Submission No 139

INQUIRY INTO VICTORIA'S CRIMINAL JUSTICE SYSTEM

Organisation: Victorian Aboriginal Legal Service (VALS) and South Eastern Australian Aboriginal Justice Services Ltd

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Victorian Aboriginal Legal Service Submission to the Inquiry into Victoria's Criminal Justice System

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Victorian Aboriginal Legal Service

Table of Contents

Victorian Aboriginal Legal Service

Victorian Aboriginal Legal Service

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Victorian Aboriginal Legal Service

BACKGROUND TO THE VICTORIAN ABORIGINAL LEGAL SERVICE

The Victorian Aboriginal Legal Service (VALS) is an Aboriginal Community Controlled Organisation (**ACCO**). VALS was established in 1973 to provide culturally safe legal and community justice services to Aboriginal and/or Torres Strait Islander people across Victoria.[1] VALS' vision is to ensure that Aboriginal people in Victoria are treated equally before the law; our human rights are respected; and we have the choice to live a life of the quality we wish.

Legal Services

Our legal practice serves Aboriginal people of all ages and genders in the areas of criminal, family and civil law. We are also in the process of relaunching a dedicated youth justice service, Balit Ngulu. Our 24-hour criminal law service is backed up by the strong community-based role of our Client Service Officers (CSOs). CSOs are the first point of contact when an Aboriginal person is taken into custody, through to the finalisation of legal proceedings.

Our Criminal Law Practice provides legal assistance and representation for Aboriginal people involved in court proceedings. This includes bail applications; representation for legal defence; and assisting clients with pleading to charges and sentencing. This includes matters in the generalist and Koori courts.[2] Most clients have been exposed to family violence, poor mental health, homelessness and poverty. We aim to understand the underlying reasons that have led to the offending behaviour and equip prosecutors, magistrates and legal officers with knowledge of this.. We support our clients to access support that can help to address the underlying reasons for offending and so reduce recidivism.

Our Civil and Human Rights Practice provides advice and casework to Aboriginal people in areas, including infringements; tenancy; victims of crime; discrimination and human rights; Personal Safety Intervention Orders (PSIVO) matters; coronial inquests; consumer law issues; and Working With Children Check suspension or cancellation.[3]

Our Aboriginal Families Practice provides legal advice and representation to clients in family law and child protection matters.[4] We aim to ensure that families can remain together and children are kept safe. We are consistent advocates for compliance with the Aboriginal Child Placement Principle in situations where children are removed from their parents' care.

[1] The term "Aboriginal" is used throughout this submission to refer to Aboriginal and/or Torres Strait Islander peoples.
[2] In 2019-2020, VALS provided legal services in relation to 1,873 criminal law matters. In 2020-2021, VALS has provided legal services in relation to 805 criminal law matters (as of 19 March 2021).
[3] In 2019-2020, VALS provided legal services in relation to 827 civil law matters. In 2020-2021, VVALS has provided legal services in relation to 450 civil law matters (as of 19 March 2021).
[4] In 2019-2020, VALS provided legal services in relation to 835 family law and/or child protection matters. In 2020-2021, VALS has provided legal services in relation to 788 family law and/or child protection matters (as of 19 March 2021).

Victorian Aboriginal Legal Service

Our Specialist Legal and Litigation Practice (Wirraway) legal advice and representation in civil litigation matters against government authorities. This includes for claims involving excessive force or unlawful detention; police complaints; prisoners' rights issues; and coronial inquests (including deaths in custody).[5]

Community Justice Programs

VALS operates a Custody Notification System (CNS). The Crimes Act 1958[6] requires that Victoria Police notify VALS within 1 hour of an Aboriginal person being taken into police custody in Victoria.[7] Once a notification is received, VALS contacts the relevant police station to conduct a welfare check and facilitate access to legal advice if required.

The Community Justice Programs Team also operates the following programs:

- Family Violence Client Support Program[8]
- Community Legal Education
- Victoria Police Electronic Referral System (V-PeR)[9]
- Regional Client Service Officers
- Baggarrook Women's Transitional Housing program[10]

Policy, Research and Advocacy

VALS informs and drives system change initiatives to improve justice outcomes for Aboriginal people in Victoria. VALS works closely with fellow members of the Aboriginal Justice Caucus and ACCOs in Victoria, as well as other key stakeholders within the justice and human rights sectors.

[5] In 2019-2020, VALS Wirraway provided legal services in relation to 2 legal matters. In 2020-2021, VALS Wirraway has provided legal services in relation to 53 legal matters (as of 19 March 2021).
[6] Ss. 464AAB and 464FA, Crimes Act 1958 (Vic).
[7] In 2019-2020, VALS CNS handled 13,426 custodial notifications. In 2020-2021, VALS CNS has handled 8,366 custodial notifications (as of 19 March 2021).
[8] VALS has three Family Violence Client Support Officers (FVCSOs) who support clients throughout their family law or civil law matter, providing holistic support to limit re-traumatisation to the client and provide appropriate referrals to access local community support programs and emergency relief monies.
[9] The Victoria Police Electronic Referral (V-PeR) program involves a partnership between VALS and Victoria Police to support Aboriginal people across Victoria to access culturally appropriate services. Individuals are referred to VALS once they are in contact with police, and VALS provides support to that person to access appropriate services, including in relation to drug and alcohol, housing and homelessness, disability support, mental health support.
[10] The Baggarrook Women's Transitional Housing program provides post-release support and culturally safe housing for six Aboriginal women to support their transition back to the community. The program is a partnership between VALS, Aboriginal Housing Victoria and Corrections Victoria.

Victorian Aboriginal Legal Service

ACKNOWLEDGEMENTS

VALS pays our deepest respect to traditional owners across Victoria, in particular, to all Elders past, present and emerging. We also acknowledge all Aboriginal and Torres Strait Islander people in Victoria and pay respect to the knowledge, cultures and continued history of all Aboriginal and Torres Strait Islander Nations.

We also acknowledge the following staff members who collaborated to prepare this submission:

- Fergus Peace (Policy, Advocacy & Research Officer)
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- Kin Leong (Director of Legal Services)
- Dominique Lardner (Principal Managing Lawyer, Criminal Law Practice)
- Negar Panahi (Senior Solicitor, Balit Ngulu)
- Lee-Anne Carter (Statewide Community Justice Leader)
- Nik Barron (Principal Managing Lawyer, Wirraway Specialist Legal & Litigation Practice)
- Sarah Schwartz (Senior Lawyer, Wirraway Specialist Legal & Litigation Practice)
- Alex Walters (Principal Managing Lawyer, Civil Law & Human Rights Practice)
- Siobhan Doyle (Senior Lawyer, Civil Law and Human Rights Practice)
- Caitlin Jakeman (Policy Volunteer)

SCOPE OF THE INQUIRY

On 3 June 2020, the Legislative Council agreed to the following motion:

That this House requires the Legal and Social Issues Committee to inquire into, consider and report, by no later than 28 February 2022, on various issues associated with the operation of Victoria's justice system, including, but not limited to —

(1) an analysis of factors influencing Victoria's growing remand and prison populations;
(2) strategies to reduce rates of criminal recidivism;
(3) an examination of how to ensure that judges and magistrates have appropriate knowledge and expertise when sentencing and dealing with offenders, including an understanding of recidivism and the causes of crime; and
(4) the consideration of judicial appointment processes in other jurisdictions, specifically noting the particular skill-set necessary for judges and magistrates overseeing specialist courts.

Victorian Aboriginal Legal Service

EXECUTIVE SUMMARY

VALS welcomes the opportunity to make a submission to the Inquiry into Victoria's Criminal Justice System. We have drawn on our nearly 50 years expertise of delivering a dedicated, culturally safe legal service for Aboriginal and Torres Strait Islander people in Victoria.

Some say that the criminal justice system is broken, but you would have heard many Aboriginal people say that the system is doing exactly what it was intended to do. **Today's legal system and institutions are built on Australia's violent colonial history**, and they are shaped by that past. **Systemic racism across the criminal legal system needs to be addressed.** Our submission highlights the way that the criminal justice system harms Aboriginal people. We also set out recommendations for a future criminal legal system that overcomes systemic racism and improves justice outcomes for all people, most particularly Aboriginal and Torres Strait Islander people in Victoria. Our recommendations address the need for broad, systemic reform, while others are specific and technical in nature. The common thread is that, if properly implemented, Victoria would move towards creating a legal system that is truly accessible and just for all. This submission makes recommendations about how to address these systemic challenges both **preventatively to divert Aboriginal people from the criminal legal system and then at each stage of the criminal legal system.**

The narrative surrounding criminal justice issues too often centres on deficits and on punishment and promotes the false dichotomy of victim vs 'offender'. The reality is that many people who get caught up in the criminal justice system are victims themselves, many have direct experience of trauma and many have slipped through the holes in our society's safety net. For instance, many people caught in the criminal legal system have experience of homelessness and poverty. For Aboriginal people, these hardships and inequities cannot be separated from the legacy of colonisation and the systemic racism that is endemic across service providers and institutions. **A foremost objective of any serious reform of the Victorian criminal legal system must be that Aboriginal people can trust the system and have confidence that it delivers just outcomes for Aboriginal people.** Without this, objectives of improved rehabilitation and reduced recidivism and seeing an end to the hyperincarceration of Aboriginal people will not be met. Moreover, such reform requires listening, learning and embedding the principles of Aboriginal self-determination in the criminal legal system. Aboriginal people have the answers and are essential to the solution. This includes making progress on recommendations of the Aboriginal Justice Caucus, such as establishing an Aboriginal Social Justice Commissioner.

A crucial reform is increased transparency and accountability across Victoria's criminal legal system. The limited availability of comprehensive, timely data is a persistent issue. **Data should be readily and publicly available,** as it is critical to assessing the operation of the system and to enable early identification of any systemic problems. This has particular pertinence to Aboriginal people, given the rights of Aboriginal people to exercise their individual and collective rights over Indigenous Data, and

Victorian Aboriginal Legal Service

Indigenous Data Sovereignty. **Greater accountability across the criminal legal system will also improve justice at an individual level and contribute to overcoming systemic deficiencies.** For example, our submission addresses the endemic failures in relation to police misconduct, adjudication of police complaints, prosecution of police, and the lack of regular detention visits to police custody in accordance with obligations that take effect from January 2022 under the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT). Without transparency and robust, independent scrutiny of the criminal legal system, the system cannot improve.

Victoria needs to adopt a more evidence-led approach to the criminal legal system. This is not just essential to securing Government commitments under Closing the Gap and the Aboriginal Justice Agreement. Rather, an evidence-led approach will deliver better justice and public policy outcomes for the whole of Victoria. This submission identifies multiple areas where Government can do better. For example, the Government must raise the age of criminal responsibility to at least 14 years old, (page 58) and reverse bail law changes which have led to a surge in prison populations. The latter has particularly impacted Aboriginal women who are being remanded for matters such as shoplifting and non-payment of fines.

We call on this Inquiry to consider the **many recommendations from many similarly significant inquiries into the criminal legal system (or parts thereof) that remain unimplemented.** For Aboriginal people, 2021 marks the 30 year anniversary of the Royal Commission into Aboriginal Deaths in Custody. However, many of those recommendations have not been implemented. At the same time, more Aboriginal people than before the Royal Commission are dying in custody. More recently, the Expert Reference Group report on decriminalisation of public intoxication has not been responded to, despite the tragic death of Tanya Day in police custody, which prompted this reform. We also wait for a Government response to the Commission for Children and Young People report released this year, *Our Youth, Our Way*, which focuses on Aboriginal children.

As the carceral net in Victoria continuously grows wider, there needs to be an acknowledgement that the criminal legal system is simply not the right mechanism by which to address the underlying causes that lead to the conduct and behaviour that constitutes offending. **The criminal legal system is ill-equipped to respond to the myriad socio-economic issues that put people at risk of offending**. **For instance, a criminal legal response to public health issues inevitably fails.** While VALS welcomes progress in decriminalising public drunkenness, we remain concerned that Victoria Police will likely be involved in the health response. VALS supports the Mental Health Royal Commission's endorsement of the principle that people experiencing mental health crises should not be met with a police-led response. However, we remain concerned by the qualification that this applies 'wherever possible'. Despite the Cannabis Inquiry, the Government seemingly has no appetite for adopting a health response to this health issue; the consequences of which are that people do not get the support they need, are criminalised and, in some cases, imprisoned. And despite VALS' consistent calls for the

Victorian Aboriginal Legal Service

Government to provide education, support and resources to community members to comply with public health directions, the Government continues to prefer a police-led response to the pandemic.

In Victoria, **we should focus investment on evidence-based prevention and early intervention, rather than police and prisons.** A growing prison population is a mark of failure of systems to prevent and divert people from custody. Incarceration should be the punishment of last resort. This is not about being soft on crime. Rather, it is recognising that incarceration leads to the harms that arise from the conditions and treatment in detention, the disruption of protective factors such as family, education, employment and housing, and the ripple effect of incarcerating someone on families and communities. **In the circumstances that the State criminalises and incarcerates people, we need that system to support community safety and rehabilitation.** For instance, avoiding the use of stigmatising labels for people who have offended, enfranchising imprisoned people by enabling them to exercise their fundamental right to vote. and not excluding certain offences from the spent convictions scheme. This will help contribute to overcoming the effect of 'othering' (excluding) individuals caught up in the criminal legal system.

Given the many inquiries and royal commissions into the criminal legal system, it seems safe to conclude that we have reached consensus. That is, we all agree that the current system and approaches are failing to create a safer community, to reduce offending, and to lead to just outcomes. If we are serious about addressing this, we need root and branch reform of the criminal legal system. We need to move to a more equitable legal system that respects Aboriginal self-determination, is free from racism and discrimination, is grounded in evidence and is accountable to the community that it aims to serve.

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Victorian Aboriginal Legal Service

SUMMARY OF RECOMMENDATIONS

Part 1: Principles for Criminal Legal System Reform

Aboriginal Self-Determination

Recommendation 1. The distinctiveness of Aboriginal peoples in Victorian society must be recognised in law.

Recommendation 2. The Victorian Government must ensure that Aboriginal peoples enjoy the right to meaningful and effective consultation in decision-making processes on matters that affect their rights. These should be based upon models of best practice within the international community, by engaging with Aboriginal communities and Aboriginal Community Controlled Organisations (ACCOs) at all stages of the conceptualisation, development and drafting of such measures.

Recommendation 3. The Victorian Government must ensure that the *Charter of Human Rights and Responsibilitie*s is amended to include recognition of the right to self-determination of Aboriginal peoples in Victoria.

Recommendation 4. The Victorian Government should ensure that all Aboriginal Community Controlled Organisations are sufficiently resourced to fulfil their respective mandates to represent the interests, both individual and collective, of Aboriginal peoples in Victoria.

Recommendation 5. The Victorian Government should implement policies and practices concerning Aboriginal persons and the Victorian criminal legal system that are consistent with the right to free, prior and informed consent of Aboriginal peoples in Victoria.

Recommendation 6. Existing legislation and policies should be reformed to ensure that Aboriginal people and ACCOs are provided access to data collected which concerns Aboriginal individuals and communities. This should also extend to participation in decisions regarding the evaluation and dissemination of such data, in a manner consistent with Indigenous Data Sovereignty (IDS) and Indigenous Data Governance (IDG). Both IDS and IDG require the meaningful and effective participation of Aboriginal people before decisions are made in relation to policies and legislation concerning Indigenous data.

Systemic Racism

Recommendation 7. The Victorian Government should work in partnership with the Victorian Aboriginal community and ACCOs to systematically assess and overcome racism at an individual and systemic level across all institutions and public services.

Recommendation 8. Systems, mechanisms and bodies of accountability and oversight, such as coronial inquests and detention oversight bodies (eg National Preventive Mechanisms under OPCAT) should examine the role of systemic racism when exercising their mandates.

Victorian Aboriginal Legal Service

Recommendation 9. Victoria Police and other relevant departments and agencies should actively foster a culture that respects human rights, through policies, procedures, operations and management. For Victoria Police, this should include a review of police training materials for their compatibility with human rights, as recommended by the Coronial Inquest into the death of Tanya Day.

Ending Aboriginal Deaths in Custody

Recommendation 10. The Victorian Government should immediately begin implementing the RCIADIC recommendations, and must not rely on the discredited Deloitte review on the status of implementation of the recommendations.

Recommendation 11. The Victorian Government should establish an independent, statutory office of the Aboriginal and Torres Strait Islander Social Justice Commissioner. This office should be properly funded and report directly to the Parliament. The mandate of the Commissioner should include monitoring the implementation of RCIADIC recommendations, as well as recommendations from coronial inquests into Aboriginal deaths in custody.

Prevention and Early Intervention

Recommendation 12. The Victorian Government should increase investment in evidence-based prevention and early intervention services, such as housing and mental health support services, to prevent offending and reoffending.

Recommendation 13. The Victorian Government should ensure housing and essential social services are accessible for people with criminal histories and Aboriginal people. In many cases, this will necessitate direct state provision and/or funding of Aboriginal Community Controlled Organisations.

Part 2: Addressing the Growth in Prison and Remand Populations

Bail

Recommendation 14. The Government must repeal the reverse-onus provisions in the *Bail Act 1977* (Vic), particularly the 'show compelling reason' and 'exceptional circumstances' provisions (sections 4AA, 4A, 4C, 4D and schedules 1 and 2).

Recommendation 15. There should be a presumption in favour of bail for all offences, with the onus on Prosecution to prove that there is a specific and immediate risk to the physical safety of another person.

Recommendation 16. There should be an explicit requirement in the Act that a person may not be remanded for an offence that is unlikely to result in a sentence of imprisonment.

Recommendation 17. The Victorian Government must amend the *Bail Act 1977* (Vic) to repeal the offences of committing an indictable offence while on bail (s. 30B), breaching bail conditions (s. 30A) and failure to answer bail (s. 30).

Recommendation 18. The Victorian Government must amend the *Bail Act 1977* (Vic) to reflect a child-centred approach and the best interests of the child principle. Children should not be subject to the same bail tests as adults, given that children are not at the same developmental stage, and do not have the same degree of autonomy and responsibility as adults. Similarly, bail conditions to which children are subject must account for their age and developmental stage.

Recommendation 19. The Victorian Government should amend the *Bail Act 1977* (Vic) to include a consideration of the implications for dependent children, when making bail decisions for mothers and primary carers, in accordance with international law standards.

Recommendation 20. The Victorian Government must prohibit on the detention of children under the age of 16 years, including detention on remand, consistent with recommendations of the Commission for Children and Young People.

Recommendation 21. The Government should invest in culturally safe residential bail accommodation and bail support for Aboriginal people, consistent with recommendations of the Commission for Children and Young People.

Recommendation 22. The Magistrates Court should expand the Court Integrated Services Program (CISP) so that it is available in all locations across Victoria. This includes ensuring sufficiency of Koori CISP workers to support Aboriginal people on bail across Victoria.

Recommendation 23. The Victorian Government must employ more bail justices, particularly in regional and rural areas. This will ensure that individuals are not remanded unnecessarily because a bail justice is not available.

Recommendation 24. In-person bail justice hearings should be the default position, with remote bail justice hearings only used in strictly limited circumstances. Deferral to a remote hearing must be strictly regulated by a clear, legally enforceable, and reportable procedure.

Recommendation 25. The Victorian Government should provide funding to VALS to deliver cultural awareness training to bail justices, including in relation to Section 3A of the *Bail Act 1977* (Vic).

Recommendation 26. If an individual identifies as Aboriginal, Victoria Police must contact VALS through the Custody Notification Service (CNS). Victoria Police must not act as gatekeepers to an Aboriginal person's rights under the *Bail Act 1977* (Vic), a concerning practice that VALS has come across.

Recommendation 27. Victoria Police must provide mandatory guidance and oversight for police officers, to ensure that they understand and comply with the requirements of the *Bail Act*. It is essential that police officers are able to appropriately determine when bail should be granted by a police decision maker, and when the individual should be brought to court.

Recommendation 28. The Victorian Government must ensure that police officers are held accountable for non-compliance with the presumption of proceeding against children by way of summons. Any complaints about police's failure in this regard must be investigated by an independent body.

Victorian Aboriginal Legal Service

Recommendation 29. The Victorian Government should establish a mechanism for effective oversight of police bail.

Recommendation 30. The Victorian Government should work with the County Court, Magistrates Court and Children's Court, to expand the jurisdiction of Koori Courts to hear bail applications.

Recommendation 31. The Courts should work with Aboriginal organisations to develop guidelines on the application of section 3A of the *Bail Act*, as recommended by the Australian Law Reform Commission.

Recommendation 32. Where a person appears unrepresented in a bail hearing, the Magistrate should proactively make inquiries as to whether the person is Aboriginal, and if so, they must meaningfully take into account Section 3A of the Bail Act 1977 (Vic).

Recommendation 33. The Victorian Government should require all bail decision makers to receive regular training on Section 3A of the *Bail Act*.

Family Violence

Recommendation 34. Victoria Police should work with family violence services, legal organisations and community members to fully implement Recommendation 41 of the Royal Commission into Family Violence, and reduce the risk of misidentification in Victoria.

Recommendation 35. The Victorian Government should not criminalise coercive control.

Recommendation 36. The Victorian Government should fund VALS to deliver culturally appropriate community legal education, to increase knowledge about coercive control and the options available.

Recommendation 37. The Victorian Government should improve training for police, service providers and courts to ensure that a proper understanding of coercive control becomes fully and consistently embedded in the practice of responses to domestic abuse.

Recommendation 38. Should a non-fatal strangulation offence be introduced in Victoria, the Victorian Government should include lack of consent as an element, and that the accused did not reasonably believe the other person was consenting.

Children & Young People

Recommendation 39. The Victorian Government should ensure that VALS can sustainably operate Balit Ngulu to provide legal assistance, advice and representation across all of Victoria to Aboriginal children who have matters in the youth justice system, and that this is extended to child protection matters.

Recommendation 40. The Victorian Government must ensure that the Koori Children's Court is accessible in additional locations across Victoria so that Aboriginal children across Victoria have access to a culturally competent and safe legal process.

Recommendation 41. The Victorian Government must raise the age of criminal responsibility to at least 14, and the age at which children can be detained to at least 16.

Victorian Aboriginal Legal Service

Recommendation 42. The Victorian Government must have no carve outs to raising the age of criminal responsibility.

Recommendation 43. The presumption of *doli incapax* should be extended by legislation to young people aged 14 to 17, with further amendments to ensure its effective operation:

- Create a legislative requirement for prosecutors to rebut the presumption;
- Place legislative restrictions on the kinds of evidence that can be produced to rebut the presumption;
- Increase funding to the Children's Court to improve the quality of clinical reports;
- Increase funding to Victoria Legal Aid to cover the cost of specialist reports requested by defence lawyers;
- Creative a legislative requirement for all police and Crown prosecutors to undergo training on the presumption of *doli incapax;*
- Incorporate mandatory training on *doli incapax* into training for admission to become a solicitor;
- Require all criminal defence lawyers to undergo training on *doli incapax* as part of their annual CDP;
- Incorporate mandatory training on *doli incapax* into training for admission to become a solicitor;
- Require all criminal defence lawyers to undergo training on *doli incapax* as part of their annual CDP.

Recommendation 44. The Victorian Government should expand the scope of the dual track system to young adults aged 21 to 25 years, who have offended

Recommendation 45. The Victorian Government should expand the dual track system, so that young adults who have offended can access non-custodial options available under the *Children, Youth and Families Act* (Vic) 2005 and the Youth Justice Act.

Recommendation 46. The Victorian Government should amend the dual track system so that young adult offenders who are eligible for a Youth Justice Centre Order and who are remanded in custody, are able to be remanded in a Youth Justice Centre (not an adult prison).

Recommendation 47. Where Victoria Police does not pursue criminal charges in relation to an incident against a child, the Victoria Police Manual should make clear that they should also not seek to take out a Personal Safety Intervention Order (PSIO).

Recommendation 48. Schools, youth services and police should make a concerted effort to avoid the use of PSIOs except as a last resort, and preference alternative options including School Safety Plans and education- and health-based interventions.

Recommendation 49. Until the age of criminal responsibility is raised to at least 14, Victoria Police guidance should recognise that it is difficult to pursue charges for breach of PSIOs against children due to *doli incapax*, and that there is therefore a presumption against seeking an order.

Recommendation 50. Staff in residential care and the child protection system should have the requisite qualifications and experience to work with vulnerable children, with complex needs, in residential care.

Victorian Aboriginal Legal Service

Recommendation 51. Comprehensive de-escalation training and guidelines should be developed and implemented for residential care staff and Victoria Police.

Recommendation 52. Cultural awareness training for residential care workers should be accompanied by specific anti-racism training and training on systemic racism.

Recommendation 53. Complaints and disciplinary procedures for Victoria Police and child protection staff should be improved to provide accountability for compliance with the *Framework* by reducing police callouts and reducing criminalisation of children in residential care.

Recommendation 54. The Victorian Government should include residential care units and secure care in the mandate of oversight mechanisms, National Preventive Mechansims (NPMs), which are to be established in compliance with Victoria's OPCAT obligations.

Recommendation 55. Community Legal Education (CLE) for children in the child protection system, including specific CLE for Aboriginal children, should be properly funded.

Recommendation 56. Resourcing of Youth Specialist Officers in Victoria Police should be increased so that these officers can fulfil their specialist functions.

Recommendation 57. Children who go missing from residential care should not spend extended periods of time in police custody when they are found. There is a responsibility on Residential Care staff and Victoria Police to avoid or reduce time spent in custody.

Recommendation 58. Victoria Police should not institute any new police-in-schools program.

Recommendation 59. The Ministerial Guidelines for the school community safety order scheme should be developed in consultation with key stakeholders, and provide for extensive safeguards to protect vulnerable children and limit the use of orders under the scheme to exceptional cases.

Recommendation 60. The school community safety order scheme should be independently evaluated, and the evaluation should be made publicly available.

Recommendation 61. The Victorian Government and Department of Education should explore opportunities to reduce the use of expulsion and suspension and their disproportionate impacts on Aboriginal children, including through models based on the NAAJA Peer Panel/Student Court pilot. VALS should be funded to develop a similar pilot in Victoria.

Recommendation 62. The Victorian Government should establish sentencing guidelines that require magistrates and judges to consider the best interests of any affected child when making sentencing decisions.

Recommendation 63. Data on the number of children who become involved with the child protection system after the incarceration of a parent should be made publicly available to improve transparency about how children's rights are impacted by the prison system.

Recommendation 64. The Victorian Government should ensure that the right of children to maintain direct contact with imprisoned parents through visitation is protected and promoted in a manner consistent with Articles 3 and 9 of the *United Nations Convention on the Rights of the Child*.

Victorian Aboriginal Legal Service

Public Health Issues

Recommendation 65. The Victorian Government should publicly respond to the report of the Expert Reference Group (ERG) on Public Drunkenness.

Recommendation 66. The ERG recommendations about an effective health-based response to public intoxication should define the roles and responsibilities of First Responders, while law enforcement officers, including Victoria Police and PSOs should not be involved in the health-based response to public intoxication.

Recommendation 67. PSOs should not be involved in the health-based response under any circumstances. They should not have any powers to arrest or detain individuals who are intoxicated in public.

Recommendation 68. No one should be detained in a police cell or police station because they are intoxicated in public. This must be explicitly prohibited in legislation.

Recommendation 69. Police should not have a legislated power to detain an intoxicated individual while they make enquiries to locate a safe place for that individual.

Recommendation 70. Any power given to police to detain an intoxicated individual for the purposes of transporting them to a safe place must only be available as a last resort and must be strictly limited. As recommended by the ERG, the power should only be exercised if the following threshold is met:

- there is a serious and imminent risk of significant harm to the individual or other individuals; and
- the police officer has exhausted all other avenues by which an intoxicated person could be transported to a safe place.

Recommendation 71. The above threshold should not be circumvented by including in the health model transport by police with the consent of the intoxicated person. The reason for this is the inherent power imbalance between police and an intoxicated individual, as well as the risk of escalation.

Recommendation 72. If Victoria Police are involved in the health-based response to public intoxication, the Victorian Government should establish safeguards and accountability mechanisms in line with the following ERG recommendations: 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 31, 32.

Recommendation 73. To mitigate the risk of up-charging intoxicated individuals, authorisation of any charges arising from an incident of public intoxication should be authorised by a Police Inspector.

Recommendation 74. Failure to comply with a police officer who is exercising any new police powers relating to public intoxication should not be a criminal offence, or be otherwise unlawful.

Recommendation 75. Any charges laid in relation to assault of police arising from attempts to escape are subject to review by a superior officer, such as the Assistant Commissioner of Professional Standards Command.

Recommendation 76. The Victorian Government should criminalise negligent conduct by police officers when detaining an individual who is intoxicated.

Recommendation 77. Whenever police detain an Aboriginal person who is intoxicated, for the purpose of transporting them to a safe place, VALS must be advised via the Custody Notification

Service. VALS must be properly funded to undertake this work and be consulted in implementation of this reform.

Recommendation 78. Treatment of, and conditions of detention for intoxicated individuals must comply with relevant international human rights standards and principles. Legislation and Regulations should ensure that treatment of people when detained and conditions in the police vehicle do not amount to torture or cruel, inhuman or degrading treatment.

Recommendation 79. Civil society organisations should be given sufficient funding to contribute to ongoing monitoring of any new police powers relating to individuals who are intoxicated in public.

Recommendation 80. The use of cannabis and the possession of cannabis for personal use should be decriminalised.

Recommendation 81. In the event that the use of cannabis and the possession of cannabis for personal use is not decriminalised:

- Cautions should be utilised as a first preference;
- To improve access to cautions and diversion, cautions should be available regardless of criminal history, and the necessity for police consent to and recommendation for diversion should be removed;
- Diversion, the Court Integrated Services Program (CISP) and other support services, including culturally appropriate services provided by ACCOs, should be expanded, to avoid recordable court outcomes;
- The use of cannabis and the possession of cannabis for personal use should be a summary offence.

Recommendation 82. The use of drugs should be approached as a public health issue, not a criminal justice issue. This should include:

- Recognition that use or possession of small amounts of a drug is unlikely to pose a social problem and need not trigger Police involvement;
- For repeat or heavy users, drug use should trigger a health and support services response, not a criminal justice response;
- The design of this public health response should be informed by international experience and best practice.

Recommendation 83. People charged with minor drug offences should have access to the Victorian Drug Court on a voluntary basis, with appropriate changes to ensure that they are not at risk of imprisonment as a result of a Drug Treatment Order.

Recommendation 84. Koori Court should be able to make Drug Treatment Orders as an alternative to imposing a custodial sentence, in cases where imprisonment is likely and the person's offending is related to drug use.

Recommendation 85. The Government should consider decriminalising use and possession of all drugs for personal use, looking to good practices in other jurisdictions. VALS' upcoming research paper should be of assistance in canvassing what approaches could be considered for the Victorian context.

Recommendation 86. VALS supports the principle that people experiencing mental health crises should not be met with a police-led response. However, there should be no qualification that this should only be the case 'wherever possible'.

Victorian Aboriginal Legal Service

Recommendation 87. The Victorian Government must improve access to multi-disciplinary and culturally safe crisis response teams including Aboriginal health workers/clinicians and other culturally aware social workers to provide better integrated health diversion processes as front-line responses.

Recommendation 88. The new Mental Health and Wellbeing Act should create the basis for a mental health system which:

- increases and enhances the provision of targeted, culturally safe mental health and wellbeing supports, services and programs to at-risk youths and adults to prevent interaction with the criminal legal system.
- recognises the need to enhance and increase support for persons with mental illness while dealing with substance abuse/addiction issues.

Recommendation 89. The Victorian Government should implement the Victorian Ombudsman's recommendation for the expansion of current therapeutic court-based interventions, together with parallel investments in associated support services.

Recommendation 90. The Victorian Government must prioritise working with ACCOs to make available a culturally appropriate model for a multi-jurisdictional therapeutic and specialised healing court for Aboriginal accused, with multiple and complex needs. This is consistent with commitments made in *Burra Lotjpa Dunguludja*, Phase 4 of the Aboriginal Justice Agreement.

Summary Offences Reform

Recommendation 91. The Victorian Government should decriminalise offences in the *Summary Offences Act 1966* (Vic) (SOA) that disproportionately target persons experiencing mental ill-health and/or who are homelessness. This includes:

- Begging (s49A of the SOA)
- Obstruction of foot paths (s5 of the SOA)
- Move on directions (s6 of the SOA)
- Obscene language (s17 of the SOA)

Sentencing

Recommendation 92. The Victorian Government should amend Section 5(2) of the *Sentencing Act 1991* (Vic) so that for the purposes of sentencing:

- Courts are required to take into account the unique systemic and background factors affecting Aboriginal and/or Torres Strait Islander peoples;
- Judicial decision-makers must demonstrate the steps taken to discharge their obligation to consider the unique and systemic background factors affecting Aboriginal and Torres Strait Islander peoples.

Victorian Aboriginal Legal Service

Recommendation 93. The new Youth Justice Act should provide that for the purposes of sentencing:

- Courts are required to take into account the unique systemic and background factors affecting Aboriginal and/or Torres Strait Islander peoples;
- Judicial decision-makers must demonstrate the steps taken to discharge their obligation to consider the unique and systemic background factors affecting Aboriginal and/or Torres Strait Islander peoples.

Recommendation 94. All Judges and Magistrates should be required to complete regular face-to-face training in cultural awareness, systemic racism and unconscious bias.

Recommendation 95. The Victorian Government must support self-determined initiatives to improve sentencing outcomes for Aboriginal people. This includes by directing dedicated funding from *Burra Lotjpa Dunguludja* to the Aboriginal Community Justice Reports project currently carried out by VALS and partners, as well as providing ongoing funding beyond the pilot Project.

Recommendation 96. The Victorian Government must support self-determined initiatives to improve sentencing outcomes for Aboriginal people. This includes by directing dedicated funding from *Burra Lotjpa Dunguludja* to the Aboriginal Community Justice Reports project currently carried out by VALS and partners, as well as providing ongoing funding beyond the pilot Project.

Recommendation 97. The Victorian Government must amend the *Sentencing Act 1991* (Vic) so that, for the purposes of sentencing women who have offended, judicial decision-makers are required to:

- Take into account the best interests of the defendant's children, particularly dependent children;
- Ensure the provision of adequate time to women with dependent children prior to beginning a custodial sentence to make necessary arrangements for dependent children;
- Permit children to be present during sentencing proceedings;
- Permit children to express their interests, views and concerns, either directly or through a representative, during sentencing proceedings involving a parent.

Recommendation 98. The Victorian Government should equip magistrates with knowledge of factors to consider when dealing with matters in the adult criminal legal system that may directly or indirectly affect the interests of children.

Recommendation 99. The Victorian Government should increase community-based sentencing options. This includes creating additional sentencing options between an adjourned undertaking and a Community Corrections Order (CCO).

Recommendation 100. The Victorian Government must work with Aboriginal organisations to implement measures to ensure that CCOs are culturally appropriate, including:

- Amending section 48A of the *Sentencing Act* so that for the purpose of attaching conditions to a CCO, courts are required to take into account the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples.
- Requiring all Judges and Magistrates to complete regular cultural competence training, to ensure that the conditions set on CCOs for Aboriginal people are culturally appropriate and achievable.

- Investing in culturally appropriate programs and supervision for Aboriginal people on CCOs, including more facilities and programs modelled off Wulgunggo Ngalu Learning Place, particularly for women.

Recommendation 101. The Victorian Government should repeal Sections 171-173 of the *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic), so that people on CCOs cannot be subject to electronic monitoring.

Recommendation 102. The Victorian Government should repeal mandatory sentencing schemes under the *Sentencing Act 1991* (Vic), including for the following offences:

- Category 1 and Category 2 offences;
- Offences against "emergency workers";
- Category A and Category B "serious youth offences."

Police Powers & Accountability

Recommendation 103. The Victorian Government should withdraw increased police powers as soon as the states of emergency and disaster end. Any proposed, permanent increased powers must be subject to careful and proper scrutiny after the pandemic.

Recommendation 104. Police must responsibly exercise their expansive powers, acknowledging that around the world, policing the pandemic through fines and arrests has disproportionately impacted marginalised communities, including Indigenous peoples.

Recommendation 105. Police should be required to record the Aboriginal status for all people they record public health-related offences against.

Recommendation 106. The Crime Statistics Agency must be required to publish regular and timely data on public health offences, with breakdowns by Aboriginal status; country of birth; Local Government Authority; and age.

Recommendation 107. When police have stopped someone in relation to public health rules, they should not be permitted to:

- Execute outstanding warrants;
- Question them about unrelated matters; or
- Search them, except for serious crimes specified by legislation.

Recommendation 108. Internal review of COVID-19 fines by Victoria Police should be subject to the same administrative standards as other agencies. This includes a requirement to articulate reasons as to why an internal review is refused.

Recommendation 109. *Police and Emergency Legislation Amendment Act 2020* (Vic) amendments about expanding and permitting the expansion of designated areas in which PSOs operate, should be repealed.

Recommendation 110. PSOs should not have powers of detention or arrest. They should also not have the power to carry weapons such as OC spray.

Recommendation 111. The Victorian Government should establish a specialist, independent, statutory body to adjudicate police complaints.

Recommendation 112. An effective complaints system must be characterised by the following principles: Independence, Capability to conduct adequate investigations, Promptness, Transparency, Victim-centred and victim-participation.

Recommendation 113. A police oversight body referring matters back to Victoria Police for their own internal investigation should be the exception. The default position should be the independent body conducting its own investigations and comprehensive reviews.

Recommendation 114. A police oversight body should investigate systemic police misconduct, not only serious incidents. A focus on the most extreme incidents, leaving individually 'minor' cases for Victoria Police to investigate itself, allows abuses to become widespread and entrenched, and prevents this body from recognising patterns of misconduct.

Recommendation 115. A police oversight body should develop a strategy for identifying and properly investigating systemic racism.

Recommendation 116. A police oversight body should make Aboriginal justice issues a key focus of their Strategic Plan.

Recommendation 117. A police complaints and oversight body should have the power to refer cases for criminal prosecution and suggest disciplinary measures to Victoria Police.

Recommendation 118. Police must be held accountable through criminal and civil processes for all future and historic Aboriginal deaths in custody. This includes the immediate referral to the OPP for criminal charges in all cases where there is sufficient evidence, as well as providing adequate compensation to victims where appropriate.

Recommendation 119. All deaths associated with police conduct must be investigated by an independent body. This should include deaths occasioned by the failure of police to discharge their duties where it is foreseeable that a failure of police to act could lead to a real and immediate risk of death caused by the actions of a third party.

Recommendation 120. Complaints outcomes must identify if the facts support a finding that Victoria Police has acted unlawfully in relation to a death in custody, and recommend matters to the OPP for prosecution. Where the OPP decides to not prosecute following an independent finding of misconduct by Victoria Police, the reasons for the decision should be provided to the family of the person who has died in custody.

Recommendation 121. The Victorian Government must ensure the mandate of the National Preventive Mechanisms which will be established/designated under OPCAT includes police custody, places of detention in which people may be detained for less than 24 hours, such as police vehicles and cells.

Recommendation 122. The SDA should be amended to remove BWC footage from that legislation's ambit by deleting references to BWCs in s30D and s30F. BWC footage should be treated like any other form of evidence or any other form of government record. This would achieve the purpose of the proposed regulatory amendments to the SDR, and would also remove uncertainties and ambiguities created by the current legislative arrangements.

Recommendation 123. BWC footage must be made available to applicants in freedom of information (FOI) applications. For example, by expanding the definition of 'civil proceedings' or through prescribing additional permitted purposes which include FOI applications. Preliminary and non-party

discovery should also be included in the definition of 'civil proceedings', and contemplated proceedings should also be referenced.

Recommendation 124. In the event that the above recommendation is not accepted, any amendments to the SDR should make clear that persons who have access to BWC footage under the SDA or SDR should be lawfully able to share it with other persons for another permitted purpose. This is necessary to allow for routine information-sharing while avoiding any risk of criminal liability under s30E.

Recommendation 125. Any amendments to r11(1) of the SDR should include the further amendments to include BWC footage of ambulance officers for disclosure in the course of civil proceedings or matters under the *Coroners Act 2008*.

Recommendation 126. The definition of 'civil proceedings' incorporated into the SDR should also extend to cover a range of regulatory and administrative decision-making processes including Transport Accident Commission claims, internal review of infringement notices, licensing decisions, reviews of decisions of the Information Commissioner, and other similar matters.

Recommendation 127. Legislation should provide for, and policy frameworks developed by Victoria Police and other agencies in which BWCs are used should include policies and procedures for:

- The retention of BWC footage in an analogous way to that used for audio-visual material under s464JC(2B) of the *Crimes Act 1958*, which requires that such recordings be retained for a minimum of seven years;
- The circumstances and manner in which body worn cameras must be turned on by officials;
- A regime for penalties and oversight in circumstances where BWCs are not turned on when they should be; and
- The accuracy of metadata descriptions attached to BWC footage.

Best practice would entail enshrining the above in legislation.

Recommendation 128. Police officers should be required to inform persons of their intention to activate a BWC prior to performing interviews or obtaining statements, and where relevant to inform them of their rights before any questioning or interview while a BWC is active.

Recommendation 129. Victoria Police should ensure that its members are sufficiently trained regarding how and when to activate BWCs in accordance with policy and legislative frameworks; and consistent practices relating to the activation and use of BWCs among all members of Victoria Police.

Recommendation 130. Legislative and policy frameworks should be amended to require the disclosure of the existence of all BWC footage relevant to an offence within the Preliminary Brief. In all instances where a person is provided caution and/or rights, policy should be amended to ensure that footage is made available to the person's legal representative via a link contained within an email. Policy and legislative frameworks governing the release of BWC footage to accused persons and their legal representatives should be amended to include penalties for failure to follow the existing legislative and policy guidelines.

Recommendation 131. Victoria Police should address racial profiling by developing and delivering, in partnership with the Aboriginal Community and ACCOs, a policy on racial profiling and training materials on preventing racial profiling.

Recommendation 132. Victoria Police should implement a racial profiling monitoring scheme, in line with the recommendations of the Police Stop Data Working Group.

Recommendation 133. Victoria Police should immediately halt the use of predictive policing tools and approaches.

Recommendation 134. Victoria Police should make public information about its past and current use of predictive tools across the state, including demographic data on the people identified and targeted by police as a result of using of such tools.

Recommendation 135. In order to meet the identified increased demand, the Victorian Government should increase funding to the VALS' Custody Notification Service (CNS).

Recommendation 136. VALS' CNS should have access to the Standard Operating Procedures of all police stations, as well as the full Victoria Police Manual.

Recommendation 137. Victoria Police should improve training of officers to recognise the requirement that the CNS is notified whenever an Aboriginal person is detained by police, not only when they are brought to a police cell. For example, the CNS should be notified where someone is taken to a hospital while in police custody.

Recommendation 138. The Aboriginal Community Justice Panels (ACJP) project should be funded adequately to ensure ACJPs are consistently available across the state.

Recommendation 139. Lawyers should continue to be able to speak to clients who are held in police cells, and appear via phone in bail applications and straight remand mentions.

Recommendation 140. The Victorian Government should legislate for Independent Third Persons to attend police interviews with adults and young people.

Recommendation 141. Independent Third Persons, Independent Persons under the Youth Referral and Independent Person Program (YRIPP), and Victoria Police should receive comprehensive cultural awareness and anti-racism training regarding dealing with Aboriginal people with cognitive disabilities and Aboriginal young people.

Recommendation 142. The Victorian Government should adequately fund VALS and organisations involved in the Youth Referral and Independent Person Program (YRIPP).

Recommendation 143. In accordance with Article 3(1) of OPCAT, the NPM in Victoria must have jurisdiction over all places where individuals are or may be detained by Victoria Police or Protective Service Officers, regardless of the length of time of detention.

Diversion & Cautions

Recommendation 144. Data on the number of Aboriginal people who received diversion in Victoria should be made available publicly.

Recommendation 145. The Government must progress options for increasing access to culturally appropriate diversion in Victoria, including:

- Expanding Koori Courts so that they operate not only as a plea and resolution court, but to also have jurisdiction to divert people to culturally appropriate diversion programs;

- Create independent self-determined Aboriginal bodies that have responsibility for developing and agreeing to a diversion plan with the person (similar to the Community Council at Aboriginal Legal Services Canada).

Recommendation 146. Remove police discretion as to which offences are suitable for diversion and remove the requirement for prosecutors to consent to diversion.

Recommendation 147. Introduce a requirement for Victoria Police to complete a 'Failure to Divert Declaration' for all police briefs. This must require police members to detail the precise grounds for failing to recommend diversion. Magistrates should review the Declaration at the mention of criminal matters and if grounds are insufficient, the matter should be referred to the Diversion Coordinator.

Recommendation 148. The Victorian Government should create a legislative presumption in favour of alternative pre-charge measures, including verbal warnings, written warnings, cautions and referral to cautioning programs, and youth justice conferencing.

Recommendation 149. There should be no exclusion of specific offences from the presumption in favour of cautions and/or diversion.

Recommendation 150. There should be no limit to the number of cautions a child can receive. Children with a criminal history should not be excluded.

Recommendation 151. Cautioning should not be conditional on a child or young person formally admitting an offence. Cautions should be available to children who do not deny the offence.

Recommendation 152. Cautions should not be conditional upon a child engaging with or completing a program, or complying with conditions or directives.

Recommendation 153. A caution or other alternative response should be offered to a child or young person regardless of the capacity or willingness of their parent or guardian.

Recommendation 154. Victoria Police should make consistent and genuine efforts to build relationships with Aboriginal children, families, communities and services. Victoria Police must address racism at both an individual and systemic level, so that Aboriginal children are not left behind in any cautioning reforms.

Recommendation 155. The Government should resource ACCOs to develop and implement pre-charge and court-based diversion programmes responding to the intersectional needs of Aboriginal youth.

Recommendation 156. Where pre-charge diversion is not possible, there should be a legal requirement to prioritise diversion at all stages of the legal process.

Recommendation 157. Where police decide not to proceed with pre-charge diversions, they should be required to complete a 'failure to caution or divert' notice, which is to be reviewed by the prosecution unit prior to charges being allowed to proceed. This notice should be provided to the child's legal team.

Recommendation 158. If a child is cautioned or diverted, the legislation should specify that

- no charges or proceedings can be commenced or continued against the child or young person for the offence;
- the child or young person is not required to disclose to any other person for any purpose information concerning the caution or diversionary process;
- the caution/diversion does not result in a criminal record;

- evidence of, or relating to, a caution, should not be able to be adduced except with the permission of the child or young person concerned, following legal advice;
- any identifying material including fingerprints, palm prints, photographs or intimate samples including forensic material (if obtained) relating to the child or young person should be destroyed.

Recommendation 159. The Courts should recruit and retain Koori Diversion Coordinators to improve the cultural safety of the Children's Court Youth Diversion service.

Community Legal Education

Recommendation 160. The Victorian Government should significantly increase funding for VALS' Community Legal Education. Funding should be provided for both staffing and creation of resources (using different media, to be disseminated on different platforms, to ensure the legal messages are accessible to and understandable for everyone in the Aboriginal community). The funding should eb sufficient to enable CLE delivery across the state, including in places of detention.

People with Cognitive Disabilities

Recommendation 161. The Government should amend the *Sentencing Act 1991* (Vic) to ensure that individuals with an acquired brain injury and/or withan intellectual disability that was not diagnosed before the age of 18 years, are eligible for a Justice Plan.

Recommendation 162. The Victorian Government should require that all people entering adult or children's prisons are screened for disability, particularly psychosocial or cognitive disabilities and other neurodiverse conditions such as an autistic spectrum condition, dyslexia and attention deficit hyperactive disorder.

Recommendation 163. The Victorian Government should establish safeguards against indefinite detention of people who are found unfit to plead or stand trial in line with those recommended by NATSILS, including:

- Imposing effective limits on the total period of imprisonment a person can be subject to;
- Requiring regular reviews of the need for someone's imprisonment after a finding that they are unfit to plead or stand trial;
- Mandating the adoption of individualised rehabilitation plans, developed by appropriately qualified professionals, which progress a person's transition to their community.

Recommendation 164. The Victorian Government should fund VALS to restart and sustain the Disability Justice Support Program piloted as part of the Unfitness to Plead Project.

Recommendation 165. Given the lengthy periods of non-criminal detention faced by some people with cognitive disabilities, the scope of OPCAT monitoring bodies established in Victoria must include forensic mental health hospitals and other places where people with cognitive disabilities are deprived of their liberty.

Parole

Recommendation 166. The Victorian Government should amend the *Corrections Act 1986* (Vic) to provide for automatic court-ordered parole for sentences under five years.

Recommendation 167. The Victorian Government should repeal Section 77C of the *Corrections Act 1986* (Vic) and adopt a new provision which provides that time spent on parole, before a parole order is cancelled, counts as time served.

Recommendation 168. The Victorian Government should repeal Section 460(7) of the *Children, Youth and Families Act 2005* (Vic), and replace it with a new provision which provides that time spent on parole, before a parole order is cancelled, counts as time served.

Recommendation 169. The Victorian Government should amend the *Corrections Act 1986* (Vic) to include a legislative requirement to have Aboriginal people on the Adult Parole Board. The new Youth Justice Act should include an equivalent provision for the Youth Parole Board. Membership of the Parole Boards must include people with professional backgrounds and with relevant lived experience.

Recommendation 170. The Victorian Government should amend the *Corrections Act 1986* (Vic) and the Adult Parole Board Manual, to provide that parole cannot be denied on the basis that a required program has not been completed, where this program is unavailable or unsuitable for Aboriginal people.

Recommendation 171. The Victorian Government should work with Aboriginal organisations to ensure that Aboriginal people who are incarcerated, particularly Aboriginal women and girls, have access to culturally safe rehabilitation programs. Funding must be given to Aboriginal organisations to design and deliver these programs.

Recommendation 172. The Victorian Government must work with Aboriginal organisations to develop and provide culturally appropriate transitional housing and support for Aboriginal people exiting prison.

Recommendation 173. The Victorian Government must repeal regulation 5 of the *Charter of Human Rights and Responsibility (Public Authorities) Regulation 2013* (Vic), which exempts the Adult Parole Board from the operation of the Charter.

Recommendation 174. The Victorian Government must repeal section 69(2) of the *Corrections Act 1986* (Vic), which provides that the Adult Parole Board is not bound by the rules of natural justice.

Recommendation 175. The Victorian Government must repeal section 449(2) of the *Children, Youth and Families Act 2005* (Vic), which provides that the Youth Parole Board is not bound by the rules of natural justice. The new Youth Justice Act should not exempt the Youth Parole Board from being bound by the rules of natural justice.

Recommendation 176. The Victorian Government should amend the *Corrections Act 1986* to include the purpose of parole and the criteria on which parole decisions are made. The legislated purpose of parole should highlight that the release of the individual on parole will contribute to the protection of society by facilitating their rehabilitation and reintegration into society.

Victorian Aboriginal Legal Service

Recommendation 177. The Victorian Government must amend the *Corrections Act 1986* to provide for the following rights of incarcerated people in relation to any decisions made by the Adult Parole Board regarding parole:

- The right to have access to all information and documents being considered by the parole authority, subject to limited exceptions;
- The right to appear before the Board;
- The right to culturally appropriate legal assistance and representation;
- The right to detailed reasons relating to a decision;
- The right to appeal a decision of the Board.

Recommendation 178. The Victorian Government must include the purposes of parole in the new Youth Justice Act:

- The legislated purpose of parole should highlight that the release of the young person on parole will contribute to the protection of society by facilitating their rehabilitation and reintegration into society. Detaining children does not support their rehabilitation.
- Reintegration planning should commence as soon as the young person enters custody.

Recommendation 179. The new Youth Justice Act should specify that the Youth Parole Board must be guided by the principle that detention is a last resort, in accordance with Article 37(b) of the *Convention on the Rights of the Child.*

Recommendation 180. The Victorian Government must include the following statutory rights in the new Youth Justice Act, relating to any decisions made by the Youth Parole Board regarding parole:

- The right to have access to all information and documents being considered by the parole authority, subject to limited exceptions;
- Right to appear before the Board;
- The right to culturally appropriate legal assistance and representation;
- The right to detailed reasons relating to a decision;
- The right to appeal a decision of the Board.

Recommendation 181. The Victorian Government should provide funding to VALS to provide legal assistance, support and representation to Aboriginal people who are applying for parole.

Recommendation 182. The Victorian Government should amend the *Corrections Act 1986* (Vic) so that the Adult Parole Board is required to take into account cultural considerations when making decisions on parole applications, suspension and cancellation of parole for Aboriginal people. The Adult Parole Board Manual should be amended to provide guidance to the Adult Parole Board on complying with this requirement. All parole officers should be required to undertake mandatory and ongoing cultural awareness training.

Rehabilitation Programs

Recommendation 183. Rehabilitation programs, both in prisons and for people transitioning out of prison or diverted from prison, should be run on a voluntary basis, not penalising or threatening people for breaching behavioural requirements.

Recommendation 184. Funding for rehabilitation in prisons, including culturally safe rehabilitation support provided by Aboriginal organisations, should be significantly increased.

Recommendation 185. Rehabilitation services should be available to people held in prison on remand.

Recommendation 186. Prison complaints, including complaints against private prisons and contractors, should be handled by an appropriately resourced independent oversight body with sufficient powers to refer matters for criminal investigation.

Recommendation 187. All prison staff should receive extensive training, that is developed and delivered in collaboration with ACCOs, on trauma-informed care, anti-racism, and the specific needs of vulnerable groups including Aboriginal people and women.

Conditions in Custody

Recommendation 188. The Government should make publicly available the health advice, risk-assessment and human rights assessment upon which it reliesin making decisions about the use of isolation and protective and transfer quarantine.

Recommendation 189. The use of protective and transfer quarantining, and the nature of the quarantine itself, should be

- reviewed on a regular basis,
- guided by medical advice, in consultation with civil society stakeholders,
- adopting the least restrictive measure, in accordance with the *Victorian Charter of Human Rights and Responsibilities.*

Recommendation 190. Legislation should be amended to require that incarcerated people in protective quarantine/transfer quarantine and isolation are regularly observed and verbally communicated with.

Recommendation 191. Legislation should explicitly provide for the rights of people in protective/transfer quarantine and children in isolation, including guaranteeing meaningful contact with other people and time out of cell, in fresh air, every day.

Recommendation 192. People in protective/transfer quarantine and children in isolation should be provided supports and services (including mental health services and cultural supports and services provided by ACCOs), and means by which to contact family, lawyers, independent oversight bodies, and ACCOs.

Recommendation 193. The Victorian Government should maintain a register of all people placed in protective/transfer quarantine, and children in isolation:

- The register should include information such as age, gender, disabilities, medical conditions, mental health conditions and Aboriginality of people in protective quarantine.
- Information should also be provided in relation to the length and the nature of meaningful contact provided on a daily basis, how much time people spend out of cell, and the services made available to them and used by them.
- Any incidents, such as attempted self-harm, should also be included.

Recommendation 194. Facilities should not, by default, go into complete lockdown during a COVID-19 outbreak.

Recommendation 195. Staffing and other operational issues should be urgently addressed, to ensure lockdowns do not occur as a result of inadequate staff to safely manage the facility.

Recommendation 196. No one should be in effective solitary confinement as a result of lockdown, particularly children and people with mental or physical disabilities, or histories of trauma.

Recommendation 197. If lockdowns occur, people should be provided supports and services (including mental health services and cultural supports and services provided by ACCOs), and means by which to contact family, lawyers, independent oversight bodies, and ACCOs, including VALS..

Recommendation 198. Information on how lockdowns are operationalised should be publicly available and regular updates should be shared.

Recommendation 199. The Victorian Government should add prisons and youth detention facilities to the Surveillance Testing Industry List, with both employees and contractors subject to regular surveillance testing.

Recommendation 200. The Victorian Government should improve the COVID-19 vaccine rollout, and put in place preparations for a significantly more effective vaccine rollout for any future pandemic, including by:

- Ensuring that no person in prison is offered a vaccine later than they would be if living freely in the community, in line with the principle of equivalence;
- Involving ACCOs in the delivery of health information and vaccines;
- Giving regular public updates on the status of the vaccine rollout, including demographic information such as Aboriginality.

Recommendation 201. There should be a legislated allowance for a reduction in sentence if a child or young person is placed into isolation in a Youth Justice scheme comparable to the legislated Emergency Management Days available to incarcerated adults.

Recommendation 202. Corrections, in making decisions in relation to Emergency Management Days, should acknowledge that the pandemic has negatively impacted on all people in detention, albeit to different degrees. Emergency Management Days should be granted not only to people who have been subject to isolation or mandatory quarantine, but to others as well, in recognition of the additional hardships faced by everyone in detention.

Recommendation 203. Corrections policy should be amended so that people can be granted 4 Emergency Management Days for each day that the 'emergency exists', and the 14 days they could be entitled to due to 'circumstances of an unforeseen and special nature.'

Recommendation 204. Corrections policy should be clarified to provide that people in detention cannot 'lose' EMDs once they have been granted, including if they are bailed and subsequently re-remanded.

Recommendation 205. There should be greater transparency in relation to the process by which Emergency Management Days are granted. Information should also be made available in relation to the number of people released on Emergency Management Days, how many days they were granted (broken down per month and per facility), and how many Aboriginal and non-Aboriginal people were granted Emergency Management Days.

Recommendation 206. Decisions in relation to EMDs should be governed by natural justice. Applicants should be given clear particulars of any reasons as to why an application has been refused and be allowed to seek review.

Recommendation 207. Emergency Management Day assessments should occur on a regular basis, to allow adequate time to prepare for release.

Recommendation 208. No one should be denied Emergency Management Days due to a lack of housing.

Recommendation 209. The regulation of use of force/restraints should be provided for in legislation, not regulations, policies/procedures, written notices, or in Gazette.

Recommendation 210. The default position must be that the use of restraints/force is prohibited, with exceptions where authorised.

Recommendation 211. Prohibitions on use of force/restraints that should be enshrined in legislation:

- There must be an explicit prohibition on the use of chemical (medical and pharmacological) restraints.
- Use of force/restraints must never involve deliberate infliction of pain and should not cause humiliation or degradation.
- There must be an express prohibition for the use of stress positions (positional torture).
- Use of force/restraints must not be used for punishment, discipline, or to facilitate compliance with an order or direction, or to force participation in an activity the incarcerated person does not want to engage in. Use of restraints rarely leads to behavioural change, can be counterproductive, and can cause physical and psychological harm and retraumatise people.
- Instruments of restraint must never be used on girls or women during labour, during childbirth and immediately after childbirth.
- The use of mechanical restraints, including handcuffs, as routine centre management practice must be prohibited.
- Only approved restraints should be kept at places of detention.
- The use of chains, irons or other instruments of restraint which are inherently degrading or painful must be prohibited. Other restraints which should be explicitly prohibited include: weighted restraints; restraints which have a fixed rigid bar between cuffs; restraints where the cuff cannot be adjusted; fixed restraints – that is, cuffs 'designed to be anchored to a wall, floor or ceiling'; restraint chairs; and shackle boards and shackle beds (chairs, boards or beds fitted with shackles or other devices to restrain a human being).

- Carrying of weapons by personnel in youth detention must be prohibited.

Recommendation 212. When use of force/restraints may be permitted:

- Use of force/restraints must only be permissible when necessary to prevent an imminent and serious threat of injury to the incarcerated person or others, and only as explicitly authorised and specified by law and regulation.
- Use of force/restraints should be exceptional, as a last resort, when all other control methods (including de-escalation techniques) have been exhausted and failed.
- The decision to use physical restraints must be made by more than one person, and must be authorised by senior management.
- Use of force/restraints must be used restrictively, for no longer than is strictly necessary.
- A minimum level of restraint/degree of force must be used.
- Restraint instruments must be used appropriately/restraint techniques properly executed.
- The safety of the incarcerated person must be a prime consideration.

Recommendation 213. Additional safeguards:

- The use of force/restraint should be under close, direct and continuous control of a medical and/or psychological professional.
- The person who is restrained must be regularly observed, while subjected to restraint instruments, at least every 15 minutes.
- Use force/restraint should be reported to senior management as soon as practicable.
- The privacy of restrained people should be respected/protected when the person in restraints is in public.
- Staff who use restraint or force in violation of the rules and standards should be disciplined and/or have their employment ceased, and prosecuted where appropriate.

Recommendation 214. Regarding the use of isolation of children

- Use of isolation on a child must be prohibited, except when necessary to prevent an imminent and serious threat of injury to the child or others, and only when all other means of control have been exhausted.
- Isolation must be used restrictively and only for the shortest necessary period of time, and be publicly reported to an independent oversight mechanism.
- The use of isolation as punishment, or on a vulnerable child, must be prohibited. Isolation must not to be used for discipline or as a generalised behaviour management strategy (including a means by which to obtain compliance with staff instructions.)
- Children who are at risk of suicide or self-harm must not be placed in isolation.

Recommendation 215. Solitary confinement should be prohibited in all places of detention (including police custody, youth detention facilities and prisons) by legislation.

- No person should ever be placed in solitary confinement, noting people who are particularly vulnerable to the harms – children, people with mental or physical disabilities, people histories of trauma.
- Prolonged solitary confinement can amount to torture, and no one should be subjected to this.

Recommendation 216. Staffing and other operational issues in places of detention should be urgently addressed, to ensure no one is subjected to solitary confinement.

Recommendation 217. The threshold for authorising a strip search in adult prisons should be raised by legislation. 'Good order' and 'security of the facility' should be removed as grounds for a strip search and legislation should provide that strip searching must be a last resort and must be based on intelligence. Prior to strip searching, other means of searching such as pat searches, metal detectors and increased surveillance must be used. Strip searching must never be routinely conducted as part of the general routine of the centre or on entry to a centre.

Recommendation 218. Strip searching in youth detention facilities should be prohibited by legislation.

Recommendation 219. Prisons should adopt policies which require them to consider the effect of strip searches on re-traumatisation.

Recommendation 220. Urine testing should only be required upon reasonable grounds and in a manner consistent with the inherent dignity and right to privacy of the detainee involved to the greatest extent possible.

Recommendation 221. Body cavity searches should never be performed on imprisoned people.

Recommendation 222. The Government should invest in technology which enables non-intrusive searching, to provide further alternatives and minimise the use of strip searching.

Recommendation 223. People in detention must be provided medical care that is the equivalent of that provided in the community. Medical care must be provided without discrimination.

Recommendation 224. Health care should be delivered through DHHS rather than DJCS, and not through for-profit organisations.

Recommendation 225. A model of delivery of primary health services by Aboriginal Community Controlled Health Organisations in places of detention in Victoria should be considered, in consultation with VACCHO and member organisations.

Recommendation 226. The Federal Government must ensure that incarcerated people have access to the Pharmaceutical Benefits Scheme (PBS) and the Medicare Benefits Schedule (MBS). The Victorian Government should advocate with the Commonwealth to enable this access in order to provide equivalence of care to Aboriginal people and other vulnerable people held in prison.

Recommendation 227. The Federal and State Governments should ensure that incarcerated people have access to the National Disability Insurance Scheme (NDIS) and are assessed for eligibility for NDIS upon entry to a prison or youth justice centre.

Recommendation 228. The Government should employ more Aboriginal Health Workers and Aboriginal Wellbeing Officers at all levels of the justice health system (Victoria Police, Courts, Forensicare/MHARS, Community Corrections, Correctional Health Services) to work with Aboriginal people at all stages of their engagement with the criminal legal system.

Recommendation 229. The Government should prioritise the development and finalisation of standards for culturally safe, trauma informed health services in the criminal legal system and youth justice.

Recommendation 230. The Government should ensure that all prison officers receive regular gender and culturally sensitive, training on how to interact with people with cognitive disabilities.

Recommendation 231. The Government should commit significant resources to improving mental healthcare for Aboriginal people in custody in Victoria, including by:

- Recruiting, training and accrediting more qualified Aboriginal and Torres Strait Islander psychologists, psychiatrists, counsellors, social workers and other mental health workers;
- Introducing a specialised Koori Unit within Mental Health Advice and Response Service;
- Introducing standardised and culturally appropriate screening tools across all custody settings.

Recommendation 232. The Victorian Government must urgently undertake robust, transparent and inclusive consultations with the Victorian Aboriginal community, its representative bodies and ACCOs on the implementation of OPCAT in a culturally appropriate way.

Recommendation 233. The operations, policies, frameworks and governance of the designated detention oversight bodies under OPCAT (National Preventive Mechanisms - NPMs) must be culturally appropriate and safe for Aboriginal people.

Recommendation 234. The Victorian Government must legislate for the NPM's mandate, structure, staffing, powers, privileges and immunities.

Recommendation 235. The Victorian and Commonwealth Governments must ensure that the NPM is sufficiently funded to carry out its mandate effectively.

Recommendation 236. In accordance with Article 3(1) of OPCAT, the NPM in Victoria must have jurisdiction over all places where individuals are or may be detained, including all police places of detention, residential care facilities, forensic mental health hospitals and other places where people with cognitive disabilities are deprived of their liberty.

Recommendation 237. The Victorian Government must amend COVID-19 Emergency legislation to ensure that visits to correctional facilities and youth detention facilities by independent detention oversight bodies cannot be prohibited.

Recommendation 238. The Victorian Government should implement the recommendations of the Victorian Ombudsman in her July 2021 report on prison disciplinary hearings.

Recommendation 239. Protections relating to procedural fairness in disciplinary proceedings should reflect those outlined in the Mandela Rules and should be enshrined in legislation.

Recommendation 240. The rights of incarcerated people with disability must continue to be upheld during the pandemic and recovery period, including the right to be supported through the Office of the Public Advocate during disciplinary hearings.

Privatisation of Prisons

Recommendation 241. The Government should end privatisation of prisons in Victoria. This should include wholly privately-run prisons, as well as particular services, such as healthcare. The Government should move towards public control of all prison facilities as a matter of urgency.

Women in Prison

Recommendation 242. The Government should expand the availability of rehabilitation and reintegration supports for women in prison.

Recommendation 243. The Government should improve transitional supports for women, including through:

- The establishment of a pre-release transitional centre for women, equivalent to the Judy Lazarus Transition Centre for men;
- Eliminating exits into homelessness by expanding housing availability for women leaving prison;
- Providing continuity of healthcare, alcohol and drug treatment and other key support services in the community.

Recommendation 244. The Government should fund a dedicated residential diversion program for Aboriginal women, similar to Wulgunggo Ngalu Learning Place.

Recommendation 245. Victorian legislation should require that Corrections Victoria select a location for a woman to serve a custodial sentence that is as close as possible to the place or residence of the imprisoned woman's family and children.

Recommendation 246. Corrections Victoria should be required to maintain records and make statistical data publicly available about all aspects of the Living with Mum program, including applications and outcomes.

Recommendation 247. The time required for the processing of applications for the Living with Mums program by Corrections Victoria should be reduced to ensure that mothers desiring to maintain custody of their dependent children while in prison are not precluded from doing so on the basis of a short custodial sentence.

Older People in Prison

Recommendation 248. Corrections Victoria should recognise the unique needs of older incarcerated people and implement necessary policy, program and practice changes in relation to matters including:

- Age-appropriate health services and programs;
- Age-appropriate approaches to rehabilitation and reintegration programs; and
- Increased access to, and frequency of, parole hearings.

Victorian Aboriginal Legal Service

Youth Justice: Reducing Reoffending Among Children and Young People

Recommendation 249. The *Children, Youth and Families Act* should be amended to specifically prohibit the Secretary from authorising further periods of isolation of children already placed in isolation, where this would effectively extend the total period of isolation of the child for more than 14 consecutive days.

Recommendation 250. VALS CNS should be notified any time an Aboriginal child or young person in detention is placed in isolation under the *Children, Youth and Families Act*, or is in effective isolation as a result of lockdown. DJCS staff should provide the contact details of the child or young person's family where the child or young person has provided consent for VALS to contact them.

Recommendation 251. The *Children, Youth and Families Act* should be amended/the new Youth Justice Act should prescribe -

- any force used to place a child in isolation must be only as a last resort;
- minimum force should be used, and only for the duration that is strictly necessary to place the child in isolation;
- any use of force should be filmed and the recording should be made available to the children and their lawyer upon their request;
- there should be a register where staff record the steps taken and alternatives pursued before making the decision to use force, which should also be made available to the children and their lawyer upon their request.

Recommendation 252. The Government should implement the recommendations from the 2017 Inquiry into the Use of Isolation, Separation and Lockdowns in the Victorian Youth Justice System.

Recommendation 253. The Government should implement the recommendations from the 2018 Report by VEOHRC and the CCYP on Aboriginal Cultural Rights in Youth Justice Centres.

Recommendation 254. The Government should provide financial support to Aboriginal families and community members to visit their young people in youth justice centres.

Recommendation 255. The Victorian Government should consider models for detention of children and young people in other jurisdictions, such as the Diagrama-run centres in Spain, for the Victorian context.

Spent Convictions

Recommendation 256. The impact of the *Spent Convictions Act 2021* (Vic) should be closely monitored, and data should be publicly available each year, including:

- the number and type of convictions spent;
- the age of the individual at the time of the conviction vs the age when the conviction was 'spent'; and
- whether the individual identifies as Aboriginal.

Recommendation 257. The Government should amend Section 6 of the *Equal Opportunity Act 2010 (Vic)* to include irrelevant criminal record as a protected attribute.
Recommendation 258. The *Spent Convictions Act 2021* (Vic) should be amended to adopt a graduated model whereby the "crime-free" period is determined with reference to the severity of the sentence imposed and the person's age.
Recommendation 259. The "crime-free" period should not restart for low-level offences that receive a prison sentence, including "survival crimes" and bail offences.
Recommendation 260. No types of offences should be excluded from the scheme. All convictions should be capable of being spent, including through special circumstances applications to the Victorian Administrative Appeals Tribunal (VCAT).
Recommendation 261. VALS should be funded to carry out targeted Community Legal Education on the new Spent Conviction Scheme, and to provide legal advice and representation for individuals applying to have their convictions spent.

Transition Support

Recommendation 262. The Government should provide long-term and stable funding to ACCOs to deliver pre- and post-release programs, including transitional housing programs run by ACCOs, such as VALS' Baggarrook program, to support men and women leaving prison.

Restorative Justice

Recommendation 263. VALS recommends the expansion of restorative justice approaches as an alternative to retributive processes across the Victorian legal system.
Recommendation 264. All restorative justice processes should be co-designed with Aboriginal communities to ensure they are culturally safe and will have the greatest possible rehabilitative potential for Aboriginal people.
Recommendation 265. Regarding restorative justice approaches for sexual offences, VALS supports the recommendation of the Aboriginal Justice Caucus to the Victorian Law Reform Commission: 'There is evidence to support Restorative Justice processes can be effective in responding to sexual offending. However, design, development and implementation of these justice responses will take time, and must be community led. Responses must be aligned with Aboriginal Community values, victim-centred and responsive to the community in which it is developed.'[11]

[11] Aboriginal Justice Caucus (2021), *Submission on Improving the Response of the Justice System to Sexual Offences to the Victorian Law Reform Commission*, p4. Accessed at https://www.lawreform.vic.gov.au/wp-content/uploads/2021/07/Sub_65_Aboriginal_Justice_Caucus_final.pdf.

Language, Stigma & Dehumanisation

Recommendation 266. The Victorian Government should undertake, in close consultation with civil society and people with lived experience of imprisonment, an evaluation and examination of the terminology employed in policies, programs, legislation and statements concerning people serving custodial sentences and who are justice system involved with the objective of mitigating the stigmatising effect of such terminology within the Victorian community.

Recommendation 267. The Victorian Government should ensure that specialised services are provided to imprisoned people and their families following the completion of their custodial sentence to address issues arising from stigma experienced within the community.

Voting Rights

Recommendation 268. Victoria should remove all restrictions in state law on the right of people in prison to vote in state and local elections.

Recommendation 269. Victoria should lead advocacy nationally, including at the Meeting of Attorneys-General, for a consistent, nationwide approach which grants full voting rights to people in prison, including in federal elections.

Part 4: Judicial Training & Expertise

Judicial Expertise and Cultural Bias; Cultural Awareness Training & Anti-Racist Training

Recommendation 270. Training and education on Aboriginal and Torres Strait Islander cultural issues, and their interaction with the criminal legal system, should be compulsory for judges, with regular refresher training.

Recommendation 271. Training and education should include anti-racism training and a concrete focus on creating a culturally appropriate judicial process for Aboriginal people, not only on creating cultural awareness.

Recommendation 272. VALS endorses the Judicial College of Victoria's 2019 recommendations in its submission to the Australian Law Reform Commission.

> "Cultural awareness training for judicial officers should include material relating to the historical and ongoing impact of colonisation on Aboriginal and Torres Strait Islander people, identity, intergenerational trauma, in addition to education about contemporary issues such as the exposure to racism that many experience daily.
>
> In addition to building judicial officers' cultural awareness, education should contribute to judicial officers acquiring cultural competence regarding how to work with Aboriginal and

Torres Strait Islander peoples. This would include training about modes of communication, body language, the need for and use of interpreters, and related issues. The development of this training must involve substantial consultation with Community, who must also lead its delivery.

Educational programs should highlight culturally-appropriate programs and services that support Aboriginal and Torres Strait Islander people who are on bail, community-based sentences or parole."

Recommendation 273. Training delivered to members of specialist courts should be adapted for broader use to equip all parts of the criminal legal system with the ability to deliver culturally appropriate services for Aboriginal people with complex needs.

Part 5: Judicial Appointments & Specialist Courts

Judicial Appointments; Judicial Diversity

Recommendation 274. The Government should reform the judicial appointments process to ensure transparency and to maintain public confidence in the administration of the law. This includes ensuring that appointees have the skills and experience to properly serve the community as judges, and that the judiciary is representative of the community.

Recommendation 275. A reformed judicial appointments process should include a focus on improving diversity in the judiciary, particularly the representation of Aboriginal people and lawyers with experience working with Aboriginal people.

Specialist Courts

Recommendation 276. The Victorian Government should increase access to culturally appropriate legal processes, by expanding the jurisdiction of Koori Courts to:

- divert Aboriginal people to culturally appropriate diversion programs;
- hear bail applications;
- hear matters that are contested and have not resolved to a plea of guilty;
- make Drug and Alcohol Treatment Orders where appropriate.

Recommendation 277. The number of Koori Courts and frequency of sitting days should be expanded across the Magistrates' Court, County Court and Children's Court jurisdictions, to ensure access to culturally appropriate courts, particularly in regional and rural areas.

Recommendation 278. Assessment and Referral Court locations should be expanded to provide equitable access for people affected by mental health issues and brain injuries across Victoria, in line with the recommendations of the Royal Commission into Victoria's Mental Health System.

Victorian Aboriginal Legal Service

DETAILED SUBMISSIONS

Part 1: Principles for Criminal Legal System Reform

Any reform to the criminal legal system needs to be guided by key principles, including the recognition of systemic racism and by making self-determination for Aboriginal communities a reality. This first part of VALS' submission enunciates these important overarching principles which must guide all specific reforms to Victoria's criminal legal system.

Aboriginal Self-Determination

Issues concerning the self-determination of Aboriginal peoples are of particular importance in relation to the criminal legal system in Victoria. The increased frequency of the use of the term 'self-determination' in relation to Aboriginal peoples[12] in Victoria, however, is only partially reflected in existing policies and legislative practices.

The bearers of the right to self-determination under international law are 'peoples'. In practice, Victorian practice appears to continue to be premised upon the traditional concept of 'peoples' as the population of a state.[13] The international legal concept of 'Indigenous peoples' recognises Aboriginal communities as being distinct 'peoples' that exist alongside the rest of the population of a state.

The Commonwealth of Australia has drawn criticism from United Nations human rights bodies for its continuing failure to Constitutionally acknowledge the legal distinctiveness and status of Aboriginal peoples.[14] While constitutional recognition is a matter to be addressed at the Commonwealth level, Victorian Parliament can provide *de facto* recognition of the distinctiveness and status of Aboriginal peoples within Victorian society through legislative practice. The legal distinctiveness of Aboriginal peoples in Victoria can be reflected in future legislation that affects members of Aboriginal communities, individually and collectively, by creating specific and dedicated legislative guidelines and frameworks.

[12] The present section utilises the legal definition of the term 'peoples', which, in essence, refers to a distinct community of persons.
[13] This is the traditional approach taken towards self-determination by States. For further information, see Kelsen, Hans. The Law of the United Nations. (1951) pp-50-53; Rigo Sureda, Andres. The Evolution of the Right to Self-determination: A Study of United Nations Practice. (1973) p. 215; and Knop, Karen. Diversity and Self-Determination in International Law. (2002) p. 99.
[14] United Nations Committee on the Elimination of Racial Discrimination. 'Concluding observations on the eighteenth to twentieth periodic reports of Australia' (2017). UN Doc. CERD/C/AUS/CO/18-20, at 19-20; United Nations Committee on the Elimination of Racial Discrimination. 'Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia' (2010). UN Doc. CERD/C/AUS/CO/15-17 at 15; United Nations Committee on Economic, Social and Cultural Rights. 'Concluding Observations on the fifth periodic report of Australia' (2017). UN Doc. E/C.12/AUS/CO/5 at 16(a); United Nations Human Rights Committee. 'Concluding observations on t
he sixth periodic report of Australia' (2017). UN Doc. CCPR/C/AUS/CO/6 at 50(b).

While self-determination can be achieved by individuals, groups[15] and minorities[16] as a component of the population of a state in the traditional sense by ensuring participation in 'representative' governmental processes, the interests of minorities are often cast aside due to majority rule.[17] For example, a group or minority can overwhelmingly vote for an individual to be elected to office, but this does not guarantee an outcome in an election.

Self-determination in the context of Indigenous peoples differs as participatory rights are enhanced when juxtaposed against the general population of a given state. Aboriginal peoples are guaranteed more than just the opportunity to provide feedback and voice opinions on matters that affect their rights individually and collectively: they have the right to meaningful and effective consultation and a role in decision-making in relation to matters that affect their rights and interests.[18] In essence, they have more than a mere right to a seat at the table, but a say in the outcomes.

Aboriginal Community Controlled Organisations (**ACCO**s) play a significant role in the efforts towards the realisation of the right to self-determination of Aboriginal peoples. The first Aboriginal Legal Service, the Aboriginal Legal Service in Redfern, New South Wales was founded in 1970 as a response the injustices and oppression endured by Aboriginal peoples.[19] One year later, the first Aboriginal community controlled health organisation (**ACCHO**) was founded in Redfern as a response to Aboriginal experiences of racism in generalist health services and the need for culturally safe and accessible primary health care services.[20] ACCOs continue to play a vital role in addressing the need for the provision of culturally appropriate and safe services to Aboriginal peoples and as an invaluable tool to respond to continuing injustices and oppressive practices against Aboriginal peoples, individually and collectively, in contemporary Australian society.

Recommendation 188 of the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**) emphasised the need for governments to negotiate with Aboriginal organisations and communities to determine the guidelines pertaining to procedures and processes to be followed to ensure that self-determination played a role in the design and implementation, or modification, of policies and programs that particularly affected Aboriginal peoples. Despite the recommendations made in 1991, Australia continues to receive criticism from UN human rights bodies for its failure to engage with Aboriginal peoples and ACCOs in relation to Closing the Gap (**CTG**),[21] despite the principal objectives

[15] 'Groups' refers to individuals that fall within a given category based upon specific traits, characteristics or interests.
[16] 'Minorities' refers to groups of individuals that constitute either a numerical minority or a minority based upon power disparity (i.e., inability to influence governmental policies, practices and outcomes typically due to existing bias and discrimination within entrenched institutions).
[17] Raic, David. Statehood and the Law of Self-Determination (2002). pp. 277-281.
[18] Article 18 of the United Nations Declaration on the Rights of Indigenous Peoples.
[19] For more information, see https://www.alsnswact.org.au/about.
[20] For more information, see https://www.naccho.org.au/acchos.
[21] United Nations Committee on Economic, Social and Cultural Rights. 'Concluding Observations on the fifth periodic report of Australia' (2017). UN Doc. E/C.12/AUS/CO/5 at 15-16; United Nations Committee on the Elimination of Racial Discrimination. 'Concluding observations on the eighteenth to twentieth periodic reports of Australia' (2017). UN Doc. CERD/C/AUS/CO/18-20, at 17-18.

of the Agreement including shared decision-making[22] and improved government engagement with Aboriginal communities when undertaking changes to policies and programs.[23] Similarly, the continued practices of the Victorian Government in relation to the participatory rights in the context of the self-determination of Aboriginal peoples in Victoria is contrary not only to their status as 'peoples', but to the objectives of the CTG Agreement.

In the context of governmental processes in Victoria, the continued treatment of Aboriginal peoples as 'minorities' rather than 'peoples' is reflected in legislative and administrative practices, particularly in relation to consultations with ACCOs regarding pending legislation. VALS is routinely contacted by departments and agencies of the Victorian Government for consultations concerning legislative and administrative proposals. The consultation timeframes are frequently very short, making it challenging for VALS, being chronically underfunded, to provide comprehensive feedback. Moreover, feedback provided by VALS is not typically reflected in the measures implemented by the Victorian Government.

Such issues are particularly apparent in relation to Aboriginal cultural rights, where departments and agencies of the Victorian Government generally respond by stating that no conflicts with Aboriginal cultural rights under s.15(2) of the *Charter of Human Rights and Responsibilities 2006* were detected by *their* legal teams. It is important to point out that, in accordance with the right to self-determination, it should not be the Victorian Government that determines whether legislative or administrative measures conflict with Aboriginal cultural rights and interests, but the Aboriginal peoples themselves - whether that be directly or through their representatives and institutions.

Additionally, the inherent failure on the part of the Victorian Government in regards to the right to participation of Aboriginal peoples in Victoria enshrined in Article 18 of the *United Nations Declaration on the Rights of Indigenous Peoples* to be reflected in practice (much less engage in shared decision-making, resulting from meaningful and effective consultation directly with Aboriginal peoples at the community level and indirectly through ACCOs) undermines the ability to effectively and efficiently reduce inequities and improve outcomes within the Aboriginal communities of Victoria. This is particularly the case in relation to CTG targets concerning Aboriginal adults and youths entangled in the Victorian criminal legal system, and Aboriginal Justice Agreement (**AJA**) milestones.[24]

The Victorian Government is party to several commitments to ensure the recognition of and respect for the self-determination of Aboriginal peoples of Victoria, including the following measures:

- The CTG Agreement recognises self-determination as the basis for shared decision making,[25] while further recognising ACCOs as self-determined institutions of Aboriginal peoples.[26]

[22] See, for example, Clause 17 and Priority Reform One of the National Agreement on Closing the Gap.
[23] Clause 59(f), ibid.
[24] Clause 38(a), ibid.
[25] Clause 32(c)(5), ibid.
[26] Clause 44, ibid.

- *Burra Lotjpa Dunguludja* is the 4th phase of the AJA in Victoria and the Victorian Government has committed to work towards self-determination and Treaty to serve as the basis for a new relationship between the Victorian Government and Aboriginal peoples.[27]
- The Victorian Aboriginal Affairs Framework (**VAAF**) recognises self-determination as not only the basis for the framework, but the basis of all future actions affecting Aboriginal peoples across Victoria.[28]
- The *Children, Youth and Families Act 2005* recognises the 'principle' of self-determination of Aboriginal peoples in Victoria.[29]

Furthermore, the pledge to support the effort for the right to self-determination to be realised by the Aboriginal peoples of Victoria is also part of the Victorian Labor Party Platform.[30]

Despite the emphasis placed on the self-determination of Aboriginal people in Victoria by the Victorian Government, the *Charter of Human Rights and Responsibilities 2006* (**the Charter**) – Victoria's core human rights document – is silent on the matter. The only references to Aboriginal peoples in the Charter appear in relation to the human rights of Aboriginal people in relation to the diverse relationships with their traditional lands and waters;[31] the definition of 'Aboriginal';[32] and the distinct cultural rights of Aboriginal peoples in Victoria.[33]

While the Charter required a review after four years to determine whether Aboriginal self-determination should be included in the Act,[34] the Scrutiny of Acts and Regulations Committee (**SARC**) recommended that the Victorian Government continue to consult with Victorian Aboriginal communities to continue to develop programs that foster improved outcomes for Aboriginal Victorians and not to include self-determination in the Charter because of the obscurity of the content of the right.[35] This was, again, in contradiction to submissions prepared concerning the matter by numerous ACCOs (including VALS[36]). The subsequent review of the Charter in 2015 concluded that the 'principle' of self-determination should be included in the Preamble of the Charter, but stopped short of recommending that the right to self-determination of Aboriginal peoples in Victoria be recognised

[27] Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement Phase 4 – A partnership between the Victorian Government and Aboriginal community, p. 11. Available at https://files.aboriginaljustice.vic.gov.au/2021-02/Victorian%20Aboriginal%20Justice%20Agreement%20Phase%204.pdf.
[28] Victoria State Government (2019). Victoria Aboriginal Affairs Framework: 2018-2023, pp. 20-27. Available at https://content.vic.gov.au/sites/default/files/2019-09/Victorian-Aboriginal-Affairs-Framework_1.pdf.
[29] s. 12 of the *Children, Youth and Families Act 2005*.
[30] Victorian Australian Labor Party (2018). Victorian Branch Australian Labor Party Platform 2018, p. 86.
[31] Preamble of the *Charter of Human Rights and Responsibilities 2006.*
[32] s. 3(1), ibid.
[33] s. 15(2), ibid.
[34] s. 44(2), ibid.
[35] Scrutiny of Acts and Regulations Committee (2011). Review of the Charter of Human Rights and Responsibilities Act 2006, pp. 52-58. Available at https://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/report_response/20110914_sarc.charterreviewreport.pdf.
[36] VALS (2011). Review of the Victorian Charter of Human Rights and Responsibilities, pp. 14-26. Available at https://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/submissions/258_VALS_1.7.2011.pdf

in the Charter.[37] To date, the 'right' to self-determination of the Aboriginal peoples of Victoria has yet to be recognised in the Charter - or any other Victorian legislation.

Another principal area of concern relating to the self-determination of Aboriginal peoples in Victoria in the context of the criminal legal system relates to the continued lack of funding for ACCOs whose mandates includes advocating for the individual and collective interests of Aboriginal peoples. While issues concerning the funding and resourcing of Aboriginal organisations and institutions have been highlighted by United Nations human rights bodies in criticisms of the Commonwealth Government,[38] the issue has also been repeatedly identified by VALS in numerous submissions to the Victorian Government.[39] The ability of ACCOs to effectively advocate for the interests of Aboriginal communities in Victoria is considerably impeded by the lack of appropriate funding and resources to fulfil their respective mandates.

Aboriginal self-determined institutions also play a critical role in addressing issues relating to Aboriginal youths and adults entangled in the Victorian criminal legal system. The Koori Courts that currently operate in Victoria provide an example of what can be achieved by Aboriginal community involvement, and have been deemed successful in addressing offences committed by Aboriginal persons in Victoria, in regards to the cultural-appropriateness of both the proceedings and sentences imposed, as well as the prevention of future offences. However, these Courts have limited jurisdiction in respect of both types of offences and plea requirements, coupled with the fact that Koori Court sits at only 12 Magistrates' Court locations and five County Court locations at present. The role of Aboriginal Elders and Respected Persons is also limited in a way that prevents Koori Courts from being truly self-determined institutions. The expansion of the Koori Courts system is a logical and necessary next step to progress towards realising Aboriginal self-determination within the Victorian criminal legal system.

The Treaty process currently being undertaken in Victoria will undoubtedly have profound implications on the nature of relations between the Victorian Government and Aboriginal peoples in Victoria, particularly in relation to how the right to self-determination of Aboriginal peoples in Victoria will be exercised. Despite the fact that the Treaty process has not yet been concluded, the Victorian

[37] Young, M. B. (2015). From commitment to culture: The 2015 Review of the Victorian Charter of Human Rights and Responsibilities Act 2006, p. 216-218. Available at https://files.justice.vic.gov.au/2021-06/report_final_charter_review_2015.pdf.

[38] United Nations Committee on the Elimination of Racial Discrimination. 'Concluding observations on the eighteenth to twentieth periodic reports of Australia' (2017). UN Doc. CERD/C/AUS/CO/18-20, at 17-18; United Nations Committee on the Elimination of Racial Discrimination. 'Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia' (2010). UN Doc. CERD/C/AUS/CO/15-17 at 15; United Nations Committee on Economic, Social and Cultural Rights. 'Concluding Observations on the fifth periodic report of Australia' (2017). UN Doc. E/C.12/AUS/CO/5, at 15-16; United Nations Human Rights Committee. 'Concluding observations on the sixth periodic report of Australia.' (2017) UN Doc. CCPR/C/AUS/CO/6, at 39-40 and 49-50, United Nations Human Rights Committee. 'Concluding observations of the Human Rights Committee: Australia. (2009) UN Doc. CCPR/C/AUS/CO/5, at 13 and 25.

[39] See, for example Recommendations 7- 10 of VALS. 'Submission to the Royal Commission into Victoria's Mental Health System (July2019); Recommendations 1 and 3 of VALS. 'Submission to the Victorian Law Reform Commission Project: Improving the Response of the Justice System to Sexual Offences.' (March 2021); Recommendations 1 and 5-11 of VALS. 'Building Back Better: Victorian Aboriginal Legal Service COVID-19 Recovery Plan.' (February 2021);

Government should work in anticipation of ensuring that its practices are consistent with the right to free, prior and informed consent (**FPIC**)[40] of Aboriginal peoples in relation to legislative and administrative measures that may affect them.[41]

While the right to FPIC generally refers to a requirement to consult with representative institutions (i.e., elected bodies), examples of FPIC practice include other Indigenous governance structures and organisations such as ACCOs, as well as engagement with Aboriginal persons and groups at the community level.[42] With regards to legislative and administrative measures relating to the Victorian criminal legal system, the implementation of policies and practices consistent with the right to FPIC would involve consultation with Aboriginal communities and ACCOs during the conceptualisation, development and drafting stages of such measures, rather than requesting feedback when such processes have been completed.

In practice, the concepts of Indigenous Data Sovereignty and Indigenous Data Governance are a specific exercise of the right to self-determination as enshrined in Article 3 (as well as numerous other Articles) of the *United Nations Declaration on the Rights of Indigenous Peoples*. The following key concepts relating to Indigenous Data Sovereignty were defined by consensus by delegates of the Indigenous Data Sovereignty Summit:[43]

- *Indigenous Data*: 'In Australia… refers to information or knowledge, in any format or medium, which is about and may affect Indigenous peoples both collectively and individually.'
- *Indigenous Data Sovereignty (IDS)*: 'refers to the right of Indigenous peoples to exercise ownership over Indigenous Data. Ownership of data can be expressed through the creation, collection, access, analysis, interpretation, management, dissemination and reuse of Indigenous Data.'
- *Indigenous Data Governance (IDG)*: 'refers to the right of Indigenous Peoples to autonomously decide what, how and why Indigenous Data are collected, accessed and used. It ensures that data on or about Indigenous peoples reflects our priorities, values, cultures, worldviews and diversity.'[44]

[40] 'Free' indicating an absence of coercion; 'Prior' meaning that consultations occur before work begins on matters that may affect Aboriginal peoples; 'Informed' meaning that all potential benefits and consequences of a measures deliberated are presented to the Aboriginal people(s) affected; and 'Consent' indicating that the scope and content of the measures is agreed upon by the State and Aboriginal parties concerned.
[41] Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples.
[42] Although focusing on land use and projects, the FAO provides a clear overview of both the right to FPIC and the processes involved in implementing FPIC. See Food and Agriculture Organization of the United Nations. Free Prior and Informed Consent: An indigenous peoples' right and a good practice for local communities. (2016). Available at http://www.fao.org/3/I6190E/i6190e.pdf.
[43] The Indigenous Data Sovereignty Summit was held in Canberra, ACT, on 20 June 2018.
[44] *Indigenous Data Sovereignty, Communique*. Indigenous Data Sovereignty Summit. 20 June 2018, p. 1.

The nature of the relationship between data collected concerning Aboriginal peoples and IDS can be described as follows:

- The right of Aboriginal peoples, individually and collectively, to access and collect data obtained about Aboriginal individuals and communities.
- The right of Aboriginal peoples, individually and collectively, to exercise control over the manner in which data concerning Aboriginal individuals and communities is gathered, managed and utilised.

The relationship between IDG and data collected concerning Aboriginal individuals and communities, on the other hand, involves determining the specific circumstances under which data concerning Aboriginal peoples can be collected in the first place. It is important to note that both IDS and IDG require the meaningful and effective participation of Aboriginal people before decisions are made in relation to policies and legislation concerning Indigenous data.

RECOMMENDATIONS

Recommendation 1. The distinctiveness of Aboriginal peoples in Victorian society must be recognised in law.

Recommendation 2. The Victorian Government must ensure that Aboriginal peoples enjoy the right to meaningful and effective consultation in decision-making processes on matters that affect their rights. These should be based upon models of best practice within the international community, by engaging with Aboriginal communities and Aboriginal Community Controlled Organisations (ACCOs) at all stages of the conceptualisation, development and drafting of such measures.

Recommendation 3. The Victorian Government must ensure that the *Charter of Human Rights and Responsibilitie*s is amended to include recognition of the right to self-determination of Aboriginal peoples in Victoria.

Recommendation 4. The Victorian Government should ensure that all Aboriginal Community Controlled Organisations are sufficiently resourced to fulfil their respective mandates to represent the interests, both individual and collective, of Aboriginal peoples in Victoria.

Recommendation 5. The Victorian Government should implement policies and practices concerning Aboriginal persons and the Victorian criminal legal system that are consistent with the right to free, prior and informed consent of Aboriginal peoples in Victoria.

Recommendation 6. Existing legislation and policies should be reformed to ensure that Aboriginal people and ACCOs are provided access to data collected which concerns Aboriginal individuals and communities. This should also extend to participation in decisions regarding the evaluation and

dissemination of such data, in a manner consistent with Indigenous Data Sovereignty (IDS) and Indigenous Data Governance (IDG). Both IDS and IDG require the meaningful and effective participation of Aboriginal people before decisions are made in relation to policies and legislation concerning Indigenous data.

Systemic Racism

As VALS outlined in our COVID-19 Recovery Plan, Building Back Better:

> The Black Lives Matter movement has brought national attention to the long-standing injustice that is systemic racism, with the voices of Aboriginal and Torres Strait Islander people being amplified through the solidarity of non-Aboriginal Australians. Acknowledging how this country's colonial history has created and shaped structures and institutions characterised by racism, which so often fail to deliver true justice for Aboriginal people, is crucial. The legal system is built on a foundation of violence and dispossession, denial of sovereignty (and of course, humanity), with the colonial project continuing through policies of protection and assimilation. Today's injustices are inextricably linked to the injustices of the past, and achieving a collective understanding of Victoria's colonial legacy can help guide the reforms necessary for realising a truly equitable legal system.[45]

Of particular concern is the fact that Victoria Police continues to have serious problems with racism – in part because of an overly police-led response to social problems that disproportionately affect Aboriginal people and other racial minorities, but also because of structural racism within the police force which has not been adequately addressed by reform and training, and robust accountability measures.

VALS remains highly concerned, for example, about police disputing or questioning the claims of people detained in police custody that they are Aboriginal and/or Torres Strait Islander.[46] Our Custody Notification Service (**CNS**), discussed further below, provides a critical safeguard against deaths in custody, but its efficacy is undermined when police question the Aboriginality of someone they have detained. It is not a matter for Victoria Police to confirm or question a person's Aboriginality, regardless of what information they may have about them in their system or whether the person who has been arrested and taken into police custody has previously identified as Aboriginal. This practice by police is not only inappropriate, but harmful, in light of Australia's history of dispossession, the Stolen Generations, and the devastating impact this has had on Aboriginal communities, that manifests itself today as intergenerational trauma, and for some, disconnection from land, culture and community. In VALS' experience, too many Victoria Police officers demonstrate a clear lack of understanding of the purpose of the CNS and the need for safeguards to protect Aboriginal people in police custody.

[45] VALS (2021), *Building Back Better: Victorian Aboriginal Legal Service COVID-19 Recovery Plan*, p99. Available at https://www.vals.org.au/wp-content/uploads/2021/02/Building-Back-Better-Victorian-Aboriginal-Legal-Service-COVID-19-Recovery-Plan-February-2021-FOR-DISTRIBUTION.pdf
[46] Ibid.

Victorian Aboriginal Legal Service

Another example can be found in the attendance of uniformed police at the coronial inquest into the death of Raymond Noel during a police pursuit. VALS' Acting CEO responded to this incident, calling for an acknowledgment of racism, and a commitment to addressing it:

> The dignity of the Thomas family, in the face of such unimaginable grief, has repeatedly been acknowledged by the Coroner. In stark contrast, the systemic racism so pervasive in the legal system, in Victoria Police, manifested itself in an utterly disgraceful way yesterday.
>
> We expect a public apology from Victoria Police to the family and the Aboriginal community. We call on the Police Commissioner and the Minister to publicly acknowledge that systemic racism exists in Victoria Police, and undertake to immediately establish an independent inquiry led by the Aboriginal Community into systemic racism within Victoria Police.
>
> But it is not only up to Victoria Police to drive this change. We also expect the Attorney-General to work with independent experts within the Aboriginal Community to examine the impacts of systemic racism within the justice system and to develop solutions to address this.
>
> These demands, following yet another shameful day of policing in Victoria, are not new; they repeat decades-long advocacy calling for genuine police accountability, and a safe and equitable system for all.[47]

Systemic racism can be understood as how laws, policies and practices across agencies work together to produce a discriminatory outcome for racial or cultural groups. Cultural awareness training will not address the issue of racism and systemic racism, although this is frequently the proposed solution. Anti-racist or unconscious bias training cannot address systemic racism, although it may achieve results at an individual level. Cultural awareness and anti-racist training are crucial, but the issue of systemic racism is deep-rooted, complex and is ultimately not about individuals within a system that otherwise operates well. What is required is a strategy that addresses racism at both the individual and the systemic level.[48]

The nature of systemic racism is that it needs to be understood and tackled across different, interacting institutions. The systems of police accountability and oversight discussed below need to examine the role of systemic racism when conducting investigations and inquiries.[49] While changes to practice in the Coroners Court for inquests into the deaths of Aboriginal people in custody (made recently, almost 30 years after they were recommended by the RCIADIC) will improve the thoroughness and cultural appropriateness of those inquiries, they did not extend to requiring

[47] VALS, *Uniformed Victoria Police attend Coronial Inquest for 'security', compounding the grief and trauma of the Thomas Family* (1 July 2021), available at https://www.vals.org.au/uniformed-victoria-police-attend-coronial-inquest-for/
[48] VALS (2021), *Building Back Better: Victorian Aboriginal Legal Service COVID-19 Recovery Plan*, p100. Available at https://www.vals.org.au/wp-content/uploads/2021/02/Building-Back-Better-Victorian-Aboriginal-Legal-Service-COVID-19-Recovery-Plan-February-2021-FOR-DISTRIBUTION.pdf.
[49] Ibid, pp102-3.

Victorian Aboriginal Legal Service

inquests to fully consider the role that systemic racism plays in those deaths.[50] There is, however, an increasing appreciation of the importance of proper consideration of systemic racism, as demonstrated with the recent launch of VEOHRC/VALS' resource, 'Investigating Systemic Racism: A Tanya Day Inquest Resource for Advocates and Lawyers'. VALS emphasises that considerations in relation to systemic racism should be a key part of the function of all oversight bodies, including the Coroner and the monitoring bodies to be established under the *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (**OPCAT**), discussed further below.

RECOMMENDATIONS

Recommendation 7. The Victorian Government should work in partnership with the Victorian Aboriginal community and ACCOs to systematically assess and overcome racism at an individual and systemic level across all institutions and public services.

Recommendation 8. Systems, mechanisms and bodies of accountability and oversight, such as coronial inquests and detention oversight bodies (eg National Preventive Mechanisms under OPCAT) should examine the role of systemic racism when exercising their mandates.

Recommendation 9. Victoria Police and other relevant departments and agencies should actively foster a culture that respects human rights, through policies, procedures, operations and management. For Victoria Police, this should include a review of police training materials for their compatibility with human rights, as recommended by the Coronial Inquest into the death of Tanya Day.

Ending Aboriginal Deaths in Custody

This year we marked the 30 year anniversary of the Royal Commission into Aboriginal Deaths in Custody. On the anniversary, a paper was released, "outlin[ing] concerns with the 2018 Deloitte Access Economics review of the implementation of the 339 recommendations of [RCIADIC]… argu[ing] that there is a risk that misinformation may influence policy and practice responses to First Nations deaths in custody, and opportunities

[50] The Guardian, 22 September 2020, 'Victorian coroner changes how Indigenous deaths in custody are investigated'. Accessed at https://www.theguardian.com/australia-news/2020/sep/22/victorian-coroner-changes-how-indigenous-deaths-in-custody-are-investigated.

Victorian Aboriginal Legal Service

to address the widespread problems in Indigenous public policy in Australia may be missed."[51]

VALS and Djirra echoed the calls of the Aboriginal Justice Caucus for the establishment of an Aboriginal Social Justice Commissioner, a call which was first made 17 years ago:

> We need an Aboriginal and Torres Strait Islander Social Justice Commissioner to ensure the unfinished work of the Royal Commission into Aboriginal Deaths in Custody is finally completed. The lack of transparency and accountability by State and Federal Governments over the last 30 years is why there has been at least 470 Aboriginal deaths in custody since the Royal Commission.[52]

RECOMMENDATIONS

Recommendation 10. The Victorian Government should immediately begin implementing the RCIADIC recommendations, and must not rely on the discredited Deloitte review on the status of implementation of the recommendations.

Recommendation 11. The Victorian Government should establish an independent, statutory office of the Aboriginal and Torres Strait Islander Social Justice Commissioner. This office should be properly funded and report directly to the Parliament. The mandate of the Commissioner should include monitoring the implementation of RCIADIC recommendations, as well as recommendations from coronial inquests into Aboriginal deaths in custody.

To mark this anniversary, VALS also produced a video podcast series of interviews with Aboriginal people, including family members whose loved ones have died in custody, Senator Patrick Dodson and our Community Justice Programs Statewide leader (who discussed the CNS). You can view the podcasts here.

Prevention and Early Intervention

VALS wishes to highlight the ongoing imbalance in the way that the Victorian Government allocates its funds to respond to problems emerging in the criminal legal system. Overwhelmingly, the Government has chosen to fund police and prisons in preference to essential services which could prevent offending and improve community safety. In its last two budgets, the Victorian Government has poured money into the prison and policing systems. There was an allocation of $3.7 billion for policing and community safety and $1.384 billion for prisons in the 2021-2022 Victorian budget.

[51] Thalia Anthony et al, 30 years on: Royal Commission into Aboriginal Deaths in Custody recommendations remain unimplemented, accessed at https://caepr.cass.anu.edu.au/research/publications/30-years-royal-commission-aboriginal-deaths-custody-recommendations-remain

[52] VALS and Djirra, It is time for a Victorian Aboriginal and Torres Strait Islander Social Justice Commissioner (26 March 2021), available at https://www.vals.org.au/joint-media-release-from-djirra-and-victorian-aboriginal-legal-service/

Victorian Aboriginal Legal Service

Justice reinvestment frequently comes up when prevention and early intervention are discussed.

As the Australian Law Reform Commission explains

> Justice reinvestment originated in the United States as a response to an exponential growth in the rate of imprisonment since the 1970s. Justice reinvestment suggests that prisons are an investment failure, 'destabilising communities along with the individuals whom they fail to train, treat, or rehabilitate (and whose mental health and substance abuse are often exacerbated by the experience of imprisonment).'[53]

Justice reinvestment is an approach to criminal justice reform which recognises the far greater value for money associated with investing in prevention compared to investing in expansion of the carceral system. VALS strongly supports a high-level shift in the Government's priorities, to be demonstrated by a change in funding decisions, away from a law and order approach which has never improved community safety and has only led to an increase in Aboriginal overincarceration.[54] Coordinated justice reinvestment approaches can have a significant impact on a wide range of outcomes associated with the criminal legal system.

Good Practice Model: Maranguka Justice Reinvestment Project in Bourke

In 2013, an Aboriginal-led, place-based justice reinvestment project was implemented in Bourke, NSW. This model 'emerged as Bourke was concerned about the number of Aboriginal families experiencing high levels of social disadvantage and rising crime.'[55]

This model has led to an 18% drop in major offences, 39% drop in domestic violence assaults, 39% drop in drug offences, and substantial falls in reoffending.[56] An impact assessment found that there was a 14% reduction in bail breaches and a 42% reduction in days spent in custody.[57]

Even without a fully coordinated justice reinvestment plan, simply redirecting funds from prisons and policing towards necessary social supports can have an important impact. Preventing involvement in the criminal legal system can be supported by investment in a wide range of social services. One of the most important is housing, which provides stability that enables people to avoid being drawn into offending. VALS supports the goals of the Homes Not Prisons campaign, which endorses 'Housing First'

[53] Australian Law Reform Commission, *What is justice reinvestment?*, available at https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/4-justice-reinvestment/what-is-justice-reinvestment/

[54] VALS, 25 November 2020, 'The Victorian Government's budget has left Aboriginal people behind'. Accessed at https://www.vals.org.au/the-victorian-governments-budget-has-left-aboriginal-people-behind/.

[55] Justice Reinvestment in Bourke, available at https://www.justreinvest.org.au/justice-reinvestment-in-bourke/

[56] Just Reinvest NSW (2018), 'New Evidence from Bourke'. Available at https://www.justreinvest.org.au/new-evidence-from-bourke/.

[57] KPMG, *Maranguka Justice Reinvestment project Impact Assessment* (November 2018), available at https://www.justreinvest.org.au/wp-content/uploads/2018/11/Maranguka-Justice-Reinvestment-Project-KPMG-Impact-Assessment-FINAL-REPORT.pdf.

principles, which recognise safe and secure housing as a precondition for people dealing with other issues in their life, not as a privilege to be provided to people who have already dealt with substance use problems or other issues they may be facing.[58] Housing is particularly important during the transition out of prison,[59] but it also has an important stabilising effect for people who have been back in the community for many years, as well as for people who have never been imprisoned but may be at risk of offending.

Another key area of underinvestment is in mental health services for people in the community. The Mental Health Royal Commission noted the disproportionate focus of state investment in Victoria on policing and prisons, observing that

> [t]here have not been similar funding trends for community-based mental health services or diversion, rehabilitation and reintegration programs. In the budget that allocated $1.8 billion for new prison accommodation, $42.7 million was allocated to services focused on keeping people out of the justice system and $22.7 million to diversion, rehabilitation and reintegration programs. This total allocation to diversion programs is equivalent to 3.6 per cent of the investment in prisons.[60]

Most strikingly, the Royal Commission received evidence from Victoria Police and the Commissioner of Corrections Victoria that underfunding of community services was a driver of growing police contacts and incarceration numbers. Victoria Police told the Commission that "patterns of investment over the past twenty years (an almost exclusive focus on numbers of police and police stations) will not meet the challenges faced by police and the community's expectations."[61] The Commission concluded that the imbalanced funding priorities perversely meant that "some people are unable to get mental health services until they enter the criminal justice system."[62]

Effective prevention and early intervention also requires the government to be involved directly in providing key services, because merely providing funding leaves open the possibility that programs and services will not reach the people most in need of support. For example, while any funding for housing is beneficial to Victoria, it is very hard for people with criminal histories to access private rentals and even, in many cases, non-government social housing. Directly provided public housing is therefore crucial, and this principle applies equally in other areas of service delivery.

Critically, all kinds of public investment must recognise the importance of cultural safety and self-determination in providing services to Aboriginal people, given the significant overrepresentation of Aboriginal people in the legal system, and also in the populations most affected by the social problems which raise the risk of offending (such as homelessness, mental illness and substance use issues). VALS

[58] Build Homes Not Prisons campaign, website at https://homesnotprisons.com.au/.
[59] ABC News, 22 July 2021, 'Concerns ex-prisoners falling back into crime because of WA rental shortage'. Available at https://www.abc.net.au/news/2021-07-22/prisoner-housing-rental-woes/100314090.
[60] Royal Commission into Victoria's Mental Health System (2021), *Final Report, Volume 3: Promoting inclusion and addressing inequities*, p358. Accessed at https://finalreport.rcvmhs.vic.gov.au/wp-content/uploads/2021/02/RCVMHS_FinalReport_Vol3_Accessible.pdf.
[61] Ibid.
[62] Ibid.

draws the Inquiry's attention to the Australian Law Reform Commission's report, which recommended that "Commonwealth, state and territory governments should support justice reinvestment trials initiated in partnership with Aboriginal and Torres Strait Islander communities, including through facilitating access to localised data related to criminal justice and other relevant government service provision, and associated costs; supporting local justice reinvestment initiatives; and facilitating participation by, and coordination between, relevant government departments and agencies."[63] While the Commonwealth Government has failed to respond to this report, VALS encourages the Victorian Government to take steps to implement this recommendation, that was, in part, directed at the State and Territory Governments.

It is critical that the Government recognise that when it builds new prison cells, they get filled. At Dame Phyllis Frost, for example, capacity has increased by 270% in the last two decades, and this was matched by a 212% increase in the number of women in prison.[64] The Victorian Government must stop celebrating expansion of the carceral system and recognise that decisions to increase prison capacity lead inexorably to higher rates of imprisonment. Abandoning these counterproductive investments in favour of delivering more accessible essential services would have a substantial impact on reducing Victoria's growing prison population.

RECOMMENDATIONS

Recommendation 12. The Victorian Government should increase investment in evidence-based prevention and early intervention services, such as housing and mental health support services, to prevent offending and reoffending.

Recommendation 13. The Victorian Government should ensure housing and essential social services are accessible for people with criminal histories and Aboriginal people. In many cases, this will necessitate direct state provision and/or funding of Aboriginal Community Controlled Organisations.

[63] Australian Law Reform Commission, Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (2017), available at https://www.alrc.gov.au/wp-content/uploads/2019/08/summary_report_133_amended.pdf
[64] Build Homes Not Prisons campaign, website at https://homesnotprisons.com.au/.

Victorian Aboriginal Legal Service

Part 2: Addressing the Growth in Prison and Remand Populations

In June 2015, there were 6,219 people held in Victorian prisons.[65] By June 2021, the prison population had swelled to 7,249.[66] These numbers, however, understate the increasing rate of imprisonment in Victoria because they reflect temporary reductions due to COVID-19 which will inevitably be reversed without a concerted policy shift towards decarceration. Prior to the pandemic, the prison population reached a high of 8,216 in 2019, an increase of 28.3% in just three years.[67]

These numbers have been driven in large part by the soaring remanded population – people held in prison who have not been sentenced by a court to jail time. From June 2015 to June 2021, the number of people serving sentences in prison actually fell slightly – from 4,786 to 4,064. Even the period from June 2015 to January 2020 (before the prison population began to fall due to COVID-19) saw an increase of 4.8%. In contrast, the number of people held without sentence skyrocketed from 1,433 to 3,185, an increase of 122%. The proportion of people in prison who had received a sentence fell from 77% to just 56%.[68]

It is unsurprising, given the history of Victoria's criminal legal system and the overpolicing of Aboriginal communities, that these changes have particularly impacted Aboriginal people. The number of Aboriginal people held in Victorian prisons was 771 in June 2021.[69] Immediately prior to the pandemic, in February 2020, the Aboriginal prison population was as high as 890, up more than 85% from the 480 held in June 2015.[70] The number of unsentenced Aboriginal people held in Victorian prisons quadrupled from June 2015 to June 2019.[71] Aboriginal people now make up more than 10% of the people held in prison in Victoria, compared to less than 1% of the Victorian population.[72]

Aboriginal women have been particularly affected by Victoria's increasingly carceral approach to dealing with social problems. In June 2015, there were 42 Aboriginal women in Victorian prisons, 10% of the prison total.[73] By June 2019, before the onset of the pandemic, that number had nearly doubled to 80, making up a hugely disproportionate 13.9% of the female prison population.[74]

These trends run completely counter to the Victorian Government's commitments and responsibilities towards Aboriginal people. It has been clear for decades that reducing the incarceration rates of

[65] Corrections Victoria, *Annual Prisoner Statistical Profile 2019-20*, Table 1.3.
[66] Corrections Victoria, *Monthly Prisoner and Offender Statistics 2020-21*, Table 1.12
[67] Corrections Victoria, *Monthly Time Series Prisoner and Offender Data*, Table 1.
[68] Ibid.
[69] Corrections Victoria, *Monthly Prisoner and Offender Statistics 2020-21*, Table 1.12
[70] Corrections Victoria, *Monthly Prisoner and Offender Statistics 2020-21*, Table 1.08.
Corrections Victoria, *Annual Prisoner Statistical Profile 2019-20*, Table 1.4.
[71] Corrections Victoria, *Annual Prisoner Statistical Profile 2019-20*, Table 1.4.
[72] Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians, June 2016*.
[73] Corrections Victoria, *Annual Prisoner Statistical Profile 2019-20*, Table 1.4.
[74] Ibid. The data released by Corrections Victoria does not allow the number of Aboriginal women in custody to be known for any date except June 30, making it impossible to see the continuing growth of numbers until immediately before the pandemic.

Victorian Aboriginal Legal Service

Aboriginal people is urgent. A key finding of the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**), whose report was handed down more than 30 years ago, was that the number of deaths in custody is due primarily to the extreme and disproportionate rate at which Aboriginal people are imprisoned. A recent analysis found that, of the over 470 Aboriginal people who have died in custody since the Royal Commission's report, more than half had not been sentenced.[75] Both the scale of the increase in Victoria's imprisonment of Aboriginal people, and the concentration of that growth in the remanded population, are putting more and more Aboriginal lives at risk.

The Government is committed under the Closing the Gap (**CTG**) Agreement to reducing the incarceration rate of Aboriginal adults by 15%, and of Aboriginal children by 30%, by 2031.[76] Given the increase in imprisonment of Aboriginal people in recent years, Victoria could meet the Closing the Gap target merely by returning to the incarceration rate of 2017.[77] The CTG targets are clearly inadequate, and reverting back to numbers from a few short years ago is much too unambitious a goal. But even such a conservative improvement will not be achieved without major policy change by the Victorian Government. *Burra Lotjpa Dunguludja*, the Aboriginal Justice Agreement Phase 4, set a more ambitious target to fully close the gap by 2031.[78] No progress has been made towards that target since 2017.[79]

VALS is calling on the Victorian Government to take the steps necessary to achieve parity in this generation's lifetimes, and to commit to the important work that needs to be done to address systemic racism. There are immediate actions the Victorian Government could take to exceed the minimum Closing the Gap targets and demonstrate its commitments to meet the goals agreed under Burra Lotjpa Dunguludja. This first section of the submission details how government policy in many domains is contributing to overincarceration, and how these shameful trends could be reversed.

[75] The Guardian, 9 April 2021, 'The 474 deaths inside: tragic toll of Indigenous deaths in custody revealed'. Accessed at https://www.theguardian.com/australia-news/2021/apr/09/the-474-deaths-inside-rising-number-of-indigenous-deaths-in-custody-revealed.
[76] Coalition of Aboriginal and Torres Strait Islander Peak Organisations and Australian Governments, National Agreement on Closing the Gap (July 2020), pp31-32.
[77] Productivity Commission, *Closing the Gap: Information Repository*, Target 10. Accessed at https://www.pc.gov.au/closing-the-gap-data/dashboard/socioeconomic/outcome-area10.
[78] Aboriginal Justice Agreement, *Burra Lotjpa Dunguludja*, pp30-31. Accessed at https://files.aboriginaljustice.vic.gov.au/2021-02/Victorian%20Aboriginal%20Justice%20Agreement%20Phase%204.pdf.
[79] The AJA reported a baseline of 1,495 Aboriginal people under adult justice supervision in 2017. At 30 June 2021, there were 1,468 Aboriginal people under supervision (771 in prison and 697 under community supervision.) Corrections Victoria, *Monthly Prisoner and Offender Statistics 2020-21*, Tables 1.12 and 2.12.

Victorian Aboriginal Legal Service

Bail

The punitive bail system in Victoria is the single largest factor contributing to the growth in prison and remand populations. By now, the "bail crisis" is well known and well documented. Across the adult prison population, 44% of people in prison are currently unsentenced,[80] versus only 28.9% in June 2016.[81] In the women's system, the situation is even more dire, with more women currently on remand than serving sentences.[82] In the youth justice system, the number of children on remand has more than doubled between 2010 and 2019.[83] Changing the punitive bail system and reducing remand rates is among the most critical reforms needed in the criminal legal system.

The evidence is clear that the current bail system disproportionality impacts Aboriginal people.[84] In June 2020, 44% of Aboriginal people in prison in Victoria were on remand, whereas only 35% of the total prison population was on remand.[85] In 2017-2018, 15% of children on remand identified as Aboriginal[86] and in 2018-2019, 48% of all Aboriginal children in youth justice custody on an average day were on remand (versus 33% in 2014-2015).[87]

VALS has the following critical concerns regarding the bail system:

(a) Harmful changes to the bail laws in 2013, 2017 and 2018, including criminalisation of additional bail offences and expansion of the reverse-onus test;
(b) Lack of bail justices and remote bail justice hearings;
(c) Challenges with police bail, including culturally inappropriate bail conditions;
(d) Cultural appropriateness of bail proceedings.

[80] Corrections Victoria, Monthly Time Series Prisoner and Offender Data: Monthly time series prisoner and offender data | Corrections, Prisons and Parole
[81] Corrections Victoria, Annual Prisoner Statistical Profile 2009-10 to 2019-20 | Corrections, Prisons and Parole, Table 1.3. Include data on average time on remand if it can be found.
[82] Corrections Victoria, Monthly Time Series Prisoner and Offender Data. In July 2021, 53% of women in Victoria's prisons are unsentenced.
[83] Sentencing Advisory Council (2020), *Children Held on Remand in Victoria*, p. ix. Accessed at https://www.sentencingcouncil.vic.gov.au/publications/children-held-on-remand-in-victoria.
[84] In 2017-2018, 15% of children on remand identified as Aboriginal, whereas 1% of Victoria's population identifies as Aboriginal. SAC, Children on Remand, p. xii. In June 2020, 44% of Aboriginal people in prison in Victoria were on remand, whereas only the 35% of the total prison population was on remand. See Corrections Victoria, Profile of Aboriginal People in Prison, Annual Prisoner Statistical Profile 2009-10 to 2019-20 | Corrections, Prisons and Parole; Corrections Victoria, Profile of People in Prison, Annual Prisoner Statistical Profile 2009-10 to 2019-20 | Corrections, Prisons and Parole
[85] See Corrections Victoria, Profile of Aboriginal People in Prison, Annual Prisoner Statistical Profile 2009-10 to 2019-20 | Corrections, Prisons and Parole; Corrections Victoria, Profile of People in Prison, Annual Prisoner Statistical Profile 2009-10 to 2019-20 | Corrections, Prisons and Parole
[86] Sentencing Advisory Council (2020), *Children Held on Remand in Victoria*, p. xii. Available at https://www.sentencingcouncil.vic.gov.au/publications/children-held-on-remand-in-victoria.
[87] Commission for Children & Young People, *Our youth, our way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system*, p. 34. Between 2014–15 and 2018–19, the number of Aboriginal children and young people held on remand in Victoria on an average day almost doubled.

Victorian Aboriginal Legal Service

Since 2017, VALS has repeatedly raised concerns about the immediate and longer-term impacts of the bail laws for Aboriginal people in Victoria.[88] In July 2021, VALS sent an open letter[89] (signed by 55 organisations) and an expert petition[90] (signed by over 250 experts) to Ministers Symes, Hutchins and Williams calling for urgent bail reform. We have still not received a response.

Harmful Changes to the Bail Laws

The current bail laws are the product of major reforms in 2017 and 2018,[91] which followed the Bourke Street incident in 2017 and the Coghlan Review,[92] commissioned by the Government. Additionally, the bail laws were amended in 2013 to introduce two new criminal offences related to breaching bail.[93]

The reforms to the *Bail Act* in 2017 and 2018 included:

- Expansion of the "reverse-onus test": if an individual is arrested for an offence listed under Schedule 1 or 2 of the *Bail Act*, they must demonstrate that there are "exceptional circumstances" (for Schedule 1 offences) or "compelling reasons" (for Schedule 2 offences) to grant bail. Although this test existed prior to the 2017/2018 reforms, it only existed for a small number of offences. Since 2017/2018, the reverse-onus test applies to a broad range of offences, including if the individual commits an indictable offence whilst on bail, is subject to a summons for an indictable offence, is on parole, or is serving a Community Corrections Order for an indictable offence.[94]

[88] Building Back Better: VALS COVID-19 Recovery Plan, February 2021.
VALS Submission to the Parliamentary Inquiry into the Government's Response to COVID-19, September 2020.
VALS Submission to the Sentencing Act Reform Project, April 2020.
VALS Submission to CCYP Inquiry, Our Youth Our Way, October 2019.
VALS submission to the Royal Commission into Victoria's Mental Health System, August 2019.
[89] VALS, Bail Reform is Urgently Needed, May 2021, available at Bail-Reform-Letter-May-2021-5.pdf (vals.org.au)
[90] VALS, Expert Petition calling for Urgent Reform of Victoria's Bail Laws, VALS-Bail-Reform-Petition.pdf
[91] *Bail Amendment (Stage One) Act 2017* (Vic) and *Bail Amendment (Stage Two) Act* 2018 (Vic)
[92] The Hon. Paul Coghlan QC, *Bail Review: First Advice to the Victorian Government*, 3 April 2017; The Hon. Paul Coghlan QC, *Bail Review: Second Advice to the Victorian Government*, 1 May 2017.
[93] In December 2013, the *Bail Act 1977* (Vic) was amended to include the following bail offences: breaching bail conditions (s. 30A); and committing an indictable offence while on bail (s. 30B). There are now three bail offences under the Act, including failure to answer bail (s. 30). The offence of breaching bail conditions (S. 30A) does not apply to children.
[94] Offences in Schedule 1 include: aggravated carjacking and aggravated home invasion. Schedule 2 is much broader and includes: as armed robbery, aggravated burglary, intentionally causing serious injury and trafficking in a drug of dependence. It also includes any indictable offence alleged to have been committed while the person was on bail or subject to a summons for an indictable offence.

- The "show cause" standard that existed previously, was replaced with a requirement to "show compelling reasons" (for Schedule 2 offences)
- In applying the "exceptional circumstances" test, the "compelling reasons" test, the "unacceptable risk" test and when considering bail conditions, the court must consider "surrounding circumstances," as defined in the Act.[95]
- Only a court can grant bail for a Schedule 1 offence[96] or where an accused is on two or more undertakings of bail.[97]

Following the 2017/2018 bail reforms, bail applications for Schedule 1 and 2 offences involve the following two step process:

1. The accused person must demonstrate that there are "exceptional circumstances"[98] (for Schedule 1 offences) or "compelling reasons"[99] (for Schedule 2 offences) for granting bail. If this step is not satisfied, bail is refused.
2. If step one is satisfied, the court must also consider whether the person poses an "unacceptable risk" of endangering the safety or welfare of any person, committing an offence while on bail, interfering with a witness, obstructing the course of justice or not attending court.[100] The burden of proof lies with the prosecutor and the court can only grant bail if satisfied that the person does not pose an "unacceptable risk."

For offences not listed in Schedule 1 and 2, the court can only grant bail if satisfied that the person does not pose an "unacceptable risk" of endangering the safety or welfare of any person, committing an offence while on bail, interfering with a witness, obstructing the course of justice or not attending court. [101] The burden of proof lies with the prosecutor.

[95] *Bail Act 1977* (Vic), Sections 3AAA (definition of "surrounding circumstances"), 4A(3) (consideration of "surrounding circumstances" when applying "exceptional circumstances" test), 4C(3) (consideration of "surrounding circumstances" when applying "compelling reasons" test), 4E(3)(a) (consideration of "surrounding circumstances" when applying "unacceptable risk" test), and s 18AD (consideration of "surrounding circumstances" when considering bail conditions).
[96] *Bail Act 1977* (Vic), Section 13(3).
[97] *Bail Act 1977* (Vic), Section 13A.
[98] *Bail Act 1977* (Vic), Section 4A.
[99] *Bail Act 1977* (Vic), Section 4C.
[100] *Bail Act 1977* (Vic), Sections 4D and 4E.
[101] *Bail Act 1977* (Vic), Sections 4D and 4E.

Victorian Aboriginal Legal Service

Case Study – Veronica Marie Nelson

In January 2020, Ms. Veronica Marie Nelson, a proud Gunditjmara, Dja Dja Wurrung, Wiradjuri and Yorta Yorta woman, was refused bail after being arrested for shoplifting-related offences and remanded at Dame Phyllis Frost Centre.

Three days after being remanded, Ms Nelson tragically died alone in her cell. On the night of her death, she was distressed and cried out for medical assistance a number of times. Her death is a piercing reminder "of the human cost of the current bail laws."[102]

VALS' Wirraway team is representing Percy Lovett, Veronica Nelson's partner of 22 years, in the Coronial Inquest into her death. The following quotes are attributable to Percy Lovett:

> *"Veronica was a strong woman – stronger than me. She'd always help someone on the street. She taught me everything about our ways. It's got me beat how she knew what she knew. She knew everything."*
>
> *"I don't want it to happen again. I want to make it easier for the next women who gets locked up. I want them to be looked after more. I want them to get more support and treatment in the community."*
>
> *"I want accountability. "I want Veronica to be heard."*[103]

The evidence is clear that the current bail system disproportionality impacts Aboriginal people.[104] Aboriginal people experience higher rates of housing instability,[105] and therefore face challenges in meeting the reverse onus provisions in the *Bail Act*. There is a significant shortage of culturally safe residential bail support and accommodation to address this issue.[106] Aboriginal people are also

[102] VALS Media Release, Coronial Inquest into death of Veronica Marie Nelson to examine healthcare in Victorian prisons and bail laws – Victorian Aboriginal Legal Service (vals.org.au)
[103] VALS Media Release, "Coronial Inquest into death of Veronica Marie Nelson to examine healthcare in Victorian prisons and bail laws," 29 March 2021.
[104] In 2017-2018, 15% of children on remand identified as Aboriginal, whereas 1% of Victoria's population identifies as Aboriginal. SAC, Children on Remand, p. xii. In June 2020, 44% of Aboriginal people in prison in Victoria were on remand, whereas only the 35% of the total prison population was on remand. See Corrections Victoria, Profile of Aboriginal People in Prison, Annual Prisoner Statistical Profile 2009-10 to 2019-20 | Corrections, Prisons and Parole; Corrections Victoria, Profile of People in Prison, Annual Prisoner Statistical Profile 2009-10 to 2019-20 | Corrections, Prisons and Parole
[105] Parliament of Victoria, *Inquiry into homelessness in Victoria: Final report*, p58. Accessed at https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Homelessness_in_Victoria/Report/LCLSIC_59-06_Homelessness_in_Vic_Final_report.pdf.
[106] Under *Burra Lotjpa Dunguludja* (AJA4), the Victorian government and the Aboriginal Justice Caucus have committed to develop a residential bail support and a therapeutic program for Aboriginal young people that builds upon the Baroona Healing Place model. See AJA4 In Action. The government has also committed to develop and implement cultural and gender specific supports for Aboriginal women involved in the correctional system to obtain bail and avoid remand. In December 2021, the Koori Justice Unit is due to release a report identifying which cultural and gender specific supports need to be

disproportionately impacted by the requirement to show "exceptional circumstances" for repeat low-level poverty/survival crimes, such as shoplifting.

Additionally, Aboriginal people are disproportionately impacted by the criminalisation of bail offences, introduced in 2013,[107] which serve no purpose other than to further criminalise people who are already criminalised.

Case Study – Jordan (a pseudonym)

Our client was a 16-year-old child who was involved in a car accident. They were alleged to have been the driver of the car. The client did not have a prior history of involvement with the youth justice system, they had a stable address and youth justice was supportive of bail being granted.

The Magistrate refused bail on the basis that the child may receive a youth justice detention order and was also of the view that the client posed an "unacceptable risk" that could not be mitigated. The child spent one week in detention prior to being granted bail with onerous bail conditions.

The immediate harm caused by detaining an Aboriginal person on remand is significant and far-reaching. Detention separates an individual from their family, community, country and culture, and jeopardises their health, wellbeing and safety. This is particularly the case at the moment given the protective quarantine regime in place in prisons, requiring individuals to isolate for the first 14 days. Being detained on remand also disrupts education and employment, risks people losing their housing, and other crucial protective factors. Unlike individuals who are on bail in the community, remandees are unable to access rehabilitation and support programs.

Aboriginal women make up 13% of the female prison population and are particularly at risk of harm caused by the draconian bail laws. Many Aboriginal women who are on remand are victim-survivors of family violence, and are further traumatised as a result of their incarceration. In accordance with the *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* (**Bangkok Rules**),[108] courts should be responding appropriately to the situation of women who have offended, which includes developing and implementing gender-specific pretrial alternatives that take into account their history of victimisation,[109] as well as the use of diversionary and alternative pretrial measures in lieu of custodial measures.[110]

implemented for Aboriginal women involved in the correctional system to obtain bail and avoid remand. See Aboriginal Justice Forum #59 (July 2021), "Progress against AJA4 actions."

[107] As noted above, the Bail Act was amended in 2013 to include two additional criminal offences: breaching bail conditions (s. 30A); and committing an indictable offence while on bail (s. 30B). There are now three bail offences under the Act, including failure to answer bail (s. 30).

[108] United Nations (2011). Resolution adopted by the General Assembly on 21 December 2010. (2011) UN Doc. A/RES/65/229 ("Bangkok Rules").

[109] Ibid., Rule 57.

[110] Ibid., Rule 58 (read in conjunction with para. 17).

Remanding women also has a significant impact on dependent children, who may be forced into alternative forms of care when their mother is in custody. There is no publicly available data on the number of women on remand in Victoria with dependent children, and the number of times that child protection becomes involved as a result of a mother going into custody. However, women are more likely to be primary caregivers to dependent children in Victoria,[111] and this trend particularly impacts Aboriginal children, families and communities.[112] Across Australia, at least 54% of women in prisons have at least one dependent child.[113] While kinship care is a common outcome for the children of women in custody, it is reported that mothers are only able to regain custody of their children following their incarceration in as few as 28% of instances in Victoria.[114]

Detaining mothers on remand without considering the implications for their dependent children is contrary to international law standards. The Bangkok Rules provide that non-custodial pretrial alternatives for women "shall be implemented wherever appropriate and possible,"[115] and non-custodial sentences are explicitly preferred for pregnant women or women with dependent children in most cases.[116] Further, the Bangkok Rules require governments to develop and implement gender-specific pretrial alternatives that take into account the caretaking responsibilities of incarcerated women.[117]

In addition, the United Nations Convention on the Rights of the Child (**UNCRC**) obliges Australia to ensure that children not be separated from their parents against their will, unless necessary for the best interests of the child.[118] International legal norms indicate a clear preference towards continued family integrity, rather than fragmentation, as a result of bail hearings.

In addition to the immediate harmful effects for Aboriginal people on remand and their families, the bail system has significant flow-on effects for sentencing outcomes,[119] and future involvement in the criminal legal system. This includes an increased likelihood of receiving a custodial sentence.[120]

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[111] Flynn, C. (2014). Getting there and being there: Visits to prisons in Victoria – the experiences of women prisoners and their children. 61(2) Probation Journal 176-191, p. 177.
[112] Walker, J. et al. (2021). Residential programmes for mothers and children in prison: Key themes and concepts. 21(1) Criminology & Criminal Justice 21-39, p.22.
[113] Australian Institute of Health and Welfare, *The Health of Australian Prisoners,* 2018, pp. 14 and 72.
[114] Stone, U. et al. (2017). Incarcerated Mothers: Issues and Barriers for Regaining Custody of Children. 97(3) The Prison Journal 296-317, pp. 297-298.
[115] United Nations (2011). Resolution adopted by the General Assembly on 21 December 2010. (2011) UN Doc. A/RES/65/229 ("Bangkok Rules"), Rule 58 (read in conjunction with para. 17).
[116] Ibid., Rule 64. The rule establishes that in the absence of a serious or violent offence or instances where a woman 'represents a continuing danger', such decisions should be made on the basis of the best interests of, and care for, dependent children.
[117] Ibid., Bangkok Rules, Rule 57.
[118] Article 9 of the UNCRC.
[119] According to the SAC, "a child's remand experience will often affect how the sentencing discretion is exercised and how the child's sentence is served."
[120] Research by the Sentencing Advisory Council indicates that there is an increased likelihood of a custodial sentence after spending time on remand: "Sentencing Advisory Council, State of Victoria, *Time Served Prison Sentences in Victoria* (2020), 10.

According to the Sentencing Advisory Council, "offenders who *may* have otherwise received a non-custodial sentence might instead receive a time served prison sentence (with or without a CCO) because they have, in effect, already been punished for their offending."[121]
Time-served sentences are harmful for a number of reasons. They effectively mean that there is no opportunity for the individual to connect with or receive holistic support. Moreover, receiving a time-served sentence means that there is a higher chance of the individual being remanded if they are arrested again.[122] It also increases the likelihood that they will receive a more severe sentence if they are sentenced again in the future.[123]

VALS is incredibly concerned about the increase in time-served sentences amongst our clients. In 2017-2018, 17.9% of VALS criminal law matters that resulted in custodial sentences involved time served prison sentences; and in 2018-2019, this figure increased to 24%.

During the COVID-19 pandemic, we have also seen an increase in individuals receiving and serving time-served prison sentences in police cells. In 2020-2021, 76 notifications from the Custody Notification System (**CNS**) involved a client serving a time-served prison sentence in police custody, compared to 21 notifications in 2019-2020. In one matter, an individual was detained in a police cell for 11 days and the VALS CNS team carried out 76 welfare checks on the individual during this time. This is incredibly concerning, given that police cells are not designed for individuals to be serving a sentence.

In addition to the human cost, the financial cost of the bail laws is enormous. In 2017-2018, 442 children were held on remand in Victoria for a combined period of 29,000 days, with a total cost was approximately $41 million.[124] Of this, approximately $15 million was spent remanding children who did not receive a custodial sentence.[125] According to information published in The Age in May 2021, the annual cost of managing prisons in Victoria (including people on remand and those serving sentences) is due to double to $3.5 billion by 2023-24.[126]

Over the past 12 months, the risks arising from the COVID-19 pandemic have been considered by courts when deciding whether or not to grant bail. This has led to more individuals being released on bail than would normally be the case. While this may have created a short-term reduction in the number of people on remand, it does not negate the need for significant reform of the bail system.

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[121] Sentencing Advisory Council (2020), *Time Served Prison Sentences in Victoria*. Available at https://www.sentencingcouncil.vic.gov.au/sites/default/files/2020-02/Time_Served_Prison_Sentences_in_Victoria.pdf.
The SAC made similar conclusions in its recent report on Children in Remand: "Courts may consider imposing a custodial sentence, where they may not otherwise, if the child has already been exposed to the custodial environment and/or it would be 'unduly punitive' to impose a non-custodial order with conditions if the child has already been in custody for a period of time." p5.
[122] Sentencing Advisory Council (2020), *Children Held on Remand in Victoria*, p5. Accessed at https://www.sentencingcouncil.vic.gov.au/publications/children-held-on-remand-in-victoria.
[123] Ibid., 11.
[124] Sentencing Advisory Council (2020), *Children Held on Remand in Victoria*, p. xi.
[125] Ibid.
[126] R. Millar, C. Vedelago, T. Mills, "New Prisons or looser bail laws? Labor's unpalatable choice," 15 May 2021.

Victorian Aboriginal Legal Service

Although the calls for change have been loud and clear, the Victorian Government has continued to politicise bail laws and refuse to address the bail crisis. This is despite its commitment under *Burra Lotjpa Dunguludja* to reduce the number of Aboriginal people on remand,[127] and its commitment under the National Closing the Gap Agreement to reduce Aboriginal incarceration rates.[128] We note that under *Burra Lotjpa Dunguludja,* the Government has committed to carrying out research on the impact of the bail reforms on Aboriginal people.[129] This research is currently being carried out by the Bail Data Working Group, chaired by the Crime Statistics Agency. We look forward to seeing the results of this research.

Over thirty years ago, the RCIADIC recommended that all governments should "revise any criteria which inappropriately restrict the granting of bail to Aboriginal people,"[130] and "legislate to enforce the principle that imprisonment should be utilised only as a sanction of last resort."[131] It is time for the government to stop paying lip service to its commitments and take action.

RECOMMENDATIONS

Recommendation 14. The Government must repeal the reverse-onus provisions in the *Bail Act 1977* (Vic), particularly the 'show compelling reason' and 'exceptional circumstances' provisions (sections 4AA, 4A, 4C, 4D and schedules 1 and 2).

Recommendation 15. There should be a presumption in favour of bail for all offences, with the onus on Prosecution to prove that there is a specific and immediate risk to the physical safety of another person.

Recommendation 16. There should be an explicit requirement in the Act that a person may not be remanded for an offence that is unlikely to result in a sentence of imprisonment.

Recommendation 17. The Victorian Government must amend the *Bail Act 1977* (Vic) to repeal the offences of committing an indictable offence while on bail (s. 30B), breaching bail conditions (s. 30A) and failure to answer bail (s. 30).

[127] Under *Burra Lotjpa Dunguludja,* the Victorian government has committed to take action to ensure that there are fewer Aboriginal people in the criminal justice system (Goal 2), including fewer Aboriginal people on remand (Outcome 2.3.2). National Closing the Gap Agreement, targets 10 and 11.
[128] By 2031, Australia governments have committed to reduce the rate of Aboriginal adults held in incarceration by 15% (target 10) and reduce the rate of young people (10-17 years) held in incarceration by at least 30 (target 11).
[129] AJA4 In Action: Impact of bail reforms | Aboriginal Justice
[130] Royal Commission into Aboriginal Deaths in Custody National Report' (1991), Recommendation 91(b), available at http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol5/5.html#Heading19
[131] Royal Commission into Aboriginal Deaths in Custody National Report' (1991), Recommendation 92, available at http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol5/5.html#Heading19

Victorian Aboriginal Legal Service

Recommendation 18. The Victorian Government must amend the *Bail Act 1977* (Vic) to reflect a child-centred approach and the best interests of the child principle. Children should not be subject to the same bail tests as adults, given that children are not at the same developmental stage, and do not have the same degree of autonomy and responsibility as adults. Similarly, bail conditions to which children are subject must account for their age and developmental stage.

Recommendation 19. The Victorian Government should amend the *Bail Act 1977* (Vic) to include a consideration of the implications for dependent children, when making bail decisions for mothers and primary carers, in accordance with international law standards.

Recommendation 20. The Victorian Government must prohibit on the detention of children under the age of 16 years, including detention on remand, consistent with recommendations of the Commission for Children and Young People.

Recommendation 21. The Government should invest in culturally safe residential bail accommodation and bail support for Aboriginal people, consistent with recommendations of the Commission for Children and Young People.

Recommendation 22. The Magistrates Court should expand the Court Integrated Services Program (CISP) so that it is available in all locations across Victoria. This includes ensuring sufficiency of Koori CISP workers to support Aboriginal people on bail across Victoria.

Bail Justices

Under the *Bail Act 1977* (Vic), bail justices[132] can hear bail applications at a police station in certain circumstances.[133] In theory, they operate as a mechanism to facilitate bail hearings without having to wait for the next court sitting date, thereby reducing short-term remand. In VALS' experience however, there are a number of challenges, including a significant shortage of bail justices, as well as a lack of diversity[134] and cultural awareness amongst bail justices. Additionally, since the Bourke Street incident, VALS has seen less willingness on the part of bail justices to grant bail.[135]

Lack of bail justices, particularly in rural and regional areas, has been an issue for some time and has been regularly raised by the Aboriginal Justice Caucus. If a bail justice is not available to attend a police

[132] A bail justice is a volunteer community member who is trained to hear bail applications at police stations when courts are closed. They are a special type of Justice of the Peace and are unique to Victoria; no other State or Territory has them.
[133] Bail justices have the power to grant bail or remand the person in custody until the next working day, or for two days in certain circumstances. See Section 10A Bail Act 1977. If the person is remanded or there is a dispute over the bail conditions, the matter goes before a court at the earliest opportunity.
[134] Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (2007) p. 87. According to the VLRC, the "overwhelming majority of bail justices are male, aged over 50 and of Anglo-Saxon background."
[135] For example, it is incredibly rare for a bail justice to grant bail to a child.

station, the individual has to make their bail application in a different location without support from their family and community,[136] or they may be remanded overnight or over the weekend until a Magistrate becomes available.

As a result of the COVID-19 pandemic, there has been an increase in non-attendance of bail justices. From 22 March 2020 to 28 May 2020, a total of 1,231 matters relating to Aboriginal people were completed by VALS Custody Notification Officers, and 20% of the custody notifications required a Bail Justice. There was a 17% non-attendance rate of bail justices.

In response to this issue, as well as a recommendation from the Bourke Street Coronial Inquest to record bail justice hearings,[137] DJCS has piloted remote bail justice hearings in partnership with Victoria Police. The pilot includes 8 sites, with plans to expand to a further 24 custody centres. VALS has not been consulted in the development or implementation of this pilot.

VALS has a number of serious concerns about remote bail justice hearings. The decision about whether or not to grant bail is one of the most serious decisions taken by the state, as it is fundamentally a decision about the right to liberty. As set out above, being detained on remand (rather than being released on bail) has clear consequences for the outcome of the criminal process, including in relation to the sentence. Accordingly, a Practice Direction from the Magistrates Court provides that all first remand hearings should be in-person, unless the individual has access to a lawyer.[138] The ability to properly assess and triage a person, likely at their most vulnerable, is best assisted by physically engaging with the individual.

We are concerned that the COVID-19 pandemic is being used as a reason to bring in permanent changes. Whilst we recognise that the shortage of bail justices can lead to someone being remanded for longer than necessary, we do not believe that remote bail justice hearings are an appropriate solution. As has been recommended previously, there is a critical need to increase the number of bail justices to ensure so that bail justices are available when needed.

If remote bail justice hearings are introduced beyond the current pilot, VALS is firmly of the view that an in-person hearing before a bail justice should remain the default position, and a remote hearing should only be used if certain conditions cannot be met. Deferral to a remote hearing must be strictly regulated by a clear, legally enforceable, and reportable procedure.

Finally, VALS takes this opportunity to reiterate concerns raised previously regarding the cultural awareness of bail justices and their ability to understand and apply Section 3A of the Bail Act. We note

[136] VALS (2020), *Public Accounts and Estimates Committee COVID-19 Inquiry Submission*, p53.
[137] Coroners Court of Victoria (2020), *Coronial Inquest into the deaths of Matthew Poh Chuan Si, Thalia Hakin, Yosuke Kanno, Jess Mudie, Zachary Matthew Bryant, Bhavita Patel*. Accessed at https://www.coronerscourt.vic.gov.au/sites/default/files/2020-11/Bourke%20Street%20Coronial%20Finding%20-%20Digital_1.pdf.
[138] Magistrates Court of Victoria, Practice Direction X of 2021, Sections 10 and 11.

that cultural awareness training for bail justices is one of the actions under *Burra Lotjpa Dunguludja* (AJA4)[139] and that Aboriginal Cultural Awareness Training has been provided to all bail justices in ten regional and five metropolitan locations.[140] VALS has previously provided training to bail justices and has recently participated in two training sessions in Melbourne metropolitan (without receiving funding to do so). VALS should be provided with funding to deliver cultural awareness training for bail justices in Victoria.

RECOMMENDATIONS

Recommendation 23. The Victorian Government must employ more bail justices, particularly in regional and rural areas. This will ensure that individuals are not remanded unnecessarily because a bail justice is not available.

Recommendation 24. In-person bail justice hearings should be the default position, with remote bail justice hearings only used in strictly limited circumstances. Deferral to a remote hearing must be strictly regulated by a clear, legally enforceable, and reportable procedure.

Recommendation 25. The Victorian Government should provide funding to VALS to deliver cultural awareness training to bail justices, including in relation to Section 3A of the *Bail Act 1977* (Vic).

Police Bail

Under the *Bail Act 1977* (Vic), police officers are empowered to grant bail for certain offences, excluding Schedule 1 offences. Police are also restricted from granting bail if the person is accused of a Schedule 2 offence and they are already on two or more undertakings of bail in relation to another indictable offence, unless the person is Aboriginal.[141]

VALS has a number of concerns about the way that Victoria Police understand and apply their powers under the *Bail Act*, particularly in relation to children and young people*:*

- Police inappropriately question or dispute an individual's Aboriginality (see further above under the section on systemic racism). This practice is not only harmful and inappropriate; it also has direct consequences for an Aboriginal person's rights under the *Bail Act*, including their ability to access police bail under Section 13A of the Bail Act;[142]

[139] *Burra Lotjpa Dunguludja: Aboriginal Justice Agreement Phase 4*, p. 47.
[140] See *AJA4 In Action*.
[141] *Bail Act 1977* (Vic), Sections 10, 13, 13A and 13AA.
[142] Under Section 13A of the *Bail Act*, Police cannot grant bail to an individual who is accused of a Schedule 2 offence and is already on two or more undertakings of bail for indictable offences. This is not the case for Aboriginal people, meaning that police may grant bail for an Aboriginal person in circumstances where they would otherwise have to present them to a bail justice or court.

- Police impose onerous and culturally inappropriate bail conditions, including: non-association conditions which create challenges in community, especially if the requirement is for non-association with a relative; regular reporting to police stations, which can further stigmatise an individual and antagonise the relationship with police; conditions not to attend a specific place (e.g. a shopping centre) which is challenging in rural communities where attending that location may be the primary activity;
- Although the *Children, Families and Youth Act 20015* (Vic) includes a presumption for proceeding by summons,[143] police regularly proceed by way of arrest;
- Although it not a criminal offence in Victoria for youth to fail to comply with bail conditions,[144] children and young people are arrested and remanded for "breaching" bail conditions. In some cases, this has resulted in our clients being remanded over a weekend or public holiday when they should not have even been in custody.

Case Study – Parker (a pseudonym)

Our client was a 15-year-old child charged with theft of a motor vehicle and associated charges. The child was refused bail on the basis that there was an unacceptable risk of reoffending, despite the fact that the child had not committed any offences for a three-month period and Youth Justice were supportive. A second bail application was heard five days later and the Magistrate granted bail.

As a result of the first bail application being refused, the child spent seven days in custody in strict lockdown due to COVID-19 restrictions. The child was incredibly vulnerable in custody presenting with complex issues.

RECOMMENDATIONS

Recommendation 26. If an individual identifies as Aboriginal, Victoria Police must contact VALS through the Custody Notification Service (CNS). Victoria Police must not act as gatekeepers to an Aboriginal person's rights under the *Bail Act 1977* (Vic), a concerning practice that VALS has come across.

Recommendation 27. Victoria Police must provide mandatory guidance and oversight for police officers, to ensure that they understand and comply with the requirements of the *Bail Act*. It is essential that police officers are able to appropriately determine when bail should be granted by a police decision maker, and when the individual should be brought to court.

[143] s. 345(1) *CYFA 2005* (Vic).
[144] s. 30A(3) *Bail Act 1977* (Vic).

Victorian Aboriginal Legal Service

Recommendation 28. The Victorian Government must ensure that police officers are held accountable for non-compliance with the presumption of proceeding against children by way of summons. Any complaints about police's failure in this regard must be investigated by an independent body.

Recommendation 29. The Victorian Government should establish a mechanism for effective oversight of police bail.

Culturally Appropriate Bail Courts

In addition to the urgent need to reform the punitive bail system, there are also significant opportunities to reduce the number of Aboriginal people on remand by expanding the jurisdiction of Koori Courts to include culturally appropriate bail proceedings. Building on the experiences of First Nations courts in Canada, VALS strongly believes that Koori Courts in Victoria should have jurisdiction over bail. However, this would require adequate resourcing for the Koori Court to manage the large additional caseload and adequate funding for VALS to represent Aboriginal people in these matters.

Since the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**), Koori Courts have been established in the Magistrates Court (2002), the Children's Court (2005) and the County Court (2008) across various locations in Victoria. Each year, VALS criminal law solicitors make approximately 300 appearances in in Koori Courts across Victoria.[145] In our experience, there is greater understanding and acknowledgment of Aboriginal culture and identity in Koori Courts, including through the critical role of Elders and Respected Person (**ERP**s), as well as Koori Court officers.

In Ontario, Canada, First Nations Courts (known as Gladue Courts) have jurisdiction over bail proceedings, and this has proven to be critical as the courts are better placed to hear bail applications and grant bail in a way that is more culturally appropriate than generalist courts. This has a significant impact for sentencing outcomes, as Indigenous people who are granted bail have far greater opportunities to address underlying reasons for offending and access services to support healing. They are therefore better placed to receive a more therapeutic and less punitive sentence.

In Victoria, section 3A of the *Bail Act* requires bail decision makers to take into account 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.

Whilst the intention behind section 3A is positive, the introduction of section 3A in 2010 has not had the effect of reducing the number of Aboriginal people on remand. VALS experience is that section 3A is not taken into account unless raised specifically by the defence, and in some cases, it is raised but

[145] In 2020-2021, the number of matters in Koori Court was significantly reduced due to the impact of Covid-19 on the Courts.

not considered seriously. In 2017, the Australian Law Reform Commission recommended that Governments work with Aboriginal organisations "to develop guidelines on the application of bail provisions requiring bail authorities to consider any issues that arise due to a person's Aboriginality."[146] This has not yet happened in Victoria, however VALS and Fitzroy Legal Service are currently developing a guide on how Aboriginality can be relevant to bail proceedings.

Recently, the Supreme Court decision in *RE: Hopper (No 2)* found that Aboriginality is a relevant factor for bail applications, even where connection has been intermittent over the course of the person's life. That said, VALS believes that culturally appropriate bail proceedings/courts would significantly reduce the number of Aboriginal people in prisons, both on remand and serving sentences. This will go a long way in achieving the Victorian Government's commitment to reduce over-representation of Aboriginal people on remand and more broadly in the criminal legal system.[147]

RECOMMENDATIONS

Recommendation 30. The Victorian Government should work with the County Court, Magistrates Court and Children's Court, to expand the jurisdiction of Koori Courts to hear bail applications.

Recommendation 31. The Courts should work with Aboriginal organisations to develop guidelines on the application of section 3A of the *Bail Act*, as recommended by the Australian Law Reform Commission.

Recommendation 32. Where a person appears unrepresented in a bail hearing, the Magistrate should proactively make inquiries as to whether the person is Aboriginal, and if so, they must meaningfully take into account Section 3A of the Bail Act 1977 (Vic).

Recommendation 33. The Victorian Government should require all bail decision makers to receive regular training on Section 3A of the *Bail Act*.

[146] ALRC, Inquiry into Incarceration Rates of Aboriginal and Torres Strait Islander Peoples, Recommendation 5-2.
[147] Under *Burra Lotjpa Dunguludja, the Victorian government has committed to take action to ensure that there are fewer Aboriginal people in the criminal justice system, including fewer Aboriginal people on remand (Outcome 2.3.2). See* Department of Justice and Community Safety, above note 334, 32.

Victorian Aboriginal Legal Service

Family Violence

Although family violence is frequently dealt with as a civil matter under Victorian law, the state's approach to family violence has important effects on the criminal legal system, in multiple ways.

Family violence matters are attended to by police, raising all the issues regarding police conduct in dealing with Aboriginal people that exist in other policing situations. Relatedly, there is a large overlap of civil and criminal jurisdiction: police may choose to lay charges in some domestic violence cases that are also dealt with through civil orders, and a breach of a family violence intervention order is a criminal offence.

Intervention orders themselves can, when applied without careful consideration of the circumstances, result in vulnerable people engaging in low-level offending. For example, intervention orders issued by police at short notice, requiring someone to leave their home or avoid a particular area, may result in short-term homelessness or unemployment. This creates the conditions in which Aboriginal people may commit offences associated with poverty. Alternatively, people may see no option but to breach some terms of the intervention order, again putting them at risk of criminal charges.

Research in Queensland has established that Aboriginal people are disproportionately likely to be named on intervention orders, charged with breaches of intervention orders, and sentenced to prison for those charges.[148] This overrepresentation is particularly acute for Aboriginal women, indicating that in many cases, these orders may involve misidentification of the perpetrator, discussed below.

Given the ongoing impacts of colonisation on Aboriginal people in Victoria, any additional entanglement with the criminal legal system caused by a misguided approach to family violence has severe consequences. As noted above, the number of Aboriginal victim-survivors of domestic abuse in Victorian prisons has soared since the introduction of Victoria's punitive bail reforms. When family violence responses end up with Aboriginal women facing criminal charges, even minor ones, this can interact with the bail laws to lead to unnecessary, unjust and deeply harmful terms of imprisonment.

[148] Douglas H and Fitzgerald R (2018) The domestic violence protection order system as entry to the criminal justice system for Aboriginal and Torres Strait Islander people. *International Journal for Crime, Justice and Social Democracy* 7(3): 41-57. DOI: 10.5204/ijcjsd.v7i3.499.

Victorian Aboriginal Legal Service

Misidentification

With alarming frequency, police and courts take action against victim-survivors of abuse instead of perpetrators. There has been increasing media reporting on extreme cases of misidentification. These include the case of Tamica Mullaley, who was assaulted by her partner in 2013. When police were called by a neighbour, they arrested her despite her serious injuries and left her partner at liberty; he tortured and killed Tamica's son the next day.[149]

Misidentification is a very serious problem with multiple causes. Research has identified a consistent set of risk factors which raise the likelihood of misidentification. Broadly, they relate to whether police perceive a victim-survivor as fitting the stereotype of an 'ideal victim' – with the effect that already marginalised women are much more likely to be subjected to misidentification.

Factors that increase the risk of misidentification include:

- Willingness of the victim-survivor to cooperate with police;[150]
- The emotional state of the victim-survivor, with police officers often regarding someone 'carrying on' in their presence as more likely to be an aggressor, and the calmer person more likely to be the victim-survivor; domestic violence specialists recognise that the opposite is true;[151]
- Mental health and addiction issues;
- Existing criminal records, which make police much less willing to think of someone as a victim.

These risk factors all make Aboriginal women much more liable to be misidentified as perpetrators by police. Aboriginal women are less likely to want to cooperate with police and are disproportionately affected by mental health issues and previous contact with the criminal legal system. As Australia's National Research Organisation for Women's Safety found:

> Aboriginal and Torres Strait Islander women very often do not fit the ideal victim stereotype. They are more likely than other women to use weapons and to be uncooperative when police intervene (Blagg, 2008; Cunneen, 2009; Nancarrow, 2010, 2016, 2019). They are also more likely to have a fraught relationship with police, due to the neo-colonial context in which violence and policing of violence plays out.[152]

Aboriginality is also a risk factor in its own right. Police stereotypes about Aboriginal women and men, and the prevalence of family violence in their relationships, lead to a bias towards thinking an

[149] Belinda Jepsen, Mamamia (2021), 'Family violence doesn't discriminate. But for Indigenous women, the support systems often do.' Available at https://www.mamamia.com.au/domestic-violence-aboriginal-women/.
[150] ANROWS [Australia's National Research Organisation for Women's Safety] (2019), *Accurately identifying the "person most in need of protection" in domestic and family violence law*.
[151] Ibid.
[152] Ibid.

Aboriginal person has been violent. This raises the risk of misidentification, particular for Aboriginal people in a relationship with a non-Aboriginal person.

Criminalisation of victim-survivors replicates the trauma and abuse they have already suffered. If held in police custody or imprisoned, of course, the risks for Aboriginal people are well known, and the denial of autonomy and the violence of incarceration mirror the dynamics of coercive control in personal relationships.[153]

Being misidentified and subject to legal proceedings as a result imposes serious limitations on what victim-survivors can do. Identification as a perpetrator is often a bar to accessing domestic violence support services, including emergency housing.[154] More broadly, it can make it difficult for a victim-survivor to find employment or access other kinds of government support. Exclusion from domestic violence services also means that victim-survivors cannot benefit from being screened and having the danger they are in assessed, leaving them alone to confront the risk of further violence.[155] Vulnerability is exacerbated by a heightened risk of homelessness and isolation from other support, which can perversely serve to increase a victim-survivor's dependence on their abuser. Intervention from child protection services or the Family Court is also a major risk, and serious concern for Aboriginal people.

Reducing misidentification by improving training and guidance within Victoria Police was Recommendation 41 of the Royal Commission into Family Violence. This work must continue, as training and adherence to protocols remain very inconsistent between police stations and courts across the state, with the effect that misidentification continues to be a major problem.

RECOMMENDATIONS

Recommendation 34. Victoria Police should work with family violence services, legal organisations and community members to fully implement Recommendation 41 of the Royal Commission into Family Violence, and reduce the risk of misidentification in Victoria.

[153] Sisters Inside & Institute for Collaborative Race Research (2021), *'In no uncertain terms' the violence of criminalising coercive control*. Available at https://www.sistersinside.com.au/in-no-uncertain-terms-the-violence-of-criminalising-coercive-control-joint-statement-sisters-inside-institute-for-collaborative-race-research/.
[154] Women's Legal Service Victoria (2018a), "Officer she's psychotic and I need protection": Police misidentification of the 'primary aggressor' in family violence incidents in Victoria.
ANROWS (2019), above note 158
[155] ANROWS (2019) , above note 158.

Coercive Control

Coercive control has gained currency through academic and clinical work as a key concept for understanding the nature of domestic abuse. It can be understood as:

> "a form of domestic abuse involving repeated patterns of abusive behaviour – which can include physical, sexual, psychological, emotional or financial abuse – the cumulative effect of which is to rob victim-survivors of their autonomy and independence."[156]

Coercive control is an especially grave type of domestic abuse. As well as being deeply harmful in its own right, it is a major predictor of intimate partner homicide. New South Wales' Domestic Violence Death Review Team found that in 111 out of 112 domestic violence homicides between 2008 and 2016, coercive and controlling behaviour was a major feature of the relationship.[157]

Jurisdictions across Australia, particularly in the last eighteen months, have begun to consider the criminalisation of coercive control. Bills have been introduced in South Australia, while New South Wales and Queensland have conducted inquiries to consult on the creation of new offences.[158]

There is a need for caution, however, in applying developments from other jurisdictions to Victoria, given their very different contexts. Criminalisation of coercive control has been adopted in jurisdictions such as England and Wales, where there was no previous recognition of coercive control in the law and no understanding of family violence as rooted in patterns of behaviour, not individual incidents.[159] In New South Wales, a victim-survivor of domestic abuse can only benefit from a civil intervention order if they fear a criminal offence.[160] As a result, intervention orders and other civil remedies are not able to be used in direct response to coercive control because it does not constitute a standalone criminal offence.

In Victoria, coercive control is already recognised as a form of family violence in the law and in key family violence response strategies.[161] Courts can make intervention orders specifically in response to coercive control and include conditions designed to target this behaviour in particular. Beyond the legislative framework, coercive control is a major focus of service providers, practitioners and policymakers working in the area. This means that criminalisation is likely to provide minimal additional value in protecting victim-survivors. Aboriginal women, in particular, will not be better protected by increasing the role of the criminal legal system in responses to family violence, including coercive control.

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[156] NSW Government (2020), *Coercive control: Discussion paper,* p2.
[157] Ibid.
[158] ABC News, 30 June 2021, 'Coercive control should be criminalised in NSW, parliamentary committee finds'. Available at https://www.abc.net.au/news/2021-06-30/committee-finds-coercive-control-should-be-criminalised/100255580.
[159] Stark, Evan & Hester, Marianne (2019), 'Coercive Control: Update and Review', Violence Against Women 25(1), pp81-104.
[160] *NSW Crimes (Domestic and Personal Violence) Act 2007*, Section 16.
[161] *Family Violence Protection Act 2008*, Section 5.

Victorian Aboriginal Legal Service

Instead, a criminal offence of coercive control would exacerbate harm to Aboriginal people in Victoria. Research shows that "the introduction of criminal sanctions in response to family violence may lead to victim-survivors being less willing to engage… due to a victim-survivor having had negative experiences with the criminal justice system in the past or not wanting the perpetrator to get a criminal record".[162] Misidentification, discussed above, would also become a greater risk. Given that misidentification occurs even in clear-cut cases of extreme physical abuse, there is reason for grave concern about how police would implement a coercive control offence. The complexity of coercive control means there is a high potential for police to misinterpret self-defensive actions or coping mechanisms as forms of abuse. Refusing to talk to someone who persistently emotionally degrades you, or verbally abusing someone in reaction to that abuse, could be misidentified by police as tactics of coercive control. Aboriginal women are significantly more likely to be misidentified, and raising the risk of misidentification in general will inevitably have disproportionate impacts on Aboriginal victim-survivors.

More broadly, just as most criminal offences are disproportionately used against Aboriginal people, a coercive control offence – which requires significant efforts in interpreting patterns of behaviour over time – would open substantial space for stereotypes and bias against Aboriginal people to affect enforcement.

Criminalising coercive control would produce no benefits for victim-survivors of family violence, particularly Aboriginal people, and would instead worsen the disproportionate impacts of the criminal legal system. **VALS will be publishing a more detailed policy paper on coercive control later this year.**

RECOMMENDATIONS

Recommendation 35. The Victorian Government should not criminalise coercive control.

Recommendation 36. The Victorian Government should fund VALS to deliver culturally appropriate community legal education, to increase knowledge about coercive control and the options available.

Recommendation 37. The Victorian Government should improve training for police, service providers and courts to ensure that a proper understanding of coercive control becomes fully and consistently embedded in the practice of responses to domestic abuse.

[162] Domestic Violence Victoria & Domestic Violence Resource Centre Victoria (2021), *Responding to Coercive Control in Victoria – Broadening the conversation beyond criminalisation*, p16.

Victorian Aboriginal Legal Service

Non-Fatal Strangulation

Strangulation of an intimate partner is another form of serious domestic violence which has often been highlighted as a precursor of intimate partner homicide. As well as the severe direct health effects, "including memory loss, paralysis, pregnancy miscarriage, and changes to vision, vocal chords, hearing and breathing", some research has found that victim-survivors of non-fatal strangulation are seven times more likely to be killed or seriously harmed by their partner than victim-survivors of other kinds of assault.[163] Australian jurisdictions have increasingly adopted specific criminal offences, to recognise the seriousness of this behaviour and facilitate prosecution more effectively than broader offences.[164]

Victoria does not have a standalone non-fatal strangulation offence, but the Victorian Government committed in 2019 to introducing one.[165] The drafting of this offence should be tightly focused on the pernicious form of domestic violence it is intended to target, to ensure it can be integrated with a wider response to family violence and to avoid unintentionally criminalising a broader range of behaviours. Given the ongoing discrimination that characterises police interactions with Aboriginal people, as well as the shortcomings in police's responses to family violence, a broad offence that relies on police discretion in enforcement would be highly problematic.

RECOMMENDATIONS

Recommendation 38. Should a non-fatal strangulation offence be introduced in Victoria, the Victorian Government should include lack of consent as an element, and that the accused did not reasonably believe the other person was consenting.

[163] Heather Douglas (2019), 'Victoria's commitment to a non-fatal strangulation offence will make a difference to vulnerable women', The Conversation. Accessed at https://theconversation.com/victorias-commitment-to-a-non-fatal-strangulation-offence-will-make-a-difference-to-vulnerable-women-119743.
[164] ABC News, 'Choking, non-fatal strangulation to become standalone offence in Tasmania under planned law', 17 June 2021. Accessed at https://www.abc.net.au/news/2021-06-17/non-fatal-strangulation-charges-to-be-standalone-offence-/100224344.
[165] Heather Douglas (2019), 'Victoria's commitment to a non-fatal strangulation offence will make a difference to vulnerable women', The Conversation. Accessed at https://theconversation.com/victorias-commitment-to-a-non-fatal-strangulation-offence-will-make-a-difference-to-vulnerable-women-119743.

Victorian Aboriginal Legal Service

Children & Young People

Victoria's criminal legal system does not do enough to properly consider the rights of children in its operation, in a number of ways. Children are directly impacted by the underuse of cautions and diversions, and children in the care of the state are treated inappropriately and driven into contact with the criminal legal system. In other areas, children's rights are not properly considered when decisions are made about bail and sentencing for parents or other family members, and decisions about policing and enforcement can have the unintended effect of separating children from education and other key protective factors against possible offending.

At the highest level, the Victorian Government needs to do more to ensure that specialist legal support is available for children at risk in the youth justice system and the child protection system. This is particularly important for Aboriginal children, given the historical role of child protection in separating Aboriginal people from their culture and the ongoing disproportionate representation of Aboriginal children in the youth justice system.

From September 2017 to October 2018, VALS provided a culturally safe community service for our children and young people across Victoria, by establishing the first Aboriginal legal service for Aboriginal children and young people in Australia. Through a service model combining both lawyers and Client Service Officers, Balit Ngulu focused on maintaining and strengthening connection to culture and family, whilst also assisting clients to access education, employment and leadership opportunities. In doing so, the service was successful in diverting Aboriginal youth from the criminal legal system and prioritising and facilitating placement of children within a kinship network. Balit Ngulu was founded on the right of self-determination of all Aboriginal peoples, and as such we ensured that our governing, management and service delivery frameworks were informed by our Aboriginal communities. We know that many Aboriginal youth prefer to use culturally safe community services like Balit Ngulu and that culturally safe and trauma informed community services are also more likely to stop youth reoffending.[166]

Culturally safe legal assistance for Aboriginal children needs to be accompanied by a culturally appropriate court process, like that provided by Children's Koori Court in selected court locations.

[166] VALS (2020), *Submission to Council of Attorneys-General Age of Criminal Responsibility Working Group*, pp2-3. Accessed at https://static1.squarespace.com/static/5eed2d72b739c17cb0fd9b2d/t/60a396058b42b505d0cbaa45/1621333513306/VALS.pdf.

Victorian Aboriginal Legal Service

Children's Koori Court currently sits in 12 locations around Victoria.[167] The lack of wider availability means that children and their legal representatives are forced to choose between attending a local court – maintaining the consistency of magistrates a child sees, which is an important benefit in the context of childhood trauma – and accessing a culturally safe court at a different location. Expansion of Children's Koori Court to more locations, with a potential priority location at Broadmeadows where the adult Koori Court provides a highly effective culturally safe service, is urgently needed.

Reducing the overrepresentation of Aboriginal children in the youth justice system helps to reduce the likelihood of later contact with the adult criminal legal system and overincarceration in adult jails. Culturally safe support and assistance, along with the specific reform areas discussed in the sub-sections below, is crucial to achieving that goal.

RECOMMENDATIONS

Recommendation 39. The Victorian Government should ensure that VALS can sustainably operate Balit Ngulu to provide legal assistance, advice and representation across all of Victoria to Aboriginal children who have matters in the youth justice system, and that this is extended to child protection matters.

Recommendation 40. The Victorian Government must ensure that the Koori Children's Court is accessible in additional locations across Victoria so that Aboriginal children across Victoria have access to a culturally competent and safe legal process.

Raise The Age of Criminal Responsibility

VALS has advocated for many years to raise the minimum age of criminal responsibility, in Victoria and across Australia.[168] The minimum age of criminal responsibility should be raised to 14, and the minimum age for incarceration should be 16. These protections should be enhanced by a legislated presumption of *doli incapax* for children aged between 14 and 17, with a requirement that the prosecution rebut this presumption in order to achieve a finding of guilt. The evidence base for these reforms is extremely strong and has been repeatedly put before decision-makers.

[167] Melbourne, Heidelberg, Dandenong, Mildura, Latrobe Valley, Bairnsdale, Warrnambool, Portland, Hamilton, Geelong, Swan Hill and Shepparton. See https://www.childrenscourt.vic.gov.au/criminal-division/koori-court.
[168] VALS (2017), *Position Paper: Age of Criminal Responsibility*.
VALS (2019), *Submission to the Commission for Children & Young People Inquiry: Our Youth, Our Way*.

Victorian Aboriginal Legal Service

Raising the age of criminal responsibility is a particularly urgent issue for VALS because of the serious overrepresentation of Aboriginal children and young people in the youth justice system. As of June 2020, there were 10.9 Aboriginal children under 18 in detention on an average night in Victoria, compared to 97.2 non-Aboriginal children.[169] This equates to an incarceration rate of 10.7 per 10,000 Aboriginal children and just 1.6 per 10,000 non-Aboriginal children.[170] Aboriginal children are detained at nearly seven times the rate of non-Aboriginal children. Eliminating criminal charges for children under 14 and incarceration for children under 16 would, by reducing the youth detention population overall, substantially reduce the overincarceration of Aboriginal children. We direct the Inquiry to the case study of Michael*in VALS' submission to the Commission for Children and Young People Inquiry, Our Youth, Our Way.[171]

Victoria introduced Aboriginal justice targets in 2012 which commit the Government to eliminating the difference in the rate of Aboriginal and non-Aboriginal people under youth justice supervision by 2031. To achieve this target, the current Aboriginal Justice Agreement requires the Government to reduce the number of Aboriginal children under youth justice supervision by at least 43 young people by 2023.[172] The Productivity Commission has found that, nationally, raising the age to 14 would reduce the number of Aboriginal children in prison by 15%.[173] This makes raising the age of criminal responsibility an important step towards meeting the Government's existing commitments under the Aboriginal Justice Agreement and the Closing The Gap Agreement and Implementation Plan.[174]

There is also a substantial body of medical, sociological and criminological evidence in favour of raising the age, presented in VALS' submission to the Council of Attorneys-General,[175] along with the submissions of dozens of other organisations to the same consultation.[176] Key considerations include the following:

[169] AIHW (2021), *Youth detention population in Australia 2020*, Supplementary Tables S2 and S5.
[170] Ibid, Supplementary Tables S31, S2 and S5.
[171] Available at http://www.vals.org.au/wp-content/uploads/2021/08/VALS-Submission-to-CCYP-Inquiry-Our-Youth-Our-Way-November-2019.pdf
[172] *Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement Phase 4*, p30. Available at https://files.aboriginaljustice.vic.gov.au/2021-02/Victorian%20Aboriginal%20Justice%20Agreement%20Phase%204.pdf.
[173] Productivity Commission for the Steering Committee for the Review of Government Service Provision, Overcoming Indigenous Disadvantage Key Indicators 2020 Report (2020) 4.143
[174] Victorian Government (2021), *The Victorian Closing the Gap Implementation Plan*. Available at https://www.aboriginalvictoria.vic.gov.au/victorian-closing-gap-implementation-plan.
[175] VALS (2020), *Submission to Council of Attorneys-General Age of Criminal Responsibility Working Group*. Accessed at https://static1.squarespace.com/static/5eed2d72b739c17cb0fd9b2d/t/60a396058b42b505d0cbaa45/1621333513306/VALS.pdf.
[176] Raise The Age (2021), *CAG Submissions*. Available at https://www.raisetheage.org.au/cag-submissions.

- Lack of culpability: medical science shows that children below the age of 14 years lack the maturity to fully comprehend the impact of their actions and meet legal standards of culpability[177]
- International law: Australia has legal obligations under the Convention on the Rights of the Child, and has repeatedly been called on to raise the age by the Committee on the Rights of the Child, the UN Special Rapporteur on the Rights of Indigenous Peoples, and the UN Human Rights Council[178]
- Recidivism: early involvement with the youth justice system significantly increases the likelihood of reoffending, including reoffending as an adult; the younger someone is when they are first sentenced, the higher their chance of reoffending[179]
- Existing protections are ineffective: current Victorian practice tries to protect children through a rebuttable presumption of *doli incapax*, but this presumption is frequently overlooked or incorrectly applied in practice[180]
- Reinforcing disadvantage: children in the youth justice system are among the most vulnerable children in Victoria, with a far higher likelihood of coming from low socio-economic backgrounds, being in the child protection system, experiencing homelessness, and a range of other vulnerabilities. The stigma and disruption of criminal prosecution reinforces these vulnerabilities
- Harms of detention: as detailed below, in response to this Committee's second term of reference, conditions in youth detention are very likely to re-traumatise children, further disrupt their development and make reoffending more likely.

VALS is firmly of the view that there must be no carve outs to raising the age of criminal responsibility, and that serious offending must not be excluded from the proposed reform. VALS also opposes any therapeutic or rehabilitative response outside the criminal legal system that relies on some form of

[177] See for example, E. Cauffman and L. Steinberg, L., '(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults', (2000) Behavioral Sciences and the Law, 18, 741–60; E. Delmage, 'The Minimum Age of Criminal Responsibility: A Medico-Legal Perspective', (2013) Youth Justice 13(2), 102–110; T. Crofts T, 'A Brighter Tomorrow: Raise the Age of Criminal Responsibility', (2015) Current Issues in Criminal Justice 27(1), 123–31; C. Fried C. and N. Reppucci, 'Criminal Decision Making: The Development of Adolescent Judgement, Criminal Responsibility, and Culpability,' (2001) Law and Human Behaviour

[178] VALS (2020), *Submission to Council of Attorneys-General Age of Criminal Responsibility Working Group*, p10. Accessed at https://static1.squarespace.com/static/5eed2d72b739c17cb0fd9b2d/t/60a396058b42b505d0cbaa45/1621333513306/VALS.pdf.

[179] Sentencing Advisory Council, Reoffending by Children and Young People in Victoria, (2016), p. 26. See also: R. Loeber and D. Farrington, 'Young Children Who Commit Crime: Epidemiology, Developmental Origins, Risk Factors, Early Interventions and Policy Implications' (2000) Development and Psychopathy 12(4), 737; Walter Forrest and Ben Edwards, 'Early Onset of Crime and Delinquency among Australian Children', in Australian Institute of Family Studies (ed.), The Longitudinal Study of Australian Children Annual Statistical Report 2014 (2014) 131–150, 131; Shuling Chen et al., The Transition from Juvenile to Adult Criminal Careers, New South Wales Crime and Justice Bulletin no. 86 (2005); Parliament of Victoria, Drugs and Crime Prevention Committee, Inquiry into Strategies to Prevent High Volume Offending and Recidivism by Young People, Final Report, no. 218 (2009), 63; Don Weatherburn et al., Screening Juvenile Offenders for Further Assessment and Intervention, Crime and Justice Bulletin no. 109 (2007).

[180] VALS (2020), *Submission to Council of Attorneys-General Age of Criminal Responsibility Working Group*, p13. Accessed at https://static1.squarespace.com/static/5eed2d72b739c17cb0fd9b2d/t/60a396058b42b505d0cbaa45/1621333513306/VALS.pdf.

deprivation of liberty. Even administrative detention has a serious risk of traumatising a child. It also risks removing a child from protective factors or potential protective factors, such as re-engaging with education, and potentially could have a stigmatising impact on the child (which certainly does not assist with making the child feel a part of a community, or having or developing a sense of belonging, civic duty and responsibility).

Ultimately, children who offend in serious ways have invariably been let down by the adults and systems in their lives – a responsible government would address this, to both support the child and to promote community safety. It is critical that the focus is not on punishment, but on accountability, rehabilitation, community safety and supporting the victims. This could include:

- Supporting victims – restorative justice processes (which have the added benefit of supporting the child to take responsibility for their actions) if the victim consents, and properly supporting victims.
- Rehabilitation of children – the rhetoric on the issue of the age of criminal responsibility needs to change. No child should be categorised as being beyond rehabilitation or community support, no matter what their harmful behaviour is. We should be dedicating more resources to the children most at risk of further offending and serious offending, not less. We should be intervening at the earliest possible stage with our support and care, to prevent contact with the criminal legal system in the first place, and to provide culturally appropriate diversion wherever possible for Aboriginal children.

Children need to be given opportunities to thrive, and that means that some children need more support because they come from backgrounds of disadvantage or trauma. Some communities need more services and more support, so that entrenched disadvantage and impacts of intergenerational trauma can be addressed, which would in turn assist families and children.

There needs to be tailored, intensive supports for the child and their family, while the child is in the community, not a facility. The focus should be on providing a wrap-around service, addressing the underlying causes of offending, assisting the family and child to navigate systems they have been excluded from or do not know to navigate (such as housing support, centrelink, education), and building a solid, extensive support network in the community (where the child will ultimately always return) to ensure that the chances of reoffending are reduced.

There will also need to be consideration of the potential trauma for the child that will result from the harm they have caused), and the potential social exclusion and stigma that will attach to the child and family. They will need support for this as well.

There are existing services and models, that could be provided greater funding and more capacity so that they could more effectively work together (rather than in silos), to achieve this intensive, tailored, community-based, ongoing support. Part of having a tailored response will also entail taking into account the child's culture and background. The Government must recognise that the Aboriginal

community and ACCOs are experts in how to best support Aboriginal children and families. Respecting Aboriginal self-determination ultimately would lead to improved outcomes for not only Aboriginal children, but more broadly for community safety. The Government's responsibility in this reform will be to provide the proper funding and support for these community-driven responses. We refer you to the case study of *Daniel in VALS' submission to Council of Attorneys-General Age of Criminal Responsibility Working Group,[181] as a case study which highlights the underlying causes of offending.

At the UN Human Rights Council's Universal Periodic Review of Australia's human rights obligations, twenty-nine countries specifically recommended that Australia increase the minimum age of criminal responsibility.[182] Several others made broader recommendations that Australian jurisdictions bring their youth justice systems in line with the Convention on the Rights of the Child, which the relevant UN Committee has interpreted as requiring a minimum age of criminal responsibility of 14.[183] The Commonwealth Government's response highlighted the responsibility of state and territory governments for raising the age in their jurisdictions, and noted the intention of some state and territory governments to do so.[184]

Despite the extensive evidence and legal considerations in favour of raising the age, the Victorian Government continues to needlessly delay reform, along with other states and territories. The then-Council of Attorneys-General (since succeeded by the Meeting of Attorneys-General) first established a working group on the age of criminal responsibility in November 2018, giving it 12 months to report back. After that reporting deadline had passed, the working group finally called for submissions from stakeholders by February 2020. The Working Group presented its report to the Council of Attorneys-General in July 2020, with recommendations, but a decision was deferred. In March 2021, the Meeting of Attorneys-General did not prioritise discussion of raising the age and deferred the issue for further discussion.[185] It is now more than 18 months since the Working Group received submissions on raising the age, and more than fifteen months since the Working Group finalised its report. The Meeting of Attorneys-General has not come to any decision, made any commitment, or even released the Working Group report. In May this year, 48 submissions to the Working Group – including the submission prepared by VALS – were released publicly by their authors, to make clear the substantial amount of analysis which the MAG has received but to which it has not responded.[186] VALS has also

[181] Available at http://www.vals.org.au/wp-content/uploads/2021/08/VALS-submission-to-the-COAG-Working-Group-on-the-Age-of-Criminal-Responsibility-February-2020.pdf
[182] UN General Assembly – Human Rights Council (2021), *Report of the Working Group on the Universal Periodic Review: Australia*. Accessed at https://undocs.org/A/HRC/47/8.
[183] United Nations Committee on the Rights of the Child (hereafter referred to as "CRC"), General Comment No. 24 (2019) on children's rights in the child justice system, CRC/C/GC/24, (18 September 2019) para 22.
[184] UN General Assembly – Human Rights Council (2021), *Report of the Working Group on the Universal Periodic Review: Australia – Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review*. Accessed at https://undocs.org/A/HRC/47/8/Add.1.
[185] VALS, 23 April 2021, 'Victoria must raise the age of criminal responsibility immediately as the federal government process stalls' . Available at https://www.vals.org.au/statement-victoria-must-raise-the-age-of-criminal-responsibility-immediately-as-the-federal-government-process-stalls/.
[186] Raise The Age (2021), 'Dozens of submissions made public after AGs refuse to act on raising the age of criminal responsibility'. Accessed at https://www.raisetheage.org.au/news/dozens-of-submissions-made-public-after-ags-refuse-to-act-on-raising-the-age-of-criminal-responsibility.

highlighted the particular impact of the low age of criminal responsibility on Aboriginal children in our *Justice Yarns* series, speaking with Aunty Rosemary Roe, the aunt of G.J. Roe, who died in custody in 1997 aged 11.[187]

After almost three years, VALS is of the view that the national process has only led to delay and inaction. While a nationally coordinated approach would ensure that the rights of children are protected across the country, there is no impediment to Victoria raising the age before national agreement can be reached. The ACT Government is proceeding with raising the age, and is taking expert advice on how to develop alternative models of care for children under 14.[188] While improving services and care for young people is important, it does not need to be a precursor for raising the age. Increasing the age of criminal responsibility by itself would be a substantial improvement to Victoria's youth justice practice. The Victorian Government's (commendable) efforts during the pandemic to reduce the number of children in detention demonstrates that a swift, effective response is, in fact, possible.[189] Following that blueprint, Victoria should commit to raising the age immediately.

RECOMMENDATIONS

Recommendation 41. The Victorian Government must raise the age of criminal responsibility to at least 14, and the age at which children can be detained to at least 16.

Recommendation 42. The Victorian Government must have no carve outs to raising the age of criminal responsibility.

Recommendation 43. The presumption of *doli incapax* should be extended by legislation to young people aged 14 to 17, with further amendments to ensure its effective operation:

- Create a legislative requirement for prosecutors to rebut the presumption;
- Place legislative restrictions on the kinds of evidence that can be produced to rebut the presumption;
- Increase funding to the Children's Court to improve the quality of clinical reports;
- Increase funding to Victoria Legal Aid to cover the cost of specialist reports requested by defence lawyers;
- Creative a legislative requirement for all police and Crown prosecutors to undergo training on the presumption of *doli incapax;*

[187] VALS, 23 April 2021, *Justice Yarns Podcast – RCIADIC 30th Anniversary chat with Aunty Rosemary Roe.* Recording available at https://www.youtube.com/watch?v=yT88cOK_W9Q.
[188] National Indigenous Times, 25 June 2021, 'ACT takes next step on raising the age'. Accessed at https://nit.com.au/act-takes-next-step-on-raising-the-age/.
[189] VALS (2021), *Building Back Better: Victorian Aboriginal Legal Service COVID-19 Recovery Plan*, p69. Available at https://www.vals.org.au/wp-content/uploads/2021/02/Building-Back-Better-Victorian-Aboriginal-Legal-Service-COVID-19-Recovery-Plan-February-2021-FOR-DISTRIBUTION.pdf.

- Incorporate mandatory training on *doli incapax* into training for admission to become a solicitor;
- Require all criminal defence lawyers to undergo training on *doli incapax* as part of their annual CDP;
- Incorporate mandatory training on *doli incapax* into training for admission to become a solicitor;
- Require all criminal defence lawyers to undergo training on *doli incapax* as part of their annual CDP.

The Dual Track System

Under the dual track system, young adults aged 18-20 years charged with an offence are sentenced in adult courts, but can receive a young justice centre order, meaning that they are sentenced to spend time in a specialised youth justice centre versus an adult prison. VALS is of the view that the dual track system should also apply to young adults aged 21-25 years.[190]

Additionally, we believe that there are significant opportunities to improve sentencing options for young adults aged 18 to 25 years. Drawing on the recent research by the Sentencing Advisory Council,[191] VALS supports the following options:

- Introduce sentencing principles in the *Sentencing Act* that specifically address young adults who offend, including making psychobiological development of an the person a specific sentencing consideration;
- Expand the dual track system, so that young adults convicted of an offence can access non-custodial options available under the *Children, Youth and Families Act* (Vic) 2005 and the new *Youth Justice Act*;
- Introduce a specialist young adult court or a specialist list to address the needs of young adults at sentencing.[192]

Furthermore, VALS is concerned that under the current dual track system, young adults charged with an offence are remanded in adult prisons, even though they may later be sentenced to a period of detention in a Youth Justice Centre. In our experience, being remanded in an adult prison, before being sentenced to a Youth Justice Centre Order can be extremely damaging for young people and can serve to undermine the purpose of the dual track system.

[190] VALS (2020), *Submission to Sentencing Act Reform Project*, p21.
[191] Sentencing Advisory Council, State of Victoria, *Rethinking Sentencing for Young Adult Offenders* (2019), 5-7.
[192] VALS (2020), *Submission to Sentencing Act Reform Project*, p21.

Whilst VALS maintains that being in the community is always better than pre-sentence detention, we strongly recommend that young adults who are on remand and are likely to receive a Youth Justice Centre Order are able to be remanded in a Youth Justice Centre.[193]

RECOMMENDATIONS

Recommendation 44. The Victorian Government should expand the scope of the dual track system to young adults aged 21 to 25 years, who have offended

Recommendation 45. The Victorian Government should expand the dual track system, so that young adults who have offended can access non-custodial options available under the *Children, Youth and Families Act* (Vic) 2005 and the Youth Justice Act.

Recommendation 46. The Victorian Government should amend the dual track system so that young adult offenders who are eligible for a Youth Justice Centre Order and who are remanded in custody, are able to be remanded in a Youth Justice Centre (not an adult prison).

Personal Safety Intervention Orders

VALS is also concerned by the growing use of civil law orders against children, for many of the same reasons that support our advocacy for raising the age of criminal responsibility.

Personal Safety Intervention Orders (**PSIO**s) impose serious restrictions on people subject to them. Although they are not part of the criminal law, PSIOs are still inappropriate for use against children who lack the capacity to fully grasp the problems with their conduct, the reasons for their order, or the nature of the restrictions against them.

Less intrusive diversionary options should be used whenever possible. This includes school safety plans and health-based support plans, which can tackle issues arising between children in educational settings. In a matter where VALS acts for a respondent child to a PSIO, we were concerned when advised by the prosecutor that the government school the protected child and respondent attended had indicated they could not have a school safety plan in place to keep the children separated without a personal safety intervention order. This indicates a worrying overreliance on intrusive interventions by the legal system as a first resort for managing children's behaviour, rather than a last resort. There is no reason to believe that involving police or the legal system succeeds in sending a 'more serious' message to children or results in improvements to behaviour.

[193] Ibid.

Victorian Aboriginal Legal Service

Issuing PSIOs runs the risk of criminalising children because, like Family Violence Intervention Orders, they can serve as an entry point to ongoing contact with police and the youth justice system. This is particularly of concern for Aboriginal children, where any contact is likely to lead to more serious consequences.[194] Breach of PSIO conditions can lead to criminal charges, even where neither the conduct itself nor the behaviour that led to the PSIO being made are criminal in their own right. The overuse of PSIOs thus expands the paths by which Aboriginal children can be caught up in the criminal legal system.

Victoria Police practice in making PSIOs against children also highlights the inadequacy of *doli incapax*, the existing measure for protecting young children from being criminalised. VALS has repeatedly seen cases in which PSIOs are taken out by police, even though it is clear that the presumption of *doli incapax* would prevent any successful prosecution for a breach. VALS believes that making orders in these circumstances is plainly inappropriate. There is also a risk that PSIOs like these can further undermine the effectiveness of the *doli incapax* safeguard. VALS has previously highlighted the problematic and legally incorrect practice of Victoria Police only giving young people one 'chance' to avoid prosecution due to *doli incapax*.[195] This gives reason to believe that previous contact with police and the existence of a PSIO against a child will prejudice police and prosecutors against properly assessing for *doli incapax* in deciding whether other charges should be laid.

RECOMMENDATIONS

Recommendation 47. Where Victoria Police does not pursue criminal charges in relation to an incident against a child, the Victoria Police Manual should make clear that they should also not seek to take out a Personal Safety Intervention Order (PSIO).

Recommendation 48. Schools, youth services and police should make a concerted effort to avoid the use of PSIOs except as a last resort, and preference alternative options including School Safety Plans and education- and health-based interventions.

Recommendation 49. Until the age of criminal responsibility is raised to at least 14, Victoria Police guidance should recognise that it is difficult to pursue charges for breach of PSIOs against children due to *doli incapax*, and that there is therefore a presumption against seeking an order.

[194] Douglas, Heather; Fitzgerald, Robin --- "The Domestic Violence Protection Order System as Entry to the Criminal Justice System for Aboriginal and Torres Strait Islander People" [2018] IntJlCrimJustSocDem 25; (2018) 7(3) International Journal for Crime, Justice and Social Democracy 41

[195] VALS (2020), *Submission to Council of Attorneys-General Age of Criminal Responsibility Working Group*, p13. Accessed at https://static1.squarespace.com/static/5eed2d72b739c17cb0fd9b2d/t/60a396058b42b505d0cbaa45/1621333513306/VALS.pdf.

Victorian Aboriginal Legal Service

Crossover Children and Criminalisation of Children in Residential Care

A major area of concern for VALS is with the treatment of 'crossover children' – children who are involved in both the child protection and youth justice systems. This is arguably the most vulnerable group of children in Victoria, and the interaction of these two systems should be carefully tailored to provide individualised support to protect children's development and improve their life chances. At present, this is not the case in Victoria, and children in need of protection are treated inappropriately by both child protection and youth justice actors.

The child protection system has, historically, played a central role in state-endorsed attacks on Aboriginal families and community life. This legacy has not been shaken off by modern practice. Aboriginal children are ten times more likely to be placed in care than non-Aboriginal children in Victoria. Though Aboriginal children are overrepresented in child protection across Australia, the problem is particularly acute in Victoria, which removes Aboriginal children from their families at a higher rate than any other state or territory, and more than double the rate in Queensland and the Northern Territory.[196]

Aboriginal children are disproportionately likely to be 'crossover children' and to be exposed to the harmful effects of a system which does not do enough to protect vulnerable young people. In fact, more than half of Aboriginal children in the youth justice system have current or previous child protection orders, compared to around 38% of the overall population in the youth justice system.[197]

The Commission for Children and Young People's landmark report on Aboriginal children's experience of the youth justice system, *Our Youth, Our Way*, made a number of findings and recommendations about the interaction of the child protection and youth justice systems.[198] The most significant, overarching findings of the Commission were that the child protection system "often fails to provide a caring home for Aboriginal children and young people, instead placing them at an unacceptable risk of harm" and "too often abdicates its responsibilities to children and young people when they come into contact with the youth justice system."[199] Overall, the child protection system "does not provide the stability, safety and access to therapeutic supports to assist children and young people to recover from the effects of early trauma."[200]

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[196] Herald Sun, 30 May 2021, 'Victoria has more Indigenous kids in child protection than any other state or territory'. Accessed at https://www.heraldsun.com.au/news/victoria/victoria-has-more-indigenous-kids-in-child-protection-than-any-other-state-or-territory/news-story/46152ef2bafcd06166649497ee26ecc9?btr=ecf085bc02533d2f5bf573e03c2abe6c.

[197] Commission for Children & Young People (2021), *Our youth, our way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system*, p294. Accessed at https://ccyp.vic.gov.au/assets/Publications-inquiries/CCYP-OYOW-Final-090621.pdf.

[198] Commission for Children & Young People (2021), *Our youth, our way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system*. Accessed at https://ccyp.vic.gov.au/assets/Publications-inquiries/CCYP-OYOW-Final-090621.pdf.

[199] Ibid, p303.

[200] Ibid, p296.

It is therefore not surprising that the Sentencing Advisory Council's analysis found that, for crossover children in Victoria, contact with the child protection system almost always preceded contact with youth justice.[201] 98% of crossover children who experienced residential care had been known to the child protection service before offending, and 74% had only committed their first offence after being placed in residential care.[202] Younger children in the youth justice system were more likely to be crossover children than older children, and this is particularly the case for Aboriginal children: "[o]f crossover children first sentenced or diverted aged 10-13, one in four were Aboriginal."[203]

This evidence paints a clear picture of a child protection system which is contributing to trauma and reinforcing underlying risk factors which contribute to youth offending. Addressing the youth detention population, and its downstream effects on the growth in the adult prison population, requires substantial change in the child protection system and the way it interacts with the youth justice system.

VALS' concerns about the child protection system are particularly acute with respect to residential care. Children in out-of-home care (which includes residential care as well as foster care and kinship care placements) are the most vulnerable of those in the child protection system, and remain affected after leaving the care system – being, for example, three times more likely than average to receive income support.[204] Aboriginal children comprise nearly a quarter of the residential care population in Victoria, compared to 1.7% of the total Victorian population aged 19 or younger.[205]
In principle, the care system is supposed to stand in the place of a parent for vulnerable children. In reality, the child protection system and residential care staff often adopt a punitive approach to children in their care. Two particularly serious issues in residential care are the inadequate response to children who go missing and the criminalisation of children living in care units.

Children going missing from residential care is a serious problem, indicative of how care settings make too many vulnerable young people "feel unsafe or threatened".[206] Although Aboriginal children are a small proportion of those who go missing from residential care, their overrepresentation in residential units in the first place means these are still issues which disproportionately affect Aboriginal children relative to the overall population.[207] In stark contrast to the way a parent would react to their child

[201] Sentencing Advisory Council (2020), *Crossover Kids: Vulnerable Children in the Youth Justice System Report 2*, p.xvi. Available at https://www.sentencingcouncil.vic.gov.au/publications/crossover-kids-vulnerable-children-youth-justice-system-report-2.
[202] Ibid.
[203] Ibid, p.xvii.
[204] Australian Institute of Health and Welfare (2021), *Income support receipt for young people transitioning from out-of-home care*, p. vii. Accessed at https://apo.org.au/sites/default/files/resource-files/2021-06/apo-nid312746.pdf.
[205] Commission for Children & Young People (2019), *In our own words: Systemic inquiry into the lived experience of children and young people in the Victorian out-of-home care system.* Available at https://ccyp.vic.gov.au/assets/Publications-inquiries/CCYP-In-Our-Own-Words.pdf.
Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians, June 2016*.
[206] Commission for Children & Young People (2021), *Out of sight: Systemic inquiry into children and young people who are absent or missing from residential care,* p3. Available at https://ccyp.vic.gov.au/upholding-childrens-rights/systemic-inquiries/out-of-sight/.
[207] Ibid, p16.

going missing, residential care units respond inconsistently and often with a lack of urgency, despite the fact that these children are especially vulnerable to exploitation and mistreatment while missing. The response can also be a source of further trauma when it involves police investigation and children being held in custody by police when they are found. This is particularly of concern when police end up bringing criminal charges – for example for drug use or assaulting an emergency worker – against children who they had been tasked with finding and returning home safely.[208] Children who go missing from residential care are clearly deeply vulnerable and traumatised, and holding them in police custody for extended periods – with or without charging them with any offence – only deepens that trauma.

Criminalisation of children in residential care is another issue which demonstrates how the child protection system treats children in ways that would be unimaginable for a parent. VALS has dealt with, and the Commission for Children and Young People has documented, cases in which residential care staff have called the police over minor behavioural issues like breaking plates or furniture.[209] The Sentencing Advisory Council noted that police were called far more often than they would be by parents, often not because the "behaviour was severe but because of its frequency"[210] – indicating that many staff do not have the skills, training or temperament to care for highly vulnerable children, whose behaviour patterns cannot be easily changed after one or two incidents.

In February 2020, the Victorian Government acknowledged this issue and published its *Framework to reduce criminalisation of young people in residential care*.[211] This is an important step, but VALS continues to see children becoming clients of our criminal practice team because their behaviour in residential care is criminalised, and more needs to be done to ensure that this phenomenon is eliminated from the care system.

In particular, VALS wishes to highlight a range of staffing issues which contribute to the criminalisation of children in residential care. Working with vulnerable and traumatised children with complex needs requires extensive training and qualifications, and on-the-job training cannot be adequate to prepare staff for this type of work. At present, staff are underqualified and can struggle to deal with persistently challenging behaviour from children with complex needs. Related to this, the remuneration and work conditions for residential care staff currently cannot attract qualified professionals, and the workforce instead is subject to a high level of turnover and reliance on agency contract staff. This limits the chance for children to build trusting relationships with staff, and the

[208] Ibid, p19.
[209] Commission for Children & Young People (2021), *Our youth, our way: Systemic inquiry into the over-representation of Aboriginal children and young people in Victoria's youth justice system*, p298. Available at https://ccyp.vic.gov.au/upholding-childrens-rights/systemic-inquiries/our-youth-our-way/.
[210] Sentencing Advisory Council (2020), *Crossover Kids: Vulnerable Children in the Youth Justice System Report 2*, p25. Available at https://www.sentencingcouncil.vic.gov.au/publications/crossover-kids-vulnerable-children-youth-justice-system-report-2.
[211] Department of Health and Human Services (2020), *Framework to reduce criminalisation of young people in residential care*. Accessed at https://providers.dffh.vic.gov.au/sites/default/files/2020-02/A%20Framework%20to%20reduce%20criminalisation%20of%20young%20people%20in%20residential%20care.PDF.

capacity for staff to consistently implement tailored support plans. Effective de-escalation of difficult situations requires these kinds of relationships and individualised supports, and when they are lacking, staff are far more likely to feel that they cannot handle a situation and have no option but to call police.

It is also important that when police are called, they too make every effort to avoid making an arrest or laying charges. VALS is aware of cases in which by the time police attend the residential care unit, staff have decided there is no need for a child to be arrested or charged, but police have nonetheless made arrests – including arrests solely for resisting arrest or assaulting a police officer. This experience suggests that police too often treat arrest as a first resort, not a last resort, and that this approach precipitates resist and assault offences. Clear guidelines on best practice in providing reassurance and de-escalation, supported by effective training and disciplinary procedures where necessary, are needed to ensure police approach call-outs from residential care appropriately. These protocols should reiterate the importance of s345 of the *Children, Youth and Families Act*, which establishes a presumption that police should proceed by summons rather than arrest when dealing with children. VALS also supports improved resourcing that would allow Youth Specialist Officers to properly fulfil their function to help reduce criminalisation in residential care, which they all too often fail to do.

Finally, implementing a range of safeguards and monitoring mechanisms can help assure implementation of the government's *Framework*. Funding Community Legal Education for children in care can empower children to understand their legal situation and assist them to mitigate their risk of becoming involved with the criminal legal system. Appropriate, responsive disciplinary procedures are needed to ensure that child protection staff and police officers are following guidelines under the framework. Monitoring bodies established under OPCAT, discussed further below, should have residential care units and secure care included within their scope to provide for regular, independent assessment of police callouts and potential misconduct by police and care staff.

Reducing the criminalisation of children in residential care, and more broadly improving support to vulnerable children in the child protection system to avoid becoming involved with the youth justice system, is crucial. Reducing early contact with the youth justice system means children can be given better care, avoid re-traumatisation and minimise the risk factors that contribute to repeated contact with the youth justice system, the adult criminal legal system, and ultimately with Victoria's prison system.

Victorian Aboriginal Legal Service

RECOMMENDATIONS

Recommendation 50. Staff in residential care and the child protection system should have the requisite qualifications and experience to work with vulnerable children, with complex needs, in residential care.

Recommendation 51. Comprehensive de-escalation training and guidelines should be developed and implemented for residential care staff and Victoria Police.

Recommendation 52. Cultural awareness training for residential care workers should be accompanied by specific anti-racism training and training on systemic racism.

Recommendation 53. Complaints and disciplinary procedures for Victoria Police and child protection staff should be improved to provide accountability for compliance with the *Framework* by reducing police callouts and reducing criminalisation of children in residential care.

Recommendation 54. The Victorian Government should include residential care units and secure care in the mandate of oversight mechanisms, National Preventive Mechansims (NPMs), which are to be established in compliance with Victoria's OPCAT obligations.

Recommendation 55. Community Legal Education (CLE) for children in the child protection system, including specific CLE for Aboriginal children, should be properly funded.

Recommendation 56. Resourcing of Youth Specialist Officers in Victoria Police should be increased so that these officers can fulfil their specialist functions.

Recommendation 57. Children who go missing from residential care should not spend extended periods of time in police custody when they are found. There is a responsibility on Residential Care staff and Victoria Police to avoid or reduce time spent in custody.

Victorian Aboriginal Legal Service

Educational Engagement

Education is essential for children's overall development, and is a key protective factor against becoming entangled in the youth justice and criminal legal systems. As well as preparing children for their adult life and helping to break cycles of socio-economic disadvantage, school can be "a key source of structure, motivation and socialisation".[212] Almost all children under 18 sentenced to youth detention have recorded truancy from school.[213]

Aboriginal children are frequently served very poorly by the education system in Victoria. Aboriginal students are at a higher risk of disengaging from school and expelled from schools at a disproportionate rate.[214,215] This a significant contributor to the overrepresentation of Aboriginal children in the youth justice system.

While education policy is beyond the remit of this inquiry and the expertise of VALS, there are a number of ways that justice system interventions and quasi-judicial, punitive approaches to school discipline can interfere with children's educational engagement. This is an issue of significant concern to VALS, as our experience accords with the statistical evidence that when Aboriginal children are disengaged from the school environment the risk of contact with the youth justice system is increased substantially.

Police in Schools

VALS is highly concerned by reports that Victoria Police are seeking to create a new police-in-schools scheme in Victoria.[216] Victoria has not had a state-wide police-in-schools scheme since the Police Schools Involvement Program was scrapped in 2006. At the time, Victoria Police acknowledged that there was no clear evidence that police in schools were having any positive impact.[217] Youth offending has continued to drop since that time and Victoria remains the state with the lowest youth offending rate in Australia, apart from the ACT.[218] It is still the case that putting police in schools is a policy proposal with no evidence to support it.

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[212] Commission for Children & Young People (2021), *Our youth, our way: Systemic inquiry into the over-representation of Aboriginal children and young people in Victoria's youth justice system*, p382. Available at https://ccyp.vic.gov.au/upholding-childrens-rights/systemic-inquiries/our-youth-our-way/.
[213] Ibid.
[214] Ibid.
[215] ABC News, 6 March 2021, 'Greater Shepparton College plagued by 'systemic racism' and bullying culture, review finds'. Available at https://www.abc.net.au/news/2021-03-06/review-systemic-racism-at-greater-shepparton-secondary-college/13212578.
[216] VALS, 12 May 2021, 'Statement: Victoria must abandon proposal to put police in classrooms'. Accessed at https://www.vals.org.au/statement-victoria-must-abandon-proposal-to-put-police-in-classrooms/.
[217] The Age, 12 May 2005, 'Fears over police-in-schools program'. Accessed at https://www.theage.com.au/national/fears-over-police-in-schools-program-20050512-ge05g7.html.
[218] Johns (2018), 'Why police in schools won't reduce youth crime in Victoria', The Conversation. Accessed at https://theconversation.com/why-police-in-schools-wont-reduce-youth-crime-in-victoria-91563.

To the contrary, international evidence clearly shows that the presence of police in schools leads to more contact with the criminal legal system for children. Schools with an embedded police officer are more likely to refer students to law enforcement for minor behavioural issues. This disproportionately affects minority youth, and has led to criminalisation of, and police violence against, African-American children in the United States.[219] VALS remains strongly opposed to any scheme that would put police in schools in Victoria.

School Community Safety Orders

The Parliament passed the *Education and Training Reform Amendment (Protection of School Communities) Bill 2021* in June this year, creating a scheme that allows school principals to issue orders banning adults from entering a school or imposing conditions on how they can attend or engage with the school.

Excluding parents from engaging with their children's education risks the students themselves becoming disengaged from their schooling. In particular, there is a clear need for safeguards against schools issuing orders against parents who persistently advocate for their children's needs. This runs a significant risk of isolating these children with complex needs and ultimately leading them to disengage from the education system. This is a particular risk for Aboriginal children and parents, as well as those with other vulnerabilities, who are both more likely to need to advocate for themselves and, in the absence of proper cultural awareness training and other safeguards at the school, more likely to be perceived as aggressive or unreasonable.

VALS opposed the legislation in the form it was passed,[220] because of the need for significantly expanded safeguards to ensure that school community safety orders are not misused. Our concerns about the scheme include:

- Natural justice issues: there are shortcomings in the procedural fairness accorded to people being excluded from schools by these orders, and the legislative language creates very wide scope for school principals to issue orders.
- Inappropriate decision-makers: school principals are not well placed or qualified to make judgements about the behaviour of adults engaging with the school, and not adequately trained to make quasi-judicial decisions limiting parents' behaviour.
- Conditions on exclusion orders: the legislation provides broad discretion for school principals to impose behavioural obligations on parents and other adults, for example to participate in education sessions, with the only alternative being to disengage from their children's schooling.

[219] National Public Radio, 23 June 2020, 'Why there's a push to get police out of schools'. Accessed at https://www.npr.org/2020/06/23/881608999/why-theres-a-push-to-get-police-out-of-schools.
[220] VALS, 22 June 2021, 'VALS' position on proposed school orders misrepresented by the Andrews Government'. Accessed at https://www.vals.org.au/vals-position-on-proposed-school-orders-misrepresented-by-the-andrews-government/.

The scheme will be governed by Ministerial Guidelines, which need to be developed in close consultation with key stakeholders to address these risks and avoid the prospect of children becoming disengaging with their schooling and risking contact with the youth justice system.

Expulsions & Alternatives

Suspensions and expulsions pose an obvious threat to the engagement of Aboriginal children with the education system, raising the risk that they will become entangled with the youth justice system. In Victoria, Aboriginal students accounted for 6.5% of all students expelled in 2019, though they made up only 2.3% of the student population.[221] This is in line with international experience that suspension, expulsion and exclusion are used by schools far more often against children from racial minority backgrounds.[222]

VALS is of the view that steps should be taken to both reduce the disproportionate use of expulsions against Aboriginal students, and to reduce their use overall. A pilot scheme from the Northern Territory, administered by the North Australian Aboriginal Justice Agency, provides an important model for good practice in this area.

Good Practice Model: Peer Panel/Student Court Pilot at the North Australian Aboriginal Justice Agency

NAAJA's Peer Panel/Student Court pilot program for young people was the first of its kind in Australia. The purpose of the program was to provide an alternative to existing responses to problematic behaviour and conduct at school that may constitute low level offending. The diversionary restorative justice program was trialled at Sanderson Middle School and Palmerston Senior College.

"The concept involved participants waiving their right to be suspended from school or referred to the police and agreeing to plead guilty to agreed facts and have the case heard and determined by their peers (who are trained Peer Panel students in years 9, 10 and 11). At Peer Panel hearings, students were appointed to various 'real life' court roles, including the prosecution, defence counsel, court staff and members of the jury. An adult Co-ordinator oversaw the hearing. The Peer Panel jury asked restorative justice questions of the Participant, the Participant's family and the victim (if relevant) and retired to determine the appropriate outcome (the sentence or penalty)."[223]

[221] Sullivan et al (2020), 'Schools are unfairly targeting vulnerable children with their exclusionary policies', Australian Association for Research in Education. Accessed at https://www.aare.edu.au/blog/?p=7763.
[222] JUSTICE (2020), *Challenging School Exclusions*. Accessed at https://files.justice.org.uk/wp-content/uploads/2020/08/06165917/Challenging-Report.pdf.
[223] NAAJA, 'Proposal to establish a Student Court program in the Northern Territory'. Accessed at http://www.naaja.org.au/wp-content/uploads/2018/01/Student-Court.pdf

Victorian Aboriginal Legal Service

"The purpose of the Student Court is:

(1) To provide an alternative to existing responses to problematic behaviour and conduct at school that may constitute low level offending. Specifically, to provide an alternative to the following current responses: Suspensions from school (which negatively impact on the student's education and places the student at risk of disengaging with the education system and the community); Referral to the police and/or criminal justice system.

(2) To foster long term behavioural changes in Participants by developing an understanding of how their behaviour impacts on others, developing a sense of community-mindedness and encouraging Participants to pursue positive pathways. This is to be achieved via the following: Harnessing peer pressure and utilising it in a positive manner to influence the behaviour of young people; Making referrals to services which address the factors (such as poor mental health, substance misuse, disengagement with the education system) contributing to the offending or problematic behaviour; Supporting young people to identify the skills they need to thrive in their environments; Making the Participants accountable for their actions.

(3) To repair the harm caused, in line with restorative justice principles. This is done by: Giving the victim an opportunity to advise the Court and the Participant of how the Participant's actions have negatively impacted on them; Determining appropriate consequences for the offender, which requires them to take responsibility for their actions.

(4) To empower youth and promote youth leadership, by Teaching Court members about the criminal justice system and restorative justice principles, Providing mediation training, Having student court members participate in the hearing process, developing skills such as conflict resolution and public speaking, Conducting group debriefs and individual feedback on performance during the hearings to develop skills and knowledge.

(5) To improve public safety by decreasing problematic behaviour of young people."[224]

[224] NAAJA, Student Court Guidelines

Victorian Aboriginal Legal Service

RECOMMENDATIONS

Recommendation 58. Victoria Police should not institute any new police-in-schools program.

Recommendation 59. The Ministerial Guidelines for the school community safety order scheme should be developed in consultation with key stakeholders, and provide for extensive safeguards to protect vulnerable children and limit the use of orders under the scheme to exceptional cases.

Recommendation 60. The school community safety order scheme should be independently evaluated, and the evaluation should be made publicly available.

Recommendation 61. The Victorian Government and Department of Education should explore opportunities to reduce the use of expulsion and suspension and their disproportionate impacts on Aboriginal children, including through models based on the NAAJA Peer Panel/Student Court pilot. VALS should be funded to develop a similar pilot in Victoria.

Children of Imprisoned People

85% of women in prison in Australia have been pregnant at some point in their lives, and more than half have a dependent child at the time of their imprisonment.[225] Research indicates that approximately 5% of all children in Australia will have an imprisoned parent, while approximately 20% of Aboriginal children will experience the incarceration of a parent.[226]

Having a parent in prison has a dramatic effect on children's wellbeing and development. If a child continues to live with the other parent or another family member, the disappearance of their imprisoned parent can leave the household in poverty, increasing the likelihood of unstable housing, disengagement from education and a range of other harms. In other cases, particularly when single mothers are imprisoned, children may come into the care of the child protection system. Any of these scenarios greatly increase the risk of children becoming involved in the youth justice system and with the criminal legal system later in life.[227] Rod Barton MP recently noted that around 77,000 young people have imprisoned parents and such children are up to six times more likely to end up in prison themselves.[228]

[225] Australian Institute of Health and Welfare, *The Health of Australian Prisoners,* 2018, pp. 14 and 72.
[226] Quilty, S. (2011). The Magnitude of Experience of Parental Incarceration in Australia. 12(1) Psychiatry, Psychology and Law 256-257.
[227] J Sherwood et al, *Reframing Space by Building Relationships: Community Collaborative Participatory Action Research with Aboriginal Mothers in Prison*, 2013, p.83, 85
[228] Rod Barton, MP. The Invisible Victims of Crime in Victoria. Available at https://rodbarton.com.au/the-invisible-victims-of-crime-in-victoria/.

Victorian Aboriginal Legal Service

Children of imprisoned parents – particularly of imprisoned mothers – are at considerably greater risk of being in contact with child protection services. Although no routine reporting of the prevalence, characteristics or impacts of parental incarceration exist, children with a history of out-of-home placement are at greater risk of mental illness, behavioural problems and poor school performance,[229] as well as increased rates of juvenile detention and adult incarceration among such children,[230] commonly referred to as 'crossover children.' 1 in 3 Aboriginal children who had received diversion or sentences under the existing Victorian youth justice framework had been the subject of child protection reports, while 1 in 6 had been placed in out-of-home care at some point.[231] Furthermore, research conducted by the Australian Law Reform Commission indicates 90% of Aboriginal youths who appeared in a children's court appeared in adult court within 8 years, with 36% receiving a prison sentence later in life.[232]

VALS is of the view that the impacts of custodial sentences on the children of imprisoned people are not adequately considered during decisions about charging, bail and sentencing parents/carers. Separating a dependent child from their parent is effectively imposing a punishment on them, and this fact should be recognised when considering the appropriateness of laying charges and the proportionality of sentencing. The UNCRC provides that the best interests of a child must be "a primary consideration" in all state actions concerning children,[233] including in judicial proceedings that affect the interests of the child indirectly.[234] However, in practice in Victoria, courts are hesitant to consider children's rights or the hardships that would be experienced by children as a result of the custodial sentences to parents as children are not the 'core business' of the adult criminal legal system.[235]

These issues are particularly significant for Aboriginal families, given the extensive history of family separation and consequent intergenerational trauma that has been imposed on Aboriginal communities in Australia. Data on the number of children who come into the child protection system as a result of their parents being incarcerated is not made publicly available by the government, making it impossible to assess the scope of this issue and eliminating any transparency about the

[229] Dowell, C. Et al. (2018). Maternal Incarceration, child protection, and infant mortality: a descriptive study of women prisoners in Western Australia. 6(2) Health and Justice 1-12, p. 2. Available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5768585/pdf/40352_2018_Article_60.pdf.
[230] Australian Law Reform Commission (2018). Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, at 15.5. Available at https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/; NSW Child, Family and Community Peak Aboriginal Corporation. (2021) The growing link between child protection and incarceration. Available at https://www.absec.org.au/growing-link-between-child-protection-and-incarceration.html.
[231] Commission for Children and Young People. (2021). Our youth, our way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system, p. 81.
[232] Australian Law Reform Commission (2018). Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, at 15.6. Available at https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/.
[233] Article 3(1) of the UNCRC. See also Mole & Sloan (2020), 'Children with imprisoned parents and the European Court of Human Rights', *European Journal of Parental Imprisonment*. Accessed at https://childrenofprisoners.eu/wp-content/uploads/2021/05/EJPI_2020-ENGLISH_COPE.pdf.
[234] Article 12 of the UNCRC.
[235] Flynn, C. et al. (2016). Responding to the needs of the children of parents arrested in Victoria, Australia. The role of the adult criminal justice system. 49(3) Australian & New Zealand Journal of Criminology 351-369, pp. 355-360.

extent to which children are being adversely affected by the criminal legal system's treatment of their parents. In particular, the lack of data makes it difficult to identify what VALS believes is a major factor in worsening this problem – the changes to bail laws, which have led to increased incarceration and extended remand periods, especially for Aboriginal women.

Furthermore, despite the right of children to maintain contact with parents while in custody,[236] considerable barriers exist that often preclude children from visiting an imprisoned parent. While the current COVID-19 pandemic has resulted in the suspension of family and personal visits to detention facilities in accordance with preventative measures,[237] barriers preventing children from visiting parents included, among others:

- The distance between the residence of the child(ren) and the detention facility;
- Financial burdens and other disadvantages of the carers of the child(ren) during the custodial sentence of the parent;
- Lack of awareness concerning the whereabouts of the parent (due to decision made by carer not to share the information with the child(ren)); and
- Carer unwillingness to arrange for the child(ren) to visit their parent.[238]

While the Bangkok Rules specifically address the need for the government to encourage and facilitate visitation of imprisoned mothers, including measures to counterbalance disadvantages,[239] VALS is of the opinion that the rights of the child place an obligation on the Victorian Government to implement such policies and practices in relation to the visitation of parents generally.[240]

When visitation does occur, children visiting a parent in custody in a detention facility, can, in and of itself, be a traumatic event that deters future visits. Factors that negatively affect the visits of children to detention facilities include:

- The oppressive and secure nature of the visiting areas in prisons with little attention to the needs of children;
- Surveillance and the lack of privacy during visits; and
- Intimidating and disrespectful attitudes of custodial staff.[241]

[236] Article 9(3) of the UNCRC.
[237] VALS (2020). Public Accounts and Estimates Committee COVID-19 Inquiry Submission, pp. 25-29, 35-36, 41-44 and 52 . Available at https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Submissions/87._Victorian_Aboriginal_Legal_Service.pdf.
[238] Flynn, C. (2014). Getting there and being there: Visits to prisons in Victoria - the experiences of women prisoners and their children. 61(2) Probation Journal 176-191, pp. 178-179.
[239] Rule 26 of the Bangkok Rules.
[240] Article 3 and 9 on the UNCRC.
[241] Flynn, C. (2014). Getting there and being there: Visits to prisons in Victoria - the experiences of women prisoners and their children., pp. 179-180.

While the barriers to visitation of a parent in custody infringe upon the rights of the child, the situation is exacerbated for mothers in custody, who receive fewer visits than fathers while in custody and are at greater risk of losing contact with their children.[242]

RECOMMENDATIONS

Recommendation 62. The Victorian Government should establish sentencing guidelines that require magistrates and judges to consider the best interests of any affected child when making sentencing decisions.

Recommendation 63. Data on the number of children who become involved with the child protection system after the incarceration of a parent should be made publicly available to improve transparency about how children's rights are impacted by the prison system.

Recommendation 64. The Victorian Government should ensure that the right of children to maintain direct contact with imprisoned parents through visitation is protected and promoted in a manner consistent with Articles 3 and 9 of the *United Nations Convention on the Rights of the Child*.

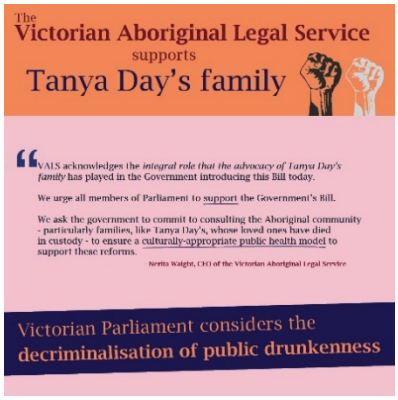
[242] Ibid., p. 177.

Victorian Aboriginal Legal Service

Public Health Issues

Criminalisation of public health issues - including mental illness, public intoxication and other drug dependencies - is a key cause of Victoria's growing prison population. VALS strongly believes that public health issues should be met with a public health response, and that a law enforcement approach is harmful, inherently discriminatory, costly and inefficient. Decriminalising public health issues would ensure that individuals receive the health support that they need and would not be further entrenched in a cycle of criminalisation and incarceration.

Public Intoxication



Decriminalisation of public intoxication was one of the key recommendations from RCIADIC and is long overdue. In 2019, two years after the death of much-loved mother, grandmother and proud Yorta Yorta woman Tanya Day, the Victorian Government finally committed to decriminalise public intoxication and replace it with a health-based response.[243] Two years later, this process is still being implemented.[244]

Broadly speaking, VALS supports the vision and recommendations of the Expert Reference Group on Public Drunkenness (**ERG**), which was established in August 2019 to advise the Government on the decriminalisation process and the development of an alternative health-based response.[245] The ERG included the CEO of VALS, Nerita Waight, and three other experts with diverse experience and skills. Over a period of 12 months, the ERG consulted widely with the community and experts and considered extensive data and research from Victoria, other jurisdictions in Australia and other countries around the world. The ERG released its final report in August 2020 with 86 recommendations.[246]

As the Government continues to implement this reform, VALS underlines that an alternative health-based response requires systemic and cultural change in the way that we understand and respond to individuals who are intoxicated in public. If we are going to achieve the objectives of the reform – including to prevent incarceration and deaths in custody – we must develop a robust and well-funded health response which does not involve law enforcement officers. Data from other states and

[243] New Health-Based Response To Public Drunkenness | Premier of Victoria (August 2019)
[244] In February 2021, the *Summary Offences Amendment (Decriminalisation of Public Drunkenness) Bill 2020* was passed. The law decriminalised the offence of public intoxication, which will come into effect in November 2022. See Historic Laws Passed To Decriminalise Public Drunkenness | Premier of Victoria (February 2021)
[245] New Health-Based Response To Public Drunkenness | Premier of Victoria (August 2019)
[246] Expert Reference Group on Decriminalizing Public Drunkenness, Seeing the Clear Light of Day: Expert Reference Group on Decriminalising Public Drunkenness, Report to the Victorian Attorney-General (August 2020). See The Report of the Expert Reference Group on Public Drunkenness | Department of Justice and Community Safety Victoria

territories that have decriminalised public intoxication clearly shows that where police continue to exercise "protective custody" powers, Aboriginal people are disproportionately affected and individuals who are intoxicated in public continued to be locked up in police cells.[247]

If law enforcement officers are to be involved in the health-based response, their role must be strictly limited to that of "last-resort responders."[248] VALS does not accept that inadequate funding in certain regions might require more extensive involvement of Victoria Police or any other law enforcement officers. Any involvement of law enforcement officers in the health-based response must be limited by the following:

- No one should be detained in a police cell or police station because they are intoxicated in public. This must be explicitly prohibited in legislation;
- Police should not have a legislated power to detain an intoxicated individual while they make enquiries to locate a safe place for that individual;
- Any power given to police to detain an intoxicated individual for the purposes of transporting them to a safe place must only be available as a last resort and must be strictly limited. As recommended by the ERG, the power should only be exercised if the following threshold is met:
  (1) there is a "serious and imminent risk of significant harm to the individual or other individuals"; and
  (2) the police officer has exhausted all other avenues by which an intoxicated person could be transported to a safe place;
- Given the inherent power imbalance between police and an intoxicated individual, police should not be permitted to transport that individual to a safe place on the basis of their informed consent. It is anticipated that there would be circumstances where an individual consents to police transport, but then withdraws consent partway through the voyage, and there would be a significant risk that the situation may escalate and result in criminal charges. The involvement of police should be limited to where the threshold of "serious and imminent risk of significant harm to the individual or other individuals" is met and all other avenues for transport have been exhausted, in the spirit of a public health response.
- PSOs should not be involved in the health-based response under any circumstances. They should not have any powers to arrest or detain individuals who are intoxicated in public.

If Victoria Police are involved in the health-based response for public intoxication, VALS strongly supports the following ERG recommendations, which seek to ensure that there are adequate safeguards and accountability mechanisms in place to regulate the role of Victoria Police:

- The Victorian Government takes steps to ensure that in accordance with the Victorian *Charter of Human Rights and Responsibilities Act*, Victoria Police exercise their powers to give effect

[247] Ibid., p. 34.
[248] Ibid., p. 4.

to the least restrictive means of achieving their objective, in terms of both the decision to detain and the nature of restraint employed (ERG recommendation 16).

- The Victorian Government ensures Victoria Police takes steps to ensure the full protection of the health of persons in their custody and in particular, shall take immediate action to secure medical attention whenever required (recommendation 17).
- The Victorian Government explores and consults with relevant stakeholders on how to ensure treatment during and conditions of detention of intoxicated people are consistent with relevant state and international human rights obligations and principles. This includes ensuring effective independent oversight of the detention of intoxicated people that is consistent with OPCAT (recommendation 18).
- The Victorian Government creates comprehensive regulations, guidelines, policies and procedures on the operationalisation of the legislation, to ensure police discretion is applied appropriately and reasonably to all members of the community (recommendation 20).
- The Victorian Government establishes legislation to ensure police discretion in assessing whether a location is a safe place is limited, including but not limited to risk of family violence and instances where the intoxicated person is behaving or is likely to behave so violently that a responsible person would not be capable of taking care of and controlling them (recommendation 21).
- Victoria Police keeps detailed records of the enquiries they made in relation to locating a safe place for the person, including any reasons for concluding that the location is not a safe place, such as risk of family violence (recommendation 25).
- Victoria Police provides police officers with training and ongoing refresher training on:
  - the legislative amendments, regulations, guidelines, policies and procedures and be provided ongoing refresher training;
  - systemic racism, unconscious bias, culturally appropriate service delivery, effective communication, de-escalation and conflict resolution, and be provided ongoing refresher training;
  - Mental health and disability (recommendations 22, 23 and 24).
- Victoria Police ensures guidelines, policies, procedures and training and other similar materials are publicly available (recommendation 26).
- The Victorian Government considers making disaggregated data relating to police assistance provided with consent, and police intervention without consent, publicly available. This information should include, but not be limited to, information with regards to whether people are Aboriginal and/or Torres Strait Islander, CALD status, homelessness, gender, disability and age (recommendation 27).
- The Victorian Government implements public reporting on the exercise of new police powers and other relevant powers that may be used more frequently subsequent to the reform (e.g. move on powers), as well as arrests for other minor offences (recommendation 28).
- The Victorian Government empowers an oversight body, such as the Victorian Ombudsman, to adjudicate complaints and conduct investigations in relation to the implementation and

operation of these reforms by police. This should include oversight of up-charging practices by police, and the treatment of people detained and conditions of detention during transport (recommendation 31).

- The Victorian Government ensures any abuse of power by police to circumvent the limitations on powers to detain an intoxicated person must be treated seriously and they should be held accountable (recommendation 32).

If Victoria Police are involved in the health-based response to public intoxication, the Victorian Government should implement additional safeguards as recommended below. If the Government is serious about reducing incarceration and achieving the objectives of the reform process, the role of Victoria Police in the health-based response must be subject to comprehensive safeguards and accountability mechanisms, enshrined in legislation.

RECOMMENDATIONS

Recommendation 65. The Victorian Government should publicly respond to the report of the Expert Reference Group (ERG) on Public Drunkenness.

Recommendation 66. The ERG recommendations about an effective health-based response to public intoxication should define the roles and responsibilities of First Responders, while law enforcement officers, including Victoria Police and PSOs should not be involved in the health-based response to public intoxication.

Recommendation 67. PSOs should not be involved in the health-based response under any circumstances. They should not have any powers to arrest or detain individuals who are intoxicated in public.

Recommendation 68. No one should be detained in a police cell or police station because they are intoxicated in public. This must be explicitly prohibited in legislation.

Recommendation 69. Police should not have a legislated power to detain an intoxicated individual while they make enquiries to locate a safe place for that individual.

Recommendation 70. Any power given to police to detain an intoxicated individual for the purposes of transporting them to a safe place must only be available as a last resort and must be strictly limited. As recommended by the ERG, the power should only be exercised if the following threshold is met:

- there is a serious and imminent risk of significant harm to the individual or other individuals; and

- the police officer has exhausted all other avenues by which an intoxicated person could be transported to a safe place.

Recommendation 71. The above threshold should not be circumvented by including in the health model transport by police with the consent of the intoxicated person. The reason for this is the inherent power imbalance between police and an intoxicated individual, as well as the risk of escalation.

Recommendation 72. If Victoria Police are involved in the health-based response to public intoxication, the Victorian Government should establish safeguards and accountability mechanisms in line with the following ERG recommendations: 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 31, 32.

Recommendation 73. To mitigate the risk of up-charging intoxicated individuals, authorisation of any charges arising from an incident of public intoxication should be authorised by a Police Inspector.

Recommendation 74. Failure to comply with a police officer who is exercising any new police powers relating to public intoxication should not be a criminal offence, or be otherwise unlawful.

Recommendation 75. Any charges laid in relation to assault of police arising from attempts to escape are subject to review by a superior officer, such as the Assistant Commissioner of Professional Standards Command.

Recommendation 76. The Victorian Government should criminalise negligent conduct by police officers when detaining an individual who is intoxicated.

Recommendation 77. Whenever police detain an Aboriginal person who is intoxicated, for the purpose of transporting them to a safe place, VALS must be advised via the Custody Notification Service. VALS must be properly funded to undertake this work and be consulted in implementation of this reform.

Recommendation 78. Treatment of, and conditions of detention for intoxicated individuals must comply with relevant international human rights standards and principles. Legislation and Regulations should ensure that treatment of people when detained and conditions in the police vehicle do not amount to torture or cruel, inhuman or degrading treatment.

Recommendation 79. Civil society organisations should be given sufficient funding to contribute to ongoing monitoring of any new police powers relating to individuals who are intoxicated in public.

Victorian Aboriginal Legal Service

Drug Decriminalisation

VALS believes that, to the extent that the use of drugs is a problem in Victoria, it should be understood as a public health issue and not a criminal one. Our longstanding position, as with public intoxication and mental health issues, is that public health issues must be met with public health responses, not with criminalisation.

VALS has previously recommended the decriminalisation of cannabis in Victoria, as an important measure to reduce the disproportionate impacts of the criminal legal system on Aboriginal people and avoid unnecessary incarceration.[249] The Victorian Parliament made a number of important findings in the recent Inquiry into the use of cannabis in Victoria, which are highly relevant to this Inquiry's focus on the criminal legal system.[250] These include:

- That "[t]he harms that arise from the criminalisation of cannabis affect a larger number of people and have a greater negative impact than the mental health and other health harms associated with cannabis use."[251]
- That Victoria Police's cannabis cautioning program is inconsistently applied and is overly restrictive.[252]
- That Aboriginal people are "significantly overrepresented in sentencing statistics for minor cannabis offences compared to other Victorians"[253] and that Aboriginal people face particular trauma from interactions with the criminal legal system.[254]
- That criminal records for cannabis offences act as an obstacle to accessing housing, employment and other services, which raises the risk of further contact with the criminal legal system.[255]

These findings clearly support VALS' position that criminalisation of cannabis use in Victoria is harmful, particularly for Aboriginal people, and serves no reasonable public policy goal. We are deeply disappointed by the Andrews Government's moves to water down the strong recommendations these findings would have justified, and its response to the Inquiry's recommendations.[256] There is no need

[249] VALS (2020), *Submission to the Inquiry into the Use of Cannabis in Victoria*. Available at https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_the_use_of_Cannabis_in_Victoria/Submissions/S1398_-_Victorian_Aboriginal_Legal_Service.pdf.
[250] Parliament of Victoria, Legislative Council Legal and Social Issues Committee (2021), *Inquiry into the use of cannabis in Victoria*. Available at https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_the_use_of_Cannabis_in_Victoria/Report/LCLSIC_59-07_Use_of_cannabis_in_Vic.pdf.
[251] Ibid, p102.
[252] Ibid, p131.
[253] Ibid, p141.
[254] Ibid, p163.
[255] Ibid, p158.
[256] The Age, 5 August 2021, 'Andrews government quashes push to legalise cannabis in Victoria'. Available at https://www.theage.com.au/politics/victoria/andrews-government-quashes-push-to-legalise-cannabis-in-victoria-20210804-p58fq1.html.
7 News, 5 August 2021, 'Vic premier dismisses call to legalise pot'. Available at https://7news.com.au/politics/report-into-cannabis-use-in-victoria-due-c-3598003.

for further inquiries to investigate cannabis decriminalisation, which should be adopted as policy by the Victorian Government without delay.

Use of cannabis by Aboriginal people is slightly higher than by non-Aboriginal Australians. However, this gap has narrowed in recent years as the rate of use among Aboriginal Australians declines.[257]

Despite this, crime statistics show that there has been a growing police emphasis on this issue.[258]

- The number of incidents for drug use and possession involving Aboriginal people has risen by 86% since 2016 and 215% since 2012.
- This is substantially faster than the overall increase in recorded incidents (36% in the last five years; 76% since 2012) suggesting that drug issues in particular have seen an increasingly police-led response.
- The increase in drug use and possession incidents is much lower for non-Aboriginal people than Aboriginal people – 94% rather than 215% since 2012, and 42% rather than 86% since 2016.

This data makes it clear that the policing-led response to drug use in Victoria has a disproportionate effect on Aboriginal people. These contacts with police and the criminal legal system, which are unnecessary and deliver no significant public benefit, contribute to the unacceptable incarceration rate of Aboriginal people in Victoria.

This is particularly so because of the way the police-led response to drug use interacts with Victoria's onerous bail regime. People arrested on drug charges – who, as noted above, are disproportionately likely to be Aboriginal – are often held in prison while awaiting trial for a charge which will not ultimately lead them to a custodial sentence.

- From 1 July 2016 to 30 June 2019, just 10.6% of proven cannabis possession charges resulted in custodial sentences.
- This is far fewer than the 29.4% which resulted in discharge, dismissal or adjournment.[259]

This phenomenon is not limited to cannabis charges. At June 2020:[260]

- *Sentenced* people in prison with drug offences as their most serious conviction were 13% of the prison population (21.7% of women, 12.5% of men)
- Among *unsentenced* people held in prisons, drug offences were the most serious charge for 17.8% of individuals (31.6% of women, 16.8% of men)

[257] Australian Institute of Health and Welfare, National Drug Strategy Household Survey 2019, Supplementary data table 8.1.
[258] Crime Statistics Agency, *Alleged offender incidents by Aboriginal and Torres Strait Islander Status – Tabular* Visualisation, Victoria – Principal offence. Accessed at https://www.crimestatistics.vic.gov.au/crime-statistics/latest-aboriginal-crime-data/alleged-offender-incidents-by-aboriginal-and-torres.
[259] Sentencing Advisory Council, *SACStat Magistrate's Court – Possess cannabis*. Accessed at https://www.sentencingcouncil.vic.gov.au/sacstat/magistrates_court/9719_73_1.7.html.
[260] Corrections Victoria, *Annual Prisoner Statistical Profile 2019-20*, Tables 1.10 & 1.11.

This is a clear indication that people charged with drug offences are denied bail out of proportion to the likelihood that they will ultimately receive a custodial sentence. A breakdown of these figures for incarcerated Aboriginal people is not available, but given the overall disproportion in the remanded population it can be presumed that the disproportionate denial of bail for drug charges is even more acute for Aboriginal people. These issues are particularly of concern in rural and regional Victoria, where it is more common that a Bail Justice will not be able to attend the police station, as discussed above.

Victorian courts sentence people to prison terms for drug charges too often. But it is crucial for this Committee to recognise that large numbers of people are held in prison over drug charges which, even under the existing harsh laws and approach to sentencing, do not warrant imprisonment. This makes drug criminalisation a significant contributor to unnecessary imprisonment, the disproportionate incarceration of Aboriginal people, and the skyrocketing remanded population in Victoria's prisons.

There is strong expert consensus around an alternative approach to drug use, which treats it as a public health issue and deals with substance use issues where necessary, without resorting to criminal punishment. In relation to cannabis, research has found that a number of therapeutic behavioural treatments, such as cognitive-behavioural therapy, contingency management and Motivational Enhancement Therapy, are the most effective way to manage, recover and rehabilitate from cannabis misuse.

At present, access to these treatments is very inconsistent and the use of public health approaches is highly discretionary. This is a particular concern because discretion from police and prosecutors typically leads to worse outcomes for Aboriginal people. In NSW, more than 80% of Aboriginal people police dealt with for small-scale cannabis use were pursued through the courts, rather than given access to cautions and diversion programs, compared to 52% of the non-Aboriginal population.[261] The court system in Victoria does not enable equivalent data analysis, but case studies that VALS has presented show a similar pattern.

[261] The Guardian, 10 June 2020, 'NSW police pursue 80% of Indigenous people caught with cannabis through courts'. Accessed at https://www.theguardian.com/australia-news/2020/jun/10/nsw-police-pursue-80-of-indigenous-people-caught-with-cannabis-through-courts.

Victorian Aboriginal Legal Service

Case Study – Cameron (a pseudonym)

Cameron, employed and with no prior criminal history, was arrested, placed on bail and charged with possessing a drug of dependence. Despite it being a small amount of cannabis, a caution was not given. Cameron suffers from post-traumatic stress disorder (PTSD) due to a previous abusive relationship and childhood trauma and abuse.

This approach to drug offences reflects a view that a criminal charge and court outcome represents the end of a person's attempt to address their use and abuse of drugs, rather than an opportunity to begin, or re-engage in, the process of rehabilitation. Instead, a guilty verdict could affect Cameron's ability to work and travel, without addressing any of the issues underlying their cannabis use.

The financial cost to the community of taking this matter through the courts is not justified by the negligible damage done by simple use of cannabis, with no allegations of more serious offending.

A more consistent public health approach would allow these opportunities for rehabilitation and therapeutic treatments to be taken, without creating further obstacles and pressures for Aboriginal people through criminalisation.

This approach to drug use could be facilitated by expanding the role of the Victorian Drug Court. The Drug Court provides access to a range of relevant services and takes a therapeutic approach to dealing with people whose offending was influenced by substance use. However, at present, Drug Court is available only to people who would be likely to receive a term of imprisonment. Drug Treatment Orders are imposed as an alternative to imprisonment, with a suspended custodial sentence alongside a treatment plan. Broadening the scope of Drug Court, including amending Drug Treatment Orders so that they do not need to be associated with a suspended prison sentence, would allow people charged with minor drug offences to access a rehabilitation-focused approach to dealing with their substance use issues. For Aboriginal people, access to this kind of therapeutic approach would also be improved by allowing Drug Treatment Orders to be a sentencing option in Koori Court, which they currently are not.

VALS also supports health responses such as supervised injecting services, as we believe that these services can save and transform lives. VALS stands with many other organisations in Victoria in supporting the establishment of a supervised injective service in the Melbourne CBD, embedded within a broader range of community health services such as mental health, housing, sexual health, oral health and allied health. Studies of injecting services around the world have shown that they are

one of the most effective tools in combating the serious harm caused by drug dependence in our community.[262]

A report on decriminalisation by the University of NSW, National Drug and Alcohol Research Centre and Drug Policy Modelling Program found that decriminalisation of drug use, not limited to cannabis:

- "Reduces the costs to society, especially the criminal justice system costs;
- Reduces social costs to individuals, including improving employment prospects;
- Does not increase drug use;
- Does not increase other crime."[263]

The Australian Lawyers Alliance (**ALA**) has also recently published a report endorsing a public health-led, harm minimisation response to drug use.[264] The ALA found that current drug policies in Australia are ineffective because criminalisation increases the dangers of drug use and limits opportunities for safe use and rehabilitation.

Victoria Police's new drug strategy issued in December 2020 takes some steps towards the need for a public health approach, recognising that "drug problems are first and foremost health issues."[265] However, the strategy still involves a too heavy focus on the role of policing and envisages a large role for Victoria Police in treatment, rehabilitation and community education functions, which would be better performed by other organisations with more relevant expertise. VALS is also concerned that the Drug Strategy appears to have been developed without consultation with Aboriginal community organisations, and contains no discussion of the particular impact that drug policing has on Aboriginal people in Victoria.

VALS is conducting further research into drug decriminalisation in 23 international jurisdictions, including a comparative analysis of what makes for an effective public health approach to drug use.

VALS will be publishing a paper on what Victoria can learn from these jurisdictions, and how to respond to the use of drugs in the community without relying on a criminal justice approach which is disproportionately affecting Aboriginal people.

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[262] Commonwealth Department of Health (2005), *Needle and Syringe Programs: A review of the evidence.* Available at https://www1.health.gov.au/internet/publications/publishing.nsf/Content/illicit-pubs-needle-kit-evid-toc~illicit-pubs-needle-kit-evid-rev#10.

[263] UNSW, National Drug & Alcohol Research Centre and Drug Policy Modelling Program (2017), *Decriminalisation of drug use and possession in Australia – a briefing note*. Accessed at https://www.parliament.vic.gov.au/images/stories/committees/lrrcsc/Drugs_/Submissions/164_2017.03.17_-_NDARC_-_submission_-_appendix_a.pdf.

[264] Australian Lawyers Alliance (2021), *Doing More Harm Than Good: The Need for a Health-Focused Legal Response to Drug Use.*

[265] Victoria Police (2020), *Drug Strategy 2020-25*. Accessed at https://www.police.vic.gov.au/drug-strategy.

Victorian Aboriginal Legal Service

RECOMMENDATIONS

Recommendation 80. The use of cannabis and the possession of cannabis for personal use should be decriminalised.

Recommendation 81. In the event that the use of cannabis and the possession of cannabis for personal use is not decriminalised:

- Cautions should be utilised as a first preference;
- To improve access to cautions and diversion, cautions should be available regardless of criminal history, and the necessity for police consent to and recommendation for diversion should be removed;
- Diversion, the Court Integrated Services Program (CISP) and other support services, including culturally appropriate services provided by ACCOs, should be expanded, to avoid recordable court outcomes;
- The use of cannabis and the possession of cannabis for personal use should be a summary offence.

Recommendation 82. The use of drugs should be approached as a public health issue, not a criminal justice issue. This should include:

- Recognition that use or possession of small amounts of a drug is unlikely to pose a social problem and need not trigger Police involvement;
- For repeat or heavy users, drug use should trigger a health and support services response, not a criminal justice response;
- The design of this public health response should be informed by international experience and best practice.

Recommendation 83. People charged with minor drug offences should have access to the Victorian Drug Court on a voluntary basis, with appropriate changes to ensure that they are not at risk of imprisonment as a result of a Drug Treatment Order.

Recommendation 84. Koori Court should be able to make Drug Treatment Orders as an alternative to imposing a custodial sentence, in cases where imprisonment is likely and the person's offending is related to drug use.

Recommendation 85. The Government should consider decriminalising use and possession of all drugs for personal use, looking to good practices in other jurisdictions. VALS' upcoming research paper should be of assistance in canvassing what approaches could be considered for the Victorian context.

Victorian Aboriginal Legal Service

Mental Health Responses

People with mental illness are routinely subjected to inappropriate policing responses in moments of crisis. This is a major contributor to the overrepresentation of people with mental illness in the Victorian prison population. Given that Aboriginal people suffer from mental health issues at far higher rates than the non-Aboriginal population, this is also a significant factor in the disproportionate incarceration of Aboriginal people.[266]

There is no clearer example of the inappropriate use of criminal justice responses to a health issue than the heavy police involvement in responding to acute mental health episodes. In September of 2020, Tim Atkins allegedly broke a glass window at Northern Hospital in Epping during a severe bipolar episode. The resulting police encounter included Atkins being struck by a police car driven by a member of Victoria Police, only to later be sprayed with pepper spray and have his head stomped on by another member of Victoria Police. The officers involved received suspension with full pay and withdrawal of authority to drive a police vehicle withdrawn based upon their respective involvements in the incident, but IBAC determined the two officers acted lawfully and should not be criminally charged, despite Atkins' injuries being so severe that he was placed in a medically induced coma following the incident.[267]

Police-led responses to mental health crises have become more common in recent years because of chronic underfunding of mental health services and a failure to develop and implement alternative emergency service responses.[268] This is deeply problematic. People with mental illness face serious difficulties in every part of the legal system; they are less likely to be granted bail, for example, and are often retraumatised by their experiences in prison. This makes it imperative that arrests and charging of people with mental health problems are avoided in the first place. Police-led responses to acute mental health episodes are inherently more likely to end in arrest. Many police have not had adequate training, and even those with some specialist training fall far short of the expertise of health professionals in therapeutic approaches.

Police responses to mental health crises also have a stigmatising effect on people with mental health issues. There is a substantial traumatising effect from being treated as a criminal, and from this treatment being witnessed by family, friends and others. This can impede people getting proper professional health support, may disrupt their personal relationships, and worsen engender a sense of marginalisation. This concern was recognised by the former Office of Police Integrity in a 2012

[266] McCausland et al (2017), 'Indigenous People, Mental Health, Cognitive Disability and the Criminal Justice System', *Indigenous Justice Clearinghouse*. Accessed at https://www.indigenousjustice.gov.au/wp-content/uploads/mp/files/publications/files/research-brief-24-final-31-8-17.pdf.
[267] Tran, D. (2021). Watchdog finds Victoria Police acted lawfully when head-stomping mentally ill man during arrest. ABC.net.au. Available at https://www.abc.net.au/news/2021-07-16/ibac-victoria-police-head-stomping-man-lawful-during-arrest/100300056.
[268] RCVMHS (2021), *Final Report: Volume 1*, p. 514.

review, which highlighted the potential for stigma as so serious that police should not even be involved in transporting people to receive health support except in special circumstances:

> The police transport of people who appear to be mentally ill is at odds with the rights, dignity and interests of people requiring mental health assessment. The safety of such people warrants transportation in an ambulance to an appropriate mental health facility. While some Crisis Assessment and Treatment Teams consulted during this review indicated a preference for mental health assessments to occur in police cells to avoid clogging up emergency departments, a person experiencing a mental health crisis does not belong in a police cell. That person's safety, wellbeing and dignity are not and cannot be properly catered for in a police cell or a divisional van.[269]

This is an important statement of principle which VALS endorses, and which is not yet reflected in Victoria's operational first response to people experiencing mental health epsidodes.

The lack of health-led frontline responses for people with mental illness also interacts with the continued existence of minor summary offences, discussed in the next section, which are enforced almost entirely at the discretion of police. When there are not sufficiently-resourced mental health response teams available to respond to an incident, police attending may have limited options for referral and so resort to enforcement of minor offences to 'secure the scene'. This discretionary enforcement serves to criminalise people experiencing mental health problems, and has a severe and discriminatory impact on Aboriginal people.

The Royal Commission into Victoria's Mental Health System recommended that the Victorian Government "ensure that, wherever possible, emergency services' responses to people experiencing time-critical mental health crises are led by health professionals rather than police."[270] VALS supports the vital principle that people experiencing mental health crises should not be met with a police-led response. However, we do not endorse the qualification that this should be the case 'wherever possible'. Police lack the training to deal with mental health crises, and it is not possible to effectively play a dual role of providing support and threatening law enforcement simultaneously. Feedback received from Aboriginal stakeholders concerning the current MHaP program note that mental health teams are often slow to respond after Victoria Police initially attend the homes of peoples in mental health crises. The preferable outcome would be for trained mental health workers, rather than Victoria Police, to lead in such instances with Victoria Police only becoming involved when requested by mental health first responders. Where police involvement is absolutely necessary for safety, as identified by the Royal Commission, their involvement should be under the direction of health professionals and subject to strict safeguards.

Models of best practice from across the world demonstrate how Victoria can do better with adequate resourcing of its mental health system. In the United States, the Support Team Assisted Response programme (**STAR**) in Denver, Colorado has had a dramatic effect in reducing arrests of people

[269] Office of Police Integrity (2012), *Policing people who appear to be mentally ill*, p25.
[270] Royal Commission into Victoria's Mental Health System (2021), *Final Report: Summary and Recommendations*, p46.

experiencing mental health crises.[271] STAR involves a mental health clinician and a paramedic travelling to respond to mental health crises as well as other minor incidents. The program's scope is broader than acute episodes of mental illness: the STAR team also responds to minor incidents like trespassing where there appear to be signs of a mental health problem. This approach "deliberately cuts down on encounters between uniformed officers and civilians."[272] There were no arrests or police charges resulting from incidents the STAR team were called to during the first six months of the program,[273] demonstrating the potential to effectively eliminate police-led responses to mental health issues, given adequate funding for alternative approaches.

Additionally, the Victorian Government has committed to ensuring that culturally safe and competent approaches to addressing issues concerning the intersectionality of Aboriginal mental health and the Victorian criminal legal system are addressed through the self-determined approaches and institutions of Aboriginal communities in Victoria. Poor mental health is correlated to a greater risk of criminal legal system involvement among Aboriginal people in Victoria.[274] Among the priority outcomes of *Burra Lotjpa Dunguludja* (Aboriginal Justice Agreement Phase 4) is ensuring a more effective justice system with greater Aboriginal control that integrates culturally-appropriate service responses that are designed and delivered by Aboriginal Community Controlled Organisations.[275] This includes the possibility of establishing a 'culturally appropriate model for a multi-jurisdictional therapeutic and specialised healing court for Aboriginal accused with multiple and complex needs'.[276]

RECOMMENDATIONS

Recommendation 86. VALS supports the principle that people experiencing mental health crises should not be met with a police-led response. However, there should be no qualification that this should only be the case 'wherever possible'.

Recommendation 87. The Victorian Government must improve access to multi-disciplinary and culturally safe crisis response teams including Aboriginal health workers/clinicians and other culturally aware social workers to provide better integrated health diversion processes as front-line responses.

[271] STAR program Evaluation (2021), pp. 6-7. Available at https://wp-denverite.s3.amazonaws.com/wp-content/uploads/sites/4/2021/02/STAR_Pilot_6_Month_Evaluation_FINAL-REPORT.pdf.
[272] Sachs, D. (2021). 'The Denver STAR program that replaces police with mental and behavioral health counsellors is working'. Denverite. Accessed at https://denverite.com/2021/02/02/in-the-first-six-months-of-health-care-professionals-replacing-police-officers-no-one-they-encountered-was-arrested/.
[273] Cohen, L. (2021). 'Health care workers replaced Denver cops in handling hundreds of mental health and substance abuse cases – and officials say it saved lives.' CBS News. Available at https://www.cbsnews.com/news/denver-health-professionals-replaced-cops-in-handling-hundreds-of-low-level-incidents-for-6-months-and-successfully-did-so-with-no-arrests/.
[274] Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement Phase 4 – A partnership between the Victorian Government and Aboriginal community, p. 19. Available at https://files.aboriginaljustice.vic.gov.au/2021-02/Victorian%20Aboriginal%20Justice%20Agreement%20Phase%204.pdf.
[275] Ibid., p. 46.
[276] Ibid., 9. 47.

Recommendation 88. The new Mental Health and Wellbeing Act should create the basis for a mental health system which:

- increases and enhances the provision of targeted, culturally safe mental health and wellbeing supports, services and programs to at-risk youths and adults to prevent interaction with the criminal legal system.
- recognises the need to enhance and increase support for persons with mental illness while dealing with substance abuse/addiction issues.

Recommendation 89. The Victorian Government should implement the Victorian Ombudsman's recommendation for the expansion of current therapeutic court-based interventions, together with parallel investments in associated support services.

Recommendation 90. The Victorian Government must prioritise working with ACCOs to make available a culturally appropriate model for a multi-jurisdictional therapeutic and specialised healing court for Aboriginal accused, with multiple and complex needs. This is consistent with commitments made in *Burra Lotjpa Dunguludja*, Phase 4 of the Aboriginal Justice Agreement.

Summary Offences Reform

As VALS has previously noted in submissions to the Royal Commission into Victoria's Mental Health System, there a number of criminal offences in statute in Victoria which serve no significant public benefit, and have the effect of creating unnecessary contact with the criminal legal system for vulnerable people. Many summary offences are difficult to avoid committing for people who are homeless, experiencing mental health or cognitive disabilities, or dealing with substance addiction.

In the context of Victoria's soaring prison population and the urgent need to reduce incarceration rates of Aboriginal people, low-level offences which unnecessarily funnel vulnerable people in the criminal legal system are deeply problematic.

A significant shift in Victoria's approach to summary offences is particularly urgent because of the punitive bail reforms discussed above. The restriction of bail means that any contact with police that leads to a charge has a higher chance of leading to people being remanded in custody. Though only indictable offences trigger some of the harsher provisions of the *Bail Act*, the existence of these summary offences brings police into contact with people who may have trauma-affected responses because of past experience with law enforcement. Up-charging on the basis that someone resists arrest or assaults a police officer, or the enforcement of old warrants against people who come to police attention because of minor summary offending, can lead to people being remanded when there was no significant reason for police to be involved with them in the first instance.

Victorian Aboriginal Legal Service

VALS supports the decriminalisation of low-level offences that have a disproportionate impact on Aboriginal people experiencing mental health and cognitive disabilities, including offences such as drunk and disorderly offences, begging, homelessness or other poverty related public order offences. To this end, the Victorian Government should work with relevant stakeholders (including with Aboriginal Community Controlled Organisations, such as VALS) to address unmet needs that lead to low level offending, and meet gaps in service provision to support people on bail or divert people to suitable services and programs. This includes resourcing of more frontline social and community services and culturally informed health services and safe, affordable and appropriate housing.

RECOMMENDATIONS

Recommendation 91. The Victorian Government should decriminalise offences in the *Summary Offences Act 1966* (Vic) (SOA) that disproportionately target persons experiencing mental ill-health and/or who are homelessness. This includes:

- Begging (s49A of the SOA)
- Obstruction of foot paths (s5 of the SOA)
- Move on directions (s6 of the SOA)
- Obscene language (s17 of the SOA)

Sentencing

"Sentencing courts are key gatekeepers for prisons and are therefore, in part, accountable for the high rates of Aboriginal incarceration."[277] In Victoria, Aboriginal people are more likely to receive a prison sentence than non-Aboriginal people, and less likely to receive a community-based sentence.[278]

Sentencing laws and decisions have contributed to the growing number of Aboriginal people in prisons in Victoria in the following ways:

1. Sentencing courts fail to take into account the unique systemic and background factors affecting Aboriginal peoples when making sentencing decisions. This means that sentences are often not appropriate and fail to take into account Aboriginal community-based options which can support rehabilitation and reintegration of the individual.

[277] T. Anthony, A. Lachsz and N. Waight, 'The role of 're-storying in addressing over-incarceration of Aboriginal and Torres Strait Islander Peoples,' 17 August 2021, The role of 're-storying' in addressing over-incarceration of Aboriginal and Torres Strait Islander peoples (theconversation.com)

[278] In 2019-2020, Aboriginal people made up 7.39% of the average daily community corrections offender population, although they only represent 0.8% of the total population (2016 census). See Productivity Commission, *Report on Government Services 2021*. Part C, Section 8: Corrective Services Data Tables, Table 8A.8 (data on CCOs). In contrast, Aboriginal people represent 8.6% of the sentenced prisoner population as at June 2020. See Corrections Victoria, Annual Prisoner Statistical Profile 2019-2020, Table 1.3. See also, Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, (2017), p. 91.

2. Sentencing courts fail to take into account the rights of dependent children when sentencing Aboriginal women. Being separated from a primary carer often means that school and housing is disrupted, leading to an increased likelihood of contact with the youth justice system.
3. Community Corrections Orders (**CCO**s) often involve onerous and culturally inappropriate conditions, and there is a significant lack of culturally appropriate support for Aboriginal people on CCOs, particularly those who have disabilities. Aboriginal people are less likely to complete a CCO than non-Aboriginal people,[279] and more likely to receive a prison sentence as a result of breaching an order.[280]
4. Mandatory sentencing removes judicial discretion and requires judicial decision-makers to impose prison sentences for particular offences, without taking into account the circumstances of the individual and the offence.

Aboriginal Community Justice Reports

Since 2017, VALS has been calling for key changes to the sentencing process for Aboriginal people, in order to improve sentencing outcomes and reduce over-incarceration of Aboriginal people in Victoria.[281] Currently, sentencing processes regularly fail to consider the unique systemic and background factors affecting Aboriginal people in the justice system. We firmly believe that two critical changes are required to address this issue:

1. Sentencing laws should be amended to require judicial decision-makers to consider the circumstances related to the person's Aboriginal background and to demonstrate the steps taken to ascertain relevant information;
2. Aboriginal Community Justice Reports should be funded on a long-term basis as a mechanism to ensure that judges have access to relevant information regarding a person's Aboriginal background and Aboriginal-specific sentencing options.

In 2017, VALS released its discussion paper, *Aboriginal Community Justice Reports: Addressing Over-Incarceration*. In this paper, VALS proposed trialling "Aboriginal Community Justice Reports… a pre-sentence, community written report, which aims to gather information about underlying impacts on any Aboriginal offender… The purpose of preparing such reports is to identify possible underlying drivers of the individual's offending, in particular, those that may relate to the impacts of trauma and colonisation uniquely experienced as an Aboriginal person… [it] also provides a further voice to the

[279] In 2019-2020 in Victoria, 45.2% of Aboriginal people on CCOs completed their orders, versus 58.5% of non-Aboriginal people on CCOs. See Productivity Commission, *Report on Government Services 2021*, Part C, Section 8, Table 8A.21. See also, Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, (2017), pp. 254 and 113.

[280] Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, (2017) p. 113.

[281] VALS, *Aboriginal Community Justice Reports Addressing Over-Incarceration* (October 2017); VALS, *Aboriginal Considerations in Sentencing: Proposed Sentencing Act Amendment, Discussion Paper*, October 2017; VALS, *Submission to ALRC Inquiry on Incarceration of Aboriginal and Torres Strait Islander Peoples*, 2017; VALS, *Submission to the Sentencing Act Reform Project* (2020); VALS, *Submission to CCYP Inquiry, Our Youth Our Way*, October 2019.

Victorian Aboriginal Legal Service

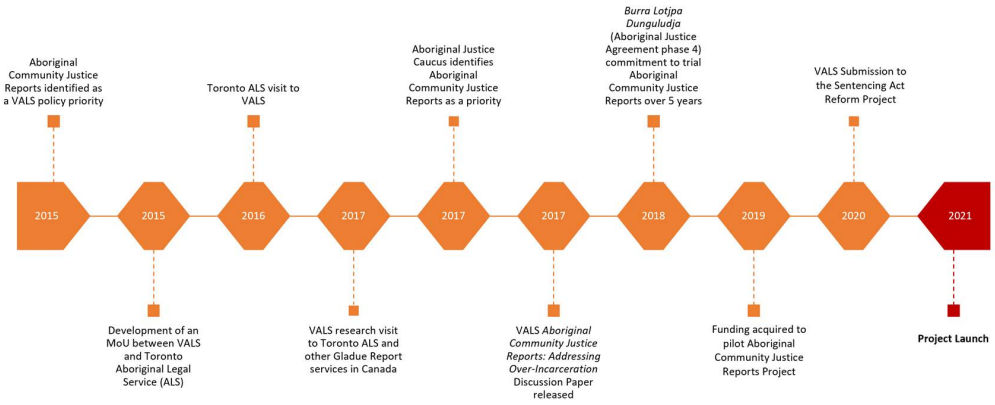
offender, their family and community, and thus greater involvement in, and engagement with the justice system."[282]

In 2018, the Victorian Government and the Aboriginal Justice Caucus committed to piloting Aboriginal Community Justice Reports over the five-year period of *Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement Phase 4*; to "[t]rial Aboriginal Community Justice Reports modelled on Canada's Gladue reports to provide information to judicial officers about an Aboriginal person's life experience and history that impacts their offending; and to identify more suitable sentencing arrangements to address these underlying factors."[283]

VALS' 2020 *Submission to the Sentencing Act Reform Project* recommended that the Government "[s]upport self-determined initiatives to improve sentencing outcomes for Aboriginal people, including by directing dedicated funding from Burra Lotjpa Dunguludja to the project currently being carried out by VALS and its partners on Aboriginal Community Justice Reports."[284]

Additionally, in 2017, the Australian Law Reform Commission's report, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* recommended that "State and territory governments, in partnership with relevant Aboriginal and Torres Strait Islander organisations, should develop and implement schemes that would facilitate the preparation of 'Indigenous Experience Reports' for Aboriginal and Torres Strait Islander offenders appearing for sentence in superior courts."[285]

The below timeline outlines the development of the Aboriginal Community Justice Reports Project in Victoria:



[282] VALS, *Aboriginal Community Justice Reports Addressing Over-Incarceration* (October 2017) 3-4.
[283] *Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement Phase 4*, 39.
[284] VALS, *Submission to the Sentencing Act Reform Project* (2020) 12.
[285] ALRC, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (2017) 214.

In addition to Victoria, progress is being made in other jurisdictions towards improving sentencing processes for Aboriginal people:

- In 2017, the ACT Government committed to trial the use of 'Aboriginal and Torres Strait Islander Experience Court Reports' in sentencing courts in the ACT.[286]
- In Queensland, Five Bridges have been developing Narrative reports for use in Murri Courts in Maroochydore, Brisbane and Ipswich since 2015, and other justice groups in Queensland also do similar reports.
- In NSW, Deadly Connections is running the Bugmy Justice Project, which seeks to improve the sentencing processes and outcomes for Aboriginal people identified as defendants, by providing courts with additional information that addresses the personal and community circumstances of the individual Aboriginal person and relevant sentencing options.[287]

Sentencing decisions are regularly informed by pre-sentence reports (**PSR**s), which do not adequately consider cultural identity or community circumstances of Aboriginal people.[288] PSRs are prepared by Corrections and do not address systemic issues linked to Aboriginality, including intergenerational trauma, impacts of child removal and land dispossession, and Aboriginal-specific sentence options are rarely identified.[289] Furthermore, they are informed by the language and measurements of "risk" and "use a deficit metric to influence decisions on sentencing. Rather than identifying strengths, community corrections treat First Nations peoples' backgrounds and circumstances as a problem."[290]

To address this gap, VALS has been advocating for a statutory obligation requiring judicial decision-makers to take into account the unique systemic or background factors for Aboriginal people in sentencing. This requires much more than simply taking into account a "disadvantaged upbringing," as was the case in *Bergman (a pseudonym) v The Queen.*[291] It requires courts to provide space within the sentencing process to better understand an Aboriginal person's life and circumstances, including their "aspirations, interests, strengths, connections, culture, and supports of the individual, as well as the adverse impact of colonial and carceral systems on their life."[292]

This proposal draws on the Canadian federal *Criminal Code* which requires that sentencing courts take into account: "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be

[286] Michael Inman (Canberra Times) "ACT set to trial sentencing reports for indigenous offenders, like Canada's Gladue reports," 6 August 2017.
[287] Deadly Connections Australia, Bugmy Justice Project.
[288] S.M. Shepherd & T. Anthony (2018) Popping the cultural bubble of violence risk assessment tools, *The Journal of Forensic Psychiatry & Psychology*, 29:2, 211-220.
[289] Anthony, T., Marchetti, E. Behrendt, L. & Longman, C, 'Individualised Justice through Indigenous Community Reports in Sentencing,' (2017) 26(3) *Journal of Judicial Administration* 121, 135.
[290] T. Anthony, A. Lachsz and N. Waight, "The role of 're-storying' in addressing over-incarceration of Aboriginal and Torres Strait Islander Peoples," 17 August 2021.
[291] *Bergman (a pseudonym) v The Queen* [2021] VSCA 148.
[292] T. Anthony, A. Lachsz and N. Waight, "The role of 're-storying' in addressing over-incarceration of Aboriginal and Torres Strait Islander Peoples," 17 August 2021.

considered for all offenders, with particular attention to the circumstances of Aboriginal offenders."[293] In practice, this means that courts consider: (a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal person before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the person because of his or her particular Aboriginal heritage or connection.

Statutory reform has also been considered by the ALRC, which recommended in 2018 that sentencing legislation provide that, when sentencing Aboriginal and Torres Strait Islander people, courts take into account unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples.[294] VALS notes that the Department of Community Justice and Safety (**DJCS**) has been considering amendments to the *Sentencing Act 1991* (Vic) and strongly encourages DJCS to consider ALRC's proposal. We also note that the development of the new Youth Justice Act provides an important opportunity to require judicial decision-makers to consider the circumstances related to the child's Aboriginal background and to demonstrate the steps taken to ascertain relevant information.

Creating a statutory obligation is critical, but Section 3A of the *Bail Act 1977* (Vic)[295] has shown that statutory reform alone will not lead to systemic change; it must also be accompanied by practical reforms to ensure that judicial decision-makers have access to the necessary information to discharge their obligations.

Good Practice Model: Aboriginal Community Justice Reports

On 10th March 2020, VALS launched its Aboriginal Community Justice Reports (**ACJR**) Project.[296] The Project aims to reduce the overincarceration of Aboriginal people and improve sentencing processes and outcomes for Aboriginal defendants. Information in the Reports will include a more holistic account of individual circumstances, including as they relate to a person's community, culture and strengths and community-based options.

VALS is undertaking this Project, funded with an Australian Research Council grant, in partnership with the Australasian Institute of Judicial Administration, University of Technology Sydney and Griffith University. The Reports are modelled on Canada's Gladue Reports, and adapted for the Victorian context. In Victoria, 20 Aboriginal Community Justice Reports will be produced as part of

[293] Criminal Code RSC 1985, c C-46 s 718.2(e).
[294] ALRC, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, December 2017, Recommendation 6-1.
[295] Section 3A of the *Bail Act 1977* (Vic) provides that: "In making a determination…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.
[296] *Aboriginal Community Justice Reports Project: Improving sentencing outcomes and reducing overincarceration of Aboriginal people*, available at https://www.vals.org.au/unlocking-victorian-justice/

this pilot. Case works upport will be made available to each person who participates in order to provide support and care.

To be considered for an Aboriginal Community Justice Report, the following eligibility criteria must be met:

- The person must be Aboriginal and/or Torres Strait Islander;
- The matter must be listed:
  - For a plea hearing (matters that are listed for sentence appeal will not automatically be excluded from eligibility for the Project, but given the pilot will be producing only 20 reports, suitability for a report for a sentence appeal will be assessed on a case-by-case basis);
  - In the County Koori Court division or in the general list before a Judge who is eligible to sit in the Koori Court division;
  - At Melbourne or La Trobe Valley.
- The person must voluntarily consent to participating. The person whose matter is before the court should also be willing to participate in an interview after sentencing, for the purpose of researching the outcomes of the Report.

Suitability is assessed by Aboriginal Community Justice Report Project staff, situated in VALS' Community Justice Programs section. To enable assessment of suitability for an Aboriginal Community Justice Report:

- The lawyer must have an initial meeting with Aboriginal Community Justice Report Project staff;
- The person whose matter is before the court must have an initial meeting with Aboriginal Community Justice Report Project staff;
- There must be sufficient notice provided, to enable Aboriginal Community Justice Report Project staff to draft the report (at least 8 weeks). It is recommended that lawyers make a referral at the committal mention stage.

Victorian Aboriginal Legal Service

RECOMMENDATIONS

Recommendation 92. The Victorian Government should amend Section 5(2) of the *Sentencing Act 1991* (Vic) so that for the purposes of sentencing:

- Courts are required to take into account the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples;
- Judicial decision-makers must demonstrate the steps taken to discharge their obligation to consider the unique and systemic background factors affecting Aboriginal and Torres Strait Islander peoples.

Recommendation 93. The new Youth Justice Act should provide that for the purposes of sentencing:

- Courts are required to take into account the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples;
- Judicial decision-makers must demonstrate the steps taken to discharge their obligation to consider the unique and systemic background factors affecting Aboriginal and/or Torres Strait Islander peoples.

Recommendation 94. All Judges and Magistrates should be required to complete regular face-to-face training in cultural awareness, systemic racism and unconscious bias.

Recommendation 95. The Victorian Government must support self-determined initiatives to improve sentencing outcomes for Aboriginal people. This includes by directing dedicated funding from *Burra Lotjpa Dunguludja* to the Aboriginal Community Justice Reports project currently carried out by VALS and partners, as well as providing ongoing funding beyond the pilot Project.

Recommendation 96. The Victorian Government should support self-determined initiatives to improve sentencing outcomes for Aboriginal people, including by directing dedicated funding from *Burra Lotjpa Dunguludja* to the Aboriginal Community Justice Reports pilot project currently being carried out by VALS and its partners, as well as providing ongoing funding beyond the pilot Project.

Victorian Aboriginal Legal Service

Women with Dependent Children

The number of women in prisons in Victoria has increased dramatically over the past decade.[297] Between 2017 and 2019, the number of women in prison almost doubled, and incarceration of Aboriginal women almost tripled.[298] As discussed elsewhere in this submission, key drivers in the rising incarceration rate of women include changes to the *Bail Act*,[299] over-policing and punitive approaches to parole and CCO supervision.

Criminalisation and over-incarceration of Aboriginal women – both on remand and serving sentences – directly affects the rights of children and has significant and inter-generational impacts for Aboriginal families and communities. The majority of women in Australian prisons are parents, with 85 per cent having been pregnant at some point in their lives, and 54 per cent having at least one dependent child.[300]

As noted above, the Bangkok Rules emphasis the need to develop and implement gender-specific diversionary and sentencing alternatives for women who have offended,[301] particularly in regards to non-custodial measures being implemented in order to avoid the separation of women from their families and communities.[302] Furthermore, the Bangkok Rules emphasise the need to avoid custodial sentences for women with dependent children except for serious or violent offences that continue to pose a danger; and only after taking into account the best interests of the child.[303] In the practice of Victorian courts, however, magistrates currently only modify sentences on the basis of childcare responsibilities in exceptional circumstances.[304]

While custodial measures are generally sought to be avoided under the Bangkok Rules, the need to ensure appropriate measures of care for children is emphasised where a custodial sentence is imposed by the court.[305] In Victoria, studies indicate that information concerning dependent children and their needs are rarely presented in court by defence counsel and, where such information is presented, magistrates lack any guidelines concerning sentencing decisions that affect children. Issues pertaining to ensuring appropriate measures of care for children can often fall by the wayside as a result since children are not the 'core business' of the adult criminal legal system, despite evidence of inconsistent

[297] Corrections Victoria, *Annual Prisoner Statistical Profile*, June 2019. Include specific reference.
[298] Corrections Victoria, *Annual Prisoner Statistical Profile*, June 2019. Include specific reference.
[299] In June 2019, 46% of women in Victorian prisons were on remand (unsentenced) as compared with 25% in 2007. Corrections Victoria, *Annual Prisoner Statistical Profile*, June 2019
[300] Australian Institute of Health and Welfare, *The Health of Australian Prisoners,* 2018, pp. 14 and 72.
[301] Rule 57 of the Bangkok Rules.
[302] Rule 58 of the Bangkok Rules.
[303] Rule 64 of the Bangkok Rules.
[304] Flynn, C. et al. (2016). Responding to the needs of the children of parents arrested in Victoria, Australia. The role of the adult criminal justice system. 49(3) Australian & New Zealand Journal of Criminology 351-369, pp. 361.
[305] Rules 2(2) and 64 of the Bangkok Rules.

practice among magistrates adjourning sentences for a day so that arrangements can be made for the child(ren) affected.[306]

Imposing custodial sentences on mothers directly impacts dependent children, including by separating children from their mothers or exposing a child to an unsafe prison environment. Children of women who are in prison are more likely to have disrupted education, unstable housing and poor health, and all of these factors increase the risk of contact with the youth justice system and intervention by child protection.[307] Children of incarcerated parents are five to six times more likely to be involved in criminal behaviour than the average child.[308] Meanwhile, anecdotal evidence indicates that magistrates do not feel any responsibility for the consequences of sentencing decisions on children.[309]

Australia's international human rights obligations require the Victorian Government to consider the rights and the best interests of children whose mothers have been imprisoned. This includes the *Convention on the Rights of the Child*, which enshrines the right to family life and requires that the best interests of the child shall be a primary consideration in all actions concerning children.[310] According to the Committee on the Rights of the Child: "[a]lternatives to detention should be made available and applied on a case-by-case basis, with full consideration of the likely impacts of different sentences on the best interests of the affected child(ren)."[311] Under the Victorian *Charter on Human Rights and Responsibilities*, the Victorian Government is also required to protect families and children.[312]

In the UK, the Parliament is considering sentencing reform to protect the right to family life of children whose mothers are in prison.[313] The reform will require that:

- judicial decision-makers consider the best interests of the defendant's dependent children, when making sentencing decisions;
- judicial decision makers demonstrate how the best interests of the child were considered when sentencing a primary carer of a dependent child; and
- judicial decision makers consider the impact of not granting bail on the defendant's children.

[306] Flynn, C. et al. (2016). Responding to the needs of the children of parents arrested in Victoria, Australia. The role of the adult criminal justice system. 49(3) Australian & New Zealand Journal of Criminology 351-369, pp. 361-362.
[307] J Sherwood et al, *Reframing Space by Building Relationships: Community Collaborative Participatory Action Research with Aboriginal Mothers in Prison*, 2013, p.83, 85
[308] Rowland. M & Watts, A (2007) Washing State's: Effort to Reduce the Generational Impact on Crime. Corrections Today 69(4) 34-42, cited in A. Shlonsky et al, *Literature Review of Prison-based Mothers and Children Programs: Final Report* (2016). See Prison-based mothers and children programs | Corrections, Prisons and Parole
[309] Flynn, C. et al. (2016). Responding to the needs of the children of parents arrested in Victoria, Australia. The role of the adult criminal justice system. 49(3) Australian & New Zealand Journal of Criminology 351-369, pp. 362.
[310] Convention on the Rights of the Child, Articles 3(1) and 9.
[311] Committee on the Rights of the Child, Report and Recommendations of the Day of General Discussion on "Children of Incarcerated Parents" (2011), p. 6. See OHCHR | Children of incarcerated parents. Replace with reference to General Comment if there is one.
[312] Victorian Human Rights Charter 2006, Section 17.
[313] Judges must consider interests of child when sentencing mother, urges Committee - Committees - UK Parliament

When making decisions concerning the best interest of the child(ren) that may be adversely affected by sentencing decisions, a further step should be taken to ensure that the institutional 'invisibility' of affected children is minimised to the greatest extent possible, by providing them the opportunity to express their views, interests and concerns during sentencing proceedings. Not only do the decisions made by Victorian courts in relation to adult sentencing predominantly overlook the best interests of children when making decisions concerning sentences, current practices by magistrates indicate a tendency to physically remove children from the proceedings altogether by removing them from the courtroom in an effort to 'protect' them. Conversely, the UNCRC requires that children be given the opportunity to speak and be heard, either directly or through a representative, during administrative and judicial decisions that affect them.[314]

To give effect to Australia's human rights obligations, the Victorian Government should amend the *Sentencing Act* to require judicial decision-makers to take into account the best interests of any dependent children and to demonstrate how they have discharged this obligation.

RECOMMENDATIONS

Recommendation 97. The Victorian Government must amend the *Sentencing Act 1991* (Vic) so that, for the purposes of sentencing women who have offended, judicial decision-makers are required to:

- Take into account the best interests of the defendant's children, particularly dependent children;
- Ensure the provision of adequate time to women with dependent children prior to beginning a custodial sentence to make necessary arrangements for dependent children;
- Permit children to be present during sentencing proceedings;
- Permit children to express their interests, views and concerns, either directly or through a representative, during sentencing proceedings involving a parent.

Recommendation 98. The Victorian Government should equip magistrates with knowledge of factors to consider when dealing with matters in the adult criminal legal system that may directly or indirectly affect the interests of children.

[314] Articles 9(2) and 12 of the UNCRC.

Community-Based Sentences

Aboriginal people are less likely to receive a community-based sentence than non-Aboriginal people,[315] less likely to complete their orders,[316] and more likely to be imprisoned as a result of breaching an order.[317] In VALS' experience, this is because CCOs are not appropriately tailored to Aboriginal people, and the mechanisms for supporting Aboriginal people to successfully complete their community-based orders continue to be grounded in punitive and paternalistic approaches.

In 2018-2019 in Victoria, Aboriginal people made up 6.87% of the average daily community corrections population[318] versus 9.5% of the average daily incarcerated population.[319] In the same year, 5.82% of VALS criminal law matters resulted in a CCO versus 6.7% which resulted in a custodial sentence.[320]

There is a critical need to increase and strengthen community-based sentencing options, in order to reduce incarceration rates of Aboriginal people, including by:

- Introducing sentencing options between a CCO and an adjourned undertaking;
- Investing in and increasing access to culturally appropriate services and programs to support Aboriginal people on community-based orders.

Since the introduction of CCOs in 2012 and abolition of a range of other community-based orders (intensive correction order, home detention, community-based order, suspended sentences), there are now only two community-based orders in Victoria: a Drug Treatment Order and a CCO.

CCOs were introduced as a flexible option, allowing a judge or magistrate to tailor the order. Conditions attached to a CCO include standard core terms (e.g. not reoffending, not leaving Victoria without permission, reporting to a community corrections centre, complying with written directions from the Secretary to the DJCS) as well as at least one additional condition (e.g. medical treatment, unpaid community work, supervision by corrections worker, non-association with certain people, complying with curfew, staying away from a specific place or area). If an individual breaches a condition of a CCO, they may be resentenced for the original offence and may face up to 3 months additional imprisonment for the breach.[321]

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[315] As noted above, in 2019-2020, Aboriginal people made up 7.39% of the average daily community corrections offender population, although they only represent 0.8% of the total population (2016 census). See Productivity Commission, *Report on Government Services 2021*. Part C, Corrective Services Data Tables, Table 8A.8 (data on CCOs).

[316] In 2019-2020 in Victoria, 45.2% of Aboriginal people on CCOs completed their orders, versus 58.5% of non-Aboriginal people on CCOs. See Productivity Commission, *Report on Government Services 2021*, Part C, Section 8, Table 8A.21.

[317] Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, (2017) p. 113.

[318] Productivity Commission, *Report on Government Services 2020*. Part C, Corrective Services Data Tables, Table 8A.8.

[319] Ibid., Table 8A.6.

[320] In 2018-2019, 73 out of 1253 VALS criminal law matters resulted in a CCO. In the same year, 85 matters resulted in a custodial sentence. In 2017-2018, 212 out of 1367 VALS criminal law matters resulted in CCO. In the same year, 106 matters resulted in a custodial sentence.

[321] See section 83AD, *Sentencing Act (Vic)* 1991.

Victorian Aboriginal Legal Service

Despite the intention of creating a more flexible sentencing option, in VALS' experience, there are a number of challenges with CCOs which mean that our clients are often in breach of conditions and may end up with a prison sentence as a result. This is supported by data from the Productivity Commission indicating that Aboriginal people in Victoria are less likely to complete a CCO than non-Aboriginal people.[322]

In particular, we see the following issues:

- CCO conditions are often not culturally appropriate;
- Corrections Victoria take a punitive, inflexible approach to enforcing CCO conditions;
- There is a shortage in Aboriginal-led culturally appropriate programs and services to support clients on CCOs, particularly in rural and regional areas;
- Electronic monitoring of people on CCOs.

Culturally Inappropriate CCO conditions

In 1991, the RCIADIC recommended that non-custodial sentences be available, accessible and culturally appropriate, and that authorities work with Aboriginal and Torres Strait Islander groups in implementing programs.[323] Thirty years later, we continue to see culturally inappropriate conditions, which essentially set Aboriginal people up to fail.

In VALS' experience, inappropriate conditions include:

- reporting conditions that do not take into account challenges associated with lack of transport options, challenges with remoteness and clashes with cultural and family obligations;
- non-association conditions that do not take into account an individuals' family or community obligations (which may mean that it is not possible to stay away from someone);
- place or area exclusions which can be challenging in rural and remote areas where there are limited public places for individuals to gather;
- conditions requiring participation in programs can be challenging in rural and regional areas where it is harder to access culturally appropriate programs and services.

Punitive Approach Taken by Corrections

In addition to culturally inappropriate conditions, the experience of our clients is that the approach to supervising compliance with CCOs is also punitive and rigid. We regularly see instances of inflexibility with reporting conditions, and a lack of understanding as to how cultural, family and/or community obligations can impact on an individual's ability to comply with their order. For example, we have

[322] In 2019-2020 in Victoria, 45.2% of Aboriginal people on CCOs completed their orders, versus 58.5% of non-Aboriginal people on CCOs. See Productivity Commission, *Report on Government Services 2021*, Part C, Section 8, Table 8A.21.
[323] Commonwealth of Australia, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Vol 5, Recommendations 111 - 116.

clients who have missed an appointment and then reengaged soon afterwards. Rather than extending or carrying the order, the worker has recommended cancellation and resentence. In our view, the rigid approach to supervision of CCOs is one of the key reasons why Aboriginal people are less likely than non-Aboriginal people to complete their orders.

In contrast, approaches such as the Wulgunggo Ngalu Learning Place demonstrate the strength of programs that are designed jointly with Aboriginal communities, run by Aboriginal people and grounded in Aboriginal culture.[324] Currently, Wulgunggo Ngalu Learning Place has capacity to support 17 Koori men at once, with support ranging from 3-6 months. As recommended by the ALRC Inquiry into Incarceration of Aboriginal Peoples,[325] the Government should increase investment in Aboriginal-led support programs for Aboriginal people on community-based sentences, including the establishment of an equivalent program for women.

Similarly, the Local Justice Worker Program, whereby Aboriginal people on CCOs can receive support from a Local Justice Worker, has been extremely successful in providing more culturally appropriate support and addressing the barriers that prevent community members from complying with the conditions of their order.[326]

Electronic Monitoring

As noted previously, VALS is concerned that the amendments under the *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic) gives the Court power to impose electronic monitoring on people serving CCOs, who have been charged with lower level, non-violent offences.[327]

Electronic monitoring creates significant stigma and can negatively impact on a person's rehabilitation and integration. Wearing an electronic monitoring device may also discourage people from seeking employment and engaging in social and community activities. VALS is also concerned that electronic monitoring may result in a greater number of breaches of minor conditions of the CCO, which may result in a term of imprisonment. This will also result in an escalation in the *Bail Act* schedules and make it difficult for people to get bail in the future.

[324] Clear Horizon Consulting, Department of Justice, *Wulgunggo Nglu Learning Place: Final Evaluation Report* (2013), 3-4.
[325] Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, (2017), Recommendation 7–3: "State and territory governments and agencies should work with relevant Aboriginal and Torres Strait Islander organisations to provide the necessary programs and support to facilitate the successful completion of community-based sentences by Aboriginal and Torres Strait Islander offenders."
[326] Clear Horizon Consulting, Department of Justice, *Wulgunggo Nglu Learning Place: Final Evaluation Report* (2013), pp. 25-26.
[327] *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic), sections 171-173.

Victorian Aboriginal Legal Service

RECOMMENDATIONS

Recommendation 99. The Victorian Government should increase community-based sentencing options. This includes creating additional sentencing options between an adjourned undertaking and a Community Corrections Order (CCO).

Recommendation 100. The Victorian Government must work with Aboriginal organisations to implement measures to ensure that CCOs are culturally appropriate, including:

- Amending section 48A of the *Sentencing Act* so that for the purpose of attaching conditions to a CCO, courts are required to take into account the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples.
- Requiring all Judges and Magistrates to complete regular cultural competence training, to ensure that the conditions set on CCOs for Aboriginal people are culturally appropriate and achievable.
- Investing in culturally appropriate programs and supervision for Aboriginal people on CCOs, including more facilities and programs modelled off Wulgunggo Ngalu Learning Place, particularly for women.

Recommendation 101. The Victorian Government should repeal Sections 171-173 of the *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic), so that people on CCOs cannot be subject to electronic monitoring.

Mandatory Sentencing

Under the *Sentencing Act 1991* (Vic), the Court must impose a custodial order for "Emergency worker harm offences," which include the following offences[328] committed against an "emergency worker" on duty:[329]

- intentionally causing serious injury in circumstances of gross violence against an emergency worker on duty;
- recklessly causing serious injury in circumstances of gross violence against an emergency worker on duty;
- causing serious injury intentionally against an emergency worker on duty;
- causing serious injury recklessly against an emergency worker on duty;
- causing injury intentionally or recklessly against an emergency worker etc on duty intentionally exposing an emergency worker to risk by driving if the emergency worker is injured, and

[328] Section 10AA *Sentencing Act 1991* (Vic) requires the court to impose a term of imprisonment for the following offences under the *Crimes Act 1958* (Vic): Causing serious injury intentionally in circumstances of gross violence (s. 15A), Causing serious injury recklessly in circumstances of gross violence (s. 15B), Causing serious injury intentionally (s. 16) and Causing serious injury recklessly (s. 17).
[329] The definition of "Emergency worker" includes custodial officers (including prisoner officers and police custody officers), emergency workers and youth justice custodial workers. Section 10AA, *Sentencing Act 1991* (Vic).

- aggravated intentionally exposing an emergency worker to risk by driving if the emergency worker is injured.

Additionally, amendments were made to the *Sentencing Act* in 2017, requiring courts to issue a custodial order (imprisonment, drug treatment order of a youth justice detention order) for Category 1 offences.[330] Custodial orders must also be made for Category 2 offences, unless certain circumstances exist.[331]

Similarly, the *Sentencing Act* provides for mandatory uplifting of certain offences[332] committed by a young person (under the age of 21), meaning that the young person cannot receive a youth justice detention order under the dual track youth justice system; they must be sentenced to adult prison.

VALS continues to oppose mandatory sentencing schemes for the following reasons:

- They erode the fundamental principle of an independent judiciary and discretion in sentencing;
- They increase incarceration rates, and are therefore more costly;[333]
- Mandatory sentencing is not an effective deterrent;
- They contradict the principle of proportionality and imprisonment as a last resort;
- Mandatory sentencing schemes have proven to be an ongoing driver of the over-incarceration of Aboriginal and Torres Strait Islander people. In this regard, mandatory sentencing contradicts the Victorian Government's commitment to addressing over-incarceration of Aboriginal people;[334]
- Mandatory sentencing for offences against emergency workers acts as a deterrent and disincentive for Aboriginal people to call on emergency and protective services to assistance in a time of crisis.

[330] See Sections 3 and 5(2G) *Sentencing Act 1991* (Vic).
[331] See Sections 3 and 5(2H) *Sentencing Act 1991* (Vic).
[332] A young person being sentenced for a "Category A serious youth offences" cannot access youth detention, unless exceptional circumstances exist. See Sections 3 and 32(2C), *Sentencing Act 1991* (Vic). A court must not impose a youth justice centre order or a youth residential centre order on a young person being sentenced for a "Category B serious youth offence" if they have previously been convicted of a Category A or Category B serious youth offence, unless exceptional circumstances exist. See Sections 3 and 32(2D) *Sentencing Act 1991*.
[333] Australian Law Reform Commission (ALRC), Report 133, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander peoples,* December 2018, 273.
[334] Department of Justice and Community Safety (DJCS), *Burra Lotjpa Dunguludja, Aboriginal Justice Agreement: Phase 4 (AJA4)* 2018, 32. See goal 2.1 Aboriginal people are not disproportionately worse off under policies and legislation; goal 2.2 Fewer Aboriginal people enter the criminal justice system; goal 2.3 Fewer Aboriginal people progress through the criminal justice system; and goal 2.4 Fewer Aboriginal people return to the criminal justice system.

Victorian Aboriginal Legal Service

RECOMMENDATION

Recommendation 102. The Victorian Government should repeal mandatory sentencing schemes under the *Sentencing Act 1991* (Vic), including for the following offences:

- Category 1 and Category 2 offences;
- Offences against "emergency workers";
- Category A and Category B "serious youth offences."

Police Powers & Accountability

COVID-19

Victoria has responded to the COVID-19 pandemic with an approach too often centred on expansive police powers and heavy enforcement of public health regulations. This approach is counterproductive in public health terms, and does not serve to effectively change behaviour or reduce disease transmission, and we have made recommendations reflecting this in multiple forums.[335]

In the context of this Committee's Inquiry, VALS wishes to highlight that this misguided pandemic response also has the effect of creating a large number of unnecessary contacts with police and the justice system for marginalised people. Expansion of police powers, and the disproportionate use of these powers and of heavy public health fines against already marginalised communities, leads to engagement with police which ultimately lead to more arrests, more people unnecessarily taken into custody and higher incarceration rates.

[335] VALS (2020), *Submission to the Public Accounts and Estimates Committee COVID-19 Inquiry*.
VALS (2021), *Building Back Better: COVID-19 Recovery Plan*.
VALS, 18 August 2021, 'The Andrews Government's love affair with policing is cheating Victoria out of an effective pandemic strategy'. Accessed at https://www.vals.org.au/the-andrews-governments-love-affair-with-policing-is-cheating-victoria-out-of-an-effective-pandemic-strategy/.
VALS, 11 August 2020, 'Increased police powers must not be free kick for discrimination'. Accessed at https://www.vals.org.au/increased-police-powers-must-not-be-free-kick-for-discrimination/.
Youthlaw, Fitzroy Legal Service, Inner Melbourne Legal Centre, Barwon Community Legal Service, Springvale Monash Legal Service & VALS, 28 May 2021, 'Community lawyers call for public health approach to compliance with directions during circuit breaker lockdown'. Accessed at https://youthlaw.asn.au/community-lawyers-call-for-public-health-approach-to-compliance-with-directions-during-circuit-breaker-lockdown/

COVID-19 Fines

As VALS has previously highlighted, COVID-19 fines have disproportionately been issued to already marginalised communities in Victoria. Fines were issued far more often in the state's most disadvantaged Local Government Areas.[336] Data shows that fines were issued more often to historically overpoliced communities, such as the Australian Sudanese and South Sudanese communities in Melbourne.[337] An alarming number of children have received fines, of amounts greater than a court would be permitted to order.[338] There is no recognition of the range of reasons children may have for breaking restrictions such as curfew, including in instances where they do not have a safe home, nor of the fact that they do not have the financial capacity to pay fines.

Police often do not record Aboriginality for people receiving COVID-19 fines, and the way data is published further limits the possibilities for analysis. For example, information on fines issued to Aboriginal people broken down by Local Government Area would help identify parts of the state where enforcement is particularly disproportionate.

However, the data does show that at least 1.6% of Aboriginal people in Victoria had COVID-19-related offences recorded by Victoria Police, compared to 0.2% of non-Indigenous Victorians.[339] This disproportion is particularly striking because 84% of offences were recorded in metropolitan Melbourne. Only 49.5% of Aboriginal Victorians live in Melbourne, compared to 75% of other Victorians.[340] With the concentration of COVID-19 restrictions and recorded offences in Melbourne, one would except that Aboriginal people in Victoria would receive *fewer* fines per capita than non-Aboriginal people. Instead, they received at least eight times more.[341]

Aboriginal people in Victoria were also significantly more likely to have COVID-19 offences recorded alongside other offences: from April to September 2020, this was the case for 90% of Aboriginal people

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[336] VALS (2021), *Building Back Better: COVID-19 Recovery Plan*, p96. Available at https://www.vals.org.au/wp-content/uploads/2021/02/Building-Back-Better-Victorian-Aboriginal-Legal-Service-COVID-19-Recovery-Plan-February-2021-FOR-DISTRIBUTION.pdf.

[337] The Guardian, 28 September 2020, 'Sudanese and Aboriginal people overrepresented in fines from Victoria police during first lockdown'. Available at https://www.theguardian.com/australia-news/2020/sep/28/sudanese-and-aboriginal-people-overrepresented-in-fines-from-victoria-police-during-first-lockdown

[338] VALS (2021), *Building Back Better: COVID-19 Recovery Plan*, pp. 120-121. Available at https://www.vals.org.au/wp-content/uploads/2021/02/Building-Back-Better-Victorian-Aboriginal-Legal-Service-COVID-19-Recovery-Plan-February-2021-FOR-DISTRIBUTION.pdf.

Youthlaw, Submission on behalf of COVID-19 Fines Community Lawyers Working Group to the Inquiry into the Victorian Government's Response to the COVID-19 Pandemic (30 November 2020) 2, available at https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Submissions/209._Youthlaw_Redacted.pdf

[339] Crime Statistics Agency (2021), *COVID-19 Unique Offenders – year ending December 2020*, Table 05.

[340] Crime Statistics Agency (2021), *COVID-19 Recorded offences by LGA – year ending December 2020*, Table 02.

[341] The data suggest extremely high enforcement rates in some areas – in the City of Melbourne and City of Yarra, the number of Aboriginal people issued fines was 13-15% of the Aboriginal population. However, many fines were likely issued in these LGAs to non-residents, and there is no comparable data for the non-Aboriginal population to support proper analysis of whether these areas saw more disproportionate enforcement approaches.

who had a public health offence recorded, compared to only 74% of non-Indigenous people.[342] This is a major concern. It suggests either that police are using public health rules as an opportunity to stop and question people for other policing purposes, or that they are recording public health offences simply to increase the penalties for people they had already stopped over other offences. Either practice would constitute a misuse of public health powers for unrelated purposes, and is likely to cause resentment towards and cynicism about important public health measures, as well as leading to unnecessary fines and arrests, which can propel into the justice system and, in turn, incarceration.

This phenomenon has not been restricted to Victoria, indicating that a disproportionate impact on Aboriginal people and other marginalised communities is a consequence of expanding police powers. Despite having a relatively low number of fines related to the enforcement of COVID-19 health orders last year, evidence indicates that such fines issued in New South Wales were disproportionately "issued in areas largely populated by Indigenous or migrant Australians."[343] NSW data also echoes the Victorian experience of public health stops of Aboriginal people leading to further police contact. Between 15 March 2020 and 15 June 2020, 17,985 persons were stopped in relation to police enforcement of public health orders, at which point 45% were searched and 0.01% were arrested. However, the statistics show that of the 848 Aboriginal persons stopped, 74% were searched and 0.03% were arrested.[344]

COVID-19 offences are associated with extremely high financial penalties – far higher than other fines that can normally be issued by police – and when these fines are levied on vulnerable people there is effectively no prospect that they will be able to be paid. In August 2021, more than three-quarters of COVID-19 fines remained unpaid.[345] This reflects the unmanageable financial burden imposed by these fines. Even when they are not paid, fines are a source of substantial stress for people in difficult situations who may also be living with unemployment, disability or mental health issues.

The problems associated with COVID-19 fines are compounded by the absence of a functioning internal review process that abides by precepts of administrative justice. Given the unusually large size of the financial penalties and their concentration in marginalised communities, where ability to pay is very often an issue, there is a clear need for a fair and efficient review process to recognise people's special circumstances and cancel, waive or reduce fines. VALS, along with other community legal centres, has been very concerned about the inadequacy of existing review options. Victoria Police's internal review process is incredibly opaque. VALS has had clients issued with infringements when they had lawful reasons to be outside the home, and has sought internal review of those

[342] Crime Statistics Agency (2020), *COVID Offenders by Sex, Age, Country of Birth and Aboriginal Status*, Table 3.
[343] Faruqi, Osman. 'Compliance fines under the microscope.' The Saturday Paper. April 18-24 2020. Available at https://www.thesaturdaypaper.com.au/news/health/2020/04/18/compliance-fines-under-the-microscope/15871320009710#hrd.
[344] Boon-Kuo, L., *et al*., Policing biosecurity: police enforcement of special measures in New South Wales and Victoria during the COVID-19 pandemic. 33:1 *Current Issues in Criminal Justice* 76-88 (2021), pp. 80-81.
[345] The Saturday Paper, 7 August 2021, 'Almost all Covid-19 fines remain unpaid'. Accessed at https://www.thesaturdaypaper.com.au/news/economy/2021/08/07/almost-all-covid-19-fines-remain-unpaid/162825840012223.

infringements. Victoria Police has rejected these internal reviews without providing any reason. There is no transparent process through which the reason for police decisions can be understood. Decisions have often been provided outside the prescribed timeframe, with only pro-forma reasons, and after notices were served directly to clients rather than to their legal representatives. All of these are significant issues which demonstrate a lack of procedural fairness in the issuing and review of COVID-19 fines, and which deny a fair opportunity for people affected to respond to and challenge their fines. VALS and the community legal sector have asked the Director of Fines Victoria to intervene in Victoria Police's internal review process because of these concerns.

Overall, public health fines have been used disproportionately against already marginalised communities, in a manner which does not provide avenues for redress to ensure fair outcomes. This continues to bring people into unnecessary contact with police which, as noted above and emphasised by VALS consistently, leads ultimately to more arrests and incarceration.

Contact Tracing & Privacy

VALS also wishes to highlight the importance of firewalling pandemic-related health data, including QR check-in data and other contact tracing information, from any access by police. This data can easily be used to extract private information, such as exactly who someone has been associating with and how frequently, which is liable to misuse for non-health-related purposes. An effective check-in system requires cooperation from a very large number of people in the community, and this can only be achieved with a guarantee that contact tracing data cannot be used by police.

Victoria has a good track record in refusing to share information from Services Victoria QR check-ins with police.[346] As with contact tracing interviews, however, it is important that this approach is legislated for. In addition, it is still possible for police to access check-in information if they are able to obtain a court order. Other jurisdictions – notably Western Australia – have moved to block anyone except health authorities accessing check-in data.[347] Though courts provide an important safeguard, VALS agrees with Liberty Victoria that "even one instance of police being granted access via a court order would seriously undermine the public's willingness to check in."[348] VALS and other legal organisations have called for the check-in system to be protected by legislation from use for any

[346] The Age, 21 June 2021, 'Police sought access to QR check-in data intended for contact tracing', available at https://www.theage.com.au/politics/victoria/police-sought-access-to-qr-check-in-data-intended-for-contact-tracing-20210621-p582x4.html.
Sydney Morning Herald, 6 September 2021, 'Breach of trust': Police using QR check-in data to solve crimes.
[347] ABC News, 16 June 2021, 'Police would not agree to stop accessing COVID SafeWA app data, Premier Mark McGowan says'. Available at https://www.abc.net.au/news/2021-06-16/police-refused-to-stop-accessing-safewa-app-data-premier-says/100218764.
[348] The Age, 22 June 2021, 'Police union, opposition and lawyers demand protection of QR data'. Available at https://www.theage.com.au/politics/victoria/police-union-opposition-and-lawyers-demand-protection-of-qr-data-20210622-p5836h.html.

purpose other than contact tracing.[349] This is important for the state's health response, but also because it ensures that public health restrictions and associated data collection do not widen the net of people brought into contact with police and the criminal legal system. Reducing these kinds of contacts and overpolicing is critical to reducing Victoria's prison population.

RECOMMENDATIONS

Recommendation 103. The Victorian Government should withdraw increased police powers as soon as the states of emergency and disaster end. Any proposed, permanent increased powers must be subject to careful and proper scrutiny after the pandemic.

Recommendation 104. Police must responsibly exercise their expansive powers, acknowledging that around the world, policing the pandemic through fines and arrests has disproportionately impacted marginalised communities, including Indigenous peoples.

Recommendation 105. Police should be required to record the Aboriginal status for all people they record public health-related offences against.

Recommendation 106. The Crime Statistics Agency must be required to publish regular and timely data on public health offences, with breakdowns by Aboriginal status; country of birth; Local Government Authority; and age.

Recommendation 107. When police have stopped someone in relation to public health rules, they should not be permitted to:

- Execute outstanding warrants;
- Question them about unrelated matters; or
- Search them, except for serious crimes specified by legislation.
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Recommendation 108. Internal review of COVID-19 fines by Victoria Police should be subject to the same administrative standards as other agencies. This includes a requirement to articulate reasons as to why an internal review is refused.

[349] VALS (2021), *Andrews Government Must Ensure Trust in COVID Check-in Data Privacy*. Available at https://www.vals.org.au/andrews-government-must-ensure-trust-in-covid-check-in-data-privacy/.

Victorian Aboriginal Legal Service

Protective Services Officers

VALS has raised concerns consistently in recent years about the powers and conduct of Protective Services Officers (**PSO**s), Victoria Police personnel who operate with many of the same powers as sworn police officers without the same degree of training. As we have noted previously, the Independent Broad-based Anti-orruption Commission (**IBAC**) has raised significant issues about PSO conduct as long ago as 2016.[350]

The remit of PSOs was expanded in 2020 during the second wave of COVID-19 infections in Victoria. Previously, PSOs were able to work only on the public transport network and at places designated by the Government in regulations – typically to support management of major events. The *Police and Emergency Legislation Amendment Act* significantly expanded this, giving police themselves – rather than the Government – the power to declare areas in which PSOs can operate. These declarations can last up to twelve months, and shorter declarations of up to 48 hours can be made with almost no preconditions or safeguards.

There was no demonstrated need for this expansion. As VALS has previously noted, there is a clear history of measures taken against 'antisocial behaviour' having a disproportionate impact on Aboriginal people, homeless people, people with mental health or substance use issues, and children.[351] Areas for PSO operation can now be designated in a number of different ways, with very little notice and for extended periods, and publicised in numerous different places ranging from the Government Gazette to the Victoria Police website. This makes it almost impossible for members of the community to be aware of when and how PSOs are permitted to operate, and also makes it more difficult for legal services to support clients in challenging their mistreatment by PSOs.

More broadly, the amendments introduced in 2020 only highlight the fact that PSOs exercise significant power without adequate training. This is an ongoing issue which brings more and more marginalised people into contact with police and the justice system, through the operation of under-trained officers wielding excessive powers. Police contact which starts with needless overpolicing of 'antisocial behaviour' can easily lead to detention, further police contact and entrenchment with the criminal legal system.

[350] IBAC (2016), *Transit Protective Services Officers: An exploration of corruption and misconduct risks*.
[351] BBB, p96.

Victorian Aboriginal Legal Service

RECOMMENDATIONS

Recommendation 109. *Police and Emergency Legislation Amendment Act 2020* (Vic) amendments about expanding and permitting the expansion of designated areas in which PSOs operate, should be repealed.

Recommendation 110. PSOs should not have powers of detention or arrest. They should also not have the power to carry weapons such as OC spray.

Oversight & Complaints

An Issue that Needs to be Addressed – Is IBAC the Right Body for Police Oversight?

VALS has serious concerns that IBAC has at no point in its history demonstrated a capacity to deliver independent or adequate investigations into police misconduct against Aboriginal people.[352] IBAC has supported and enabled an approach to misconduct complaints which is centred on Victoria Police investigating themselves. This approach, which fails to adequately account for the major racial disparities in misconduct complaints and for the possibility of systemic misconduct issues which cannot be identified or addressed from inside Victoria Police, has little hope of winning trust or credibility with the Aboriginal community.

The most significant challenge faced by IBAC is that it is perceived as ineffective at dealing with police misconduct by a substantial number of community members, clients and stakeholders with which VALS interacts. If IBAC is to continue in its watchdog role, there would need to be a significant overhaul of IBAC's operating approach and a reorientation of its attitude to the investigation of police complaints. As things currently stand, the number of referrals to Victoria Police for self-investigation inhibits proper oversight and creates the perception that IBAC is a 'rubber stamp' agency. A question that must be posed at this juncture is whether the persistent deficiencies in IBAC's operations can, in fact, be remedied, or whether establishing a new, specialised police oversight body is required.

Key Characteristics of an Effective Police Oversight Body

VALS continues to be of the view, as stated in our submission to the *Parliamentary Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria*, that the current police complaint system is not working.[353]

[352] VALS (2021), *Submission to the Development of IBAC's Strategic Plan 2021-2024*, p4.
[353] Ibid, p7.

Victorian Aboriginal Legal Service

VALS reiterates recommendations that it has previously made, in *The effectiveness of the Victoria Police Complaint System for VALS clients*, that there should be an independent oversight body for police complaints.[354] VALS reaffirms its support for an effective complaints system characterised by the following principles:

- *Independent*: Institutionally, practically, culturally, and politically, from the police force and associated unions;
- *Capable of conducting adequate investigations*: adequately resourced to be able to ascertain whether police have breached legal or disciplinary standards, and whether they have acted in compliance with human rights;
- *Prompt*: Immediate interviewing of suspects and witnesses, enforceable timelines for investigation, and prioritising the provision of documents by police;
- *Transparent*: Regular and public reporting of police complaints including outcomes, disciplinary action, civil litigation and prosecutions;
- *Victim-centred and victim-participation*: protection from victimisation after making a complaint such as scrutinising any charges laid after a complaint has been made of as possible misconduct, permitted to provide evidence, provided with a full and detailed explanation of the reasons for their complaint outcome.[355]

Specifically, the following procedural elements are essential:

- Complaint histories for police should be available to investigators;
- Documents associated with police complaints should be accessible;
- Culturally appropriate mediation should be developed for police complaints, to be available where both parties consent. This should be developed in partnership with Aboriginal communities and organisations, including VALS;
- Additional funding should be provided to VALS and other legal services currently assisting Aboriginal people to make police complaints;
- There needs to be a focus on collecting and publishing accurate data of police complaints, including data on Aboriginal complainants;
- Where complaints continue to be investigated by Victoria Police (for example, customer service complaints), that complainants should have the ability to request an external review of the investigation of their complaint.[356]

VALS will be releasing a paper shortly that discusses in greater detail best practice models.

[354] VALS (2021), *Building Back Better: VALS COVID-19 Recovery Plan*, p105.
[355] Ibid, p106.
[356] Ibid.

The Experiences and Needs of Aboriginal People

Research has clearly established that complaints about police misconduct made by Aboriginal people in Victoria are systematically different from those made by the non-Aboriginal population. They are far more likely to involve excessive force, duty failure and demeanour problems including racism, whereas the general population most commonly complains about customer service issues.[357] As a result, any police oversight body will have a caseload of serious police misconduct complaints that consistently involve a disproportionate number of Aboriginal and Torres Strait Islander complainants. As this is a predictable and consistent feature of police oversight work, there should be a well-established processes for handling these complaints in a transparent, professional and culturally appropriate manner. IBAC's lack of focus on the experiences and needs of Aboriginal people demonstrates a concerning failure to understand the racial disparities in police misconduct issues, a core function of IBAC's remit.

A planned research report on IBAC's audit of how Victoria Police handles complaints made by Aboriginal people was due for publication in 2020-21 but has not yet been issued. VALS looks forward to engaging with this report, but emphasises that focused attention on Aboriginal issues must be a mainstreamed part of any police oversight body's strategic approach, not a subject of one-off research.

Police Investigating Police

VALS is concerned that IBAC's role in police oversight is largely limited to a complaint triage service, with IBAC having limited oversight of internal police investigations even in cases of serious police misconduct.

In the vast majority of complaints, IBAC does not gather evidence, further compromising its ability to provide adequate oversight to police complaints. This issue is not, however, limited to police complaints. Significantly, when a person dies in police custody in Victoria, the death is subject to a mandatory investigation and inquest by a coroner. The investigation of the death and preparation of evidence for the coroner is carried out by a member of Victoria Police. It is a clear conflict of interest to have police investigating allegations of police misconduct and deaths in police custody.

The United Nations Human Rights Committee (**UNHRC**) has found internal investigations by Victoria Police into alleged human rights abuses by police are in breach of the *International Covenant on Civil and Political Rights*.[358] For a police complaints and oversight body to be independent, there should be

[357] Victoria Police Ethical Standards Unit & Department of Justice Indigenous Issues Unit (2008), *Koori Complaints Project 2006-2008: Final Report*, p19.
Flemington & Kensington Legal Centre (2015), *Police Accountability and Human Rights Clinic: Report on the first year of operation*.
[358] *Horvath v Australia.*

no institutional or hierarchical connections between the investigators and the officer(s) involved in the complaint. There must be practical and cultural independence from the police. The current system fails to meet this standard of independence, as the overwhelming majority of police complaints are referred by IBAC to Victoria Police, where they are investigated internally by Victoria Police, often by officers stationed alongside the officer(s) under investigation.

VALS' position is that for IBAC to be an effective police oversight body, it needs to develop a far more robust investigative capacity and significantly reduce, if not eliminate, the use of referrals back to Victoria Police. This would require a major shift in IBAC's strategic orientation, given the almost total reliance on police referrals at present. In 2019-20, IBAC assessed 3,145 allegations against police and determined 1,392 required investigation. However only 32 were investigated directly by IBAC, and only 59 of those referred back to Victoria Police were comprehensively reviewed. This leaves 93.5% of allegations which were investigated by Victoria Police without any meaningful involvement from IBAC.[359]

Narrow Focus of Investigations – A Missed Opportunity to Address Entrenched, Systemic Issues

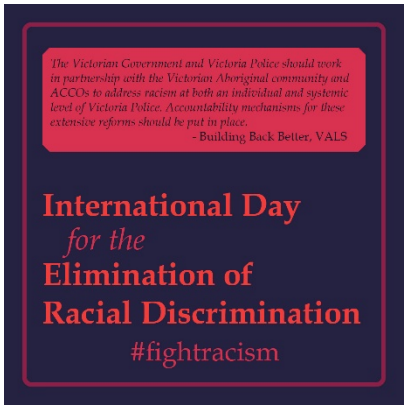
Given the very small number of investigations undertaken by IBAC into police misconduct, it is not surprising that investigations have been focused on the most serious cases of police misconduct. While VALS had welcomed IBAC's decision to investigate the extreme misconduct displayed by police during the arrest of a man with mental health issues in Epping in September 2020, independent investigation of police should be the norm, not the exception reserved for the most egregious cases or those with significant media coverage.[360]

IBAC's narrow focus on only the most extreme cases, with the majority of complaints being left to Victoria Police to self-investigate, allows for abuse to become entrenched and prevents IBAC from identifying patterns of misconduct. Investigation of complaints by Victoria Police on the basis of individual incidents can obscure the cause or extent of systemic problems. This is particularly the case if referrals to Victoria Police lead to investigations of such 'minor' complaints being conducted by officers affected by the same cultural and systemic factors that contributed to the misconduct being investigated, making it unlikely these issues will be treated seriously or there is the ability to identify the wider problem. This remains a concern even if investigations are conducted fairly and properly. For example, incidents of racist language or behaviour, even if taken seriously, may only lead to sanctions or training for the individual officers involved in a particular incident, rather than identification of the cultural factors in a unit, station or command which lead to such problems. By

[359] IBAC, *Annual Report 2019/20*, p44. Available at https://www.ibac.vic.gov.au/publications-and-resources/article/annual-report-2019-20.
[360] IBAC, 16 July 2021, 'Outcome of IBAC's investigation into the conduct of Victoria Police officers in the apprehension of a person in Epping in September 2020'. Accessed at https://www.ibac.vic.gov.au/media-releases/article/outcome-of-ibac's-investigation-into-the-conduct-of-victoria-police-officers-in-the-apprehension-of-a-person-in-epping-in-september-2020.

Victorian Aboriginal Legal Service

failing to properly locate individual incidents within broader, systemic issues, IBAC risks failing to address systemic issues entirely and risks incidents being treated on an individual level without proper consideration for the widespread severity of the issue.



Last year, the Black Lives Matter movement brought global attention to the systemic racism endemic to policing. Footage of African-American man, George Floyd, being killed at the hands of police officers triggered global protests and catapulted conversations about police accountability into the mainstream. In Australia, the movement focused on the lack of accountability for the more than 475 deaths in custody since the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**) alongside the often violent over-policing of Aboriginal people in Australia. At the same time that this movement was gaining momentum in Australia, footage emerged of NSW Police kicking and pinning down an Aboriginal teenager during an arrest, with the teenager not being charged with any offences.[361]

VALS is particularly concerned about this issue because Aboriginal people are routinely affected by systemic issues in the criminal legal system, and the perception in the community that making complaints to police is futile strongly suggests that the complaints system is not equipped to identify structural issues or take complaints about systemic racism seriously. VALS expects Victoria's police complaints body to develop a strategy on systemic racism, ensuring investigations into racist police behaviour on an individual level lead to systemic responses and are not confined to findings of individual misconduct. The issue of systemic racism in Victoria Police must be at the forefront of any police oversight body's work, to achieve improved outcomes and protections for Aboriginal people.

Community Engagement

IBAC procedures lack the transparency and accessibility that is needed in an effective police watchdog.[362] VALS notes that IBAC has previously made recommendations about the transparency of Victoria Police's complaints investigations and highlighted best practice for the communication of outcomes to complainants.[363] Research on VALS client files indicates that these recommended practices for communication are very rarely followed in practice.[364] This underlines the need for an

[361] ABC News, 2 June 2020, 'NSW Police investigate officer filmed kicking, pinning down Indigenous teen during arrest'. Available at https://www.abc.net.au/news/2020-06-02/nsw-police-investigate-officer-over-arrest-of-indigenous-teen/12310758.
[362] VALS, *Building Back Better: COVID-19 Recovery Plan* (February 2021), available at https://www.vals.org.au/wp-content/uploads/2021/02/Building-Back-Better-Victorian-Aboriginal-Legal-Service-COVID-19-Recovery-Plan-February-2021-FOR-DISTRIBUTION.pdf
[363] IBAC (2016), *Audit of Victoria Police complaints handling systems at regional level*, pp81-85.
[364] VALS (2016), *The effectiveness of the police complaint system for VALS clients*, p37.

independent oversight body to play a more robust role in the investigation of complaints and to put transparency and a victim-centred approach at the heart of its procedures.

VALS is of the view that an adequate police complaints and oversight body must engage regularly with community organisations in order to understand the needs of people impacted by over-policing and police misconduct. VALS, alongside other community legal centres and community organisations, can provide valuable feedback, especially in relation to people who decide not to make or abandon complaints, and their reasons for doing so. Furthermore, engaging regularly with community organisations provides an opportunity to rebuild confidence among Aboriginal people in Victoria in a police complaints and oversight body.[365]

Prosecution for Police Misconduct and Deaths in Custody

A police complaints and oversight body should have the power to refer cases for criminal prosecution and suggest disciplinary measures to Victoria Police.[366] The Police Ombudsman of Northern Ireland (**PONI**) provides an international example of an oversight body with adequate powers. The PONI Ombudsman can refer matters to the public prosecutor or recommend disciplinary action be taken against an officer to the Chief Constable.[367]

Despite more than 475 Aboriginal people dying in custody since 1991, no one has been convicted for any of these deaths. Aboriginal communities, organisations and families whose loved ones have died in custody continue to advocate for an end to police impunity, advocating that "[a]ll deaths associated with police conduct must be investigated by an independent body. This should include deaths occasioned by the failure of police to discharge their duties where it is foreseeable that a failure of police to act could lead to a real and immediate risk of death caused by the actions of a third party."[368]

In August 2020, when the OPP announced its decision not to prosecute in the Tanya Day case despite a referral from the Coroner to open a criminal investigation into the police officers' conduct, VALS supported the Day family's calls for justice.[369] VALS affirmed their support for the Day family's assertion that "it is in the public interest and the interests of Aboriginal people across Australia that the police be held accountable for their actions."[370] VALS highlighted that an opportunity to achieve justice has been "squandered, and it has been squandered in the context of the Black Lives Matter movement gaining momentum across the world, and in Australia."[371]

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[365] Ibid.
[366] Who Polices the Police? The Role of Independent Agencies in Criminal Investigations of State Agents, Open Society Justice Initiative, access at: www.justiceinitiative.org/publications/who-polices-the-police-the-role-of-independent-agencies-in-criminal-investigations, p10.
[367] Police (Northern Ireland) Act 1998, s59.
[368] VALS (2021), *Building Back Better: VALS COVID-19 Recovery Plan*, p108.
[369] Ibid.
[370] Ibid.
[371] Ibid.

Victorian Aboriginal Legal Service

Prosecutions against the police play an important role in police accountability and providing a sense of justice to family members and the community of the deceased. Criminal prosecutions are important as they hold the individual officer(s) accountable for their criminal conduct and are crucial in upholding the rule of law and demonstrating that police are not above the law and cannot act with impunity. Civil litigation against police officer(s) involved in police contact deaths may provide significant financial compensation to victims and their families.

In death in custody cases where the OPP decides not to prosecute, the reasons for their decision should be provided to the family of the deceased. Requiring the OPP to provide reasons for not pursuing criminal charges enables involved parties to understand the scope of the investigation and the legal reasons for the determination that no reasonable grounds exist to conclude a criminal offence may have occurred.[372]

OPCAT

The mandate of National Preventive Mechanisms (**NPM**s) which will be established by or designated under OPCAT must encompass police custody, including places of detention in which people may be detained for less than 24 hours. The importance of robust detention oversight of police custody has been demonstrated:

> Carver and Handley, in their study on whether prevention of torture works, found that despite the fact that the greatest risk of torture (noting this study did not extend to ill-treatment) is in police custody, monitoring bodies focused more on prisons. They recommended that monitoring bodies more frequently visit police stations. Similarly, the UN *Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (**SPT**) recognises that 'while all detainees are in a position of vulnerability, those in police cells awaiting questioning and those in pretrial custody… are particularly vulnerable.[373]

RECOMMENDATIONS

Recommendation 111. The Victorian Government should establish a specialist, independent, statutory body to adjudicate police complaints.

Recommendation 112. An effective complaints system must be characterised by the following principles: Independence, Capability to conduct adequate investigations, Promptness, Transparency, Victim-centred and victim-participation.

[372] Who Polices the Police? The Role of Independent Agencies in Criminal Investigations of State Agents, Open Society Justice Initiative, p62.
[373] VALS (2021), *Building Back Better: VALS COVID-19 Recovery Plan*, p110.

Victorian Aboriginal Legal Service

Recommendation 113. A police oversight body referring matters back to Victoria Police for their own internal investigation should be the exception. The default position should be the independent body conducting its own investigations and comprehensive reviews.

Recommendation 114. A police oversight body should investigate systemic police misconduct, not only serious incidents. A focus on the most extreme incidents, leaving individually 'minor' cases for Victoria Police to investigate itself, allows abuses to become widespread and entrenched, and prevents this body from recognising patterns of misconduct.

Recommendation 115. A police oversight body should develop a strategy for identifying and properly investigating systemic racism.

Recommendation 116. A police oversight body should make Aboriginal justice issues a key focus of their Strategic Plan.

Recommendation 117. A police complaints and oversight body should have the power to refer cases for criminal prosecution and suggest disciplinary measures to Victoria Police.

Recommendation 118. Police must be held accountable through criminal and civil processes for all future and historic Aboriginal deaths in custody. This includes the immediate referral to the OPP for criminal charges in all cases where there is sufficient evidence, as well as providing adequate compensation to victims where appropriate.

Recommendation 119. All deaths associated with police conduct must be investigated by an independent body. This should include deaths occasioned by the failure of police to discharge their duties where it is foreseeable that a failure of police to act could lead to a real and immediate risk of death caused by the actions of a third party.

Recommendation 120. Complaints outcomes must identify if the facts support a finding that Victoria Police has acted unlawfully in relation to a death in custody, and recommend matters to the OPP for prosecution. Where the OPP decides to not prosecute following an independent finding of misconduct by Victoria Police, the reasons for the decision should be provided to the family of the person who has died in custody.

Recommendation 121. The Victorian Government must ensure the mandate of the National Preventive Mechanisms which will be established/designated under OPCAT includes police custody, places of detention in which people may be detained for less than 24 hours, such as police vehicles and cells.

Victorian Aboriginal Legal Service

Body Worn Cameras

The use of Body-Worn Cameras (**BWC**s) by members of Victoria Police and Protective Services Officers (**PSO**s) is currently in its fifth year. BWCs are now used by a range of prescribed officers, including law enforcement, corrections, and emergency personnel. The main supposed benefits of the widespread deployment of BWCs include:

- Enhanced transparency and protection for both public officials and the community through the availability of unbiased video records of interactions between officials and citizens;
- Improved accountability outcomes flowing from the availability of such records; and
- The enhancement or establishment of community trust in the conduct of public officials.

Unfortunately, the current legislative regime enshrined in the *Surveillance Devices Act 1999* (**SDA**) and the *Surveillance Devices Regulations 2016* (**SDR**) actively works to frustrate the realisation of these objectives. While BWC footage is disclosed in the course of criminal proceedings pursuant to s30F(1)(c) of the SDA, that same footage is not accessible for members of the public through any other legal or administrative channel. It cannot be obtained through discovery or via subpoena in civil proceedings, accessed under the *Freedom of Information Act 1982* (**FOI Act**), or obtained by citizens to help substantiate complaints of official misconduct. Further, s30E of the SDA criminalises certain disclosures of BWC footage, even where that footage has been lawfully obtained. This has wide-ranging legal and ethical implications for VALS clients and staff members.

As was noted in *German v State of Victoria* [2020] VCC 1517 (***German***), the current legislative and regulatory scheme effectively precludes the discovery of BWC footage in the course of civil litigation. This is an unfortunate and untenable situation for persons who are victims of state violence and official misconduct. They find themselves in the position of having BWC footage used to prosecute them, while being unable to rely upon the same footage in their efforts to obtain justice for wrongs done to them by public officials.

VALS is of the view that the most effective solution to the issues created by the current SDA and SDR provisions on BWC footage is to remove BWC footage from that legislative regime entirely. The decision by Parliament to legislate for the BWC rollout across the public sector by utilising the framework of Part 5 of the SDA has created numerous issues for lawyers practising at the intersections of criminal and civil law, particularly on matters concerning law enforcement accountability.

There are three main ways in which the current regime to regulate BWC footage fails to achieve the objectives of accountability and transparency.

First, as stated in the *German* decision, evidence relied on by public authorities in the course of prosecutions is not available to be used against those same public authorities and their officers in civil proceedings.

Second, the regime does not provide any pathway for citizens to access BWC footage through FOI applications or pre-trial disclosures. This produces the result that while the legislation states that a permissible purpose for the use of BWC footage is that it can be used as part of disciplinary investigations and complaints, there is no pathway for members of the public who wish to lodge complaints to access footage for that purpose.

Third, the regime potentially criminalises information sharing by lawyers and others who legitimately and legally obtain BWC footage. s30E of the SDA makes it an offence to disclose BWC footage (or information disclosed from BWC footage) for a purpose other than those enshrined in the SDA and SDR. This limitation can only be overcome if, in accordance with s30E(4) of the SDA, the footage is played in open court or otherwise enters the public domain. BWC footage can, of course, only enter the public domain if a public authority chooses to publish it in some way.

Further, the current regime lacks clarity regarding the consequences of playing the footage in open court. While further disclosure or description of the footage is no longer criminally sanctionable, the footage is not necessarily deprived of its status as locally protected information. There is also no affirmative basis for disclosure under s30F. At VALS, where some lawyers work across multiple practice areas, and where our criminal team works collaboratively with our civil lawyers, navigating this regime and its potential to impose criminal liability creates significant ethical dilemmas and hardships not intended by the legislative regime.

The provisions of Part 5 were initially designed to provide a framework for dealing with material garnered from covert surveillance devices deployed pursuant to warrants or, in some circumstances, emergency authorisations. These tools are typically utilised in complex and sensitive investigations concerning serious criminality or risks to public safety. This is reflected in the structure of the SDA – a surveillance device warrant (other than a warrant concerning a tracking device) must be approved by an authorised police officer (who must be at or above the rank of inspector) and signed by a judge of the Supreme Court.[374] In those circumstances, it can be accepted that there is a need for enhanced secrecy provisions which limit the disclosure or use of material collected from a covert surveillance device.

By contrast, BWCs are not deployed pursuant to any form of targeted warrant or judicial oversight. They are used overtly in the course of regular policing duties (or, in the case of other public officials, in certain on-duty situations). The resulting footage is not necessarily used in the prosecution of serious criminal offences. Indeed, it is frequently used in relation to minor offences of the sort police officers are regularly expected to deal with, such as offences against public order and traffic offences. It simply does not make sense to regulate BWC footage in a manner equivalent to covert surveillance products.

[374] s15 of the *Surveillance Devices Act 1999*.

The simplest and most effective solution to these problems, in VALS's view, is to remove BWC footage from the ambit of the SDA by deleting references to it in Part 5 and other incidental places in the legislation. This would involve deleting:

- In s30D of the SDA, subsections (ab)-(ac);
- In s30F of the SDA, subsections (1A)-(1B) and (4)(c)-(d); and
- In the SDR, r10 and 11, along with certain definitions and other incidental provisions.

This would return Part 5 of the SDA to dealing solely with surveillance devices placed under warrants or emergency authorisations. The SDA is simply the wrong statutory framework in which to manage BWC footage. It is VALS's position that there are sufficient protections in other Victorian legislation to effectively manage the release of BWC footage in a way that meets the needs and interests of state agencies while allowing for disclosure to meet the legal needs of the wider community. For example:

- Where BWC footage is sought in the course of civil proceedings or criminal proceedings (whether by discovery, disclosure, subpoena, or some other mechanism), the law of evidence, rules of civil and criminal procedure, provisions of the *Crimes Act 1958*, court rules, and other applicable instruments are sufficient to govern whether and how the footage can be disclosed and used.
- Where BWC footage is sought in an application under the FOI Act, the provisions of that legislation can be utilised to ensure that, for example, footage is exempt from disclosure if it would affect a criminal investigation, prejudice a fair trial, interfere with personal privacy, or disclose sensitive police methodology.
- Where BWC footage is sought in any matter before a tribunal, access to it would be on the same terms and subject to the same restrictions as any other class of documents.

The current legislative arrangements are unsatisfactory. BWC footage is captured, handled, and utilised by public authorities in a manner that is clearly different from a covert surveillance product. Situating them in the same statutory scheme creates confusion and serious risk for both lawyers and clients, and frustrates efforts by members of the public affected by official misconduct to access justice.

Activation and Use of BWCs

The widespread use of BWCs by law enforcement and corrections means that the stringency of policies governing their use is of paramount importance, but this is not reflected in practice of prescribed agencies. For example, most of the existing frameworks governing the use of BWCs by members of Victoria Police are primarily either based upon policies developed by Victoria Police or matters left to the discretion of the members of Victoria Police utilising the devices. There is also a lack of appropriate frameworks governing disciplinary proceedings in relation to incidents where BWCs are turned off inappropriately or when footage is deleted in violation of the retention policy, which has serious

implications for the ability of VALS to act for clients in police misconduct cases and undermines the intended benefits of BWCs.

The amount of discretion afforded to prescribed officers, coupled with the lack of stringent and enforced guidelines concerning the use and activation of BWC devices, can have deleterious effects on the intended transparency and accountability outcomes in relation to the use of BWCs by prescribed officers in Victoria.[375] The Independent Broad-based Anti-corruption Commission (**IBAC**) recently found that corrections staff at Port Philip Prison failed to activate BWCs during critical incidents, as well as intentionally interfering with the recordings made by BWCs when activated. The outcome of the investigation conducted during Operation Rous also notes that interference with BWCs and closed-circuit television (CCTV) was part of a broader phenomenon that occurs in corrections service environments across Australia.[376]

VALS has a number of concerns, informed by our legal practice in cases where BWC footage has potential relevance, about the policies governing the use of BWCs and the way they are operationalised. These include:

- The considerable discretion given to Victoria Police over when BWCs are operated, including the obligation on officers to stop recording when directed by a supervisor;[377]
- The short retention period for BWC footage, of only 90 days unless the footage is known to have evidentiary value (given it can take months or years for related proceedings to be commenced);
- The inaccuracy of metadata: only metadata remains available after BWC footage is deleted, and in VALS' experience metadata often fail to accurately reflect the content of the footage;
- The lack of policy requiring police officers to inform community members before activating their BWC and obtaining statements, and to give people information about their rights – equivalent to the rights information given before police interviews – when they are being recorded.

BWCs in Criminal Law Matters

VALS' clients are often not only unaware of the activation of BWCs by members of Victoria Police, they appear to be unaware of their rights while BWCs are activated during field interviews; and while BWCs are activated when members of Victoria Police are serving Intervention Orders and speaking with the subject of the Intervention Order. Obtaining incriminating statements or admissions during field interviews while BWCs are activated can later be corroborated during formal interviews after a

[375] Independent Broad-based Anti-corruption Commission (2021). Summary: Special report on corrections, p. 3. Available at https://www.ibac.vic.gov.au/docs/default-source/special-reports/summary-special-report-on-corrections---june-2021.pdf?sfvrsn=9b09a3c_4.

[376] Independent Broad-based Anti-corruption Commission (2021). Special report on corrections: IBAC Operation Rous, Caparra, Nisidia and Molara, pp. 56-589. Available at https://www.ibac.vic.gov.au/docs/default-source/special-reports/special-report-on-corrections---june-2021.pdf?sfvrsn=ee450c8c_2.

[377] Victoria Police, Chief Commissioner's Instruction, 'CCI06/19 Body-Worn camera deployment'. 2019, Section 20.

suspect has been taken into police custody by asking the suspect to confirm earlier statements. The issue that arises is that the suspect, who was unaware of their rights during the initial police encounter captured on BWC footage, confirms previous statements during formal interviews without legal representation present, because they previously provided information to members of Victoria Police while BWCs were activated.

RECOMMENDATIONS

Recommendation 122. The SDA should be amended to remove BWC footage from that legislation's ambit by deleting references to BWCs in s30D and s30F. BWC footage should be treated like any other form of evidence or any other form of government record. This would achieve the purpose of the proposed regulatory amendments to the SDR, and would also remove uncertainties and ambiguities created by the current legislative arrangements.

Recommendation 123. BWC footage must be made available to applicants in freedom of information (FOI) applications. For example, by expanding the definition of 'civil proceedings' or through prescribing additional permitted purposes which include FOI applications. Preliminary and non-party discovery should also be included in the definition of 'civil proceedings', and contemplated proceedings should also be referenced.

Recommendation 124. In the event that the above recommendation is not accepted, any amendments to the SDR should make clear that persons who have access to BWC footage under the SDA or SDR should be lawfully able to share it with other persons for another permitted purpose. This is necessary to allow for routine information-sharing while avoiding any risk of criminal liability under s30E.

Recommendation 125. Any amendments to r11(1) of the SDR should include the further amendments to include BWC footage of ambulance officers for disclosure in the course of civil proceedings or matters under the *Coroners Act 2008*.

Recommendation 126. The definition of 'civil proceedings' incorporated into the SDR should also extend to cover a range of regulatory and administrative decision-making processes including Transport Accident Commission claims, internal review of infringement notices, licensing decisions, reviews of decisions of the Information Commissioner, and other similar matters.

Recommendation 127. Legislation should provide for, and policy frameworks developed by Victoria Police and other agencies in which BWCs are used should include policies and procedures for:

- The retention of BWC footage in an analogous way to that used for audio-visual material under s464JC(2B) of the *Crimes Act 1958*, which requires that such recordings be retained for a minimum of seven years;

- The circumstances and manner in which body worn cameras must be turned on by officials;
- A regime for penalties and oversight in circumstances where BWCs are not turned on when they should be; and
- The accuracy of metadata descriptions attached to BWC footage.

Best practice would entail enshrining the above in legislation.

Recommendation 128. Police officers should be required to inform persons of their intention to activate a BWC prior to performing interviews or obtaining statements, and where relevant to inform them of their rights before any questioning or interview while a BWC is active.

Recommendation 129. Victoria Police should ensure that its members are sufficiently trained regarding how and when to activate BWCs in accordance with policy and legislative frameworks; and consistent practices relating to the activation and use of BWCs among all members of Victoria Police.

Recommendation 130. Legislative and policy frameworks should be amended to require the disclosure of the existence of all BWC footage relevant to an offence within the Preliminary Brief. In all instances where a person is provided caution and/or rights, policy should be amended to ensure that footage is made available to the person's legal representative via a link contained within an email. Policy and legislative frameworks governing the release of BWC footage to accused persons and their legal representatives should be amended to include penalties for failure to follow the existing legislative and policy guidelines.

Police Searches

Victoria Police continues to have a problem with racial profiling, despite the ongoing implementation of the *Equality is not the same* plan.[378] This is a serious issue which necessitates far greater transparency and monitoring, as well as improved training for police. VALS continues to support recommendations and training materials developed by the Police Accountability Project.[379]

Hard evidence on racial profiling in Victoria is difficult to obtain because of a lack of data around police stops. The best available evidence comes from a race discrimination lawsuit settled in 2013, in the course of which Victoria Police released data to an expert analyst who found that young African-Australians were stopped by police at a rate around 2.5 times higher than people of other racial

[378] Victoria Police, *Equality is not the same*, https://www.police.vic.gov.au/equality-not-same.
[379] Police Accountability Project, *Anti-racial Profiling training*, available at https://www.policeaccountability.org.au/issues-and-cases/racial-profiling/anti-racial-profiling-training/#.

backgrounds in Flemington and North Melbourne from 2005-2008.[380] This was despite people of African descent being underrepresented in offence statistics from the area. The analysis also found that police were more likely to record stops of people from African backgrounds as being for no reason or because of suspected gang membership, making even clearer that these stops were not associated with investigating or interrupting immediate offending.

Rectifying the lack of transparency around how prevalent racial profiling is should be an urgent focus. VALS and other community legal centres have previously called for the expansion of a pilot scheme to provide receipts to people stopped and searched by police.[381] Such a scheme, if expanded to include ethnicity data, would facilitate regular publication of aggregate data from stops. The Police Stop Data Working Group, a group of academic researchers, called on Victoria Police in 2017 to collaborate with academics, community groups and legal organisations to implement a racial profiling data collection trial, capable of being extended.[382] This would involve requiring police to record the race (as they perceive it) of all people they stop, and make mandatory other pieces of reporting – such as the reason for a police stop – which are sometimes but not always recorded in police databases.

In addition to improved monitoring, there needs to be significantly improved training of police to avoid racial bias and racial profiling continuing to be a part of policing practice. Police training on racial profiling occurs in other jurisdictions.[383] For example, the Ottawa Police Service 'Racial Profiling' policy document requires that the:

> officer in charge of the Professional Development Centre… shall ensure that: training materials relevant to understanding and preventing racial profiling are developed, training is reviewed regularly to ensure the currency of the training materials, [and] anti-racial profiling sessions are delivered to all new recruits, currently serving officers, new and currently serving supervisors, as well as all new and current civilian members. The training can be tailored depending on the delivery group.[384]

The Ontario Human Rights Commission has recommended that training for police include "[e]ducat[ing] officers on the history of stereotyping and racism against racialized and Indigenous groups" and "[i]nvolve local racialized and marginalized communities in design, delivery and evaluation, including identifying relevant racial profiling scenarios."[385]

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[380] Court documents from *Haile-Michael v. Konstantinidis*, 'Summary of Professor Gordon's and Dr Henstridge's First Reports'. Accessed at https://www.policeaccountability.org.au/wp-content/uploads/2014/03/Summary-of-Experts_report.pdf.

[381] Herald Sun, 9 August 2016, 'Community and legal groups lobby for Victoria Police to introduce stop and search receipts'. Accessed at https://www.heraldsun.com.au/leader/news/community-and-legal-groups-lobby-for-victoria-police-to-introduce-stop-and-search-receipts/news-story/c965d9a5da32cc1efbbc8f056361e230.

[382] Police Stop Data Working Group (2017), *Monitoring Racial Profiling - Introducing a scheme to prevent unlawful stops and searches by Victoria Police*. Accessed at https://www.policeaccountability.org.au/wp-content/uploads/2017/08/monitoringRP_report_softcopy_FINAL_22082017.pdf.

[383] VALS (2021), *Building Back Better: Victorian Aboriginal Legal Service COVID-19 Recovery Plan*, pp101-102.

[384] Ottawa Police Service, Racial Profiling (27 June 2010) 5, available at https://www.ottawapolice.ca/en/news-and-community/resources/Racial_Profiling_Policy27Jun11_FINALpdf.pdf

[385] Ontario Human Rights Commission, Response to the Race Data and Traffic Stops in Ottawa Report - 6.2. Training (28 November 2016), available at http://www.ohrc.on.ca/en/book/export/html/19676

The Police Accountability Project has made recommendations on racial profiling training which should be implemented by Victoria Police.[386] It is also important that strategies and training to address racial profiling are developed in consultation with the Aboriginal community, to ensure they reflect the unique circumstances faced by Aboriginal people in Victorian society and in their interactions with police.

RECOMMENDATIONS

Recommendation 131. Victoria Police should address racial profiling by developing and delivering, in partnership with the Aboriginal Community and ACCOs, a policy on racial profiling and training materials on preventing racial profiling.

Recommendation 132. Victoria Police should implement a racial profiling monitoring scheme, in line with the recommendations of the Police Stop Data Working Group.

Predictive Policing

As emphasised throughout this submission, the key to reducing Victoria's prison population is to eliminate unnecessary contacts between police and marginalised people, which can lead to arrests and remand that in no way serve the public interest. VALS is firmly opposed to any use of 'predictive policing' tools, which actively create police contact that would otherwise not take place, and is highly concerned about the use of such tools in Victoria.

Victoria Police has used predictive policing tools in a number of contexts. Operation Wayward was established in 2017 in response to sensationalist media coverage of youth offending, and operated by identifying young people at high risk of reoffending for particular police attention, mostly in Melbourne's northwest. This included random checks by police officers on the location of children.[387] There is no data available on the people targeted by Operation Wayward, including demographic data which could reveal the impact of this pre-emptive operation on racial minorities.

Similarly, Victoria Police has not provided data – either publicly or on request to researchers – on the number of people targeted by a predictive tool used in south-eastern Melbourne, or their demographic characteristics. The tool classified young people as 'youth network offenders' or 'core

[386] Police Accountability Project, *Anti-racial Profiling training*, available at https://www.policeaccountability.org.au/issues-and-cases/racial-profiling/anti-racial-profiling-training/#.
[387] Herald Sun, 15 May 2018, 'New Victoria police taskforce targeting wayward teens in home invasion crackdown'. Accessed at https://www.news.com.au/national/victoria/crime/new-victoria-police-taskforce-targeting-wayward-teens-in-home-invasion-crackdown/news-story/3c55249e127cc83a1f217fc46c5f18fa.

youth network offenders', and police have claimed that this classification enables them to predict "how many crimes [a child] is going to commit before he is 21" based on their current profile.[388]

The lack of transparency around the use of these tools is an enormous obstacle to understanding their use and their contribution to the problem of discriminatory policing in Victoria. The nature of the tools being used, the evidence base for their application in Victoria, and the impact they are having on marginalised communities are all entirely unclear.

There is abundant international evidence that predictive policing tools lead to disproportionate impacts on racial minorities. There are a number of fundamental reasons for this. When tools are trained on data from very different populations, their validity when applied to minority communities is highly doubtful.[389] Predictive tools are also highly sensitive to previous overpolicing: because Aboriginal people are, as a result of existing biases and systemic racism in the legal system, more likely to have criminal records, they are more likely to be assessed as a risk by predictive tools, essentially entrenching historical discrimination in data.[390] Other socioeconomic indicators are also liable to focus disproportionate attention on Aboriginal people, because of the ongoing marginalisation of Aboriginal communities by government social and economic policy. And experience shows that there is scope for interpretation and inconsistent application of the results given by predictive tools – for example, between police stations or courts – opening up space for discrimination to be reinforced.[391]

Although evidence from Australia is much more limited, due to the lack of transparency about the use of predictive policing tools and approaches, research from NSW has found that its Suspect Targeting Management Plan, which attempts to target people likely to commit offences, disproportionately identified Aboriginal young people for police focus.[392] The NSW Law Enforcement Conduct Commission found that many of these children had committed no offence – some had come to police attention because they were at risk of suffering domestic abuse – and that they were targeted with "unreasonable, unjust and oppressive" policing tactics, including home visits in the middle of the night.[393]

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[388] Nino Bucci, Victoria police refuses to reveal how many young people tracked using secretive data tool (23 November 2020) The Guardian. Accessed at https://www.theguardian.com/australia-news/2020/nov/23/victoria-police-refuses-to-reveal-how-many-young-people-tracked-using-secretive-data-tool

[389] Day et al. (2018), 'Assessing violence risk with Aboriginal and Torres Strait Islander offenders: considerations for forensic practice', *Psychiatry, Psychology & Law*. Accessed at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6818327/.

[390] Heaven (2021), 'Predictive policing is still racist—whatever data it uses', *MIT Technology Review*. Accessed at https://www.technologyreview.com/2021/02/05/1017560/predictive-policing-racist-algorithmic-bias-data-crime-predpol/.

[391] Stevenson (2018), 'Assessing Risk Assessment in Action', *Minnesota Law Review*, p309. Accessed at https://www.minnesotalawreview.org/wp-content/uploads/2019/01/13Stevenson_MLR.pdf.

[392] Youth Justice Coalition (2017), *A study of the Suspect Targeting Management Plan*, p14. Accessed at https://piac.asn.au/wp-content/uploads/2017/10/17.10.25-YJC-STMP-Report.pdf.

[393] The Guardian, 14 February 2020, 'NSW police put children as young as nine, many of them Indigenous, under surveillance'. Accessed at https://www.theguardian.com/australia-news/2020/feb/14/nsw-police-put-children-as-young-as-nine-many-of-them-indigenous-under-surveillance.

As well as racial bias in the targets identified by the tools, the use of predictive policing approaches encourages overpolicing as a method of gathering data that can be fed into the tool. One researcher found in interviews with young people from racial minority backgrounds that "police around Dandenong [where the predictive tool was being used] stopped them frequently without apparent reason", in an attempt to gather information which the predictive algorithm could use.[394] The use of these predictive tools therefore generates overpolicing and discriminatory policing both in the gathering of inputs and in the biased outputs they produce.

VALS does not support the use of predictive policing tools in Victoria, and we firmly believe that they should be abandoned by Victoria Police. As long as they continue to be used, it is critical that more information is available to enable the community and advocates to understand the impact predictive policing is having, and the way it is contributing to overpolicing, and therefore to the rapid growth in Victoria's prison population.

RECOMMENDATIONS

Recommendation 133. Victoria Police should immediately halt the use of predictive policing tools and approaches.

Recommendation 134. Victoria Police should make public information about its past and current use of predictive tools across the state, including demographic data on the people identified and targeted by police as a result of using of such tools.

Protections and Supports in Police Custody

Providing appropriate protections and supports in police custody is a vital way of safeguarding the rights of detained people and avoiding overincarceration. People who do not have access to necessary supports in custody may jeopardise their cases because they do not have a full understanding of what is happening or of their rights. Neglect or poor treatment in custody can also seriously affect the welfare of people detained by police, with a significant impact on their ability to pursue their case when they are ultimately brought before a court.

These issues are particularly important for Aboriginal people. Aboriginal people continue to die in police custody at alarming rates, despite the recommendations made by the Royal Commission into Aboriginal Deaths in Custody more than thirty years ago. This remains one of the most pressing reasons to be concerned about Victoria's increasing incarceration rates, and it warrants a strong focus

[394] The Guardian, 23 November 2020, 'Victoria police refuses to reveal how many young people tracked using secretive data tool'. Accessed at https://www.theguardian.com/australia-news/2020/nov/23/victoria-police-refuses-to-reveal-how-many-young-people-tracked-using-secretive-data-tool.

on improving safeguards for people brought into police custody.

Custody Notification Service

VALS run a Custody Notification System (**CNS**) which requires Victoria Police to notify VALS within 1 hour every time an Aboriginal person in Victoria is taken into police custody. Since October 2019, this requirement is legislated under the *Crimes Act 1958*. Once a notification is received, VALS will contact the relevant police station to carry out a welfare check and provide legal advice if required.

Overpolicing, court backlogs and punitive bail laws have all contributed to a growing number of Aboriginal people being taken into police custody and being held for longer periods. This has been exacerbated by COVID-19 restrictions, which directly impact the welfare of Aboriginal people in custody as well as further lengthening the time many are being held. The restrictions are impacting the availability of transport to remove people from police custody, making it entirely unpredictable how long people may be held in police cells. VALS has released a video podcast discussing the history of the CNS and the stresses on it during the pandemic.[395]

In 2020/21, VALS receive 11,850 custody notifications, down from 13,426 in 2019/20. However, the total number of times VALS contacted police stations rose by 38% – there were 65,902 contacts made, an average of 5.56 per custody notification, compared to 47,562 for an average of 3.54 per notification in 2019/20.

This includes a substantially higher number of follow-up calls tagged as 'welfare checks', which VALS Custody Notification Officers make for people held in custody for extended periods to follow up on medication, behaviour, supply of food and other key factors in protecting the wellbeing of people detained by police. The number of welfare check calls was up to 30,511 in 2020/21, from 11,036 in 2019/20 – an increase of 176%. The higher number of total contacts, and far higher number of welfare check follow-ups, provide a clear indication of the fact that Aboriginal people are being held in police custody for longer periods, and the welfare needs of Aboriginal people are more acute. The CNS team recently supported a person who was held in police custody for 11 days, requiring 74 phone calls to the police station.

Longer periods in custody are leading to more acute welfare issues arising. Our CNS data indicate a major increase in reported self-harm incidents at the height of pandemic restrictions in 2020, at 0.56% of Aboriginal people taken into custody from April to August 2020, compared to just 0.15% in the same

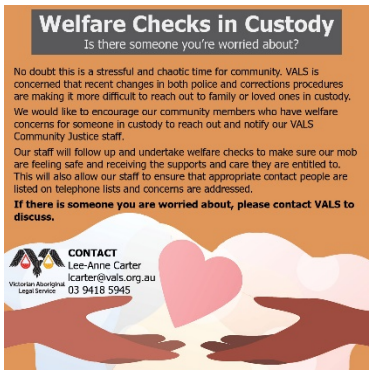
[395] VALS, 29 April 2021, *Justice Yarns Podcast – RCIADIC 30th Anniversary chat with Lee-Anne Carter*. Recording available at https://www.youtube.com/watch?v=tOO5VltropE.

Victorian Aboriginal Legal Service

period of 2019 – almost quadrupling the rate of attempts at self-harm by Aboriginal people in police custody.[396]

Evidently, many people taken into custody have significant welfare, medical and mental health concerns. This requires Community Justice Program staff who run the CNS to maintain consistent contact and extensive notes in client records. Some of the issues staff are frequently encountering at present include a rise in people in custody who are pregnant, homeless or both; continuing risk of self-harm in custody; and people in custody reporting that police are downplaying their mental health issues and not supporting them to access the services they need for treatment.

CJP welfare checks are critical, with staff providing wide-ranging assistance, from ensuring that people with suicidal ideation in prison are supported by the psychiatric team, to identifying when someone is withdrawing from substances in police custody and needs medical care, notifying family or friends that the person has been remanded (which can greatly reduce stress and any potential management issues in custody), and even assisting people who have been remanded and are at risk of losing their housing as a result. CJP has received extensive positive feedback from family members (both in Victoria and interstate).[397]



Pre-COVID-19, the CNS team was already at capacity, and the extra welfare checks have stretched VALS' resources beyond sustainable service delivery. The Custody Notification Service is a vital safeguard for the wellbeing of Aboriginal people in police custody, and Victoria Police's responsibility to notify the CNS has been legislated in recognition of this essential role. It is therefore urgent that the CNS is adequately funded to maintain its services in the face of this growing strain.

The proper functioning of the CNS is also put at risk by inconsistent practice between police stations in responding to VALS staff. There is currently no consistency in whether police are willing to share medical information about Aboriginal people in custody, making it very difficult to conduct proper welfare checks. In some stations, police are not reporting to VALS when they take an Aboriginal person into custody and bring them directly to a hospital – despite the fact that, in these instances, welfare checks are particularly important – failing to recognise that the CNS covers police *custody*, not only police cells. There are also a concerning number of incidents in which police officers question whether someone who has identified as Aboriginal is 'really' Aboriginal. VALS has its own processes for cases where there are serious doubts about Aboriginality, and it is never appropriate for police to question

[396] VALS (2021), *Building Back Better: COVID-19 Recovery Plan*, p54. Available at https://www.vals.org.au/wp-content/uploads/2021/02/Building-Back-Better-Victorian-Aboriginal-Legal-Service-COVID-19-Recovery-Plan-February-2021-FOR-DISTRIBUTION.pdf.
[397] Ibid.

someone's Aboriginality when taking them into custody, or to prefer evidence from police records over someone's self-identification. These are issues which VALS hopes to deal with by formalising information-sharing frameworks with Victoria Police and making them consistent across the state. There should be an ongoing, open dialogue between Victoria Police and VALS about the contents of Victoria Police protocols and the Victoria Police Manual, bringing a cultural lens to these procedures and enabling them to be adjusted as necessary.

VALS' CNS is complemented by volunteer-based Aboriginal Community Justice Panels (**ACJP**), a community initiative to support people taken into police custody by protecting their wellbeing and assisting with the coordination of diversion programmes for Aboriginal people.[398] ACJPs operate predominantly in regional Victoria and do most of their work after hours and on weekends, when other support services may be unavailable or overstretched. They therefore and play an important role in providing a further layer of checks and safeguards for the welfare of detained people. While there is no legislated requirement to contact a local ACJP when an Aboriginal person is detained, it is still critically important that these notifications are made. VALS has observed highly inconsistent practice in whether ACJPs are notified about Aboriginal people taken into custody. This needs to be rectified, and the ACJP project needs to be better resourced to ensure the availability of ACJPs across the state and proper remuneration of the people doing this vital work.

There is a growing trend of VALS clients being taken from police custody to court for a bail hearing and instead having their matters finalised by the court. In many cases there is no interval between police custody and a court hearing which determines the outcome of an Aboriginal person's charges. This makes it even more essential that people's welfare in police custody is maintained and they are given proper access to services, to avoid the risk that they are brought to court traumatised by their time in custody or denied access to the support they need.

RECOMMENDATIONS

Recommendation 135. In order to meet the identified increased demand, the Victorian Government should increase funding to the VALS' Custody Notification Service (CNS).

Recommendation 136. VALS' CNS should have access to the Standard Operating Procedures of all police stations, as well as the full Victoria Police Manual.

Recommendation 137. Victoria Police should improve training of officers to recognise the requirement that the CNS is notified whenever an Aboriginal person is detained by police, not only when they are brought to a police cell. For example, the CNS should be notified where someone is taken to a hospital while in police custody.

[398] VALS, *Aboriginal Community Justice Panels (ACJP) Program*, https://www.vals.org.au/aboriginal-community-justice-panels-acjp-program/.

Victorian Aboriginal Legal Service

Recommendation 138. The Aboriginal Community Justice Panels (ACJP) project should be funded adequately to ensure ACJPs are consistently available across the state.

Recommendation 139. Lawyers should continue to be able to speak to clients who are held in police cells, and appear via phone in bail applications and straight remand mentions.

Independent Third Persons and Youth Referral & Independent Person Program

Independent Third Persons (**ITP**s) attend police interviews of people with disability or mental illness, to help these marginalised people understand the process and their rights.[399] ITPs are provided by the Office of the Public Advocate, and trained to ensure that they can provide safe and effective support to people held in police custody. This is a vital safeguard, and VALS is concerned that the ITP scheme is not operating effectively. In early 2020, during the early stages of pandemic restrictions, VALS received 145 notifications about Aboriginal people in custody requiring support from an ITP, but only 81 were able to access it. 14 of these 81 accessed support only via telephone, which cannot provide the same safeguards given that ITPs' responsibilities include observing the person in custody for signs of distress and requesting breaks in interviews if necessary. The ITP service overall remains heavily underutilised, with some police stations making almost no calls to the ITP service each year.[400]

VALS supports the numerous options for improving the ITP service identified by the Centre for Innovative Justice in a 2018 report.[401] The critical starting point is that the requirement to call an ITP when interviewing people who may have a disability or mental illness should be included in legislation, not only in Victoria Police policy as at present. This core reform would support further steps, including the expansion of resourcing, improved training for police about the ITP service, and improved cultural awareness training for ITPs. Extensive training on cultural awareness is particularly important given the disproportionate rates at which Aboriginal people have disabilities, mental illness and acquired brain injuries. Cultural competence training and anti-racism training for police is also necessary to reduce the risk that signs of a disability are, due to racial stereotyping, perceived by police simply as an Aboriginal person being uncooperative or under the influence of drugs or alcohol.

For young people, independent persons are provided through the Youth Referral and Independent Person Program (**YRIPP**), run by the Centre for Multicultural Youth, in collaboration with other organisations, in 157 police stations across Victoria.[402] YRIPP is a more expansive programme than the

[399] Office of the Public Advocate, 'Independent Third Persons', available at https://www.publicadvocate.vic.gov.au/opa-volunteers/independent-third-persons.
[400] The Age, 20 February 2021, 'Cognitively impaired admitting to crimes they say they didn't commit'.
[401] Centre for Innovative Justice & Jesuit Social Services (2018), *Recognition, Respect and Support: Enabling justice for people with an Acquired Brain Injury*. Accessed at https://cij.org.au/cms/wp-content/uploads/2018/08/enabling-justice-full-report.pdf.
[402] YRIPP, 'Police stations', available at https://www.cmy.net.au/yripp/police/police-station/.

ITP scheme, since legislation requires the presence of an Independent Person for a police interview of *any* young person if a parent or guardian is not attending.[403] YRIPP Independent Persons play a broadly similar role during the interview itself, but they also speak with the young person before and after the interview and can offer them referrals to appropriate support services. YRIPP is an effective scheme, but its effectiveness for Aboriginal youth is highly dependent on the project being properly connected to culturally safe support services – so that Aboriginal young people can be referred to appropriate services – and on Independent Persons receiving proper training on how to work with Aboriginal young people. To this end, VALS has been involved in developing and implementing training for YRIPP Independent Persons. It is critical that YRIPP and all the organisations involved in implementing it are funded adequately to maintain this high level of training and coordination.

RECOMMENDATIONS

Recommendation 140. The Victorian Government should legislate for Independent Third Persons to attend police interviews with adults and young people.

Recommendation 141. Independent Third Persons, Independent Persons under the Youth Referral and Independent Person Program (YRIPP), and Victoria Police should receive comprehensive cultural awareness and anti-racism training regarding dealing with Aboriginal people with cognitive disabilities and Aboriginal young people.

Recommendation 142. The Victorian Government should adequately fund VALS and organisations involved in the Youth Referral and Independent Person Program (YRIPP).

OPCAT

Under the *Optional Protocol on the Convention Against Torture, Cruel, Inhuman and Degrading Treatment and Punishment* (**OPCAT**), the Australian Government is required to establish and maintain a National Preventative Mechanism (**NPM**) with jurisdiction to visit "any place under its jurisdiction and control where persons are or may be deprived of their liberty."[404] In Australia, OPCAT will be implemented through a national network of bodies fulfilling the functions of an NPM.[405] The Victorian Government has responsibility for designating and maintaining a body or group of bodies to fulfil the functions of the NPM in Victoria.[406]

[403] YRIPP, 'About us', available at https://www.cmy.net.au/yripp/about-us/.
[404] *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Article 3(1). According to Article 3(2), "deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority."
[405] Commonwealth Ombudsman, *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT),* September 2019, p. 7.
[406] Ibid.

According to the Commonwealth Government, OPCAT will initially be implemented in Australia in "primary places of detention" including police lock-up or police station cells (where people are held for equal to, or greater than, 24 hours).[407] VALS strongly disagrees with the narrow approach being proposed by the Commonwealth Government. As noted by the Australian Human Rights Commission, OPCAT does not permit any temporal limit – such as a minimum time in custody – to be imposed on when oversight obligations are engaged.[408] OPCAT implementation in Victoria must include all police places of detention. This will provide for routine visits to police cells and vehicles to ensure that conditions are adequate and that people's rights and welfare are being protected.

Further recommendations on OPCAT implementation in Victoria are contained below in relation to Conditions in Custody. The recommendations below apply equally to OPCAT implementation in places of police detention.

RECOMMENDATIONS

Recommendation 143. In accordance with Article 3(1) of OPCAT, the NPM in Victoria must have jurisdiction over all places where individuals are or may be detained by Victoria Police or Protective Service Officers, regardless of the length of time of detention.

Diversion & Cautions

Diversions in the Adult System

A key reason for the continued growth in Victoria's prison population is the underuse of diversion and formal cautioning, approaches which can avoid extended contact with the criminal legal system and reduce incarceration. VALS has set out our positions on the need for greater diversion and appropriate models on numerous occasions.[409]

Currently, diversion is only available in limited circumstances, and even when it is available, the Criminal Justice Diversion Program does not adequately cater for the needs and experiences of Aboriginal people. Significant changes are required in order to ensure that diversion is available and effective in diverting Aboriginal people away from the criminal legal system.

[407] G Brandis, 2017 DFAT-NGO Forum on Human Rights, Canberra, 9 February 2017, cited in Commonwealth Ombudsman, *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT),* September 2019, p. 5.
[408] Australian Human Rights Commission, *Implementing OPCAT in Australia* (2020).
[409] VALS (2020), *Submission to Sentencing Act Reform Project*, pp17-20. Accessed at https://www.vals.org.au/wp-content/uploads/2021/03/Sentencing-Act-Reform-Project-VALS-submission-FINAL1.pdf.

Diversion is currently available in Victoria if the following criteria[410] are met:

- The offence is not precluded from diversion;[411]
- The accused acknowledges responsibility for the offence;
- It appears appropriate to the Magistrates Court that the accused should participate in the diversion program;
- Both the prosecution and the accused consent to the Magistrates Court adjourning the proceedings for the purposes of diversion;
- Whilst not a strict requirement, generally, diversion is only available in cases of first offence.

Pursuant to section 59 of the *Criminal Procedure Act*, the magistrate can adjourn proceedings for up to 12 months, and require the accused to complete certain conditions as set out under the diversion plan. If the program is completed successfully, no plea is taken and the court must discharge the accused without any finding of guilt.

Data from the Victorian Sentencing Advisory Council indicates that in 2019-20, 6.4% of cases before the Magistrates' Court were adjourned for diversion, a figure which has not shifted substantially in the last decade.[412] Unfortunately, data is not available publicly on the number of Aboriginal people who received diversion in Victoria. However, research from across Australia indicates that Aboriginal people are less likely than non-Aboriginal people to receive a police caution and less likely to have their matters adjourned for diversion.[413] In 2019-20, only 2.5% of VALS criminal law matters were adjourned for diversion, and this fell to 1.3% in 2020-21.[414] These are well below the already low figure of around 4% we experienced from 2017 to 2019.[415] This is a phenomenon seen in many parts of the justice system, with data from NSW revealing that Aboriginal people were far less likely to receive cautions for cannabis possession than non-Aboriginal people.[416]

The current approach to diversion fails Aboriginal people for a number of reasons:

- Inconsistent decisions by police informants as to when diversion is available;

[410] Section 59, *Criminal Procedure Act* (CPA) (Vic) 2009.
[411] Under section 59(1) of the CPA, the following offences are excluded: (a) an offence punishable by a minimum or fixed sentence or penalty, including cancellation or suspension of a licence or permit to drive a motor vehicle and disqualification under the Road Safety Act 1986 or the Sentencing Act 1991 from obtaining such a licence or permit or from driving a motor vehicle on a road in Victoria but not including the incurring of demerit points under the Road Safety Act 1986 or regulations made under that Act; or (b) an offence against section 49(1) of the Road Safety Act 1986 not referred to in paragraph (a).
[412] Sentencing Advisory Council, *Sentencing Outcomes in the Magistrates' Court*. Accessed at https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/sentencing-outcomes-magistrates-court.
[413] Lucy Snowball and Australian Institute of Criminology, 'Diversion of Indigenous Juvenile Offenders' (Trends & Issues in Crime and Criminal Justice No 355, Australian Institute of Criminology, 2008).
[414] In 2019-20, VALS provided legal representation in relation to 1,648 criminal law matters and 41 of these resulted in diversion. In 2020-21, VALS provided legal representation in relation to 1,045 criminal law matters and 14 of these matters resulted in diversion.
[415] In 2017-2018, VALS provided legal representation in relation to 1,367 criminal law matters and 57 of these resulted in diversion. In 2018-2019, VALS provided legal representation in relation to 1,253 criminal law matters and 55 of these matters resulted in diversion.
[416] The Guardian, 10 June 2020, 'NSW police pursue 80% of Indigenous people caught with cannabis through courts'. Accessed at https://www.theguardian.com/australia-news/2020/jun/10/nsw-police-pursue-80-of-indigenous-people-caught-with-cannabis-through-courts.

- Even when diversion is approved by the informant and considered suitable by the diversion coordinator, the prosecution at court can refuse to consent;
- Generally diversion is only available in cases of first offence – as Aboriginal people are engaged in the system earlier than non-Aboriginal people, they often use up diversion options and escalate more quickly up the sentencing hierarchy;
- Financial contributions can be problematic for many of our clients;
- Lack of culturally appropriate diversion programs, particularly in rural and regional areas;
- An expectation of cooperativeness with police, which Aboriginal people may not initially meet due to mistrust rooted in personal and/or intergenerational trauma – in the ACT, criteria for a restorative justice programme were altered to make eligible anyone who did not *deny* responsibility for offending, rather than requiring full and proactive confession at the outset.[417]

While some of these issues can be mitigated through reforms to and expansion of existing diversion programmes, VALS is of the view that the full benefits of diversion for Aboriginal people can only be realised through diversion processes developed and implemented by Aboriginal communities, grounded in self-determination. This is a model seen in some parts of Canada, as part of a much broader approach to Aboriginal self-determination in the justice system.

Good Practice Model: Old City Hall Gladue Court, Toronto, Canada[418]

Gladue Courts in Ontario have much broader jurisdiction than Koori Courts in Victoria. They operate as a plea and resolution court, with diversion being a possible resolution.

Whilst the process for accessing diversion still includes approval by the Crown Attorney, the decision is based on the recommendation of the Aboriginal court worker and legal counsel. Diversion is available to Aboriginal people even if this is not their first offence.

Individuals are diverted to the "Community Council" which is a restorative circle of Aboriginal volunteers, including Elders, based at the Aboriginal Legal Service (**ALS**). The role of the Council is to work with the individual to develop a 'decision' (which is a list of tasks to which the client agrees) and to approve successful completion of the diversion. The Council talks with the client about why the offence occurred, and works with the client to develop a rehabilitative program. They also link the individual to culturally relevant services suited to their circumstances and needs. A critical element of the way that the Council works is that it is the individual who decides on the program direction to follow. According to a 2016 evaluation of the program, this creates agency for the individual in their own development and leads to a program direction that is more likely to elicit commitment and to result in success.

[417] Australian Association for Restorative Justice (2020), *Winter 2020: Review of contemporary restorative practice*.
[418] Aboriginal Legal Services, *Evaluation of the Gladue Court Old City Hall, Toronto* (2016), 43-44.

Victorian Aboriginal Legal Service

During the period of diversion, the individual is supported by an ALS case worker who supports each client through their diversionary activities. The role of the case worker is not to enforce or police compliance with the diversion plan. If the individual is re-arrested, they are not allowed to return to the Community Council until they have completed the previous diversion.

In contrast to many diversion programs in Victoria, diversion to the Community Council appears to have the effect of engaging individuals with their culture and decreasing re-offending. The diversion programs aim to address the underlying reasons for offending and are more likely to divert the person away from the further reoffending.

VALS believes that there is a lot to learn from experiences in other jurisdictions, where diversion programs operate as a culturally appropriate way of reducing recidivism and preventing Aboriginal people from escalating up the sentencing hierarchy.

In Victoria, Koori Court has demonstrated that culturally appropriate court processes and responses can be far more effective and relevant for Aboriginal people. Similarly, diversion should be a culturally relevant for Aboriginal people and Aboriginal communities should have a much greater role in developing and implementing diversion. An expanded role for Elders and Respected Persons would be beneficial, with the condition that Aboriginal people must continue to consent to the Koori Court process and have access to legal representation to support them through all stages of that process.

RECOMMENDATIONS

Recommendation 144. Data on the number of Aboriginal people who received diversion in Victoria should be made available publicly.

Recommendation 145. The Government must progress options for increasing access to culturally appropriate diversion in Victoria, including:

- Expanding Koori Courts so that they operate not only as a plea and resolution court, but to also have jurisdiction to divert people to culturally appropriate diversion programs;
- Create independent self-determined Aboriginal bodies that have responsibility for developing and agreeing to a diversion plan with the person (similar to the Community Council at Aboriginal Legal Services Canada).

Recommendation 146. Remove police discretion as to which offences are suitable for diversion and remove the requirement for prosecutors to consent to diversion.

Recommendation 147. Introduce a requirement for Victoria Police to complete a 'Failure to Divert Declaration' for all police briefs. This must require police members to detail the precise grounds for

failing to recommend diversion. Magistrates should review the Declaration at the mention of criminal matters and if grounds are insufficient, the matter should be referred to the Diversion Coordinator.

Diversions in the Youth Justice System

Diversion and cautioning are particularly important for children and young people. Early contact with the criminal legal system has a tendency to reproduce itself, and children are particularly likely to be fully integrated into society and avoid reoffending if they are given appropriate support.[419] There is clear evidence from Victoria that diversion away from the court system has a positive impact in reducing reoffending for young people.[420] Avoiding the use of full judicial proceedings for children is also part of Australia's obligations under the *Convention on the Rights of the Child*. [421]

For children, the principal options for diversion in the current system are:

- Pre-charge caution by Victoria Police;[422]
- Referral to a pre-charge cautioning program, where available;[423]
- Court-based diversion through the Children's Court Youth Diversion (**CCYD**) Service.[424]

There are challenges with the current cautioning and court-based diversion mechanisms, which mean that they are inconsistency applied. In particular, we believe that the lack of a legislative basis for pre-charge cautions, the discretionary powers of police in relation to cautions, and the police veto on court-based diversion undermine the potential for a rehabilitative approach to youth justice and instead channel children and young people into a cycle of reoffending.

To strengthen the mechanisms for diverting Aboriginal children and young people away from the youth justice system, we believe that there is a need for significant legislative and policy reform. In relation to the legislative framework, VALS believes that several key changes must be incorporated

[419] VALS (2019), *Submission to the Commission for Children & Young People Inquiry: Our Youth, Our Way*. Accessed at http://vals.org.au/wp-content/uploads/2019/12/VALS-Submission-to-CCYP-Inquiry-Our-Youth-Our-Way-November-2019.pdf.
[420] Crime Statistics Agency, *In Brief 9: The Cautious Approach: Police cautions and the impact on youth reoffending*, (2017).
[421] United Nations Convention on the Rights of the Child, Article 40(3)(b).
[422] Under the *Victoria Police Manual – Procedures and Guidelines*, young people are eligible for a caution if they meet the following mandatory criteria: the individual admits to the offence; the individual is between the ages of 10-17 years; parent/guardian consents to the caution; and parent/guardian is present at the time of the formal provision of the caution.
[423] There have been several pre-charge cautioning pilot programs in Victoria, including: a 12-month Koori Youth Cautioning Pilot in Mildura (2007-2008); Youth Cautioning Pilot introduced in 2010 in Western Region Division 4, the Northern Grampians and Horsham Police Service Areas, the Eastern Region Division 2 Knox PSA and the Southern Metro Region Division 3 Casey PSA. Victoria police are currently working with Aboriginal communities in Echuca, Dandenong and Bendigo to develop and implement a new Aboriginal Youth Cautioning Pilot program.
[424] See s. 356 *CYFA 2005*. Court-based diversion has been available in all Children's Courts across Victoria since January 2017. The scheme is managed across Victoria by the Children's Court Youth Diversion Service (CCYD).

into the *CYFA* and the new Youth Justice Act, detailed in the recommendations below. These would operate to expand the circumstances in which diversion is available.

Additionally, we believe that there is a significant need to invest in culturally appropriate pre-charge and court-based diversion programs that are gender-sensitive and respond to the intersectional needs of Aboriginal youth. We believe that ACCOs are best placed to develop and implement such programs, building on the existing work by ACCOs in this space.[425]

Case Study: Successful Diversion

James was a 15-year-old boy in regional Victoria who had his first criminal matter in January 2018 and received diversion. He didn't engage at all with his previous lawyer and therefore failed to comply with the court's conditions.

The matter was referred to Balit Ngulu by the Diversion Co-ordinator, who was disappointed to have to file a report that would have seen a warrant issued for his arrest. We pleaded with the Magistrate to adjourn the matter for a month to give our unique service the chance to get him to attend court without police arresting him.

Our application was granted, and thanks to our Client Service Officer, we were able to support out client to enrol in a TAFE course, engage in drug and alcohol counselling, and explore a community and social group. As a result of the support from Balit Ngulu, James is now on track to avoid a criminal conviction.

Cautions in the Youth Justice System

VALS is firmly of the view that there must be a statutory presumption in favour of cautioning children, that there should be no limit to the number of cautions a child can receive, and that children with a criminal history should not be excluded. Cautioning should not be conditional on a child or young person formally admitting an offence – cautions should be available to children who do not deny the offence.

Snap decisions by police regarding cautioning can have lifelong and devastating impacts for children; children who have often been let down by multiple systems. The data shows that Aboriginal and Torres Strait Islander children are less likely to receive a caution from police than non-Aboriginal children. The CCYP report, *Our Youth Our Way* noted the following:

[425] Programs such as Bareng Maroop, Dardi Munwurro Youth Journeys Program and the Bert Williams Koori Youth Justice Program are excellent examples of ACCO diversion programs.

Victorian Aboriginal Legal Service

> The cautioning rate for Aboriginal children and young people in Victoria declined from 14.6% of outcomes in 2008 to 3.9% of outcomes in 2015, while the proportion of arrests increased over the same period. Data from the Crimes Statistics Agency shows that between January 2018 and December 2019 Aboriginal children and young people aged 10 to 17 years were cautioned in 13% of incidents compared to 21% of incidents involving non-Aboriginal children and young people. This is important given that most children and young people who are effectively cautioned will not have further contact with the criminal justice system.[426]

We also know that many of the children who come into contact with police and the criminal legal system are involved in the child protection system. It is critical that reforms in relation to cautioning, and more broadly, reforms aimed at diverting children away from the criminal legal system, have the appropriate protections and safeguards in place to ensure that the objectives can be achieved. We would expect cautioning reforms to be reflected in legislation, not only police policies and procedures, and updated training to Victoria Police. We would expect police to make consistent and genuine efforts to build relationships with Aboriginal children, families, communities and services. And we would expect Victoria Police to address racism at both an individual and systemic level, so that Aboriginal children are not left behind in these reforms.

There is an opportunity, that is too often squandered by Victoria Police, to support Aboriginal children, particularly those children who have been removed from their families, to strengthen their connection to their community and culture. There is an opportunity missed when police do not consider what might be happening in the child's family or whether the child might have an undiagnosed disability; when police do not step aside, and make space for community-driven solutions. Cautioning more Aboriginal children, and involving Elders in this process, would be a positive step forward. We hope to see the promise of such an approach be realised.

In relation to pre-charge cautioning, we note that the current five-year Aboriginal Youth Cautioning Pilot (**ACYP**) program is a priority under *Burra Lotjpa Dunguludja* (AJA4), and we support this collaboration between Victoria Police and Aboriginal communities in the three pilot sites (Echuca, Dandenong and Bendigo).[427] However, we are concerned that this is now the second Koori specific youth cautioning pilot program in Victoria, and the Government has still not committed to long-term sustainable funding to ensure that pre-charge cautioning programs are available across Victoria. VALS welcomes Victoria Police's intended change of policy, but emphasises that it is critical that changes are enshrined in legislation.[428]

[426] CCYP, *Our Youth Our Way* report, p33
[427] Under *Burra Lotjpa Dunguludja,* the Aboriginal Justice Forum has committed to implement this program in four sites over the next 5 years. See AJF, *Burra Lotjpa Dungulugja* (2018), p. 41.
[428] Tammy Mills, Police Change Tack on Youth Cautions, The Age (9 September 2021)

Victorian Aboriginal Legal Service

Diversions at Court in the Youth Justice System

Regarding court-based diversion, we are concerned that the lack of culturally safe diversion programs, particularly for Aboriginal youth in rural and regional Victoria means that an Aboriginal young person may be eligible for Court-based diversion, but there are no programs available to support diversion. It is critical to ensure that the commitment under *Burra Lotjpa Dunguludja* (AJA4) to deliver community-based diversion programs is adequately funded and implemented in a timely manner.[429] Additionally, there is a need to enhance the cultural safety of the CCYD, by ensuring that there are Koori Diversion Coordinators.

RECOMMENDATIONS

Recommendation 148. The Victorian Government should create a legislative presumption in favour of alternative pre-charge measures, including verbal warnings, written warnings, cautions and referral to cautioning programs, and youth justice conferencing.

Recommendation 149. There should be no exclusion of specific offences from the presumption in favour of cautions and/or diversion.

Recommendation 150. There should be no limit to the number of cautions a child can receive. Children with a criminal history should not be excluded.

Recommendation 151. Cautioning should not be conditional on a child or young person formally admitting an offence. Cautions should be available to children who do not deny the offence.

Recommendation 152. Cautions should not be conditional upon a child engaging with or completing a program, or complying with conditions or directives.

Recommendation 153. A caution or other alternative response should be offered to a child or young person regardless of the capacity or willingness of their parent or guardian.

Recommendation 154. Victoria Police should make consistent and genuine efforts to build relationships with Aboriginal children, families, communities and services. Victoria Police must address racism at both an individual and systemic level, so that Aboriginal children are not left behind in any cautioning reforms.

[429] See *Burra Lotjpa Dunguludja*, p. 43. Development and delivery of community based diversion programs is yet to commence. See AJA4 in Action.

Victorian Aboriginal Legal Service

Recommendation 155. The Government should resource ACCOs to develop and implement pre-charge and court-based diversion programmes responding to the intersectional needs of Aboriginal youth.

Recommendation 156. Where pre-charge diversion is not possible, there should be a legal requirement to prioritise diversion at all stages of the legal process.

Recommendation 157. Where police decide not to proceed with pre-charge diversions, they should be required to complete a 'failure to caution or divert' notice, which is to be reviewed by the prosecution unit prior to charges being allowed to proceed. This notice should be provided to the child's legal team.

Recommendation 158. If a child is cautioned or diverted, the legislation should specify that

- no charges or proceedings can be commenced or continued against the child or young person for the offence;
- the child or young person is not required to disclose to any other person for any purpose information concerning the caution or diversionary process;
- the caution/diversion does not result in a criminal record;
- evidence of, or relating to, a caution, should not be able to be adduced except with the permission of the child or young person concerned, following legal advice;
- any identifying material including fingerprints, palm prints, photographs or intimate samples including forensic material (if obtained) relating to the child or young person should be destroyed.

Recommendation 159. The Courts should recruit and retain Koori Diversion Coordinators to improve the cultural safety of the Children's Court Youth Diversion service.

Victorian Aboriginal Legal Service

Community Legal Education

Community Legal Education (**CLE**) is an essential tool in reducing contact with the criminal legal system for marginalised people in Victoria. A key driver of continuing contact with police and the legal system, and consequently of overincarceration, is people's uncertainty about their rights in the face of a complex and regularly changing legal landscape. The preventative role of CLE in helping people understand their legal situation and avoid involvement in the legal system complements our client work.

This has been a particularly important issue during the pandemic, with regular changes to legal restrictions and police powers that are not communicated consistently or clearly by the Government to Aboriginal communities. The provision of culturally competent community legal education is therefore crucial to improving Aboriginal people's experience with the justice system, as has been emphasised by the UN's Special Rapporteur on the Rights of Indigenous Peoples.[430]

CLE can prompt individuals to recognise that they have existing legal issues, with which VALS can assist. This empowers individuals with the knowledge that they have rights, and that they can access culturally competent legal assistance in realising and protecting those rights. CLE can assist individuals already caught up in these legal systems to navigate their way with more confidence, taking proactive steps to mitigate risks and achieve better outcomes. CLE also has an important role to play in the prevention space, such as avoiding COVID-19 fines to begin with. Finally, CLE can play an important role in improving VALS' practice, as well as informing policy and law reform. CLE provides an opportunity for the Victorian Aboriginal community to highlight the legal issues which are particularly impacting on them, and their views on current laws or practices.

As part of our Community Justice programming, VALS provides this community legal education to Aboriginal communities across Victoria. For example, VALS welcomed the Victorian Government's provision of funding for *Stronger me, Stronger us*, a CLE program relating to family violence and healthy relationships.[431] Our CLE work consists of information sessions around the state as well as a library of resources available to Aboriginal people and organisations.

However, our CLE work has been strained in the past year due to a series of *Omnibus Bills* and other legislative reforms, and changes to regulations, which have introduced rapid change across VALS' practice areas, along with logistical difficulties in running CLE across the state under pandemic restrictions.

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[430] VALS (2021), *Building Back Better: Victorian Aboriginal Legal Service COVID-19 Recovery Plan*, p55. Available at https://www.vals.org.au/wp-content/uploads/2021/02/Building-Back-Better-Victorian-Aboriginal-Legal-Service-COVID-19-Recovery-Plan-February-2021-FOR-DISTRIBUTION.pdf.

[431] Victorian Government, 22 June 2021, 'Supporting Aboriginal Young People to Connect'. Accessed at https://www.premier.vic.gov.au/supporting-aboriginal-young-people-connect.

Victorian Aboriginal Legal Service

Maintaining and advancing Aboriginal people's knowledge of their legal rights and responsibilities is essential to minimising unnecessary contact with the justice system and reducing overincarceration. Sustainable, ongoing funding is crucial for us to continue operating effective, culturally safe CLE in a variety of formats to Aboriginal people around the state. Community Legal Education should also be made available in prisons, to help provide legal information to people who are particularly at risk of repeat contact with the criminal legal system, and funding should be made available to support this.

RECOMMENDATIONS

Recommendation 160. The Victorian Government should significantly increase funding for VALS' Community Legal Education. Funding should be provided for both staffing and creation of resources (using different media, to be disseminated on different platforms, to ensure the legal messages are accessible to and understandable for everyone in the Aboriginal community). The funding should eb sufficient to enable CLE delivery across the state, including in places of detention.

People with Cognitive Disabilities

Research indicates that persons with cognitive disabilities are significantly over-represented in the justice system in Australia. In 2011 the Victorian DJCS reported 42% of incarcerated men and 33% of incarcerated women had an acquired brain injury, compared to 2.2% of the general population.[432] A 2013 Victorian parliamentary inquiry reported that individuals with an intellectual disability were "anywhere between 40 and 300 per cent more likely" to be jailed than those without an intellectual disability.[433]

Aboriginal people are overrepresented in the justice system and among people with cognitive disabilities, meaning that the way criminal legal processes treat people with disability is of huge significance to Aboriginal people's individual and collective wellbeing.[434] In 2019-2020, 16.9% of criminal matters opened by VALS' Criminal Team involved clients with a disability, although this figure relies on individuals to have received a diagnosis and identify their disability. In reality, a higher number of our clients have disabilities, including undiagnosed and untreated disabilities.

In addition to the support they may need while in police custody, detailed above, people with cognitive disabilities need substantial assistance to navigate the criminal legal system. It can be very difficult for

[432] Martin Jackson et al, 'Acquired Brain Injury in the Victorian Prison System', Corrections Research Paper No 4, Department of Justice (2011) 22.
[433] Law Reform Committee, Parliament of Victoria, Inquiry into Access to and interaction with the Justice System by People with an Intellectual Disability and their Families and Carers (2013).
[434] McCausland et al (2017), 'Indigenous People, Mental Health, Cognitive Disability and the Criminal Justice System', *Indigenous Justice Clearinghouse*. Accessed at https://www.indigenousjustice.gov.au/wp-content/uploads/mp/files/publications/files/research-brief-24-final-31-8-17.pdf.

people with cognitive disabilities to understand proceedings in a criminal trial and get access to justice on the same terms as other people charged with offences. Additionally, individuals with cognitive disabilities face significant challenges in complying with their sentences, including both prison and community-based sentences.

Lack of Support for Clients with Acquired Brain Injury

Under section 80 of the *Sentencing Act*, individuals who are on a CCO and have an intellectual disability (as defined under the *Disability Act 2006*) are eligible for a Justice Plan. Justice Plans are prepared by the Department of Families, Fairness and Housing, and identify treatment services and specialised support to help them comply with the conditions of the Order.[435]

However, due to the narrow definition of intellectual disability under the *Disability Act*, many of VALS' clients who are in need of additional support are not eligible for a Justice Plan. This includes clients with an Acquired Brain Injury (**ABI**), as well as clients who have an intellectual disability that was not diagnosed before the age of 18 years. This issue was also identified by the Centre for Innovative Justice in its recent report on Enabling Justice for People with an Acquired Brain Injury.[436]

Although the term 'ABI' encompasses a broad range of injuries, common symptoms can include problems with concentration and memory, difficulties in planning and organising, confusion, mood swings, and changes in personality and behaviour that may be viewed as irritable and inappropriate. These symptoms can often make it harder to comply with the conditions on a CCO and increases the likelihood that the client will breach the order and end up with a prison sentence.[437]

Unfitness to Stand Trial

Avenues available to people with severe cognitive disabilities, include the statutory scheme for people found unfit to plead or stand trial. In Victoria, people deemed unfit to stand trial are still subject to a 'special hearing' to determine whether they did the act that comprises the offence – with no guarantee that they will understand the proceedings against them, which are meant to be conducted "as nearly as possible as if they were criminal trials".[438] In some cases, people found unfit to stand trial end up facing indefinite detention, including for periods longer than if they had been convicted in an ordinary trial.[439]

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[435] Sentencing Advisory Council, 'Community Correction Order', https://www.sentencingcouncil.vic.gov.au/about-sentencing/community-correction-order

[436] Centre for Innovative Justice and Jesuit Social Services, *Recognition, Respect and Support: Enabling Justice for People with an Acquired Brain Injury*, September 2017, Recommendation 18.

[437] An offender who breaches a condition of a community correction order may be resentenced for the original offence and may face up to 3 months additional imprisonment for the breach. See section 83AD, *Sentencing Act (Vic)* 1991.

[438] Judicial College of Victoria, 'Special Hearings' paragraph 14. Accessed at https://www.judicialcollege.vic.edu.au/eManuals/CCB/29030.htm.

[439] NATSILS (2020), *Submission to the Disability Royal Commission's Criminal Justice Issues Paper*, p36. Available at https://disability.royalcommission.gov.au/system/files/submission/ISS.001.00157.PDF.

The number of people deemed unfit to plead or stand trial is generally low, particularly in comparison to the number of people with cognitive or intellectual disabilities in the prison system.[440] Clearly, unfitness to stand trial is not relevant to many people with disabilities going through criminal legal processes. For those who do come within the remit of the special hearings system, it provides no guarantee of procedural fairness or access to justice.

In 2017, VALS was a participant in the University of Melbourne's *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities* project. The project was built on the recognition that 'unfit to stand trial' provisions alone are not adequate to ensure people with cognitive disabilities have access to justice, and the principle that people should be supported to understand the process they are being subjected to wherever possible.

The research element of the project found a number of barriers to justice for people with cognitive disabilities, which mean they are not treated with procedural fairness, increasing the likelihood they will receive unjustified court outcomes and avoidable prison sentences. These include:

- inaccessible court proceedings that rely on complex language;
- the inconsistent availability of support through proceedings;
- legal services that are under-resourced and not necessarily prepared to respond to the access needs of persons with disabilities;
- long delays in proceedings involving accused persons with cognitive disabilities; and
- the 'criminalisation of disabilities', in which the environmental causes of difficult behaviour are ignored or played down, and/or disability is misinterpreted as deliberately difficult or defiant behaviour.[441]

VALS' role in the Unfitness to Plead project was to implement a 6-month Disability Justice Support Program, aiming to "optimise the participation of accused persons with cognitive disabilities in proceedings against them by focusing on the supports they may require to exercise legal capacity and access to justice on an equal basis with others."[442]

There was consensus among clients, their families, lawyers and support workers that the project delivered significantly better outcomes. Many clients served by the program were able to access support services rather than being given a custodial sentence. The program successfully bridged communications gaps between clients, lawyers, magistrates, police and court personnel. The support worker was also able to provide support beyond the legal process, thanks to their relationship with the clients and understanding of their disabilities, including referrals to other services or assistance in

[440] McSherry et al (2017), *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities*, p17. Accessed at https://socialequity.unimelb.edu.au/__data/assets/pdf_file/0006/2477031/Unfitness-to-Plead-Main-Project-Report.pdf.
[441] Ibid, p10
[442] Ibid, p30.

managing tasks that might otherwise compound the client's stress, such as paying bills and grocery shopping.[443]

A comprehensive costs analysis conducted by the research team confirmed significant short-term savings, with it being estimated that the long-term savings would be even greater. The research team published a detailed account of these findings with a full explanation of the costing's methodology.[444] In addition to the benefits of the support services, the report found that Victorian participants who were able to access Koori Court and the Assessment and Referral Court List were significantly better off. The supportive environment with the Elders and support worker present and the Magistrate sitting at the table with the client, assisted the client to feel less vulnerable throughout the hearing. The process was a conversation, without the confusing legal jargon, facilitating the client's ability to comprehend and actively participate in the process.[445]

The findings of the project strongly support our view that accused persons with cognitive disabilities should be provided with comprehensive support to understand and engage in the legal processes they are subject to. Legal support alone is inadequate, and a finding that someone is unfit to stand trial does not eliminate their right to have access to a fair process and the support they need to properly engage with it.

Aboriginal participants and lawyers from the two participating Aboriginal legal services identified that the success of the Disability Justice Support Program required the following:

- It must be delivered by an Aboriginal Community Controlled Organisation;
- It must be gender specific in its design;
- The support worker must be Aboriginal, or receive cultural training and work in partnership with an Aboriginal client service officer;
- Engagement must take into consideration historical distrust of social welfare services.[446]

This should be the basis of a renewed effort to improve access to justice for people with cognitive disabilities, building on the Disability Justice Support Program model. VALS and other organisations should receive funding to deliver these support services on an ongoing basis. Improving people with disabilities' experience of the criminal legal system protects their rights and will help to avoid continued growth in Victoria's prison population, by ensuring that people are connected with appropriate support services as an alternative to custodial sentences wherever possible.

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[443] VALS (2020), *Royal Commission into Victoria's Mental Health System Supplementary Submission*, p6. Accessed at https://www.vals.org.au/wp-content/uploads/2020/08/Royal-Commission-into-Victorias-Mental-Health-System-Supplementary-Submission.pdf.

[444] McCausland et al (2017), *Cost Benefit Analysis of Support Workers in Legal Services for People with Cognitive Disability*. Available at https://socialequity.unimelb.edu.au/__data/assets/pdf_file/0003/2477046/Unfitness-to-Plead-Project-Cost-Benefit-Analysis.pdf.

[445] VALS (2020), *Royal Commission into Victoria's Mental Health System Supplementary Submission*, p7.

[446] Ibid.

Victorian Aboriginal Legal Service

RECOMMENDATIONS

Recommendation 161. The Government should amend the *Sentencing Act 1991* (Vic) to ensure that individuals with an acquired brain injury and/or withan intellectual disability that was not diagnosed before the age of 18 years, are eligible for a Justice Plan.

Recommendation 162. The Victorian Government should require that all people entering adult or children's prisons are screened for disability, particularly psychosocial or cognitive disabilities and other neurodiverse conditions such as an autistic spectrum condition, dyslexia and attention deficit hyperactive disorder.

Recommendation 163. The Victorian Government should establish safeguards against indefinite detention of people who are found unfit to plead or stand trial in line with those recommended by NATSILS, including:

- Imposing effective limits on the total period of imprisonment a person can be subject to;
- Requiring regular reviews of the need for someone's imprisonment after a finding that they are unfit to plead or stand trial;
- Mandating the adoption of individualised rehabilitation plans, developed by appropriately qualified professionals, which progress a person's transition to their community.

Recommendation 164. The Victorian Government should fund VALS to restart and sustain the Disability Justice Support Program piloted as part of the Unfitness to Plead Project.

Recommendation 165. Given the lengthy periods of non-criminal detention faced by some people with cognitive disabilities, the scope of OPCAT monitoring bodies established in Victoria must include forensic mental health hospitals and other places where people with cognitive disabilities are deprived of their liberty.

Victorian Aboriginal Legal Service

Part 3: Reducing Reoffending and Improving Rehabilitation

This Inquiry's second area of focus is on identifying strategies to reduce recidivism. VALS believes it is critical to recognise that reoffending is reduced most effectively by identifying the underlying causes of offending and providing people with the support they need to be rehabilitated and integrated into society.

There is very limited reason to believe that prison is an effective way of achieving these goals, and even less evidence that harsher sentencing produces better outcomes for rehabilitation or community safety. Research evidence suggests that without dedicated rehabilitation support, *incarceration alone tends to increase reoffending* rather than reduce it.[447] A review of evidence by the Sentencing Advisory Council highlighted that while "increases in the *certainty* of apprehension and punishment demonstrate a significant deterrent effect… imprisonment has, at best, no effect on the rate of reoffending and often results in a greater rate of recidivism."[448] Even the deterrent effect of imprisonment for people other than the person imprisoned (ie. general, rather than specific, deterrence) is small, and "increases in the severity of penalties… do not produce a corresponding increase in deterrence."[449]

This evidence challenges Victoria's policy of increasing focus on incarceration as the primary tool of the state criminal legal system. One of the most important steps Victoria could take to reduce reoffending would be to act on the recommendations of the previous section, and make a decisive shift towards decarceration, reducing the prison population. Especially for Aboriginal people, who are disproportionately represented throughout the criminal legal system and disproportionately subjected to mistreatment in prisons, reducing the prison population would have a substantial effect in reducing reoffending and promoting community safety.

Beyond reducing the prison population, an evidence-based approach to reducing reoffending would change the way prisons operate and the way the criminal legal system responds to people convicted of offences. This section of the submission highlights a number of specific changes that are needed to promote a constructive approach to lowering reoffending rates in Victoria.

[447] Centre for Innovative Justice (2021), *Leaving custody behind: Foundations for safer communities & gender-informed criminal justice systems*, p86. Available at https://cij.org.au/cms/wp-content/uploads/2021/09/leaving-custody-behind-issues-paper-july-2021-.pdf.
[448] Ritchie, Sentencing Advisory Council (2011), *Does Imprisonment Deter? A Review of the Evidence*, p3.
[449] Ibid.

Victorian Aboriginal Legal Service

Parole

Parole allows individuals serving a custodial sentence to serve part of the sentence in the community. When done effectively, parole plays a critical role in the rehabilitation and reintegration of incarcerated people, as it provides for supported transition from prison to the community,[450] which can in turn reduce recidivism.

Since the reform of the Victorian parole system in 2015, parole has become harder to access, which is another factor contributing to the growing prison population.[451] The "tougher" parole system has had a disproportionate impact on Aboriginal people in prison, who are less likely to apply for parole than non-Aboriginal people, and also less likely to be released on parole.[452]

Significant reform is required to reverse the changes made in 2015 and establish a fair, transparent and equitable parole system that is genuinely committed to the rehabilitation and reintegration of incarcerated people. These reforms include:

- Replacing the discretionary adult parole system with automatic parole for certain sentences;
- Permitting time spent on parole to contribute to the head sentence, even if parole is cancelled;
- Amending the parole process to incorporate procedural fairness and natural justice;
- Investing in, and ensuring access to, culturally appropriate rehabilitation programs that are designed, developed and delivered by Aboriginal organisations;
- Ensuring that parole conditions are achievable and culturally appropriate;
- Investing in, and ensuring access to, culturally appropriate support for Aboriginal people on parole, including transitional housing and holistic support.

[450] Research by the AIC indicates that incarcerated people who receive parole have significantly lower rates of recidivism or commit less serious offences than those released unsupervised. See Wan, W-Y, et al. (2014). Parole Supervision and Reoffending. Australian Institute of Criminology.. Available at https://www.aic.gov.au/sites/default/files/2020-05/tandi485.pdf

[451] VALS has previously indicated its concerns with the adult parole system. See VALS (2017). Submission to ALRC Inquiry, 2017; VALS (2011). Submission to SAC review of parole in Victoria, 2011.

[452] Evaluation of AJA2 found that 67% of Aboriginal offenders released from prison were not released on parole. See Nous Group, *Evaluation of the Aboriginal Justice Agreement—Phase 2: Final Report* (2012) [10.2.5]; Australian Law Reform Commission (2019), *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, pp.268-269.

The Adult and Youth Parole Systems

In 2015, the Victorian parole system was amended significantly to implement the recommendations of the Callinan Review.[453] Key changes included:

- Implementation of a discretionary parole system, whereby the onus is on incarcerated people to apply for parole. Prior to this, the presumption was that parole should be granted at the eligibility date, unless there was some compelling reason not to do so.
- A requirement that incarcerated people complete programs while in prison, in order to be eligible for parole, even if they have to wait for the programs to become available.[454]
- Tougher rules for people in prison who reapply for parole after having their parole cancelled for reoffending (including being convicted of the offence of breaching parole);[455]
- A two-layered review process for parole applications from "Serious Violent and Sexual Offenders."[456]

The Callinan Review also recommended that the Adult Parole Board (**APB**) should continue to be excluded from the application of the Human Rights Charter,[457] and that the rules of natural justice should not apply to parole decisions, as was the case prior to the Review.[458]

Discretionary Versus Statutory Parole

The discretionary parole system – whereby people in prison are required to apply for parole rather than being automatically considered at their earliest possible date – creates an unnecessary barrier to parole, resulting in some people not applying for parole even though they are eligible. In 2019-2020, 152 people were eligible for parole in Victoria but did not apply.[459] This is another factor contributing to the growing prison population. Additionally, it means that some people in prison are released at the end of their sentence without ongoing support in the community.

[453] The Callinan review was an independent review commissioned by DJCS, following a number of high profile violent crimes committed by individuals who were on parole. The review resulted in 23 recommendations, all of which were accepted by the government.
[454] Adult Parole Board (2020). Parole Manual: Adult Parole Board of Victoria, Sections 5.3.5 and 4.7. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20%20Board%20-%20Parole%20Manual%202020.pdf.
[455] Corrections Amendment (Parole Reform) Act 2013, s11. Include legislative provision. Law passed in May 2014. See AG report.
[456] Corrections Amendment (Parole Reform) Act 2013, s10(2). Law passed in May 2014, See AG report.
[457] See Section 5(a) and (*c), Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2013*.
[458] Callinan Review, Recommendation 8. See Section 69(2) of the *Corrections Act 1986*.
[459] This represented 8% of the total number of incarcerated people who were eligible to apply for parole. In 2018-2019, 156 (8%) of incarcerated people who were eligible did not apply for parole, and in 2017-2018, there were 114. Adult Parole Board Victoria (2019). Annual Report: 2018-19, p. 24. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20Board%20Annual%20Report%202018-19.pdf.

In contrast to Victoria, the adult parole systems in NSW,[460] QLD[461] and SA[462] combine both statutory parole and discretionary parole. Statutory parole is also used in the UK, NZ and Canada.[463] Accordingly, people on short sentences are automatically released on parole on the date set by the court, without having to apply. Those on longer sentences must apply for parole under a discretionary system. In South Australia, statutory parole applies to people serving sentences of less than five years.[464] Individuals must accept parole conditions before they are released on parole, and in NSW and QLD there is a mechanism for over-riding court-ordered parole.[465]

VALS strongly supports automatic parole for people serving sentences of less than five years imprisonment.[466] Automatic parole will increase access to parole for Aboriginal people,[467] who are more likely to be convicted of low-level offences and sentenced to shorter sentences.[468] However, an automatic parole must be accompanied by abolition of the parole revocation scheme and ensuring parole supervision is less punitive and more focused on rehabilitation.

[460] In NSW, people sentenced to 3 years or less are automatically released when the non-parole period expires, unless the State Parole Authority decides to revoke the automatic release. See *Crimes (Administration of Sentences) Act* 1999 (NSW), Section 158 and *Children (Detention Centres) Act* 1987 (NSW), Section 44.

[461] In QLD, incarcerated people sentenced to less than 3 years (and not a serious violent or sexual offence) are automatically released at the end of the non-parole period. See *Penalties and Sentences Act 1992* (Qld) s 160B(3).

[462] In South Australia, incarcerated people serving sentences of less than 5 years are generally released automatically at the end of the non-parole period. See C*orrectional Services Act 1982* (SA) s 66.

[463] In the UK, most incarcerated people serving a determinate sentence are now released automatically after expiry of one-half of their sentenced terms. See *Criminal Justice Act 2003* (UK) c 44, s 244. In NZ, incarcerated people with sentences of 2 years or shorter are automatically released after serving half of their sentence. Incarcerated people serving sentences of over 2 years become eligible for parole after serving one-third of their sentence (unless the court has imposed a longer minimum non-parole period). Naylor, B. and Schmidt, J. (2010), Do Prisoners have a Right to Fairness before the Parole Board? 32 Sydney Law Review 437-469, p. 440..

[464] C*orrectional Services Act 1982* (SA) s 66.

[465] For example, in NSW, an incarcerated person can request revocation, or the State Parole Authority can revoke court-ordered parole if the SPA decides that the offender is unable to adapt to normal lawful community life, or that satisfactory post-released accommodation or plans have not been made. See s. 222(1)(a)-(c) *Crimes (Administration of Sentences) Regulation 2014* (NSW), cited in ALRC Inquiry p. 307.

[466] VALS (2019*), Submission to Australian Law Reform Commission Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, p42. Available at https://www.alrc.gov.au/wp-content/uploads/2019/08/39._victorian_aboriginal_legal_service_vals.pdf.

[467] See Australian Law Reform Commission (2019), *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, p. 303. Available at https://www.alrc.gov.au/wp-content/uploads/2019/08/final_report_133_amended1.pdf

[468] Australian Law Reform Commission (2019), *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, pp.268-269.

Victorian Aboriginal Legal Service

RECOMMENDATIONS

Recommendation 166. The Victorian Government should amend the *Corrections Act 1986* (Vic) to provide for automatic court-ordered parole for sentences under five years.

Parole Revocation Schemes

In addition to the barriers created by the discretionary parole system, some people may be dissuaded from applying for parole because of the parole revocation system, whereby time on parole does not automatically count towards the head sentence if the parole order is cancelled, unless the APB[469] or the Youth Parole Board[470] directs otherwise. In 2019-2020, 54% of adults who had their parole cancelled did not have their time on parole counted towards their sentence.

According to an investigation by the Victorian Ombudsman in 2016, some incarcerated people were choosing not to apply for parole and instead serve the full sentence in prison because "they found the parole conditions to be too onerous and would rather spend extra time in prison than be released on parole and risk the chance of breaching parole and being reimprisoned."[471] As a result, people are being straight released back to the community without any supports and a much higher risk of recidivism.

In contrast to the situation in Victoria, the parole system in Queensland provides that time served on parole counts towards the head sentence.[472] This approach was also recommended by the ALRC Inquiry into Incarceration of Aboriginal and Torres Strait Islander People.[473]

VALS strongly recommends that the parole revocation scheme in Victoria be abolished.[474] We believe that this reform would lead to more Aboriginal people being released on parole, rather than being

[469] Adult Parole Board (2020). Parole Manual: Adult Parole Board of Victoria, Section 7.6. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20%20Board%20-%20Parole%20Manual%202020.pdf..

[470] The Youth Parole Board has the power, if cancelling parole, to deduct the time or part of the time spent on parole (having regard to the extent and manner in which the young person complied with the parole order) in determining the unexpired portion of detention, see s. 460(7) of the *Children, Youth and Families Act 2005*.

[471] Victorian Ombudsman (2015), *Investigation into the rehabilitation and reintegration of prisoners in Victoria,* p30. Available at https://assets.ombudsman.vic.gov.au/assets/Reports/Parliamentary-Reports/1-PDF-Report-Files/Investigation-into-the-rehabilitation-and-reintegration-of-prisoners-in-Victoria.pdf?mtime=20191217123824

[472] Sofronoff (2016), *Queensland Parole System Review: Final Report*, p300. Accessed at https://parolereview.premiers.qld.gov.au/assets/queensland-parole-system-review-final-report.pdf.

[473] Australian Law Reform Commission (2019), *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples,* Recommendation 9(2).

[474] VALS (2019*), Submission to Australian Law Reform Commission Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, p44. Available at https://www.alrc.gov.au/wp-content/uploads/2019/08/39. victorian aboriginal legal service vals.pdf.
Australian Law Reform Commission (2019), *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples,* Recommendation 9(2)

"straight released" back to the community without support. Provided there is effective and culturally appropriate support in place for Aboriginal parolees, parole offers a much better chance at successfully reintegrating back to the community rather than "straight release".

RECOMMENDATIONS

Recommendation 167. The Victorian Government should repeal Section 77C of the *Corrections Act 1986* (Vic) and adopt a new provision which provides that time spent on parole, before a parole order is cancelled, counts as time served.

Recommendation 168. The Victorian Government should repeal Section 460(7) of the *Children, Youth and Families Act 2005* (Vic), and replace it with a new provision which provides that time spent on parole, before a parole order is cancelled, counts as time served.

Membership of the Parole Board

The Adult Parole Board is established under Section 61 of the *Corrections Act 1986* (Vic)[475] and consists of members appointed by the Government, including current and retired judicial officers, lawyers with at least 10 years' experience and community members. There are currently 32 members of the Adult Parole Board, including 15 community members.[476] The Board includes an Aboriginal Elder, although this is not required under the Act. Board panels normally comprise a presiding divisional chairperson, a community member and a full-time member.[477]

The Youth Parole Board (**YPB**) is established under section 442 of the *Children, Youth and Families Act 2005* (Vic) and consists of 8 members, including 4 community members and two departmental members. The Board includes an Aboriginal Elder, although this is not required under the Act.

According to the 2019-2020 Annual Report of the Adult Parole Board, "the experience and background of the community members include:

- People who have been or have supported victims of crimes
- Retired police officers
- An Aboriginal Elder
- Mental health service provision
- Public administration

[475] s. 61 of the *Corrections Act 1986* (Vic).
[476] Adult Parole Board Victoria (2020). Annual Report: 2019-20, p. 13. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20Board%20Annual%20Report%202019-20.pdf.
[477] Ibid.

- Members of other decision-making Boards at tribunals, hospital administration, education and child protection."[478]

Whilst VALS acknowledges that both the APB and the YPB include one Aboriginal Elder, we believe that this position should be provided for in legislation. We also support additional representation from the Aboriginal community on the respective Boards.

RECOMMENDATIONS

Recommendation 169. The Victorian Government should amend the *Corrections Act 1986* (Vic) to include a legislative requirement to have Aboriginal people on the Adult Parole Board. The new Youth Justice Act should include an equivalent provision for the Youth Parole Board. Membership of the Parole Boards must include people with professional backgrounds and with relevant lived experience.

Culturally Appropriate Rehabilitation Programs in Prisons

As noted above, incarcerated people are required to complete certain offending behaviour programs whilst in prison, in order to be eligible for parole. However, there is a shortage of programs, which means that there are long waiting lists for program participation, and in some cases, inability to access programs has prevented people in prison from applying for parole.[479] Similarly, there are long waiting lists for screening and assessment to determine program suitability and treatment needs.[480]

The Adult Parole Board Manual provides some discretion in granting parole where an individual has not completed the required programs. However this does not include situations where the program has not been completed because it is not available.[481]

Aboriginal people are disproportionality affected by the requirement to complete offending behaviour programs for the following reasons:

[478] Adult Parole Board Victoria (2020). Annual Report: 2019-20, p. 13. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20Board%20Annual%20Report%202019-20.pdf.
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[479] Victorian Ombudsman (2015), *Investigation into the rehabilitation and reintegration of prisoners in Victoria,* p30. Available at https://assets.ombudsman.vic.gov.au/assets/Reports/Parliamentary-Reports/1-PDF-Report-Files/Investigation-into-the-rehabilitation-and-reintegration-of-prisoners-in-Victoria.pdf?mtime=20191217123824
[480] Ibid, p52.
[481] Adult Parole Board Manual Section 4.7 - The Board would only consider paroling an incarcerated person that had been assessed as requiring treatment but has not done that treatment if there were significant factors to mitigate the risk to the community.

- There are not enough culturally appropriate programs for incarcerated Aboriginal people.[482] This is an ongoing issue, but it is becoming even more accentuated due to restrictions on programs arising from the COVID-19 pandemic.[483]
- Incarcerated Aboriginal people are also more likely to serve shorter sentences,[484] which makes it harder to access pre-release programs because of long waiting times. Similarly, they are more likely to receive time-served sentences,[485] which means that they are not able to access programs as the entire sentence is served on remand.[486]

VALS has previously called for investment in culturally appropriate rehabilitation programs for incarcerated Aboriginal people.[487] This gap has also been identified by the Australian Law Reform Commission,[488] and by the Commonwealth Government in its *Prison to Work* Report in 2016.[489] Programs must be designed, developed and delivered by Aboriginal people, and supported by prison staff who are trained in cultural awareness.[490] Additionally, they must be trauma-informed, especially programs being delivered to Aboriginal women.[491]

[482] There are positive examples such as Dilly Bag, but overall the system is under strain. See also VO report, indicating 5 programs as at 2015. See p. 82. The Prison to Work Report also sets out

[483] Department of Justice and Community Safety, *Changes to coronavirus (COVID-19) restrictions: Factsheet for stakeholders*, 23 November 2020; Department of Justice and Community Safety, *Youth Justice coronavirus (COVID-19) update: Factsheet for stakeholders.*

[484] Australian Law Reform Commission (2018). Pathways to Justice – Inquiry into the Incarceration of Rate of Aboriginal and Torres Strait Islander Peoples (ALRC Report 133) at 9.16-9.2. Available at https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/.

[485] Sentencing Advisory Council (2020), *Time Served Prison Sentences in Victoria*. Available at https://www.sentencingcouncil.vic.gov.au/sites/default/files/2020-02/Time_Served_Prison_Sentences_in_Victoria.pdf.

[486] While there are some programs available for remandees, they are much more limited and delivery is inconsistent. See Victorian Ombudsman (2015), p50.

[487] VALS (2014), *Response from the Victorian Aboriginal Legal Service: Victorian Ombudsman Investigation into the rehabilitation and reintegration of prisoners in Victoria – Discussion Paper.* (

[488] Australian Law Reform Commission (2019), *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander People*, pp. 285-301.

[489] The Prison to Work report highlighted the importance of cultural competence in programs; coordination in the delivery of throughcare and post-release services; and the need for an increased focus on the delivery of programs to women in prison—with particular emphasis on Aboriginal and Torres Strait Islander women in prison.

[490] VALS (2019*), Submission to Australian Law Reform Commission Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, p37. Available at https://www.alrc.gov.au/wp-content/uploads/2019/08/39._victorian_aboriginal_legal_service_vals.pdf..

[491] Australian Law Reform Commission (2019), *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander People*, p. 297.

Victorian Aboriginal Legal Service

RECOMMENDATIONS

Recommendation 170. The Victorian Government should amend the *Corrections Act 1986* (Vic) and the Adult Parole Board Manual, to provide that parole cannot be denied on the basis that a required program has not been completed, where this program is unavailable or unsuitable for Aboriginal people.

Recommendation 171. The Victorian Government should work with Aboriginal organisations to ensure that Aboriginal people who are incarcerated, particularly Aboriginal women and girls, have access to culturally safe rehabilitation programs. Funding must be given to Aboriginal organisations to design and deliver these programs.

Lack of Stable Accommodation for Parolees

Similar to bail, access to housing is a major factor preventing people from accessing parole. In 2019-2020, absence of suitable accommodation was one of the factors considered by the Board in 63% of cases in which parole was denied.[492] Aboriginal people are disproportionality impacted by housing issues, particularly homelessness, inadequate housing and overcrowding.[493]

Dedicated transitional housing for individuals exiting prison in Victoria – either on parole or at the end of their sentences – is woefully inadequate. According to an investigation by the Victorian Ombudsman in 2015, the transitional housing available through Corrections Victoria "would at best provide supported transitional housing for 1.7% of released prisoners."[494] In June 2019, over half of the prison population in Australia expected to be homeless when discharged from prison.[495] In 2019-2020, 51% of people exiting prison who accessed specialist homelessness services, accessed those services in Victoria.[496]

Transitional housing for Aboriginal people exiting prison in Victoria is even more limited. Through the Baggarrook program, VALS and Aboriginal Housing Victoria provide transitional housing and support for 6 Aboriginal women and their families.[497] A new facility is also being developed by Warrigunya

[492] Adult Parole Board Victoria (2020). Annual Report: 2019-20, p. 25. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20Board%20Annual%20Report%202019-20.pdf.. The Youth Parole Board has also indicated that housing remains an issue. See YPB Annual Report.

[493] Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2016—Report* (2016). Victorian Parliamentary Inquiry into Homelessness, p. 58.

[494] Victorian Ombudsman (2015), *Investigation into the rehabilitation and reintegration of prisoners in Victoria,* p107. Available at https://assets.ombudsman.vic.gov.au/assets/Reports/Parliamentary-Reports/1-PDF-Report-Files/Investigation-into-the-rehabilitation-and-reintegration-of-prisoners-in-Victoria.pdf?mtime=20191217123824p. 107.

[495] AIHW (2019), The Health of Australia's Prisoners 2018, p. 24.

[496] AIWH, Specialist Homelessness Services Annual Report.

[497] The Baggarrook program combines transitional housing and holistic support for Aboriginal women as they transition from prison. Housing is provided by Aboriginal Housing Victoria and holistic support is provided by VALS and allied organisations,

Aboriginal and Torres Strait Islander Corporation in Gippsland, which will provide safe, affordable post-release housing for 12 Aboriginal men.[498] There are also several residential rehabilitation centres for Aboriginal people managing alcohol and/or drug dependencies,[499] however these are usually short-term and not specifically for people leaving prison.

As recommended by the Parliamentary Inquiry into Homelessness in March 2021, the Victorian Government must provide additional transitional housing for people leaving custodial settings.[500] VALS recommends further investment in Aboriginal controlled transitional housing and support, building on Baggarrook and the Wulgunggo Ngalu Learning Place, which provides residential support for Aboriginal men on Community Corrections Orders.

RECOMMENDATIONS

Recommendation 172. The Victorian Government must work with Aboriginal organisations to develop and provide culturally appropriate transitional housing and support for Aboriginal people exiting prison.

Natural Justice and Procedural Fairness

In both the adult and youth justice parole systems in Victoria, principles of procedural fairness and natural justice, as well as the *Charter of Human Rights and Responsibilities 2006*, do not apply to decisions of the parole boards.[501] This is not the case in jurisdictions such as NSW, QLD, ACT, UK, NZ, and Europe, where reforms have led to a more transparent and fair system in which individual rights derived from natural justice are provided for in legislation and/or regulations, and upheld in court.[502]

as well as DHHS and Corrections Victoria. The program is funded by Corrections Victoria. See Baggarrook – Victorian Aboriginal Legal Service (vals.org.au)

[498] Warrigunya News, June 2021.

[499] Ngwala Willumbong Aboriginal Corporation runs the following Recovery Centres: Yitjawudik Men's Recovery Centre, Galiamble Men's Recovery Centre and Winja Ulupna Women's Recovery Centre. For young Aboriginal people, there is also Bunjilwarra (Koori Youth Alcohol and Drug Healing Service) and Baroona Youth Healing Centre. If an Aboriginal person is serving a Community Corrections Order after finishing their prison sentence, they may also be able to access Wulgunggo Ngalu Learning Place.

[500] Parliamentary Inquiry into Homelessness, Recommendation 22. Available at https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Homelessness_in_Victoria/Report/LCLSIC_59-06_Homelessness_in_Vic_Final_report.pdf.

[501] S. 69(2) of the Corrections Act 1986, s. 69(2); ; s. 449(2) of the *Children, Youth and Families Act 2005*; and Adult Parole Board (2020). Parole Manual: Adult Parole Board of Victoria, Section 3.3. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20%20Board%20-%20Parole%20Manual%202020.pdf.

[502] In 1988, "the European Court of Human Rights held that a refusal to grant parole is a deprivation of liberty and that, in England, natural justice is required for parole decisions." See Naylor, B. and Schmidt, J. (2010), Do Prisoners have a Right to Fairness before the Parole Board? 32 Sydney Law Review 437-469, p. 455.

VALS strongly believes that there is a need for greater transparency, accountability and fairness in the parole process.[503] As VALS noted in its 2011 submission to the SAC review of the adult parole framework, people should be "afforded the same procedural fairness granted in criminal proceedings. In both proceedings, decisions impacting on an individual's rights to liberty are at stake and therefore compel the employment of procedural fairness."[504]

Incorporating procedural fairness into the *Corrections Act* 1986 (Vic) and the new Youth Justice Act will increase community and incarcerated people's confidence in the parole process, increase incarcerated people's acceptance of parole board decisions, encourage positive behaviour by them and lead to better outcomes for incarcerated Aboriginal people.

Without procedural fairness and natural justice, there is also an increased risk of discriminatory practices that could impact on Aboriginal people, people with disabilities, and people with other characteristics that increase their vulnerability to discriminatory practices. Safeguards are critical to protect against systemic and institutional racism, including racialised understandings of risk.

Procedural Fairness

Procedural fairness is a core component of administrative law and includes:

- the right to be informed of and understand the case against you;
- the right to be heard and respond to the case against you;
- the right to have a decision affecting you made without bias;
- the right to be informed of and understand a decision in a case against you; and
- the right to appeal a decision in a case against you.

These principles ensure that decisions affecting the rights, interests or legitimate expectations of individuals are fair, transparent and equitable. The Victorian Human Rights Charter enshrines these principles as they relate to criminal proceedings.[505]

The Parole Decision-Making Process

The parole process is set out in the Manuals for the Adult Parole Board and the Youth Parole Board, but it is not enshrined in legislation. In both jurisdictions, the overarching purpose of parole is to promote public safety by supervising and supporting the transition of people from custody back into the community in a way that seeks to minimise their risk of reoffending, in terms of both frequency

[503] See VALS Submission to Review of the Adult Parole Board, VALS submission to ALRC Inquiry?
[504] VALS (2011). Review of Victoria's Adult Parole Framework – Submission to the Sentencing Advisory Council.
[505] ss. 24-25 of the *Charter of Human Rights and Responsibilities 2006*.

and seriousness, while on parole and after they complete their sentence.[506] In the youth justice system, the purpose of parole also includes support for the young person's continued rehabilitation.[507]

In the adult parole system, the parole decision making process includes both an application phase and a decision-making phase:

- Parole application: incarcerated people must apply for parole 12 months prior to their earliest eligibility date. Following the application, Corrections Victoria prepares a report which is considered by the APB, along with the incarcerated person's application. The APB can either deny or defer the application, or request a Parole Suitability Assessment.
- Parole decision: the APB considers the Parole Suitability Assessment Report and the incarcerated person's parole application. They may also interview them, although this is the exception rather than the rule,[508] and will take into account any victims' statements. The paramount consideration in deciding whether or not to grant parole is safety and protection of the community.[509] The APB Manual and Annual Report sets out a non-exhaustive list of factors that are also considered.[510] A two-tiered decision-making process exists for 'Serious Violent Offenders or Sexual Offenders'.[511]

In the youth justice system, the YPB is established under the CYFA, but the process for granting parole and any guidance on how the YPB exercises its discretion is not provided for in the public domain, other than a brief overview in the YPB Annual Reports. VALS is of the view it is critical that the new Youth Justice Act include more detailed provisions relating to youth parole.

Currently, parole for young people is automatically considered by the Youth Parole Board, which has discretion to grant parole at any time (subject to limited exceptions).[512] In practice, the YPB will set a

[506] Adult Parole Board (2020). Parole Manual: Adult Parole Board of Victoria, p. 7. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20%20Board%20-%20Parole%20Manual%202020.pdf. Youth Parole Board (2020). Annual Report 2019-2020, p. 15. Available at https://files.justice.vic.gov.au/2021-06/YPB_Annual_Report_2020_0.pdf.

[507] Youth Parole Board (2020). Annual Report 2019-2020, p. 15. Available at https://files.justice.vic.gov.au/2021-06/YPB_Annual_Report_2020_0.pdf.

[508] Adult Parole Board (2020). Parole Manual: Adult Parole Board of Victoria, Section 5.3. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20%20Board%20-%20Parole%20Manual%202020.pdf.

[509] s. 73A of the *Corrections Act 1986*.

[510] The factors include: the sentence imposed by the court including any comments by the court about parole and rehabilitation; psychiatric or psychological reports available to the court when it imposed the sentence; victim impact statements provided to the sentencing court; the nature and circumstances of the offence for which the incarcerated person is serving a sentence; the incarcerated person's criminal history, including performance on past parole orders or community-based orders' a submission received from a victim of the prisoner; the outcome of formal risk assessments conducted for the incarcerated person; whether the incarcerated person has undertaken treatment or programs and, if so, formal reports of their performance; psychiatric or psychological reports requested by the Board; whether proposed accommodation is suitable and stable; the incarcerated person's behaviour in prison, including outcomes of random drug tests.

[511] Adult Parole Board Victoria (2020). Annual Report: 2019-20. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20Board%20Annual%20Report%202019-20.pdf..

[512] CYFA. Exceptions are: where a young person has been sentenced to a term of imprisonment of over 12 months or with a non-parole period by a higher court and has subsequently been transferred to a youth justice centre, or; where a young

review date part way through the young person's sentence. At the review, the YPB receives a report from the manager of the youth justice centre setting out how the young person has been going during their sentence and a recommendation on whether they should be granted parole.[513]

Furthermore, the YPB Annual Report indicates that in carrying out its functions, the Board:

- interviews young people in detention either at the request of centre management, a young person, or on the Board's own initiative;
- receives and considers case histories, summaries of offences, outcomes of risk assessments using validated tools and reports on young people's progress in custody and on parole to assist in their decision-making;
- requests and considers special reports and court documents, for example, court transcripts, victim impact statements, school reports, police summaries, psychiatric and psychological reports;
- hears from victims and/or their families;
- may warn a young person who is demonstrating non-compliance or problematic behaviour in a Youth Justice Centre that their behaviour is delaying or even jeopardising their prospects of being granted parole.[514]

The YPB Annual Report sets out a range of factors that are considered by the Board when making decisions concerning parole.[515]

The Right to be Informed of and Understand the Case Against You

In both the adult and youth justice parole systems, individuals do not have the right to view or receive copies of reports submitted about them to the APB/YPB. This includes reports from Corrections and Youth Justice officers, as well as other reports that may be considered by the APB when deciding whether to request a Parole Suitability Assessment and whether to grant parole. Additionally, information provided to the APB through interviews with prison staff is not shared with the incarcerated person.

person is subject to a mandatory minimum youth justice centre order imposed by a higher court for an assault against an emergency or custodial worker. In both cases, the Board must not release the young person on parole before the expiry of the relevant period or term. There are also some other very limited circumstances in which the Board's discretion to grant or cancel parole is curtailed in the context of terrorism-related offending.

[513] See Parole in the youth justice system | Department of Justice and Community Safety Victoria.

[514] Youth Parole Board (2020). Annual Report 2019-2020, p. 16. Available at https://files.justice.vic.gov.au/2021-06/YPB_Annual_Report_2020_0.pdf

[515] The factors considered by the Board in making its decisions include: the young person's age and interests; the nature and circumstances of the offence; the young person's criminal history, outstanding charges, and compliance with any previous community-based orders; comments by the sentencing court; interests of or risk to the community; capacity for parole to assist rehabilitation; family and community support networks; reports, assessments and recommendations made by medical practitioners, psychologists and psychiatrists, custodial staff, parole officers and support agencies; submissions from the young person, their family and friends; and from victims and police informants.

In contrast, the parole systems in NSW, ACT,[516] QLD,[517] NZ,[518] UK[519] and Canada[520] provide for an incarcerated person to access all information that is being considered by the relevant parole authorities, subject to safety and security considerations. For example, in the ACT, the parole decision-making process includes an initial inquiry, following by a hearing if the parole authority decides not to grant parole at the inquiry stage.[521] The incarcerated person is given written notice of the hearing and is provided with copies of any report or other document that will be considered by the Board in deciding whether or not to grant parole.[522] The incarcerated person is invited to make a submission or appear at the hearing.[523]

VALS strongly recommends that Victoria follows the approach taken in these jurisdictions and creates a statutory right to access all information used by the Board to make a decision regarding parole, subject to limited exceptions. Relevant documents must be provided in a timely manner, so that incarcerated people have adequate time to consider the material and respond. Transparency in the parole decision-making process will increase incarcerated people's confidence in the parole process and acceptance of decisions by the Parole Boards.

<u>The Right to be Heard and Respond to the Case Against You</u>

The APB regularly interviews incarcerated people as part of the parole decision making process, but there is no right to appear in person before the APB. Even if the Board does interview the incarcerated person, the individual is not in a position to respond fully to the case against them if they have not previously been provided with all relevant documents and given appropriate time and support to prepare for the interview. Moreover, legal representatives do not have standing before the Parole board, and VALS is not funded to provide advice and support to people in prison regarding their parole applications.

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[516] *Crimes (Sentence Administration) Act 2005* (ACT) s 127.
[517] The Parole Board first forms a preliminary view. If the Board forms the view that parole should not be granted, the Board informs the incarcerated person in writing and discloses all relevant information and materials to the incarcerated person. The incarcerated person then has 14 days to submit additional information or make further submissions, before the Board reconsiders the application. See *Parole Board Queensland: Parole Board Manual* (2019), p. 16.
[518] *Parole Act 2002* (NZ) s 13. The Board must take all reasonable steps to ensure that the information received by the Board on which it will make any decision relating to an offender is made available to the offender—(a) at least 5 working days before the relevant hearing; or (b) if that is not possible, as soon as practicable before the hearing.
[519] Incarcerated people in the UK receive a dossier containing the documents going to the parole board. There is provision for withholding information if disclosure would adversely affect: (i) national security; (ii) the prevention of disorder or crime; or (iii) the health or welfare of the incarcerated person or any other person. Withholding of the information must be necessary and proportionate in the circumstances. See Parole Board Rules 2019, Rules 16-17
[520] *Corrections and Conditional Release Act*, SC 1992, c 20, s 141. At least fifteen days before the day set for the review of the case of an offender, the Board shall provide or cause to be provided to the offender, in writing, in whichever of the two official languages of Canada is requested by the offender, the information that is to be considered in the review of the case or a summary of that information.
[521] Crimes (Sentence Administration) Act 2005, (ACT) ss. 125-127.
[522] Crimes (Sentence Administration) Act 2005, (ACT) s. 127(3)(b).
[523] Crimes (Sentence Administration) Act 2005, (ACT), s. 127(2)(c).

In the Youth Justice parole system, the young person attends an interview on the day they are being released on parole, but they do not appear in person before the Board as part of the decision-making process.[524] They do not have a right to legal assistance or representation as part of the parole process.

The right to appear before the parole authority has been incorporated into other jurisdictions, both in Australia and abroad.[525] This means that incarcerated people are able to address any inaccuracies in the documents being considered by the parole authority. For this right to be effective however, it is critical that incarcerated people are able to access relevant support in preparing their submissions and have the right to be represented by a lawyer. This is the case in the ACT,[526] South Australia[527] and Canada,[528] which provide for a statutory right to legal representation at parole hearings. In NZ, incarcerated people are entitled to be represented by a lawyer, with leave of the board,[529] and in NSW, incarcerated people can access legal representation through Legal Aid and NSW ALS, although they do not have a statutory right.

As stated previously, VALS believes that "the right to appear before the board is central to the notion of positive engagement whereby the prisoner is involved in the decision-making process and is therefore more likely to help arrive at an informed and well-tailored plan for conditional release, or alternatively be more accepting of the decision of the Board if they decide not to grant parole."[530]

Given recent reports by IBAC and the Victorian Ombudsman – relating to serious misconduct by prison staff and challenges with the disciplinary process – we also believe that it is critical that incarcerated people in Victoria have the opportunity to test the accuracy of information before the Board. High illiteracy rates amongst incarcerated people[531] mean that access to legal assistance and representation is essential to ensure that incarcerated people are able to participate fully in this process.

The Right to be Informed of and Understand a Decision in a Case Against You

The right to be informed of and understand the parole decision requires both transparency in the criteria on which a decision is made, as well as the right to receive detailed reasons for the decision by the parole authority.

[524] Youth Parole Board (2020). Annual Report 2019-2020, p. 18. Available at https://files.justice.vic.gov.au/2021-06/YPB_Annual_Report_2020_0.pdf
[525] s. 209 of the *Crimes (Sentence Administration) Act 2005* (ACT); s. 140 of the *Crimes (Administration of Sentences) Act 1999* (NSW), although limited to review hearings (s. 137C(2)); s. 77(2)(c) of the *Correctional Services Act 1982* (SA); s. 189 of the *Corrective Services Act 2006* (Qld)(if leave is granted);s.72(2) of the *Corrections Act 1997* (Tas) (if leave is granted).
[526] s. 209(a) of the *Crimes (Sentence Administration) Act 2005* (ACT).
[527] *Correctional Services Act 1982* (SA) s 77(3).
[528] *Corrections and Conditional Release Act*, SC 1992, c 20, s 140(7)–(9).
[529] *Parole Act 2002* (NZ) s 49(3).
[530] VALS (2011), *Review of Victoria's Adult Parole Framework: Submission to the Sentencing Advisory Council,* p10. Available at https://balitngulu.org.au/assets/2015/06/Review-of-Victoria's-Adult-Parole-System.pdf.
[531] Kendall & Hopkins (2019), 'Inside out literacies: literacy learning with a peer-led prison reading scheme', *International Journal of Bias, Identity and Diversities in Education*.

As noted above, the purpose of parole and the criteria that guide the decision-making process of the APB and the YPB in Victoria are now publicly available.[532] In the adult system, the paramount consideration in deciding whether or not to grant parole is the safety and protection of the community.[533] Other factors take into consideration by the Board include: formal risk assessments; criminal history; performance on other supervised sentencing orders served in the community; behaviour in prison; ability to address factors underlying offending behaviour; victims' submissions; and accommodation and release planning.[534]

In deciding whether to grant a youth parole order, the YPB considers the following factors in making a decision: the interests of, or risk to the community; the interests of the young person; comments by the sentencing court; the age of the young person; the capacity for parole to assist the young person's rehabilitation; the nature and circumstances of the offences; outstanding charges or pending court appearances; the young person's criminal history; previous community-based dispositions and compliance; risk assessments using validated tools; family and community support networks; access to appropriate and stable accommodation; reports from psychologists, psychiatrists, teachers, medical practitioners and other professionals; submissions made by victims and police informants; and submissions made by the young person, the young person's family, friends and potential employers. [535]

Although there is now further clarity in what guides the exercise of discretion by the Boards, such criteria should be legislated, as is the case in NSW[536] and ACT.[537] As in Canada, the legislated criteria in Victoria should include a requirement to consider how the release of the person will contribute to the protection of society by facilitating the reintegration of the person who has offended into society.[538] Legislating the criteria to be considered by the parole boards in their decision-making, and having flexible and individualised responses are not mutually exclusive.

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[532] Adult Parole Board (2020). Parole Manual: Adult Parole Board of Victoria, Sections 3.1 and 5.3. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20%20Board%20-%20Parole%20Manual%202020.pdf; Adult Parole Board Victoria (2020). Annual Report: 2019-20, pp. 20-21. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20Board%20Annual%20Report%202019-20.pdf.. The purpose of parole is to promote public safety by supervising and supporting the transition of offenders from prison back into the community in a way that seeks to minimise their risk of reoffending, in terms of both frequency and seriousness, while on parole and after they complete their sentence. The Board must treat the safety and protection of the community as its paramount consideration.

[533] s. 73A of the *Corrections Act 1986*.

[534] Adult Parole Board (2020). Parole Manual: Adult Parole Board of Victoria, Section 5.3. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20%20Board%20-%20Parole%20Manual%202020.pdf.

[535] Youth Parole Board (2020). Annual Report 2019-2020, pp. 15 and 18. Available at https://files.justice.vic.gov.au/2021-06/YPB_Annual_Report_2020_0.pdf

[536] s. 135 of the *Crimes (Administration of Sentences) Act 1999* (NSW).

[537] s. 120 of the *Crimes (Sentence Administration) Act 2005* (ACT).

[538] Canadian legislation provides the following criteria for granting parole: (a) "the offender will not, by reoffending, present an undue risk to society before the expiration according to law of the sentence the offender is serving; and (b) the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen." See c. 20, s. 102 of the *Corrections and Conditional Release Act*, SC 1992.

If parole is refused, individuals do not receive detailed reasons for the decision reached by the respective parole boards and decisions cannot be accessed through Freedom of Information requests.[539] As noted above, in the youth justice parole system, the young person does not appear at their parole review. The YPB makes a decision based on a report from the manager of the Youth Justice Centre, which includes a recommendation on whether the young person should be released on parole. If parole is not granted, the young person is not informed of the reasons for the decision.

In line with other jurisdictions,[540] Victoria should provide a statutory right for individuals to receive written reasons for the decision when parole is refused, including any matters that may assist the incarcerated person in further parole applications. We believe that providing detailed reasons setting out why parole was refused will increase confidence in the parole system, as well as understanding and acceptance of parole decisions.

The Right to Appeal a Decision in a Case Against You

The right to appeal a parole decision is fundamental for procedural fairness and must include review by a body that is independent to the body that made the original decision. In Victoria, the adult parole system currently provides for internal review by the APB, as well as judicial review by the Supreme Court in limited circumstances.[541] The APB Manual provides that incarcerated people can request an internal review of a board decision, and "if the Board determines that there is a proper basis for the review, it may review the original decision."[542] No further information is provided regarding the grounds for review or what will guide the decision of the Board in granting or refusing the request. Decisions of the APB are explicitly excluded from the jurisdiction of the Victorian Ombudsman.[543]

The right to appeal a parole decision in certain circumstances is provided for in the UK,[544] NZ[545] and Canada.[546] In NSW and WA, the person in prison can request the parole authority to review its decision.[547] This is similar to Victoria, but the right to review in NSW and WA is provided for in

[539] The *Freedom of Information Act 1982* does not apply to the Adult Parole Board as it is not a 'prescribed authority' as defined in section 5 of the *Freedom of Information Act 1982.*
[540] *Crimes (Sentence Administration) Act 2005* (ACT) s.126(2B); *Corrective Services Act 2006* (Qld) s 193(5)(a); *Correctional Services Act 1982* (SA) s 67(9)(b); *Corrections Act 1997* (Tas) s 72(8); *Corrections and Conditional Release Act*, SC 1992, c 20, ss 143–144; *Parole Act 2002* (NZ) s 67; Parole Board Rules, rules 19(8), 21(12), 25(6) and 28(10); cited in Naylor,
[541] Currently, judicial review of a decision of the Adult Parole Board by the Supreme Court of Victoria is available on the grounds of jurisdictional error.
[542] Adult Parole Board (2020). Parole Manual: Adult Parole Board of Victoria, Section 3.3.2. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20%20Board%20-%20Parole%20Manual%202020.pdf.
[543] *Corrections Act 1986* (Vic).
[544] Individuals can request review of parole board decisions made since 2019, if parole was not review correctly, or the decision was unreasonable. The Parole Board will decide if the decision needs to be reconsidered, and if there needs to be a new hearing. If the Parole Board refuses to reconsider the decision, the individual can apply for judicial review.
[545] *Parole Act 2002* (NZ) ss 67–68.
[546] *Corrections and Conditional Release Act*, SC 1992, c 20, s 157.
[547] *Crimes (Administration of Sentences) Act 1999* (NSW) s 139; *Sentence Administration Act 2003* (WA) s 115A. In WA, the grounds for review are that the person who made the decision: (a) did not comply with the Act or regulations; or (b) made an error of law; or (c) used incorrect or irrelevant information or was not provided with relevant information.

legislation. Similar to other aspects of procedural fairness, VALS strongly recommends that the right to appeal to an independent body should be enshrined in legislation.

RECOMMENDATIONS

Recommendation 173. The Victorian Government must repeal regulation 5 of the *Charter of Human Rights and Responsibility (Public Authorities) Regulation 2013* (Vic), which exempts the Adult Parole Board from the operation of the Charter.

Recommendation 174. The Victorian Government must repeal section 69(2) of the *Corrections Act 1986* (Vic), which provides that the Adult Parole Board is not bound by the rules of natural justice.

Recommendation 175. The Victorian Government must repeal section 449(2) of the *Children, Youth and Families Act 2005* (Vic), which provides that the Youth Parole Board is not bound by the rules of natural justice. The new Youth Justice Act should not exempt the Youth Parole Board from being bound by the rules of natural justice.

Recommendation 176. The Victorian Government should amend the *Corrections Act 1986* to include the purpose of parole and the criteria on which parole decisions are made. The legislated purpose of parole should highlight that the release of the individual on parole will contribute to the protection of society by facilitating their rehabilitation and reintegration into society.

Recommendation 177. The Victorian Government must amend the *Corrections Act 1986* to provide for the following rights of incarcerated people in relation to any decisions made by the Adult Parole Board regarding parole:

- The right to have access to all information and documents being considered by the parole authority, subject to limited exceptions;
- The right to appear before the Board;
- The right to culturally appropriate legal assistance and representation;
- The right to detailed reasons relating to a decision;
- The right to appeal a decision of the Board.

Recommendation 178. The Victorian Government must include the purposes of parole in the new Youth Justice Act:

- The legislated purpose of parole should highlight that the release of the young person on parole will contribute to the protection of society by facilitating their rehabilitation and reintegration into society. Detaining children does not support their rehabilitation.
- Reintegration planning should commence as soon as the young person enters custody.

Victorian Aboriginal Legal Service

Recommendation 179. The new Youth Justice Act should specify that the Youth Parole Board must be guided by the principle that detention is a last resort, in accordance with Article 37(b) of the *Convention on the Rights of the Child.*

Recommendation 180. The Victorian Government must include the following statutory rights in the new Youth Justice Act, relating to any decisions made by the Youth Parole Board regarding parole:

- The right to have access to all information and documents being considered by the parole authority, subject to limited exceptions;
- Right to appear before the Board;
- The right to culturally appropriate legal assistance and representation;
- The right to detailed reasons relating to a decision;
- The right to appeal a decision of the Board.

Recommendation 181. The Victorian Government should provide funding to VALS to provide legal assistance, support and representation to Aboriginal people who are applying for parole.

Parole Conditions and Supervision: Setting People up to Fail

In addition to challenges in accessing parole, Aboriginal people face challenges in meeting parole conditions, which are often culturally inappropriate, excessive and inflexible. Furthermore, Corrections Victoria takes a rigid and punitive approach, which has a disproportionate impact on Aboriginal people.

Both youth and adult parole orders contain mandatory conditions,[548] including a requirement not to break the law and reporting conditions.[549] Additionally, the APB/YPB may also impose special conditions such as a requirement not to consume alcohol, to not contact specified persons or attend a specified place.[550] Similar to bail conditions, and conditions attached to a Community Corrections Order, parole conditions can often be culturally inappropriate, for example, requiring someone not to contact a specific person when they may have cultural obligations in relation that person.

Supervision of parole by Corrections Victoria is often punitive and rigid, and carried out by parole officers who have not undertaken cultural awareness training. Whilst there are some Aboriginal parole officers, there is no program whereby Aboriginal people on parole can access an Aboriginal parole

[548] s. 458(4) of the *Children, Youth and Families Act 2005*.
[549] Adult Parole Board (2020). Parole Manual: Adult Parole Board of Victoria, Section 5.6.1. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20%20Board%20-%20Parole%20Manual%202020.pdf
[550] Adult Parole Board (2020). Parole Manual: Adult Parole Board of Victoria, Section 5.6.2. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20%20Board%20-%20Parole%20Manual%202020.pdf

officer. In VALS' experience, the rigid and inflexible approach taken by parole officers does not work for Aboriginal people and there is a high risk of breaching parole, resulting in cancellation of their parole, as well as an additional prison sentence (up to 3 months) on top of their original sentence and/or 30 penalty units.[551]

In 2019-2020, 19% of adults on parole had their parole cancelled.[552] Non-compliance with parole conditions - including breaches of conditions, loss of contact with CCS or unacceptable absences for scheduled appointments - was a factor in 73% of cancellations.[553] In the same time period, the Youth Parole Board issued 160 parole orders, 40 warnings and 83 parole cancellations.[554]

In other jurisdictions, including Queensland, the Parole Board is specifically directed to take into account cultural considerations when considering both parole applications and parole cancellations.[555] A similar approach should be taken in Victoria, including through guidance in the Parole Board Manuals, as well as a legislative requirement under the *Corrections Act 1986* and the new Youth Justice Act.

Changes must also be made to parole supervision, to ensure that Aboriginal people are not set up to fail, and to support rehabilitation and reintegration of parolees. The section below on transition support sets out additional recommendations for Aboriginal people leaving prison, including on parole and at the end of their sentence.

RECOMMENDATIONS

Recommendation 182. The Victorian Government should amend the *Corrections Act 1986* (Vic) so that the Adult Parole Board is required to take into account cultural considerations when making decisions on parole applications, suspension and cancellation of parole for Aboriginal people. The Adult Parole Board Manual should be amended to provide guidance to the Adult Parole Board on complying with this requirement. All parole officers should be required to undertake mandatory and ongoing cultural awareness training.

[551] S. 78A of the *Corrections Act 1986*.
[552] Adult Parole Board Victoria (2020). Annual Report: 2019-20, p. 26. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20Board%20Annual%20Report%202019-20.pdf..
[553] Ibid., , p. 26.
[554] Youth Parole Board (2020). Annual Report 2019-2020, pp. 23, 25 and 26. Available at https://files.justice.vic.gov.au/2021-06/YPB_Annual_Report_2020_0.pdf
[555] See Queensland Parole Manual.

Victorian Aboriginal Legal Service

Rehabilitation Programs

An important part of reducing the risk of reoffending for people in prison is ensuring that adequate rehabilitation and reintegration programs are available. This includes, for Aboriginal people, access to culturally safe programs which support connection to culture, a protective factor against reoffending.[556]

VALS has observed a concerning lack of programs available for Aboriginal people in prison, contributing to disconnection from community and culture, in the past eighteen months. This is partly attributable to the effects of COVID-19 restrictions, which have limited in-person visits to prisons and consequently impacted face-to-face programs. Restrictions in the wider community have also had flow-on impacts for rehabilitation services – supplies for art programs, for example, have been disrupted, as have programs delivered in partnership with outside organisations that are heavily affected by the pandemic. The introduction of some restrictions is an important safety measure, but, as detailed further below, VALS is of the view that restrictions in prisons have gone beyond what is necessary to protect the health of people in prison, as demonstrated by their frequent lack of alignment with restrictions in place in the community. Prisons should be very hesitant about disrupting access to rehabilitative programming, especially for Aboriginal people. Furthermore, decisions to suspend any programs should not be taken unless truly necessary and suspended programs should be restored at the first opportunity.[557] In the interim, it is critical that detained people are not penalised – for example, in parole applications or treatment by prison authorities – for failing to participate in or complete programs when they are not being run.

Further shortcomings in the programs offered by Victorian prisons continue to exist that predate the current COVID-19 pandemic. Services for Aboriginal people (particularly Aboriginal women) are rarely able to meet demand because of insufficient funding to the ACCOs that provide these services. People on remand typically have no access to rehabilitation programs, an issue which has become even more serious as the remand population has grown and the amount of time people spend on remand has steadily increased.

The Victorian Government has formally recognised the inadequacy of rehabilitation offerings for Aboriginal people in prison before the Supreme Court. Perversely, however, this admission was used to argue for harsher sentences on the basis that, since the Government is not properly resourcing rehabilitation, community safety could only be protected by a longer prison term. VALS was satisfied to see this argument, which was tendered in a case involving one of our clients who had been

[556] Edwige & Gray (2021), *Significance of Culture to Wellbeing, Healing and Rehabilitation*. Available at https://www.publicdefenders.nsw.gov.au/Documents/significance-of-culture-2021.pdf.
[557] VALS (2021), *Building Back Better: Victorian Aboriginal Legal Service COVID-19 Recovery Plan*, p83. Available at https://www.vals.org.au/wp-content/uploads/2021/02/Building-Back-Better-Victorian-Aboriginal-Legal-Service-COVID-19-Recovery-Plan-February-2021-FOR-DISTRIBUTION.pdf.

convicted of serious charges, rejected by the court.[558] Nonetheless, it reflects a concerning attitude on the part of the Government. Rehabilitation programs should not be an afterthought for the Government, and the absence of such programs cannot be compensated for by longer sentences, which are unlikely, in and of themselves, to have any beneficial impact in reducing reoffending.[559]

VALS firmly believes that rehabilitation programs should operate on voluntary principles. Attempts to rehabilitate people are unlikely to be successful when they are premised upon a carceral logic that threatens people with punishment – such as being returned to court in formal breach of a community corrections order – for not meeting the requirements of a program. There needs to be recognition of the complex needs of people who have committed offences and of the fact that rehabilitation cannot be forced. This is particularly true for Aboriginal people, and rehabilitative programs which are focused on encouraging reconnection to culture; meaningful engagement with culture and community can only come voluntarily, not from activities undertaken under the threat of a formal breach of a community corrections order. It must also be recognised that disengagement from a program should be met with greater support to facilitate reengagement – a punitive approach simply will not enable rehabilitative objectives to be met.

An important model is Wulgunggo Ngalu Learning Place, a residential program for Aboriginal men on Community Corrections Orders.[560] Participation in Wulgunggo Ngalu is voluntary and participants are able to voluntarily 'discharge' themselves at any time. Rather than trying to compel participation, the program aims to facilitate it by removing barriers which, in other contexts, prevent Aboriginal people completing programs. This is reflected in the attitudes of participants, who feel they have a better chance of completing the terms of their CCOs at Wulgunggo Ngalu than other programs, according to a formal evaluation of the initiative.[561] Involuntary rehabilitation has very limited prospects of successfully integrating people into society or establishing meaningful connections with culture, and so its value is very low. The focus of the Victorian Government needs to be on programming which attracts willing participants and creates environments where they are empowered to complete their rehabilitation voluntarily. This principle extends to drug and alcohol rehabilitation, which is a medical treatment that should always be provided on the basis of informed consent, not made mandatory.[562]

Positive models for rehabilitation and reintegration are too often kept at a very small scale and not made accessible to enough people in prison, particularly Aboriginal people. Despite supportive

[558] DPP v Herrman, https://www.supremecourt.vic.gov.au/case-summaries/judgment-summaries/director-of-public-prosecutions-v-codey-herrmann
[559] Centre for Innovative Justice (2021), *Leaving custody behind: Foundations for safer communities & gender-informed criminal justice systems*, p86. Available at https://cij.org.au/cms/wp-content/uploads/2021/09/leaving-custody-behind-issues-paper-july-2021-.pdf.
[560] Corrections Victoria (2015), Wulgunggo Ngalu Learning Place leaflet. Available at https://files.corrections.vic.gov.au/2021-06/wulgunggodl2015_acc.pdf.
[561] Clear Horizon (2013), *Wulgunggo Ngalu Learning Place: Final Evaluation Report*, p25. Available at https://files.corrections.vic.gov.au/2021-06/wnlp_evaluationfinal.pdf.
[562] Harm Reduction International (2010), *Human Rights and Drug Policy: Compulsory Drug Treatment*. Available at https://www.hri.global/files/2010/11/01/IHRA_BriefingNew_4.pdf.

feedback and research evaluations, Wulgunggo Ngalu remains a small-scale project. Corrections Victoria should establish similar programs that are accessible for the many Aboriginal people who cannot access Wulgunggo Ngalu, including women, people not assessed as suitable for CCOs, and people who cannot take a residential placement in Gippsland away from their family and community. Similarly, the Judy Lazarus Transition Centre – a pre-release centre for people in the last months of a custodial sentence appears to have a strong track record in reducing reoffending rates.[563] However, its small capacity limits the benefits it delivers, and tight restrictions on who can be admitted – including a security assessment – exclude too many Aboriginal people from being able to access this specialised support. There is also no equivalent centre for women, neglecting a population who are highly capable of reintegration if given adequate support, as discussed further below.

RECOMMENDATIONS

Recommendation 183. Rehabilitation programs, both in prisons and for people transitioning out of prison or diverted from prison, should be run on a voluntary basis, not penalising or threatening people for breaching behavioural requirements.

Recommendation 184. Funding for rehabilitation in prisons, including culturally safe rehabilitation support provided by Aboriginal organisations, should be significantly increased.

Recommendation 185. Rehabilitation services should be available to people held in prison on remand.

Conditions in Custody

Conditions in prisons and other places of custody are critical to reducing reoffending rates. Contrary to a simplistic deterrence-based view of the causes of offending, harsh conditions in custody can increase the risk of reoffending for many people held in prisons.

Prison can be a deeply traumatising experience, and these harms are particularly acute for people already marginalised or living with a history of trauma, such as Aboriginal people, those living disability or mental illness and victim-survivors of family violence. Inducing this kind of trauma directly conflicts with the therapeutic approach to rehabilitation and social integration which is needed to address the underlying causes of offending for most people held in Victorian prisons. International evidence has shown that, because of this traumatising effect and the lost opportunity for productive rehabilitation

[563] Victorian Ombudsman (2015), *Investigation into the rehabilitation and reintegration of prisoners in Victoria,* p102. Available at https://assets.ombudsman.vic.gov.au/assets/Reports/Parliamentary-Reports/1-PDF-Report-Files/Investigation-into-the-rehabilitation-and-reintegration-of-prisoners-in-Victoria.pdf?mtime=20191217123824.

that results, harsher prison conditions tend to raise reoffending rates.[564] Prison conditions are also the focus of international rights obligations and minimum standards, including the Mandela Rules and the Optional Protocol to the Convention Against Torture.[565]

Victoria's prison system has become characterised by poor administration and deteriorating conditions, as the imprisoned population has increased. In 2020-21, one prison guard every week was suspended for reasons including the excessive use of force, smuggling of contraband and sexual harassment.[566] An IBAC inquiry into the corrections system found widespread corruption risks and "problematic workplace cultures", manifesting themselves in misconduct including the inappropriate use of force – including against people with disabilities – and in the lack of real accountability for that misconduct.[567]

Addressing these seriously concerning conditions in custody is essential to upholding human rights and reducing rates of reoffending. A number of specific issues with prison conditions are identified in this subsection, with recommendations to address them. More generally, fuller safeguards against the emergence of systemic problems in prison workplace culture and inhumane conditions are urgently needed. These should include an effective, independent complaints system which people in prison feel genuinely able to access, and which must be culturally safe for Aboriginal people in prison. A functioning complaints and investigation system is an important check on deterioration of prison conditions.[568] It is also crucial that all prison staff are given training to develop their capacity for trauma-informed approaches to working with incarcerated people, and to improve their cultural competency towards Aboriginal people held in Victorian prisons.

RECOMMENDATIONS

Recommendation 186. Prison complaints, including complaints against private prisons and contractors, should be handled by an appropriately resourced independent oversight body with sufficient powers to refer matters for criminal investigation.

Recommendation 187. All prison staff should receive extensive training, that is developed and delivered in collaboration with ACCOs, on trauma-informed care, anti-racism, and the specific needs of vulnerable groups including Aboriginal people and women.

[564] Ritchie, Sentencing Advisory Council (2011), *Does Imprisonment Deter? A Review of the Evidence*, p. 49; Cullen et al (2011), 'Prisons Do Not Reduce Recidivism', *The Prison Journal*, p. 58; and Chen & Shapiro (2007), 'Do Harsher Prison Conditions Reduce Recidivism?', *American Law & Economics Review*, p. 22. Accessed at https://www.anderson.ucla.edu/faculty/keith.chen/papers/Final_ALER07.pdf.
[565] United Nations System (2021), *Common Position on Incarceration*.
[566] David Southwick MP, 20 July 2021, 'One prison guard a week suspended in Andrews' chaotic corrections system
[567] IBAC (2021), *Special report on corrections*, https://www.ibac.vic.gov.au/publications-and-resources/article/special-report-on-corrections.
[568] Tomczak & McAllister (2021), 'Prisoner death investigations: a means for safety in prisons and societies', *Journal of Social Welfare and Family Law*.

Victorian Aboriginal Legal Service

COVID-19, Isolation and Prison Lockdowns

VALS has consistently advised that the use of quarantine, isolation and lockdowns as preventative measures in Victorian prisons needs urgent reform. Recommendations reflecting our sentiments concerning such issues have been made to the Public Accounts and Estimates Committee, in our COVID-19 Recovery Plan, and routinely in consultation with Government.

These recommendations have not been acted upon. Victoria's repeated lockdowns highlight that the preventative measures implemented in prisons during the COVID-19 pandemic have continued even after the most severe period of community transmission and restrictions have passed. Prisons continue to be subject to severe limitations, including bans on all visits at the smallest indication of community transmission and the ongoing use of Protective Quarantine (**PQ**) during periods without community transmission.

Solitary confinement has a particularly detrimental impact on Aboriginal people, with the Royal Commission into Aboriginal Deaths in Custody noting that it is "undesirable in the highest degree that an Aboriginal person in prison should be placed in segregation or isolated detention."[569] There is a very serious risk that the use of Protective and Transfer Quarantine (**TQ**) in prisons to limit the spread of COVID-19 can amount to solitary confinement, if these regimes are not implemented with the utmost care and accompanied extensive safeguards for the wellbeing of detained people. Examples VALS is aware of include people being permitted only 12 minutes out of their cell per day, with no opportunity to exercise.

Government practice in Victoria has not heeded the advice found in guidelines from the World Health Organization and Communicable Diseases Network Australia.[570] Over more than fifteen months since the introduction of Protective Quarantine, during which the restrictions in place in the community have varied substantially, the 14-day requirement has remained static. In early 2021, the protective quarantine requirement remained unchanged during a period of nearly three months without any cases of COVID-19 in the community. Plainly, in this period, the risk that a newly-detained person would bring COVID-19 from the general Victorian community into the prison population was almost non-existent. VALS is of the view that a 14-day quarantine is self-evidently not the least restrictive available measure in such circumstances, as opposed to isolation while awaiting test results or for a defined shorter period. We have previously noted that a different, commendable approach has been adopted in youth detention settings, where newly admitted children are isolated only while awaiting a negative test result.[571] There is no reason why this approach could not also be adopted in adult prisons.

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[569] Human Rights Law Centre et al. (2021), *Joint open letter on ongoing and arbitrary use of 14 day quarantine in prisons*. Available at https://www.hrlc.org.au/s/Open-letter-29-March-2021.pdf.
[570] VALS (2021), *Building Back Better: COVID-19 Recovery Plan*, pp. 70-87. Available at https://www.vals.org.au/wp-content/uploads/2021/02/Building-Back-Better-Victorian-Aboriginal-Legal-Service-COVID-19-Recovery-Plan-February-2021-FOR-DISTRIBUTION.pdf.
[571] *Ibid.*, p. 76.

VALS also wishes to reiterate our concerns about cycles of lockdown in places of detention. Both adult and youth prisons have been placed into immediate lockdowns on the detection of COVID-19 cases, without a careful assessment and balancing of the harm inflicted by confining people in prison to their cells.

A highly effective way of mitigating the risks of COVID-19 in prison settings, and thus reducing the use of harmful lockdown and quarantine requirements, is to improve the rollout of vaccines for people in prison. Given the high risks associated with detention settings and the pre-existing vulnerabilities of many people in prison, particularly Aboriginal people, the prison population should be a priority for vaccination in response to any pandemic disease. The vaccine rollout in Victorian prisons began in June 2021, and although some delay is associated with problems in the broader vaccine rollout, it is clear that prisons have not been appropriately prioritised. The Victorian Government told media that the rollout in prisons would be completed in August 2021.[572] Yet a recent update stated that, on September 10, after that deadline, only 45% of people in adult prisons were fully vaccinated.[573] VALS understands that the vaccination rate for Aboriginal people in prisons is significantly lower than this. Substantially more needs to be done to improve the rollout, including by involving ACCOs in addressing vaccine hesitancy (through both provision of information and administering the vaccine). Improving vaccine coverage is essential to reducing the use of lockdown and quarantine.

Another important measure for mitigating COVID-19 risks in prisons is surveillance testing of staff and detained people. VALS has previously called for surveillance testing in prisons, in line with the approach in other high-risk environments such as hospitals, aged care facilities and hotel quarantine.[574] Surveillance testing of prison and youth detention employees and contractors is a proactive measure which can help reduce the risk of outbreaks in Victorian prisons without resorting to extremely harsh measures such as the suspension of in-person visits and the ongoing use of quarantine. Prison staff in the UK have been routinely tested for COVID-19 since at least November 2020.[575] Victoria should urgently adopt surveillance testing of prison staff.

Despite calls for reform from VALS and other legal and human rights organisations, the analysis of the serious problems with isolation, quarantine and lockdowns presented in our submission to the PAEC Inquiry remain relevant.[576] Many of the recommendations from that submission and our COVID-19

[572] Croakey Health Media, (2021), 'Survey raises serious concerns about COVID vaccination rollout to prisons'. Accessed at https://www.croakey.org/survey-raises-serious-concerns-about-covid-vaccination-rollout-to-prisons/.
[573] Bendigo Advertiser (2021), 'Victorian prison records COVID-19 case'. Available at https://www.bendigoadvertiser.com.au/story/7427629/victorian-prison-records-covid-19-case/.
[574] VALS (2021), *Building Back Better: Victorian Aboriginal Legal Service COVID-19 Recovery Plan*, p81. Available at https://www.vals.org.au/wp-content/uploads/2021/02/Building-Back-Better-Victorian-Aboriginal-Legal-Service-COVID-19-Recovery-Plan-February-2021-FOR-DISTRIBUTION.pdf.
[575] UK Ministry of Justice, *HM Prison and Probation Service COVID-19 Official Statistics*, p5. Accessed at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/945608/HMPPS_COVID19_NOV20_Pub_Doc.pdf.
[576] VALS (2020), *Submission to the Public Accounts and Estimates Committee COVID-19 Inquiry*, pp. 16-25.

Victorian Aboriginal Legal Service

Recovery Plan are reiterated below. In the context of this Committee's Inquiry, the Government's failure to respond to these recommendations is significant because lockdowns and isolation have highly disruptive and sometimes traumatising effects on people in prison. The prospects for successful rehabilitation and reintegration are very poor when people have been isolated from meaningful human contact on a regular basis while in prison, have had little to no opportunity to engage with programs, and are subjected to the archaic and harmful practice of solitary confinement.

RECOMMENDATIONS

Recommendation 188. The Government should make publicly available the health advice, risk-assessment and human rights assessment upon which it reliesin making decisions about the use of isolation and protective and transfer quarantine.

Recommendation 189. The use of protective and transfer quarantining, and the nature of the quarantine itself, should be

- reviewed on a regular basis,
- guided by medical advice, in consultation with civil society stakeholders,
- adopting the least restrictive measure, in accordance with the *Victorian Charter of Human Rights and Responsibilities.*

Recommendation 190. Legislation should be amended to require that incarcerated people in protective quarantine/transfer quarantine and isolation are regularly observed and verbally communicated with.

Recommendation 191. Legislation should explicitly provide for the rights of people in protective/transfer quarantine and children in isolation, including guaranteeing meaningful contact with other people and time out of cell, in fresh air, every day.

Recommendation 192. People in protective/transfer quarantine and children in isolation should be provided supports and services (including mental health services and cultural supports and services provided by ACCOs), and means by which to contact family, lawyers, independent oversight bodies, and ACCOs.

Recommendation 193. The Victorian Government should maintain a register of all people placed in protective/transfer quarantine, and children in isolation:

- The register should include information such as age, gender, disabilities, medical conditions, mental health conditions and Aboriginality of people in protective quarantine.
- Information should also be provided in relation to the length and the nature of meaningful contact provided on a daily basis, how much time people spend out of cell, and the services made available to them and used by them.

Victorian Aboriginal Legal Service

- Any incidents, such as attempted self-harm, should also be included.

Recommendation 194. Facilities should not, by default, go into complete lockdown during a COVID-19 outbreak.

Recommendation 195. Staffing and other operational issues should be urgently addressed, to ensure lockdowns do not occur as a result of inadequate staff to safely manage the facility.

Recommendation 196. No one should be in effective solitary confinement as a result of lockdown, particularly children and people with mental or physical disabilities, or histories of trauma.

Recommendation 197. If lockdowns occur, people should be provided supports and services (including mental health services and cultural supports and services provided by ACCOs), and means by which to contact family, lawyers, independent oversight bodies, and ACCOs, including VALS..

Recommendation 198. Information on how lockdowns are operationalised should be publicly available and regular updates should be shared.

Recommendation 199. The Victorian Government should add prisons and youth detention facilities to the Surveillance Testing Industry List, with both employees and contractors subject to regular surveillance testing.

Recommendation 200. The Victorian Government should improve the COVID-19 vaccine rollout, and put in place preparations for a significantly more effective vaccine rollout for any future pandemic, including by:

- Ensuring that no person in prison is offered a vaccine later than they would be if living freely in the community, in line with the principle of equivalence;
- Involving ACCOs in the delivery of health information and vaccines;
- Giving regular public updates on the status of the vaccine rollout, including demographic information such as Aboriginality.

Victorian Aboriginal Legal Service

Emergency Management Days

Emergency Management Days (**EMD**s) are days deducted from an individual's sentence due to the impact of particular situations on the person held in custody. The situations identified in existing legislation include industrial disputes or emergencies within the prison or gaol where the sentence is being served; and other circumstances of an unforeseen and special nature provided the individual in question has exhibited 'good behaviour' during the situation.[577] The sentence reduction can amount to four (4) days for every day, or part of day, where industrial disputes and emergencies exist; and up to fourteen (14) days for circumstances of an unforeseen and special nature.[578] However, as noted by the PAEC, no such equivalent program exists in the Victorian youth justice system.[579]

The continuing COVID-19 pandemic is of particular concern in relation to EMDs. VALS has previously noted the negative impact of the suspension of programs and personal visits and the increased risks of COVID-19 in detention environments, as well as quarantine, isolation and lockdowns.[580] Additionally, VALS has previously noted concern with Corrections policies that allocate only the approximate equivalent of 1 EMD per day of preventative measures instead of allocating up to four (4) days per day in such cases of emergency, as well as failing to include further EMDs on the basis of circumstances of an unforeseen and special nature.[581]

More recently, further changes have occurred in relation to the allocation of EMDs to people on remand. Until 28 July 2021, people in prison on remand may have been granted EMDs before they received their sentence if they had been of good behaviour and suffered disruption or deprivation due to the response to COVID-19. If EMDs were granted, they were applied to any sentence of imprisonment they would receive as part of a continuous period of imprisonment. However, after 28 July 2021, people in prison on remand are eligible for EMDs if they have suffered disruption or deprivation due to the response to COVID-19, such as time spent in the protective quarantine unit following reception, but the EMDs are only granted after a person has been sentenced.[582]

VALS further reiterates its concerns regarding the lack of transparency in relation to policies concerning when and how individual EMD applications will be determined by Corrections. While Corrections has stated that incarcerated people who are of 'good behaviour' during preventative

[577] s. 58E(1) of the *Corrections Act 1986*. 'Emergencies', however, do not extend to emergencies, riots or other security incidents caused by incarcerated people under s. 58E(3) of the *Corrections Act 1986.*
[578] s. 100 of *Corrections Regulation 2019*.
[579] Parliament of Victoria: Public Accounts and Estimates Committee (2021). Inquiry in the Victorian government's response to the COVID-19 pandemic, p. 287.
[580] VALS, Submission to the Public Accounts and Estimates Committee's Inquiry into the Victorian Government's response to COVID-19 (September 2020) 35, available at https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Submissions/87._Victorian_Aboriginal_Legal_Service.pdf. See also Parliament of Victoria: Public Accounts and Estimates Committee (2021). Inquiry in the Victorian government's response to the COVID-19 pandemic, p. 291-292.
[581] Ibid., 36.
[582] Department of Justice and Community Safety (2021). Emergency Management Days – COVID-19: Factsheet for remand prisoners, p. 1.

measures - including quarantine, isolation and lockdowns – will be eligible for EMDs, the lack and inconsistency of information regarding the process has been problematic for both detainees and their advocates.[583]

Furthermore, VALS is concerned by the introduction of the *Crime Amendment (Remission of Sentences) Bill 2021* (Cth), which, if passed, will eliminate the application of EMDs for people serving sentences for federal offending in a state or territory prison.[584] The proposed amendments to legislation concerning EMDs would result in greater uncertainty about measures available to reduce the sentences of incarcerated people adversely impacted by emergency situations within a prison, which include the preventative measures undertaken in relation to the current COVID-19 pandemic.

As noted in VALS submission to the Public Accounts and Estimates Committee (**PAEC**) in September 2020, situations have arisen where individuals with sentences shorter than one month have been denied EMDs. One such instance involved a client that filed an EMD application on the first day of a 28 day sentence, which was denied. The basis for the decision was EMD assessments only occurred fortnightly and, by the time the application was considered, Corrections needed time to prepare for the individual's release. Increased frequency of EMD assessments are important given that 25.5% of men and 40.9% of women are serving sentences of less than one month.[585]

VALS continues to advocate that disadvantage should not serve as a basis for the denial of EMDs to persons that have otherwise served their sentences. Of particular importance are reports that the lack of housing or the need for other support services for some individuals after being released from prison has served as the basis for the rejection of their EMD applications.[586]

RECOMMENDATIONS

Recommendation 201. There should be a legislated allowance for a reduction in sentence if a child or young person is placed into isolation in a Youth Justice scheme comparable to the legislated Emergency Management Days available to incarcerated adults.

Recommendation 202. Corrections, in making decisions in relation to Emergency Management Days, should acknowledge that the pandemic has negatively impacted on all people in detention, albeit to different degrees. Emergency Management Days should be granted not only to people

[583] Ibid., p. 36.
[584] Parliament of the Commonwealth of Australia (2021). *Crimes Amendment (Remissions of Sentences) Bill 2021*: Explanatory Memorandum, at 12.
[585] VALS (2020). Submission to the Public Accounts and Estimates Committee's Inquiry into the Victorian Government's response to COVID-19, pp. 35-36. Available at https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Submissions/87._Victorian_Aboriginal_Legal_Service.pdf
[586] Federation of Community Legal Centres Vic. A Just and Equitable COVID Recovery: A community Legal Sector Plan for Victoria, 40. Available at https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Submissions/101a._Federation_of_Community_Legal_Centres.pdf.

who have been subject to isolation or mandatory quarantine, but to others as well, in recognition of the additional hardships faced by everyone in detention.

Recommendation 203. Corrections policy should be amended so that people can be granted 4 Emergency Management Days for each day that the 'emergency exists', and the 14 days they could be entitled to due to 'circumstances of an unforeseen and special nature.'

Recommendation 204. Corrections policy should be clarified to provide that people in detention cannot 'lose' EMDs once they have been granted, including if they are bailed and subsequently re-remanded.

Recommendation 205. There should be greater transparency in relation to the process by which Emergency Management Days are granted. Information should also be made available in relation to the number of people released on Emergency Management Days, how many days they were granted (broken down per month and per facility), and how many Aboriginal and non-Aboriginal people were granted Emergency Management Days.

Recommendation 206. Decisions in relation to EMDs should be governed by natural justice. Applicants should be given clear particulars of any reasons as to why an application has been refused and be allowed to seek review.

Recommendation 207. Emergency Management Day assessments should occur on a regular basis, to allow adequate time to prepare for release.

Recommendation 208. No one should be denied Emergency Management Days due to a lack of housing.

Police Cells

An increasing and highly concerning number of people imprisoned in Victoria are serving their entire sentences in police cells, due to overcrowding of prisons and severe congestion in the court system. This phenomenon was noted as early as 2017, in the Coghlan review of Victoria's bail system, and has typically been associated with people serving short sentences (for example, of under 14 days).[587] The problem has become much more serious in recent years, however. The soaring prison population associated with Victoria's punitive bail legislation has worsened capacity issues in Victorian prisons. Most recently, COVID-19 interruptions have led to significant backlogs in the courts and delays in

[587] Coghlan (2017). *Bail Review: Second advice to the Victorian Government*, pp. 45-46. Accessed at https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/4414/9419/8013/Coghlan-report-2.pdf.

transportation between police stations and prisons, which increase the likelihood that people end up serving their full sentences in police cells.

Police cells are not designed to hold people for any extended period of time, and they are clearly not fit to be used as substitutes for prison cells. Because they were intended as temporary holding places, the design of police cells does not facilitate very basic welfare safeguards, such as the separation of detainees (men from women, vulnerable people from others, etc), the provision of healthcare, access to showers and exercise, and the right to have visitors or make phone calls.[588] People who serve their sentences in police cells are also not able to access rehabilitation programs or other supports.

Serving a prison sentence in these conditions is extremely unlikely to have any beneficial impact in reducing reoffending. Research evidence suggests that without dedicated rehabilitation support, incarceration alone tends to *increase reoffending* rather than reduce it.[589] This is particularly the case in conditions that have a particularly negative impact on detained people's mental and physical wellbeing, such as the conditions in police cells.

Use of Force and Restraints

The use of force and restraints in prisons may sometimes be necessary. However, the fact that prisons are closed environments where a severe power imbalance exists between detained people and staff means that there is a high potential for force to be used excessively and in inappropriate situations. Such abuses can have extremely harmful consequences, particularly for people already experiencing intergenerational trauma and dealing with mental health or substance use issues. The use of excessive force or unnecessary restraints is a human rights violation and can contribute to re-traumatisation and institutionalisation, worsening prospects for rehabilitation and increasing the risk of recidivism.

There are extensive national and international human rights standards governing the use of force and restraints in prisons that inform VALS' position on the safeguards needed in Victorian prisons. The Victorian Charter of Human Rights specifies that human rights should be limited only by the least restrictive means available. The Mandela Rules on the treatment of people in custody and the Havana Rules for young people both stipulate that restraints and force should be used only as a last resort, and for the shortest period of time possible.[590] The Mandela Rules also require that restraint never be used punitively or as a disciplinary method.[591] The Australian Children's Commissioners have stated that "[t]he use of restraints on a child or young person should be prohibited, except when necessary to prevent an imminent and serious threat of injury," and only after "all other means of control have

[588] Ombudsman Victoria & Office of Police Integrity (2006), *Conditions for persons in custody*. Accessed at https://www.vgls.vic.gov.au/client/en_AU/search/asset/1148071/0.
[589] Centre for Innovative Justice (2021), *Leaving custody behind: Foundations for safer communities & gender-informed criminal justice systems*, p. 86. Available at https://cij.org.au/cms/wp-content/uploads/2021/09/leaving-custody-behind-issues-paper-july-2021-.pdf.
[590] Rules 48 and 82 of the Mandela Rules. See also Rule 64 of the Havana Rules.
[591] Rule 43(2) of the Mandela Rules.

been exhausted".[592] This is consistent with the views expressed by the UN Committee on the Rights of the Child.[593] These human rights standards also provide for the prohibition of chemical or medical restraints, the prohibition of certain kinds of physical restraints, the prohibition of force and restraints being used against people in certain circumstances such as during childbirth, and the prompt reporting and monitoring of all uses of force or restraints.

As Victoria has not established a prison inspections body to fulfil the state's obligations under OPCAT, discussed below, there is limited public reporting or transparency on the use of force and restraints in Victorian prisons. The Victorian Ombudsman conducted an inspection of the Dame Phyllis Frost Centre (**DPFC**) in 2017, and IBAC published a report in 2021 on several investigations of specific incidents. Regular monitoring and reporting, however, is still not in place. This limits the effectiveness of oversight as a mechanism for creating real accountability for abuses in custody.

The most pressing concern is the use of excessive force or the use of restraints when the situation does not call for them. At DPFC, the Ombudsman observed use of restraints in circumstances where they clearly were not needed, "including reports of pregnant women being handcuffed when attending external medical appointments."[594] These instances were particularly acute in the Swan 2 management unit, where women are kept isolated. In this unit, "[i]ncident reports record instances where staff applied handcuffs to women who were incapacitated or unconscious after self-harming, and before medical assistance was provided" and women being handcuffed and escorted by five officers for a transfer of only a few metres.[595] The use of restraints can be dehumanising and humiliating for people held in prison, and may impact their willingness to engage with medical or other support services while visibly restrained. An ongoing coronial inquest in Western Australia has heard that an Aboriginal man who died of a heart attack had been "too ashamed" to attend medical appointments for his chronic heart condition while handcuffed.[596] The unnecessary use of restraints is continuous with the use of force, as both interfere with detained people's right to humane treatment and reinforce power dynamics in the prison.

IBAC's investigation of particular incidents found manifestly excessive use of force on several occasions in Port Phillip Prison. These included an assault of a person after a strip search, and the continued striking of a person with a disability after he had been taken to ground and restrained. IBAC found that the use of force "was excessive and inconsistent with Port Phillip Prison policy, which

[592] Australian Children's Commissioners & Guardians (2017), *Statement on Conditions and Treatment in Youth Justice Detention*. Accessed at https://humanrights.gov.au/our-work/childrens-rights/publications/accg-statement-conditions-and-treatment-youth-justice.
[593] Committee on the Rights of the Child, *General comment No.24 (2019) on children's rights in the child justice system,* CRC/C/GC/24, paragraph 95.
[594] Victorian Ombudsman (2017), *Implementing OPAT in Victoria – report and inspection of Dame Phyllis Frost Centre*, p4. Available at https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/implementing-opcat-in-victoria-report-and-inspection-of-dame-phyllis-frost-centre/.
[595] Ibid, p53.
[596] ABC News, 4 September 2021, 'Inquest hears how prisoner Mr Yeeda was too ashamed to get medical help in handcuffs'. Accessed at https://www.abc.net.au/news/2021-09-04/mr-yeeda-inquest-ashamed-to-get-medical-help-in-handcuffs/100433356.

requires officers to use the minimum amount of force necessary to achieve control," and in one case amounted to inhuman or degrading treatment under the Victorian Charter.[597]

VALS is of the view that excessive force and the inappropriate use of restraints are widespread practices throughout the Victorian prison system, but not fully captured by existing inquiries due to under-reporting and the lack of continuous monitoring. Reports by the Queensland Crime & Corruption Commission and the WA Inspector of Custodial Services have highlighted systemic issues with regard to assaults on incarcerated people.[598] The Ombudsman's inspection of DPFC found that although there were only five recorded allegations of assaults by staff in 2016-17, 11% of women surveyed in the prison said that they had been assaulted by staff.[599] This is a clear indication that assaults are under-reported by people in prison; 46% of women surveyed in DPFC said they did not feel safe to make a complaint in the prison.[600]

Aboriginal people are disproportionately subjected to violence in prison. In Victoria, the only investigation that examined and quantified this disproportionality was undertaken by the Commission for Children and Young People's analysis of the youth prison system, which found that "Aboriginal children and young people were alarmingly overrepresented in relation to injury as a result of a serious assault in custody"; and that force and restraints were used against Aboriginal children in youth prisons more than twice a day in 2018 and 2019.[601] Investigations of adult prisons in other states have made similar findings. In WA, force was used against Aboriginal people more frequently than against non-Aboriginal people. Notably, the disproportionality was even more acute for Aboriginal women; while force was used against incarcerated women overall less often than against men, this was not the case for Aboriginal women.[602]

The use of excessive force is unlikely to become less common in Victoria without significant reform to legislation governing the conduct of prison staff. There is substantial evidence of a cultural problem in Victorian prisons that affords minimal accountability for abuses, including misuse of restraints and force. In its investigation of one incident, IBAC found that two officers had intentionally kept their BWCs turned off, while two others had interfered with recordings to hide evidence of wrongdoing.[603] After the incident, Corrections staff produced reports which were "incomplete or failed to give a full

[597] IBAC (2021), *Special report on corrections*, p. 34. Accessed at https://www.ibac.vic.gov.au/docs/default-source/special-reports/special-report-on-corrections---june-2021.pdf?sfvrsn=ee450c8c_2.
[598] Queensland Crime and Corruption Commission (2018), *Taskforce Flaxton: An examination of corruption risks and corruption in Queensland prisons*. Accessed at https://www.ccc.qld.gov.au/sites/default/files/Docs/Public-Hearings/Flaxton/Taskforce-Flaxton-An-examination-of-corruption-risks-and-corruption-in-qld-prisons-Report-2018.pdf.
Office of the Inspector of Custodial Services (2021), *Use of force against prisoners in Western Australia*. Accessed at https://www.oics.wa.gov.au/wp-content/uploads/2021/05/Use-of-Force-Review-May-2021.pdf.
[599] Victorian Ombudsman (2017), *Implementing OPAT in Victoria – report and inspection of Dame Phyllis Frost Centre*, p. 63.
[600] Ibid, p. 68.
[601] Commission for Children & Young People (2021), *Our youth, our way: Systemic inquiry into the over-representation of Aboriginal children and young people in Victoria's youth justice system*, p. 38. Accessed at https://ccyp.vic.gov.au/upholding-childrens-rights/systemic-inquiries/our-youth-our-way/.
[602] Office of the Inspector of Custodial Services (2021), *Use of force against prisoners in Western Australia*, pp. 13-15.
[603] IBAC (2021), *Special report on corrections*, p. 34.

account of events." Furthermore, the supervisor's summary of the incident repeated those reports without accounting for ways they contradicted video evidence and made no attempt to critically examine the incident.[604] IBAC also pointed to "a culture of excessive use of force" among Tactical Operations Group officers, the specialist staff who receive training on the use of force and restraints.[605] The Victorian Ombudsman suggested that DPFC may be affected by "a culture within the prison where the application of restraints is prioritised over the provision of medical assistance."[606]

Ingrained problems with the excessive use of force and restraints can only by addressed by legislative reform of the thresholds for the use of force, not by tweaks to prison policy and inconsistently-delivered training programs. New safeguards and thresholds for the use of force must be actively monitored by an inspection body that is compliant with Victoria's OPCAT obligations, to ensure that they are properly implemented.

The analysis and recommendations concerning BWCs presented above, in relation to the use of BWCs by police officers, are also applicable to prison staff. The protection of BWC footage by the *Surveillance Devices Act 1999* obstructs people who face abuses in prison being able to pursue legal remedies. The person assaulted in one of the incidents examined in IBAC's report on the prison system has not been able to access BWC footage to support his legal claim against the prison.[607]

RECOMMENDATIONS

Recommendation 209. The regulation of use of force/restraints should be provided for in legislation, not regulations, policies/procedures, written notices, or in Gazette.

Recommendation 210. The default position must be that the use of restraints/force is prohibited, with exceptions where authorised.

Recommendation 211. Prohibitions on use of force/restraints that should be enshrined in legislation:

- There must be an explicit prohibition on the use of chemical (medical and pharmacological) restraints.
- Use of force/restraints must never involve deliberate infliction of pain and should not cause humiliation or degradation.
- There must be an express prohibition for the use of stress positions (positional torture).

[604] Ibid.
[605] Ibid, p. 9.
[606] Victorian Ombudsman (2017), *Implementing OPAT in Victoria – report and inspection of Dame Phyllis Frost Centre*, p. 53.
[607] The Age, 5 September 2021, 'Prisoner bashed by guards unable to access body-camera footage'. Accessed at https://www.theage.com.au/national/victoria/prisoner-bashed-by-guards-unable-to-access-body-camera-footage-20210831-p58nit.html.

- Use of force/restraints must not be used for punishment, discipline, or to facilitate compliance with an order or direction, or to force participation in an activity the incarcerated person does not want to engage in. Use of restraints rarely leads to behavioural change, can be counterproductive, and can cause physical and psychological harm and retraumatise people.
- Instruments of restraint must never be used on girls or women during labour, during childbirth and immediately after childbirth.
- The use of mechanical restraints, including handcuffs, as routine centre management practice must be prohibited.
- Only approved restraints should be kept at places of detention.
- The use of chains, irons or other instruments of restraint which are inherently degrading or painful must be prohibited. Other restraints which should be explicitly prohibited include: weighted restraints; restraints which have a fixed rigid bar between cuffs; restraints where the cuff cannot be adjusted; fixed restraints – that is, cuffs 'designed to be anchored to a wall, floor or ceiling'; restraint chairs; and shackle boards and shackle beds (chairs, boards or beds fitted with shackles or other devices to restrain a human being).
- Carrying of weapons by personnel in youth detention must be prohibited.

Recommendation 212. When use of force/restraints may be permitted:

- Use of force/restraints must only be permissible when necessary to prevent an imminent and serious threat of injury to the incarcerated person or others, and only as explicitly authorised and specified by law and regulation.
- Use of force/restraints should be exceptional, as a last resort, when all other control methods (including de-escalation techniques) have been exhausted and failed.
- The decision to use physical restraints must be made by more than one person, and must be authorised by senior management.
- Use of force/restraints must be used restrictively, for no longer than is strictly necessary.
- A minimum level of restraint/degree of force must be used.
- Restraint instruments must be used appropriately/restraint techniques properly executed.
- The safety of the incarcerated person must be a prime consideration.

Recommendation 213. Additional safeguards:

- The use of force/restraint should be under close, direct and continuous control of a medical and/or psychological professional.
- The person who is restrained must be regularly observed, while subjected to restraint instruments, at least every 15 minutes.
- Use force/restraint should be reported to senior management as soon as practicable.

Victorian Aboriginal Legal Service

- The privacy of restrained people should be respected/protected when the person in restraints is in public.
- Staff who use restraint or force in violation of the rules and standards should be disciplined and/or have their employment ceased. Staff should be prosecuted where appropriate.

Isolation and Solitary Confinement

Isolation

The Australian Children's Commissioners and Guardians have clearly stated that the

> use of isolation on a child or young person should be prohibited, except when necessary to prevent an imminent and serious threat of injury to the child or others, and only when all other means of control have been exhausted. Isolation should be used restrictively and only for the shortest appropriate period of time, and be publicly reported to an independent oversight mechanism. The use of isolation as punishment, or on a vulnerable child or young person, should be prohibited.[608]

The Commissioners' position was that "isolation practices are likely to be counterproductive as a behaviour management tool… have no recognised therapeutic value and often retraumatise children and young people in youth justice detention and exacerbate medical, psychological and social problems." Not only did they identify the negative impacts on a child's "education, rehabilitation, physical health, and family involvement," they also noted that "[i]solation practices can constitute cruel, inhuman or degrading treatment and breach the human rights of children and young people." They were of the view that there should be a prohibition on "the use of isolation for children and young people who are at risk of suicide or self-harm," and that "[u]nscheduled lockdowns contribute to emotional instability in children and young people with histories of trauma."[609]

In its report, *The Same Four Walls*, the CCYP stated that the extensive use of lockdowns due to staff shortages is entirely unacceptable, and recommended that there be an immediate review of "the Youth Justice staffing and recruitment model to ensure that sufficient, suitably trained staff are available to supervise children and young people to prevent frequent and extensive lockdowns."[610] The Victorian Ombudsman has noted that the Government has "been on notice for years about the impact of lockdowns caused by staff shortages, including significant frustration among young people

[608] Australian Children's Commissioners and Guardians (2017), *Statement on Conditions and Treatment in Youth Justice Detention*
[609] Ibid.
[610] Commission for Children & Young People (2017), *The same four walls: Inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system*, p84. Available at https://ccyp.vic.gov.au/assets/Publications-inquiries/The-Same-Four-Walls1.pdf.

which can contribute to escalated behaviour, and reduced access to education, visits, fresh air and meaningful activity."[611]

Despite the concerns raised in relation to isolation above, a staggering 11,558 Youth Justice Custodial isolation episodes were reported between July and September 2020 (498 due to behaviour, 7,294 due to security concerns and 3,766 for reasons related to COVID-19). These episodes include "all instances where a young person is placed in a locked room, separate from others and from the normal routine of the centre as a distinct period of isolation."[612]

Solitary Confinement

The UN Mandela Rules define solitary confinement as the "'confinement of prisoners for 22 hours or more a day without meaningful human contact," and define prolonged solitary confinement as solitary confinement for a time period in excess of 15 consecutive days.[613] They state that solitary confinement "shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority."[614] They prohibit the use of solitary confinement for people "with mental or physical disabilities when their conditions would be exacerbated by such measures."[615]

The UN Havana Rules, which focus on children, state that "all disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned."[616] The Committee on The Rights of the Child has reiterated that solitary confinement should not be used on children.[617]

Solitary confinement is a fundamentally harmful practice. As Lachsz and Hurley have noted:

> Solitary confinement is 'strikingly toxic to mental functioning' and can cause long-term, irreversible harm (Grassian, 2006, p. 354). As documented by Walsh et al. (2020), the cruel impact of the practice has been recognised in case law from Australia and across the world.
>
> Solitary confinement has a particularly detrimental impact on Aboriginal and Torres Strait Islander people, with the Royal Commission into Aboriginal Deaths in Custody noting the 'extreme anxiety

[611] Victorian Ombudsman (2019). *OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people*.
[612] Youth justice isolation quarterly reporting (1 July to 30 September 2020), https://www.justice.vic.gov.au/youth-justice-isolation-quarterly-reporting-1-july-to-30-september-2020
[613] Rule 44 of the Mandela Rules.
[614] Rule 45(1), ibid.
[615] Rule 45(2), ibid.
[616] Rule 6.7 of the Havana Rules.
[617] United Nations Committee on the Rights of the Child (2019). General Comment No. 24 on children's rights in the child justice system, at (95(h).

Victorian Aboriginal Legal Service

suffered by Aboriginal prisoners committed to solitary confinement' and that it is 'undesirable in the highest degree that an Aboriginal prisoner should be placed in segregation or isolated detention'.[618]

Recently, VALS hosted a webinar on the harms of solitary as part of its *Unlocking Victorian Justice* webinar series. The recording of the webinar can be viewed here. VALS encourages Committee members to view this webinar, which outlines the medical evidence in relation to the harms of solitary confinement (both during and after incarceration) and includes the stories of people with lived experience of this archaic and barbaric practice.

RECOMMENDATIONS

Recommendation 214. Regarding the use of isolation of children

- Use of isolation on a child must be prohibited, except when necessary to prevent an imminent and serious threat of injury to the child or others, and only when all other means of control have been exhausted.
- Isolation must be used restrictively and only for the shortest necessary period of time, and be publicly reported to an independent oversight mechanism.
- The use of isolation as punishment, or on a vulnerable child, must be prohibited. Isolation must not to be used for discipline or as a generalised behaviour management strategy (including a means by which to obtain compliance with staff instructions.)
- Children who are at risk of suicide or self-harm must not be placed in isolation.

Recommendation 215. Solitary confinement should be prohibited in all places of detention (including police custody, youth detention facilities and prisons) by legislation.

- No person should ever be placed in solitary confinement, noting people who are particularly vulnerable to the harms – children, people with mental or physical disabilities, people histories of trauma.
- Prolonged solitary confinement can amount to torture, and no one should be subjected to this.

[618] Lachsz and Hurley, 'Why practices that could be torture or cruel, inhuman and degrading treatment should never have formed part of the public health response to the COVID-19 pandemic in prisons' (2021)

Victorian Aboriginal Legal Service

Recommendation 216. Staffing and other operational issues in places of detention should be urgently addressed, to ensure no one is subjected to solitary confinement.

Strip Searching

This issue of strip searching is of particular concern to VALS because there is mounting evidence of the disproportionate rates at which Aboriginal people are subjected to strip searching. For example, in the ACT women's prison between October 2020 and April 2021, 58% of strip searches were of Aboriginal women, who made up only 44% of the prison population.[619]

The law in Victoria allows incarcerated people to be strip searched when there is a belief based on reasonable grounds that the search is necessary for the security or good order of the prison, or the safety or welfare of any incarcerated person, or that the incarcerated person being searched is hiding something that may pose a risk.[620] The standards for strip searching in Victoria are lower than those in other Australian jurisdictions. In adult prisons in New South Wales, strip searches can only be performed when absolutely necessary[621] and never involve body cavity searches.[622] Meanwhile, in the ACT, strip searching is only performed on reasonable grounds and in the least restrictive manner possible, while respecting the dignity of the detainee.[623]

Strip searching in prisons is an inherently harmful practice for detained people. Being subjected to an intrusive search can be degrading and a source of re-traumatisation for vulnerable people in the prison system. When time spent in prison serves to re-traumatise people, rather than providing an opportunity for rehabilitation and therapeutic care, the risk of recidivism is greatly increased. This is particularly important given the vulnerable profile of the prison population, in both youth and adult prisons. A large proportion of people held in prisons are victim-survivors of domestic abuse, sexual violence and other forms of trauma.

Legal practitioners at VALS report that some clients had been required to be strip searched in front of multiple guards. These clients often had histories of abuse, and the practice of strip searching was re-traumatising. Some of these clients had medical evidence which suggested that a strip search could be re-traumatising, and this evidence was often not considered before the searches were undertaken.

[619] Dani Larkin (2021), 'Excessive strip-searching shines light on discrimination of Aboriginal women in the criminal justice system', *The Conversation*. Accessed at https://theconversation.com/excessive-strip-searching-shines-light-on-discrimination-of-aboriginal-women-in-the-criminal-justice-system-163969.
[620] S. 45 of the *Corrections Act 1986*.
[621] Inspector of Custodial Services, New South Wales (2020). Inspection standards: For adult custodial services in New South Wales, at 40.9
[622] Ibid., at 40.13.
[623] Inspector for Custodial Services, ACT (2019). ACT Standards for Adult Correctional Services, Standard 28.

It is clear that the use of strip searching is not confined to situations where it is truly necessary or a last resort for prison staff. At the highest level, data on strip searches reveal that they are extremely ineffective in uncovering contraband. For example, in youth detention, figures obtained by the Human Rights Law Centre showed that "over a four month period between July and October 2019, 1,277 strip searches were conducted on children and young people at the two juvenile justice centres in Victoria [and]… Only 6 items were found as a result."[624] This strongly suggests that strip searches are used far more often than could be justified by any reasonable suspicion that they are necessary or likely to uncover contraband.

In 2017, the Victorian Ombudsman identified "a significant number of routine and unnecessary strip searches", including searches of detained people before and after receiving visits, in violation of the Victorian Charter, the Mandela Rules, and prison policy. The Ombudsman recommended this practice should immediately cease; that recommendation was not accepted by the Government.[625]

Furthermore, in Minogue v. Thompson,[626] the Victorian Supreme Court held that random strip searches and urine testing to be performed within sight of prison officials were violations of Minogue's right to privacy under the *Victorian Charter of Human Rights and Responsibilities 2006*. Based upon the knowledge and experience of legal staff at VALS, people in prison who are required to submit to urine testing are required to do so in the presence of multiple prison guards. This can be re-traumatising for people who have histories of abuse. People in prison should be given an option of passing urine while not in the direct presence of guards (for example, in darkened rooms with the use of urine-sensitive dye in toilets).

IBAC's recent report on the corrections system exposed serious misconduct in the way that strip searches are managed and conducted. Several specific incidents of inappropriate searches were investigated by IBAC, which found that staff were unfamiliar with the human rights standards supposed to govern their behaviour and that prison management did not properly investigate complaints about inappropriate searches.[627]

Most concerningly, IBAC reported that the General Manager of Port Phillip Prison told its investigators that strip searches were "one of the options available to assert control" over people in prison.[628] This is a clear demonstration that strip searches are used not out of necessity, but as a tool of discipline and to exert power over detained people – echoing the concerns of an earlier investigation in Western Australia.[629] The fact that the strip searches investigated by IBAC were conducted shortly after

[624] Dani Larkin (2021), 'Excessive strip-searching shines light on discrimination of Aboriginal women in the criminal justice system', *The Conversation*. Accessed at https://theconversation.com/excessive-strip-searching-shines-light-on-discrimination-of-aboriginal-women-in-the-criminal-justice-system-163969.
[625] IBAC (2021), *Special report on corrections*, p54. Accessed at https://www.ibac.vic.gov.au/docs/default-source/special-reports/special-report-on-corrections---june-2021.pdf?sfvrsn=ee450c8c_2.
[626] [2021] VSC 56
[627] IBAC (2021), *Special report on corrections*, p54, 62.
[628] Ibid, p53.
[629] Ibid, p. 55.

unrelated behavioural incidents reinforces this, as does the escalation of the searches into assaults on incarcerated people by staff. While the IBAC report is disturbing, issues concerning strip searches have been raised in other Australian jurisdictions

Women in Tasmanian jails were subjected to 841 strip searches over a seven-month period, according to figures obtained under a Right To Information request. The Human Rights Law Centre obtained the data from Mary Hutchinson Women's Prison and the Risdon Prison Complex for the period between October 2020 and April 2021. The documents show only three searches turned up concealed items: pain medication; tobacco and a lighter; and tobacco and matchsticks.[630]

It is clear that strip searching is being used for general discipline and order in Victorian prisons. The legislative threshold for strip searching is too low, and training on human rights standards is wholly inadequate. Legislation needs to raise the bar so that strip searching is only to beused as a last resort, not as a routine tool for corrections staff.

Inappropriate practices need to be reined in through legislative reform and the establishment of robust, independent prison oversight, in line with Australia's OPCAT obligations (discussed below). Prison staff and management have not responded to well-documented patterns of inappropriate searching. Changes to policy are inadequate in the face of a culture of disregard for the human rights concerns associated with strip searching. It is important to note that this culture is not unique to Victoria; reports from NSW also show prison staff conducting strip searches far beyond their legal authority to do so, including on visitors,[631] despite the stringent standards outlined above. These considerations have led human rights groups around Australia to conclude that a ban on routine strip searches, entrenched in legislation, is the only safeguard which can entrench proper protections for people in prison.[632]

RECOMMENDATIONS

Recommendation 217. The threshold for authorising a strip search in adult prisons should be raised by legislation. 'Good order' and 'security of the facility' should be removed as grounds for a strip search and legislation should provide that strip searching must be a last resort and must be based on intelligence. Prior to strip searching, other means of searching such as pat searches, metal detectors and increased surveillance must be used. Strip searching must never be routinely conducted as part of the general routine of the centre or on entry to a centre.

[630] Alvaro, A. (2021). Female inmates in Tasmania subjected to 841 strip searches. ABC.net.au. Available at https://www.abc.net.au/news/2021-09-03/strip-searches-of-female-prisoners-in-tasmania/100431432.
[631] O'Brien Criminal & Civil Solicitors (2021), 'Damages awarded to woman strip-searched by Corrective Services officer'. Accessed at https://obriensolicitors.com.au/damages-awarded-woman-strip-searched-correctives-officer/.
[632] Lawyers Weekly (2021). 'Human rights lawyers call for end to "demoralising" strip searches'. Accessed at https://www.lawyersweekly.com.au/biglaw/31596-human-rights-lawyers-call-for-end-to-demoralising-strip-searches.
Canberra Times, 5 August)2021, 'Call to ban routine strip searches on women in Canberra's prisons'. Accessed at https://www.canberratimes.com.au/story/7370668/call-to-ban-routine-strip-searches-on-women-in-canberras-prison/.

Victorian Aboriginal Legal Service

Recommendation 218. Strip searching in youth detention facilities should be prohibited by legislation.

Recommendation 219. Prisons should adopt policies which require them to consider the effect of strip searches on re-traumatisation.

Recommendation 220. Urine testing should only be required upon reasonable grounds and in a manner consistent with the inherent dignity and right to privacy of the detainee involved to the greatest extent possible.

Recommendation 221. Body cavity searches should never be performed on imprisoned people.

Recommendation 222. The Government should invest in technology which enables non-intrusive searching, to provide further alternatives and minimise the use of strip searching.

Equivalence of Healthcare

The provision of high-quality healthcare in prison is essential to maintaining adequate conditions and treatment in custody, avoiding re-traumatisation, and reducing risk factors for reoffending. It is also necessary for upholding the human rights and wellbeing of people in prison. This is the basis of the 'equivalence of care' principle, according to which the Government has an obligation to provide equivalent access to medical care for people in detention as those in the community. People held in prisons are completely dependent on the state to provide adequate healthcare.

The *United Nations Standard Minimum Rules for the Treatment of Prisoners* (**the Mandela Rules**) make clear that "prisoners should enjoy the same standards of health care that are available in the community, and should have access to necessary healthcare services free of charge, without discrimination on the grounds of their legal status."[633] The obligation to provide equivalence of medical care to people deprived of their liberty is echoed in *the International Covenant on Economic, Social and Cultural Rights*, which emphasises "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[634]

The Victorian Charter of Human Rights and Responsibilities requires that "[a]ll persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person".[635] The Victorian Coroners Court has found, in its inquest into the death of Yorta Yorta woman

[633] United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), UN Doc A/RES/70/175 (17 December 2015).
[634] International Covenant on Economic, Social and Cultural Rights, Article 12.
[635] Charter of Human Rights and Responsibilities Act 2006, s22(1).

Ms Tanya Day, that in custodial settings this requires police and prison staff to ensure access to medical care, given that people detained are completely dependent on the state to provide for their health.[636]

Equivalence of care is particularly important because people in prison are disproportionately likely to have pre-existing health conditions and vulnerabilities which exacerbate their healthcare needs. This is a characteristic common to prison populations across jurisdictions, and has been found in both Australian prisons[637] and by international organisations.[638] As discussed above, many incarcerated people have both diagnosed and undiagnosed disabilities. Victoria is no exception to this well-documented phenomenon, which makes the provision of healthcare in prisons an urgent matter for the state.[639] The same is generally observed in youth detention setting,[640] though data in Australia is more limited.[641] Existing evidence indicates that the health needs of incarcerated adolescents are greater than those in non-custodial settings.[642]

A recent tragic example of the lack of equivalence in healthcare in Victorian prisons involved the death of a 12-day-old baby in the mothers and children unit at Dame Phyllis Frost Centre on 18 August 2018. Despite efforts made by the mother and a fellow incarcerated person to elicit assistance to attempt to resuscitate the baby, the prison officers and nurse that arrived in the cell allegedly failed to engage in any efforts to perform CPR.[643] The failure of officers and healthcare staff to attempt to perform lifesaving measures on a newborn baby would be extremely unlikely if the situation had occurred within the greater Victorian community.

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[636] Coronial Inquest into the Death of Tanya Day, [533].

[637] Australian Institute of Health and Welfare (2019). The health of Australia's prisoners: 2018, p. vi. Available at https://www.aihw.gov.au/getmedia/2e92f007-453d-48a1-9c6b-4c9531cf0371/aihw-phe-246.pdf.aspx?inline=true; Royal Australian College of General Practitioners (2019). Custodial health in Australia: Tips for providing healthcare to people in prison, pp. 3-4. Available at https://www.racgp.org.au/FSDEDEV/media/documents/Faculties/SI/Custodial-health-in-Australia.pdf; and Australian Medical Association (2012). Position statement on Health and the Criminal Justice System, 3. Available at https://www.ama.com.au/sites/default/files/documents/Health_%26_the_Criminal_Justice_System_%28final%29.pdf.

[638] United Nations (2021). United Nations System Common Position on Incarceration, p. 12; and World Health Organisation Europe (2007). Health in Prisons: A WHO guide to the essentials in prison health, pp. 15-17. Available at https://www.euro.who.int/__data/assets/pdf_file/0009/99018/E90174.pdf.

[639] Deloitte Consulting. Victorian prisoner health study: Department of Justice, Government of Victoria (February 2003), 1-2. Available at https://files.corrections.vic.gov.au/2021-06/victorian_prisoner_health_study_february_2003_part1.pdf?VersionId=HvouyrKcAd05KLEQ4GICvOJkd_YvB2a6;

[640] See American Academy of Pediatrics. Policy Statement: Health Care for Youth in the Juvenile Justice System (2011), 1. Available at http://yvppolicyportal.safestates.org/wp-content/uploads/2015/09/Health-Care-for-Youth.pdf;

[641] Australian Institute of Health and Welfare. National data on the health of justice-involved young people: A feasibility study, 2016-17 (2018), vi. Available at https://www.aihw.gov.au/getmedia/4d24014b-dc78-4948-a9c4-6a80a91a3134/aihw-juv-125.pdf.aspx?inline=true;

[642] The Royal Australasian College of Physicians. The health and Wellbeing of Adolescents (2011), 4, available at https://www.racp.edu.au/docs/default-source/advocacy-library/the-health-and-wellbeing-on-incarcerated-adolescents.pdf;

[643] Schelle, C. (2021) Coroner to probe newborn baby's tragic death in Melbourne prison. News.com.au. Available at https://www.news.com.au/national/victoria/courts-law/coroner-to-probe-newborn-babys-tragic-death-in-melbourne-prison/news-story/0679b4ba482860ecf392dc6d3ce5ac3a.

Aboriginal people already haveh serious health conditions at a much higher rate than other parts of the Australian population. Aboriginal people detained in prisons are, according to research from the Victorian Aboriginal Community Controlled Health Organisation (**VACCHO**), less healthy than Aboriginal people in the community and less healthy than non-Aboriginal people in prison.[644] In youth detention, across the country, the majority of Aboriginal children are found to have multiple health and social problems upon entering detention.[645]

The principle of equivalency is not only applicable to prisons but – like the jurisdiction of OPCAT monitoring bodies, discussed below – to all places where people are deprived of their liberty. This includes police custody, where ensuring adequate healthcare is an important element in reducing deaths in custody. In July of this year, the Queensland Ambulance Service issued an apology for providing inadequate care before the death of an Aboriginal man detained by police in Townsville.[646] There are far more cases where no accountability has ever been established. The sheer number of deaths in custody, from a variety of causes, are testament to the inadequate provision of health care – including mental health care – and the failure of Australian jurisdictions to enact the principle of equivalency.

Victoria is not an exception to this pattern of failure. But Victoria is unusual among Australian states and territories in not providing healthcare in places of detention through its health department, but through private providers sub-contracted by the Department of Justice and Community Safety.[647] This arrangement falls short of international human rights standards which are themselves inadequate in many respects, and the lack of transparency around places of detention makes scrutiny of healthcare provision extremely difficult.

It should also be acknowledged that it becomes far more difficult to deliver high-quality healthcare in prisons when the prison population is growing and, as a result of the high proportion of people on remand, has high rates of people moving in and out of custody. In NSW, the Inspector of Custodial Services' review of health services noted:

> Overall inmate population increases, combined with high numbers of inmates moving through the custodial system each year even for short periods, has placed extra demand on health services […] This is because each person entering the correctional environment, even for the shortest period of time, needs to be fully assessed from a health, welfare and safety perspective. Previously prescribed

[644] Victorian Aboriginal Community Controlled Health Organisation. Keeping our mob healthy in and out of prison: Exploring Prison Health in Victoria to Improve Quality, Culturally Appropriate Health Care of Aboriginal People.(2015), 9, 13. Available at http://www.vaccho.org.au/assets/01-RESOURCES/TOPIC-AREA/RESEARCH/KEEPING-OUR-MOB-HEALTHY.pdf.

[645] Parliament of the Commonwealth of Australia. Doing Time – Time for Doing: Indigenous youth in the criminal justice system (2011),87-88. Available at https://www.aph.gov.au/binaries/house/committee/atsia/sentencing/report/fullreport.pdf.

[646] The Guardian (2021). 'Tragic on many levels': Queensland ambulance service apologises after death of Indigenous man'. Accessed at https://www.theguardian.com/australia-news/2021/jul/23/tragic-on-many-levels-queensland-ambulance-service-apologises-after-death-of-indigenous-man.

[647] For further information concerning contracted providers of healthcare in Victorian prisons, see https://www.corrections.vic.gov.au/justice-health.

> medication needs to be confirmed, ordered and administered […] current and emerging acute and chronic health issues need to be identified, assessed and managed.
>
> This is different from what a health service in the community would be expected to do […] This is the predominate workload of health professionals working within the custodial environment. This also diverts nursing, medical and other health professional time from the delivery of acute and chronic health interventions this vulnerable and disadvantaged high needs population requires, both for themselves and for the community to which they will return.[648]

In Victoria, the tightening of bail laws has increased the number of unsentenced people in prison, which leads to higher numbers of admissions to prisons, more short spells in custody, and more transfers between facilities – putting intense pressure on the delivery of services VALS expects to deliver high-quality healthcare.

Equivalence of care, particularly for Aboriginal people with serious health issues, and a need for culturally safe healthcare services, can only be delivered with substantial resourcing. This requires greater investment from the state Government, but there is also a need for people in prison to have access to funding from Medicare and the Pharmaceutical Benefits Scheme, to ensure that resources are available to provide all the care needed to the same standard enjoyed in the community. This is particularly important for Aboriginal people, as there are a number of specific items in the Medicare Benefits Schedule which support enhanced screenings, assessments and health promotion activities for Aboriginal people. These streams of Medicare funding are critical to the operation of Aboriginal health services.[649] Access to Medicare funding for people in prison would enable the expansion of in-reach care in prisons by Aboriginal health services. It would also bring funding arrangements in line with those for people in the community. ACCHOs receive direct state and federal funding, as well as being eligible for Medicare funding streams. Similar funding arrangements should be available in relation to custodial settings to ensure the same quality of care can be provided.[650]

[648] NSW Inspector of Custodial Services (2021), *Health services in NSW correctional facilities*, p. 14. Accessed at https://www.inspectorcustodial.nsw.gov.au/inspector-of-custodial-services/reports-and-publications/inspection-reports/adult-reports/health-services-in-nsw-correctional-facilities.html.
[649] Ibid, p. 83.
[650] ABC News, 19 October 2020, 'Greg Hunt rejects Danila Dilba's request for Medicare-funded health services in Don Dale'. Available at https://www.abc.net.au/news/2020-10-19/don-dale-medicare-health-services-rejected-by-greg-hunt/12776808.

Victorian Aboriginal Legal Service

Good Practice Models

ACT: Since Medicare access is suspended for incarcerated people during incarceration, the ACT Government committed funding to establish an autonomous Winnunga AMC Health and Wellbeing Service to Aboriginal people in prison in Alexander Maconochie Centre (AMC), resulting in Winnunga Nimmityjah Aboriginal Health and Community Services being the first ACCHO to provide primary healthcare service to incarcerated people in 2019.[651]

Northern Territory: Successes with in-reach care to Aboriginal children in detention following the commissioning of an Aboriginal community health organisation, Danila Dilba, to deliver healthcare in the Don Dale Youth Detention Centre.[652]

New South Wales: The inspector of Custodial Services made a firm recommendation that access to Medicare would facilitate the expansion of in-reach care in prisons by Aboriginal health services.[653]

The importance of equivalence of care to Aboriginal people in prison was recognised by the Royal Commission into Aboriginal Deaths in Custody more than thirty years ago. Recommendation 150 of the Royal Commission was that "health care available to persons in correctional institutions should be of an equivalent standard to that available to the general public," and specifically identified access to mental health and AOD services and the importance of culturally safe care. Equivalence of care is also the underlying goal of other RCIADIC recommendations regarding healthcare in prisons and police custody, including Recommendations 127, 252, 152, 154, 133, 265 and 283.[654]

A Guardian analysis of 474 Aboriginal and/or Torres Strait Islander Deaths in Custody since 1991, published in April this year for the 30th anniversary of the Royal Commission into Aboriginal Deaths in Custody, found that:

> For both Aboriginal and Torres Strait Islander people and non-Indigenous people, the most common cause of death was medical problems, followed by self-harm. However, Indigenous people who died in custody were three times more likely not to receive all necessary medical care, compared to non-Indigenous people.

[651] Shukralla, H. & Tongs, J. (2020). Austrailan first in Aboriginal and Torres Strait Islander prisoner health care in the Australian Capital Territory. 44(4) Australian and New Zealand Journal of Public Health 324. Available at https://onlinelibrary.wiley.com/doi/full/10.1111/1753-6405.13007

[652] For further information, see https://ddhs.org.au/services/don-dale-youth-support.

[653] NSW Inspector of Custodial Services (2021), *Health services in NSW correctional facilities*, p. 83. Accessed at https://www.inspectorcustodial.nsw.gov.au/inspector-of-custodial-services/reports-and-publications/inspection-reports/adult-reports/health-services-in-nsw-correctional-facilities.html.

[654] Williams (2021), 'Comprehensive Indigenous health care in prisons requires federal funding of community-controlled services', The Conversation. Accessed at https://theconversation.com/comprehensive-indigenous-health-care-in-prisons-requires-federal-funding-of-community-controlled-services-158131.

> For Indigenous women, the result was even worse – less than half received all required medical care prior to death.[655]
>
> Aboriginal and Torres Strait Islander women were less likely to have received all appropriate medical care before death (54%) compared to men (36%)… Agencies such as police watch houses, prisons, and hospitals did not follow all of their own procedures in 43% of the cases in which Aboriginal and Torres Strait Islander people died, compared to 19% of the cases of non-Indigenous people.[656]

Addressing health care inequalities in prisons has been found to provide multiple broader-reaching benefits. Ensuring that the health needs of persons in detention benefits public health outcomes upon release of people in detention, since physical health issues, such as communicable diseases, and mental health issues, which may be a root cause of criminal behaviours in certain instances, are mitigated or resolved prior to release into the community.[657] Furthermore, addressing health and wellbeing issues increases the likelihood of good health during and following release, as well as decreasing the risk of death following release from custody.[658] Absolutely critical to the context of the present submission, the provision of adequate and appropriate physical and mental health services to persons in detention has also been demonstrated to increase the likelihood of positive reintegration into the community and decrease recidivism.[659]

RECOMMENDATIONS

Recommendation 223. People in detention must be provided medical care that is the equivalent of that provided in the community. Medical care must be provided without discrimination.

Recommendation 224. Health care should be delivered through DHHS rather than DJCS, and not through for-profit organisations.

Recommendation 225. A model of delivery of primary health services by Aboriginal Community Controlled Health Organisations in places of detention in Victoria should be considered, in consultation with VACCHO and member organisations.

[655] Allam, L. et al. (2021). The facts about Australia's rising toll of Indigenous deaths in custody. Available at https://www.theguardian.com/australia-news/2021/apr/09/the-facts-about-australias-rising-toll-of-indigenous-deaths-in-custody.
[656] Ibid.
[657] United Nations (2021). United Nations System Common Position on Incarceration, p. 12.
[658] Royal Australian College of General Practitioners (2019). Custodial health in Australia: Tips for providing healthcare to people in prison, p. 5. Available at https://www.racgp.org.au/FSDEDEV/media/documents/Faculties/SI/Custodial-health-in-Australia.pdf
[659] Ibid, p. 12; Australian Institute of Health and Welfare (2019). The health of Australia's prisoners: 2018, p. vi. Available at https://www.aihw.gov.au/getmedia/2e92f007-453d-48a1-9c6b-4c9531cf0371/aihw-phe-246.pdf.aspx?inline=true; Royal Australian College of General Practitioners (2019). Custodial health in Australia: Tips for providing healthcare to people in prison, p. 5. Available at https://www.racgp.org.au/FSDEDEV/media/documents/Faculties/SI/Custodial-health-in-Australia.pdf.

Victorian Aboriginal Legal Service

Recommendation 226. The Federal Government must ensure that incarcerated people have access to the Pharmaceutical Benefits Scheme (PBS) and the Medicare Benefits Schedule (MBS). The Victorian Government should advocate with the Commonwealth to enable this access in order to provide equivalence of care to Aboriginal people and other vulnerable people held in prison.

Recommendation 227. The Federal and State Governments should ensure that incarcerated people have access to the National Disability Insurance Scheme (NDIS) and are assessed for eligibility for NDIS upon entry to a prison or youth justice centre.

Recommendation 228. The Government should employ more Aboriginal Health Workers and Aboriginal Wellbeing Officers at all levels of the justice health system (Victoria Police, Courts, Forensicare/MHARS, Community Corrections, Correctional Health Services) to work with Aboriginal people at all stages of their engagement with the criminal legal system.

Recommendation 229. The Government should prioritise the development and finalisation of standards for culturally safe, trauma informed health services in the criminal legal system and youth justice.

Mental Health & Mental Healthcare

High-quality healthcare for people in prison is particularly important given the high rates of mental ill-health among the prison population and among Aboriginal people in Victoria. As noted above, mental illness can cause or exacerbate engagement with the criminal legal system – by leading to police becoming involved, as well as leading to inadequate and insensitive engagement by police officers and courts.

The Mental Health Advice and Response Service (**MHARS**)[660] provides clinical mental health advice to courts concerning the appropriateness of mental health interventions and to Community Corrections concerning the appropriateness of mental health treatment and rehabilitation conditions on Community Corrections Orders (**CCO**) and people on parole with a mandated health order. Additionally, the MHARS also performs a consultation and education function for judges, community corrections officers and other court users on mental health services and issues. Phase 4 of the Aboriginal Justice Agreement includes a commitment to provide access to culturally safe mental health services for Aboriginal people who have a moderate mental health condition or disorder, and who have a CCO with a mental health treatment and rehabilitation condition or are on parole with a mandated health order. VALS reiterates its prior recommendation to establish a specialist Koori Unit

[660] For an overview of the MHARS, see https://www.forensicare.vic.gov.au/our-services/community-forensic-mental-health-services/court-mental-health-response-service/.

within MHARS to lead service delivery for Aboriginal people coming into contact with the criminal legal system.[661]

VALS has also emphasised the need for high-quality, culturally safe mental health care in prisons previously, in work focused on the mental health system more broadly. These recommendations remain important to the context of this Committee's Inquiry. Without adequate care, people in prison may find their mental health problems worsening, creating circumstances which may lead to further contact with the justice system and reoffending upon release.

There is a lack of sustainably resourced culturally appropriate health services and programs to meet the social and emotional wellbeing needs of Aboriginal people in prison.[662] VALS continues to call for increased access to culturally safe, trauma-informed forensic mental health services throughout the criminal legal system.[663] Critically, this should involve resources for VACCHO to guide the development of culturally safe programs. VACCHO has long called for changes in correctional health service delivery, including recommendations around improving cultural safety across the clinical, programs and policy spheres, to decrease service barriers and increase health service utilisation by Aboriginal people in prison.[664]

RECOMMENDATIONS

Recommendation 230. The Government should ensure that all prison officers receive regular gender and culturally sensitive, training on how to interact with people with cognitive disabilities.

Recommendation 231. The Government should commit significant resources to improving mental healthcare for Aboriginal people in custody in Victoria, including by:

- Recruiting, training and accrediting more qualified Aboriginal and Torres Strait Islander psychologists, psychiatrists, counsellors, social workers and other mental health workers;
- Introducing a specialised Koori Unit within Mental Health Advice and Response Service;
- Introducing standardised and culturally appropriate screening tools across all custody settings.

[661] VALS (2019). Submission to the Royal Commission into Victoria's Mental Health System, pp. 44-45.
[662] Ibid., p.34.
[663] Ibid., p.43.
[664] Victorian Aboriginal Community Controlled Health Organisation (2015). Keeping our mob healthy in and out of prison: Exploring Prison Health in Victoria to Improve Quality, Culturally Appropriate Health Care of Aboriginal People, pp. 9, 13. Available at http://www.vaccho.org.au/assets/01-RESOURCES/TOPIC-AREA/RESEARCH/KEEPING-OUR-MOB-HEALTHY.pdf; and VALS (2019). Submission to the Royal Commission into Victoria's Mental Health System, p. 43.

Victorian Aboriginal Legal Service

OPCAT

VALS has repeatedly called for the Victorian Government to take steps to implement Australia's obligations under the *Optional Protocol on the Convention Against Torture, Cruel, Inhuman and Degrading Treatment and Punishment* (**OPCAT**).[665]

Effective and culturally appropriate implementation of OPCAT is critical to prevent many of the primary concerns in prison environments, including excessive use of force, inappropriate strip searching, excessive use of isolation and lockdowns and woefully inadequate healthcare and mental healthcare. As noted above in relation to protections in police custody, it is also a critical way of protecting the rights of individuals who are in police custody.

Australia ratified OPCAT in December 2017 and has until January 2022 to fully implement its legal obligations under this treaty. OPCAT will be implemented in Australia through a national network of bodies fulfilling the functions of a National Preventive Mechanism (**NPM**). To date, Western Australia is the only State or Territory to have formally designated an NPM.[666] Legislative processes are currently underway in Tasmania[667] and South Australia[668] to designate their respective NPMs. Very little progress has been made in Victoria.

The urgent need to implement OPCAT in Victoria has been identified by the Victorian Ombudsman, who carried out two OPCAT style investigations in custodial facilities in 2017 and 2019.[669] The Victorian Government had not responded to the Ombudsman's recommendation to establish, and properly resource, a NPM in Victoria.[670] According to the Ombudsman, "DJCS has advised that a considerable amount of work has been done on the government's implementation of its responsibilities under OPCAT, and that a lack of public statements about OPCAT is not an indicator that progress is not being made."[671]

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[665] VALS, *Submission to the Commission for Children and Young People Inquiry: Our Youth Our Way*, p. 21; VALS, *Supplementary Submission to the Royal Commission on Victoria's Mental Health System*, p. 8-13; VALS, *Public Accounts and Estimates Committee COVID-19 Inquiry*, p. 44-45; VALS, *Building Back Better: COVID-19 Recovery Plan*, pp. 87-91.

[666] The Western Australian Ombudsman and the Office of the Inspector of Custodial Services have been nominated as Western Australia's NPMs for mental health and other secure facilities, as well as justice-related facilities (including police lock-ups). See Commonwealth Ombudsman (2019). *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT),* p. 3.

[667] In November 2020 the Tasmanian Government announced that it would nominate the Tasmanian Custodial Inspector as its NPM. A draft Bill, the *Custodial Inspector Amendment (OPCAT) Bill 2020*, was released by the Department of Justice for information and comment in November-December 2020. A second draft Bill, the *OPCAT Implementation Bill* 2021, is currently open for submissions.

[668] The *OPCAT Implementation Bill 2021* (South Australia) is currently before the South Australian House of Assembly. The Bill nominates multiple existing bodies as NPMs, each with jurisdiction in relation to different places of detention.

[669] Victorian Ombudsman, *Implementing OPCAT in Victoria: Report and inspection of Dame Phyllis Frost Centre*, 2017; Victorian Ombudsman, *OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people* (2019), p. 61.

[670] Victorian Ombudsman (2020). *Ombudsman's Recommendations – Third Report*, p. 14.

[671] Ibid., p. 14.

Victorian Aboriginal Legal Service

Since June 2020, the Government has remained silent on its "considerable" progress. The only information in the public record is the allocation of $500,000 for OPCAT implementation between 2021-2025.[672] This is woefully inadequate, and VALS is concerned that this once in a generation opportunity is being squandered.

In August 2021, the Commonwealth Government released the Commonwealth Closing the Gap Implementation Plan, which dedicates funding over two years (2021-2022) to support states and territories to implement OPCAT.[673] Although the document indicates the amount of funding for other actions under the Plan, it is silent on the amount of funding that will be provided to States and Territories for OPCAT implementation.[674]

VALS takes this opportunity to reiterate the recommendations that it has made previously. The Victorian Government must be transparent and provide a public update on its progress in implementing OPCAT. VALS and the Aboriginal Justice Caucus expect the Victorian Government to engage in robust consultations in developing an appropriate model and legislation for Victoria.

You can find out more about OPCAT from VALS' OPCAT factsheet and *Unlocking Victorian Justice* webinar, *OPCAT: An opportunity to prevent the ill-treatment, torture and death of Aboriginal and Torres Strait Islander people in custody*. VALS' Head of Policy, Communications and Strategy also completed a Churchill Fellowship on culturally appropriate OPCAT implementation for Aboriginal and Torres Strait Islander people.

RECOMMENDATIONS

Recommendation 232. The Victorian Government must urgently undertake robust, transparent and inclusive consultations with the Victorian Aboriginal community, its representative bodies and ACCOs on the implementation of OPCAT in a culturally appropriate way.

Recommendation 233. The operations, policies, frameworks and governance of the designated detention oversight bodies under OPCAT (National Preventive Mechanisms - NPMs) must be culturally appropriate and safe for Aboriginal people.

Recommendation 234. The Victorian Government must legislate for the NPM's mandate, structure, staffing, powers, privileges and immunities.

[672] VALS (2021), 'This International Day in Support of Victims of Torture, the Andrews Government must do better on OPCAT'. Available at https://www.vals.org.au/this-international-day-in-support-of-victims-of-torture-the-andrews-government-must-do-better-on-opcat/.
[673] Commonwealth of Australia (2021). *Commonwealth Closing the Gap Implementation Plan,* p. 48. The funding is linked to Targets 10 (By 2031, reduce the rate of Aboriginal and Torres Strait Islander adults held in incarceration by at least 15%) and Target 11 (By 2031, reduce the rate of Aboriginal and Torres Strait Islander young people (10-17 years) in detention by at least 30%).
[674] Ibid., pp. 152 and 157.

Victorian Aboriginal Legal Service

Recommendation 235. The Victorian and Commonwealth Governments must ensure that the NPM is sufficiently funded to carry out its mandate effectively.

Recommendation 236. In accordance with Article 3(1) of OPCAT, the NPM in Victoria must have jurisdiction over all places where individuals are or may be detained, including all police places of detention, residential care facilities, forensic mental health hospitals and other places where people with cognitive disabilities are deprived of their liberty.

Recommendation 237. The Victorian Government must amend COVID-19 Emergency legislation to ensure that visits to correctional facilities and youth detention facilities by independent detention oversight bodies cannot be prohibited.

Disciplinary Proceedings

As noted by the Victorian Ombudsman in her recent report, "[d]isciplinary hearings in Victorian prisons are still carried out 'in the dark' with insufficient scrutiny, oversight or transparency."[675] The disciplinary system in Victoria must operate in accordance with procedural fairness, and key protections derived from procedural fairness must be enshrined in legislation.

The prison disciplinary system deals with incarcerated people who break prison rules. The process has three stages: (1) investigation of the alleged offence, resulting in a decision to charge the incarcerated person; (2) a disciplinary hearing; and (3) determination of a penalty (if the person pleads guilty or is found guilty of the offence).[676] According to the Victorian Ombudsman, there are approximately 10,000 disciplinary hearings each year across Victoria's 14 prisons.[677]

The prison disciplinary system is regulated through the *Corrections Act 1986* (Vic), *Corrections Regulations* 2019 (Vic), Commissioner's Requirements (setting out high-level policy requirements for all prisons in Victoria), Deputy Commissioner's Instructions (for public prisons) and Operating Instructions (for private prisons) and the Prison Disciplinary Handbook.[678] Prison staff involved in disciplinary hearings are also bound by the *Charter of Human Rights and Responsibilities 2006*, as well as procedural fairness principles arising under common law.[679] Under international law, the Mandela Rules provide detailed requirements for prison disciplinary systems,[680] including that "[n]o prisoner shall be sanctioned except in accordance with…. the principles of fairness and due process."[681]

[675] Victoria Ombudsman (2021). Investigation into good practice when conducting prison disciplinary hearings, p. 4.
[676] Ibid., p. 11.
[677] Ibid., p. 4.
[678] Ibid., p. 20.
[679] Procedural fairness includes: the hearing rule, the bias rule, the notice rule and the evidence rule. Ibid., p. 16.
[680] *The United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules)*, Rules 37 – 43 and Rule 46.
[681] Ibid., Rule 39(1).

A recent investigation by the Victorian Ombudsman revealed serious concerns regarding the investigation of prison offences and disciplinary hearings:

- Perception amongst incarcerated people that prison officers investigating the offence and conducting disciplinary hearings are not impartial;
- Use of undocumented pre-hearing discussions;
- Insufficient information provided to incarcerated people about the charge;
- Poor use of discretion in the decision to charge an incarcerated people or a prison offence;
- Limited availability of independent legal advice and support;
- No requirement for written reasons for a decision;
- Use of disciplinary hearings when other less severe options were reasonably are available;
- Inconsistent and disproportionate penalties;
- Limited right of review of the outcome of a disciplinary hearing (incarcerated people who want to challenge the outcome of a disciplinary hearing can only do so in the Supreme Court).[682]

Additionally, the Ombudsman's investigation identified the following concerns relating to disciplinary proceedings for incarcerated people with a cognitive disability or mental illness:[683]

- over-representation of such incarcerated people in disciplinary processes;
- failure to identify and consider the condition of some incarcerated people;
- limited independent support for many incarcerated people with a disability;[684]
- inconsistent consultation with relevant professionals.[685]

Although the disciplinary process is bound by procedural fairness, the Ombudsman's report demonstrates that important protections derived from procedural fairness are not being respected in practice. VALS' is of the view that protections must be enshrined in legislation, with clear avenues for recourse when the rights of incarcerated people are not respected. This is particularly essential to ensure that the obligations on staff and rights of detainees are consistent across both public and private prisons in Victoria.

The Ombudsman's report notes that the "consequences for a prisoner can be serious, can impact on parole and include the loss of 'privileges' – such as telephone calls or out of cell time – and can even result in contact visits with family or children being withdrawn."[686] This is particularly concerning as

[682] Victoria Ombudsman (2021). Investigation into good practice when conducting prison disciplinary hearings, p. 24.
[683] According to data from Corrections Victoria, as noted in the report by the Victorian Ombudsman, 4% of Victoria's 7,808 incarcerated people had a registered intellectual disability, over 54% of incarcerated people were considered at risk of suicide or self-harm, and 42% of incarcerated people had a psychiatric rating (indicating either a suspected or diagnosed psychiatric condition). Ibid., p. 54.
[684] The Office of the Public Advocate has also raised concerns about this. See: Hope, Z. (2020). "Intellectually disabled prisoners punished without oversight,"
[685] Victoria Ombudsman (2021). Investigation into good practice when conducting prison disciplinary hearings, p. 56.
[686] Ibid., p. 4.

contact with family is critical to rehabilitation. According to the Mandela Rules, "disciplinary sanctions or restrictive measures shall not include the prohibition of family contact."[687]

Regarding people with disability, the Mandela Rules provide that: "Before imposing disciplinary sanctions, prison administrations shall consider whether and how a prisoner's mental illness or developmental disability may have contributed to his or her conduct and the commission of the offence or act."[688] This is of particular importance, given the report's finding that there was inconsistent use of Corrections Independent Support Officer volunteers for incarcerated people with an intellectual disability.

RECOMMENDATIONS

Recommendation 238. The Victorian Government should implement the recommendations of the Victorian Ombudsman in her July 2021 report on prison disciplinary hearings.

Recommendation 239. Protections relating to procedural fairness in disciplinary proceedings should reflect those outlined in the Mandela Rules and should be enshrined in legislation.

Recommendation 240. The rights of incarcerated people with disability must continue to be upheld during the pandemic and recovery period, including the right to be supported through the Office of the Public Advocate during disciplinary hearings.

Privatisation of Prisons

The modern phenomenon of private, or for-profit prisons, originated in the United States in the mid-1980s in an effort to manage rapidly rising prison populations. The model was quickly adopted by Australia and the United Kingdom. In 2013, as the prison population in the United States reached a peak, approximately 15% or 30,000 people in prison were held in privately operated centres.[689]

Under the Obama Administration, the United States began moving away from having privately run prisons. The Biden Administration has continued the trend, with President Joe Biden this year signing a series of executive actions around racial equity which included a focus on prison reform. The President directed the Justice Department not to renew federal contracts with private prisons and has campaigned to eliminate the use of private prisons by the federal government. Notably, the motivation behind the shift is "the fact that prisons are not only encouraged profiteering off of human

[687] Rule 43(3) of the *Mandela Rules*.
[688] Rule 39(3) of the *Mandela Rules*.
[689] U.S Department of Justice (2016) Memorandum for the Acting Director Federal Bureau of Prisons. Accessed at: https://www.justice.gov/archives/opa/file/886311/downloa d

lives but more importantly, I've been shown by the Department of Justice Inspector General's report to be subpar in terms of safety and security for those incarcerated."[690]

Across Victoria, there are eleven public operated prisons and three privately operated prisons. The three privately managed prisons are Port Phillip Prison run by G4S, and Ravenhall Correctional Centre and Fulham Correctional Centre both run by the GEO Group. As of 31 May 2021, Corrections Victoria reported there were 7,274 people in prison, with 778 of those being Aboriginal people. Around 40% of Victoria's prison population is held in private prisons, a significant proportion compared with 15% of people in privately managed prisons in the United States, and the highest number in Australia.

VALS is deeply concerned about the degree of privatisation in Victoria's prison system. In addition to the wholly privately-run prisons, particular services – including healthcare – are contracted to private operators in many public prisons. The effect of this is to weaken accountability, undermine democratic control of the prison system, and put private profits before the wellbeing of people in prison and the integrity of the system. It also puts private profit ahead of rehabilitation and reducing recidivism.

Victoria's history with privately operated prisons should be a stark warning about the risks of privatisation. The Metropolitan Women's Correctional Centre was opened in 1996 as the first privately designed and operated prison in the state. In 2000, the State Government terminated the contracts and took over the prison after serious concerns about the safety of people in the prison. A report by the Correctional Services Commissioner found "an unacceptably high number of prison incidents," "a disproportionate number of prisoners being classified as Protection Prisoners as they were, or felt unsafe," and up to 29% of the prison population being held in an overcrowded protection unit. Contractual benchmarks came nowhere near being met: "levels of attempted suicide [were] more than double the maximum allowed benchmark," "prisoner assaults on staff [were] almost double the maximum allowed benchmark," and "prisoner on prisoner assaults [were] significantly in excess of the maximum allowed benchmark." Issues with subcontractors led to the prison's health service losing its accreditation. Overall, the report found "an inability by the prison to implement strategies to ensure the welfare and safety of prisoners and staff."[691]

Despite this disastrous outcome of privatisation at what is now the Dame Phyllis Frost Centre, Victoria has continued to offer private contracts for managing prisons. G4S and GEO are global corporations with extensive records of mismanagement and scandal internationally – as was CCA, the contractor which ran the MWCC. The growing role of these corporations in Victoria's prison system should be a cause of serious concern.

[690] Vazquez, M. (2021) "It's time to act': Biden moves to address racial inequality'. CNN. Accessed at: https://edition.cnn.com/2021/01/26/politics/executive-orders-equity-joe-biden/index.html

[691] Correctional Services Commissioners' Report on Metropolitan Women's Correctional Centre's Compliance with its Contractual Obligations and Prison Services Agreement, Department of Justice, 1999-2000. Accessed at: https://www.parliament.vic.gov.au/papers/govpub/VPARL1999-2002No40.pdf

Victoria's reliance on private prisons has increased in recent years, as the overall prison population has skyrocketed. The unacceptable incarceration rate is putting increasing numbers of people at risk of mistreatment in private prison environments. Privatisation, by raising the risk of mistreatment, abuse and corruption, increases the number of people who are at risk of leaving prison with traumatic experiences and inadequate progress towards rehabilitation.

Fundamentally, a question that needs to be asked is what incentive is there for a private company that profits from booming prison populations to truly commit to reducing recidivism rates? This concern is clearly demonstrated in the amounts of money that people in prison are charged for basic necessities – VALS has had a client asked by a private prison to pay around $1500 to have a computer in his cell in order to prepare for his trial. This is illustrative of the incentive for private prison operators to focus on financial issues rather than on giving detained people the best chance to leave prison and avoid reoffending. The extensive involvement of private companies in the prison system will, as a result, only serve to increase recidivism if it is not rapidly abandoned.

Challenges in Management and Accountability

Private prisons are monitored by Corrections Victoria using Service Delivery Outcomes, including some intended to measure safety and security. This is consistent with the approach to private prisons in other jurisdictions, where the state takes on an arms-length role in tracking the performance of private contractors. This approach, however, greatly reduces transparency and accountability, and undermines the Government's ability to address misconduct and abuses in prisons.

In its assessment of the prison system in Queensland, the Crime & Corruption Commission (CCC) found that

> [t]his marketised approach, where prisons are operated by private, profit-driven organisations, disconnects the State from direct responsibility for the delivery of privately operated prisons" and "creates challenges for the State in ensuring prisoners […] are treated humanely and have appropriate access to programs and services.[692]

In Victoria, a 2021 report by IBAC found similar issues with the arms-length approach to monitoring and managing prisons. IBAC concluded that "[i]ssues related to transparency are of particular concern in privately managed prisons", in part because of "commercial-in-confidence clauses in contracts between the state and private service providers which may affect the public's ability to identify contractual violations and any remedial actions taken".[693]

[692] Queensland Crime & Corruption Commission (2018), *Taskforce Flaxton: An examination of corruption risks and corruption in Queensland prisons*, p10. Accessed at https://www.ccc.qld.gov.au/sites/default/files/Docs/Public-Hearings/Flaxton/Taskforce-Flaxton-An-examination-of-corruption-risks-and-corruption-in-qld-prisons-Report-2018.pdf
[693] IBAC (2021), *Special report on corrections*. Accessed at: https://www.ibac.vic.gov.au/publications-and-resources/article/special-report-on-corrections

The lack of transparency and accountability means that even identified problems can be difficult to remediate in private prisons. Risk management and the response to serious incidents has been a particular cause of concern in Victoria. The Victorian Auditor-General has reported that "[s]erious incidents at both Port Phillip and Fulham have, in some instances, exposed weaknesses in how G4S and GEO manage safety and security risks," and that these incidents are not being investigated in a way that identifies or addresses their underlying causes.[694]

The absence of functional risk management, or processes to respond to serious incidents and prevent their recurrence, poses an enormous risk to the wellbeing of people in prison in Victoria.

Culture and Disciplinary Procedures

A related problem with private prisons is the difficulty of influencing operational culture and establishing appropriate ethical standards.

Corruption in prisons is not only a risk to public funds and the integrity of the system. It also creates an environment where prison staff feel impunity about breaking rules, and so makes space for serious forms of misconduct including invasive strip-searching, use of force and inappropriate use of solitary confinement. The Queensland CCC found that "the public–private model makes developing a positive, corruption-resistant culture difficult" because the government "has limited visibility of, and ability to influence, the culture of the private centres."[695] More generally, it reported that Queensland's Ethical Standards Unit (**ESU**) for prisons

> has limited influence in private prisons. Once a matter has been assessed, it is referred to the private prison to investigate and manage. The ESU has limited ability to influence professional standards or discipline outcomes in private prisons.[696]

These problems in Queensland are driven by structural features of prison privatisation, and the dynamics are no different in Victoria. IBAC's report identified serious misconduct in both public and private prisons, but it is notable that Port Phillip Prison – a private facility – saw the most inadequate disciplinary response, with some staff only disciplined when IBAC began its external investigation. Some staff at Port Phillip Prison were found to have interfered with their BWCs to obscure footage of misconduct, and investigations into incidents were not conducted in line with government or prison policy.[697]

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[694] Victorian Auditor-General's Office (2018), *Safety and Cost Effectiveness of Private Prisons*, p45. Accessed at https://www.audit.vic.gov.au/sites/default/files/2018-03/20180328-Private-Prisons.pdf.
[695] Queensland Crime & Corruption Commission (2018), *Taskforce Flaxton: An examination of corruption risks and corruption in Queensland prisons*, p27.
[696] Ibid, p. 43.
[697] IBAC (2021), *Special report on corrections*, pp34-36. Accessed at https://www.ibac.vic.gov.au/publications-and-resources/article/special-report-on-corrections.

Inadequate training and tokenistic efforts at investigating abuses are clear indications of a culture where the human rights and wellbeing of people in prison are not taken seriously. Though severe problems also exist in public prisons, privatisation makes it extremely difficult to address this culture in facilities which hold 40% of the prison population.

Healthcare Contracting

Another important element of Victoria's troubling approach to privatisation in the prison system is the contracting of healthcare. As discussed above, equivalency of healthcare is an important principle for prisons, set out in the Mandela Rules, which establish minimum standards for the treatment of people in prison. Healthcare equivalency means that people held in prison must have access to an equivalent standard of healthcare as they would if living freely in the community.

This vital principle can be undermined by subcontracting. In Australia, all jurisdictions except Victoria have healthcare in prisons managed by the health department. In Victoria, healthcare is managed by the Department of Justice and Community Safety, and service delivery is contracted to six private providers. These providers also subcontract some services.[698] The effect is a patchwork system where continuity of care is very hard to provide, particularly since people in prison may move between facilities, and the reliability and quality of services is highly inconsistent. Reducing the quality of health services and the possibility for people in prison to receive consistent, comprehensive care further contributes to poor prison conditions, undermining rehabilitation and increasing the risk of reoffending.

RECOMMENDATIONS

Recommendation 241. The Government should end privatisation of prisons in Victoria. This should include wholly privately-run prisons, as well as particular services, such as healthcare. The Government should move towards public control of all prison facilities as a matter of urgency.

[698] Corrections Victoria, 'Justice Health', https://www.corrections.vic.gov.au/justice-health.

Women in Prison

The female prison population is distinct in many ways from the male prison population, and there are important factors warranting a gender-sensitive approach to criminal justice reform. Women in prison should be provided with appropriate supports to reduce the risk of recidivism and increase successful reintegration into Victorian community. Additionally, the location of the custodial placement of women – particularly Aboriginal women – is critical. In instances where women desire to serve their custodial sentences with dependent children, efforts need to be undertaken to streamline the process and enhance its transparency.

Women in prison should be given particular attention in the design and implementation of programs to rehabilitate and reduce reoffending. This is essential because incarcerated women are, on the one hand, less likely to have committed serious offences, and on the other ,more likely to enter prison with past experiences that make them susceptible to re-traumatisation and cycles of offending without special care. Furthermore, specifically addressing the distinct needs of minorities and Indigenous peoples, the Bangkok Rules contain provisions mandating the development and provision of gender and culturally-relevant programs and services, designed in consultation with Aboriginal women and communities, for Aboriginal women (while in prison,[699] prior to and following release from custody[700]).

Upwards of three quarters of imprisoned women in Australia have suffered violence and abuse,[701] and rates of mental illness, substance use issues and histories of homelessness are higher than among men in prison.[702] These issues disproportionately affect Aboriginal women, and Aboriginal women are imprisoned at extremely high rates – 21 times more than non-Aboriginal women.[703] This is particularly challenging in prison environments, which do not do enough to support women dealing with these vulnerabilities and can instead exacerbate them. Custodial sentences can also be highly traumatising for women because they involve family separation – more than half of women in prison have dependent children[704] – and this is an especially serious issue for Aboriginal women, many of whom live with the intergenerational trauma of state-enforced separation of families in previous generations.

At the same time, the offences that women are imprisoned for tend to be less serious crimes, associated with the vulnerabilities identified above. These include drug offending, theft and property

[699] Rule 54 of the Bangkok Rules.
[700] Rule 55 of the Bangkok Rules.
[701] Johnson, H. (2004). *Drugs and crime: A study of incarcerated female offenders, Research and public policy series*; Justice Health & Forensic Mental Health Network (2017), *2015 Network Patient Health Survey report*; M Wilson, M. et al, (2017). *Violence in the Lives of Incarcerated Aboriginal Mothers in Western Australia,* SAGE Open.
[702] Australian Institute of Health and Welfare (2020). *The Health of Australia's Prisoners*.
[703] Change the Record Coalition (2017). *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment*.
[704] Australian Institute of Health and Welfare (2020) *The Health and Welfare of Women in Australia's Prisons*.

offences, often committed in the context of struggling with addiction, homelessness or mental illness.[705] Women on average serve shorter prison sentences than men and are more likely to be held in prison on remand.[706]

These facts clearly show that women in prison are very often only offending out of necessity and are more likely to have vulnerabilities that make prison environments very damaging for their wellbeing. On the other hand, they are in a good position to be reintegrated into society, if given adequate supports. Many women in prison have sought help from support services prior to being incarcerated.[707] Together, these factors point to the importance of creating therapeutic, trauma-informed approaches to supporting women in prison.

In Victoria, however, support for women in prison is sorely lacking. Women often serve short sentences, or (due to Victoria's bail laws) are only held in prison on remand for offences which ultimately do not lead to prison time. As a result, they are often not given access to rehabilitation programs which have a longer duration.[708] Research evidence suggests that without dedicated rehabilitation support, incarceration alone tends to *increase reoffending* rather than reduce it.[709] Women serve shorter sentences because their offences are less serious and it is a perverse feature of the Victorian criminal legal system that the less serious nature of offending results in women receiving fewer social supports. Improving the provision of support in the community, including for women on Community Corrections Orders, would be a far more effective approach to reducing reoffending.[710] In this context, VALS wishes to emphasise our support for the Aboriginal Justice Caucus' goal of establishing a residential diversion programme for Aboriginal women. Drawing lessons from the Wulgunggo Ngalu Learning Place model, this program could strengthen connections to culture and address causes of offending, with significant benefits over the existing carceral approach.[711]

There are also significant shortcomings in transitional support for women leaving prison. Given that women are more likely to be imprisoned for offences associated with poverty, homelessness and addiction, transitional support is essential to avoiding reoffending among women. However, Victoria's only dedicated transition facility, the Judy Lazarus Transition Centre, holds only men. A similar facility for women with up to a year of their sentence remaining would be highly beneficial, as VALS has previously noted.[712] Beyond transitional prison facilities, improved provision of post-release housing and transitional healthcare and alcohol and drug treatment would greatly reduce the risk of

[705] Ibid.
[706] Crime Statistics Agency (2019). *Characteristics and offending of women in prison in Victoria, 2012-2018*.
[707] Victorian Ombudsman (2015). *Investigation into the rehabilitation and reintegration of prisoners in Victoria,* p. 94. Available at https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/investigation-into-the-rehabilitation-and-reintegration-of-prisoners-in-victoria/.
[708] Ibid.
[709] Centre for Innovative Justice (2021), *Leaving custody behind: Foundations for safer communities & gender-informed criminal justice systems*, p. 86. Available at https://cij.org.au/cms/wp-content/uploads/2021/09/leaving-custody-behind-issues-paper-july-2021-.pdf.
[710] Ibid.
[711] Aboriginal Justice Caucus (2021), submission to this Inquiry, p11.
[712] Victorian Ombudsman (2015), *Investigation into the rehabilitation and reintegration of prisoners in Victoria,* p127.

reoffending among women. In addition to the recommendations in this section, VALS highlights that the recommendations below on transition and throughcare are particularly important for women.

The prison where the custodial sentence is served is also an important issue for women. In Victoria, prisons where women are held are geographically isolated, which has considerable impacts on the ability of children and other family members to visit due to transportation time and costs, as well as other disadvantages.[713] The preference for the location of the prison selected to be close as possible to the home of the woman serving a custodial sentence is raised in Rule 3 of the Bangkok Rules. Furthermore, the Royal Commission into Aboriginal Deaths in Custody made similar recommendations concerning the issue in reference to Aboriginal people in custody, 30 years ago. [714]

Data is not publicly available on the number of women in Victorian prisons who have dependent children residing with them. Corrections Victoria runs the Living with Mum program for mothers and dependent children,[715] but prison can never be a healthy environment for a child. While VALS is fundamentally opposed to families being held in prison environments, the issue is addressed in this submission, given the fact that the Victorian criminal legal system makes provision for such circumstances.

While women can apply to have their children live in prison with them, the decisions concerning whether a child is permitted to live in prison with their mother are made by prison managers and senior executives within Corrections Victoria. The manner in which such matters are assessed, however, is far from transparent.[716] The situation is concerning, given the fact that in the recent study conducted by Walker et al., decisions made by corrections agencies resulted in two Aboriginal women not being allowed to keep their babies with them in prison (the only two women in the study to have such applications denied), which was implicitly attributed to the stigma endured by Aboriginal women in society generally. However, the lack of routine data collected concerning women with dependent children in prison presents further difficulties in determining whether such occurrences are widespread; and whether they are the intentional or unintentional consequence of systemic racism.[717]

Another obstacle noted regarding the application process is that mothers with dependent children frequently wanted to have their children with them if possible, but the processing time precluded the application – particularly for mothers who were on remand serving short sentences. Mothers desiring to have their children reside in prison with them in such circumstances face considerable barriers while trying to avoid the damage caused to the mother-child relationship as a result of separation;

[713] Sheehan, R. (2010). Parents as prisoners: A study of the parent-child relationships in the Children's Court of Victoria.11(4) Journal of Social Work 358-374, p. 361.
[714] Recommendation 168 of the Royal Commission into Aboriginal Deaths in Custody.
[715] Corrections Victoria runs the Living with Mum program in Dame Phyliss Frost Centre and the Tarrengower Prison, whereby dependent infants and pre-school age children can reside with their mothers in prison. See Pregnancy and childcare | Corrections, Prisons and Parole
[716] Walker, J. et al. (2021). Residential programmes for mothers and children in prison: Key themes and concepts. 21(1) Criminology & Criminal Justice 21-39, p.27.
[717] Ibid., p. 25.

and the inherent risks associated with their children becoming swept up in the child protection system.[718]

RECOMMENDATIONS

Recommendation 242. The Government should expand the availability of rehabilitation and reintegration supports for women in prison.

Recommendation 243. The Government should improve transitional supports for women, including through:

- The establishment of a pre-release transitional centre for women, equivalent to the Judy Lazarus Transition Centre for men;
- Eliminating exits into homelessness by expanding housing availability for women leaving prison;
- Providing continuity of healthcare, alcohol and drug treatment and other key support services in the community.

Recommendation 244. The Government should fund a dedicated residential diversion program for Aboriginal women, similar to Wulgunggo Ngalu Learning Place.

Recommendation 245. Victorian legislation should require that Corrections Victoria select a location for a woman to serve a custodial sentence that is as close as possible to the place or residence of the imprisoned woman's family and children.

Recommendation 246. Corrections Victoria should be required to maintain records and make statistical data publicly available about all aspects of the Living with Mum program, including applications and outcomes.

Recommendation 247. The time required for the processing of applications for the Living with Mums program by Corrections Victoria should be reduced to ensure that mothers desiring to maintain custody of their dependent children while in prison are not precluded from doing so on the basis of a short custodial sentence.

[718] Stone, U. et al. (2017). Incarcerated Mothers: Issues and Barriers for Regaining Custody of Children. 97(3) The Prison Journal 296-317, pp. 304-305.

Victorian Aboriginal Legal Service

Older People in Prison

Similar to women in prison, older people in prisons are highly amenable to being successfully reintegrated into society and highly vulnerable if the prison system does not recognise and respond to their particular needs.

An ageing prison population poses many of the same challenges as the ageing population in Australian society more broadly. The effects, however, are accelerated. Research suggests an approximately 10-year gap in overall health between imprisoned people and people in the community – that is, people in prison suffer from age-related conditions around a decade sooner than people outside prison, because of a range of socioeconomic factors.[719] As a result, policy and practice frameworks for caring for older people in prison generally use a minimum age of around 50 to define the 'older' group, and as low as 45 for Aboriginal people.[720]

Empirical reasons for the lower age of an 'older' person in relation to Aboriginal people is that life expectancy that is approximately ten years less than the general population of Australia, owing in part to the early onset of health conditions and comorbidities,[721] which is attributable to disadvantage in relation to social determinants, including education, employment, income, and cultural determinants, including colonisation, racism, loss of language and loss of connection to land.[722] The socioeconomic factors associated with imprisoned people generally that lead to lower life expectancy and the documented sociocultural elements attributed to the lower life expectancy of Aboriginal people specifically raise concerns about the combined impact of such disadvantages resulting in a lower life expectancy for Aboriginal people in prison.

Older populations create pressure on services in prisons, not restricted to higher demand for healthcare. Mainstream services in prisons are generally targeted at younger people, meaning either that prisons need to provide specialised services or – as is more often the case, including in Victoria – that older incarcerated people are unintentionally excluded from services and prison activities. According to the WA Inspector of Custodial Services, this can amount to a "double punishment" for older incarcerated people because being "isolated from the daily regime … intensifies the punishment of imprisonment."[723] To avoid this injustice and the harmful mental health effects it can engender,

[719] Inspector of Custodial Services, Western Australia (2021). Older Prisoners, p. iv. Available at https://www.oics.wa.gov.au/wp-content/uploads/2021/05/Older-Prisoners-Review-April-2021.pdf.
[720] Corrections Victoria (2015), *Ageing Prisoner and Offender Policy Framework 2015-2020*. Accessed at https://files.corrections.vic.gov.au/2021-06/cv_ageing_prisoner%20offender_policyframework15_0.pdf?VersionId=mQntg8_TX5xFu6Prjpy4PJuza8rHxpWl.
[721] Temple, J. et al (2020). Ageing of the Aboriginal and Torres Strait Islander population: numerical, structural, timing and spatial aspects. 44(4) Indigenous Health 271-278, p. 273.
[722] Wettasinghe, P.M. et al. (2020). Older Aboriginal Australians' Health Concerns and Preferences for Healthy Ageing Programs. 17 International Journal of Environmental Research and Public Health 7390.
[723] Inspector of Custodial Services, Western Australia (2021). Older Prisoners, p. v. Available at https://www.oics.wa.gov.au/wp-content/uploads/2021/05/Older-Prisoners-Review-April-2021.pdf.

"adjustments to the regime are required to ensure that older incarcerated people are not routinely excluded from activities like employment, programs, or recreation."[724]

Research evidence generally suggests that, across the world, older incarcerated people are less likely to reoffend after their release than younger people.[725] In Victoria, data availability is limited, but reoffending rates for people under 25 were 8 percentage points higher than the overall rate, showing a strong age effect on the risk of reoffending.[726] At the same time, the Victorian Ombudsman has pointed to evidence that rehabilitation programs have less influence on older people.[727] This highlights the importance of strong supports and reintegration efforts for young people, but it also suggests the need for an alternative approach to older people in prison. Such an approach would recognise that older people generally do not need to be managed or monitored extensively, and are likely to reintegrate into society successfully as long as they are provided the tools to do so. Transitional support with finding housing, accessing healthcare, and navigating new technologies and social contexts may be particularly important for people who have served long sentences in prison.

In Victoria, the strategy for caring for older incarcerated people is set out in the *Ageing Prisoner and Offender Policy Framework 2015-2020*.[728] This document was published in 2015, and there have been no published updates. The 'action plan' proposed in the policy framework has also not been published. Although it is clear that Corrections Victoria and the Government are aware of the broad issues relating to caring for older people in prison, greater transparency is needed to enable accountability, monitoring and evaluation.

RECOMMENDATION

Recommendation 248. Corrections Victoria should recognise the unique needs of older incarcerated people and implement necessary policy, program and practice changes in relation to matters including:

- Age-appropriate health services and programs;
- Age-appropriate approaches to rehabilitation and reintegration programs; and
- Increased access to, and frequency of, parole hearings.

[724] Ibid, p. 18.
[725] Rakes et al (2018), 'Recidivism among Older Adults: Correlates of Prison Re-entry', *Justice Policy Journal*. Accessed at http://www.cjcj.org/uploads/cjcj/documents/recidivism_among_older_adults_correlates_of_prison_reentry.pdf; Baidawi et al (2011), 'Older prisoners: a challenge for Australian corrections', Australian Institute of Criminology. Accessed at https://www.aic.gov.au/publications/tandi/tandi426.
[726] Victorian Ombudsman (2015). Investigation into the rehabilitation and reintegration of prisoners in Victoria, p. 34. Available at https://assets.ombudsman.vic.gov.au/assets/Reports/Parliamentary-Reports/1-PDF-Report-Files/Investigation-into-the-rehabilitation-and-reintegration-of-prisoners-in-Victoria.pdf?mtime=20191217123824.
[727] Ibid, p. 97.
[728] Corrections Victoria (2015), *Ageing Prisoner and Offender Policy Framework 2015-2020*. Accessed at https://files.corrections.vic.gov.au/2021-06/cv_ageing_prisoner%20offender_policyframework15_0.pdf?VersionId=mQntg8_TX5xFu6Prjpy4PJuza8rHxpWl.

Victorian Aboriginal Legal Service

Youth Justice: Reducing Reoffending Among Children and Young People

VALS is a member of the Smart Justice for Young People coalition, and we endorse the SJ4YP joint submission to this Inquiry.

Adopting an approach to reducing reoffending which focuses on creating protective factors, not on punitive deterrence, is even more important for children than it is for adults. Time spent in custody or under state supervision has a significant effect on children's development. There are opportunities to ensure that children are given the support they need to address underlying causes of their offending. If these opportunities are not recognised and acted on, the youth justice system can instead be a source of trauma which creates the conditions for long-term reoffending.

The analysis of custody conditions in adult prisons above encompasses many issues which are equally relevant in youth detention settings. 67% of children and young people in Victoria's youth detention centres are victims of abuse, trauma or neglect.[729] The potential for re-traumatisation is especially high in youth prisons, with especially serious consequences. VALS therefore reiterates the importance of addressing the issues described above in youth prisons, as well as adult prisons.

Regarding strip searching, the figures cited above from the Human Rights Law Centre reveal that more than 10 strip searches are conducted every day in youth prisons in Victoria.[730] With a contraband discovery rate of less than 0.5%, these searches clearly have limited utility except as a method of discipline that reinforces staff's power over children – exactly the kind of practice which can lead to long-term trauma issues. Reports of historic sexual abuse occurring during routine strip searching have recently begun to emerge from Aboriginal people in multiple jurisdictions, who never reported incidents at the time out of fear of payback in the custodial environment.[731]

The use of isolation and lockdowns are also of particular concern in youth prisons. Although the pandemic has led to widespread use of isolation and lockdowns in both adult and youth prisons, concerns about lockdowns long predate any measures taken in response to COVID-19.[732] The Commissioner for Children and Young People reported on the 'unacceptable' use of lockdowns in youth detention to manage staff shortages as long ago as 2017.[733] This report has not yet led to adequate changes. In 2019, a 16-year old VALS client was placed in a room by herself for the entirety

[729] Human Rights Law Centre (nd), *Briefing paper: Victoria must stop strip searching children in prison*.
[730] Ibid.
[731] ABC News (2021), 'Two Aboriginal men claim they were sexually abused during strip searches in youth detention'. Accessed at https://www.abc.net.au/news/2021-05-25/aboriginal-men-claim-sexual-abuse-youth-detention-strip-search/100143968.
[732] See, for example, the most recent lockdown of Parkville Youth Justice Precinct after a staff member contracted COVID-19: Victoria records 392 new local cases of COVID-19 amid concern about regional spread (12 September 2021), available at https://www.abc.net.au/news/2021-09-12/victoria-covid-cases-vaccination-rates/100455074
[733] Commissioner for Children and Young People (2017). The Same Four Walls: Inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system, p. 17. available at: https://ccyp.vic.gov.au/assets/Publications-inquiries/The-Same-Four-Walls1.pdf.

of her remand period – totalling 94 days. Aboriginal young people with poor mental health are still being subjected to harmful practices that undermine their social and emotional wellbeing and compound trauma.[734]

VALS also wishes to highlight the use of force in youth detention settings, and reiterate our previous recommendations that legislative reform is also needed to protect children and young people.[735] Although there are more legislated and regulatory limits on the use of force in children's prisons than adult prisons, the *Children, Youth and Families Act* still provides for the use of force to place children into isolation. Further safeguards are needed to ensure that the use of force does not re-traumatise young people and create conditions that may lead to reoffending.

Finally, promoting connection with culture is a crucial element in reducing the risk of Aboriginal children being propelled into further offending. A 2018 joint report from the Commissioner for Children and Young People and the Victorian Equal Opportunity and Human Rights Commission made important recommendations regarding improving programs and services that maintain Aboriginal children's connection with their culture.[736] These included:

- Increase the number of Aboriginal staff in youth justice centres
- Increase the consistency, duration and variety of cultural programs
- Develop culturally safe transitional support for young people being released
- Cultural awareness training for all staff in youth justice centres
- Develop a social and emotional wellbeing strategy for Koori youth in custody that recognises the fundamental role of culture, community and spirituality in Aboriginal wellbeing
- Prioritise the promotion of Aboriginal cultural rights in the Koori Youth Justice Strategy

The full implementation of these recommendations remains critical.

VALS also wishes to emphasise that connection to culture should not exclusively be promoted through formal programming in detention centres. Organic connections to family and community are an important part of maintaining cultural links for young people. Ensuring that family and community are able to visit their children in detention is crucial to building this protective factor against offending. VALS is concerned about the ability of family to visit being disrupted, particularly for young Aboriginal people from rural and regional areas, whose families may find it financially or logistically difficult to travel to visit their children.[737] These concerns are heightened by the COVID-19 situation, when visits may be limited and travel between regions restricted. However, they are longstanding concerns which

[734] VALS (2019), *Submission to the Royal Commission into Victoria's Mental Health System,* p. 59.
[735] VALS (2020), *Public Accounts and Estimates Committee – COVID-19 Inquiry Submission*, p. 21. Available at https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Submissions/87._Victorian_Aboriginal_Legal_Service.pdf.
[736] Commission for Children and Young People & Victorian Equal Opportunity and Human Rights Commission (2018), *Aboriginal cultural rights in youth justice centres*. Available at https://ccyp.vic.gov.au/assets/resources/Aboriginal-Cultural-Rights/Aboriginal-Cultural-Rights-for-Koori-Youth-Final-Web.pdf.
[737] VALS (2019), *Submission to the Royal Commission into Victoria's Mental Health System,* p. 60.

the Government must address in order to uphold the rights of Aboriginal children and reduce rates of reoffending.

This year, for National Aboriginal & Torres Strait Islander Children's Day we interviewed the Aboriginal Children's Commissioner, Justin Mohamed, who discussed the importance of culture for Aboriginal children.

Finally, culturally effective support for Aboriginal young people should not be limited to those given custodial sentences in youth detention. Children on community based orders should be supported to access culturally safe support from ACCOs, which requires an increase in funding to ensure that these services can be sustainably delivered across the state. This includes secure funding for Balit Ngulu, VALS' specialist legal service for Aboriginal children, which was forced to close in 2018 due to lack of funding. Balit Ngulu has been re-established this year, but sustainable long-term funding is critical for enabling this service and others like it to be maximally effective.

Alternative Models of Care

Beyond these areas of specific reform, VALS is of the view that the most effective way to reduce reoffending among young people in contact with the criminal legal system would be a broader change to the philosophy underlying youth custody and the model of care embodied in it. There are important lessons to be learned from international experience, notably the Diagrama centres in Spain.

Good Practice Model: Diagrama

The NGO, Fundacion Diagrama, runs re-education centres in Spain. In Diagrama-run centres children and young people aged 14 to 23 are detained. In Spain, children who are subject to a custodial order may have an order that is closed, semi-open, open regime or weekend custody. If children are subject to the open regime, for example, they attend school, training and employment in the community, and reside in the centre.

David McGuire, CEO of Diagrama Foundation, has compared the UK youth detention system with that in Spain, concluding that in the UK, "there needs to be a cultural shift, not least in the perception of children who offend. Other changes that would be needed include:

- The perception of the purpose of custody – becoming more receptive to the importance of rehabilitation and education, and recognising the need for a highly skilled workforce…
- The regionalisation of facilities to allow children to be placed within their own area, avoiding disconnection of support and improving integration in the community.
- Moving away from the risk-adverse culture that restricts innovation and outcomes."[738]

[738] Derren Hayes, 'Tackling youth offending in Spain' (April 2017) Children & Young People Now

Victorian Aboriginal Legal Service

"Re-education centres provide cognitive and emotional support. As well as being provided with social education, children in the centres receive an average of 30 hours of formal education every week and are encouraged to achieve additional qualifications in sports and leisure activities… The focus is on re-education to rehabilitate. Staff are highly qualified (social educators, social workers, psychologists and teachers will all be at degree-level educated or equivalent)."[739]

A 2009 study found that recidivism rates for children in Diagrama run centres was 28.2%, as opposed to State-run centres, for which it was 50.3%.[740] Diagrama-run centres are cheaper than government-run ones, although cost depends on a number of factors. Generally the cost is It is 80-120K Euro per child per year.

The average length of stay for young people in Diagrama-run centres is 9 months, and about 30% of children in centres run by Diagrama are on remand, 70% have been sentenced. In 2018, there were 954 children (14 – 17yo) detained, and 544 young people (18 – 23yo). In that year, 86.7% were male and 13.3% were female. The offences for which children were detained included: 22.04% for violence against the person, 33.79% for robbery, and 15.30% for domestic violence.

Diagrama cannot refuse any children, and some children are only in the centres for a few days, although this is an infrequent occurrence. Diagrama's view is that it is difficult to achieve positive results with children in less than 6 months; the recommendation is 9-12 months to achieve positive outcomes.

[739] Derren Hayes, 'Tackling youth offending in Spain' (April 2017) Children & Young People Now
[740] Dr Antonio Velandrino Nicolás, Study on the effectiveness of the educational intervention with children and young people in custody in Murcia County Council.

Victorian Aboriginal Legal Service

RECOMMENDATIONS

Recommendation 249. The *Children, Youth and Families Act* should be amended to specifically prohibit the Secretary from authorising further periods of isolation of children already placed in isolation, where this would effectively extend the total period of isolation of the child for more than 14 consecutive days.

Recommendation 250. VALS CNS should be notified any time an Aboriginal child or young person in detention is placed in isolation under the *Children, Youth and Families Act*, or is in effective isolation as a result of lockdown. DJCS staff should provide the contact details of the child or young person's family where the child or young person has provided consent for VALS to contact them.

Recommendation 251. The *Children, Youth and Families Act* should be amended/the new Youth Justice Act should prescribe -

- any force used to place a child in isolation must be only as a last resort;
- minimum force should be used, and only for the duration that is strictly necessary to place the child in isolation;
- any use of force should be filmed and the recording should be made available to the children and their lawyer upon their request;
- there should be a register where staff record the steps taken and alternatives pursued before making the decision to use force, which should also be made available to the children and their lawyer upon their request.

Recommendation 252. The Government should implement the recommendations from the 2017 Inquiry into the Use of Isolation, Separation and Lockdowns in the Victorian Youth Justice System.

Recommendation 253. The Government should implement the recommendations from the 2018 Report by VEOHRC and the CCYP on Aboriginal Cultural Rights in Youth Justice Centres.

Recommendation 254. The Government should provide financial support to Aboriginal families and community members to visit their young people in youth justice centres.

Recommendation 255. The Victorian Government should consider models for detention of children and young people in other jurisdictions, such as the Diagrama-run centres in Spain, for the Victorian context.

Victorian Aboriginal Legal Service

Spent Convictions

VALS commends the Government for enacting a legislated Spent Convictions Scheme in February 2021. We would also like to acknowledge the work of the Parliamentary Inquiry into a Legislated Spent Convictions Scheme, which was pivotal for this important reform.

The Act is an important step forward in promoting rehabilitation for individuals who have previously been convicted of a criminal offence. However, we believe that additional reform is required to ensure that the Act is effective in supporting genuine rehabilitation and reintegration. VALS strongly believes that rehabilitation is the most effective way of ensuring community safety.

To further strengthen the legislated Spent Convictions Scheme, we strongly recommend that the impact of the Act is closely monitored, with opportunities for review. We also recommend the following key changes:

1. **Discrimination on the basis of an irrelevant criminal record must be prohibited.** While the *Equal Opportunity Act* has been amended to prohibit discrimination on the basis of a spent conviction, we believe that discrimination on the basis of an irrelevant criminal record should also be prohibited. Under the new Spent Convictions Scheme, individuals have to wait for 5 or 10 years for a conviction to be spent and are likely to experience discrimination on the basis of their criminal record during this time. To ensure that individuals are able to genuinely rehabilitate and reintegrate back to the community, all efforts must be made to ensure that they are not discriminated against on the basis of an irrelevant criminal record.[741]

2. **The "crime-free" periods for both children and adults must be shorter.** The Act requires that children and young people aged 15 – 20 years at the time of the offence, must wait 5 years for their convictions to be spent,[742] and adults must wait 10 years.[743] In both cases, the time period starts again if the individual is convicted of another offence, unless - no conviction is recorded; no penalty is imposed; the penalty imposed is an order to pay restitution or compensation; or the penalty imposed for the subsequent offence is less than 10 penalty units[744] (for 2021/2022, this is $1817.40). These time periods are arbitrary and onerous, and they undermine the rehabilitative aims of the Act.

   Five years is a long period of time for a child or young person, particularly given that offending behaviour is most likely to occur between the ages of 16 and 17.[745] Waiting five years at this age

[741] Woor Dungin (2017). *Criminal Record Discrimination Project: Submission to Aboriginal Justice Forum 49,*, p. 39.
[742] Under s. 7(1)(c) of the *Spent Convictions Act 2021* (Vic), a conviction is automatically spent on the day of the conviction, if the conviction is for an offence committed when the person was under the age of 15 years. See also Section 9(1)(a).
[743] s. 9(1)(b) of the *Spent Convictions Act 2021* (Vic).
[744] s. 10(3) of the *Spent Convictions Act 2021* (Vic).
[745] P. Armytage, P. and Ogloff, J. (2017). *Youth Justice Review and Strategy: Meeting Needs and Reducing Offending (Executive Summary)*, p. 8.

can have a significant impact on future education and/or employment opportunities, as young people are particularly vulnerable to stigma and discrimination in employment settings and are also at a high risk of reoffending and becoming trapped in a cycle of offending behaviour. The ten-year waiting period for adults is also excessive and will have a discriminatory effect for Aboriginal people, given that the life expectancy of Aboriginal people is significantly lower than non-Aboriginal people.[746]

The Spent Convictions Scheme in Victoria should adopt a graduated model whereby the "crime-free" period is determined with reference to the severity of the sentence imposed and the person's age.[747]

3. **The "crime-free" period should not restart for low-level offences that receive a prison sentence.** As noted above, the crime-free period does not restart for some offences. However, it does restart if the individual is convicted of a low-level offence and receives a short prison sentence, for example, breaching bail conditions (30 penalty units or 3 months imprisonment[748]) or failure to answer bail (Level 7 imprisonment - 2 years maximum[749]).

   The evidence is clear that Aboriginal people are over-policed and are disproportionality charged and convicted of low-level crimes.[750] We are therefore concerned that the threshold for restarting the crime-free period is too low. Many poverty crimes are committed out of necessity and because the individual needs support. The risk of such a low threshold is that many individuals who are trapped into a cycle of offending will never have their convictions spent and will, thus, never have a genuine opportunity for rehabilitation and reintegration.

4. **No convictions should be excluded from the scheme: all convictions should be capable of being spent, including through special circumstances applications.** VALS is firmly of the view that no offences should be excluded from the scheme. Once a sentence is complete, individuals should not have to suffer further punishment as a result of a criminal record. We believe that risks to community safety are adequately addressed through other mechanisms, including for example Working with Children checks and the Sexual Offences Register.

[746] For Aboriginal and Torres Strait Islander males born between 2005-2007, life expectancy is 11.5 years lower than that of non-Aboriginal males and 9.7 years lower for Aboriginal females born during this period. See Australian Institute of Health and Welfare (2018), Deaths in Australia.
[747] VALS, *Submission to the Parliamentary Inquiry on a Legislated Spent Convictions Scheme*, recommendation 9.
[748] s. 30A of the *Bail Act 1991* (Vic).
[749] s. 30 of the *Bail Act 1991* (Vic).
[750] For a recent summary of research on over-policing of Aboriginal peoples, see The Law Council (2018), *The Justice Project: Final Report – Part I (Aboriginal and Torres Strait Islander Peoples)*, pp. 65-70.

The new law provides that individuals convicted of a sexual offence, a serious violent offence, or an offence for which the penalty imposed was more than 30 months imprisonment,[751] can apply to the Magistrates Court to have their conviction spent, but only if: (a) the person was between 15-20 years at the time of the offence;[752] or the offence was a serious violence or sexual offence, but no term of imprisonment was imposed; or the offence was not a serious violence or sexual offence and the term of imprisonment was not more than 5 years.[753]

VALS supports the mechanism in the new Act whereby serious convictions can be spent in some cases. However, we believe that this mechanism should apply to all convictions. The effect of excluding some convictions from the scheme is that the individual will continue to be discriminated against and punished for the rest of their life, despite the fact that they have served their sentence. There will always be convictions where the circumstances are exceptional, and the individual deserves a second chance. The law should recognise this by allowing applications to be made for convictions that currently do not fall within the scope of the law, where this is in the interests of justice to do so.

Additionally, we believe that applications under the Spent Convictions Act 2021 should be considered by VCAT, because it is more accessible and less formal than the Magistrates Court.

RECOMMENDATIONS

Recommendation 256. The impact of the *Spent Convictions Act 2021* (Vic) should be closely monitored, and data should be publicly available each year, including:

- the number and type of convictions spent;
- the age of the individual at the time of the conviction vs the age when the conviction was 'spent'; and
- whether the individual identifies as Aboriginal.

Recommendation 257. The Government should amend Section 6 of the *Equal Opportunity Act 2010 (Vic)* to include irrelevant criminal record as a protected attribute.

Recommendation 258. The *Spent Convictions Act 2021* (Vic) should be amended to adopt a graduated model whereby the "crime-free" period is determined with reference to the severity of the sentence imposed and the person's age.

[751] Section 3 of the *Spent Convictions Act 2021* (Vic) defines "serious conviction" as: (a) a conviction for which a term of imprisonment or detention of more than 30 months is imposed; or (b) a conviction of a person for a sexual offence; or (c) a conviction of a person for a serious violence offence.
[752] Under Section 7(1)(c) of the *Spent Convictions Act 2021* (Vic), a conviction is spent immediately if the conviction is for an offence committed when the person was under the age of 15 years (including serious convictions).
[753] s. 11(1) of the *Spent Convictions Act 2021* (Vic).

Victorian Aboriginal Legal Service

Recommendation 259. The "crime-free" period should not restart for low-level offences that receive a prison sentence, including "survival crimes" and bail offences.

Recommendation 260. No types of offences should be excluded from the scheme. All convictions should be capable of being spent, including through special circumstances applications to the Victorian Administrative Appeals Tribunal (VCAT).

Recommendation 261. VALS should be funded to carry out targeted Community Legal Education on the new Spent Conviction Scheme, and to provide legal advice and representation for individuals applying to have their convictions spent.

Transition Support

One of the most important factors in avoiding reoffending is supporting people released from prison to have a successful transition back into the community. Transitions can be extremely challenging. Access to housing and employment can be very difficult for people with criminal records. Accessing government services such as healthcare or social security payments is not straightforward for people who have been deprived of their liberty and responsibility over their own lives, often for long periods. In the absence of strong support through the transition period, there is a high risk that people released from prison will be drawn back into offending because of the return of health or social problems they were struggling to deal with before being imprisoned, or because they are forced into crimes of poverty. Most strikingly, these difficulties and the stresses of release from a highly institutionalised carceral environment contribute to making formerly incarcerated people 12 times more likely to die in the four weeks after they are released.[754]

VALS is extremely concerned about the significant unmet need for holistic and targeted culturally safe and responsive pre- and post-release programs for Aboriginal people in prison.[755] Of the incarcerated people in Victoria who were released in 2015-16, 43.7% had returned to prison under sentence within two years of release. We note that the lack of transitional support is acknowledged in *Burra Lotjpa Dunguludja*.[756] Pre- and post-release programs must be sufficiently flexible, recognising the complexity of individual needs and the barriers that exist in access to vital community services such as stable, safe and appropriate housing. They must also ensure continuity of culturally safe mental health care and take an early intervention approach to addressing barriers to opportunities for meaningful employment. Pre- and post-release programs must be designed, developed and implemented in consultation with the Aboriginal community and in partnership with ACCOs. They need to be accessible at all prisons and at all stages of the custodial process.

[754] Victorian Ombudsman (2015). Investigation into the rehabilitation and reintegration of prisoners in Victoria, p. 102. Available at https://assets.ombudsman.vic.gov.au/assets/Reports/Parliamentary-Reports/1-PDF-Report-Files/Investigation-into-the-rehabilitation-and-reintegration-of-prisoners-in-Victoria.pdf?mtime=20191217123824.
[755] VALS (2019). Submission to the Royal Commission into Victoria's Mental Health System, pp. 45-46.
[756] Victorian Government (2018) *Burra Lotjpa Dunguludja*, p. 44.

From 2015 to 2017, VALS was involved in Corrections Victoria's main post-release transition program, ReConnect. VALS ReConnect workers were able to provide culturally safe, trauma-informed case management and support to people transitioning out of prison, helping to identify complex needs and address risk factors for reoffending. Resources for the ReConnect program, however, were not adequate to sustain a specialist culturally safe service of the kind VALS was delivering, and we were not able to continue providing services with ReConnect.

One of the most important elements in successful transitions is access to safe and stable housing. Homelessness can cause or exacerbate mental illness and is a key driver of reoffending. For Aboriginal people, stable housing is essential for the healthy functioning of family and community relationships.[757] In the most extreme circumstances, people may deliberately reoffend because returning to prison is preferable to ongoing homelessness.[758] More commonly, homelessness or housing insecurity may force people to live in family violence situations, associate with people they might prefer to avoid during a transition back into the community, or commit crimes associated with poverty or mental health issues.

Across Australia, housing support for people released from prison is wholly inadequate given the growing need. The overall strain on social housing providers has led to stricter targeting of their efforts, and a concentration on providing subsidies and support for clients to access private rentals – which many people released from prison simply will not be able to access, even with financial support. Providing public housing to a person released from prison provides them stability and kicks off a beneficial cycle, with long-term effects: police incidents fall by 8.9% each year after being housed, court appearances fall 7.6% each year, time in custody falls by 11.2% per year, and the justice system costs of engaging the person fall by more than $2000 each year.[759]

Victoria has, during the COVID-19 pandemic, expanded the availability of transitional housing to avoid people being released into homelessness amidst high levels of COVID-19 infection.[760] While this is a positive shift, efforts to reduce homelessness among people released from prison should not be limited to a pandemic period, and there are significant problems with how this support has been offered. The main facility developed to provide transitional housing in this period has been a centre at Maribyrnong run out of a former immigration detention centre. The built environment of this facility continues to clearly resemble a prison, and the centre is run by Corrections Victoria rather than by housing providers or support agencies.[761] There are serious limitations on how much reintegration

[757] VALS (2019). Submission to the Royal Commission into Victoria's Mental Health System, p. 47.
[758] ABC News (2021). 'Concerns ex-prisoners falling back into crime because of WA rental shortage'. Accessed at https://www.abc.net.au/news/2021-07-22/prisoner-housing-rental-woes/100314090.
[759] Martin et al (2021), *Exiting prison with complex support needs*, p. 4. Accessed at https://apo.org.au/sites/default/files/resource-files/2021-08/apo-nid313664.pdf.
[760] The Age (2021). 'I'm not scared any more: The unique halfway house helping ex-inmates adjust to the outside'. Available at https://www.theage.com.au/national/victoria/i-m-not-scared-any-more-the-unique-halfway-house-helping-ex-inmates-adjust-to-the-outside-20210530-p57wes.html.
[761] Ibid.

into society can be achieved in such a setting. It would be more suited to being a pre-release transition facility (similarly to the Judy Lazarus Transition Centre) than to use in the post-release period, when a clearer transition away from the prison setting is important.

VALS is a key partner with Aboriginal Housing Victoria in operating Baggarrook, a transitional housing and holistic support program for Aboriginal women transitioning out of prison.[762] This is an important initiative which expands the transition supports for women, who face homelessness after release at about twice the rate men do, and have access to very few dedicated transitional housing supports.[763] Alongside ongoing support and funding for Baggarrook, the Government should work to expand other transition supports for women. These should include a pre-release transition facility equivalent to the Judy Lazarus Transition Centre for men in the last year of their sentence, whose recidivism rate is less than one-quarter the rate of the overall male prison population.[764]

Beyond housing, providing continuity of care is important for Aboriginal people held in prison who are disproportionately likely to have complex health and psychosocial needs. As noted above, the chronic underfunding of mental health services in the community means that prison may be the first time many incarcerated people are able to get the support they need. Ensuring that they are able to stay connected with health services, including ACCHOs, is critical. If support falls away, Aboriginal people may fall back into acute or chronic mental illness and the risk of reoffending is substantially higher. A Queensland initiative to connect people with NDIS support after their sentencing, run in the state's equivalent of Koori Court, has seen no reoffending among the small number of people it has helped to date, compared to a typical recidivism rate of 75%.[765] This is a clear demonstration of the importance of providing and maintaining connection to health and disability services through the transition period

This applies equally to other kinds of support services. Careful case management through pre-release and post-release phases would help Aboriginal people stay connected with healthcare, mental health support, or alcohol and drug programs, as well as empowering them to stay engaged with their legal matters and re-establish their connections with family and community.

[762] VALS, 'Baggarrook', https://www.vals.org.au/baggarrook/.
[763] Victorian Ombudsman (2015). Investigation into the rehabilitation and reintegration of prisoners in Victoria, p.102. Accessed at https://assets.ombudsman.vic.gov.au/assets/Reports/Parliamentary-Reports/1-PDF-Report-Files/Investigation-into-the-rehabilitation-and-reintegration-of-prisoners-in-Victoria.pdf?mtime=20191217123824
[764] Ibid, pp. 127-128.
[765] SBS News (2021) 'A special program is helping Indigenous offenders with disability turn their lives around'. Accessed at https://www.sbs.com.au/news/a-special-program-is-helping-indigenous-offenders-with-disability-turn-their-lives-around/9cfa95bb-8866-4f50-9a54-8b70fa3bca93.

Victorian Aboriginal Legal Service

Good Practice Model: NAAJA Throughcare Service

The North Australian Aboriginal Justice Agency's (**NAAJA**) Throughcare service begins working with people in prison and youth detention six months prior to their release, with the aim of supporting people's transition back into the community. The support is provided in recognition of the various issues that might present challenges to a successful transition, including "Homelessness or marginal accommodation; No income, disengagement from Centrelink, or unstable income; Literacy and numeracy issues, and/or English as second, third or fourth language; Problematic family relationships, Involvement with welfare agencies, history of family violence; Cultural/payback issues; Lack of community supports; Substance misuse issues; and Health, including mental health issues, and/or physical disabilities."[766] Support can come in the form of "Ongoing rehabilitation, Accommodation, Employment, Education and training, Health, Life and problem solving skills, and Reconnection to family and community."[767]

In its 2018-2019 Annual Report, NAAJA reported that, "since commencing in February 2010, case management support has been provided to 1102 clients. Only 143 of which (approximately 13.3%) have been returned to prison for re-offending or a conditional breach while participating in the Program. This figure continues to compare favourably with the NT recidivism rate of 60%, notwithstanding the measures are not directly comparable."[768]

RECOMMENDATIONS

Recommendation 262. The Government should provide long-term and stable funding to ACCOs to deliver pre- and post-release programs, including transitional housing programs run by ACCOs, such as VALS' Baggarrook program, to support men and women leaving prison.

Restorative Justice

Victoria's criminal legal system would benefit from an expansion of restorative justice approaches, which focus on repairing harm and promoting accountability and understanding, rather than on punishment.

The *UN Office on Drugs and Crime Handbook on Restorative Justice Programs* identifies the following benefits of restorative justice:

> the formal justice process is not designed to allow victims to describe the nature and consequences of the crime, let alone to ask questions of the offender. The restorative justice model can support a

[766] NAAJA, Throughcare, accessed at http://www.naaja.org.au/law-and-justice/throughcare/
[767] NAAJA, Throughcare, accessed at http://www.naaja.org.au/law-and-justice/throughcare/
[768] NAAJA, Annual Report 2018-2019, accessed at http://www.naaja.org.au/wp-content/uploads/2020/02/BJ1938-NAAJA-Annual-Report-2018-2019-Web-Version.pdf

> process where the victims' views and interests count, where they can participate and be treated fairly and respectfully and receive restoration and redress. By participating in the decision-making, victims have a say in determining what would be an acceptable outcome for the process and are able to take steps toward closure.[769]

According to the Australian Association for Restorative Justice, there are opportunities for restorative justice approaches to be used at multiple stages of a criminal legal process, including:[770]

- To *divert* cases from court, where appropriate, instead using group conferences and other restorative methods.
- In court, as part of *sentencing decisions* to broaden the sentencing options beyond solely punitive measures.

Of course, restorative justice processes can be used as an alternative outside the formal process entirely.

Restorative justice approaches can work through the practice of *reintegrative shaming*.[771] This is to be contrasted with stigmatic shaming, which is a punitive approach designed to mark someone as an outcast and signal an expectation that they are likely to commit further offences. Reintegrative shaming instead aims to "strengthen the moral bonds between the offender and the community," and to make people who have committed offences "*feel* ashamed of what they have done without making them into shameful people."[772]

The use of restorative justice methods has proven effective in decreasing reoffending, including among people who would otherwise be at the highest risk of reoffending. In the ACT, a restorative justice program for young people has been found to have impressive rehabilitative results.[773] Findings of the evaluation included:[774]

- A 98% satisfaction rate for participants in restorative conferences, including the victims of crime;
- A 20% reoffending rate within 12 months for scheme participants, compared to 29% for comparable young people who were sent to court rather than a restorative conference;
- Among those who do reoffend, restorative justice participants "take longer to reoffend, and accumulate fewer offences" than those sent to court.

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[769] UN Office on Drugs and Crime (2006). *Handbook on Restorative Justice Programs*, p. 10

[770] Australian Association for Restorative Justice (2020), *Winter 2020: Review of contemporary restorative practice*, p2.

[771] Sherman & Strang (1997), 'The right kind of shame for crime prevention', Reintegrative Shaming Experiments Working Paper No.1, Australian Institute of Criminology. Accessed at https://openresearch-repository.anu.edu.au/bitstream/1885/41916/1/risepap1.html.

[772] Ibid.

[773] Lawyers Weekly, 9 December 2018, 'ACT's restorative justice scheme shows less re-offending'. Available at https://www.lawyersweekly.com.au/wig-chamber/24611-act-s-restorative-justice-scheme-shows-less-re-offending.

[774] Broadhurst et al. (2018), *Australian Capital Territory Restorative Justice Evaluation: An Observational Outcome Evaluation*. Accessed at http://cdn.justice.act.gov.au/resources/uploads/JACS/PDF/Restorative_Justice_Phase_1_evaluation.pdf.

A study of restorative justice conferences in Queensland's youth justice system similarly found "those who were conferenced had significantly fewer recontacts with the system within two years than young offenders who went to court".[775]

Victoria has introduced restorative justice to the criminal legal system in some limited ways. The Department of Justice and Community Safety runs a restorative justice service for victim-survivors of family violence, following a recommendation made by the Royal Commission into Family Violence.[776] At present, however, the Department explicitly states that this service "should not be seen as a substitute for criminal or civil law processes" and that restorative processes may be suspended to allow criminal trials to proceed.[777] This limits the potential for restorative justice to provide a less harmful, more rehabilitative approach to dealing with offending behaviour. Another restorative justice program is offered as a diversion option from the Neighbourhood Justice Centre – an integrated court and support service centre in the City of Yarra – for young people who have committed offences. Koori Court sentencing conversations incorporate some elements of restorative justice approaches, particularly when the victim of an offence joins the conversation.

The Victorian Law Reform Commission (**VLRC**) is considering the appropriateness of restorative justice approaches for sexual offences, which are often excluded from the ambit of restorative schemes[778] (the ACT's restorative justice scheme did not originally include family violence or sexual offences, but was expanded to do so in 2018[779]).

VALS' submission to the VLRC *Project on Improving the Response of the Justice System to Sexual Offences*[780] highlighted the benefits of restorative justice processes for sexual offending, for both victim-survivors and people who have offended, as well as the community. The submission canvassed the risks involved in restorative justice and how to mitigate this, taking into consideration best practices and lessons learned from other jurisdictions. A more detailed analysis can be found in the submission, but broadly, best practice for restorative justice for sexual offending includes the following:

- Both parties must freely and voluntarily consent,

[775] Griffith University (2016), 'Youth conferencing key to reduced reoffending'. Accessed at https://news.griffith.edu.au/2016/09/13/youth-conferencing-key-to-reduced-reoffending/.
[776] Department of Justice and Community Safety, *Restorative justice for victim survivors of family violence*, accessed at https://www.justice.vic.gov.au/fvrjservice.
[777] Department of Justice and Community Safety (2017), *Restorative Justice for Victim Survivors of Family Violence: Framework*, p8. Accessed at https://files.justice.vic.gov.au/2021-06/Restorative%20Justice%20for%20Victim%20Survivors%20of%20Family%20Violence%20Framework%202017.pdf.
[778] The Age, 29 August 2021, 'Push for new justice approach for sexual assault survivors'. Available at https://www.theage.com.au/national/victoria/push-for-new-justice-approach-for-sexual-assault-survivors-20210818-p58jx7.html.
[779] Canberra Times, 19 September 2018, 'From November, survivors of sex crimes can access restorative justice'. Available at https://www.canberratimes.com.au/story/6002979/from-november-survivors-of-sex-crimes-can-access-restorative-justice/.
[780] VALS (2021). VALS Submission to the VLRC Project on Improving the Response of the Justice System to Sexual Offences, available at https://www.vals.org.au/wp-content/uploads/2021/03/VALS-Submission-to-the-Victorian-Law-Reform-Commission-Project-Improving-the-Response-of-the-Justice-System-to-Sexual-Offences.pdf.

- Both parties must have legal advice and representation, and support people,
- There must be a rigorous process for assessing suitability,
- The timing of the restorative justice process must be carefully considered,
- The motivation for participation in the process must be properly considered,
- Power imbalances must be properly considered and addressed,
- The person who has offended must accept responsibility for their actions,
- The facts must be agreed,
- Confidentiality must be maintained,
- Facilitators must have the requisite expertise and experience,
- Compliance with the agreement reached at the restorative justice conference(s),
- Participation must not be used as evidence of guilt,
- Participation in an unsuccessful restorative justice process must not be used to justify a more severe sentence.

Critically, restorative justice models must be culturally appropriate for Aboriginal people. There are certainly lessons to be learned from other jurisdictions, such as Canada, regarding the appropriation and homogenisation of Indigenous restorative justice processes, and the imposition of culturally inappropriate processes.[781]

VALS is supportive of restorative justice approaches playing a bigger role in Victoria's criminal legal system. However, it is critical that restorative justice is not merely used as an additional layer of process – its greatest potential to improve rehabilitation lies in its use as a *replacement* for retraumatising and stigmatising punitive practices, not in being used alongside them. VALS also strongly emphasises the importance of any restorative justice programs being co-designed with Aboriginal communities, to ensure their cultural safety and maximise their reintegrative impact for Aboriginal people – for both people who have committed offences and victims of crime. This is in line with the submissions made by VALS, Djirra and the Aboriginal Justice Caucus to the Victorian Law Reform Commission.[782] A pilot of Aboriginal-led restorative justice responses is being developed in the Lotjapadhan project, as part of the Aboriginal Justice Agreement.[783]

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[781] BC Association of Specialized Victim Assistance and Counselling Programs, *Restorative Justice, Domestic Violence and Sexual Assault in Canada: A Summary of Critical Perspectives from British Columbia* (May 2020)

[782] VALS (2021), *Submission to the Victorian Law Reform Commission Project: Improving the Response of the Justice System to Sexual Offences*. Accessed at https://www.lawreform.vic.gov.au/wp-content/uploads/2021/07/Sub_67_Victorian_Aboriginal_Legal_Service_final.pdf.
Djirra (2020), *Submission to the Victorian Law Reform Commission Inquiry Improving the Response of the Justice System to Sexual Offences*. Accessed at https://www.lawreform.vic.gov.au/wp-content/uploads/2021/07/Sub_9_Djirra_final.pdf.
Aboriginal Justice Caucus (2021), *Submission on Improving the Response of the Justice System to Sexual Offences to the Victorian Law Reform Commission*, p4. Accessed at https://www.lawreform.vic.gov.au/wp-content/uploads/2021/07/Sub_65_Aboriginal_Justice_Caucus_final.pdf.

[783] *Burra Lotjpa Dunguludja: Aboriginal Justice Agreement Phase 4*, 'Restorative justice responses'. Available at https://www.aboriginaljustice.vic.gov.au/the-agreement/aboriginal-justice-outcomes-framework/goal-12-aboriginal-communities-are-safer-6.

Victorian Aboriginal Legal Service

RECOMMENDATIONS

Recommendation 278. VALS supports the expansion of restorative justice approaches as an alternative to retributive processes across the Victorian legal system.

Recommendation 279. All restorative justice processes should be co-designed with Aboriginal communities to ensure they are culturally safe and will have the greatest possible rehabilitative potential for Aboriginal people.

Recommendation 280. Regarding restorative justice approaches for sexual offences, VALS supports the recommendation of the Aboriginal Justice Caucus to the Victorian Law Reform Commission: 'There is evidence to support Restorative Justice processes can be effective in responding to sexual offending. However, design, development and implementation of these justice responses will take time, and must be community led. Responses must be aligned with Aboriginal Community values, victim-centred and responsive to the community in which it is developed.'[784]

Language, Stigma & Dehumanisation

There is a growing recognition in criminal justice advocacy that stigma around people in prison can be a source of trauma and, after people's release, a barrier to their reintegration into the community. Alongside formal means of tackling stigmatisation, such as the spent convictions scheme discussed above, it is important to address the effects of language and nomenclature on societal perceptions of people who come into contact with the criminal legal system.

A particular area of focus is the use of 'person-first' language to avoid dehumanising people in prison. Referring to 'people in prison' or 'incarcerated individuals' emphasises that imprisonment is a situation that the person is in, while terms like 'convict' and 'inmate' which treat being in prison as an overriding fact about a person. Some people who have lived experience of prison describe these terms as feeling like a "violat[ion of] their humanity", entrenching a "feeling of powerlessness" and providing implicit justification for poor prison conditions.[785]

In the United States, New York State has formally removed the word 'inmate' from all provisions of state law, in order to respond to and mitigate the stigmatising effect that language can have.[786] As the

[784] Aboriginal Justice Caucus (2021), *Submission on Improving the Response of the Justice System to Sexual Offences to the Victorian Law Reform Commission*, p4. Accessed at https://www.lawreform.vic.gov.au/wp-content/uploads/2021/07/Sub_65_Aboriginal_Justice_Caucus_final.pdf.
[785] Bamenga (2021), 'Good Intentions Don't Blunt the Impact of Dehumanizing Words', The Marshall Project. Accessed at https://www.themarshallproject.org/2021/04/12/good-intentions-don-t-blunt-the-impact-of-dehumanizing-words.
[786] Corrections1, 7 August 2021, 'NY governor signs bill ending use of 'inmate' in state law'. Accessed at https://www.corrections1.com/law-and-legislation/articles/ny-governor-signs-bill-ending-use-of-inmate-in-state-law-2qJIFSum9yza3pvl/.

legislature highlighted in passing the bill, "studies have shown these terminologies have an inadvertent and adverse impact on individuals' employment, housing and other communal opportunities" and can increase the risk of recidivism as a result.[787]

VALS is of the view that changes to everyday terminology can affect social perception of people in prison and released from prison, and even marginal shifts in these perceptions make a difference to people's ability to reintegrate into society and avoid reoffending. VALS makes every effort in our own work to use terminology which avoid dehumanisation and stigma. A broader adoption of these efforts in government, the criminal legal system, and across legal service providers would help create a shift in perception which can have very important ramifications for people released from prison.

However, the question of what language is stigmatising or dehumanising cannot be answered in the abstract or by outside advocates. In the United States, for example, there is significant regional variation in what language is preferred by people in prison.[788] It is crucial that the voices of people with lived experience, and especially Aboriginal people who are profoundly affected by stigmatisation in many parts of society, are heard and respected in all conversations about the criminal legal system in Victoria.

The stigma that attaches to people following the completion of custodial sentences in detention facilities has further effects on their families following release. Families, including the children, of imprisoned people experience "social stigma, isolation and ostracism'" within their respective communities.[789]

RECOMMENDATIONS

Recommendation 266. The Victorian Government should undertake, in close consultation with civil society and people with lived experience of imprisonment, an evaluation and examination of the terminology employed in policies, programs, legislation and statements concerning people serving custodial sentences and who are justice system involved with the objective of mitigating the stigmatising effect of such terminology within the Victorian community.

Recommendation 267. The Victorian Government should ensure that specialised services are provided to imprisoned people and their families following the completion of their custodial sentence to address issues arising from stigma experienced within the community.

[787] New York State Assembly, Bill A02395 – Memorandum in Support of Legislation. Accessed at https://assembly.ny.gov/leg/?bn=A02395&term=&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y.
[788] Bartley (2021), 'I am not your 'inmate'', The Marshall Project. Accessed at https://www.themarshallproject.org/2021/04/12/i-am-not-your-inmate.
[789] Sheehan, R. (2010). Parents as prisoners: A study of the parent-child relationship in the Children's Court of Victoria. 11(4) Journal of Social Work 358-374, p. 361.

Victorian Aboriginal Legal Service

Voting Rights

Another area where broader social questions affect rehabilitation and reintegration is the issue of voting rights. Most jurisdictions in Australia prevent some people serving time in prison from voting in elections. Under Victorian law, people in prison on a sentence of more than five years are barred from voting.[790] People in Victorian prisons also cannot vote in federal elections if their sentence is more than three years.[791] Some Australian states impose harsher rules – banning voting at sentences of more than three years or, in NSW and WA, twelve months – while the ACT and South Australia do not restrict voting rights of people in prison.[792]

The restriction of voting rights for people in prison is a form of disenfranchisement which heavily affects already marginalised people. The over-incarceration of Aboriginal people means that disenfranchisement disproportionately affects Aboriginal communities which are already neglected by political processes. It has been estimated that 0.6% of Aboriginal people in Australia are disenfranchised by restrictions on voting from prison, compared to 0.075% of non-Aboriginal people.[793] In addition, people removed from the electoral roll while in prison may not re-enrol after their release, particularly in the absence of strong transitional supports, which means that the number of Aboriginal people not enrolled to vote because of their time in prison is much higher than the number in prison at any given time. In New Zealand, the Waitangi Tribunal found that Māori people removed from the electoral roll – particularly if this occurs when they are young – are less likely to *ever* vote.[794]

Denial of the right to vote to people serving prison sentences constitutes an additional punishment over the jail term itself.[795] It is dubious that this additional punishment is given adequate consideration, either in sentencing decisions or in any assessment of its effects on rehabilitation. Disenfranchisement explicitly treats incarcerated people as though they are not members of the Victorian community, at odds with the goal of rehabilitative interventions.

The Waitangi Tribunal – the body in New Zealand responsible for monitoring the government's treaty obligations to Māori people – has recommended that complying with the Treaty requires abolition of all limits on voting rights for people in prison.[796] This finding recognised both the disproportionate

[790] Constitution Act 1975 (Vic), s48(2)(b). Accessible at http://classic.austlii.edu.au/au/legis/vic/consol_act/ca1975188/s48.html.
[791] Commonwealth Electoral Act 1918, s93(8AA). Accessible at http://classic.austlii.edu.au/au/legis/cth/consol_act/cea1918233/s93.html.
[792] Churchill (2020), *Voting Rights in Prison: Issues Paper*, University of Queensland, p4. Accessed at https://law.uq.edu.au/files/60196/REP_PBC_MsP_Voting_Rights_Australian_Prisons_FIN_20200715.pdf.
[793] Churchill (2020), Voting Rights in Prison: Issues Paper, University of Queensland, p8. Accessed at https://law.uq.edu.au/files/60196/REP_PBC_MsP_Voting_Rights_Australian_Prisons_FIN_20200715.pdf
[794] Waitangi Tribunal (2020), *He Aha I Pera Ai? The Maori Prisoners' Voting Report*, p25. Accessed at https://waitangitribunal.govt.nz/news/tribunal-releases-report-on-maori-prisoners-voting-rights/.
[795] Churchill (2020), Voting Rights in Prison: Issues Paper, University of Queensland, pp7-8. Accessed at https://law.uq.edu.au/files/60196/REP_PBC_MsP_Voting_Rights_Australian_Prisons_FIN_20200715.pdf
[796] Waitangi Tribunal (2020).

effect of disenfranchisement on Māori people, but also the potential "rehabilitative and reintegrative potential of the franchise."[797] Evidence at the Tribunal showed that people released from prison "are more likely to identify with a society they have had a stake in creating" and that disenfranchisement is inconsistent with an effective focus on reintegration and rehabilitation.[798] The Tribunal also found that restricting voting rights of people in prison had flow-on effects for the political participation of family members and wider Māori communities.

VALS is of the view that denying the right to vote to people in prison is inconsistent with human rights obligations and counterproductive. Disenfranchisement from the electoral roll contributes to a sense of broader social disenfranchisement which obstructs rehabilitation and stigmatises people who have been in prison.

RECOMMENDATIONS

Recommendation 268. Victoria should remove all restrictions in state law on the right of people in prison to vote in state and local elections.

Recommendation 269. Victoria should lead advocacy nationally, including at the Meeting of Attorneys-General, for a consistent, nationwide approach which grants full voting rights to people in prison, including in federal elections.

[797] Ibid, p. 25.
[798] Ibid, p. 23.

Victorian Aboriginal Legal Service

Part 4: Judicial Training & Expertise

Judicial Expertise and Cultural Bias

Lack of adequate knowledge and understanding about Aboriginal people and communities can lead to inappropriate and unjust outcomes in criminal proceedings. This can be due to direct bias, or may simply result from ignorance about the effects of the criminal legal system on Aboriginal communities in Australian history.

Stereotypes about Aboriginal people are widespread throughout the Australian community, and can have impacts on criminal legal matters. In the Northern Territory, one judge was the subject of repeated complaints over a series of racist remarks he made in court. These included telling a mother that she had abandoned her child to go drinking "in that great Indigenous fashion", comparing an Aboriginal defendant's actions to "a primitive person dragging his woman out of the cave", and accusing a 13-year old Aboriginal boy of not "know[ing] what a first-world economy is" and 'taking advantage' of his mother's murder.[799]

This level of extreme and overt bias is unusual, but it demonstrates that judicial officers are not immune from belief in or exposure to stereotypes about Aboriginal people's family structures, substance use and violence. They can have very serious consequences for the way that judges approach important matters such as bail applications or sentencing decisions. For example, when a judge is required to assess the risk associated with releasing someone on bail, even less extreme stereotypes about the tendency of Aboriginal people to drink alcohol or use violence may play an important role.

Inadequate cultural knowledge and competence can create problems even without direct stereotyping. The environment and process of the justice system imposed by colonisation can be a hostile environment for Aboriginal people, who are acutely aware that the criminal legal system leads to disproportionately worse outcomes for them. Formal legal procedures can be alien and difficult to understand, and Aboriginal people are far more likely to have had members of their family who have had bad experiences with the legal system. This affects the way that Aboriginal people interact with the court and the legal process, and judges need to understand this context if they are to treat Aboriginal people fairly in court.

Koori Court is an example of an attempt to address these issues and create a less hostile environment for Aboriginal people interacting with the criminal legal system. Koori Court is discussed further below.

[799] ABC News, 11 December 2019, https://www.abc.net.au/news/2019-12-11/nt-chief-judges-investigates-complaint-against-greg-borchers/11784300.
ABC News, 17 June 2017, https://www.abc.net.au/news/2017-06-17/nt-judge-made-disgraceful-comments-about-teen-offender/8627282.

Victorian Aboriginal Legal Service

Another initiative is the Aboriginal Community Justice Reports project, an initiative modelled on Canada's 'Gladue reports', currently being trialled by the County Court in partnership with VALS (discussed in greater detail above).[800] "The purpose of preparing such reports is to identify possible underlying drivers of the individual's offending, in particular, those that may relate to the impacts of trauma and colonisation uniquely experienced as an Aboriginal person… [it] also provides a further voice to the offender, their family and community, and thus greater involvement in, and engagement with the justice system."[801] Importantly, these reports propose community-driven solutions and focus on strengths of the person before the court, as well as of their family and community. This can give courts a much better guide to understanding how the person might best be rehabilitated:

> The language and measurements of risk inform pre-sentence reports prepared for courts by community corrections. They use a deficit metric to influence decisions on sentencing. Rather than identifying strengths, community corrections treat First Nations peoples' backgrounds and circumstances as a problem. Australian and Canadian research has found that such reports reinforce racist assumptions about First Nations people. A risk framework focused on perceived deficits of Aboriginal people positions them, according to Munanjahli and South Sea Islander woman and health professor Chelsea Watego and colleagues, as "in need of 'fixing' and 'moulding' (usually by white hands).[802]

Specific initiatives like Koori Court and Community Justice Reports are essential parts of making the criminal legal system more culturally safe for Aboriginal people. However, their reach is naturally limited. Both are limited to sentencing decisions, and Koori Court is generally only available to people who plead guilty. Community Justice Reports, as discussed above, are successful in Canada, but at present only a small-scale pilot in Victoria, for which there is no ongoing funding, despite being identified as a priority under the AJA4.

It is essential that the Victorian legal system goes beyond these specific programs, and applies their lesson – that formal processes can be hostile for Aboriginal people, and this difficult relationship needs to be appreciated – throughout the whole system.

[800] VALS, 'Aboriginal Community Justice Reports', http://www.vals.org.au/aboriginal-community-justice-reports/.
[801] VALS, Aboriginal Community Justice Reports: Addressing Over-Incarceration (2017), https://www.vals.org.au/wp-content/uploads/2021/03/Aboriginal-Community-Justice-Reports-Addressing-Overincarceration-2017-Discussion-Paper.pdf
[802] Anthony, Lachsz & Waight (2021), 'The role of 're-storying' in addressing over-incarceration of Aboriginal and Torres Strait Islander peoples', The Conversation. Accessed at https://theconversation.com/the-role-of-re-storying-in-addressing-over-incarceration-of-aboriginal-and-torres-strait-islander-peoples-163577.

Victorian Aboriginal Legal Service

Cultural Awareness Training & Anti-Racist Training

A key part of achieving this is judicial training and education on Aboriginal cultural issues. The Judicial College of Victoria works with the Victorian Judicial Officers' Aboriginal Cultural Awareness Committee (**JOACAC**) to deliver education to judges,[803] and cultural awareness training is also delivered by Aboriginal organisations like VACSAL.[804] Training available ranges from evening seminar and workshop sessions, such as the JOACAC Koori Twilight programme, to day visits to culturally significant sites and multi-day programmes such as 'Back to Country'.[805] Their goals vary from a focus on specific aspects of the legal system to more general education about Aboriginal communities and their relationship to justice and the legal system.

The effectiveness of these training programs can be limited in practice, however, because their reach is not broad enough. When proper cultural awareness training is not compulsory, it often reaches only judges who are already invested in the issues in question. This applies to Aboriginal cultural awareness training, but also to specialist training in other areas such as addiction, brain injuries and mental trauma, and family violence – all of which affect Aboriginal people at high rates. Important knowledge often becomes concentrated in a handful of judges, often those sitting in Koori Court, Assessment & Referral Court and Drug Court.

Aboriginal people are present in criminal court at disproportionate rates in all kinds of proceedings, across all parts of the state. Cultural safety cannot be delivered only through specialist services, and their existence must not be an excuse for inadequate judicial training and education throughout the judicial system. In Victoria, training on Aboriginal cultural issues is compulsory only for judges sitting in Koori Court.[806] This compares unfavourably to the practice in South Australia, where cultural awareness training is a compulsory part of induction for all new judicial officers.[807] Good practice should go beyond this to ensure that training is ongoing, providing opportunities for judges to reinforce, embed and enhance their understanding and culturally appropriate practice.

The content of training programs also needs to be robust, going beyond simple 'awareness' of Aboriginal culture. The essential first step is for judges to understand that Aboriginal people arrive in the courtroom with a unique perspective on the law and policing, shaped by their own, their family's and their community's experiences, and the violent colonial history of this country, on which today's

[803] Judicial College of Victoria (2017), *Submission to the ALRC Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*. Accessed at https://www.alrc.gov.au/wp-content/uploads/2019/08/102._the_judicial_college_of_victoria.pdf.
[804] Victorian Aboriginal Community Services Association Ltd, 'Indigenous Cultural Awareness Training', http://www.vacsal.org.au/programs/indigenous-cultural-awareness-training.aspx.
[805] Judicial College of Victoria (2017), *Submission to the ALRC Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*. Accessed at https://www.alrc.gov.au/wp-content/uploads/2019/08/102._the_judicial_college_of_victoria.pdf.
[806] Cavanagh & Marchetti (2016), 'Judicial indigenous cross-cultural training : What is available, how good is it and can it be improved?'. Accessed at https://ro.uow.edu.au/cgi/viewcontent.cgi?article=4692&context=sspapers.
[807] Ibid.

legal systems and institutions are founded. Federal courts, in particular, hear family law and discrimination law matters – both of which can lead to particularly traumatic experiences for Aboriginal people, who still experience the breakup of their families by the government and courts at extraordinary rates. At the highest level, courts and judges have been instrumental in dispossessing Aboriginal people and breaking up families since invasion.

A real understanding of this background is essential to creating courtrooms free from both subtle and overt bias against Aboriginal people. This makes anti-racism training a particularly important element of tackling bias and unfairness in the criminal legal system, not only cultural awareness training. This kind of training needs to be focused on delivering this perspective and reinforcing it over time, with the goal of helping judges develop their cultural awareness through continuous learning. Courts that are free of cultural bias can only be realised when judges understand their own position, appreciate the effects of racism and colonialism, and positively involve Aboriginal people in creating a culturally appropriate judicial process.

As such, the recommendations made by the Judicial College of Victoria in its submission to the Australian Law Reform Commission Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples remain extremely important.[808] There are two elements which are particularly important to include to ensure that a training program gives judicial officers adequate preparation for dealing with Aboriginal people in their courtrooms. First, cultural awareness training must incorporate a strong focus on the ongoing impacts of colonisation, intergenerational trauma, and racism.[809] Second, training should include up-to-date, practical information on culturally appropriate programs and services for Aboriginal people. Judicial officers can prescribe cultural or personal development programmes when making bail decisions or Community Correction Orders, and their suggestions about specific programs are taken into account by Corrections Victoria. When judicial officers have limited or out-of-date information about culturally appropriate programs and services, they cannot make such suggestions and access to appropriate services is likely to be reduced.[810]

[808] Judicial College of Victoria (2017), *Submission to the ALRC Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*. Accessed at https://www.alrc.gov.au/wp-content/uploads/2019/08/102. the judicial college of victoria.pdf.
[809] Ibid, p3.
[810] Ibid, p4.

Victorian Aboriginal Legal Service

RECOMMENDATIONS

Recommendation 270. Training and education on Aboriginal and Torres Strait Islander cultural issues, and their interaction with the criminal legal system, should be compulsory for judges, with regular refresher training.

Recommendation 271. Training and education should include anti-racism training and a concrete focus on creating a culturally appropriate judicial process for Aboriginal people, not only on creating cultural awareness.

Recommendation 272. VALS endorses the Judicial College of Victoria's 2019 recommendations in its submission to the Australian Law Reform Commission.

> "Cultural awareness training for judicial officers should include material relating to the historical and ongoing impact of colonisation on Aboriginal and Torres Strait Islander people, identity, intergenerational trauma, in addition to education about contemporary issues such as the exposure to racism that many experience daily.
>
> In addition to building judicial officers' cultural awareness, education should contribute to judicial officers acquiring cultural competence regarding how to work with Aboriginal and Torres Strait Islander peoples. This would include training about modes of communication, body language, the need for and use of interpreters, and related issues. The development of this training must involve substantial consultation with Community, who must also lead its delivery.
>
> Educational programs should highlight culturally-appropriate programs and services that support Aboriginal and Torres Strait Islander people who are on bail, community-based sentences or parole."

Recommendation 273. Training delivered to members of specialist courts should be adapted for broader use to equip all parts of the criminal legal system with the ability to deliver culturally appropriate services for Aboriginal people with complex needs.

Victorian Aboriginal Legal Service

Part 5: Judicial Appointments & Specialist Courts

Judicial Appointments

The composition of the judiciary is essential to maintaining public confidence in the administration of the law, and ensuring that appointees have the skills and experience to properly serve the community as judges.

The risk of political appointments can create a perception of bias and reduce the community's faith that the law is being fairly and impartially applied. Inadequate diversity in the judiciary, discussed further below, also contributes to alienation from and lack of trust in the justice system. A variety of skills and backgrounds are needed to work effectively as a judge in different courts, and if these skills are not actively sought out and assessed in the appointments process, the quality of the judiciary as a whole suffers and some members of the community may be denied equitable access to justice. This is particularly a concern for already-marginalised groups, like the Aboriginal community in Victoria, where access to the justice system to protect their rights and wellbeing is especially important.

At present, Victoria's process for appointing new judges is sorely lacking in transparency. The Department of Justice and Community Safety occasionally seeks expressions of interest for judicial positions.[811] There is no formal application process for judicial appointments, however, and no dedicated body for assessing candidates and making decisions. The partial exception to this has been the use of advisory panels to give the Attorney-General advice on appointments to the Magistrates' Court and VCAT, though the Attorney-General retains discretion to ignore the assessment of the panel or make appointments outside the panel process.[812] The result is that judicial vacancies are often filled by people with personal or professional connections with the Attorney-General or the heads of jurisdiction for each court. Though the quality of appointments is generally high, the process denies a fair opportunity to qualified candidates without those connections.

The effect of this is that, particularly for higher courts, judicial appointments are typically made from a very narrow pool, with little diversity in race, gender or professional background. The focus of attention on senior members of the Bar denies the courts and the Victorian community the benefit of judges with more understanding of different aspects of the legal system, different clients, and expertise in different areas of law.

[811] Department of Justice & Community Safety, 'Judicial appointments', https://www.justice.vic.gov.au/justice-system/courts-and-tribunals/judicial-appointments.
[812] Victorian Department of Justice (2010), *Reviewing the judicial appointments process in Victoria: Discussion Paper*. Accessed at https://www.vgls.vic.gov.au/client/en_AU/search/asset/1267527/0.

In 2010, the Victorian Government ran a consultation on judicial appointments reform.[813] The discussion paper canvassed options including a permanent Judicial Appointments Commission, modelled on the UK system, or formalising the advisory panel arrangement and extending it to other Victorian courts. This consultation, however, has not led to any change in the judicial appointments process eleven years later. A fairer and more transparent appointments process is desperately needed.

Judicial Diversity

A key goal of a reformed judicial appointments process should be to improve diversity on the bench. Appointments are generally made from a very narrow pool, focused on practising barristers, especially for higher courts. This lack of diversity leaves the judiciary missing important perspectives on the law. Greater diversity is essential to ensuring the impartiality of the justice system and to retaining societal trust in the administration of justice.

As noted above, the legal system can appear hostile and alien to many marginalised and poorly represented groups, including Aboriginal people. Along with addressing bias among judicial officers and modifying judicial procedures, this sense of mistrust can be addressed by creating a judiciary whose members represent all parts of the Australian population. At present, judges remain disproportionately white and male. This is particularly an issue for higher courts. Although Victoria has the highest rate of female representation at 45.1% of judges, for example, this falls to just one-third for judges of the Supreme Court and Court of Appeal.[814]

Representation of Aboriginal people is far worse than this. In fact, Aboriginal and Torres Strait Islander people are virtually unrepresented as members of the judiciary. There have been only a handful of Aboriginal judges anywhere in Australia: two Indigenous magistrates in Victoria, and some magistrates in other states, but only three judges on higher courts anywhere in the country. This inevitably reinforces the perception that the legal system is not inclusive of Aboriginal people, and undermines trust in the law.

Improved diversity, including representation of Aboriginal people, also supports impartiality by helping individual judges recognise and reduce their own biases. A more diverse bench is not a replacement for individual judges developing their cultural awareness. A greater range of backgrounds, experiences and perspectives in the judiciary creates more opportunities for all judges to recognise their individual biases.

[813] Victorian Department of Justice (2010), *Reviewing the judicial appointments process in Victoria: Discussion Paper*. Accessed at https://www.vgls.vic.gov.au/client/en_AU/search/asset/1267527/0.
[814] Australian Institute of Judicial Administration (2020), *AIJA Judicial Gender Statistics.* Available at https://aija.org.au/wp-content/uploads/2020/07/2020-JUDICIAL-GENDER-STATISTICS-v3.pdf.

Supporting the representation of Aboriginal people in the judiciary is a long-term task. There are currently only four Aboriginal barristers practising in Victoria. Judicial appointments, particularly to higher courts, are frequently drawn from senior members of the Bar. At every level of the legal profession, there needs to be serious efforts to improve the cultural safety of workplaces, and to proactively train and recruit Aboriginal people, in order to ultimately address the issue of diversity in the judiciary.

In the shorter term, an important step would be to increase the number of judges with professional experience in Aboriginal legal services. Judges disproportionately have professional backgrounds in particular areas of law, rather than being broadly representative of the legal profession. This is again particularly an issue on higher courts. Experience working in Aboriginal legal services, or with Aboriginal clients, helps lawyers develop cultural awareness and understand the perspective of many Aboriginal people in the legal system. This experience is clearly relevant to the responsibilities of judges, and the judiciary would benefit from greater representation of this kind of professional background.

Both demographic and professional diversity should be important elements in decisions about judicial appointments under any reformed appointments system.

RECOMMENDATIONS

Recommendation 274. The Government should reform the judicial appointments process to ensure transparency and to maintain public confidence in the administration of the law. This includes ensuring that appointees have the skills and experience to properly serve the community as judges, and that the judiciary is representative of the community.

Recommendation 275. A reformed judicial appointments process should include a focus on improving diversity in the judiciary, particularly the representation of Aboriginal people and lawyers with experience working with Aboriginal people.

Specialist Courts

Specialist courts are an important element of delivering justice to VALS clients and all marginalised people. However, they are not a substitute for a thorough understanding of complex issues being developed by judges and judicial officers across all jurisdictions and outside the specialist courts and lists. The remit of specialist courts means that they may not be available for certain offences, or may be limited to the sentencing in a matter. The specific needs of marginalised people and people with complex needs are not limited in the same way: Aboriginal people need culturally appropriate judicial processes at all stages of their interaction with the justice system, not only in sentencing; people with

acquired brain injuries or drug issues need to have these issues properly accounted for even when they are charged with serious offences.

Specialist courts in Victoria include Koori Court, Drug Court, and Assessment and Referral Court, as well as Children's Court and specialised divisions such as the Family Violence Division of the Magistrate's Court. These specialist courts have identified and implemented some good practice in their areas of focus, many of which are also relevant to courts and judges in other parts of the judicial system. The recommendations above, on the importance of delivering Aboriginal cultural training to all judges and judicial officers, are also applicable to other kinds of training which significantly affect marginalised people coming before the court

Koori Court

Koori Court is a specialist court which aims to incorporate elements of Aboriginal and Torres Strait Islander culture, authority and process, in order to make the legal process more culturally appropriate for Aboriginal people. Notably, Aboriginal Elders participate in the process, as a trusted and authoritative voice to both denounce wrongdoing and assure Aboriginal people of community support in their rehabilitation. Koori Court hearings involve a 'sentencing conversation', where the judge does not speak from the bench but sits around a table with the person before the court, Elders, lawyers, family members and support workers. The conversation covers the circumstances of the offence, as well as the Aboriginal person's personal and family history, their ties to their community, and their plans for rehabilitation. The conversation is led by the Elders. A sentencing discount is available when the judge assesses that the defendant's participation has been genuine, recognising that the conversation is confronting and difficult, and has significant rehabilitative and shaming power for defendants.

Evaluation of the first two Koori Courts found that they led to fewer breaches of correctional orders and fewer failures to appear on bail, caused less alienation for the Aboriginal people before the Court, and did better at integrating court outcomes with access to other support services.[815] The model has been expanded to the Children's Court and County Court, and there are now more than 100 Elders who participate in Koori Court across Victoria. County Court Koori Court is leading the trial of Aboriginal Community Justice Reports, discussed above, to further improve the Court's approach to rehabilitation and bring more understanding of people's Aboriginality and the effects of colonialism into the judicial process.

In the context of Victoria's efforts to realise the right of Aboriginal self-determination, and the clear success of Koori Court in improving outcomes for Aboriginal people, the Government should expand the scope of the Koori Court system. VALS believes that a Koori Court model is an important aspect in

[815] Judge Irene Lawson, County Court of Victoria (2020), 'The County Koori Court: An Information Paper for Legal Practitioners', pp2-3. Accessed at https://www.cpdinsession.com.au/wp-content/uploads/2020/10/Paper-and-Presentation.pdf.

progressing Aboriginal self-determination in the Victorian justice system. In the short term, Victoria can make progress towards this goal by increasing the range of functions performed by Koori Courts, and the geographical reach of the Court. Aboriginal people have a right to culturally safe judicial processes at all stages of their legal matters, across all of Victoria.

This should include, as a starting point, increased access to Koori Courts in more locations across Victoria. This is discussed above in relations to Children's Koori Court, but is also an important priority for adult Koori Court. The Supreme Court's decision in *Cemino v. Cannan and Ors* has meant that Aboriginal people can have their matters heard at a different venue in order to access Koori Court.[816] However, Aboriginal people should not be forced to choose between a local court and a culturally appropriate judicial process, and establishing Koori Court at every regional court should be a priority.

Beyond this, the remit of Koori Courts should be expanded so that they can hear bail applications and the sentencing hearings of all matters for Aboriginal people, not only those where a guilty plea is entered. Koori Court bail hearings are particularly important given the disproportionate impact of Victoria's bail laws on Aboriginal people, and the recognised success of Koori Court in reducing rates of breaches and reoffending. Koori Court jurisdiction should also expand to divert people to culturally appropriate diversion programs.

Access to Koori Court has been sharply limited by COVID-19 restrictions. In 2020-21, VALS clients came before Koori Court for criminal matters on 40 occasions, compared to 124 in 2019-20.[817] Special effort is needed to ensure that wider access to Koori Court is restored, both in the pandemic recovery period and in any future pandemic.

RECOMMENDATIONS

Recommendation 276. The Victorian Government should increase access to culturally appropriate legal processes, by expanding the jurisdiction of Koori Courts to:

- divert Aboriginal people to culturally appropriate diversion programs;
- hear bail applications;
- hear matters that are contested and have not resolved to a plea of guilty;
- make Drug and Alcohol Treatment Orders where appropriate.

Recommendation 277. The number of Koori Courts and frequency of sitting days should be expanded across the Magistrates' Court, County Court and Children's Court jurisdictions, to ensure access to culturally appropriate courts, particularly in regional and rural areas.

[816] Cemino v. Cannan and Ors [2018] VSC 535.
[817] VALS data.

Drug Court

The section above regarding drug decriminalisation discusses the value of Drug Court in providing a therapeutic, rehabilitation-focused approach to dealing with offending by people with substance use issues. VALS recommends the expansion of Drug Court to be available to more people facing court for drug-related offences, as detailed above.

Assessment and Referral Court

Assessment and Referral Court (known as **ARC**) is a specialist program for people affected by mental illness, acquired brain injury or cognitive impairments. Its goal is to provide a form of diversion from the criminal legal system and offer therapeutic support.

Many Aboriginal people in prison are affected by mental illness or acquired brain injuries.[818] However, their access to Assessment and Referral Court is limited by two key factors. One is the restricted geographic availability of ARC - only five Magistrates' Courts, all in Melbourne or Gippsland.[819] Aboriginal people are much more likely than other Victorians to live in rural parts of the state, and the lack of availability of ARC in many courts where Aboriginal people appear means they are denied equitable access.

The eligibility criteria for ARC are also a limiting factor, because people are required to be on bail in order to be referred to ARC. Victoria's punitive bail laws and their disproportionate effects on Aboriginal people therefore prevent many people from accessing therapeutic support, instead pushing them towards inappropriate criminal legal responses.

RECOMMENDATIONS

Recommendation 278. Assessment and Referral Court locations should be expanded to provide equitable access for people affected by mental health issues and brain injuries across Victoria, in line with the recommendations of the Royal Commission into Victoria's Mental Health System.

[818] Centre for Innovative Justice & Jesuit Social Services (2018), *Recognition Respect and Support: Enabling justice for people with an Acquired Brain Injury,* p15. Accessed at https://cij.org.au/cms/wp-content/uploads/2018/08/enabling-justice-full-report.pdf.
[819] Magistrates' Court of Victoria, 'Assessment and Referral Court (ARC)', https://www.mcv.vic.gov.au/about-us/assessment-and-referral-court-arc.