

# Bail Saves Lives

## Poccum's Law is the Way Forward

### VALS Statement of Advice: High Harm & Two Strike Bail Changes - Safeguards & Supports Needed



## Summary

The following provides a summary of the advice VALS has provided to the Attorney General to inform the development of the second tranche of the Victorian Government's bail amendments which we understand will be introduced mid-year. VALS opposes harsher bail laws including the proposed High Harm and Two Strike tests, but recognises the need to provide constructive advice to Government to ensure appropriate safeguards and supports accompany these bail changes which are likely to be progressed. Our key asks include legislative safeguards and funded service supports that must be implemented to minimise the harm inflicted on Aboriginal people.

Detailed below are the mechanisms that we believe will decrease the likelihood of unjust bail decisions that cause harm and do not increase community safety. These proposals will reduce the inevitable impacts and potential injustices of tightened bail provisions on Aboriginal women, children and vulnerable people. The safeguards VALS are proposing are essential to protect Aboriginal lives given the proven links between harsh bail laws and increasing Aboriginal deaths in custody and incarceration, as outlined in the findings from the Inquest into the death in custody of Veronica Nelson, the Royal Commission into Aboriginal Deaths in Custody and the Yoorrook Justice Commission, alongside many other inquiries.

The purpose of this advice is to continue our collective advocacy, as part of the '[Bail Saves Lives](#)' open letter which over 100 Aboriginal, community, family violence and legal organisations endorsed. We are seeking our key asks to inform the legislation in its development, and to scope the implementation of these safeguards both within the legislation and programmatic funding to prevent future and further Aboriginal deaths in custody.



# Bail Saves Lives

## Poccum's Law is the Way Forward



### Key Asks

***Expand Koori Court to hear bail applications and protect Aboriginal cultural rights in the Bail Act***

#### ***Legislative safeguards***

1. Amend s 1B(1) of the *Bail Act 1977* (Bail Act) to include “taking into account issues that arise due to a person's Aboriginality under section 3A” as a guiding principle.
2. Amend s 4E of the *Magistrates Court Act 1989* to expand the jurisdiction of the Koori Court to hear bail applications.

#### ***Program and funding supports***

3. Resource pilot bail hearings in three initial Koori Court locations: Mildura, Shepparton and Melbourne. Expansion of the court's jurisdiction will require significant additional resources for staffing and related programs such as Court Integrated Services Program (CISP).
4. Noting the expansion of the Koori Court, suitable Aboriginal led training for Elders and Respected Persons to hear bail applications must be developed and implemented, noting that bail hearings have different considerations to sentencing procedures.
5. Invest in resourcing intensive case management support for Aboriginal people applying for bail in both mainstream and Koori Court systems. This should include funding for Koori Support Officers that work with CISP at the Bail and Remand Court to link accused people to community-based support to address their medical, personal, cultural and/or social needs to reduce their likelihood of re-offending.

#### ***High Harm mitigation measures***

##### ***Legislative safeguards***

6. High harm test should not be introduced. If the test is introduced, against our advice, there must be adequate safeguards established and put in place to ensure that the test is not casting too broad a net and catching vulnerable people in the community whose offending is not ‘violent’.
7. Amend s 3AAA of the Bail Act to include a specific requirement that bail decision makers consider “the impact of denying bail on dependent children, including on unborn children, and whether granting bail is in the best interests of dependent children”. This consideration is in line with the *Convention on the Rights of the Child* and the *Charter of Human Rights and Responsibilities 2006* (Charter).



# Bail Saves Lives

## Poccum's Law is the Way Forward



8. Amend s 3AAA(h) of the Bail Act to include a specific requirement that bail decision makers consider “being pregnant” in the list of special vulnerabilities of people applying for bail.
9. If the high-harm test is established, against our advice, ensure the list of offences subjected to this test are limited as to not include offences that may not include an element of ‘violence’ or cause a ‘high risk’ to community safety.
10. Consult with VALS and other expert representatives in developing the High Harm test wording and the list of offences that will fall within scope, to ensure it aligns with Charter of Human Rights & Responsibilities.
11. Establish appropriate safeguards to ensure that children in care are not disproportionately impacted by these reforms.

### ***Program and funding supports***

12. Adequately fund culturally safe social support services to support at-risk people before they come into contact with the criminal legal system, but also after having come into contact with the system. This includes funding drug and alcohol programs, men's behavioural change programs, mainstream and alternative education and schooling programs and models, youth programs, family violence programs, and housing and social support programs.
13. Urgently invest in mental health responses and outreach programs for young people, with particular emphasis on identifying and supporting vulnerable and at-risk young people.
14. Urgently invest in an Aboriginal Bail Support model for men, women and young people.
15. Urgently invest in the expansion of Aboriginal Community Justice Reports Project, so that more Aboriginal people can access culturally safe sentencing hearings

### ***Ensure two-strike regime does not capture non-violence indictable offences***

16. Ensure the new two-strike regime applies for “violent indictable offences that endanger community safety”, rather than all indictable offences, to effectively implement the government’s intent with these reforms.
17. Ensure the two-strike test includes a carve out for “minor or non-violent offences that do not endanger community safety”.
18. Add a new Schedule to the Bail Act containing a non-exhaustive list of non-violent indictable offences which are exempt from any uplift and are not subject to the new two-strike regime.
19. Include the offences listed in the attached Annexure A in the new Schedule as exempt offences that are not subject to the new two-strike or any uplift regime.



# Bail Saves Lives

## Poccum's Law is the Way Forward



### *Funding for psychological/psychiatrist reports & risk assessments in bail applications*

20. Increase funding for VALS for psychological and psychiatrist evaluations and risk assessments in bail applications.



# Bail Saves Lives

## Poccum's Law is the Way Forward



### Detailed briefing information relating to key asks

#### Expand Koori Court to bail applications & protect Aboriginal cultural rights in Bail Act

##### ***Protecting Aboriginal cultural rights in the guiding principles***

Under s 3A of the Bail Act there are legislative protections to help address the historical and continuing disadvantage faced by Aboriginal people in the criminal justice system and to minimise the over-incarceration of Aboriginal people. These build on the cultural rights protected under s 19(2) in the Victorian Charter of Human Rights and a substantive equality special measure under s 8(3). Section 3A requires explicit consideration of the factors resulting in the over-representation of Aboriginal people in the criminal justice system, the specific harm occasioned to Aboriginal people of incarceration, the importance of maintaining connection to culture, community, kinship and elders, intergenerational trauma, and other factors that disproportionately negatively impact Aboriginal people and communities.

Section 3A of the Bail Act was strengthened in 2023 to include 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.<sup>1</sup> The proposed bail laws undermine these principles given the inevitable disproportionate impact on Aboriginal people of stricter bail tests. Therefore, the importance of s 3A is elevated with the passing of harsher bail laws.

VALS recommends amending the guiding principles at s 1B of the Bail Act to protect Aboriginal cultural rights.

##### ***Expand the Koori Court's jurisdiction to hear bail applications***

To increase access to culturally appropriate bail hearings and ensure better application of s 3A of the Bail Act, VALS recommends expanding the jurisdiction of the Koori Court to hear bail applications. We are calling on the Victorian Government to fund the piloting of bail hearings in the Koori Court at three locations: Shepparton, Mildura and Melbourne, where Elders and Respected Persons provide guidance on s 3A considerations. VALS also calls for increased funding for Aboriginal-specific case management and bail support services.

---

<sup>1</sup> Bail Amendment Act 2023 (Vic).



# Bail Saves Lives

## Poccum's Law is the Way Forward



In operation VALS envisions that, in a system where the Koori Court is given jurisdiction to hear bail applications, Aboriginal people who are charged and remanded will:

- I. Have their first bail hearing heard in the mainstream Bail and Remand Court.

VALS recognises that it is not currently feasible to have a dedicated 24/7 Koori Bail and Remand Court, and people will have to be initially processed through the mainstream bail application hearing systems. This will ensure the accused's case is heard as soon as possible, and that the accused spends as little time on remand as possible.

- II. If bail is denied, the accused will be given the option to make a fresh bail application<sup>2</sup> within the Koori Court system. This will require legislative amendment to give the Koori Court jurisdiction to hear bail applications.
- III. When this fresh bail application is heard in the Koori Court, Elders and Respected persons be given a specific role to advise on the s 3A considerations. Elders and Respected Persons are best positioned to consider an accused's circumstances, cultural context and strengths. Elders and Respected Persons already play a role in providing sentencing judicial officers with advice and information on cultural and community matters to contextualise the participant's behaviour and help them understand the reasons underlying the offending so are well positioned to advise on s 3A considerations.

### ***Invest in corresponding programmatic supports for the Koori Court***

It is not enough to simply expand the Koori Court's jurisdiction to hear bail matters without providing programmatic supports. Without the resourcing and programmatic supports, the government would be setting this model up to fail and undermining the success of Aboriginal-led justice models. VALS calls on the government to invest in resourcing intensive case management support for Aboriginal people applying for bail in both mainstream and Koori Court systems. This should include funding for Koori Court Officers to work with mainstream Court Integrated Services Program (CISP) at the bail and remand court to link accused Aboriginal people to community-based support to address their medical, personal, cultural and/or social needs to reduce their likelihood of re-offending, and funding VALS to provide a duty lawyer service at Bail and Remand Courts.

---

<sup>2</sup> s 18 of the *Bail Act* already provides a right to a further application for bail if it has been refused by a bail decision maker.



# Bail Saves Lives

## Poccum's Law is the Way Forward



### **Harm mitigation measures**

VALS opposes the introduction of the new 'high harm' test. Establishing a 'high harm' test without incorporating adequate safeguards will undoubtedly result in Aboriginal young people, and adults being disproportionately impacted by these reforms. We recommend various safeguards outlined below that must be incorporated in the reform process, noting that there is far more work to be done to ensure these reforms are not harming vulnerable and at-risk cohorts.

### ***Adequate funding for social support services***

If the government is serious about preventing 'high harm' crimes it must invest in addressing the issues that underlie a person's offending behaviour, such as struggles with drug addiction, mental health, and lack of supports and access to housing. Providing vulnerable people with appropriate and comprehensive supports will increase positive social engagement and reduce the likelihood of engaging in risk-taking and anti-social behaviours. The government needs to urgently invest in housing, residential drug rehabilitation programs, mental health, youth, and non-mainstream education, training and schooling models. We know that increased carceral responses do not keep communities safe, in fact the criminogenic effects of any time in prison drastically increases the likelihood of reoffending in more serious ways.

### ***Aboriginal Bail Support Model – for men, women and young people***

VALS recommends the state invest in an Aboriginal Bail Support model for men, women and young people. We know that housing is often a barrier to being granted bail for Aboriginal peoples. We are seeking a residential bail support program, with pilot sites in metropolitan Melbourne and regional Victoria.

Investing in this model will ensure that bail supports for Aboriginal people are culturally safe, provide holistic, therapeutic and appropriate supports that will empower the individual to comply with their bail conditions. This includes having a safe and suitable place to reside and remain connected to their family, community and culture.

### ***Expand the Aboriginal Community Justice Reports Project***

The Aboriginal Community Justice Reports Project (ACJR) aims to reduce overincarceration and improve sentencing outcomes for Aboriginal people and has been successful in doing so.

A key component of an ACJR is that it focuses on the individual's strength being rooted in their culture, challenging the traditional sentencing process which often looks at Aboriginality through a deficit lens – which, in turn, can have negative impacts on an





# Bail Saves Lives

## Poccum's Law is the Way Forward



Aboriginal person's sentencing outcome. The strengths of the individual are then used to establish alternatives to incarceration that are community-based and healing-focused. Importantly, a case worker is made available to each person who participates in order to provide ongoing support. VALS recommends increased resourcing for the expansion of ACJR, so that more Aboriginal people can access them at the sentencing stage.

### ***Children in care***

VALS believes the 'high harm' test should not apply to young people in the care of the state. This reflects the need to minimise the criminalisation of an already over criminalised and at-risk cohort of young people. The charges laid against young people in care are often not reflective of the gravity of the offence committed and are regularly criminalised for behaviours that would never result in police or court interventions for other young people. We supported a young person in residential care who had been charged with aggravated burglary for entering the office at their residential care facility. We have supported young people in residential care charged with stealing food from the locked pantry and charged with property damage where they have broken a glass. We are criminalising children, who if not for being in state care, would not have police involvement in their lives. Instead, there needs to be adequate funding and intensive therapeutic support made available to support these young people.

### ***Limit list of offences subject to 'High Harm' test***

In addition to the above safeguards VALS would like to see established, we strongly recommend that the list of offences included in the 'high harm' test is limited to offences that impact community safety, rather than broad prescription of offences that may include non-violent conduct. To protect vulnerable cohorts who continue to be over-policed and overrepresented in the criminal legal system it's important that the list of offences that constitute the 'high harm' test are limited per our advice.

Offences such as theft of motor vehicle or aggravated burglary should be excluded from the 'high harm' test as they do not reflect a high level of harm against the community.

In developing the 'high harm' test wording and the list of offences that will fall within it, the government must consult with VALS and other expert representatives. It is particularly important that VALS is involved in the development of this list given the intersection of vulnerabilities our clients experience, and the likelihood these reforms will have on those cohorts of the community.





# Bail Saves Lives

## Poccum's Law is the Way Forward



### ***Adding consideration of parental responsibility in the Bail Act***

We are deeply concerned about the anticipated further criminalisation and harm of Aboriginal mothers and their dependent children who are refused bail, due to both 'high harm' and 'two strike' tests. This will result in higher rates of Aboriginal children being removed because their parent has been incarcerated. We advocate strongly that the Bail Act be amended to ensure that pregnancy and parental responsibility is a stated consideration when making decisions regarding bail.

### **Ensure two-strike regime does not capture non-violent indictable offences**

VALS recommends carving out non-violent indictable offences from the new two-strike regime. Indictable offences include many minor and non-violent offences such as theft, drug possession and damaging property. VALS have counted and considered more than 400 indictable offences between 13 different pieces of Victorian legislation alone<sup>3</sup> – including the *Occupational Health and Safety Act 2004*, Crimes Act and *Road Safety Act 1986*. Hundreds of these offences do not have an element of actual or threatened application of force (i.e. violence) as an element of the charge. The nature of offending can range from trivial to extremely unusual but usually do not constitute any kind of threat to community safety.

We recommend that the next tranche of bail reform include a separate schedule containing a non-exhaustive list of non-violent indictable offences which are not to be uplifted and subject to the new two-strike regime. VALS recommends articulating certain non-violent indictable offences to which the two-strike system will NOT apply, for clarity to police, lawyers, prosecutors and judges and so the intention behind the schedule becomes clear over time and can be applied to obscure indictable offences that cannot all be captured in a Schedule. Some of the exempt offences that should be specified in a Schedule should be:

- Theft (s 74 Crimes Act)
- Burglary (s 76 Crimes Act)
- Obtaining property or financial advantage by deception (s 81 and 82 Crimes Act)
- Handling stolen goods (s 88 Crimes Act)
- Going equipped for stealing (s 91 Crimes Act)

---

<sup>3</sup> *Road Safety Act 1986, Crimes Act 1958, Firearms Act 1996, Drugs, Poisons and Controlled Substances Act 1981, Corrections Act 1986, Bail Act 1977, Family Violence Protection Act 2008, Personal Safety Intervention Order Act, Serious Offenders Act 2018 and Occupational Health and Safety Act 2004.*



# Bail Saves Lives

## Poccum's Law is the Way Forward



- Dealing with proceeds of crime (s 194 Crimes Act)
- Damage property (s 197 Crimes Act)
- Making false statements (s 165 Crimes Act)
- Possess a drug of dependence (s 73(1) *Drugs, Poisons and Controlled Substances Act 1981*)
- Use a drug of dependence (s 75 *Drugs, Poisons and Controlled Substances Act 1981*)
- Contravene Family Violence Intervention Order – there should be carve outs for breaches that do not involve allegations of violence or form technical breaches (s 123 *Family Violence Protection Act 2008*)
- Fail to Answer Bail (s 30 Bail Act)
- Commit an indictable offence whilst on bail (s 30B Bail Act)

If the government's purpose is for these bail changes to apply to serious violent offences which endanger community, then these exceptions are critical safeguards to ensure the new bail laws do not have a 'net widening effect' or will capture an incredibly large cohort of vulnerable people charged with non-violent indictable offences.

### **Funding for psychological/psychiatrist reports & risk assessments in bail applications**

There has been a noticeable uptake in psychologist and psychiatrist evaluations and risk assessments in bail applications in the past month.

The costs associated with this is immediate and high for VALS as we do not have dedicated funding for psychological and risk assessments, but where the presence of such reports and assessments can make the difference between bail being granted or not.

