

Bail considerations for Aboriginal people

Changes to section 3A of the *Bail Act 1977* as amended by the *Bail Amendment Act 2023*

Why does the Bail Act have Aboriginal-specific considerations?

The inclusion of Aboriginal-specific considerations in the Bail Act:

- recognises that Aboriginal peoples are overrepresented on remand and face unique disadvantages in their contact with the criminal legal system.
- promotes and supports the exercise of Aboriginal cultural rights as protected under the [Victorian Human Rights Charter](#) including the right to enjoy identity and culture and maintain kinship ties.

What is section 3A?

[Section 3A](#) of the Bail Act:

- provides a non-exhaustive list of considerations that bail decision makers **must take into account** when making a bail determination in relation to an Aboriginal person;
- must be applied where the bail applicant is an Aboriginal adult **or** an Aboriginal child;
- is to be applied in **all determinations made under the Bail Act** where the person is Aboriginal. This includes:
 - extending, granting, refusing or revoking bail;
 - setting or varying bail conditions; and
 - considering whether a person has a reasonable cause for failing to answer bail ([section 30](#) Bail Act).

[Section 3A](#) works with the other provisions in the Bail Act that you must consider including the Guiding Principles under [section 1B](#), which remain unchanged.

What does a bail decision maker have to do to apply section 3A?

The following pages set out in detail how section 3A is to be applied. In summary:

1. [Ask](#) whether the applicant is an Aboriginal person and [connect](#) them to relevant support services.
2. [Take](#) into account any issues that arise due to the person's Aboriginality, including the experiences of Aboriginal peoples and the factors that make Aboriginal peoples particularly vulnerable in custody. This will support more culturally appropriate bail decisions.
3. [Identify and record](#) the considerations you took into account if you refuse bail to an Aboriginal person.

Purpose of this guide

This is a general guide developed by the Department of Justice and Community Safety to help bail decision makers understand and apply [section 3A](#). You must refer to the legislation and case law for your specific powers and responsibilities in your role as bail decision maker.

Note- This guide uses the word 'Aboriginal' to refer to Aboriginal and/or Torres Strait Islander people, communities and organisations.

Click link to be taken to relevant section

[How to apply section 3A](#)

[Section 3A\(1\) considerations explained](#)

[Flowchart- Bail decisions for Aboriginal people](#)

[Possible sources of information and/or evidence about section 3A matters](#)

[Relevant legislation](#)

Acknowledgement of Country

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How to apply section 3A

1. Ask whether the applicant is an Aboriginal person

You must ask whether the applicant is Aboriginal

[Section 3A](#) must be taken into account where the applicant is an Aboriginal person. This means there is an implicit obligation to ask whether the applicant is an Aboriginal person so you know whether to take into account [section 3A](#).

There may be situations where a person does not answer or does not want to answer when you ask this question. However, if there is evidence to suggest the person is Aboriginal, you should make further enquiries to ensure that [section 3A](#) is applied where it should be. For example, if the person's Aboriginality is not raised other than in the remand summary, it would be appropriate for the Bail Justice to ask the investigating officer why the remand summary makes this reference.

There is a legislative requirement for police to ask everyone who is taken into police custody if they are an Aboriginal or Torres Strait Islander person ([section 464AAB](#) Crimes Act) .

If police have not provided the bail justice with information on the person's Aboriginality, the bail justice should ask the person if they identify as an Aboriginal or Torres Strait Islander person. This is especially important in circumstances where the applicant is not legally represented.

You should not question a person's statement that they are Aboriginal

Where a person says they are Aboriginal, you must accept this. It is not appropriate to challenge a person's Aboriginality or require the person to provide evidence of their cultural identity. VALS must be contacted by police ([see below](#)) and VALS and other Aboriginal Community Controlled Organisations have processes for determining Aboriginality.

'Aboriginal person' is defined in [section 3](#) of the Bail Act.

[Section 3A\(4\)](#) sets out different factors which may affect how a person connects to their Aboriginality and culture. It makes clear that [section 3A](#) applies even if a person chooses (for whatever reason) not to disclose their Aboriginality earlier in proceedings, or if their connection to culture or their Aboriginal heritage has been intermittent or only recent.

Example

- Some Aboriginal persons may not feel comfortable informing authorities that they are Aboriginal because they are scared it will make things worse for them.
- The impacts of forced removal policies and practices, including those resulting in the Stolen Generations, are profound and continue to impact many of those removed, as well as their families and descendants. This history and its continued impacts may inform whether a person chooses to advise that they are Aboriginal.

Police must always contact VALS when an Aboriginal or Torres Strait Islander person is brought into custody

When an Aboriginal person is in police custody, police must notify the Victorian Aboriginal Legal Service (VALS), which runs a 24/7 Custody Notification Service (CNS) (see [section 464FA](#)). Once notified, VALS Custody Notification Officers will call regularly to check on the person while they are in custody. A VALS lawyer can give free legal advice at any time when the person is in police custody.

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Contact details for VALS

Phone: 1800 064 865

Email: vals@vals.org.au

Website: www.vals.org.au

Other relevant supports and resources

When considering whether to grant bail to a child, whether or not they are Aboriginal, a parent or guardian of the child or an independent person must be present during the bail proceeding.

Other supports and resources are available to support bail applicants and bail decision making processes, for example:

- Aboriginal Community Justice Panels (ACJP) – may assist with welfare matters and advise on medical/ behavioural background that may be relevant to the person's health and safety/wellbeing in custody.
- Independent third persons (ITPs) – where the person has a disability or mental illness, irrespective of whether they are Aboriginal, a child or an adult. ITPs are specially trained and skilled service providers.
- Support person – a person who can join and support an Aboriginal person being interviewed consistent with the Anunga Rules/Principles.

2. Take into account any issues that arise due to the person's Aboriginality

Any issues that arise due to the person's Aboriginality must be taken into account

[Section 3A\(1\)](#) sets out a non-exhaustive list of considerations relevant to Aboriginality that must be taken into account in addition to any other requirements in the Bail Act. This means that you can also take into account relevant matters that are not listed in [section 3A\(1\)](#).

The [section 3A\(1\)](#) factors are:

- (a) the historical and ongoing discriminatory systemic factors that have resulted in Aboriginal people being over-represented in the criminal justice system, including in the remand population;
- (b) the risk of harm and trauma that being in custody poses to Aboriginal people;
- (c) the importance of maintaining and supporting the development of the person's connection to culture, kinship, family, Elders, country and community;
- (d) any issues that arise in relation to the person's history, culture or circumstances, including the following—
 - (i) the impact of any experience of trauma and intergenerational trauma, including abuse, neglect, loss and family violence;
 - (ii) any experience of out of home care, including foster care and residential care;
 - (iii) any experience of social or economic disadvantage, including homelessness and unstable housing;
 - (iv) any ill health the person experiences, including mental illness;
 - (v) any disability the person has, including physical disability, intellectual disability and cognitive impairment;
 - (vi) any caring responsibilities the person has, including as the sole or primary parent of an Aboriginal child;

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(e) any other relevant cultural issue or obligation.

Some considerations apply in every case and others require evidence or information

[Sections 3A\(1\)\(a\)-\(c\)](#)

- Do not require specific evidence or information and you must take these matters into account when making a decision regarding an Aboriginal person.
- These are known facts and significant issues that are relevant for all Aboriginal peoples that you will have received training about.

[Sections 3A\(1\)\(d\)-\(e\)](#)

- You will need some information or evidence about these issues to understand how they apply to a particular applicant. However, you should turn your mind to the entirety of the list in every case to ensure that you have taken into account all reasonably available evidence and information about the person before making a decision (see [possible sources of information and/or evidence about section 3A matters](#) for ideas on how you might find out whether an issue is relevant).

Example:

- If there is no evidence or information which suggests the applicant has caring responsibilities, then caring responsibilities cannot be taken into account.
- If there is evidence or information which suggests the person has physical health conditions, then you must take that into account when making a decision.

Relevant sections- [section 3A\(2\) and \(3\)](#) Bail Act

What is reasonably available evidence and information?

New [section 3A\(2\)](#) clarifies that you must take account of a [section 3A\(1\)](#) issue by reference to the evidence and information that is reasonably available to you at the time. This includes information provided by the Aboriginal person's family and community and providers of Aboriginal bail support services.

What is considered 'reasonably available' will require an assessment about what is practicable in the circumstances. For example:

- information available to a decision maker late at night may be different than during the day, such as information from a support service.
- a court hearing an application by a person with legal representation will have more information before it than an arresting officer.

Some information may be reasonably available by asking questions or making simple enquiries ([see below](#)).

Application of [section 3A](#) should not delay bail determinations. However, it may be appropriate for some decisions to take longer if it means you are considering all the relevant information.


Examples of sources of evidence and information and how they may be useful in an application can be found below under [Possible sources of information and/or evidence about section 3A matters](#).

You may need to make further enquiries to support your decision making

[Section 3A](#) does not explicitly require bail decision makers to make enquiries about each consideration. This is because bail decision makers obtain and receive information differently. For example, the courts do not conduct their own investigation, unlike police in their role as investigators.

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Some of the considerations, particularly those in [subsection 3A\(1\)\(d\)](#), are deeply personal. In some cases it may be more appropriate to wait until a support person is present before asking about certain matters.

You should always provide the applicant an opportunity to raise any other information they feel would be important for the decision maker to know.

Example

- A person has just been arrested and is highly distressed. In such circumstances, asking questions about trauma may cause further harm. You could seek information from a support person instead, if available.
- The applicant is self-represented and appears to have health issues but has not raised these as part of the bail application. You can ask the applicant if there are any issues relating to their physical or mental health that may be relevant to the bail application. Even if the person does not provide information, they have been given the opportunity to do so.

Helping a person who is not represented by a lawyer

Sometimes the person applying for bail will not be represented by a lawyer. This is usually the case in police bail. Applicants who are not legally represented are not expected to know about all of the matters listed in [section 3A](#). You may need to refer to those matters and ask the person if there is anything further they would like to say as part of their bail application.

Example

The bail decision maker may say: “The Bail Act requires me to take into account any issues that arise in relation to your Aboriginality, including:

- the importance of connection to culture;
- trauma and intergenerational trauma, including family violence;
- experience of out of home care;
- social or economic disadvantage;
- physical and mental health issues;
- caring responsibilities; and
- other relevant cultural issues or obligations

“Is there anything about those matters that you want to tell me? Is there anything else you would like to tell me that is relevant to your bail application?”

See also [possible sources of information and/or evidence about section 3A matters](#)

If the person applying for bail is an Aboriginal child you must take into account the considerations listed in sections 3A and 3B

[Section 3B\(1\)](#) has been expanded and takes into account the special needs and vulnerability of children. It sets out a non-exhaustive list of considerations relevant to children that must be taken into account in addition to any other requirements in the Bail Act. This means that you can also take into account relevant matters that are not listed in [section 3B\(1\)](#).

The [section 3B\(1\)](#) factors are:

- (a) the child's age, maturity and stage of development at the time of the alleged offence;
- (b) the need to impose on the child the minimum intervention required in the circumstances, with the remand of the child being a last resort;
- (c) the presumption at common law that a child who is 10 years of age or over but under 14 years of age cannot commit an offence;

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- (d) the need to preserve and strengthen the child's relationships with—
 - (i) the child's parents, guardian and carers; and
 - (ii) other significant persons in the child's life;
- (e) the importance of supporting the child to live at home or in safe, stable and secure living arrangements in the community;
- (f) the importance—
 - (i) of supporting the child to engage in education, or in training or work; and
 - (ii) of that engagement being subject only to minimal interruption or disturbance;
- (g) the need to minimise the stigma to the child resulting from being remanded;
- (h) the fact that time in custody has been shown to pose criminogenic and other risks for children, including—
 - (i) a risk that the child will become further involved in the criminal justice system; and
 - (ii) a risk of harm;
- (i) the need to ensure that the conditions of bail—
 - (i) are no more onerous than is necessary; and
 - (ii) do not constitute unfair management of the child;
- (j) the fact that some cohorts of children, including the following cohorts, experience discrimination resulting in that cohort's over-representation in the criminal justice system—
 - (i) Aboriginal children;
 - (ii) children involved in the child protection system;
 - (iii) children from culturally and linguistically diverse backgrounds;
- (k) whether, if the child were found guilty of the offence charged, it is likely—
 - (i) that the child would be sentenced to a term of imprisonment; and
 - (ii) if so, that the time the child would spend remanded in custody if bail is refused would exceed that term of imprisonment;
- (l) any of the following issues that arise—
 - (i) any ill health the child experiences, including mental illness;
 - (ii) any disability the child has, including physical disability, intellectual disability, cognitive impairment and developmental delay;
 - (iii) the impact on the child, and on the child's behaviour, of any experience of abuse, trauma, neglect, loss, family violence or child protection involvement, including removal from family or placement in out of home care;
- (m) any other relevant factor or characteristic.

Surrounding circumstances must also be considered

Where the applicant is:

- an Aboriginal child, the bail decision maker must take into account the surrounding circumstances ([section 3AAA](#)) and the specific considerations for children ([section 3B](#)) and Aboriginal people ([section 3A](#)).
- an Aboriginal adult, the bail decision maker must take into account the surrounding circumstances ([section 3AAA](#)) and the specific considerations for Aboriginal people ([section 3A](#)).

Bail conditions should take into account the issues set out in section 3A(1)

[Section 3A](#) must be applied when setting bail conditions for an Aboriginal person so that they are supported to complete bail in a way that is culturally appropriate and are not at a higher risk of breaching bail because of their Aboriginality (see also section [5AAA\(2\)\(a\)–\(c\)](#) Bail Act).

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Examples that may not be culturally appropriate include:

- requiring a person to reside at a fixed address, which may be problematic for Aboriginal people where the person has family or kinship ties that mean they reside at more than one address.
- non-association with a relative, which may be challenging due to cultural obligations.
- conditions that make it difficult or impossible to participate in cultural obligations such as Sorry Business (a culturally significant period of mourning following a person's passing)
- conditions that unnecessarily disrupt a child's education, training or work.

Consider Aboriginal bail support services when imposing bail conditions

This is to ensure culturally appropriate responses are put in place for Aboriginal people where possible. However, an Aboriginal person should not be refused bail because an Aboriginal bail support service is not available.

- Definition of Aboriginal person and Aboriginal bail support service – [section 3](#) Bail Act
- Considering an Aboriginal bail support service as a bail condition - [section 5AAA\(4A\)](#) Bail Act

3. Identify and record the considerations you took into account if you refuse bail to an Aboriginal person

Requirements if bail is refused

When refusing bail to an Aboriginal person, you must always identify and record the considerations you had regard to under [section 3A\(1\)](#).

Note- for the purposes of [section 3A\(5\)](#), where bail is refused to an Aboriginal child the bail decision maker is only required to identify and record the relevant considerations in [section 3A\(1\)](#).

Recordings can be done in writing or audio/visual

You can make a record in one of two ways:

- stating those matters orally, and ensuring that an audio-visual recording or audio recording is made of that statement; or
- recording those matters in writing in a form the bail decision maker considers appropriate.

The options make it easier for the new requirement to be incorporated into your usual practice and ensure proceedings are not unreasonably delayed.

The requirement to make a record is not expected to be burdensome or onerous, but it should be done at the time of the bail decision. This new requirement is intended to promote accountability, consistency and transparency in the application of [section 3A](#), and to embed culturally appropriate practices in the bail system.

You must engage with this requirement in a meaningful way rather than treat it as a 'tick-box' exercise. This includes recording the matters appropriately to ensure the reforms can be properly monitored and ensure that [section 3A](#) is working as intended.

Requirement to identify and record – [section 3A\(5\)](#) Bail Act

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Section 3A(1) considerations explained

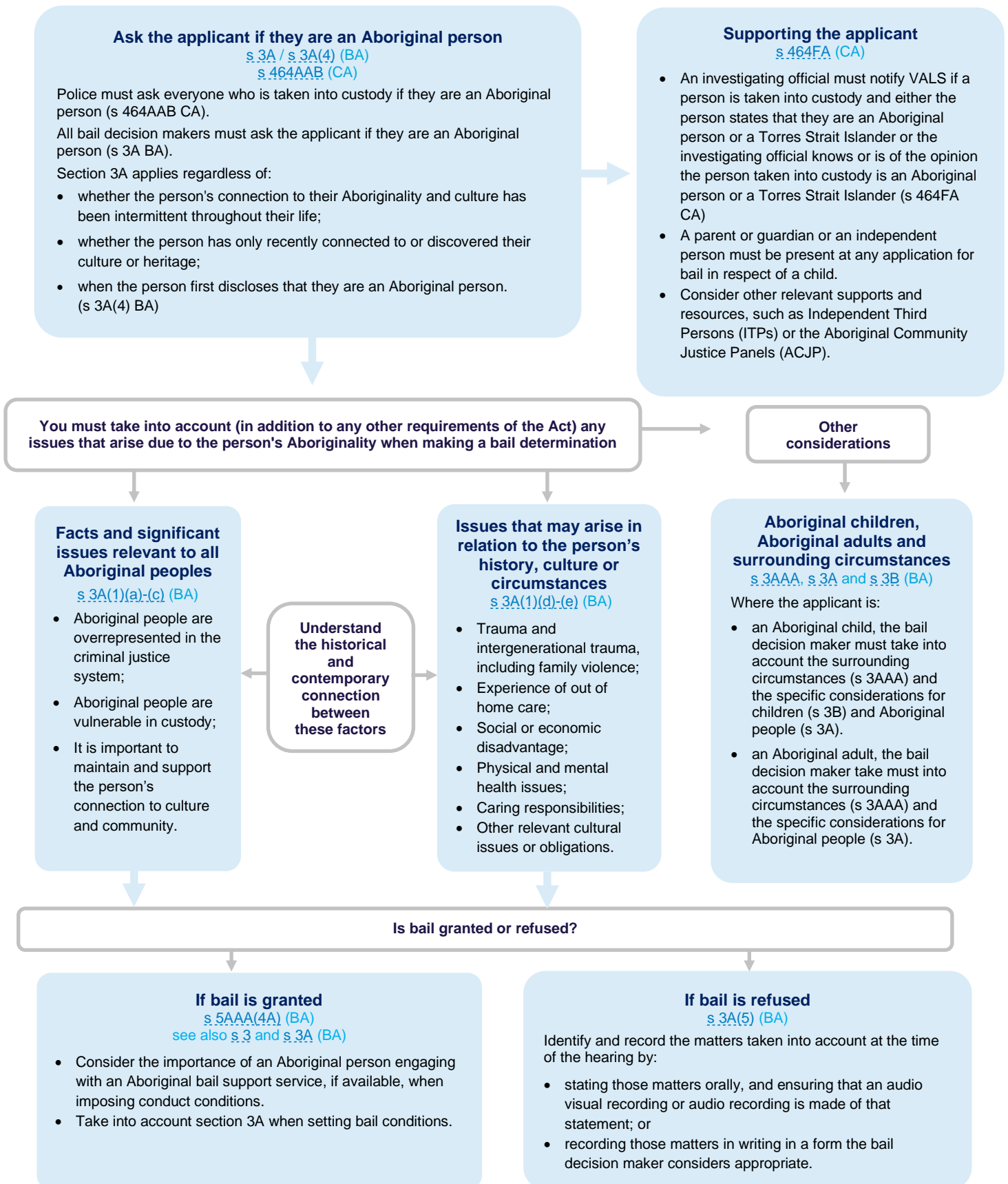
Section	Text of subsection	Why it is a consideration?
3A(1)(a)	The historical and ongoing discriminatory systemic factors that have resulted in Aboriginal people being over-represented in the criminal justice system, including in the remand population	<ul style="list-style-type: none"> Considers the historical and contemporary context of Aboriginal people in the criminal justice system, including whether the determination will unnecessarily compound the over-representation of Aboriginal people in custody. See also significant cases: Judicial College of Victoria.
3A(1)(b)	The risk of harm and trauma that being in custody poses to Aboriginal people	<ul style="list-style-type: none"> Recognises the historically high, and continuing, number of Aboriginal deaths in custody making Aboriginal people particularly vulnerable in custody. Time in custody may cut people off from social or economic supports and increase loss of culture, family and purpose. Individuals may be exposed to practices such as isolation, that may be particularly harmful for Aboriginal people.
3A(1)(c)	The importance of maintaining and supporting the development of the person's connection to culture, kinship, family, Elders, country and community	<ul style="list-style-type: none"> The importance of cultural connection for Aboriginal people, such as residing on country and supporting Aboriginal people to learn more about their Aboriginality and culture, and to strengthen family bonds. Maintaining cultural connections may support rehabilitation through healing and supporting social and emotional wellbeing.
3A(1)(d)(i)	The impact of any experience of trauma and intergenerational trauma, including abuse, neglect, loss and family violence	<ul style="list-style-type: none"> Intergenerational trauma may include the impact of the Stolen Generations or where family members have experienced trauma in the criminal justice system, such as a family members' experience of custody or death in custody. Family violence may include experience of, exposure to, or risk of exposure to family violence, including being misidentified as the perpetrator. Ongoing contact with the criminal justice system can cause and/or contribute to trauma.
3A(1)(d)(ii)	Any experience of out of home care, including foster care and residential care	<ul style="list-style-type: none"> Such experiences may cause disruption to the person's life, including disconnection from family and community. Time in custody may trigger past trauma for Aboriginal people who were displaced because of the Stolen Generations or taken into care by the State.
3A(1)(d)(iii)	Any experience of social or economic disadvantage, including homelessness and unstable housing	<ul style="list-style-type: none"> This may be a reason for the alleged offending. Being on remand for any length of time may result in a person losing housing or a job, or disrupting education etc, undermining rehabilitation and increasing risk of further engagement with the justice system.
3A(1)(d)(iv)	Any ill health the person experiences, including mental illness	<ul style="list-style-type: none"> Consider how time in custody could affect the person's health. Consider how the person's health may cause additional challenges in custody and require further support.
3A(1)(d)(v)	Any disability the person has, including physical disability, intellectual disability and cognitive impairment	<ul style="list-style-type: none"> Disability may cause further challenges in custody. 'Disability' can refer to a broad range of conditions, for example hearing impairment. Any disability should be considered, even if there is limited medical information available.
3A(1)(d)(vi)	Any caring responsibilities the person has, including as the sole or primary parent of an Aboriginal child	<ul style="list-style-type: none"> Caring responsibilities may include, for example, caring for children, siblings, extended family and kinship relationships. Time in custody or certain conditions may impact these responsibilities. For example, if an applicant is placed on remand, their children risk being removed into out of home care.
3A(1)(e)	Any other relevant cultural issue or obligation	<ul style="list-style-type: none"> This may include cultural obligations such as Sorry Business or any other relevant cultural issue. See also cultural issues and obligations identified in case law, including the availability of culturally safe support services, connections to local cultural organisations, ability to participate in Koori Court, opportunity/plans to explore culture and cultural obligations to a family member.

Note- [s 19\(2\)](#) of the *Charter of Human Rights and Responsibilities Act 2006* provides that Aboriginal persons hold distinct cultural rights and must not be denied the rights referred to in that provision.

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Flowchart – Bail decisions where the applicant is Aboriginal



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Possible sources of information and/or evidence about section 3A matters

Possible Source	Example	Possible relevant section
Case law considering a person's Aboriginality when determining bail	Compounding incarceration rates for Aboriginal peoples should be avoided unless there is good cause to do so - Re HA (pseudonym) [2021] VSCA 64 , [59]. In a marginal case section 3A considerations may operate in favour of granting bail - Re Chafer-Smith: An application for Bail [2014] VSC 51 [27]. See significant cases: Judicial College of Victoria . Note- You should stay up to date with case law following the commencement of the Bail Amendment Act 2023.	3A(1)
Aboriginal Cultural Awareness, Anti-racism or Conscious/ Unconscious Bias Training	As provided by your organisation. See also any guidelines/manuals etc that include cultural awareness content.	3A(1)
Coronial inquests	<i>I find that the Bail Act has a discriminatory impact on First Nations people resulting in grossly disproportionate rates of remand in custody, the most egregious of which affect alleged offenders who are Aboriginal and/or Torres Strait Islander women.</i> Finding 14- Inquest into the passing of Veronica Nelson, 30 January 2023	3A(1)
Royal Commissions	Royal Commission into Aboriginal Deaths in Custody	3A(1)
Truth-telling processes/ inquiries	<i>When someone is charged with an offence and bail is denied, they are imprisoned on remand waiting for their trial or sentence. Loss of liberty is just one of the harms imposed. Imprisonment on remand creates risks of the person losing their housing, employment, family and community supports, and their children to the child protection system. It also risks deaths in custody.</i> Yoorrook for Justice Report 2023	3A(1)
Applicant's family or community member present at the police station /court	Provides the bail decision maker with information about the person's connection to culture, kinship, family, Elders, country and community. Can also provide information about the person's personal circumstances.	3A(1)(c)
History of the person held by police	A final family violence intervention order exists where the applicant is the affected family member.	3A(1)(d)(i)
Information provided by legal representative	Psychological report indicates that the applicant has spent their childhood in out of home care. The report also discloses the applicant is on medication for depression.	3A(1)(d)(ii) and 3A(1)(d)(iv)
Police standard question	Police ask for current address and the applicant indicates they are homeless.	3A(1)(d)(iii)
Previous interaction with applicant	An independent third party was present during previous record of interview.	3A(1)(d)(v)
Observations	Children are with the applicant when they are arrested and address the applicant as 'mum'.	3A(1)(d)(vi)
Matters disclosed by the applicant	The applicant discloses there has been a recent death in the family.	3A(1)(e)
Aboriginal bail support service	Provides information about a specialist Aboriginal service that is available to support the person to comply with their bail conditions.	5AAA(4A)

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Relevant legislation

Bail Act 1977

- Definition of Aboriginal person and Aboriginal bail support service – [s.3](#)
- Surrounding circumstances - [s.3AAA](#)
- Aboriginal specific bail considerations - [s 3A](#)
- Child specific bail considerations - [s 3B](#)
- Considering an Aboriginal bail support service as a bail condition - [s 5AAA\(4A\)](#)

Crimes Act 1958

- Investigating official to ask whether person in custody is an Aboriginal person- [s 464AAB](#)
- Investigating official must notify VALS when an Aboriginal person is in police custody- [s 464FA](#)

Charter of Human Rights and Responsibilities Act 2006

- Cultural rights - [s 19](#)

Currency of this document

This document is current as at 25 March 2024.

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