

Assessing bail conditions and dealing with breach

Guidance for criminal legal aid providers

Introduction

This resource is designed to assist legal aid providers to understand the Ministry's expectations of good practice when:

- assessing if a bail condition is appropriate
- managing a bail condition that may be inappropriate
- breach of bail conditions.

Applying for bail

Clients will often accept most conditions at first instance to ensure they do not remain in custody, but it is necessary to consider whether those conditions are reasonable, despite client consent.

In determining what terms of bail are 'reasonable' the Court of Appeal held in *R v Keefe 2004*, that the Court must balance the likely restrictions on an alleged offender's liberty (on the one hand) against the interests of the community in ensuring that alleged offenders do not flee, interfere with evidence or re-offend while awaiting trial (on the other).

Viewed in that way, reasonable conditions of bail can be seen as those that are the least restrictive necessary to manage the risk of:

- flight (failure to appear)
- interference, and
- reoffending.

Considering restrictive conditions

There are large bodies of case law surrounding restrictive conditions and when they can be appropriately imposed.

Bail conditions shouldn't be unnecessarily restrictive on a defendant's rights under the New Zealand Bill of Rights Act 1990; meaning there must be a reasonable connection between the condition sought and the expressed prosecution concern.

The following are commonly encountered bail conditions that provide useful examples of how to consider whether a bail condition is appropriate.

Curfews

The Court of Appeal in *R v Fatu 2005* warned against the routine imposition of curfews and highlighted the need to analyse the case's individual circumstances.

In terms of reoffending, unless there is a clear pattern of nocturnal offending, the efficacy of night curfew should be brought into question.

In terms of interference, it may be that other conditions such as non-association more appropriately mitigate risk.

However, in cases with family violence related offending, a curfew is more likely to be found justifiable – for example, if the offending is more likely to happen during the curfew hours.

Important questions are:

- what is the nature of offending?
- when and where did offending occur?
- what risk is the prosecution seeking to protect against?
- how could a curfew reduce the risk?
- would there be an impact on other household occupants when curfew checks are done?

Not to consume alcohol

When a participant has been charged with offending while under the influence of alcohol, a bail condition to not consume alcohol aims to mitigate the risk of reoffending.

It is possible to establish a link between a proposed bail condition if the client has a propensity to offend when consuming alcohol. Further, even where the current offending was not alcohol-related, a prior history demonstrating issues with alcohol may be sufficient to justify this condition.

Not to drive

To impose a condition that prevents a client from driving, it is necessary to consider whether a different condition may be sufficient in mitigating the relevant risk.

For example, risk to the community of drink and drive reoffending on bail, perhaps could be appropriately mitigated by a condition not to consume alcohol rather than a condition not to drive.

However, there are instances where the risk of dangerous driving that could cause harm to the community is so great multiple conditions (not to drive and not to consume alcohol) may be justifiable.

Important considerations are:

- what is the nature of the defendant's previous driving convictions?
- what is the defendant's history of offending on bail in relation to driving?
- can a condition be tailored to meet the defendant's needs? (for example, employment or childcare).

Non-association condition in family violence cases

This condition is regularly imposed in family violence cases and is often disputed during proceedings as the parties reconcile and seek to have contact again.

If a not guilty plea has been entered and the matter is continuing to trial, the condition is often maintained to mitigate the risk of interference. The court is required to take into consideration the views of complainant, however, concerns of interference may still remain.

Family violence cases have their own unique features which creates a different risk profile to other offending. Each case is complex and requires careful analysis.

Breach of bail conditions

Police may arrest a client that breaches a bail condition, and they will be required to attend a breach of bail hearing.

Breaching a bail condition (other than to attend court) is not an offence. While judicial officers may issue 'warnings' at a breach of bail hearing, there is no provision for issuing "warnings" in legislation. If a client breaches a bail condition, bail may be revoked and/or it may have an impact on the outcome of future bail applications.

Bail cannot be refused as a penalty for breaching a condition or disregarding a 'warning' in and of itself. Bail must always be determined by assessing the relevant risk factors, and whether these are elevated by the breach of bail.

Further advice

- A client may breach bail conditions if they don't understand what is expected of them. Take time to explain what the bail conditions mean and what the client is expected to do.
- In imposing conditions, there must be a rational link between the condition and the risk identified.
- It is for the prosecution to justify why the condition is sought.
- If a condition is originally accepted, it can be revisited if there is no reasonable connection between the condition and the articulated risk.
- With restrictive conditions, it is important to consider the potential length of time the condition may apply. This is relevant both to whether the condition is justified and the likelihood the defendant will be able to comply with it.
- It may be appropriate to revisit conditions at different stage of proceedings, or when circumstances change.