



BAIL DECISIONS

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Courts across Australia deal with hundreds of thousands of criminal cases each year. It is important to remember that in our system of justice, a person charged with a criminal offence is presumed to be innocent, until the charge is admitted or proved.

In many of those criminal cases, a decision will have to be made about whether the person is granted bail.

Courts and police are sometimes criticised about their bail decisions when for example, someone who is charged with a serious offence gets bail or when someone who is on bail commits another offence or tries to flee the country.

It is important to draw a distinction between bail and what happens in the criminal case itself.

Bail authorises a person to stay in the community while waiting for their case to be finalised which can sometimes take weeks, months, or years. Otherwise, the person would have to stay in jail until their case is finished and/or they have served their sentence.

The criminal case finishes after someone pleads guilty or after they are found guilty or not guilty at a trial and if relevant, they are sentenced. It can take months to get a case ready for trial and even longer to get a trial date. Many people are found not guilty at the end of their case at which time they can have lost their job, their housing and have no financial resources left.

Every State and Territory and the Commonwealth have laws about bail. There are a lot of similarities between them.

Police are able to make decisions about bail and they do dispense with bail or grant bail to many people particularly where the charges are less serious. Certain court staff have also been able to make bail decisions although this is changing at least in NSW.

Every person who makes a bail decision has to apply the bail laws that operate in their State or Territory. These laws require the judge, magistrate or other decision maker to consider the risks of letting the person stay in the community, and what things can be done to manage that risk. Parliaments have passed laws which set out the risks that they say should be addressed in any bail application. Some charges are so serious that there may be a presumption against granting bail.

No bail decision is risk free. Someone with nothing or very little on their criminal record might commit a very serious offence without anyone suspecting that he or she might do so. The vast majority of people who are granted bail do not commit further serious offences while they are on bail.

Before a person makes a bail decision, they normally receive information from the prosecutor and the defendant about the case and the defendant. A court is likely to receive far less information at the start of a case than after the police have conducted a full investigation and prepared the evidence that will be used at a trial. A defendant may offer to do different things to address the risks that have previously been identified. For example, a defendant may be able to get into a drug rehabilitation program to address a long-standing drug addiction.

Bail can be varied during the time a case is before the courts, but the decision-maker still has to consider any bail concerns before varying the bail. The police, the DPP and a defendant can appeal against bail decisions.

Most people will have been granted bail by the time their case has been finalised. NSW Bureau of Crime Statistics and Research (BOCSAR) statistics show that in 2021, 7.5% of defendants had been refused bail at the time their case was finalised. This figure has remained reasonably stable between 2017 and 2021. (NSW BOCSAR: Progression through the NSW criminal court system 2017 to 2021)

Bail decisions are serious decisions. It is important to recognise that as with any other decision in life, these decisions are not risk free. However, safeguards have been built into the process which minimise risk.

The Australian Judicial Officers Association is the professional association of judges and magistrates in Australia. For further information, contact Karen Sloan, Australian Judicial Officers Association Secretariat: secretariat@ajoa.asn.au | 02 6125 5763.

The President of the AJOA is not available for broadcast or television interviews on this matter.