



**Te Tari Ture
o te Karauna**
Crown Law

Bail

Peira

As at 1 January 2025

Introduction | Ngā kupu whakataki

1. The Bail Act 2000 sets out a detailed legislative regime for bail. In addition, s 24(b) of the New Zealand Bill of Rights Act 1990 provides that those who are charged with criminal offences shall be released on reasonable terms and conditions unless there is just cause for continued detention.

Roles | Ngā tūnga

2. It is the court's responsibility to decide whether to grant bail. However, prosecutors have a role in seeking conditions and supporting or opposing an application for bail. In doing so, prosecutors should make decisions based on the evidence and information available to them. While this guideline recommends that prosecutors take into account a wide range of information in making prosecution submissions, that is limited to information the prosecutor is personally aware of at the time. Prosecutors are not expected to make further enquiries about matters relating to the suitability of an address for bail. Ultimately, whether bail is granted, and upon what conditions, will be a matter for the court.
3. Victims can have an important role in providing investigators and prosecutors with information that is relevant to bail decisions. Some victims also have rights to be informed, and have their views sought, in respect of particular decisions relating to bail. These rights are set out in the guideline on Victims | Ngā pāturenga and prosecutors should be familiar with them.

Scope | Te korahi

4. This guideline covers court ordered bail. It does not cover Police bail.
5. It also does not cover prosecutor decisions to appeal bail. Guidance for appeals is set out in the guideline on Appeals | Ngā Pīra.

Guideline | Te aratohu

6. Prosecutors involved in bail decisions are expected to be familiar with the Bail Act and any judicial practice notes relating to bail. Decisions on whether to oppose bail and what conditions to seek must always be based on the grounds in the Bail Act. These decisions should be tailored to the specific risks the defendant poses and should not be routinely sought without reference to these specific risks.
7. Prosecutors should make decisions on what position to take on bail based on credible and relevant information.

Victims' and investigators' views

8. Victims and their whānau have an interest in whether a defendant is granted bail and upon what conditions. They may also have information that is relevant to:
 - 8.1 the prosecutor's decision about whether to oppose bail;
 - 8.2 the proposed bail address;

- 8.3 the prosecutor's decision about whether to seek conditions and what conditions to seek (including information about any geographic conditions that might be appropriate); and
- 8.4 the prosecutor's assessment about relevant Bail Act risks, such as the risk the defendant will offend while on bail or interfere with witnesses.

Commentary

Victims may have information that goes beyond what is contained in an agency's information management systems (such as the New Zealand Police's National Intelligence Application or NIA). For example, victims may have views about appropriate geographic conditions other than proximity to their residential address.

9. Prosecutors should take into account the views of victims of specified offences¹ and investigators in developing a prosecution position on bail. However, the prosecution's position on a bail application is ultimately an independent decision made by the prosecutor.
10. Prosecutors should consult with the investigator in charge of the file about Bail Act risks. In particular, investigators may have useful information about public safety concerns, especially for victims, their whānau and witnesses.
11. Prosecutors should be aware that victims' views can change over time and should seek to provide information to the court that is up-to-date and accurate.

When to oppose bail

12. Decisions to oppose bail must be based on there being just cause for continued detention, taking into account the risks and factors set out in the Bail Act.²
13. In assessing the risk of offending on bail as set out in s 8(1)(a)(iii) of the Bail Act, the prosecutor should predominantly consider the risk to public safety, particularly the safety of victims and their whānau. This involves assessing the nature of potential offending.

Commentary

Where the risk relates to offending that is likely to involve sexual or physical violence against any person, this public safety risk will likely weigh heavily in the prosecutor's decision on whether to oppose bail. In contrast, if the risk of offending relates only to minor offending which would not warrant a custodial remand, a prosecutor may decide not to oppose bail.

14. Prosecutors should only oppose bail where the risks outlined in the Bail Act³ cannot be adequately mitigated by conditions on release. For instance, where the defendant does not have a suitable bail address, prosecutors should consider whether the risks can be sufficiently mitigated by the proposed conditions (as outlined in the section on conditions below) rather than opposing bail.

¹ Victims' Rights Act 2002, s 29.

² Bail Act 2000, s 8.

³ Bail Act 2000, s 8(1)(a).

15. Prosecutors should be aware that their prosecution positions on bail could inadvertently reflect biases. Some considerations can be neutral on their face but can be applied in a way that disproportionately impacts some people. Prosecutors should be mindful of this and make sure their evaluation of risks is tailored to the circumstances of each defendant rather than using blanket rules.

Commentary

There are multiple factors that are relevant to assessing whether a proposed address is “suitable”. This is a highly subjective evaluation and may therefore be affected by bias. To reduce that risk, the following should not automatically be considered unsuitable but instead carefully assessed against the risks in the Bail Act:

- Addresses where multiple generations live, or that have residents who come and go. This may be more traditional in certain cultures, such as Māori, Pasifika and Asian cultures.
- Addresses with elderly inhabitants. In some instances, there may be evidence that family elders, such as kaumātua and kuia, can exert a positive influence on defendants by taking on some collective responsibility for the defendant’s bail conditions. This could be a factor that supports bail.

Family violence offences

16. The Bail Act contains restrictions on bail for defendants who have previously been convicted of a specified offence as defined under the Bail Act.⁴ In addition to these restrictions, prosecutors should consider ss 8(3A), (3C) and (4) of the Bail Act, which set out mandatory considerations in family violence cases.

Reverse onus provisions

17. The Bail Act contains some reverse onus provisions where the defendant must satisfy a judge that they should be granted bail or allowed to go at large.⁵ Prosecutors may decide not to oppose bail even where the reverse onus applies. If doing so, they should explain to the judge why the prosecution is not opposing bail (for instance, because the defendant is a primary caregiver and the risk of offending while on bail is low and can be mitigated by conditions) to assist the judge in making their decision.

When to request bail conditions

18. Prosecutors must only seek conditions that are reasonably necessary on one of the grounds set out in the Bail Act.⁶
19. Prosecutors should not automatically propose certain conditions as standard practice. Every proposed condition should respond to specific identifiable risks posed by the defendant in the particular case.

⁴ Bail Act 2000, s 10. Note this is distinct from “specified offences” under the Victims’ Rights Act 2002 (although there are overlaps).

⁵ See, for instance, Bail Act 2000, ss 12 and 17A.

⁶ Bail Act 2000, s 30(4).

20. Defendants who are experiencing significant mental health issues, have a disability, or are otherwise disadvantaged may not have access to accommodation, resources, networks or support systems that commonly exist for other members of the community. Prosecutors should only seek conditions that are necessary to manage the defendant's risk.
21. Conditions should be the least restrictive means capable of achieving the intended purpose. What is "least" restrictive may depend on the defendant's specific circumstances. It may be appropriate to seek more restrictive conditions if there have been breaches of less restrictive bail conditions.

Commentary

As an example, curfew conditions can be onerous for defendants as curfew checks may be conducted late at night. If the reason for seeking a curfew is to manage the risk of flight, prosecutors may consider whether a reporting condition would adequately manage that risk in a less restrictive manner.

22. Prosecutors should only seek conditions with which a defendant can realistically comply. Prosecutors should also carefully consider the possibility of unintended consequences of proposed conditions. Whether compliance is realistic should be assessed against the defendant's individual circumstances.

Commentary

Bail conditions that a defendant cannot realistically comply with may result in the defendant simply accruing breaches of bail conditions. Prosecutors should consider matters that may make it difficult for a defendant to comply with a proposed bail condition, such as whether to propose a condition not to consume alcohol where a defendant has an alcohol addiction. Similarly, a condition that is drafted broadly to prevent a defendant from entering any "licensed" premises, rather than any "on-licence" premises, could prevent the defendant from going to a supermarket.

Bail variations

23. The guidance above also applies to applications to vary bail conditions.
24. Prosecutors should promptly respond to applications to vary bail conditions. If a defendant seeks to vary their bail conditions without notice, the prosecutor should consider whether to seek an adjournment in order to assess the proposed variations against Bail Act risks and, in serious cases, seek the views of any victims.

Defendants with particular characteristics

Young people

25. Different bail regimes will apply to children and young people under the age of 18 depending on whether they are appearing before the Youth Court or the adult courts. Prosecutors should take particular care before opposing bail for offending by children and those under 18 years old. Opposing bail for children and young people under 18 years old is likely to be inappropriate unless the offending is serious or the defendant is high-risk.⁷ Generally, prosecutors should seek to mitigate risks posed by such persons by seeking conditions rather than opposing bail.

Defendants experiencing significant mental health issues

26. Prosecutors should recognise the unique circumstances and vulnerability of defendants who are experiencing significant mental health issues. A prosecutor should make submissions on bail that take account of these circumstances and consider whether their position on bail could reinforce mental health supports. For instance:
 - 26.1 If a defendant voluntarily decides to undertake a mental health programme (such as attending an addiction clinic), prosecutors should consider how this affects their assessment of Bail Act risks. This is particularly the case where the programme is residential.
 - 26.2 If there is a compulsory treatment order for the defendant under the Mental Health (Compulsory Assessment and Treatment) Act 1992 and bail is not opposed, prosecutors should consider whether the order adequately addresses Bail Act risks, or seek bail conditions that are consistent with, and support, the order.
27. In some instances, a defendant's significant mental health issues may warrant opposing bail because they increase a relevant Bail Act risk, such as offending on bail.
28. Prosecutors should be aware of the Criminal Procedure (Mentally Impaired Persons) Act 2003 and how it intersects with bail decisions.⁸

Bail pending sentencing

29. Section 13 of the Bail Act applies pending sentencing. Where a guilty plea has been intimated, prosecutors should be aware of the effect of s 11 of the Bail Act and draw it to the attention of the court prior to guilty pleas being entered for an offence specified in that provision.
30. Prosecutors should also refer to guidance in the guideline on Sentencing | Te whiu when considering whether to oppose or consent to an adjournment to enable the defendant to complete a rehabilitation programme or course of action.

⁷ In addition to relevant provisions in the Oranga Tamariki Act 1989, see also s 15 of the Bail Act 2000 and s 175 of the Criminal Procedure Act 2011.

⁸ See, for example, Criminal Procedure (Mentally Impaired Persons) Act 2003, ss 18, 22, 23, 35, 38.

Other relevant guidelines | Ētahi atu aratohu e whai pānga ana

Victims | Ngā pārurenga

Sentencing | Te whiu

Making unbiased decisions | Te whakatau rītaha-kore

Appeals | Ngā pīra