

# AMENDMENTS TO THE BAIL ACT 1977

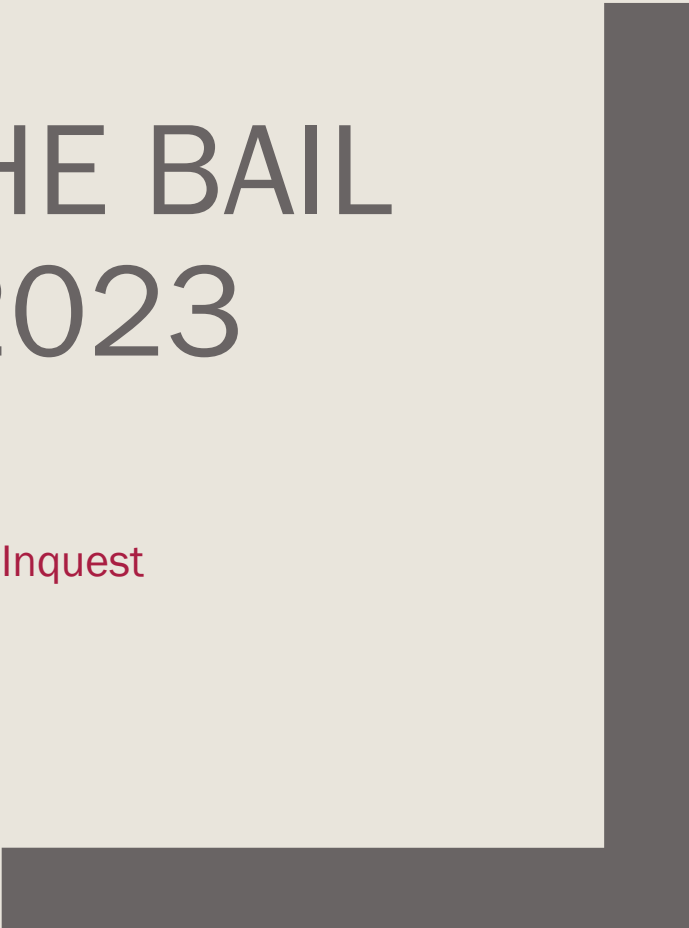


Criminal Bar  
Association  
OF VICTORIA

Sharon Lacy SC  
Elissa Taylor



# BAIL ACT 1977 AND THE BAIL AMENDMENT ACT 2023

- The Bail Act 1977 and key amendments
  - Findings and recommendations of the Veronica Nelson Inquest
  - An introduction to the Bail Amendment Act 2023
- 

# A short history of the Bail Act 1977 and key amendments

- Commencement of the Bail Act 1977: 1 September 1977
- 2013 Amendment: Introduced: s.30A and s.30B offences
- 2016 Amendment: Terrorism-related amendments
- 2018 Amendment: show “compelling reason” test and “reverse onus” uplift introduced

# Bail Findings from the Inquest into the passing of Veronica Nelson

## Police

4. I find that the police BDM was empowered to grant Veronica bail and failed to give proper consideration to the discretion to do so and this infringed her Charter rights.
5. By failing to give proper consideration to the discretion, I find that the police BDM failed to adequately consider Veronica's vulnerability in custody as an Aboriginal woman.
6. I find that the training provided by Victoria Police on these topics fails to equip its members with an adequate appreciation of the vulnerability of an Aboriginal person in custody.
7. I find that Victoria Police failed to inform the MMC of Veronica's Aboriginality

## The Bail Act

14. 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 effect alleged offenders who are Aboriginal and/or Torres Strait Islander women.

15. I find that ss 4AA(2)(c), 4A, 4C and Clauses 1 and 30 of Schedule 2 of the Bail Act are incompatible with the Charter.

## Cultural Competence

26. I find that Veronica was culturally isolated and provided with no culturally competent or culturally-specific care or support from the moment of her arrest on 30 December 2019 to her passing at DPFC on 2 January 2020.

## Death Preventable

50. I find that Veronica's death was preventable.

51. I find that, had the RCADIC recommendations been successfully implemented by the Government and its agencies, Veronica's passing would have been prevented.

# Nelson Inquest – Recommendations

3. I recommend the urgent review of the Bail Act with a view to repeal any provision having a disproportionate adverse effect on Aboriginal and/or Torres Strait Islander people.

4. I recommend urgent legislative amendment of the Bail Act including that:

- 4.1. section 4AA(2)(c) is repealed ('double uplift');
- 4.2. clause 1 of Schedule 2 is repealed (including any indictable offence in certain circumstances within reverse onus regime);
- 4.3. clause 30 of Schedule 2 is repealed (including bail offences within reverse onus regime);
- 4.4. section 18(4) is repealed;
- 4.5. section 30 is repealed (failure to answer bail);
- 4.6. section 30A is repealed (contravention of conduct condition of bail);
- 4.7. section 30B is repealed (commit indictable offence on bail);

3. I recommend the urgent review of the Bail Act with a view to the repeal of any provision having a disproportionate adverse effect on Aboriginal and/or Torres Strait Islander people.

4. I recommend urgent legislative amendment of the Bail Act including that:

~~4.1. section 4AA(2)(c) is repealed ('double uplift');~~ **(DID NOT IMPLEMENT AND ADDED MORE)**

4.2. clause 1 of Schedule 2 is repealed (including any indictable offence in certain circumstances within reverse onus regime);

4.3. clause 30 of Schedule 2 is repealed (including bail offences within reverse onus regime);

~~4.4. section 18(4) is repealed;~~

~~4.5. section 30 is repealed (failure to answer bail);~~

4.6. section 30A is repealed (contravention of conduct condition of bail);

4.7. section 30B is repealed (commit indictable offence on bail);

4.8. section 18AA is amended so that –

4.8.1. an applicant for bail need not establish ‘new facts and circumstances’ before making a second application for bail; and

4.8.2. an applicant for bail who is vulnerable (for instance, by virtue of being an Aboriginal or Torres Strait Islander person, a child, or a vulnerable adult as these terms are defined in sections 3 and 3AAAA, respectively, of the Bail Act) need not establish ‘new facts and circumstances’ before making any subsequent application for bail;

4.9. section 3A is amended to include more guidance to BDMs about the procedural and substantive matters to be considered to ensure application of the section gives effect to the purposes for which it was inserted, including to address the persistent over-representation of Aboriginal people in the criminal justice system;

4.10. revision of section 3A should occur in a manner that is consistent with principles of self-determination of First Nations peoples;

4.11. section 4E(1)(a)(ii) is amended to narrow the scope of commit ‘offence’ while on bail;

4.12. before a BDM refuses bail to an Aboriginal person, they are required by law to articulate (and record) what enquiries were made into the surrounding circumstances and what factors relevant to sections s3A and s3AAA of the Bail Act were considered to reach the decision;

4.13. BDMs intending to refuse an application for bail are required by law to make all necessary enquiries about, and where necessary note on any remand warrant, any potential custody management issues.



4.8. section 18AA is amended so that –

4.8.1. an applicant for bail need not establish ‘new facts and circumstances’ before making a second application for bail; and

~~4.8.2. an applicant for bail who is vulnerable (for instance, by virtue of being an Aboriginal or Torres Strait Islander person, a child, or a vulnerable adult as these terms are defined in sections 3 and 3AAAA, respectively, of the Bail Act) need not establish ‘new facts and circumstances’ before making any subsequent application for bail;~~

4.9. section 3A is amended to include more guidance to BDMs about the procedural and substantive matters to be considered to ensure application of the section gives effect to the purposes for which it was inserted, including to address the persistent over-representation of Aboriginal people in the criminal justice system;

~~4.10. revision of section 3A should occur in a manner that is consistent with principles of self-determination of First Nations peoples;~~

4.11. section 4E(1)(a)(ii) is amended to narrow the scope of commit ‘offence’ while on bail;

4.12. before a BDM refuses bail to an Aboriginal person, they are required by law to articulate (and record) what enquiries were made into the surrounding circumstances and what factors relevant to sections s3A and s3AAA of the Bail Act were considered to reach the decision;

~~4.13. BDMs intending to refuse an application for bail are required by law to make all necessary enquiries about, and where necessary note on any remand warrant, any potential custody management issues.~~

# Introduction to the *Bail Amendment Act 2023*

The Bail Amendment Bill 2023 received royal assent on October 24, 2023. The amendments are scheduled to **take effect from March 25, 2024**.

The most significant changes the Amendment Act introduces are:

a) Amendments to the **tests to be applied** by bail decision-makers:

- i. redefinition of the ‘unacceptable risk’ test;*
- ii. offences for which bail must not be refused; and*
- iii. the removal of certain double uplift provisions;*

b) Amendments to what bail decision makers **must consider**:

- i. considerations concerning children;*
- ii. considerations concerning Aboriginal people; and*
- iii. changes to what are ‘surrounding circumstances’;*

c) Removal of certain specific Bail Act offences; and

d) Other amendments include those that facilitate further bail applications and amendments to clarify, update and modernise the Bail Act.

# KEY AMENDMENTS

- Bail Act Offences and Summary Offences
- Considerations and tests
- Other Amendments

# BAIL ACT OFFENCES AND SUMMARY OFFENCES

Section 30A

Section 30B

Section 32A

Section 4AAA

# Offences under the Bail Act 1977

**Repealed:** Section 30A has been **removed** from the Act.

- With section 30A being removed from the Act it is no longer a standalone offence to a breach a condition of a bail agreement.

**Repealed:** Section 30B has been **removed** from the Act.

- With the removal of Section 30B it is no longer a standalone offence to commit an indictable offence whilst on bail.

**Repealed:** Section 32A has been **removed** from the Act.

- With the removal of Section 32A, a police officer can no longer issue an infringement notice against an offence under s.30A (the infringement penalty was 1 penalty unit).

# Summary Offences where bail must not be refused

Section 4AAA Is a **new addition to the Act**. The new section can be summarised as follows:

- **s.4AAA(1)** Bail cannot be refused if the accused is only charged with offences under the Summary Offences Act 1966: exceptions apply (schedule 3 offences)
- **s.4AAA(2)** Exceptions for a court to refuse bail include if the person is determined to be a risk of committing terrorism or foreign incursion offences, or if their previously granted bail was revoked.
- **s.4AAA(3)** Clarifies who has to comply with the section- bail decision makers.
- **s.4AAA(4)** The section does not restrict the court's authority to revoke bail already granted.
- **Schedule 3:** There are 13 offences excluded from section s.4AAA (sexual exposure, public display of Nazi Symbols, common assault)
- **NOTE:** s.12B Persons subject to a summons to answer a charge

# CHANGES TO CONSIDERATIONS AND TESTS

Section 3AAA

Section 3A

Section 3B

Section 4AA

Section 4D

Section 4E

Schedule 2

Schedule 3

# Section 3AAA Surrounding Circumstances

Section 3AAA has been **amended**. There are three Key Amendments to Section 3AAA of the Bail Act:

- **Addition:** section 3AAA(1)(aa) requires decision-makers to consider whether the accused if found guilty, is likely to be sentenced to imprisonment and, if so, if the time on remand will exceed the likely sentence.
- **Expansion:** Section 3AAA(1)(e) requires a decision maker to consider whether the accused was on remand, awaiting sentence, or subject to an undertaking at the time of the alleged offending.
- **Restructure and expansion:** Definition of 'Special Vulnerabilities' under s.3AAA(1)(h) to: being an Aboriginal person or a child experiencing ill health, including mental illness Having a disability (recognising that disabilities can be physical, intellectual, or cognitive impairments)



# Determinations in relation to an Aboriginal Person

**Substitution:** The new section 3A is a **complete rewrite** of the previous section. The new section can be summarised as follows:

- **s.3A(1) Consideration of Aboriginality:** Bail decision-makers must factor in issues related to the person's Aboriginality. This includes historical and ongoing discrimination, the overrepresentation in the criminal justice system, and the specific risks and trauma associated with custody for Aboriginal people.
- **s.3A(2) Evidence and Information:** Decision-makers should base their considerations on evidence and information reasonably available at the time, including input from the person's family, community, and Aboriginal bail support service providers.
- **s.3A(3) Mandatory Consideration of issues in s.3A(1)(a) to (c)** Certain issues such as discrimination, risks of custody, and connection to culture must be considered regardless of the availability of specific evidence or information.
- **s.3A(4) Inclusive Consideration:** The requirement to consider issues related to Aboriginality applies irrespective of the continuity of the person's connection to their culture or when they first disclosed their Aboriginality.
- **s.3A(5) Documentation of reasons for refusal of bail:** If bail is refused, the decision-maker must document the considerations related to Aboriginality and either state them orally, ensuring an audio or audio-visual recording, or record them in written form as deemed appropriate

# Determinations in relation to a child

**Substitution:** The new section 3B is a **complete rewrite** of the previous section. The new section can be summarised as follows:

- **s.3B(1)(a) Child's Development:** Consider the child's age, maturity, and developmental stage at the time of the alleged offence.
- **s.3B(1)( b) Minimal Intervention:** Ensure that intervention is minimal and remand is a last resort.
- **s.3B(1)( c) Doli Incapax:** Acknowledge the common law presumption that children between 10 and 14 years of age are incapable of committing an offence.
- **s.3B(1)( d) Family Relationships:** Preserve and strengthen the child's relationships with parents, guardians, carers, and other significant individuals.
- **s.3B(1)( e) Stable Living:** Support the child in maintaining a stable and secure home life or living situation.
- **s.3B(1)( f) Education and Work:** Encourage the child's involvement in education or employment with minimal disruption.
- **s.3B(1)(g) Stigma Minimization:** Minimize the stigma associated with the child being remanded.
- **s.3B(1)(h) Risks of Custody:** Recognize the risks of custody, including the potential for further criminal involvement and harm.
- **s.3B(1)(i) Bail Conditions:** Ensure bail conditions are not overly restrictive and are fair to the child.
- **s.3B(1)(j) Awareness:** Be aware of over-representation and discrimination in the criminal justice system, particularly among Aboriginal children, those in child protection, and those from diverse cultural backgrounds.
- **s.3B(1)(k) Sentence Consideration:** Assess the likelihood and appropriateness of a potential prison sentence relative to possible remand time.
- **s.3B(1)(l) Health and Trauma:** Consider the child's health, disabilities, and experiences of abuse, trauma, loss, and involvement with the child protection system.
- **s.3B(1)(m) Other Relevant Factors:** Take into account any other factors that are pertinent to the child's situation.

# Double Uplift Provisions

Schedule 2 has been **amended**. The key amendments are:

- **Removal: Item 1 and Item 30:** were **removed** to narrow the scope of the reverse onus provisions for multiple minor offending.
- **Addition: item 32:** Historical offences corresponding to Schedule 2 offences- Schedule 2 provides that any historical offence which consists of elements that constitute an offence under Schedule 2 is an offence under Schedule 2.

Section 4AA has been **amended**. The key amendments are:

- **addition:** s.4AA(2)(iiia)and (iiib): This expands the double uplift provision so that the “exceptional circumstances” test now also apply to an accused alleged to have committed an offence on remand and those awaiting sentence.
- **addition:** of the new s.4AA(5): Clarifies an exception for people on adjourned undertakings.

# The unacceptable risk test

## Sections 4D and 4E

**Substitution:** The new section 4D is a **complete rewrite** of the previous section. The new section can be summarised as follows:

- **s.4D(a) Following Step 1 Tests:** The unacceptable risk test must be applied after completing either the exceptional circumstances or show compelling reason test as dictated by sections 4A(4) or 4C(4).
- **s.4D(b) Absence of Step 1 Tests:** The unacceptable risk test is also used when neither the exceptional circumstances test nor the show compelling reason test is required for a bail decision under sections 4AA or 4AAB.

Section 4E has been **amended**. The key amendments are:

- **Addition:** the unacceptable risk test in Section 4E(1)(a)(i) incorporates the wording of the previous s.4E(1)(a)(ii) so that the prosecution must show that there is an unacceptable risk that the person will: endanger the safety or welfare of any other person, whether by committing an offence that has that effect, or by any other means
- **Removal:** The amendments repeal the existing second limb of the unacceptable risk test in section 4E(1)(a)(ii) which refers to committing an offence while on bail.

# OTHER AMENDMENTS

Section 3

Section 18AA

Section 28

# Represented Bail Applications

Section 18AA has been **amended**. The key amendment is:

- **Addition s.18AA(1)(aa)** all accused persons, including those who have had bail refused by a bail justice, may make two bail applications before a court without showing new facts or circumstances.

# Amendments for clarification, of gendered language and of definition

## Amendments of definitions

- **Addition:** Aboriginal Support Service
- **Substitution:** Aboriginal person

## Amendments for clarification

- **s.3 :** Bail Guarantee/Bail Guarantor- (replacing term Surety) All references to surety/sureties to have been replaced by either bail guarantee or bail guarantor as appropriate

## Amendments for gendered language

- **s.28** is a complete rewrite of the previous section.

**CURRENT:** *Where an accused is taken into custody upon charges for two or more offences, he may be admitted to bail upon his entering, together with his sureties (if any), into one undertaking for his attendance at a stated time and place upon all the charges.*

**NEW:** *If a bail decision maker is to grant bail to an accused who is held in custody in relation to charges for 2 or more offences, the bail decision maker may allow the accused to give a single bail undertaking in respect of all the charges*

# CONCLUDING THOUGHTS

Sharon Lacy SC

Elissa Taylor