

# **Bail Amendment (Reducing Pre-trial Imprisonment of Women, Aboriginal, and Vulnerable Persons) Bill 2021**

## **Introduction Print**

### **EXPLANATORY MEMORANDUM**

#### **General**

The purpose of the Bail Amendment (Reducing Pre-Trial Imprisonment of Women, Aboriginal, and Vulnerable Persons) Bill 2021 (the Bill) is to address problems arising from legislative reforms to the **Bail Act 1977** (the Act) over the last decade. These reforms have led to significant rises in the number of unsentenced prisoners on remand awaiting trial. This, in turn, has caused exponential growth in the capital and operational costs of Victoria's prison system, considerable declines in prison performance measures, and rising reoffending rates for both children and adults. At the same time there is no empirical evidence that the reforms have enhanced community safety.

Moreover, the reforms have led to the disproportionately higher rates of imprisonment of women, Aboriginal and Torres Strait Islander people, and children, despite the fact that these groups are generally not responsible for the majority of serious criminal offending in the community.

High numbers of vulnerable people being imprisoned for alleged low-level offences raises serious concerns that the bail system is operating counter to the fundamental principles of our criminal justice system, that may be contributing to injustices.

The Bill will improve the process for determining bail under the Act by—

- providing for the granting of bail based on a simplified single test of "unacceptable risk", with no reverse onus provisions; and

- expanding and clarifying the list of surrounding circumstances to be taken into consideration in relation to bail matters.

### Clause Notes

- Clause 1 sets out the purposes of the Bill, which are to simplify the process for granting bail, and to provide for other matters related to the process of granting bail.
- Clause 2 defines when the Bill comes into effect. The Act commences 6 months after the day it receives Royal Assent.
- Clause 3 provides that the **Bail Act 1977** is called the Principal Act in the Bill.
- Clause 4 amends section 3AAA(1), that provides a list of surrounding circumstances to be taken into consideration in regards to bail related matters.

Clause 4(a) amends paragraph (a). Paragraph (a), which requires consideration of the nature and seriousness of the alleged offending and whether it is a serious example of the offence, is amended to include consideration of whether the alleged offence is classified as a Schedule 1 or a Schedule 2 offence in the Act. This is intended to provide further guidance to bail decision makers in regards to determining the seriousness of an alleged offence.

Clause 4(b) inserts new paragraph (ea) to require that if paragraph (e), regarding other alleged offending of the accused at the time of the offence, applies to the accused, then the bail decision maker should take into account the nature and seriousness of the other alleged offending, including whether this offence is classified as a Schedule 1 or a Schedule 2 offence under the Act.

Clause 4(c) amends paragraph (g) to explicitly include any parental responsibilities the accused may have in relation to a child, when considering the accused's personal circumstances, associations, home environment and background.

Clause 4(d) inserts new paragraph (ka) to include consideration of the length of time the accused has already spent in custody.

Clause 4(e) amends paragraph (l) to include consideration of the likelihood of a custodial sentence for the accused, should they be found guilty of the offence they are charged with.

Clause 4(g) inserts new paragraphs (o), (p) and (q). New paragraph (o) includes consideration of any risk of physical, psychological or other harm to the accused while on remand, including self-harm or harm by others.

New paragraph (p) includes consideration of the interests of justice.

New paragraph (q) includes consideration of relevant human rights under the Charter of Human Rights and Responsibilities.

Clause 5 repeals section 3D(1), (2), (3) and (4) of the Act. The repealed sections contain flow charts attempting to further clarify the process for bail decisions involving reverse onus tests. Clauses 5(6) and (7) consequentially amend section 3D of the Act as a result of the repeal of sections 3D(1) to (4).

Clause 6 repeals sections 4AA, 4A, 4C and 4D of the Act. These sections outlined the process for applying the exceptional circumstances test, the compelling reason test, and when bail decision makers were to apply these tests alongside the unacceptable risk test. Repealing these sections means that a single unacceptable risk test will be used to determine bail.

Clause 7 substitutes section 4E(1) and (2) of the Act, regarding the unacceptable risk test.

New section 4E(1) means that the unacceptable risk test will operate in the same way as currently under the Act. A bail decision maker must refuse bail for a person accused of any offence if the bail decision maker is satisfied that if the accused is released on bail there is an unacceptable risk they would—

- endanger the safety or welfare of any person; or
- commit an offence; or
- interfere with a witness or obstruct justice; or
- fail to surrender into custody.

New section 4E(2) provides separate consideration of unacceptable risk where the court has determined under section 8AA that there is a risk that the accused will commit a terrorism or foreign incursion offence. In this instance the court must refuse bail for the accused if the court is satisfied that the risk is unacceptable. If the court does not determine a risk in relation to section 8AA, then the court still must apply the unacceptable risk test 4E(1) to determine whether to grant bail. This section is required to maintain the process under section 8AA of the Act, where the court must make a preliminary determination as to whether there is a risk that the accused will commit a terrorism or foreign incursion offence, before determining whether to grant bail. New section 4E(2) replaces the exceptional circumstances or compelling reason tests when determining bail where there may be terrorism or foreign incursion risks.

New section 4E(2A) and (2B) state that in applying the unacceptable risk test and the provisions under 4E(2), the prosecutor bears the burden of satisfying the bail decision maker that the risk is unacceptable.

- Clause 8 repeals section 8AAA(1)(b) of the Act and the note at the foot of the subsection. This removes provisions relating to the exceptional circumstances test in this instance. Refer to new section 4E(2).
- Clause 9 omits the reference to the exceptional circumstances test in Section 10(5) of the Act.
- Clause 10 omits the reference to the exceptional circumstances test in Section 10A(5) of the Act.
- Clause 11 substitutes section 12A of the Act.

New section 12A outlines when a bail decision maker must state reasons for granting bail. A bail decision maker must record the reasons for granting bail when granting bail to a person accused of a Schedule 1 or Schedule 2 offence whether or not the bail decision is made by a court. New section 12A effectively retains the existing requirements under the Act in regards to stating the reasons for granting bail.

Clause 12 substitutes sections 13(3) and (4) of the Act.

New section 13(3) states that only a court may grant bail to a person accused of a Schedule 1 offence subject to subsection (4). This replaces the existing section that states that only a court can grant bail where the exceptional circumstances test applies, which also includes circumstances where the offence is alleged to be committed when the accused was on bail, summons or at large for any Schedule 1 or Schedule 2 offence, except where that offence is an indictable offence (item 1 of Schedule 2) or an offence against the Act (item 30 of Schedule 2). It is intended that in practice, this amendment will provide similar circumstances where only a court may grant bail.

New subsection (4) states that new section 13(3) does not apply if the accused is a child, a vulnerable adult or an Aboriginal person. Effectively, this will not change these current exemptions.

Clause 13 inserts new subsection 21 into section 34 of the Act. This subsection outlines the Bill's transitional provisions, that the **Bail Amendment (Reducing Pre-trial Imprisonment of Women, Aboriginal, and Vulnerable Persons) Act 2021** applies to bail applications made and appeals commenced on or after the commencement of the Act, regardless of when the offence was committed.

Clause 14 omits Notes 1 and 2 in Schedule 1 of the Act. These refer to the operation of the exceptional circumstances and compelling reason tests that are repealed by the Bill.

Clause 15 omits the Note in Schedule 2 of the Act. This note refers to the operation of the exceptional circumstances and compelling reason tests that are repealed by the Bill.