

# How to Apply for Bail

*Bail Act (NSW) 2013*

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Criminal defence lawyers are routinely called on to apply for bail. This article aims to assist legal practitioners making bail applications in the Local Court of NSW by explaining the tests and procedure that the court applies in determining a bail application.

## The Unacceptable Risk Test

The bail authority is required to assess the four 'bail concerns'.<sup>1</sup> A bail concern is a concern that an accused person, if released from custody, will:<sup>2</sup>

- a) Fail to appear at any proceedings for the offence, or
- b) Commit a serious offence, or
- c) Endanger the safety of victims, individuals or the community, or
- d) Interfere with witnesses or evidence.

The bail authority is required to consider only the matters listed in section 18 (which is annexed to this article). The magistrate will expect the applicant's submissions to cover each of the four bail concerns in order and refer to as many of the s18 matters as are relevant to each. If the court finds there is no unacceptable risk then the court must grant or dispense with bail.<sup>3</sup>

## Bail Conditions

If the bail authority finds that there is an unacceptable risk with respect to one or more of the bail concerns, then the authority must consider whether those risks can be mitigated with bail conditions.<sup>4</sup> Bail conditions always include reporting to police and residing at a particular address. Further conditions will vary depending on which bail concern is being addressed.

Risk	Common Conditions
Failing to Appear usually arises when the applicant has failed to appear previously. Also, if the applicant lives overseas or interstate.	Not to approach any ports of exit from Australia
Committing a Serious Offence turns on the applicant's criminal antecedents and drug use	Abiding by a curfew Not using illicit drugs

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<sup>1</sup> s17 Bail Act (NSW) 2013

<sup>2</sup> s19 Bail Act (NSW) 2013

<sup>3</sup> s20 Bail Act 2013

<sup>4</sup> s20A Bail Act 2013

Endanger safety of Victims, Individuals or the Community	Not approaching or contacting witnesses Not attending specific places (including witnesses' homes and workplaces)
Risk of interfering with witnesses or evidence	Not approaching or contacting witnesses Not attending specific places (including witnesses' homes and workplaces)

## Sample Submissions

The submissions will start by telling the court about the applicant's background and circumstances and then address each of the matters in s18. For example:

*May it please the court, I make a release application under s49 Bail Act 2013. My client comes before the court charged with assault. He is a 25 years old carpenter. He has steady employment and has lived at the same address for the past three years.*

*I submit that the allegation against my client falls at the lower end of the scale of seriousness. The allegation is not of a sexual nature, no weapon was used and there is no suggestion that the offending was motivated by racial or sexual prejudice. Despite the police assertion of a strong case, my client instructs me that he intends to contest the charge vigorously.*

*My client has a chequered past but his criminal antecedents includes only minor offences and the last offending was over two years ago. The offending was limited to drug possession and larceny and he has no history of violence. He has been released on bail previously and has always complied with his bail conditions and never failed to appear. He was placed on a 12 month bond for his most recent offending and complied with the conditions.*

*I ask the court to take into account the current delays in obtaining a hearing date. My client is likely to spend at least three month in custody if bail is refused. Even if convicted, he is unlikely to receive a custodial sentence of that length. I also ask the court to consider my client's special vulnerability and needs as an aborigine with a cognitive impairment.*

*Bail will allow my clients to continue with his employment and allow him to obtain legal advice and prepare his defence. The complainant in the matter is a stranger to the accused and they are unlikely to cross paths again before the hearing. Any concern the court might have can be mitigated with conditions prohibiting contact between the accused and any witnesses in the matter.*

*I submit that there is no unacceptable risk regarding the bail concerns that cannot be mitigated by the imposition of bail conditions.*

Should you have any interesting issues, I am available every day.

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## Section 18 Bail Act 2013 - Matters to be considered as part of assessment

(1) A bail authority is to consider the following matters, and only the following matters, in an assessment of bail concerns under this Division:

- (a) the accused person's background, including criminal history, circumstances and community ties,
- (b) the nature and seriousness of the offence,
- (c) the strength of the prosecution case,
- (d) whether the accused person has a history of violence,
- (e) whether the accused person has previously committed a serious offence while on bail,
- (f) whether the accused person has a history of compliance or non-compliance with any of the following:
  - (i) bail acknowledgments,
  - (ii) bail conditions,
  - (iii) apprehended violence orders,
  - (iv) parole orders,
  - (v) good behaviour bonds,
  - (vi) intensive correction orders,
  - (vii) home detention orders,
  - (viii) community service orders,
  - (ix) non-association and place restriction orders,
  - (x) supervision orders,
- (f1) if the bail authority is making the assessment of bail concerns because the accused person has failed or was about to fail to comply with a bail acknowledgment or a bail condition, any warnings issued to the accused person by police officers or bail authorities regarding non-compliance with bail acknowledgments or bail conditions,
- (g) whether the accused person has any criminal associations,
- (h) the length of time the accused person is likely to spend in custody if bail is refused,
- (i) the likelihood of a custodial sentence being imposed if the accused person is convicted of the offence,
- (i1) if the accused person has been convicted of the offence, but not yet sentenced, the likelihood of a custodial sentence being imposed,
- (j) if the accused person has been convicted of the offence and proceedings on an appeal against conviction or sentence are pending before a court, whether the appeal has a reasonably arguable prospect of success,
- (k) any special vulnerability or needs the accused person has including because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment,
- (l) the need for the accused person to be free to prepare for his or her appearance in court or to obtain legal advice,
- (m) the need for the accused person to be free for any other lawful reason,
- (n) the conduct of the accused person towards any victim of the offence, or any family member of a victim, after the offence,
- (o) in the case of a serious offence, the views of any victim of the offence or any family member of a victim (if available to the bail authority), to the extent relevant to a concern that the accused person could, if released from custody, endanger the safety of victims, individuals or the community,
- (p) the bail conditions that could reasonably be imposed to address any bail concerns in accordance with section 20A,
- (q) whether the accused person has any associations with a terrorist organisation (within the meaning of Division 102 of Part 5.3 of the Commonwealth Criminal Code),
- (r) whether the accused person has made statements or carried out activities advocating support for terrorist acts or violent extremism,
- (s) whether the accused person has any associations or affiliation with any persons or groups advocating support for terrorist acts or violent extremism.