

The Bail Amendment Act 2023 (Vic)

The *Bail Amendment Act 2023* (Vic) introduces a suite of changes to the *Bail Act 1977* (Vic) (the *Bail Act*). It will commence operation on 25 March 2024.

A key reform is to section 3A of the *Bail Act*, expanding the non-exhaustive list of mandatory considerations for a bail decision maker ('DM') in making a bail determination in relation to an Aboriginal and/or Torres Strait Islander person.¹ The new section 3A 'includes consideration of broader systemic factors that drive inequality as well as circumstances relevant to Aboriginal people, including factors that make them particularly vulnerable in custody.'² It is intended to:

- Support the common law responsibility on DMs to ensure incarceration rates of Aboriginal peoples are not further compounded.³
- Give greater guidance to DMs and prompt them to challenge any unconscious biases and make more culturally appropriate decisions.⁴
- Support the exercise of Aboriginal cultural rights as protected under Victoria's human rights Charter.⁵

New section 3A

New section 3A will require DMs, when making a bail determination in relation to an Aboriginal person,⁶ to take into account any issues that arise due to the person's Aboriginality, including the subsection 3A(1)(a) to (e) factors set out in Table 1. This requirement applies to all decisions made under the *Bail Act*,⁷ and applies regardless of:

- whether the person's connection to their Aboriginality and culture has been intermittent throughout their life,
- whether the person has only recently connected to or discovered their culture or heritage, or
- when the person first discloses that they are an Aboriginal person.⁸

A DM is to take account of a subsection 3A(1) factor by reference to the evidence and information that is reasonably available at the time,⁹ including information provided by the Aboriginal person's family and community, and providers of Aboriginal bail support services.¹⁰ The factors in subsections 3A(1)(a) to (c) must be taken into account even if there is no evidence or information before the DM in respect of those issues.¹¹

If an Aboriginal person is refused bail, the DM must identify the subsection 3A(1) factors they had regard to, and either state those matters orally and ensure a recording is made or give written reasons.¹² This is intended to

¹ Throughout this document we use "Aboriginal" to refer to Aboriginal and/or Torres Strait Islander people.

² Victoria, *Parliamentary Debates*, Legislative Assembly, 17 August 2023, 2900 (Anthony Carbines, Minister for Police and Crime Prevention) ('*Debates*').

³ *Ibid.* See also *Re HA (a pseudonym)* [2021] VSCA 64.

⁴ *Debates* 2900.

⁵ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 19(2). This includes the right to enjoy identity and culture, and maintain kinship ties and connection to Country, traditional laws and customs. See *Debates* 2896.

⁶ There is an implicit obligation on a DM to ask whether the applicant is an Aboriginal person. This is particularly critical in cases where the applicant is self-represented.

⁷ 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.

⁸ *Bail Act 1977* (Vic) s 3A(4).

⁹ What is considered "reasonably available" will require an assessment about what is practicable in the circumstances. Some information may be "reasonably available" by asking questions or making simple enquiries.

¹⁰ *Ibid* s 3A(2). Clause 31 of the *Bail Amendment Act 2023* (Vic) inserts a definition of 'Aboriginal bail support service' into section 3 of the *Bail Act 1977* (Vic) as being a bail support service that is provided by an entity that is managed by Aboriginal people or operates for the benefit of Aboriginal people.

¹¹ *Bail Act 1977* (Vic) s 3A(3).

¹² *Ibid* s 3A(5).



'promote consistency and transparency in decision making and to embed culturally safe practices in the bail system.'¹³

¹³ *Debates* 2900.

Table 1: Bail Act section 3A(1) factors

| Section Bail Act 1977 (Vic) | Factors to be considered | Purpose/intended effect ¹⁴ |
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| <p><i>The considerations set out in subsections 3A(1)(a) to (c) must be taken into account by a DM, even if there is no evidence or information before the DM in respect of those issues.¹⁵ Subsections 3A(1)(a) to (c) are distinguished because they reflect commonly understood facts and significant issues as they pertain to Aboriginal people.</i></p> | | |
| 3A(1)(a) | <p>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.</p> | <p>To ensure DMs actively turn their mind to the historical and contemporary context of Aboriginal people in the criminal justice system, including over-representation of Aboriginal people in custody.</p> |
| 3A(1)(b) | <p>The risk of harm and trauma that being in custody poses to Aboriginal people.</p> | <p>The historically high, and continuing, number of Aboriginal deaths in custody means Aboriginal people are particularly vulnerable in custody. Time in custody may also further perpetuate social and economic exclusion and isolation and compound loss of culture, family and purpose.</p> |
| 3A(1)(c) | <p>The importance of maintaining and supporting the development of the person's connection to culture, kinship, family, Elders, Country and community.</p> | <p>This new provision reflects the importance of cultural connection for Aboriginal people, including residing on Country, and how maintaining cultural connections may support rehabilitation. Time in custody will disrupt this connection.</p> |
| <p><i>Although the Explanatory Memorandum notes that DMs are only expected to take into account the information in s 3A(1)(d) where it is presented by the person or their legal representative as questioning the person about these experiences may be re-traumatising,¹⁶ in respect of self-represented applicants a DM may need to refer to each of the section 3A factors and ask if there is anything further the applicant would like to say as part of their bail application.¹⁷</i></p> | | |
| 3A(1)(d) | <p>Any issues that arise in relation to the person's history, culture or circumstances, including:</p> <p>(i) the impact of any experience of trauma and intergenerational trauma, including abuse, neglect, loss and family violence.</p> <p>(ii) any experience of out of home care, including foster care and residential care.</p> | <p>Intergenerational trauma may include the impact of the Stolen Generations or traumatic experiences in the criminal justice system, such as a family members' experience of custody or death in custody. Family violence may include experience of or exposure to, or risk of exposure to, family violence, including being misidentified as a perpetrator. Ongoing contact with the criminal justice system can cause and/or contribute to trauma.¹⁸</p> <p>Such experiences may cause disruption to the person's life and disconnection from family and community. Time in custody may trigger past trauma.¹⁹</p> <p>This may be a causal factor of the alleged offending or may be affected by remand. Being on remand may result in loss of</p> |

¹⁴ As per the Explanatory Memorandum, *Bail Amendment Bill 2023* (Vic) ('Explanatory Memo').

¹⁵ *Bail Act 1977* (Vic) s 3A(3).

¹⁶ Explanatory Memo 16.

¹⁷ See also The Department of Justice and Community Safety (Vic), *Bail considerations for Aboriginal people* (2024) 4-5.

¹⁸ *Ibid* 8.

¹⁹ *Ibid*.



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| | <p>(iii) any experience of social or economic disadvantage, including homelessness and unstable housing.</p> <p>(iv) any ill health the person experiences, including mental illness.</p> <p>(v) any disability the person has, including physical disability, intellectual disability and cognitive impairment.</p> <p>(vi) any caring responsibilities the person has, including as the sole or primary parent of an Aboriginal child.</p> | <p>housing and/or a job, or disruption to education, undermining rehabilitation and increasing the risk of further engagement with the justice system.²⁰</p> <p>Consider how time in custody could affect the person's health, or how the person's health may cause additional challenges in custody and require further support.²¹</p> <p>'Disability' can refer to a broad range of conditions. For example, hearing impairment or hearing loss may greatly impact a person in a custodial setting.</p> <p>Caring responsibilities may include, for example, caring for children, siblings, extended family and kinship relationships. Time in custody or certain bail conditions may impact caring responsibilities. For example, there may be a risk children will be removed into out-of-home care if an applicant is placed on remand.²²</p> |
| 3A(1)(e) | Any other relevant cultural issue or obligation . | This may include cultural obligations such as Sorry Business. DMs should also consider 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. ²³ DMs may need to ask the applicant if there is "any other relevant cultural issue or obligation" that may impact the bail application or bail conditions. |

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

²³ Ibid.