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Bail Acts of the Caribbean Report

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Introduction

At present, only 4 of the Member States have enacted special Bail Acts. The Trinidad and Tobago Act is the oldest, dating from 1994. Barbados and Jamaica followed in 1996 and 2000 respectively. St. Kitts is the most recent, having enacted the legislation in 2012. Dominica and Antigua and Barbuda have tabled Bills in Parliament.^{1,2} These Acts are largely based on the Bail Act 1976 of the England which is still in use there today. St. Lucia does not have a special Bail Act but has included equivalent provisions in its Criminal Code 2004.

In the other Caribbean jurisdictions, the bail provisions are piecemeal. Although they speak of the discretion of judge and Magistrate to grant bail, they do not state the considerations. Instead, the common law principles are used.

Countries with Bail Acts

Member State	Legislation
Trinidad & Tobago	Bail Act (Chap 4:60, 1994)
Barbados	Bail Act (1996-28)
Jamaica	Bail Act 2000
St. Lucia	Criminal Code 2004
St. Kitts & Nevis	Bail Act 18 of 2012 ³
(Dominica)	(Bail Bill introduced October 2016)
(Antigua & Barbuda)	(Bail Bill introduced 2016)

¹ <http://listen.dbcradio.net/new-bail-act-set-for-parliament/>

² <http://legalaffairs.gov.ag/pdf/bills/THE-BAIL-BILL-2016-23-11-16.pdf>

³ Unfortunately this Act was not available either online or in the Law Library

Countries without Bail Acts

Member State

Legislation

Antigua & Barbuda

Magistrates' Code of Procedure Act, Cap 255 s62 (Bail Bill introduced 2016)

Belize

Crime Control and Criminal Justice Act, Cap 102, Summary Jurisdiction (Procedure) Act, Cap 99 (2000), Indictable Procedure Act, Police Act, Juvenile Offenders Act

Dominica

Magistrates Code of Procedure Act, Chap 4:20, s58 (Bail Bill introduced 2016)

Grenada

Criminal Procedure Code, Cap 72 ss 47-49, Juvenile Justice Act 24 of 2012

Guyana

Criminal Law Procedure Code, Cap 10:01, ss81-87, Guyana Kidnapping Act (6 of 2003) (no bail for kidnapping), Firearms (Amendment Act) (no bail for certain offences), Summary Jurisdiction (Procedure) Act, Summary Jurisdiction (Appeals) Act, 3:04, Criminal Law Procedure Act

Montserrat

Criminal Procedure Code, 9 of 2010

St. Vincent & the

Criminal Procedure Code Cap 172, (1988)

Grenadines

General Provisions

The Right to Bail

Most of the countries provide in their Constitutions that a person who has been charged but who is not tried within a reasonable time is entitled to be released either unconditionally or

upon reasonable conditions. Some of the Constitutions expressly mention bail, and a few state that the bail must not be unreasonable.

For example, the Antigua and Barbuda Constitution at Section 5(4-6) provides

(4) When a person is arrested, excessive bail shall not be required in those cases where bail is being granted.

(5) Any person who is arrested or detained-

- a. for the purpose of bringing him before a court in execution of the order of a court; or
- b. upon reasonable suspicion of his having committed or being about to commit a criminal offence under any law,

and who is not released shall be brought before the court within forty-eight hours after his detention and, in computing time for the purposes of this subsection, Sundays and public holidays shall be excluded.

(6) If any person arrested or detained as mentioned in subsection (5) (b) of this section is not tried within a reasonable time, then, without prejudice to any further proceedings which may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial and, subject to subsection (4) of this section, such conditions may include bail.

Similar provisions are found in the Barbados Constitution at section 13(3)(b), Belize 5(5), Dominica 3(5), Grenada 3(5), Guyana 139(4), Jamaica 14(3), St. Vincent and the Grenadines 27(5), Montserrat 6(6), St. Lucia 3(5) and St. Kitts & Nevis 5(5).

Trinidad is somewhat different. The Trinidad and Tobago Constitution provides at section 5.

(1) Except as is otherwise expressly provided in this Chapter and in section 54, no law may abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms hereinbefore recognised and declared.

(2) Without prejudice to subsection (1), but subject to this Chapter and to section 54, Parliament may not—

- (f) deprive a person charged with a criminal offence of the right—

- (i) to be presumed innocent until proved guilty according to law, but this shall not invalidate a law by reason only that the law imposes on any such person the burden of proving particular facts;
- (ii) to a fair and public hearing by an independent and impartial tribunal; or
- (iii) to reasonable bail without just cause;

Although these provisions can be considered a Constitutional right to bail, most of the countries which have Bail Acts still expressly mention the right in the Act. Thus, the Barbados Bail Act provides at section 4(1)

- 4(1) Subject to this Act, a defendant shall be entitled to bail.
- (2) Where bail is granted, the conditions of bail shall be reasonable.

This is repeated in the Jamaica Bail Act at section 4(1), the Dominica Bill at section 4(1) and the Antigua and Barbuda Bill at section 5(1).

The St. Vincent and the Grenadines Criminal Code of Procedure provides at section 43 that bail shall not be excessive, and continues that the amount of bail shall not be deemed to be excessive if it is equal to or less than the maximum fine prescribed for any offence with which the applicant has been charged.

The Trinidad legislation makes other provisions which will be further discussed below. The question of bail for capital offences will also be discussed below.

A defendant who has been refused bail by a judge may reapply if there has been a change of circumstances, such as matters of health or delay in obtaining a trial date.

In Trinidad, following a 2005 amendment, both defendant and prosecutor can appeal to Court of Appeal in respect of judge's decision on bail. In Jamaica, since Amendment 20 of 2010, the

prosecutor can appeal the Resident Magistrate's decision to grant bail. Previously, only the defendant could appeal. Antigua and Barbuda, Dominica and St. Lucia also provide for prosecutorial appeals, but Barbados does not.

Bail may also be granted after conviction has been handed down if the defendant has appealed. However, this is only granted in usual circumstances as there is no longer a presumption of innocence.⁴

Offences which are not punishable by imprisonment

The Acts generally provide that bail is available to an accused in relation to offences which are not punishable with imprisonment except in certain cases:

1. If he or she has previously absconded
2. If he or she has been arrested while on bail
3. If he or she needs to be protected for his or her own welfare.

These provisions are found at section 5(3) of the Barbados Act, 3(3) and 4(4) of the Jamaica Act, and 6(4) of the Trinidad Act.

Offences which are punishable by imprisonment

Where the offence is punishable by imprisonment, the Acts provide that the courts must consider certain factors. These are described in the Trinidad Act at 6(2), the Jamaica Act at 4(1), the Barbados Act at 5(1), the Dominica Bill at 6(1) and the Antigua and Barbuda Bill at 7(1).

For example, the Trinidad Act reads:

⁴ See for example the Montserrat case *Warren Cassell v R*, [High Court Criminal Appeal No. 1 of 2012] decided 25th July, 2012.

6(2) Where the offence or one of the offences of which the defendant is accused in the proceedings is punishable with imprisonment, it shall be within the discretion of the Court to deny bail to the defendant in the following circumstances:

(a) where the Court is satisfied that there are substantial grounds for believing that the defendant, if released on bail would—

- (i) fail to surrender to custody;
- (ii) commit an offence while on bail; or
- (iii) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person;

(b) where the Court is satisfied that the defendant should be kept in custody for his own protection or, where he is a child or young person, for his own welfare;

(c) where he is in custody in pursuance of the sentence of a Court or any authority acting under the Defence Act;

(d) where the Court is satisfied that it has not been practicable to obtain sufficient information for the purpose of taking the decisions required by this section for want of time since the institution of the proceedings against him;

(e) where, having been released on bail in or in connection with the proceedings for the offence, he is arrested in pursuance of section 13;

(f) where he is charged with an offence alleged to have been committed while he was released on bail; or

(g) where his case is adjourned for inquiries or a report and it appears to the Court that it would be impracticable to complete the inquiries or make the report without keeping him in custody.

The Acts continue that in exercising its discretion, the Court may consider the following:

(a) the nature and seriousness of the offence or default and the probable method of dealing with the defendant for it;

(b) the character, antecedents, associations and social ties of the defendant;

(c) the defendant's record with respect to the fulfilment of his obligations under previous grants of bail in criminal proceedings;

(d) except in the case of a defendant whose case is adjourned for inquiries or a report; the strength of the evidence of his having committed the offence or having failed to surrender to custody; and

(e) any other factor which appears to be relevant.

In Barbados, the Court can also consider the length of time the defendant is likely to spend in custody if the matter is adjourned. In Jamaica, the Court can consider whether the accused is a repeat offender, but section 4(6) then provides that where this has been taken into consideration, a different court must hear the substantive criminal charge.

Conditions of Bail

The Court can set certain conditions for bail. For example, the Trinidad Act provides at section 12,

12. (3) A Court may further require any person applying for bail to—

- (a) surrender his passport to the Court;
- (b) inform the Court if he intends to leave the State;
- (c) report at specified times to any police station

(4) Where it appears that the applicant for bail is unlikely to remain in Trinidad and Tobago until the time appointed for him to surrender to custody, he may be required, before being released on bail, to give security for his surrender to custody and the security may be given by him or on his behalf.

Police Bail

In all of the jurisdictions, senior police officers can grant bail in a similar manner as magistrates. In Barbados, the Act provides at section 6 that the officer must be of the rank of inspector or higher, or must be the officer in charge of the station to which the accused was brought. Bail must be considered where the defendant cannot be brought before the court within 24 hours. Bail must be granted for offences where there is no imprisonment. It may be granted to for other offences. In St. Lucia, section 594 provides that bail must be considered if the accused cannot be brought before a Magistrate “without undue delay” but in any event within 72 hours. Otherwise the provision is the same as in Barbados.

The Dominica Bill provides for police bail at section 5 and the Antigua and Barbuda Bill at section 11. The officer must be of or above the rank of Inspector. The provisions are essentially the same as in Barbados.

The Jamaica Act does not make separate provisions for police officers. Instead, section 3 provides that every person who is charged with an offence shall be entitled to be granted bail by a Court, a Justice of the Peace or a police officer. “Police officer” is defined as the arresting officer or the officer or subofficer in charge of the station or lockup. The 2001 Regulations place a limit on the amount of bail which may be set by an officer or Justice of the Peace.

In Trinidad, there are no separate provisions for police officers, and there are no restrictions on them.

In Guyana, the Police Act Cap 16:01 provides at section 20 that the member of the force in charge of the police station may enquire into a case of a person arrested without a warrant, and except where the case appears serious, may release the accused on his or her own recognizance with or without sureties.

Bail Procedure

The procedure is outlined in a simple way in Part II of the Barbados Act (sections 7 to 11). This Act provides that where bail is granted, denied or varied, the court or police officer must keep a record of the decision and provide a copy to the defendant. A magistrate who makes an order in respect of bail must include his or her decisions in the record so as to facilitate the defendant or the police in appealing to the High Court. Where a magistrate has made a decision, the defendant may appeal to the High Court as of right.

If the defendant is in custody, he or she may raise the issue of bail at each subsequent hearing, though the court need not hear any argument or fact it has heard previously. If a trial has started and has been adjourned, the court, in refusing bail, must issue a certificate in a prescribed form stating that it heard a full argument on bail or that new considerations, such as a change in circumstances, had been placed before it before the refusal.

Similar provisions are found in St. Lucia (section 596), Dominica (section 13) and Trinidad (section 6A). In these countries, the prosecutor also has a right of appeal.

The Jamaica provisions at section 7 to 11 are similar, except that where a Magistrate grants bail, the police must follow a specified procedure if they intend to appeal. They must immediately give oral notice of their intention to appeal, and must serve a written notice of appeal on the court and defendant within 24 hours. The court must immediately remand the defendant on receiving the oral notice, and must immediately release him or her if the written notice of appeal is not received within 24 hours. In Antigua and Barbuda, written notice of appeal must be given within 2 hours, and the appeal must be heard within 5 days (section 17). The prosecutor's right to appeal only applies where the person is charged with an offence punishable by 5 years or more in prison.

Sureties

Where a defendant is required to provide a surety, the court must consider the suitability of the proposed surety in regard to his or her financial resources, character and previous conditions, and proximity (kinship, residence or otherwise) to the defendant. If the defendant is unable to provide a surety on the same occasion, then the recognizance of the surety may be entered into subsequently.

If the defendant fails to surrender to custody, then the court may order the forfeiture of all or some of the security. The defendant or surety may apply to the court for it to consider mitigating factors such as reasonable cause for the defendant's failure to surrender.

These provisions are found at sections 14-15 of the Barbados Act, section 16 and 17 of the Trinidad Act, 603 and 604 of the St. Lucia Code, 18 and 19 of the Antigua and Barbuda Bill, and 10 and 11 of the Dominica Bill.

The Dominica Bill also requires the Court, in considering the suitability of the surety, to consider the degree of control or influence the surety has over the defendant. The Jamaica Act includes among the factors, the surety's profession, occupation, trade or business. The Jamaica Regulations then state at 6 that the Court may refuse to make the determination unless satisfied about the proposed surety's identity, residential address and time residing there, and ownership of the asset being put up as security. In addition, the judicial officer, lawyer on record and co-accused are all barred from standing as surety in that case. A person with a pending criminal charge is also exempt.

Young People

While the Acts generally provide that "child" is defined as under the age of 14, they vary in their definition of young person. In Barbados, Belize, Dominica and Trinidad, a young person is under 16. In Jamaica, however, a young person is under the age of 17.

The St. Lucia Criminal Code defines "child" as a person who is under 12 and "young person" as one who is under 16.

The Acts provide that

(5) If a parent or guardian of a child or young person consents to be a surety for the child or young person for the purposes of this subsection, the parent or guardian may be required to ensure that the child or young person complies with any requirement imposed on him or her by virtue of subsection (4), but —

(a) no requirement shall be imposed on the parent or the guardian of a young person by virtue of this subsection where it appears that the young person will attain the age of eighteen before the time to be appointed for him or her to surrender to custody; and (b) the parent or guardian shall not be required to secure compliance with any requirement to which his or her consent does not extend and shall not, in respect of those requirements to which his or her consent does not extend, be bound in a sum greater than five hundred dollars.

These provisions are found at section 601(5) of St. Lucia, 12(5) of Trinidad, 5(4) of Dominica, 12(5) of Barbados and 6(5) of Jamaica.

This provision is not found in the Guyanese Code, but the Code provides at section 90 that where the accused person admitted to bail is an infant, the recognizance should only be taken from the surety.

Comparative Table

Provision	Antigua & Barbuda	Barbados	Dominica	Jamaica	St. Lucia	Trinidad & Tobago
Entitlement to bail	5	4	4(1)	3(1)	592	5
Reasons for denying bail	7(1)	5(1)	6(1)	4(1)	593(1)	6(2)
Factors for the Court to consider	7(2)	5(2)	6(2)	4(2)	593(2)	6(3)
Conditions for bail	8,9	12	8	6	601	12
Police bail	11	6	5		594	
Record of decision	12	7	12	7	596	8
Right to apply to High Court	13	9	14	9	598	10
Powers of High Court	16	11		10	600	11
Considerations for sureties	18	14	10	17	603	16
Forfeiture of sureties	19	15	11	18	604	17
Offences	20-24	16-18	17-19	14	605, 606	13, 14, 18, 19
Prosecution right of appeal	17		20	10	608	11



Significant Differences Between Countries

Bail for Murder

Section 5(4) of the Barbados Bail Act provides that a person charged with murder, treason, high treason or an indictable offence under the Firearms Act shall not be granted bail except by a High Court judge. In Antigua, Act 2004-13 replaced s62(3) of Magistrates Code of Procedure to specifically prohibit a Magistrate from granting bail to a person charged with murder, treason, certain offences against Firearms Act and all offences under Sexual Offences Act. The Antigua and Barbuda Bill provides at section 4 that High Court and Court of Appeal judges have exclusive jurisdiction to hear application for bail in certain offences. These offences include murder, treason, hijacking, and indictable offences under the Firearms, Electronic Crimes and Telecommunications Acts.

The St. Lucia Criminal Code was amended in 2006 by Act 11. A judge can now entertain applications for bail for murder, treason, rape and a few other offences for which bail previously could not be granted.

The Dominica Bill provides that an accused who is charged with murder, treason, drug trafficking, any offence under the Firearms Act, 2011 punishable by a term of imprisonment of 5 years or more; kidnapping, abduction, robbery, rape or unlawful carnal knowledge; or terrorism or terrorism related offence, shall not be granted bail unless there are exceptional circumstances. These exceptional circumstances not include the usual conditions relating to non-interference with witnesses and surrendering to custody, but also provide that it must be in the public interest for the defendant to be released. There is no explanation of “public

interest”, but this expression was used in a case from Namibia where one of the grounds for refusing bail was that it would not be in the public’s interest. In that case, a policeman was charged with stealing a police-issued firearm and shooting his girlfriend.⁵ The Namibia Criminal Procedure Act section 63(4)(e) states that a person may not be released on bail where, in exceptional circumstances, there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.⁶

Trinidad goes even further. The Trinidad Bail Act provides at section 5(1) that bail cannot be granted at all where a person is charged with murder, treason, piracy or hijacking, or any offence for which death is the penalty. The St. Vincent Criminal Code contains a similar provision at section 43.

Professional Sureties

All of the jurisdictions provide that a Court may require a defendant to provide a surety to secure his or her surrender to custody. While those without Bail Acts do not expressly state any restrictions, it is generally an offence for a defendant to pay a third party to be a surety. For example the Barbados Act provides at section 16:

16. (1) Where a person
 - (a) indemnifies another or agrees to indemnify another; or
 - (b) accepts a fee from another or agrees to accept a fee from another against any liability which that other may incur as a surety to secure the surrender to custody of a defendant, he and that other person are guilty of an offence.
- (2) An offence under subsection (1) is committed whether
 - (a) the agreement is made before or after the person to be indemnified becomes a surety;
 - (b) the person becomes a surety or not; or

⁵ *The State v Gideon Hashiyana* (cc 04/2010) [2010] NAHC 30 (29 March 2010), accessed via <http://www.saflii.org/na/cases/NAHC/2010/30.html>

⁶ http://www.wipo.int/wipolex/en/text.jsp?file_id=223230#LinkTarget_6767

(c) the agreement contemplates compensation in money or in money's worth.

Trinidad makes a similar provision at section 18, Dominica at section 17 and Antigua and Barbuda at sections 20 and 23. Despite this provision, there exist what are known as “professional bailers” who stand as sureties in exchange for a fee. This issue was highlighted in the 1965 case *Bardoon v Magistrates (2nd and 3rd Courts)*⁷ where the Court of Appeal, led by Chief Justice Wooding, said:

The appellant admitted that he stood surety on eleven occasions in the course of four months. It is clear from his own admission that he is a professional bailer, a type of person who ought to be stamped out of this community because of the ill effects which follow from his activities here, and we think the Courts ought to be astute to do everything possible to put an end to them.

Despite the Court’s censure, this practice remains common, and in fact, calls have been made to regularize it. For example, Dana Seetahal, SC in a 2012 article in the Trinidad Express stated:

In T&T it is an open secret among the fraternity in the criminal justice system that professional bailors are the mainstay of the bail system. ...

What then must a person of modest means do where he or a member of his family is charged with an offence and bail is fixed in the sum of say \$50,000? He seeks out a "bailor" who is often recommended by the police or even a JP. That person provides a deed, up to the requisite amount, which is then checked by the court authorities and will invariably prove to be clear. The defendant or his family or friends will then fork out to the bailor ten per cent of the bail amount. This means if bail was fixed at \$50,000 the payment to have that deed used as security is a minimum of \$5,000. This is bail as we know it for the average person who may not have a clear deed since most likely even if he owns his house he has a mortgage. ...

The law thus prohibits professional bailors. This is completely ridiculous and unfair since first, everyone knows that this is what happens every day and secondly were it not for this under-the-table system only

⁷ TT 1965 CA 59, decided April 22, 1965 (unreported)

the rich or well off person charged with an offence can afford bail. The entire system needs to be revised to legitimise professional bailors as has been done in other countries...⁸

There is evidence that professional bailing also occurs Belize. The Justices of the Peace Association Chapter of Toledo's Code of Ethics provides at section 8:

A Justice of the Peace shall not associate himself or purport to lend support to a person described as a "professional bailor", that is, a person who acts as a surety for an accused person for a fee, reward, gratuity, recompense or advantage contrary to the laws of Belize.⁹

On the other hand, the Belize Bail Reform Act of 1999 expressly permits official Bail Bondsmen approved by the Supreme Court.

Professional bailing is not an offence under the Jamaica Act. The Jamaica Act does not contain the provision creating an offence of standing as surety for money.

Review of cases

Section 12 of the Jamaica Act provides that a Resident Magistrate shall carry out, at least once per week, a review of cases involving defendants who were granted bail but were unable to take up such bail. The other Acts do not make this provision.

⁸ http://www.trinidadexpress.com/commentaries/Bail_in_T_T-148351925.html

⁹ <http://www.ipbelize.org/about-us/25-statements/55-code-of-ethics.html>



Current Issues

Young Persons

The issue of bail for young persons was examined by the Court of Appeal of the Bahamas in a decision handed down on September 1, 2016.¹⁰ The Court noted that section 3 of the Child Protection Act stated clearly that in any determination regarding a child, that child's welfare should be of paramount consideration. This accorded with the Convention of the Right of the child. The Court found that the judge at first instance in refusing bail had only canvassed the provisions of the Bail Act and had not, as required by the Child Protection Act, cast her mind to the factors affecting the welfare of the minor. One significant factor which she seemed to have overlooked was that he was being held at an adult facility. Another was his complaint that he had not received adequate medical attention for his gunshot wounds. She also failed to consider the minor's proposed alternatives to remand including the use of ankle-monitoring. The Court of Appeal, at paragraph 89 of their judgment, found the judge's approach to be "fundamentally flawed". The Court granted bail with conditions including a curfew and a requirement for the minor to make every effort to enroll in an educational programme.

This case sets an important precedent for judicial officers in the Member States.

Recent Amendments to Tackle Gun Violence

The Bail Amendment Act 7 of 2015 of Trinidad introduced new provisions which expired in August 2016. This Act was enacted with sufficient majority that it could take effect even though it was inconsistent with sections 4 and 5 of the Constitution (declaration and protection of rights and freedoms). Under the amendment, persons charged with certain firearm offences

¹⁰ *R.B (A Juvenile) v AG* SCCrimApp 205 of 2015 decided September 1, 2016 (unreported). Accessed via <http://www.courtofappeal.org.bs/download/059952600.pdf>

could not be granted bail for the first 120 days. If the trial did not start within the 120 days, then the defendant could apply for bail.

In the recent case of *Danielle St. Omer v AG Trinidad and Tobago*¹¹, the Court examined the Amendment notwithstanding the fact that the provisions had already expired. Among other things, the Court considered the fact that the amendment seemed not to have had any impact in the fight against violent crime. It was also noted that it was extremely unlikely that a trial would start within 120 days, and made reference a well-publicized murder case which lasted 10 years ending in 2016. The Court held that the Amendment was unconstitutional because it was not reasonably justifiable in a society which has proper respect for the rights and freedoms of the individual. It was also held that the Act violated the principle of separation of powers by removing the jurisdiction and discretion of the Court to grant bail for 120 days in circumstances caught by the legislation. Damages and costs were awarded to the two claimants in the matter.

Similarly in the Jamaican case *Adrian Nation v DPP*¹², the Court examined two “Anti-Crime bills”, the Bail Amendment Act 2010 (Act 20/2010) and the Bail (Interim Provisions for Specified Offences) Act 2010 (Act 22/2010). In these Acts,

- i. The entitlement to bail in Section 3 of the Bail Act 2000 was altered with regards to certain specified offences as contained in a Second schedule;
- ii. The burden of proof as to whether a person charged with an offence should access bail was reversed – it was the person charged who now bore the burden of “satisfying” the Court that bail should be granted. (section 3(4A))

¹¹ CV 3475 of 2015, decision October 7, 2016 (unreported). Accessed via:

http://webopac.ttlawcourts.org/LibraryJud/Judgments/HC/gobin/2015/cv_15_3475DD07oct2016.pdf

¹² 2010 HCV 5201, decision July 15, 2011 (unreported). Accessed via:

<http://supremecourt.gov.jm/sites/default/files/judgments/Nation,%20Adrian%20v%20The%20Director%20of%20Public%20Prosecutions%20and%20The%20Attorney%20General%20of%20Jamaica%20%20Consolidated%20with%20Wright,%20Kerreen%20v%20The%20Director%20of%20Public%20Prosecutions%20et%20al.pdf>



- iii. There were set periods, a minimum of seven days and a maximum of fourteen days when a person held in custody should be brought to court, up to sixty days, before Section 22 of the Bail Act could come into force. This section referred to procedure on arrest and detention where a person is not charged within twenty four hours of such charge or arrest. (section 3A, 3B)
- iv. A right of appeal was granted to the prosecution where bail was granted.
- v. A Second Schedule containing a list of eleven serious sets of offences for which there were special provisions for the grant of bail.

The Court held that the sections designated 3A and 3B of the Bail Act were void as being unconstitutional, and that section 3(4A) and the second schedule were also void.¹³

¹³ Notwithstanding this outcome, the Prime Minister of Jamaica recently announced plans to amend the Bail Act to prevent persons charged with murder from getting bail in certain circumstances: <http://jamaica-gleaner.com/article/lead-stories/20160525/govt-amend-bail-act>

International Legislation

Bail reform is ongoing in many countries. In some countries reform occurs as governments seek to appear tougher on crime, and measures are taken such as amending the Acts so as to remove presumptions for bail. In other countries, such as Canada, on the other hand, reform has come about because research has shown that the bail system is “broken” and has disproportionately adverse effects on those who are already at a disadvantage in society.

United Kingdom

The Bail Act of 1976, which forms the basis of the Caribbean Acts, remains the law.

In 2015, following public consultation, then Home Secretary Theresa May announced a package of reforms mostly related to police use of pre-charge bail, including setting a limit that pre-charge bail should not last longer than 28 days, with extensions permissible only under specific circumstances and court oversight for any extension beyond 3 months. May stated in a press release: “I have been clear that it is simply not acceptable for individuals to spend months and in some cases years on pre-charge bail, with no system of review, only for charges never to be brought against them”.¹⁴

Australia

The operation of bail in New South Wales is governed by the *Bail Act 1978* which is similar in substance to the Caribbean Acts although the form is very different.

Before the amendments of 2013, the Act provided:

“A bail authority that makes a bail decision under this Act is to have regard to the presumption of innocence and the general right to be at liberty.”

¹⁴ <https://www.gov.uk/government/news/home-secretary-announces-time-limits-for-police-bail>

This has been replaced with a preamble which states:

“The Parliament of New South Wales, in enacting this Act, has regard to the following:

- (a) the need to ensure the safety of victims of crime, individuals and the community,
- (b) the need to ensure the integrity of the justice system,
- (c) the common law presumption of innocence and the general right to be at liberty.”

The amendment in 2013 introduced the concept of “show cause” offences, for which the accused was required to show cause why detention was not justified. These include serious sexual offences against minors, serious indictable offences involving firearms and military style weapons, and drug trafficking. Defendants must also show cause if they are accused while on bail or parole.

There is case law from other Australian jurisdictions on relevant factors in determining what constitutes ‘show cause’, such as: Strength of the prosecution case, time between the application for bail and trial, and anxiety of returning to solitary confinement.¹⁵

The United States

Bail in the United States refers to the sum of money which the accused must pay to be released. The system of sureties is not widespread there. Professional bail bond providers are legal, and these persons often act as bounty hunters tracking down clients who have absconded. Most of the calls for reform in the US relate to the question of whether bail discriminates against poor people who cannot afford bail.¹⁶

¹⁵ See

Bail – recent developments, Jane Sanders, Principal Solicitor, The Shopfront Youth Legal Centre, April 2015: http://www.criminalcle.net.au/attachments/Bail_recent_developments_April_2015.pdf

¹⁶ See *Detaining the Poor: How money bail perpetuates an endless cycle of poverty and jail time*, Bernadette Rabuy and Daniel Kopf, Prison Policy Initiative, May 10, 2016, <http://www.prisonpolicy.org/reports/incomejails.html>, *America's Peculiar Bail System*, Dan Kopf, Priceonomics, May 26, 2015, <https://priceonomics.com/americas-peculiar-bail-system/>, and

Canada

In Canada, bail is dealt with under the Criminal Code section 515 (“Judicial Interim Release”). The Code provides that persons should generally be released without conditions, putting the onus on the prosecution to show cause why they should be detained or that conditions should be attached to their release. For some crimes, however, there is a ‘reverse onus’, where the onus is on the accused to show why he or she should not be detained in custody. The reverse onus, for example, is applied to firearm offences and trafficking in narcotics. There is no list of factors for the court to consider as occurs in the Caribbean Bail Acts.

In general, the system of bail and remand has come under a great deal of scrutiny, and the new Justice Minister announced in February 2016 that she had been mandated by the Prime Minister to reform the regime. Although crime rates in Canada have fallen over the last 30 years and the number of persons incarcerated has also fallen, the number of persons on remand has risen. At present, over half of all adults in correctional facilities are on remand.¹⁷

As in the Caribbean, the general practice is for defendants to have sureties who must be a friend or relative and professional bail bonding is illegal. The Canadian Civil Liberties Association and Education Trust noted,

In many courts across the country, however, the bail system is operating in a manner that is contrary to the spirit – and, at times, the letter – of the law. Legally innocent individuals are processed through a bail system that is chaotic and unnecessarily risk-averse and that disproportionately penalizes – and frequently criminalizes – poverty, addiction and mental illness.

...

Bail Shouldn't Mean Jail for Poor Nonfelony Defendants, Jamie Fellner, New York Law Journal, Feb 9, 2011, <https://www.hrw.org/news/2011/02/09/bail-shouldnt-mean-jail-poor-nonfelony-defendants>

¹⁷ See the Star Newspaper online, Feb 22, 2016: <https://www.thestar.com/news/canada/2016/02/22/overhaul-of-canadas-broken-bail-system-on-the-table.html>

A surety release is one of the most restrictive forms of release, and the costs of presumptively demanding an accused locate an acceptable surety – and requiring sureties to testify in court prior to release – are significant. Accused spend more time in detention and ask for numerous adjournments as they try to put in place a release plan. Families and friends must take time off work, pledge their money and act as ‘jailors’ in the community. The practice especially impacts those with few resources or limited social support, and accused from remote communities. In Ontario even consent releases can be lengthy, contested affairs, as sureties are cross-examined in open court. British Columbia, in contrast, processes the vast majority of bail cases without requiring surety supervision, suggesting the significant personal, systemic and financial costs of insisting on so many surety releases in Ontario and Yukon are unnecessary.

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Calls have been made for state supervision of defendants on bail (similar to parole officers) instead of sureties, and for more people to be released on their own recognizance.¹⁹

¹⁸ *Set-up to Fail, Bail and the Revolving Door of Pre-trial Detention*, The Canadian Civil Liberties Association and Education Trust, July 2014, accessed via: https://ccla.org/dev/v5/_doc/CCLA_set_up_to_fail.pdf

¹⁹ *The Bail Reform Act Revisited*, Martin L. Friedland, Canadian Criminal Law Review, 16 CCLR 315, accessed via: http://www.law.utoronto.ca/utfl_file/count/documents/Friedland/Bail%20Reform.pdf

Conclusion

The Bail Acts of the Caribbean are quite modern and generally reflect international best practices. However, there is still some room for improvement.

There has not been a great deal of research into the numbers of persons on bail in the Caribbean, or on the numbers who cannot afford bail. The Attorney General of Barbados has expressed concern over the number of persons on remand (which in June 2016 was 30-40% of the prison population).²⁰ While he did not state how many of these had been granted bail but either could not afford or could not arrange it, anecdotal evidence suggests that his figure is quite high. It is also likely that those persons who are on bail face the same challenges as described in the Canadian literature. As proposed for Canada, one recommendation is to make greater use of the court's powers to release persons on their own recognizance.

A further recommendation is that judicial officers be made aware of their obligations in respect of young persons when considering bail for minors. Not all of the jurisdictions have Child Protection Acts but they are almost all signatories to the Convention on the Rights of the Child.

Finally, it is recommended that those jurisdictions which do not have Bail Acts should move to implement them so as to bring uniformity to the granting and refusal of bail.

²⁰ <http://barbadosadvocate.com/news/remand-issues>