Memorandum:
Section 3A *Bail Act 1977* Determination in relation to an Aboriginal Person

Document Details	
To	Judges of the County Court – Criminal Division
Cc	Judges' Associates – Criminal Division
From	Judge Lawson
Date	18 June 2019

Purpose

1. This memorandum addresses section 3A of the *Bail Act 1977* ('*Bail Act*').

2. This memorandum summarises some key cases in relation to section 3A of the *Bail Act*.

Background

3. Section 3A of the *Bail Act* was inserted by the *Bail Amendment Act 2010*. It requires decision makers to take into account any issues that arise due to a person's Aboriginality, when making a determination under the *Bail Act*. This is in addition to any other requirements of the *Bail Act*. It does not require the decision maker to reach a particular decision and the test for granting bail is not changed.

4. This change was made following the Victorian Law Reform Commission's Review of the Bail Act: Final Report) 2007. The purpose of the change was to ensure that "*cultural factors and community expectation are taken into account when making bail decisions. Otherwise Indigenous Australians may be bailed on inappropriate bail conditions which they are more likely to breach, or remanded unnecessarily contributing to their over-representation in custody*."

5. Section 3A of the *Bail Act* recognises historical disadvantage which has led to the overrepresentation of Aboriginal and Torres Strait Islander people on remand. It promotes cultural rights of Aboriginal persons which includes participation in cultural events or ceremonies.[1]

6. "*[S]ubstantive equality is not necessarily achieved by treating everyone equally, and… affirmative action or positive discrimination may be necessary to achieve equality for some groups in the community. As the purpose of section 3A is to recognise historical disadvantage, which has led to the overrepresentation of Aboriginal people on remand, in accordance with section 8(4) of the [Human Rights] charter, it constitutes permissible discrimination.*"[2]

[1] Victoria, *Parliamentary Debates,* Legislative Assembly, 2 September 2010, 3600 (Robert Hulls AG).
[2] Ibid.

Policy

7. High levels of over-representation of Aboriginal and Torres Strait Islander people in the custodial setting is a reality. It is a complex and enduring issue.

8. Although the rate of Aboriginal people in the criminal justice system in Victoria is lower than most other Australian jurisdictions and nationally, the rate is high when compared to the non-Aboriginal population. This figure is only increasing.[3]

Over-representation Aboriginal Adults

9. "*Between 2011-12 and 2016-17, the rate of Aboriginal adults under justice supervision [community corrections and prison] increased by 52.6 per cent (from 294.5 to 449.5 per 10,000) compared with a 34 per cent increase among non-Aboriginal adults (from 28.6 to 28.4 per 10,000). In 2016-17, Aboriginal adults were 11.7 times more likely than non-Aboriginal adults to be under justice supervision in Victoria*."[4]

10. In 2017, 8.5 per cent of all prisoners in Victoria were Aboriginal adults despite Aboriginal adults comprising only 0.6 per cent of the Victorian adult population.[5]

11. In 2017, Aboriginal adults were 12 times more likely to enter a custodial setting.

    (a) Non-Aboriginal imprisonment rate – 14.0 per 10, 000 adults in Victoria.

    (b) Aboriginal imprisonment rate – 168.3 per 10, 000 adults in Victoria.[6]

Over-representation Aboriginal Youths (aged 10-17 years)

12. "*Over the past five years, the rate of Aboriginal youth under justice supervision decreased by 13.1 per cent (from 170.2 to 147.9 per 10,000) compared with a 34.8 per cent decrease among non-Aboriginal youth (from 16.2 to 10.6 per 10,000). In 2016-17, Aboriginal youth were 14 times more likely than non-Aboriginal youth to be under justice supervision in Victoria.*"[7]

13. In 2016-17, 16.9 per cent of all young people in youth detention were Aboriginal youths despite Aboriginal youths comprising only 1.3 per cent of the Victorian youth population.[8]

14. In 2016-17, Aboriginal youths were 12.7 times more likely to enter youth detention.

    (a) Non-Aboriginal youth detention rate – 1.8 per 10, 000 youths in Victoria.

    (b) Aboriginal youth detention rate – 23.2 per 10, 000 youths in Victoria.[9]

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[3] Department of Justice and Community Safety, *Aboriginal over-representation in the justice system* (21 August 2018) Victorian Aboriginal Justice Agreement <https://www.aboriginaljustice.vic.gov.au/the-agreement/aboriginal-over-representation-in-the-justice-system>
[4] Ibid.
[5] Depart of Justice and Community Safety, *Aboriginal cohorts under justice supervision* (21 August 2018) Victorian Aboriginal Justice Agreement <https://www.aboriginaljustice.vic.gov.au/the-agreement/aboriginal-over-representation-in-the-justice-system/aboriginal-cohorts-under-justice>
[6] Ibid.
[7] Above n 3.
[8] Above n 5.
[9] Ibid.

Disadvantage

15. In a broader setting, disadvantage for Aboriginal and Torres Strait Islander people cuts across health, education, housing, income and employment. Imprisonment is particularly damaging. It reduces future employment prospects and creates the stigma of a criminal record. Post-prison homelessness is a risk factor for re-offending, and research shows that after release, the risk of homelessness is doubled. Most critically, Aboriginal and Torres Strait Islander people are more prone to deaths in custody.

16. In terms of their cultural engagement with the criminal justice system, this is also an issue for Aboriginal and Torres Strait Islander people. Some feel that the courts have a historical role in enforcing colonial rule, resulting in a disengagement and distrust of the system. Further, Aboriginal and Torres Strait Islander people are treated differently, and are less likely to be diverted to cautionary measures.

Section 3A *Bail Act*

17. Section 3 *Bail Act* provides:

    Aboriginal person means a person who—

    (a) is descended from an Aborigine or Torres Strait Islander; and

    (b) identifies as an Aborigine or Torres Strait Islander; and

    (c) is accepted as an Aborigine or Torres Strait Islander by an Aboriginal or Torres Strait Island community…

18. Section 3A *Bail Act* provides:

    In making a determination under this Act in relation to an Aboriginal person, a bail decision maker must take into account (in addition to any other requirements of this Act) any issues that arise due to the person's Aboriginality, including—

    (a) the person's cultural background, including the person's ties to extended family or place; and

    (b) any other relevant cultural issue or obligation.

19. Section 3A applies not only when considering whether or not to grant bail but also in considering setting appropriate conditions for bail.

Common Law

***Re LT* [2019] VSC 143**

20. The applicant, in this case, was 16 years of age and of Aboriginal descent.

21. The applicant was charged with offences of recklessly causing injury, unlawful assault and committing an indictable offence whilst on bail (‘the alleged offending’).

22. At the time of the alleged offending, the applicant was on bail for a number of charges including property damage and violence related offending which occurred on four separate occasions.

23. The applicant had a history with respect to violence related offending.

24. Elliot J found that exceptional circumstances existed[10] and that factors in favour of the applicant coupled with further bail conditions, rendered the applicant an acceptable risk.[11]

25. In granting bail, Elliot J took into account sections 3A and 3B of the *Bail Act* in addition to the matters contained in sections 3AAA, 4A, 4AA and 4E of the *Bail Act*.

26. Elliot J said:

> [O]pportunities for the applicant to strengthen her familial bond or to explore Aboriginality are to be strongly encouraged. Any further time in custody would likely be highly disruptive to the applicant's personal and cultural development. The applicant also has other extensive support available to her and has indicated a willingness to take advantage of this support.[12]

DPP v S E [2017] VSC 13

27. The relevant issues that arise for Aboriginal and Torres Strait Islander people in bail applications has been well summarised by the Supreme Court of Victoria in the case of *DPP v SE [2017] VSC 13*.[13] In granting bail, Bell J gave consideration to the increased negative impact of custody, and the need to facilitate contact with the applicant's Aboriginal family in Queensland.[14]

Re Chafer-Smith [2014] VSC 51

28. This case concerned a young Aboriginal woman charged with reckless conduct placing persons at risk of death, alternatively reckless conduct placing persons at risk of serious injury as well as driving offences, possession of a drug of dependence and a prohibited weapon, a dishonesty offence, failing to appear on bail and associated minor offences. At the time of her arrest, the applicant had five outstanding warrants.

29. Forrest J refused bail having considered that the applicant represented an unacceptable risk.[15]

30. In refusing bail, Forrest J said:

> In the circumstances that I have outlined, I consider that there is a significant risk that the applicant will repeat this type of offending should I grant bail and should that risk become reality, the consequences may well be catastrophic. I have considered the applicant's Aboriginality, as I must under s 3A of the Bail Act. I am obliged to take into account any issues that arise therefrom. I accept that Aboriginal Australians are very significantly overrepresented in our prisons and I consider that if this were a marginal case where a decision to grant bail or

[10] *Re LT* [2017] VSC 143, [66-67].
[11] Ibid, [68-77].
[12] Ibid, 67.
[13] *DPP v SE* [2017] VSC 13, [21-28].
[14] Ibid, [49-50].
[15] *Re Chafer-Smith* [2014] VSC 51, [24-27].

> refuse it was a close run thing, then s 3A considerations may well operate to determine the application in the applicant's favour. I further consider that the applicant's youth, difficult personal circumstances, psychological state and strong familial circumstances all weigh in her favour.[16]

***Re Mitchell* [2013] VSC 59**

31. This case concerned a young Aboriginal accused who was alleged to have committed "*trivial [offending] when compared with other cases that come before [the Supreme] Court in this type of application*."[17]

32. Forrest J said:

> I should add that I have been required to take into account the applicant's Aboriginality, by virtue of s 3A of the Bail Act 1977. In the context of this application I would have granted bail regardless of any impact from that provision. That said, over policing of Aboriginal communities and their overrepresentation amongst the prison population are matters of public notoriety. In this case I regard the use of s 82(1) of the Act (obtaining financial advantage by deception) to charge an adult for travelling on a child's ticket as singularly inappropriate.[18]

Judicial College of Victoria

33. The Judicial College of Victoria provides a helpful summary of key bail cases which can be accessed here.

Comments

34. There is a perception in the Koori Community that section 3A of the *Bail Act* is being under-utilised.

35. Further, there is an increasing number of Aboriginal and Torres Strait Islander people being held on remand and an over-representation of the Indigenous community in the prison system.

36. As Judge Pullen (having attended the Corrections Stakeholder Forum) addressed in her memorandum to the Chief Judge dated 11 June 2019, it is 14 times more likely that members of the Indigenous community will go into the prison system.

37. In the case of *Re Chatters* [2017] VSC 2 ('*Chatters*'), Elliot J noted that *"[T]he applicant submitted that other factors, including her identification as a person of Aboriginal heritage, might be relevant. No submissions were made concerning the applicability of s 3A of the Bail Act…*" In circumstances where other factors supported the grant of bail, Elliot J considered it unnecessary to further consider other potential factors in the applicant's favour.

[16] Ibid, [27].
[17] *Re Mitchell* [2013] VSC 59, [5].
[18] Ibid, [13].

38. *Chatters* is an example that there may be cases where section 3A of the *Bail Act* may be relevant to a Bail Application but practitioners are either unaware of this provision or do not adequately address the Court on this provision.

39. I have proposed that the Practice Note ('PNCR 1-2015') and Bail Application forms be amended to ensure that the question of whether the accused identifies as an Aboriginal or Torres Strait Islander person is asked.

40. Amendments to PNCR 1-2015 and Bail Application forms will:

    (a) assist the Court in flagging section 3A as a factor for every judge to consider irrespective of whether the matter is proceeding in the Koori Court or mainstream court; and

    (b) ensure the legal profession is aware of the section 3A provision and what they need to provide to the Court in support of a Bail Application.

41. Koori Court Officers are available to provide assistance to Judges in the event that assistance is required for Bail Applications in Melbourne. On circuit, Koori Court Officers can be contacted via telephone. Koori Court Officers can provide assistance in such matters as proof of Aboriginality, availability of culturally safe services and other relevant cultural matters.

42. Should Judges require the assistance of a Koori Court Officer, Judges or Judges' Associates can contact, in the first instance:

Terrie Stewart
County Koori Court Coordinator
☎ 03 8636 6083
✆ 0407 358 059
💻 terrie.stewart@countycourt.vic.gov.au
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