

Bail

The approach to bail in domestic and family violence related cases varies between Australian jurisdictions (see table below). In a number of jurisdictions, bail laws have incorporated special provisions that either displace or reverse the general presumption in favour of bail [Ng & Douglas 2016]. In all Australian jurisdictions the safety and protection of the victim and any children or other people at risk is a key consideration in the decision to grant bail.

Where a judicial officer considers that a grant of bail is appropriate in a case where a domestic and family violence related offence is alleged, bail conditions may be imposed to minimise the **risk** of further harm to the victim and any children or other people at risk. For example the accused may be monitored by GPS. If GPS monitoring is used, consider imposing a significant exclusion zone (eg several kilometres) around the victim's home so that once police are alerted to the accused's breach they have sufficient time to attend directly at the victim's address. Further conditions may include prohibiting the accused from contacting, harassing, threatening or intimidating the victim or others; or conditions requiring the accused to vacate the family home (exclusion/ouster), or to not go within a certain distance of the victim's home, or to undergo treatment or counselling (**perpetrator interventions**). Bail conditions should be carefully balanced having regard, along with other relevant matters, to the circumstances of the accused and the victim, the accused's history of violence towards the victim, and the fact that the conditions are imposed in a context where there is not yet a finding of guilt. For example, a condition forcing an unwilling accused to participate in a perpetrator intervention program may increase the risk of breaching bail and the later imposition of a custodial sentence [Ng & Douglas 2016]. When determining the most appropriate bail conditions in a particular case, judicial officers should ensure where possible that they have access to all available information regarding, for example, existing orders and prior convictions; and, if necessary, make enquiries of the prosecution.

There may be particular considerations relevant to bail where the victim or accused is from a **vulnerable group**.

Aboriginal and Torres Strait Islander people may experience particular difficulties in obtaining bail or meeting bail conditions. For example, an accused may be denied bail because of lack of legal representation, insufficient assets to provide a surety, no stable address, or absence of a responsible person to care for children; and yet being remanded in custody may cause further disadvantage and harm to an accused who is detained far from community and family or has problems with **drug or alcohol addiction** [WA Aboriginal BB 2008]. In ordering bail conditions in these circumstances, it may be appropriate for the judicial officer to consider an accused's kinship and family ties with a particular location and the availability of community or family-based support that may be engaged to ensure that bail conditions are observed [Judicial Commission of NSW Equality before Law BB 2018]. The safety and protection of the victim and other people may override these considerations.

Bail may be imposed alongside a **protection order**. It is important that bail conditions and protection order conditions are consistent (or, if different, not inconsistent) as inconsistency may increase confusion and the likelihood of breach [WALRC 2014]. Bail conditions may also be imposed when there are also child protection orders or family law orders in place [Vic FVBB 2014]. Such orders should also be considered in determining appropriate bail conditions and inconsistency should be avoided where possible.

A bail condition may require an accused to comply with the conditions of a protection order, with the consequence that a breach of the protection order amounts to a breach of bail. Where there is no protection order in place, and the bail conditions alone may not protect a victim adequately, it may be appropriate for the judicial officer, where legislation permits, to also issue a protection order [ALRC/NSWLRC 2010].

Where an accused applies for bail upon being charged with a breach of a protection order, the judicial officer should consider the **risk** of breach of bail in light of the alleged breach of the protection order. Where an accused's conduct amounts to a breach of both a bail order and a protection order, and the accused applies for bail, the judicial officer should consider the possibility of heightened risk of harm to the victim and any children or other people at risk.

It is important that those affected by the bail conditions understand the nature and effect of the bail decision [ALRC/NSWLRC 2010], and that any order, or any condition of an order, can only be varied or revoked by the court, not by agreement between the accused and victim or other individuals. The victim and those affected by bail conditions should be made aware of the grant of bail and the conditions of the bail granted to the accused.

Jurisdiction	Relevant legislation
Australian Capital Territory	<i>Bail Act 1992</i> ss 9B(iv); 25(4) (f)(i)-(vi)
New South Wales	<i>Bail Act 2013</i> ss 16A, 16B, 17
Northern Territory	<i>Bail Act</i> ss 7A(1)(dd), (dh); 27A(1)(a)-(c)
Queensland	<i>Bail Act 1980</i> s 16(1)(3)

South Australia	<i>Bail Act 1985</i> s 10A(2)(ba); 11(2)(a)(ii); 21B.
Tasmania	<i>Family Violence Act 2004</i> s 12
Victoria	<i>Bail Act 1977</i> s 4(4)(b) (ba); s 5(2A)(d), (f)
Western Australia	<i>Bail Act 1982</i> Sch 1, Pt C, cl 3B; Pt D cl 2(2b)