CHAPTER 23: BAIL AND SURETIES

What is Bail?

The concept of bail centres around the notion that a person charged with an offence can remain at liberty if there is some assurance of the person's future appearance in court to answer charges. The basic principles underlying the concept of bail are:

- the presumption of "innocent until proven guilty." Time lags occur before trial, and it would be unfair for the accused to spend time in custody when they have not been found guilty; versus
- the need to ensure that suspected persons are brought to trial on the relevant date.

Key Phrases

Show cause situation	While there is a general presumption that bail should be granted, several situations are outlined in the *Bail Act 1980* (Qld), where the onus is reversed. These are called "show cause" situations. In a show-cause situation, the onus falls on the defence to explain why the defendant should be granted bail.
Surety	Something provided by a person by guaranteeing, by way of deposit of cash or property, that a defendant will abide by the terms of the bail undertaking and appear in court on the hearing date and at the prescribed time

The Role of the JP

As a JP(Qual), you have the power in certain circumstances, usually in conjunction with another JP, to conduct a bail hearing or to adjourn the hearing of a matter. A bail hearing may involve matters such as:

- Seeking information from the defendant or their legal representative that might enable you to reach a decision.
- Deciding on the imposition of a range of bail conditions.
- Hearing show cause applications.

Under sections 20(5), 20(6)(a), and 21 of the *Bail Act 1980*, the Justice of the Peace (Qualified) has a role in respect to sureties. These duties are to:

- satisfy oneself that the defendant and the surety or sureties understand the nature and extent of the obligations of the defendant under the conditions of the bail and the consequences of the defendant's failure to comply with them; and
- satisfy oneself as to the suitability of the person to be a surety.
- require that the person providing the surety make before the Justice an Affidavit of justification in the approved form (form 11). Just like a normal Affidavit, the document is sworn under Oath or Affirmation; and
- give to the defendant and the defendant's surety or sureties a notice of the undertaking in the approved form (form 8).

The reality today is that very few Justices of the Peace (Qualified) conduct bail hearings, except in remote locations. If not conducted by a Judge or a Magistrate, these hearings are generally conducted by a JP (Magistrates Court). Technological advances and a provision in section 15A of the *Bail Act 1980*

have primarily made this JP(Qual) power obsolete. Nevertheless, this chapter covers procedures that you may encounter when conducting a bail hearing.

Background Information

General bail procedures

Bail in Queensland is regulated by the provisions of the *Bail Act 1980* (Qld). Section 9 of the *Bail Act* states the general presumption that bail will be granted to a person who has not yet been convicted of the offence for which they have been charged. If bail is to be refused, the onus rests with the prosecution to justify why. It is not up to the defence to explain why bail should not be granted, except where a show-cause situation exists.

Section 16(2) of the *Bail Act 1980* outlines a list of factors that may need to be taken into account when determining the suitability of bail for a particular defendant. These include:

- The nature and seriousness of the offence.
- The character, antecedents, associations, home environment, employment, and background of the defendant.
- The history of any previous grants of bail to the defendant.
- The strength of the evidence against the defendant.
- If the defendant is an Aboriginal person or Torres Strait Islander person—any submissions made by a representative of the community justice group in the defendant's community, including, for example, about:
    - the defendant's relationship to the defendant's community; or
    - any cultural considerations; or
    - any considerations relating to programs and services in which the community justice group participates.

Some appropriate reasons to refuse bail are outlined in section 16(1) of the *Bail Act 1980*. These include that there is an unacceptable risk that the defendant, if released on bail, would:

(i) fail to appear and surrender into custody.
(ii) commit another offence; or
(iii) 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
(iv) interfere with witnesses or otherwise obstruct the course of justice, whether for the defendant or anyone else; or
(v) not be protected from physical harm.

It does not automatically follow that if any section 16(1) conditions exist, that bail would be refused. Often it would be that conditions may be placed on the bail of the defendant, such as:

- the applicant residing at a specified address;
- home detention or curfew.
- conditions relating to the physical protection of a victim, e.g., non-contact clauses.
- the applicant reporting to police regularly.
- surrender of any passport.
- forfeiture of a specified sum of money if the applicant fails, without proper excuse, to comply with any term of the bail agreement; or
- surety.

Section 11 of Bail Act 1980 has recently been toughened to ensure a person, while released on bail, does not endanger the safety or welfare of members of the public, particularly those on bail for participating in organised crime activities. For example, conditions have now been specified that restrict who

(including a class of persons) the person can have contact with and/or mix with, or conditions considered necessary to protect the public by preventing, restricting, or disrupting their involvement in serious criminal activity.

"Show-cause" situations.

While there is a general presumption that bail should be granted, several situations are outlined in the *Bail Act 1980,* where the onus is reversed. These are called "show cause" situations. In a show-cause situation, the onus falls on the defence to explain why the defendant should be granted bail. Examples of show-cause situations are covered under section 16(3) of the *Bail Act 1980.* These include where the defendant is charged:

- 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
- with an offence for which the penalty is life imprisonment or an indefinite sentence (note: only a judge may grant bail in this situation); or
- with an indictable offence and while committing the offence, the defendant is alleged to have used or threatened to use a firearm, offensive weapon, or explosive substance; or
- with an offence against the *Bail Act 1980* itself (an example of this might be failing to appear in court previously); or
- contravention of a control order, as outlined in section 161ZI of the *Penalties and Sentences Act 1992* (Qld)
- contravention of a public safety order, as outlined in the *Peace and Good Behaviour Act 1982* (Qld)
- with an offence against section 359(2) of the *Criminal Code Act 1899* (Qld). This section relates to threats made against law enforcement officers.

At the time of writing, persons charged with domestic violence offences will be added to the list of show cause situations.

The outcome of a bail hearing

If bail is granted, it will result in the person being released on their own undertaking. This will involve the person signing (and you, as the presiding Justice, witnessing) a Form 7 – Undertaking as to Bail, which states that the person will appear in court at a designated place at a designated time. Additionally, the provision of a deposit of money or other security of stated value or a surety or sureties (guarantee) of stated value may be required.

Sureties

A surety is something provided by a person by guaranteeing, by way of deposit of cash or property, that a defendant will abide by the terms of the bail undertaking and appear in court on the hearing date and at the prescribed time. The surety does not have to be put forward by the defendant.

A person can only provide surety if:

- They are at least 18 years of age.
- They have no criminal convictions for indictable offences.
- The property or money they offer belongs to them.
- They are not an involuntary patient under the *Mental Health Act 2016*, who is, or is liable to be, detained in an authorised mental health service under that Act.
- They are not a person for whom a guardian or administrator has been appointed under the *Guardianship and Administration Act 2000*.
- They have not been declared bankrupt.
- They have not been, and are not likely to be, charged.

- Their personal financial worth is not less than the amount of the surety to be provided.

Usually, the ownership of real estate or cash will be accepted. If a person owns property, they can only provide surety for the amount they own. If there is still a mortgage, the surety can only provide an amount equivalent to the amount paid off.

The amount of surety required increases with:

- the seriousness of the offence.
- the number of times the defendant has previously failed to appear in court when required, and
- the fewer ties the defendant has with Queensland.

Under section 21(2) of the *Bail Act 1980*, a person who provides a surety becomes bound, upon its forfeiture, to pay the sum of money in the undertaking with respect to that surety.

Handy Tips: Sureties

- ✓ The JP must explain in detail to the surety all charges and any bail conditions, including the need for the defendant to attend all court dates and to comply with any additional conditions.
- ✓ The JP must explain to the surety that they will forfeit any promised money or property to the Crown if the defendant does not comply with all the bail conditions.
- ✓ The surety should be asked if it would damage them or their family if the undertaking were forfeited. The surety cannot be accepted if it appears that it would be damaging.
- ✓ The surety should be asked whether the defendant has indemnified them. If this is the case, then the surety cannot be accepted.
- ✓ If the surety wishes to proceed with the undertaking, you must ensure that the Affidavit of justification (form 11) is fully completed, and you must place the deponent under Oath / Affirmation.
- ✓ You must ask questions to ensure the suitability of the person to be a surety.
- ✓ The surety must be warned that if they sell any property given as an undertaking, they may be subject to criminal charges.
- ✓ If a document proving ownership is provided as evidence, any details must be recorded on the Affidavit, and the document should then be returned to the surety.

Steps for witnessing an Affidavit of Justification.

The following is the sequence that is recommended specifically for witnessing an Affidavit of justification. It must be remembered that other than the sequence listed, you should always keep in mind all the general tips about witnessing documents discussed in Chapter 4. At the end of this chapter, these steps have been outlined in a flowchart, which can be used as a "ready reckoner" when witnessing.

1. Ensure that you are in possession of a copy of the bail undertaking from the relevant court registry.	
2. Explain in detail to the surety all charges and any bail conditions, including the need for the defendant to attend all court dates and to comply with any additional conditions.	
3. Explain to the surety that they are personally liable for ensuring that bail conditions are adhered to and that they will forfeit any promised money or property to the Crown if the defendant does not comply with all the bail conditions.	
4. If the surety wishes to proceed with the undertaking, you must ensure that the Affidavit of justification (form 11) is fully completed.	
5. Ask the deponent for identification.	
6. Advise the deponent that you are required to administer an Oath / Affirmation. Ask the deponent whether they would prefer to take an Oath on the Christian Bible or if an Affirmation is desired.	If a Christian Oath is chosen, go to step 7. If not a Christian Oath or if an Affirmation is preferred, ask further questions about preference, and refer to chapter 12 re other Oaths and Affirmations for administration.
7. Ask the deponent to take the Bible in either of their bare hands and then say, "I swear that the contents of this summons and any further information that I may supply either orally or in writing are true and correct, so help me God."	
8. Ask the complainant whether any other JP has refused to witness this document.	This may help to pinpoint possible problems.
9. Ask questions to ensure the suitability of a person to be a surety.	This includes asking to see evidence of ownership of any real or personal property. Evidence of ownership of real estate would be like the evidence required when witnessing land title documents. Personal

	property that can be disposed of easily (e.g., car, jewellery) should only be accepted as a last resort. When determining suitability, you may also consider the person's character and proximity to the defendant (whether by kinship, place of residence, or otherwise). If a document proving ownership is provided as evidence, you must record on the Affidavit any details and return the document to the surety. Ensure that any amount owed against the nominated property must be subtracted from the overall value when determining its value.
10. Ask the surety if it would be damaging to them or their family if the undertaking was forfeited	If the answer is yes, decline to accept the person as a surety.
11. Ask whether the defendant has indemnified the surety.	If the answer is yes, then the surety cannot be accepted.
12. The surety must be warned that if they sell any property given as an undertaking, they may be subject to criminal charges.	
13. Ask the deponent whether they fully understand the contents and practical effect of signing this document.	This may (again) include you asking questions or explaining the consequences for the surety of the defendant not meeting all bail conditions.
14. Check the document for alterations and blank spaces.	Alterations must be initialled by both parties. Large blank spaces must be Z out.
15. Check page numbering – (number each page 1 of 4, 2 of 4, etc.) in the lower right-hand corner.	Initial each page and ensure that the deponent does the same.
16. Check for any exhibits. Ensure that the exhibits are appropriately endorsed and that they are referred to in the body of the Affidavit.	
17. Ensure that the Affidavit is signed in front of you and that the deponent's signature and your signature appear on every page.	
18. Sign the Jurat (in blue or black) on the last page; affix your seal of office and insert your registration number.	Do not place the seal over your signature or sign over your seal.
19. Obtain the Form 8 documents from the Court. Explain the details of the form in full and have the surety sign all copies of the Undertaking of Surety portion of the document. You must sign the Notice to	

Surety as the person before whom the undertaking is made.	
20. Instruct the surety to pay the surety amount to the relevant court registry and ensure that the court registry has a copy of this documentation.	
21. Note the details of any questions asked and actions taken in your logbook.	

Frequently Asked Questions

I have been asked to conduct a bail hearing, and I feel uncomfortable about doing this. What should I do?

If you are approached to conduct a bail hearing, you should seek advice from the Department of Justice and Attorney-General if you feel unsure about your role in the process.

What happens if bail is refused?

If bail is refused, the defendant is remanded in custody, and a remand warrant is prepared that authorises police to remove the person to the nearest remand centre.

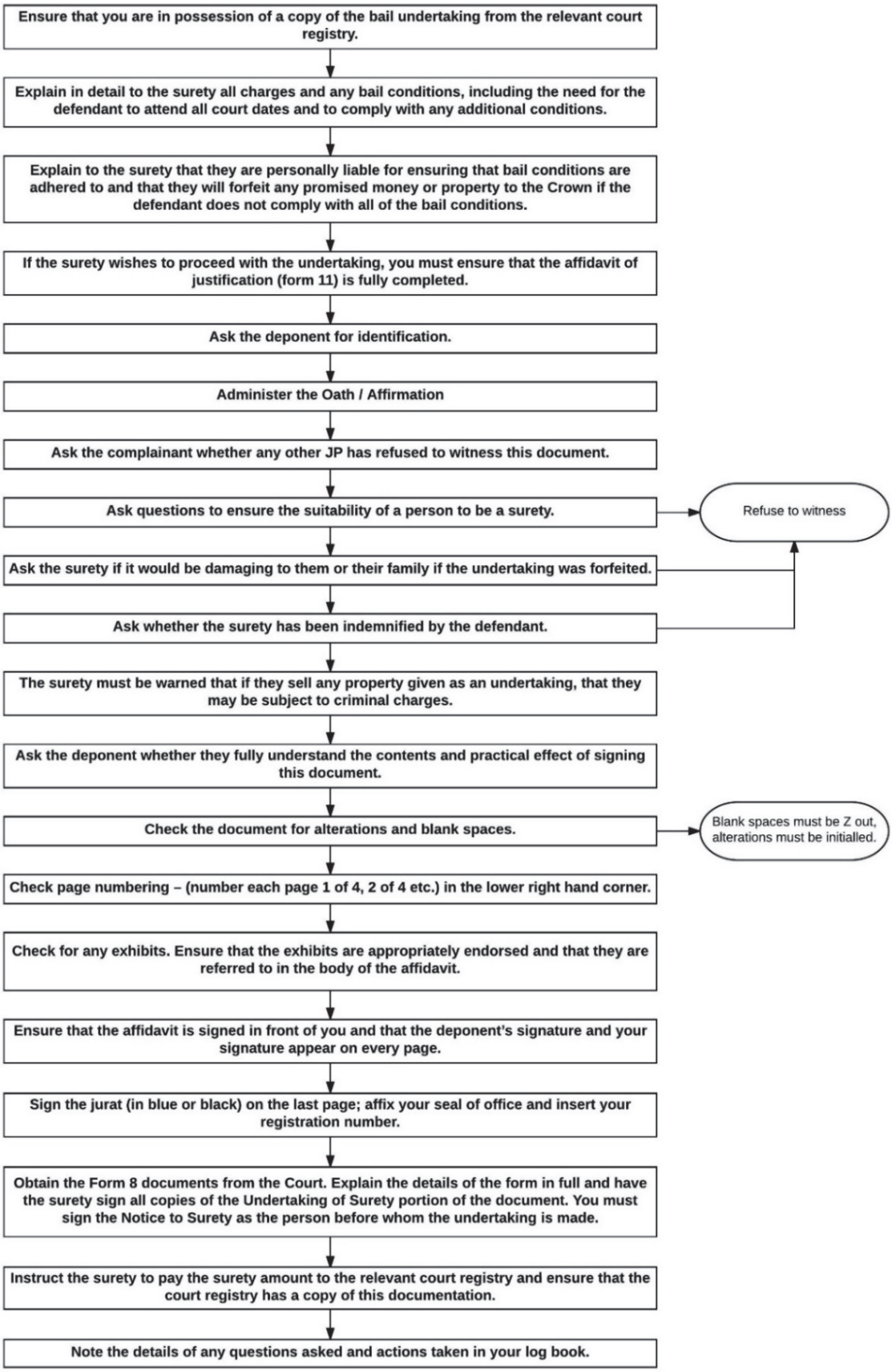
If the defendant fails to appear at a court hearing, what happens to the money or property provided as surety?

In other words, if the defendant fails to appear at a court hearing, the person providing the surety forfeits the promised money or property to the Crown.

Resource and Reference Materials – Bail and Sureties

Checklists

Following is a flowchart that can be used to guide you when witnessing an Affidavit of justification. It must be remembered that, in addition to the sequence listed, you should always keep in mind all the general tips about witnessing documents discussed in Chapter 4.


Ensure that you are in possession of a copy of the bail undertaking from the relevant court registry.
Explain in detail to the surety all charges and any bail conditions, including the need for the defendant to attend all court dates and to comply with any additional conditions.
Explain to the surety that they are personally liable for ensuring that bail conditions are adhered to and that they will forfeit any promised money or property to the Crown if the defendant does not comply with all of the bail conditions.
If the surety wishes to proceed with the undertaking, you must ensure that the affidavit of justification (form 11) is fully completed.
Ask the deponent for identification.
Administer the Oath / Affirmation
Ask the complainant whether any other JP has refused to witness this document.
Ask questions to ensure the suitability of a person to be a surety.
Refuse to witness
Ask the surety if it would be damaging to them or their family if the undertaking was forfeited.
Ask whether the surety has been indemnified by the defendant.
The surety must be warned that if they sell any property given as an undertaking, that they may be subject to criminal charges.
Ask the deponent whether they fully understand the contents and practical effect of signing this document.
Check the document for alterations and blank spaces.
Blank spaces must be Z out, alterations must be initialled.
Check page numbering – (number each page 1 of 4, 2 of 4 etc.) in the lower right hand corner.
Check for any exhibits. Ensure that the exhibits are appropriately endorsed and that they are referred to in the body of the affidavit.
Ensure that the affidavit is signed in front of you and that the deponent's signature and your signature appear on every page.
Sign the jurat (in blue or black) on the last page; affix your seal of office and insert your registration number.
Obtain the Form 8 documents from the Court. Explain the details of the form in full and have the surety sign all copies of the Undertaking of Surety portion of the document. You must sign the Notice to Surety as the person before whom the undertaking is made.
Instruct the surety to pay the surety amount to the relevant court registry and ensure that the court registry has a copy of this documentation.
Note the details of any questions asked and actions taken in your log book.