Chapter 2
Bail

Chapter 2—Bail

A. Basic principles

2-1 Principles contained in the *Bail Act 1980* (Qld)

The *Bail Act 1980* (Qld) contains the basic principles relating to bail. Ultimately, the court has discretion about granting bail. However, the starting point is where a defendant is 'held in custody on a charge of an offence of which the person has not been convicted' and that defendant appears before a court 'in relation to that offence, the court shall, subject to this Act, grant bail to that person or enlarge or vary bail already granted to the person' (s 9). This means that, except in certain situations expressly outlined in the Bail Act, the court has a duty to grant the defendant bail.

2-2 When the court will refuse bail

The court will refuse to grant bail to the defendant if 'there is an unacceptable risk that the defendant if released on bail —

(i) would fail to appear and surrender into custody; or

(ii) would while released on bail—

  (A) commit an offence: or

  (B) endanger the safety or welfare of a person who is claimed to be a victim of the offence with which the defendant is charged or anyone else's safety or welfare; or

  (C) interfere with witnesses or otherwise obstruct the course of justice, whether for the defendant or anyone else' (s 16).

The court shall also refuse bail if it believes 'that the defendant should remain in custody for the defendant's own protection'.

2-3 Where a magistrates court cannot grant bail

A magistrates court cannot grant bail to a defendant charged with an offence for which the penalty is 'imprisonment for life, which cannot be mitigated or varied under the Criminal Code or any other law'.

2-4 Supreme Court bail

The Supreme Court has the power to make an order granting bail to any defendant who has been charged with an offence at any stage of the proceedings (s 10). This power includes granting bail to defendants who have previously had bail refused or revoked by lower courts.

One exception is where the defendant is before a trial judge and jury, where the judge's decision on bail is final (s 10(3)).

B. Grants of bail—general

2-5 Power of a police officer to grant bail

The Bail Act empowers a police officer—either an officer-in-charge or watch-house manager—to grant a defendant bail prior to them appearing in court, except where the Act states otherwise (s 7).

Section 382 of the *Police Powers and Responsibilities Act 2000* (Qld) (PPRA) allows a police officer to issue and serve a notice to appear on an adult who has committed an offence, or they reasonably suspect has committed an offence. A notice to appear has the same effect as a complaint and summons under s 53 of the *Justices Act 1886* (Qld) (PPRA, s 388).

Issuing a notice to appear is the most common way to require a defendant to appear before a court without the defendant spending unnecessary time in custody. This method is also preferable to issuing a complaint and summons due to the delays associated with that process.

Although there are no steadfast rules for issuing a notice to appear, as a duty lawyer, you will observe that, for some offences (e.g. breach of domestic violence order), police prefer not to adopt the convenience of the notice to appear.

2-6 Power of magistrates court to grant bail

The magistrates court has the power to grant bail to a defendant held in custody on a charge and may enlarge, vary or revoke any bail that has been granted (s 8).

2-7 Consideration of options by court or police officer

A court or police officer authorised by the Bail Act to grant bail shall consider the release of a defendant on bail in the following sequence:

- bail on own undertaking
- bail on own undertaking with a deposit of money or other security
- bail on own undertaking with a surety or sureties
- bail on own undertaking with a deposit of money or other security and with a surety or sureties (s 11(1)).

When acting under this subsection, the court or police officer 'shall not make the conditions of a grant of bail more onerous for the person than those that in the opinion of the court or police officer are necessary having regard to the nature of the offence, the circumstances of the defendant and the public interest'.

2-8 Special conditions

The court or police officer can impose special conditions on any bail grant if they believe that the conditions are necessary to ensure that the defendant:

(a) 'appears in accordance with the person's bail and surrenders into custody; or

(b) while released on bail does not —

  (i) commit an offence; or

  (ii) endanger the safety or welfare of members of the public; or

  (iii) interfere with witnesses or otherwise obstruct the course of justice whether in relation to the person or another person' (s 11(2)).

The 'court or police officer shall impose such conditions as [they think] fit for any or all such purposes'.

The same qualifications regarding onerous conditions apply as referred to in 2-7 above. The power under this section is a wide one and can include imposing reporting conditions, conditions requiring the defendant to reside at a certain place, or conditions restraining the defendant's contact with the complainant or other Crown witnesses.

2-9 Restriction on publication

The court can restrict the publication of information or evidence given in a bail application (s 12). If a bail application is opposed in the magistrates court, the prosecutor may lead certain information that could prejudice the determination of the matter. This can occur particularly when a matter is highly publicised or likely to be highly publicised. In these circumstances, an application should be made under s 12.

2-10 Cash bail

A police officer or court can release a defendant on bail after they make a deposit of money as security for appearing in court (ss 14 and 14A) if the charge is not indictable or a scheduled offence. The defendant and duty lawyer should view this form of bail as the same as other forms of bail. The deposit of money is security for the defendant's appearance before a court on the day, and at a time and place, provided to the defendant.

Although, historically, the view has been that a defendant's failure to appear when cash bail has been granted merely renders the deposit forfeited with no further punishment, you should neither encourage nor offer this as advice. The court can still issue warrants if a cash bail is granted and a defendant fails to appear (s 14(10)). Always advise a defendant to adhere to the cash bail conditions—namely, to surrender themselves to court at the time and place outlined in the notice.

2-11 Effect of *Penalties and Sentences Act 1992* (Qld)

Under the *Penalties and Sentences Act 1992* (Qld), if an offender has breached a suspended sentence, the Bail Act applies if that offender is not dealt with immediately. For example, under s 146(4) of the Penalties and Sentences Act, if a defendant commits an offence during the operational period of a suspended sentence and appears before the magistrates court, if a higher court imposed the suspended sentence, the magistrate must remand the matter to that higher court and may commit the offender to custody or grant the offender bail.

2-12 Release of a person with an impairment of the mind

Section 11A(7) defines an 'intellectually impaired defendant' as a defendant 'who has a disability that—

(a) is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these; and

(b) results in—

  (i) a substantial reduction of the person's capacity for communication, social interaction or learning; and

  (ii) the person needing support.

Section 11A of the Bail Act applies if a police officer or court 'considers—

(a) a person held in custody on a charge of or in connection with an offence is, or appears to be, a person with an impairment of the mind; and

(b) the person does not, or appears not to, understand the nature and effect of entering into an undertaking under section 20; and

(c) if the person understood the nature and effect of entering into the undertaking, the person would be released on bail'.

The police officer or court may then release the defendant 'without bail by—

(a) releasing the person into the care of another person who ordinarily has the care of the person or with whom the person resides; or

(b) permitting the person to go at large'.

The defendant is then given a notice under s 11B, which is similar to a notice to appear. Under this notice, the defendant must surrender to the court at the time and place stated in the notice (s 11A(3)). If the defendant appears in line with the notice, the court may similarly release them (s 11A(4)). A court may revoke such a release notice (s 11A(5)). If the defendant is released into the care of another, the carer must be given a copy of the notice (s 11B(4)).

You must consider your obligations under Chapter 14 of the *Criminal Law Duty Lawyer Handbook* regarding obtaining instructions from a defendant with an impairment of the mind. If you make a submission to the court that bail be granted under s 11A, the court may ask you how you obtained signed instructions if there is doubt about the defendant's mental state. You may appear as amicus curiae or 'friend of the court' if you cannot obtain signed instructions and suggest that the court consider bail under s 11A of the Bail Act.

C. Procedures on bail applications

2-13 Procedures

When dealing with the bail application, the court may make investigations of and about the defendant—on oath or otherwise—as it sees fit, as long as the defendant is not examined or cross-examined by the court or any other person about the actual offence.

The prosecutor may lead evidence by affidavit, or otherwise:

(i) 'to prove that the defendant—
  (A) has been convicted previously of an indictable offence; and
  (B) has been charged with and is awaiting trial on an indictable offence; and
  (C) has failed previously to appear in accordance with the defendant's undertaking and surrender into custody' (s 15(1)).

In demonstrating that a defendant has been charged with and is awaiting trial on an indictable offence, prosecutors will often tender 'not for production' criminal histories. Usually, in a sentence hearing, these would be objected to; however, on a bail application, the court is entitled to receive these documents.

Evidence can be offered to show the circumstances of the offence, particularly as they relate to the probability of convicting the defendant. The court can also consider relevant matters agreed on by the prosecution and defence. The court may receive and consider any evidence that it considers credible or trustworthy in the circumstances (s 15(e)).

2-14 Facts in dispute

If any of the matters referred to in s 15 are in dispute, the court needs to take evidence and make a decision about that fact, (e.g. a dispute regarding an alleged previous conviction). The court can take such matters into account without evidence only if the prosecution and defence agree about the fact.

2-15 Remand in custody

If there has not been enough time to obtain sufficient information to make a decision about any of the matters in s 16(1), the court shall remand the defendant in custody to obtain the required information (s 16(1A)). It is not uncommon for a court to remand a defendant until later in the day or even the following day.

2-16 Assessing unacceptable risk

In assessing whether there is an unacceptable risk under s 16(1), the court will consider all matters it considers relevant, including:

- the offence's nature and seriousness
- the defendant's character, antecedents, associations, home environment, employment, background and place of residence
- the history of any previous bail grants to the defendant
- the strength of the evidence against the defendant.

It is often helpful to read the decision of *Williamson v Director of Public Prosecutions (Queensland)* [2001] 1 Qd R 99; [1999] QCA 356, particularly the observations of Thomas JA at paragraph 21, where his Honour said:

'No grant of bail is risk-free. The grant of bail however is an important process in civilised societies which reject any general right of the executive to imprison a citizen upon mere allegation or without trial. It is a necessary part of such a system that some risks have to be taken in order to protect citizens in those respects. This does not depend on the so-called presumption of innocence which has little relevance in an exercise which includes forming provisional assessments upon very limited material of the strength of the Crown case and of the defendant's character. Recognising that there is always some risk of misconduct when an accused person or for that matter any person, is free in society, one moves to consideration of the concept of unacceptable risk.'

2-17 Onus on defendant to 'show cause'

'Where the defendant is charged—

a. with an indictable offence that is alleged to have been committed while the defendant was at large with or without bail between the date of the defendant's apprehension and the date of the defendant's committal for trial or while awaiting trial for another indictable offence; or
b. an offence to which section 13 applies; or
c. with an indictable offence in the course of committing which the defendant is alleged to have used or threatened to use a firearm, offensive weapon or explosive substance; or
d. with an offence against this Act; or
e. with an offence against the *Criminal Organisation Act 2009*, section 24 or 38; or
f. with an offence against the Criminal Code, section 359 with a circumstance of aggravation mentioned in section 359(2);

the court or police officer shall refuse to grant bail unless the defendant shows cause why the defendant's detention in custody is not justified' (s 16(3)).

Where a show cause situation does exist, courts will place considerable reliance on the strength of the Crown case. If the Crown have a strong case, and the time to be spent in custody on remand is not likely to exceed any custodial sentence which might be imposed after conviction, the defendant will have difficulty in having his application for bail approved. See *Lacey & Lacey v DPP* [2007] QSC 291; [2007] QCA 413.

You should be familiar with the provisions of s 16, particularly ss 16(1) and (3). Clarify whether a 'show cause' situation exists with the prosecutor prior to court and obtain full instructions for the bail application beforehand.

2-18 Further applications for bail

A defendant does have the right to apply further to a court to grant bail or vary a condition of bail (s 19). They can bring a matter on again before a magistrates court by arrangement even earlier than the date to which the defendant has been remanded.

Magistrates do not sit as 'Courts of Appeal' on their fellow magistrates and a relevant change in circumstances would have to have occurred since the previous application for the court to entertain such an application (e.g. a surety may not have been available when the matter was previously raised at court but may be available now). The defendant still has a right of application to the Supreme Court under s 10.

2-19 Undertakings as to bail

An officer of the court, who takes the undertaking, usually explains these matters to a defendant. However, you should clearly and comprehensively explain to any client who has been granted bail the importance of honouring the undertaking and consequences of a bail breach.

2-20 Sureties

Section 21 of the Bail Act contains provisions regarding sureties. Magistrates regularly impose sureties, particularly when they doubt whether the defendant will appear. Before any person can act as a surety, the justice of the peace taking the surety must consider the person's financial resources, character and antecedents, and proximity to the defendant (i.e. kinship, place of residence or otherwise) (s 21(3)).

'Every surety to an undertaking must be a person who—

(a) has attained the age of 18 years; and

(b) has not been convicted of an indictable offence; and

(c) is not—

  (i) an involuntary patient under the *Mental Health Act 2000* who is, or is liable to be, detained in an authorised mental health service under that Act; or

  (ii) a forensic disability client within the meaning of the *Forensic Disability Act 2011*; or

  (iii) (a person for whom a guardian or administrator has been appointed under the *Guardianship and Administration Act 2000*; and

(d) is not an insolvent under administration; and

(e) has not been, and is not likely to be, charged; and

(f) is worth not less than the amount of bail in real or personal property' (s 21(1)).

Some doubt exists as to whether the surety amount should be deposited with the court or keeper of the prison. Some justices believe that the monies must be deposited, while others, once satisfied as to the surety's financial position, will accept a person as surety without any deposit. If any doubt exists as to what is required in a particular case, check with the officer responsible at the appropriate court or the prison.

It is an offence for any person to indemnify a surety (s 26). This means that any defendant who undertakes to refund monies to another person who acts as surety is committing an offence.

D. Breaches of the Bail Act, including failure to appear

2-21 Failure to appear

If a defendant fails to appear in line with a notice to appear, the court has power, under the PPRA, s 389, to either decide the complaint in the defendant's absence or issue a warrant under the PPRA.

If a defendant fails to appear in line with an undertaking, the court can issue a warrant to apprehend the defendant (s 28A(1)).

If it is possible that the defendant has a genuine excuse for failing to appear (e.g. sickness or transport delays), the court may remand the charge, and order that the warrant lie in the court registry and not be sent to the police for execution unless the defendant fails to appear at the next remand date.

If the defendant fails to appear but a friend or relative with information about the defendant's non-appearance wishes to address the court, you may seek leave to appear as 'friend of the court' to help that person provide the information they possess to the court. You will then help arrange for the matter to be stood down or adjourned pending the defendant's appearance or receipt of medical certificates etc.

2-22 Surrender by the defendant into custody after failing to appear

If the defendant has failed to appear and a warrant has been issued but not been executed, the defendant may surrender into the court's custody as soon as practicable after the time specified for appearance. If the defendant surrenders before the warrant for apprehension is executed and can satisfy the court that they had reasonable cause for failing to appear, the court can withdraw and cancel the warrant (s 28A(2)).

This procedure is convenient when a genuine delay has occurred and saves the defendant being arrested and processed through the watch-house for a subsequent court appearance. It can also avoid a conviction for breach of the Bail Act. If the defendant shows reasonable cause, the matter ends as far as any breach of the Bail Act is concerned. The court can then grant the defendant bail for the original offence. However, if the defendant cannot 'show cause', the magistrate must order that the warrant remain in force and the defendant be brought before the court under s 33 (see 2-23 below).

2-23 Breaches of the Bail Act

'A defendant who—
(a) fails to surrender into custody in accordance with the defendant's undertaking; and
(b) is apprehended under a warrant issued pursuant to section 28 or 28A(1)(a), (b), (c) or (e);
(c) commits an offence against [the Bail] Act' (s 33(1)).

Under s 33(4), if a court imposes an imprisonment term, the jail term is cumulative to any other jail term to which the defendant is subject, and cumulative to any imprisonment term that a court may impose on the defendant after the commitment for breaching the Act.

2-24 Arrest on warrant for failure to appear or breach of bail condition

If a defendant has been arrested on a warrant for failing to appear and/or honour an undertaking regarding bail, they will be brought before a magistrates court in the magistrates court district where the defendant was apprehended under the warrant.

If the warrant was issued under the PPRA, the defendant has not committed any offence—the warrant was simply a means to bring the defendant before a court. The issue for you is whether the defendant wants the court to deal with the charge/s on a plea of guilty or apply for a remand and bail.

If the warrant was issued under the Bail Act, the court will charge the defendant from the bench for failing to appear and ask the defendant to plead to the charge.

Note: Under s 33(3A), 'the court shall then and there call on the defendant to prove why the defendant should not be convicted of an offence against this section'.

Section 33(2) states that it 'is a defence to [the] offence…if the defendant satisfies the court that the defendant had reasonable cause—
(a) for failing to surrender into custody in accordance with the defendant's undertaking; and
(b) for failing to appear before the court specified in the defendant's undertaking and surrender into custody as soon after the time for the time being appointed for the defendant to do so as is reasonably practicable'.

If the defendant pleads not guilty, the magistrate may set the matter for hearing or remand the defendant for hearing at the court from which the warrant was issued.

The magistrate would then again consider an application for bail; although, under s 16(3), the defendant is in a 'show cause' situation in relation to the bail application.

2-25 Failure to appear in the Supreme or district court

If a defendant fails to appear in the Supreme or district court, a warrant of apprehension may be issued under ss 28 (form 15 of the Bail Regulations), 30(3) (form 19) or 30(4) (form 20).

Note: Under s 33, it is an offence for a defendant to fail to surrender into custody if they are apprehended under a warrant issued under ss28 or 28A(1)(a). Therefore, a warrant issued under any other section cannot result in a defendant being charged with breach of bail.

If a defendant is brought before a magistrates court on a warrant issued by a higher court, the matter is usually remanded to the court that issued the warrant (s 33B).

2-26 Penalty for breach

Proceedings are taken summarily and may be commenced notwithstanding that one year has elapsed since the offence was committed. If convicted, a defendant is liable to a fine of 40 penalty units or two years' imprisonment (s 35), and any imprisonment period is to be served cumulatively on any existing or subsequent imprisonment term (s 33(4)).

2-27 Bail granted for the substantive offence

Bail can still be granted for the substantive offence even if the defendant is convicted for breach of bail.

E. Conduct of bail applications

2-28 Defendant in custody

This chapter relates to situations where the defendant is in custody prior to their appearance. If the defendant has previously been granted bail, it is highly unlikely that there would be problems in having that bail enlarged. However, it does occasionally occur. If unprepared, you should request that the matter be stood down so you can obtain further instructions.

2-29 Instructions

At the first interview at the watch-house, you should, in the brief time available, obtain as much of the following information as possible from the defendant:

- full name and address
- length of residence at that address, details of other residents and defendant's relationship to them (if any), and rent paid
- if from interstate or elsewhere, length of residence in Queensland
- family situation (parents, spouse, children, etc), particulars of dependants, and health of client or family if relevant
- employment; period of time in current employment or, if unemployed, employment prospects; ability to report if required; and type and amount of benefit received
- medical illnesses, prescribed medicines, treating doctor/s and whether defendant is on an involuntary treatment order
- property and financial interests in Queensland (e.g. real estate owned or being purchased, business owned/operated etc)
- previous convictions
- whether the defendant has previously failed to honour bail and brief details of the reasons for any failure

- particulars of the charge and circumstances giving rise to the charge (without going into too much detail)
- whether the defendant is currently on bail for an indictable offence
- availability and details of any surety or sureties
- whether the defendant has an alcohol and/or drug addiction or other medical problem and, if so, whether arrangements be made for rehabilitation or treatment
- any other matters that the duty lawyer may consider relevant.

2-30 Confirm information with prosecutor

It is inadvisable to accept without question all a defendant's instructions. Often, they do not include important matters in the instructions, such as previous convictions. Before actually appearing for the defendant, check the prosecutor's attitude to bail. If they oppose bail, clarify all relevant matters with the prosecutor such as previous convictions. Usually, if the prosecutor indicates that they will not object to bail on the defendant's undertaking, you do not need to obtain any further detailed instructions.

However, bail is still a matter for the court to consider and you should have at least basic instructions available in case the court raises any matter.

If a magistrate asks a question about issues not discussed during your initial conference with the defendant, ask that the matter be stood down so you can obtain those instructions. Never assume the answers.

2-31 Ascertaining whether onus of proof is on defendant

In clarifying the prosecutor's attitude to the application, ascertain whether the prosecutor is opposing bail or will indicate to the court that, for whatever reason, a 'show cause' situation exists under s 16(3). You can then obtain the defendant's instructions to prepare for the 'show cause' submission.

2-32 Where bail is opposed and defendant is not in a show cause situation

If a 'show cause' situation does not exist and the prosecution is opposing bail on the basis of 'unacceptable risk' under s 16(1), establish the prosecutor's basis for the claim of unacceptable risk prior to the appearance. For example, if they allege that the defendant would fail to honour any undertaking, try to ascertain the prosecutor's basis for alleging this and obtain full instructions prior to the court appearance. Be prepared to request that the matter be stood down if your instructions are not sufficient so you can obtain further instructions.

2-33 Duties of the court

In considering an application for bail, the court first has a duty to grant bail (s 9). The court must then consider a grant of bail in the order of priorities as set out in s 11 (see 2-7). The court must then consider whether there is an 'unacceptable risk', as set out in s 16(1). Of course, if a 'show cause' situation applies, the onus is reversed.

2-34 Order of address

If the prosecutor has already indicated that they intend to oppose bail, you should be aware of the procedures that apply in the court. First, the magistrate asks the legal representative about the situation regarding bail. If a bail application is being made, you should seek bail on the defendant's undertaking. The court then asks the prosecutor's attitude. If opposing bail, the prosecutor usually sets out the reasons why they are opposing bail or indicates that a 'show cause' situation exists. When the magistrate makes this initial inquiry, do not proceed in detail with your application; instead, wait until the prosecutor has outlined their objections in detail, so you can direct your address specifically to those objections.

2-35 Special conditions

If bail is opposed and you, as duty lawyer, doubt whether bail will be granted, consider suggesting possible special conditions to the bail grant. Some common special conditions include:

- **Sureties**
  These are common in the magistrates court, particularly where the defendant has a bad record or previous convictions for failing to appear, or the offence is a serious one. In such cases, obtain full instructions about possible sureties beforehand
- **Reporting conditions**
  Some magistrates rely greatly on reporting conditions. You should obtain instructions about whether the defendant is able to report daily to a local police station if necessary
- **Non-contact with witnesses**
  In cases of assault or sexual offences, obtain detailed instructions regarding the possibility of future contact between the defendant and the complainant or any Crown witnesses. If such contact is unlikely and the defendant is prepared to refrain from such contact as a condition of bail, this may assist the bail application
- **Alcohol/drug-related offences**
  If alcohol and/or drugs have contributed to the defendant committing the offence, obtain instructions regarding the defendant's willingness to participate in a drug and/or alcohol rehabilitation program as a condition of bail
- **Curfew**
  If the defendant is young and the offences are alleged to have occurred at night or in the early hours of the morning, obtain instructions regarding the defendant's willingness to abide by a curfew.

2-36 Being as concise as possible

When you apply for bail, it is invariably in a mention court. The magistrate is anxious to dispose of mention matters quickly. Therefore, when you make an application, direct the address solely to the relevant matters. Any duty lawyer who wastes time referring to matters that are not relevant is not assisting the client.

When placing the client's instructions before the court through submissions, avoid using generalities; for example, if there are instructions relating to future employment, it is not helpful to say, "The defendant has a job to go to next week'. It would be more helpful and precise to say something such as, 'The defendant is commencing a permanent position as a truck driver with a company at Rocklea on Monday', if those are the instructions.

At all times, try not to use the phrase 'my instructions are that Mrs Smith is employed' or 'I am instructed that Mr Smith has three children'. This may give the magistrate the impression that you do not believe what you are instructed. Instead, say 'Mrs Smith is employed' or 'Mr Smith has three children'.

2-37 Relevant submissions

Advise the court if the defendant denies the accusations and of any circumstances that might make it inappropriate for the defendant to spend a lengthy period in custody. Examples of relevant submissions include:

- age (either extremely young and likely to be adversely influenced by prison, or extremely old)
- state of health (including any medical treatment both recent past and near future, together with any current medical conditions)
- length of time defendant is likely to spend in custody (especially as this relates to the likely penalty, such as the likelihood that the sentencing court may seriously consider a probation order)
- indications that no further offences are likely to be committed
- anything relevant to the actual offences (e.g. a defendant on bail for break and enter who is charged with possession of a dangerous drug poses no real risk of damage, loss or injury to the community, is on an entirely different charge, was not aware of the significance and seriousness of the latter charge and/or the offence relates to behaviour before the previous grant of bail).

The above are examples only. As the defendant's liberty is at stake, you should explore all possibilities to obtain bail for them.

2-38 Caution when making admissions

As the magistrate must consider the strength of the evidence against the defendant (i.e. the likelihood of conviction) and will, therefore, be aware the police allegations specifically regarding the offence, you must consider what (if anything) to say in relation to the actual offence.

Remain conscious of speaking for the defendant and not make admissions that would subsequently prejudice the defendant on the hearing of the matter. You need to consider the situation where the defendant intends to deny the charge and the allegations, and to explain existing evidence that suggests guilt. The defendant could be outlining a defence to the court that may prejudice the subsequent trial. If you are going to make submissions for the purpose of a bail application that effectively place a defence before the court, obtain signed instructions indicating that the defendant is aware of the risks and possible detriment to any further defences raised if they are inconsistent with, or vary from, the initial instructions.

Often, the defendant has actually brought their part in the offence to the notice of police or has made full admissions, has accepted the facts as outlined by the prosecution and wishes to have charges against them 'cleared up'. In this case, there is no difficulty and a magistrate may be told that the defendant has cooperated fully with the police—making admissions and bringing further matters to their attention—and desires to have all outstanding matters disposed of. You can suggest that the defendant is, therefore, unlikely to abscond if granted bail. Generally, though, the question is a difficult one and you should be very careful when making admissions or outlining a defence.

Of course, you can say that the defendant vehemently denies any involvement in relation to the offence and has consistently denied the same to the police, or that they acknowledge the facts as outlined but state that the requisite intent was absent at the time.

There is no easy answer to this question and you need to consider each case on its merits. Usually, it is best not to discuss the police allegations at great length unless they are superficially damaging and certain matters (which, if accepted, would make bail unlikely) that can be explained by the defendant. However, where possible, do this in generalisations and without making admissions.

2-39 Previous convictions

The question of any previous convictions is often very relevant to a bail application. It is important to study the previous convictions to see whether any trend has developed. For example, a defendant may have had numerous convictions for dishonesty but be appearing before the court on a relatively minor drug matter. The prosecutor may oppose bail on the basis of an unacceptable risk that the defendant may commit an offence while on bail. In these circumstances, you could greatly rely on the fact that:

- the defendant has no previous convictions for drug matters
- there is no suggestion that the defendant is likely to commit any further offences for drug matters, and
- in the circumstances, the unacceptable risk does not exist.

Alternatively, a defendant's criminal history may have numerous entries but also lengthy periods with no entries. In this scenario, detailed instructions may show that rehabilitation has occurred, which may bolster the chances of bail being granted.

2-40 Where the defendant is legally represented

You may appear for defendants on bail with other legal representatives who have instructed you to appear on behalf of their client(s). Section 20(3AA) states that, unless otherwise ordered by the court, 'the defendant need not surrender into custody or appear personally if the defendant is represented'.

2-41 Applying to the Supreme Court if bail is refused

If bail is refused or the bail conditions are so onerous that the defendant cannot comply (e.g. a substantial surety has been imposed and the defendant has no prospects of raising it), advise the defendant of their right to apply to the Supreme Court for bail. The defendant may be eligible for legal assistance through Legal Aid Queensland. Application forms for legal aid are available at any court house and prison, and should be forwarded to Legal Aid Queensland.

F. Appeal of bail

2-42 Appeal of bail

An application for bail pending an appeal to the Supreme Court or Court of Appeal should be made to the Supreme Court.

If a magistrates court convicts a defendant of a summary offence, the defendant can appeal under s 222 of the Justices Act to the district court, and the magistrates court can hear an application for bail (s 8(1)(a)(i)). They should file a notice of appeal with the relevant district court registry before making such an application.

If a magistrates court convicts a defendant of an indictable offence, they must apply for bail pending a s 222 appeal to the Supreme Court (see 3-9).