person on bail who breaks, or is about to break, any condition of bail may be arrested by police and taken before a court which can then reconsider the question of bail.

It is a serious offence for a person released on bail not to attend court. A person who does not attend, may be punished for this offence as well as the one for which he or she was originally arrested. A person who breaches a bail undertaking by failing to appear at court, will find that the court is less likely to give bail.

Where a person fails to appear in answer to a bail undertaking, the court may order that a warrant be issued for the arrest of the person. In some cases, the court can hear the charge in the person's absence, and can issue a warrant for the person to be brought to court for sentencing .

The courts deal very harshly with people who commit further offences while on bail. Little evidence is available concerning the level at which people who are granted bail, go on to commit further offences whilst on bail, or fail to appear at court when required. In a study of serious drug offenders it was found that over 90% of those persons who were charged with such offences, and were granted bail, appeared at court in accordance with their bail undertaking. In 4.9% of cases those charged with drug offences were alleged to have committed further offences whilst on bail. *(5)*

Bail Agreements

A bail acknowledgment or agreement and the depositing of security or cash is made with the judicial officer or police officer to whom the bail undertaking is given. It is an offence to enter falsely into an agreement.

A surety may later apply to be discharged from liability, provided the accused person has not already breached the bail undertaking or agreement.

When the surety makes such an application, the accused person is required to appear before the court. The surety may be discharged from liability and the bail conditions applicable to the accused person may be altered.

When an accused person fails to attend court as required by the bail undertaking, any bail money is forfeited. Any other money the subject of a bail agreement becomes a debt owed to the State, although the surety can apply to the District Court to be excused from the payment or forfeiture of the money.

Review of Bail Decisions

There is generally no limit to the number of applications for bail, or reviews of a bail decision which can be made by an accused person.

Applications for review of bail decisions may be brought in the same court as the original application except that Supreme Court judges have power to review any bail decision.

An application for review of a bail decision is conducted as a new hearing so the same information that was given in the previous application and any new information may be given in support of the application.

Remand in Custody

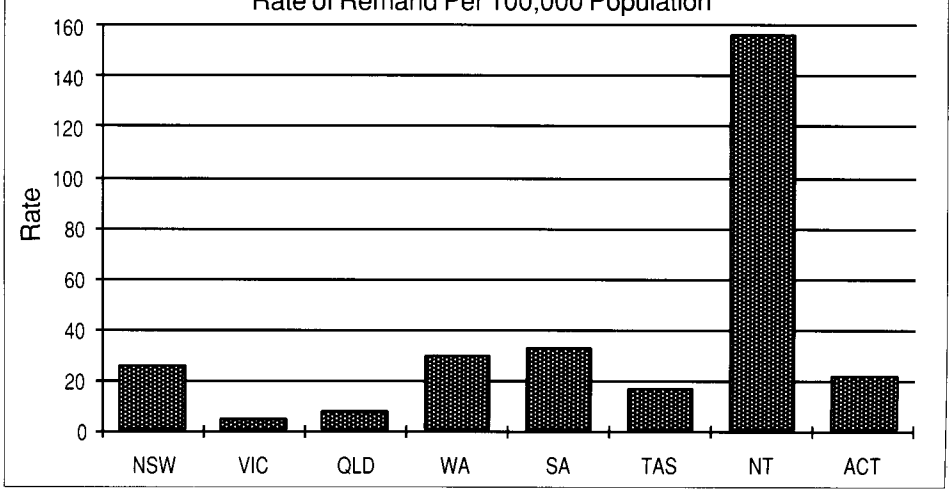
A person who is refused bail, or who is unable to meet the conditions of bail, will be remanded in custody until the charge against them is finally determined by a court. However, the period spent in remand may be taken into consideration if the person is found to be guilty and is sent to gaol.

In a study conducted during 1984 the rate of remand in N.S.W. was found to be 25.9 for each 100,000 persons in the population aged between 15 and 69. *(6)* As shown in Figure 2 below, this rate is less than that in Western Australia and South Australia, and substantially less than in the Northern Territory. However, it is almost three times higher than that in Queensland, and five times that in Victoria. A substantial proportion (37.2%) of those on remand in N.S.W. were remanded because they could not comply with the conditions of bail which had been set.

This percentage was similar to that of Queensland (45.9%) and Western

FIGURE 2

Rate of Remand Per 100,000 Population



Australia (40.1%), but was approximately four times that of Victoria (10.0%) and Tasmania (10.2%). It would seem that many more people in N.S.W. could be released on bail if bail conditions were set within their reach.

Most persons held on remand in N.S.W. (67.9%) spend less than one month in custody before the determination of their case *(7)*. A further 21.4% spend from one to three months on remand, 8.2% from three to six months, and 2.6% more than six months but less than 12 months. These figures are similar to those for other States, with only Western Australia (77.1%) and Tasmania (95.9%) having higher percentages of remands in the less than one month category.

Conclusion

The *Bail Act* represents a valuable reform. The accused person in many cases now has a right to bail and in most cases has a presumption in favour of bail. Moreover, a range of conditions of bail has been introduced and there is less reliance on money bail.

Generally, the bail system works well. Most people are granted bail and the available evidence indicates that very few people abscond or offend whilst on bail. It would appear that at present, however, that a substantial proportion of those people remanded in custody are only there because they could not meet their bail conditions.

References

(1) Stubbs, J. *Bail Reform in New South Wales.* Research Study No. 1. Bureau of Crime Statistics and Research, 1984.

(2) Bureau of Crime Statistics and Research. *Court Statistics 1985*, 1987.

(3) Bureau of Crime Statistics and Research. *Bail and Drug Charges*, 1986.

(4) Stubbs, J. *op.cit.*

(5) Bureau of Crime Statistics and Research, *op. cit.*, 1986.

(6) Walker, J. *The Outcomes of Remand in Custody Orders,* Australian Institute of Criminology, 1985.

(7) *Ibid.*

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