



Victorian Aboriginal Legal Service Co-operative Limited (VALS)

Access to justice for people with a cognitive disability

Submission to the Parliament of Victoria Law Reform Committee

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Victorian Aboriginal Legal Service Co-operative Limited
6 Alexandra Parade [P.O. Box 218]
Fitzroy, Victoria 3065
03 9419 3888
www.vals.org.au

For any questions regarding this submission, please contact VALS' Research Officer, Louise Hicks, on the above number or at lhicks@vals.org.au.

ABOUT THE VICTORIAN ABORIGINAL LEGAL SERVICE

The Victorian Aboriginal Legal Service Co-operative Limited (VALS) was established as a community controlled Co-operative Society in 1973 to address the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system. VALS plays an important role in providing referrals, advice, duty work or case work assistance to Aboriginal and Torres Strait Islander peoples in the State of Victoria. Solicitors at VALS specialise in one of three areas of law being criminal law, family law and civil law. VALS maintains a strong client service focus which is achieved through the role of Client Service Officer (CSO). CSOs act as a bridge between the legal system and the Aboriginal and Torres Strait Islander community.

VALS is actively involved in community education, research and advocacy around law reform and policy development. VALS strives to:

- a) Promote social justice for Aboriginal and Torres Strait Islander peoples;
- b) Promote the right of Aboriginal and Torres Strait Islander peoples to empowerment, identity and culture;
- c) Ensure that Aboriginal and Torres Strait Islander peoples enjoy their rights, are aware of their responsibilities under the law and have access to appropriate advice, assistance and representation;
- d) Reduce the disproportionate involvement of Aboriginal and Torres Strait Islander peoples in the criminal justice system; and
- e) Promote the review of legislation and other practices which discriminate against Aboriginal and Torres Strait Islander peoples.

For further information about VALS, please see our website: www.vals.org.au



TABLE OF CONTENTS

About the Victorian Aboriginal Legal Service.....	2
1. Introduction.....	4
2. Background.....	6
3. Police.....	11
3.1. Interviews.....	12
3.2. Diversion.....	13
3.3. Victims & Witnesses.....	13
3.4. Independent Third Person Program.....	13
4. Legal Representation.....	16
5. Courts & Tribunals.....	18
5.1. Services, Assessment & Orders.....	20
6. Custody & Corrections.....	36
7. Parole.....	39
8. Crime Prevention & Diversion.....	41
9. Human rights as best practice.....	42
10. Collaborative, Co-ordinated Approaches Across Government Departments & Agencies ...	46
10.1. Policy.....	46
10.2. Data.....	48

1. INTRODUCTION

People with an intellectual disability are over-represented in the criminal justice system as alleged offenders and victims¹ and are vulnerable to physical mistreatment, financial exploitation, and inappropriate decisions being made on their behalf.² Furthermore, Aboriginal and Torres Strait Islander peoples with cognitive disabilities are significantly over-represented when compared with non-Aboriginal and Torres Strait Islander people with similar disabilities in the criminal justice system.³

The former Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma, has identified Aboriginal and Torres Strait Islander young people with cognitive disabilities and/or mental health issues are some of the most disadvantaged and vulnerable people in Australia.⁴ He notes that these young people often face systemic failures and discrimination which combine to contribute the unacceptably high number of these people in the juvenile justice system.

International evidence also points to widespread over-representation of people with mental health and cognitive disabilities in police work, in addition to the courts and prisoner populations, both as victims and offenders.⁵ This over-representation is further influenced by disadvantaged and marginalised people with mental health disorders and cognitive disabilities as they are far more vulnerable to homelessness and other socially disabling experiences.⁶ The question has been asked: 'How is it that such vulnerable persons are so concentrated in a system primarily for punishment.'⁷

This is an area of acute concern for VALS and we welcome the opportunity to respond to the current Inquiry. It is VALS' experience that clients with a cognitive disability are likely to have a negative or harmful experience when in contact with the justice system as both offender and victim. There are some promising initiatives in Victoria that show a willingness for some sections of our justice system to improve when responding and interacting with people with a cognitive disability, however we

¹ New South Wales Law Reform Commission, 'People with an Intellectual Disability and the Criminal Justice System' (1996) <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R80CHP2>; Eileen Baldry, Leanne Dowse and Melissa Clarence, 'People with mental illness and cognitive disabilities: pathways to prison' *Background Paper for Leal Aid Conference, Darwin* (2011).

² As cited in L Schetzer and J Henderson, 'Public consultations: a project to identify legal needs, pathways and barriers for disadvantaged people in NSW, Access to justice and legal needs vol. 1,' *Law and Justice Foundation of NSW*, at www.lawfoundation.net.au/report/consultations/75EF763FF2DD2469CA257060007D4EAC.html

³ Id.

⁴ Tom Calma, 'Human rights and crime prevention in Indigenous communities' Federal Criminal Justice Forum Position Paper (2008).

⁵ Baldry, Dowse and Clarence (2011) Ibid, 2.

⁶ Id.

⁷ Id.

believe there is a still a great need for research, consultation and action in this area in order to provide equitable access to justice.

Our submission will attempt to cover the majority of the Terms of Reference however we note the magnitude of the subject matter and the limited time with which to respond to them. VALS hopes this is Inquiry is a first step in uncovering the issues that need to be addressed for those with a cognitive disability and their families. VALS therefore recommends that from this Inquiry a discussion or issues paper be produced in order to encourage participation from the individuals and communities that the current Inquiry seeks to understand. Our submission will seek to touch on the areas of civil, family and criminal law as they interact with police, courts and tribunals and parole. We also briefly highlight some policy considerations and flag some areas for further investigation, such as human rights.

VALS notes that the current Terms of Reference don't direct comment to the access to and interaction with the justice system for people experiencing mental illness. We are unsure if this exclusion is deliberate however we will limit our submission so much as is possible to cognitive disability. Noting that research in this area often talks simultaneously about persons with mental health disorders and cognitive disabilities, the former may enter our discussion.

Recommendation 1: The Victorian Government use the current Inquiry to produce a discussion or issues paper to encourage a more informed and directed discussion around the issue of interaction and access to the justice system for people with a cognitive disability.

2. BACKGROUND

Former Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma, cites research that describes how people with intellectual and cognitive disabilities experience deficits in social and adaptive functioning which limits communication and daily social and living skills.⁸ As concepts around cognitive disability can be confused and contested, Calma provides the following as relevant to Aboriginal and Torres Strait Islander communities:

The category of cognitive disabilities includes a range of disorders relating to mental processes on knowing, including awareness, attention, memory, perception, reasoning and judgement. Cognitive disabilities include intellectual disabilities, learning difficulties, acquired brain injury, foetal alcohol syndrome, neurological disorders and autism spectrum disorders.⁹

These forms of disability are poorly understood by people within the justice system. For example, many treat people with cognitive disability the same as someone with a mental health problem where unique and tailored supports should in fact be available to both – especially for those with dual diagnosis or comorbidity.¹⁰

It is also important to note that mental illness is in fact relevant to the issue of cognitive impairment. While acknowledging that mental illness and cognitive disability are two separate conditions, research has found that connections between the two exist where some people have a cognitive disability as well as a mental health condition. This obviously makes the lives and interventions for such people more complex.¹¹

Cognitive disability is often masked by other issues such as English as a second language, hearing impairment, immediate effects of alcohol and/ or other drugs, cultural factors such as shame influencing the type of interaction with criminal justice staff, and racism.¹² There are also significant

⁸ NSW Law Reform Commission (1994) in Id.

⁹ Tom Calma, 'Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues' *Australian Human Rights Commission* (2008) at www.hreoc.gov.au/social_justice/publications/preventing_crime/. It is important to note the inclusion of conditions that may significantly affect Aboriginal and Torres Strait Islander people such as Foetal Alcohol Syndrome and acquired brain injury (ABI) that can result from substance use (including inhalant use/petrol sniffing) that may link to offending behaviour.

¹⁰ Snoyman (2010) in Id.

¹¹ Calma (2008) Ibid.

¹² J Simpson and M Sitori, 'Criminal Justice and Indigenous People with Cognitive Disabilities', (2004) at www.beyondbars.org.au.

concerns about the cultural appropriateness of standard intelligence tests which are used to identify an intellectual disability.¹³

Young Aboriginal and Torres Strait Islander people with cognitive disabilities or mental illness are considered to be not only doubly disadvantaged, but multiply disadvantaged as 'cognitive disability is likely to be viewed as simply one more hardship that Indigenous people must endure'.¹⁴ Within an overwhelming set of circumstances, cognitive disabilities and/ or mental health issues are less likely to be picked up.¹⁵

Victorian research in this area is patchy save a Victorian study from 1999 that revealed gross disadvantages suffered by prisoners with intellectual disability as well as the over-representation of Aboriginal and Torres Strait Islander men amongst prisoners with an intellectual disability.¹⁶ More recent research is discussed later in this submission.

The over-representation of people with an intellectual disability in the justice system has been more broadly researched in NSW where the Department of Juvenile Justice found 17% of surveyed juvenile offenders scored below the average range of intellectual functioning (compared with 25%).¹⁷ Furthermore, a more recent juvenile justice survey amongst those in custody found that 13.5% of young people had an intellectual disability (IQ < 70) and a further 32% having a borderline intellectual disability (IQ between 70 and 79).¹⁸ The NSW Sentencing Council has also recognised the serious consequences of imprisonment for people with cognitive disabilities, such as:

- entrenchment within a culture of criminality due to the tendency of those with a cognitive disability to want to be accepted by their peer group;
- vulnerability to assault and mistreatment; and
- reintegration problems post-release as people with cognitive disabilities inherently have impaired adaptive skills.¹⁹

Aboriginal and Torres Strait Islander peoples with cognitive disabilities face particular challenges in having their disability related needs identified and met.²⁰ It is suggested that the lack of available or

¹³ Calma (2008) op cit

¹⁴ Simpson and Sitori (2004) op cit.

¹⁵ Calma (2008) op cit.

¹⁶ Glaser and Deane (1999) in Baldry, Dowse and Clarence (2011) *Ibid*.

¹⁷ NSW Department of Justice (2003) in Baldry, Dowse and Clarence (2011) *Ibid*.

¹⁸ Baldry, Dowse and Clarence (2011) *Ibid*. It is suggested that those with borderline intellectual disability face particular difficulties because they are not recognised as having a disability for the purposes of receiving support and assistance for disability services in some states.

¹⁹ *Id*.

²⁰ Simpson and Sotiri (2004) op cit.

appropriate community services and facilities may not be the only factor affecting the prevalence of mental illness and intellectual disability in prisons. A strong contributing factor could also be the rapid rise in the co-occurrence of substance abuse.²¹

The problem of disability being masked by other factors of disadvantage is perhaps most evident when it comes to contact with the criminal justice system. If a brain injury is acquired early in life, and is never properly assessed, there is the potential that behaviours that are a consequence of that brain injury will never be properly attributed. During contact with police, behaviour is much more likely to be connected with the immediate influence of drugs and alcohol, or perhaps implicitly linked to the fact of Aboriginality rather than a brain injury.²²

A 2004 discussion paper designed for the Australian Government found that many Aboriginal and Torres Strait Islander people 'do not separate out cognitive disability from other social or health issues' and 'this approach is complicated within the context of a western criminal justice system.'²³ This research was taken further by the Human Rights and Equal Opportunity Commission (now known as Australian Human Rights Commission) which found that Aboriginal and Torres Strait Islander people with cognitive disabilities in the criminal justice system are more likely to experience further discrimination once involved in the system.²⁴

VALS believes it is important for our submission to give weight to Foetal Alcohol Spectrum Disorder (FASD) as an emerging issue across the Australian population as it links with offending behaviour. FASD includes a range of physical, mental, behavioural and learning disabilities that are a direct result of alcohol use during pregnancy.²⁵ People with FASD are 'unable to learn from mistakes, cannot change their behaviour and do not understand the consequences of their actions and are very impulsive.'²⁶

Aboriginal and Torres Strait Islander communities are at a very high risk of FASD because of other factors which relate to determinants of health.²⁷ Diagnosis of FASD is difficult as there is currently no

²¹ Baldry, Dowse and Clarence (2011) op cit.

²² Simpson and Sotiri (2004) Ibid, 11.

²³ Simpson and Sotiri (2004) op cit.

²⁴ Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Indigenous young people with cognitive disabilities & the Australian juvenile justice systems,' Equal Opportunity and Human Rights Commission (2005) at http://www.hreoc.gov.au/social_justice/publications/cognitive_disabilities.pdf

²⁵ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (2011) op cit.

²⁶ Sue Miers (2010) in House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (2011), Id.

²⁷ Id.

diagnostic measure that has been developed or implemented across Australian communities.²⁸ It has been estimated that 60 per cent of adolescents with FASD have been in trouble with the law²⁹ as:

- complex learning and behavioural difficulties observed in people with FASD increase their risk of displaying offending behaviour, or being guided into criminal behaviour;
- people with FASD have difficulties in understanding the criminal justice system and its processes³⁰
- lack of memory or understanding of cause and effect may lead to breach of court orders;³¹ and
- people with FASD may make false confessions without understanding the legal consequences;³²

*...punitive rather than remedial responses have prevailed.*³⁴

People with FASD can also be victimised in custody.

The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs calls for the careful handling of FASD diagnosis, counselling and information sharing due to the potential adverse stigmas associated with the condition:

Unsubstantiated claims of FASD could fuel racism or lead to inappropriate interventions. Culturally appropriate diagnostic and treatment services are required.³³

The Standing Committee on Aboriginal and Torres Strait Islander Affairs also argues that FASD is an issue poorly understood by governments and that Aboriginal and Torres Strait Islander people who end up in prison are there 'partly as a result of the failure of governments to identify FASD as an issue underpinning their offending behaviour. As a result, punitive rather than remedial responses have prevailed'.³⁴

²⁸ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (2011) Ibid.

²⁹ Heather Douglas (2010) in House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (2011) Ibid.

³⁰ Supreme Court of Western Australia (2010) in House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (2011) Ibid.

³¹ Heather Douglas (2010) in House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (2011) op cit.

³² Supreme Court of Western Australia (2010) in House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (2011) op cit

³³ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (2011) op cit

³⁴ Ibid, 101.

As a poorly understood condition that has potentially significant effects on contact with the justice system for both offenders and victims, and may have particular prevalence in Aboriginal and Torres Strait Islander communities, VALS recommends the following:

Recommendation 2: The Victorian Government urgently address the high incidence of FASD in the Aboriginal and Torres Strait Islander community by:

- a) developing and implementing FASD diagnostic tools and therapies in partnership with Aboriginal and Torres Strait Islander health organisations;
- b) recognising FASD as a registered disability; and
- c) conducting a comprehensive inquiry into FASD's prevalence in the community and within the justice system.³⁵

³⁵ Adapted from the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (2011) *op cit*, recommendation 4.56, 102-103.

3. POLICE

The relationships and interactions between police and the Aboriginal and Torres Strait Islander community are significant to any Inquiry into the justice system as police are generally the first point of contact. There are well-documented examples of Aboriginal and Torres Strait Islander-police relations that reveal distrust and fear. The rate at which Aboriginal and Torres Strait Islander peoples come into contact with the criminal justice system is affected by the over-policing of the Aboriginal and Torres Strait Islander community. There is a critical need for improved cultural awareness training of police in addition to training regarding the existence and symptomology of cognitive disabilities and the best options for dealing with offending behaviour resulting from such conditions.

Alleged offenders are rarely aware of their rights in custody, whilst victims of crime are often not taken seriously, or prematurely judged with regard to their ability to make a reliable witness in court

It is internationally recognised that police significantly attend to, and make decisions regarding, ‘psychiatrically disturbed people behaving in an anti-social or offender manner’ and with this comes issues such as:

- Lack of police training in recognising and dealing with mental health disorders; and
- Individuals not being accepted into the mental health system either due to lack of space or the person being deemed not ill enough and should therefore be handled by the criminal justice system.³⁶

It is not surprising then that there is an international trend for people with a cognitive disability to experience a higher incidence of being held on remand or bail than for those without a cognitive disability.³⁷ This trend is in line with what VALS staff experience when dealing with clients. Whilst working as an Aboriginal Liaison Officer, a current VALS staff member had a client who was brought into the cells by police who believed the client to be under the influence of alcohol. She knew the client had an ABI and his presentation (ataxic gait; speech and cognitive functioning) may have presented like he was intoxicated, whilst in fact he was not.

³⁶ Baldry, Dowse and Clarence (2011), 5.

³⁷ Lyall (1995) in Baldry, Dowse and Clarence (2011) op cit.

3.1. INTERVIEWS

Research of relevant Australian literature and consultation with a range of relevant people and organisations in the Aboriginal and Torres Strait Islander disability, justice and related sectors has found that police interviews can yield unreliable statements if the police are not skilled in communicating with a person with a cognitive disability or if an individual lacks appropriate supports.³⁸ Aboriginality is identified as an additional source of disadvantage in this context in a number of ways. For example, there is a very problematic history to the relationship between Aboriginal and Torres Strait Islander peoples and the police.³⁹ In relation to these findings, it was recommended that:

- a) rights-based support networks be developed for Aboriginal and Torres Strait Islander people with cognitive disabilities who are being interviewed by police;
- b) there be enhanced access to face-to-face legal advice for Aboriginal and Torres Strait Islander people with cognitive disabilities in police interviews;
- c) police skills in identifying and interviewing Aboriginal and Torres Strait Islander people with cognitive disabilities be developed;
- d) police practices take better account of the impact of cognitive disability including:
 - The time limit a person can be held in custody after arrest;
 - The process of interviewing victims of crime; and
- e) police build respectful and consultative relationships with Aboriginal and Torres Strait Islander communities.⁴⁰

³⁸ Ibid.

³⁹ Id.

* Simpson and Sotiri (2004) op cit, v.

⁴⁰ Ibid, v.

3.2. DIVERSION

Police have discretion with it comes to diversion such as through a caution or a conference. These powers determine who is and who isn't likely proceed through the criminal justice system.⁴¹ Diversion should always be considered for those experiencing a cognitive disability, especially in the case of a juvenile. This option is undermined by the lack of training police receive in identifying or confirming these disabilities. VALS designed and ran a police cautioning and diversion program for young Koories following research that showed Koori young people were being cautioned at a lower rate than non-Koories. This program was evaluated as successful yet funding for this program recently ceased and is now being run internal to Victoria Police. Formal cautioning and diversion has therefore been shown to provide data, and hopefully equity, in the way police discharge their duties and discretion. It would be interesting to investigate how current systems could adopt a cautioning and diversion scheme in circumstances where there is a potential cognitive disability.

3.3. VICTIMS & WITNESSES

VALS is aware of scenarios that may eventuate for a person with a cognitive disability as a victim whereby they are not considered a reliable source of evidence and so charges are not laid and/or a witness with a cognitive disability is considered similarly by police. By extension, if police do in fact lay charges, there is a likelihood that for similar reasons the evidence of a victim or witness with a cognitive disability will be found as unreliable and the case dismissed.

In cases where a victim with a cognitive disability are considered to be incapable of participating in the justice system, it has been argued that this can lead to further fear and isolation of the victim and a greater risk of assault.⁴² This is not a fair or equitable outcome.

3.4. INDEPENDENT THIRD PERSON PROGRAM

The Independent Third Person (ITP) program is designed to assist Victorians with a disability who

⁴¹ R Tanimu (2010) in House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (2011) op cit.

⁴² Jonathan Goodfellow and Margaret Camilleri, 'Beyond Belief, Beyond Justice: The difficulties for victims, survivors with disabilities when reporting sexual assault and seeking justice' *Disability Discrimination Legal Service* (2003) at www.wwda.org.au/beyondbelief1.pdf

are interviewed by, or need to make a formal statement to, police.⁴³ This includes a person with a cognitive disability or a mental illness. The coordinator of the ITP program has expressed concern at the perceived low uptake of the program by Koori people with a disability.⁴⁴

A 2003 study conducted in the Goulburn Valley region in Victoria noted the following:

- There is limited uptake of the ITP program by the disabled Koori community.
- There is a lack of understanding within the Koori community about concerning the definition of disability as it is relevant to the ITP program.
- The Koori community is not aware of the ITP program and does not recognise the program's advertising materials as relevant to their community as it does not depict Koori culture of give consideration to varied literacy levels.
- There is a lack of understanding of the ITP program amongst staff who work in the justice sector.
- There appears to be inconsistent identification of a person with a disability by police that then qualifies a person for an ITP interview. This study found that out of a random sample of 12 Koori ITP interviews, only 5 of these peoples disability status had been registered on the Law Enforcement Assistance Program (LEAP) database.
- Community Justice Panel (CJP) members who are present during police interviews with members of the Koori community lack sufficient knowledge of the ITP program and the distinction between their role and that of the ITP.
- Of the 12 Koories with a disability (identified as intellectual disability, depression, schizophrenia and behavioural disorders and use of volatile solvents that can cause a permanent ABI) that had appeared before the Koori Court between February 2002 and

⁴³ Jacqui Shultz, Michele Barry and Cameron Barnes, 'Koories and Disability: The Double Disadvantage. The Utilisation of the Independent Third Person (ITP) Program in the Goulburn Valley Koori Community,' Department of Justice (Office of the Public Advocate) and La Trobe University (2003).

⁴⁴ Id.

May 2003, none of these officers had benefited from an ITP 'and it remains unclear why they were not identified as having a disability before their Court appearance.'⁴⁵

The study recommended that:

- the statutory agency mandated to promote the interests, rights and dignity of Victorians with a disability, the Office of the Public Advocate (OPA), needed to review Victoria Police training to ensure that all police officers are able to identify disability in accordance with their operating procedures.
- policy and procedures be implemented to ensure that all relevant information gathered by courts and the police on the disability status of offenders is recorded.⁴⁶ (This recommendation was subsequently escalated a Koori Court Magistrate.)
- CJP members receive training by the OPA regarding the role of the ITP and on the definition of disability specific to the ITP program.

VALS is interested in the status of the above recommendations and how similar concerns and recommendations apply to the Youth Referral and Independent Person Program (YRIPP).

⁴⁵ Schultz, Barry and Barnes (2003) op cit, 16.

⁴⁶ The study noted that when interviewing a person with a disability, police are required to register the person's disability status on the Law Enforcement Assistance Program (LEAP).

4. LEGAL REPRESENTATION

Research shows that given people with a mental illness tend to have lower levels of income, they are likely to be reliant on the increasingly stretched services of legal aid services, Community Legal Centres, Aboriginal and Torres Strait Islander Legal Services and pro bono legal services.⁴⁷ While people with a mental illness often require longer appointments with their lawyers, the limited resourcing of Community Legal Centres, Legal Aid and Aboriginal and Torres Strait Islander Legal Services makes this extremely difficult. Noting that the current Terms of Reference are concerned with cognitive disability rather than mental illness, we argue that the same or similar problems relating to legal representation are inherent.

The recent *Doing Time – Time for Doing* report noted that Aboriginal and Torres Strait Islander Legal Services (ATSILS) play a critical role in the experience of Aboriginal and Torres Strait Islander peoples in the justice system as they provide culturally appropriate services and advice to offenders, victims and their families.⁴⁸ The importance of ATSILS has been noted in the report by the Law Council of Australia, Victoria Legal Aid and others who acknowledge that ATSILS have been found to be more effective than mainstream legal services.

While it is argued that mainstream Legal Aid Commissions are underfunded, ATSILS are even more under-resourced and more over-stretched. *Doing Time- Time for Doing* acknowledges that ATSILS funding has remained constant – becoming reduced in real terms – for over ten years while funding for mainstream legal services has more than doubled in the same period.⁴⁹ In addition to ATSILS practitioners having higher workloads than their mainstream counterparts, this has led to:

- some ATSILS not being able to provide some services to their clients;
- undermined effectiveness in terms of having the capacity to provide quality services due to resources; and
- subsequent problems in recruiting and retaining staff.

⁴⁷ M Karras et al, 'On the Edge of Justice: The Legal Needs of People with a Mental Illness in NSW, Volume 4' Law and Justice Foundation NSW (2006).

⁴⁸ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, (2011) op cit.

⁴⁹ Aboriginal Legal Rights Movement (2010) in House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (2011) Ibid.

The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs has found the lack of adequately staffed legal aid resources available to Aboriginal and Torres Strait Islander people involved in the criminal justice system to be ‘a cause for concern’.⁵⁰

VALS also notes that there is lack of availability of appropriate legal services service for a civil or family law issues in general. Traditionally, civil and family law has been under-funded in the Legal Aid Commission, Community Legal Centre and Aboriginal Legal Service sector. For instance, VALS’ funding only provides for two family law solicitors (one of which primarily deals with child protection matters only). The third family law solicitor is seconded from Victoria Legal Aid. VALS has one civil law solicitor who is expected to cover the civil law needs of the entire State. If services such as VALS are stretched to provide civil law and family law assistance in general, then it is foreseeable that a person with cognitive disability who has needs of additional assistance may not receive the appropriate level of service.

Recommendation 3: In recognising the direct relationship between the jurisdiction of the state government on justice issues, the Victorian Government consider their potential role in the funding of VALS in order to achieve parity with Victoria Legal Aid.

⁵⁰ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (2011) op cit, 213. This topic relates to indexation which is well captured for the NGO context in The Allen Consulting Group, ‘NGO price Indexation: Report to the Victorian Council of Social Services’ (2005).

5. COURTS & TRIBUNALS

The lack of data and research on police, people with cognitive disability and the subsequent contact with courts across Australia is apparent. NSW, however, has some interesting data showing that up to 23% of people appearing before NSW local courts on criminal charges likely have a severe to mild or borderline intellectual disability.⁵¹ A much higher percentage are estimated to have a mental illness with many having dual diagnosis.⁵²

People with a cognitive disability find giving evidence stressful and difficult, particularly when faced with tactics used to undermine their evidence.

There are many elements of the court process that pose significant difficulties for Aboriginal and Torres Strait Islander peoples with cognitive and other disabilities, such as the:

- formal and intimidating environment;
- use of complex and inaccessible legal language;
- speed at which cases are heard;
- absence of adequate time with legal representatives;
- frequent lengthy period of time between being charged with an offence and the court hearing;
- the absence of Aboriginal and/or Torres Strait Islander support workers; and
- the need for training about disabilities for all court staff including judges and magistrates.⁵³

Furthermore, both the victims and witnesses may experience the following as identified by Goodfellow and Camilleri:

- difficulties in understanding the law and legal processes including the language used;
- following events;
- recalling and describing assaults (events) particularly under pressure and when being cross-examined.⁵⁴

People with a cognitive disability find giving evidence stressful and difficult, particularly when faced with tactics used to undermine their evidence. It has been highlighted that people may become

⁵¹ New South Wales Law Reform Commission (1993) in Baldry, Dowse and Clarence (2011) op cit.

⁵² Id.

** VALS Criminal Law Solicitor.

⁵³ Simpson and Sotiri (2004) *op cit*, vi.

⁵⁴ Goodfellow and Camilleri (2003) op cit.

flustered during cross-examination and the cross-examiner's questioning technique may emphasise the person's disability.⁵⁵ This form of cross-examination is inherently unfair for a person with an intellectual or other disability because he or she is less able to observe what the cross-examination is attempting to do.⁵⁶ In this way cross examination tactics can make a victim or witness feel that they are on trial themselves.

There are also multiple barriers for clients with a cognitive disability involved in family law matters as the following case study highlights:

A mother with an intellectual disability and her children are victims of family violence by the husband/father. The police are called to an incident and involve the Department of Human Services. The children are removed from the home and child protection proceedings commence. VALS acts for the mother, however the mother hides her intellectual disability from the solicitor. It is only after the Aboriginal Family Decision Making process has taken place and the matter is brought before the court that it becomes apparent to the VALS solicitor and the court that the mother has an intellectual disability and does not understand what has transpired so far.

In the scenario above it is unlikely that the mother received the appropriate service and support because it was not initially clear to the solicitor, nor the court, that she had an intellectual disability. If the mother did not have a lawyer she would have been even more vulnerable as in the family law context, people who do not have legal representation are less likely to enter negotiations and more likely to have a judgments entered against them.⁵⁷

As noted by Tom Calma, ATSILS staff have expressed a need for practical training aimed at magistrates and legal professionals to increase their awareness of issues concerning the prevalence and signs of mental health and cognitive disabilities to promote a basic understanding.⁵⁸

⁵⁵ A Gray, S Forell S & S Clarke, 'Cognitive impairment, legal need and access to justice' *Justice Issues Paper 10, Law and Justice Foundation of NSW* (2009) at:

www.lawfoundation.net.au/ljf/app/4016D540ECE363B3CA25756F001DEE70.html

⁵⁶ Id.

⁵⁷ Louis Schetzer & Judith Henderson, 'Access to justice and legal needs. Stage 1: public consultations' *Law and Justice Foundation of NSW* (2003) at

[http://www.lawfoundation.net.au/ljf/site/articleIDs/EA0F86973A9B9F35CA257060007D4EA2/\\$file/public_consultations_report.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/EA0F86973A9B9F35CA257060007D4EA2/$file/public_consultations_report.pdf)

⁵⁸ Calma (2008) op cit.

5.1. SERVICES, ASSESSMENT & ORDERS

It is the experience of VALS' Criminal Law Division that there is currently a significant difference in the services available to individuals with a cognitive disability and individuals with an ABI. This is despite the fact that there are many common difficulties faced by individuals with these conditions such as trouble remembering dates, appointments and the like.

For instance, a client with a cognitive disability such as an intellectual impairment can be assessed for a Justice Plan which is a special type of Community Based Order (CBO)

tailored specifically for people that will have trouble remembering appointments and may therefore be at risk of breaching a generic CBO by way of non-compliance. Clients with an ABI have no such option despite the fact that their condition gives rise to similar difficulties in completing a CBO.⁵⁹

VALS' Prisoner Support Worker/Client Service Officer argues that clients cannot understand their rights when a cognitive impairment is present.

Memory in this area can be greatly affected for clients with an acquired brain injury or cognitive disability. They may need information repeated numerous times and may be concrete or rigid in their thinking and have difficulty making change.

She notes that she is often required to break down information for clients regarding their rights and obligations in relation to various court orders.

Some clients are not able to process information (executive functioning impaired) such as four instructions at one time. I have witnessed clients advising they have understood their rights and obligations. When asked to repeat or explain using their own words the clients have not absorbed relevant information.

In terms of cognitive assessments, it is the experience of our Criminal Law Division that there is often significant delay involved which is particularly concerning for clients in custody.

A person with an intellectual disability can be assessed for a special type of Community Based Order tailored for a person that may be at risk of breaching ...

A person with an ABI has no such option.

⁵⁹ VALS notes that the current CBO system in Victoria may undergo change in the near future with debate on the proposed Community Corrections Order to recommence 29 September 2011. It is likely that the CBO system will be replaced with the new Community Corrections Order system.

VALS' Prisoner Support worker/Client Service Officer believes that early intervention to allow for case planning, case management and ongoing support is crucial:

I became aware of a client who has a diagnosed ABI and was unable to attend a family funeral due to his behaviours as the staff were not confident that they would be able to support him or manage behaviours should they arise during his attendance at the funeral.

She argues that clients with a possible cognitive disability need early assessments and referrals. Some waiting lists for assessments and case management are long and need to be made at the earliest time. Ongoing support for these clients is crucial as the difficulties and challenges they face can impact significantly in many areas of their lives such as: legally; in relationships with partners, family and community; interaction with others in 'a socially appropriate manner'; work; housing; education; health; and so on. Earliest supports and intervention have shown to have more positive impact and greater chance of reducing offending behaviours or interaction with the justice system.

It is my experience that clients I have dealt with are sometimes not aware of their cognitive impairment. Ongoing case management can provide clients with culturally appropriate and sensitive supports.

Housing is sighted by VALS staff as a significant area of difficulty, especially for clients that are transient and require stability or a stable address to be bailed and paroled to etc. VALS' Prisoner Support Worker/Client Service Officer says that this is particularly difficult for clients with cognitive disabilities.

Placing clients with a cognitive disability in emergency housing is difficult due to lack of services and appropriately trained staff. Many clients and families are not aware of services available through the Department of Human Services such as: registering on the DSR or Individual support packages that could assist with case management; and services and respite for both the individual and family. The practical assistance that can be provided and is not presently been made available can make a significant difference to the individual and family members who are most times struggling to assist, understand and support the person.

5.1.1. Postcode justice

A recent report has examined the equity in the administration of the law in regional communities through the courts and tribunals and associated services. *Postcode Justice*⁶⁰

⁶⁰ Richard Coverdale, 'Postcode Justice: Rural and Regional Disadvantage in the Administration of the Law in Victoria' Centre for Rural and Regional Law and Justice, Deakin University (July 2011).

identifies factors that combine to create disadvantage for people living in rural and regional Victoria when using justice system services. This research highlights a number of issues relevant to the current Terms of Reference such as availability of appropriate services and supports; the operation of the courts; barriers to the justice system to enhance participation; and responses that address the circumstances of the offender and offence concerned.

Postcode Justice found that while therapeutic jurisprudence in the form of problem solving courts is a model that has been embraced in Victorian courts, it relies on a level of court based programs and local support services that are not often available to smaller rural centres.

Limited and inconsistent roll-out of programs such as CISP (Court Integrated Services Program) and Credit Bail; and Specialist Magistrates' Courts such as the Family Violence Diversion and the Drug Court, is likely to result in inequitable outcomes for court participants in regional centres not covered by the program.⁶¹

Postcode Justice also highlights the lack of local human service agencies in rural and regional areas and how this affects justice system outcomes. For instance, the limited availability of mental health, disability and other services in rural and regional areas of Victoria not only increases the likelihood of involvement in the criminal justice system but also placement in remand and recidivism.

5.1.2. Specialist courts and related services

The Royal Commission into Aboriginal Deaths in Custody and the Victorian initiatives developed in response to its findings coincided with broader philosophical changes within the Australian criminal justice system.⁶² As a reflection of dissatisfaction with mainstream criminal justice processes and a need for more collaborative, inclusive and participatory delivering justice, a number of alternative, non-adversarial approaches to addressing criminal behaviour have emerged over the past two decades, including therapeutic, restorative, preventative and problem-solving innovations.⁶³

Examples of specialist and problem-solving courts include drug courts, community courts, mental health courts, domestic violence courts and the Koori courts.

⁶¹ Coverdale (2011) op cit.

⁶² Sentencing Advisory Council, 'Sentencing in the Koori Court Division of the Magistrates' Court: A Statistical Report' (2010).

⁶³ Michael King, Arie Freiberg, Becky Batagol and Ross Hyams, 'Non-adversarial Justice' (2009) in Sentencing Advisory Council (2010) Ibid.

These innovations seek to shift the court's focus from addressing the criminal behaviour of the offender only, to addressing the factors underlying the behaviour. The emergence of Indigenous courts, alongside a number of these other courts, reflects a 'recognition that the traditional adversarial system, in structure, style and service delivery' may not be appropriate for all offenders.⁶⁴

Koori Court

The Koori Court has been created under the *Magistrates' Court Act 1989* and operates as a division of the Magistrates' Court. The Koori Court is a sentencing court that is available to Aboriginal and Torres Strait Islander peoples in Victoria who plead guilty. There is also a Children's Koori Court was established under the *Children, Youth and Families Act 2005*.⁶⁵

The Koori Court provides an informal atmosphere and allows greater participation by the Victorian Aboriginal and Torres Strait Islander community in the court process. This includes not only the offender and their families, but also Koori Elders or Respected Persons and the Koori Court Officer.

One of the aims of the court is to reduce cultural alienation from the court and ensures sentencing orders are appropriate to the cultural needs of Koori offenders, and assists them to address issues relating to their offending behaviour.⁶⁶ The Koori court is less formal than the mainstream court and participants talk in 'plain English' rather than using technical legal language.

The Koori Court aims to:

- increase Koori ownership of the administration of the law;
- increase positive participation by Koori offenders;
- increase the accountability of the Koori offenders, families and community;
- encourage the accused to appear in court;
- reduce the amount of breached court orders;

⁶⁴ King et al (2009) in Sentencing Advisory Council (2010) Ibid.

⁶⁵ The Koori Court is currently located at Bairnsdale, Broadmeadows, Latrobe, Mildura, Shepparton, Swan Hill and Warrnambool Magistrates' Courts. Children's Koori Courts are also located in Melbourne and Mildura.

⁶⁶ The Magistrates' Court of Victoria, 'Guide to Court Support & Diversion Services' (2011).

- increase community awareness about community codes of conduct and standards of behaviour; and
- explore sentencing alternatives prior to imprisonment.⁶⁷

In light of our earlier discussion around the difficulties inherent in people with cognitive disabilities in the court environment, the nature of the Koori Court and the supports and services attached are likely to benefit these individuals. VALS is unaware if the Koori Courts are currently capturing data with specific regard to cognitive impairment (other than that identified through the Court Integrated Services Program (CISP)).

Koori Liaison Officer Program

The Koori Liaison Officer (KLO) Program became operational in 2002 as a result of the Victorian Aboriginal Justice Agreement which was brought about by recommendations from the Royal Commission into Aboriginal Deaths in Custody. The program aims to address the over-representation of Koori people in the justice system by working with Koori accused when they enter the court system.⁶⁸ This program also aims to help Koori people to maximise their chances of rehabilitation through culturally appropriate intervention.

The KLO Program has a coordinator and liaison officer and operates as part of CISP. Any party to a court proceeding can access the KLO Program, including applicants, respondents and accused from all jurisdictions of the Magistrates' Court, such as the Family Violence Court Division.

One of the objectives of the KLO Program is to consult, negotiate and liaise with government and non-government organisations to coordinate service delivery and promote knowledge of issues relating to Koori persons.⁶⁹ VALS therefore refers the current Inquiry to the expertise of the KLO Program as to how the justice system can best support Aboriginal and Torres Strait Islander peoples in contact with the justice system from their perspective.

Assessment and Referral Court List (ARC)

The Assessment and Referral Court List (ARC) is a specialist court list to meet the needs of accused persons who have a mental illness and/or a cognitive disability with the aim to address underlying factors that contribute to offending behaviour and reduce the number of offenders with mental impairments and other conditions entering the prison system. Located at

⁶⁷ Id.

⁶⁸ Id.

⁶⁹ Id.

Melbourne Magistrates' Court, ARC works collaboratively with CISP which provides case management.

VALS made a submission⁷⁰ in response to the *Magistrates' Court Amendment (Mental Health List) Bill 2009* (Vic) which proposed the form that ARC would take. In this submission VALS supported a court list that could potentially reduce the number of Aboriginal and Torres Strait Islander peoples inappropriately incarcerated. VALS therefore advocated for the adoption of a problem solving approach to justice utilising therapeutic jurisprudence elements to adjudication, such as:

- a collaborative approach over and adversarial approach;
- people-oriented;
- needs focused;
- common-sensical; and
- forward focused and plan-based (rather than relying on precedents)⁷¹

VALS' submission also considered the role of the offender in a therapeutic jurisprudence approach to court proceedings. We argued for a move away from the offender playing a passive role and instead being supported into a more active role. We also noted the importance of self-determination being emphasised through an active role of the offender in therapeutic jurisprudence processes in a number of ways, including:

- giving the offender the option of participating in a diversionary program;
- encouraging the offender in the setting of goals and treatment strategies;
- allowing the offender the opportunity to report on their own progress; and
- for self-determination to be achieved in the ARC list, formal involvement of Elders and/or Respected Persons and/or other members of the Koori community must be present in the development of the ARC framework and operation.

While VALS is pleased at the introduction of the ARC list, we note that there are limitations to its scope due to its eligibility criteria:

⁷⁰Victorian Aboriginal Legal Service Co-operative Limited, 'The Victorian Aboriginal Legal Service Co-operative Limited's response to the *Magistrates' Court Amendment (Mental Health List) Bill 2009*' (2009)

http://vals.org.au/static/files/assets/3257b7cb/Magistrates_Court_Mental_Health_List_Bill_Sub_Final.pdf

⁷¹E Newitt and V Stojcevski, 'Mental Health Diversion List: Evaluation Report' Magistrates Court of Tasmania (2009) at

www.magistratescourt.tas.gov.au/_data/assets/pdf_file/0003/127029/Mental_Health_Diversion_List_-_Evaluation_Report_-_May_2009.pdf

- The accused is charged with a criminal offence that is not a violent, serious violence or serious sexual offence as defined by section 6B(1) of the Sentencing Act 1991;
- The accused has one or more of the following:
 - a mental illness
 - an intellectual disability
 - an acquired brain injury
 - autism spectrum disorder
 - a neurological impairment, including but not limited to dementia
- The accused has one or more of the above, which causes a substantially reduced capacity in at least one of the areas of self-care, self-management, social interaction or communication;
- The accused would benefit from a problem-solving court process and an individual support plan; and
- The accused must consent to participate in the List.⁷²

If the participant pleads guilty at the end of their participation, they will be sentenced within the List. If the participant pleads not guilty her/his case will be returned to 'mainstream' court for a contested hearing. This therapeutic jurisprudence option is therefore only available to those who plead guilty and therefore limits therapeutic jurisprudence to those do not plead guilty and face the less holistic and person-centred mainstream court. This has obvious negative consequences for people with cognitive disabilities who do not plead guilty. A similar restriction applies to those eligible to appear before the Koori Court.

Furthermore, the fact that the ARC list is not available to sexual offences (depending on what is deemed 'serious') is also problematic for people experiencing certain disabilities such as FASD as it was earlier noted that some people with this disability display inappropriate sexual behaviours.

Court Integrated Services Program (CISP)

Victorian Magistrates' Court CISP program is a multi-disciplinary approach to assessment and referral to treatment of clients prior to sentencing. A review of the CISP program noted a

⁷² Magistrates' Court of Victoria, 'Assessment and Referral Court List' (2011) at www.magistratescourt.vic.gov.au/wps/wcm/connect/justlib/magistrates+court/home/court+support+services/magistrates+-+assessment+and+referral+court+list

general issue in supporting clients with acquired brain injury (ABI)⁷³ whereby the level of clients with ABI exceeded demand. CISP believes the high rate of ABI in the justice client population indicates the need for a comprehensive strategy to address this issue.⁷⁴ At 2010, 10% (174) clients were identified as having indicators of ABI and were referred for CISP-funded neuropsychological assessment.⁷⁵

At 2010, clients that identified as Aboriginal and/or Torres Strait Islander comprised of 8.1% of all CISP clients. This figure is representative of the general over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system but also highlights a significant uptake of program by Aboriginal and Torres Strait Islander peoples.⁷⁶

On the whole, what the specialist courts and affiliated services that incorporate therapeutic jurisprudence and/or restorative justice principles recognise is the need for greater flexibility in process and timeframes to address areas of rigidity within the system.

Both inside and outside the specialist court jurisdiction, general action areas identified to improve the interaction between people with a cognitive disability and the courts include:

- a) Development of networks of trained support people for Aboriginal and Torres Strait Islander defendants and witnesses;
- b) Development of the skills of judges, lawyers and other court staff in identifying cognitive disability and responding to the impact of a cognitive disability in the court room;
- c) Greater use of plain language in court proceedings;
- d) Defendants be afforded substantial time with legal representatives prior to the court case so that a disability is recognised and appropriately responded;
- e) Enhancing the availability of interpreters if a disability is present and the person has English as a second language; and

⁷³ Several indicators of ABI include head injury, periods of unconsciousness, inhalant use, long term alcohol and drug use.

⁷⁴ Stuart Ross, 'Evaluation of the Court Integrated Services Program – Final Report,' Melbourne University (2009).

⁷⁵ Courts and Tribunals, Victoria Department of Justice, 'Courts Integrated Services Program: Tackling the causes of crime. Executive Summary Evaluation Report' (2010)

⁷⁶ Courts and Tribunals, Victoria Department of Justice (2010) op cit. It is also worth noting that there is an Aboriginal Liaison Officer service within CISP.

- f) Particular examination of the implications for Aboriginal and Torres Strait Islander people with cognitive disabilities of delays in court proceedings.⁷⁷

It has been suggested, however, that on their own, specialist court diversions such that utilise the model of therapeutic jurisprudence do not appear to have reduced the numbers of people with mental illness and cognitive disability in prison.⁷⁸ This is due to limited long-term success with keeping people with mental illness and cognitive disability from arrest and therefore reoffending.

This has been found due to:

- poor planning;
- inadequate referrals;
- lack of commitment from and integration with psychiatric services;
- inadequate resources; and
- lack of appropriate accommodation.⁷⁹

Victims of Crime Assistance Tribunal (VOCAT)

Aboriginal and Torres Strait Islander witnesses with cognitive disabilities also require assistance and support throughout the court process, particularly in the case of victims of crime. Aboriginal and Torres Strait Islander people experience violence at a rate well above their non-Aboriginal and Torres Strait counterparts. Rates of assault-related violence towards the Aboriginal and Torres Strait Islander population are typically three to four times those of the non-Aboriginal and Torres Strait Islander population.⁸⁰ Rates of (reported) Aboriginal and Torres Strait Islander sexual violence victimisation are also higher than the non-Aboriginal and Torres Strait Islander population.⁸¹

In our submission to the Department of Justice regarding a review of the Victims of Crime Compensation Scheme, VALS agreed with the principle that the system should be equitable between victims who have suffered similar forms of harm, however we suggest that the unique

⁷⁷ Simpson and Sotiri (2004) *op cit*.

⁷⁸ Baldry, Dowse and Clarence (2011) *op cit*.

⁷⁹ James (1999); Baldry and Maplestone (2003); Rowlamds et al (1996), in Baldry, Dowse and Clarence (2011) *op cit*.

⁸⁰ Steering Committee for the Review of Government Service Provision, 'Report on Government Services' (2009).

⁸¹ Id. VALS would like to stress that the term "victim" is used when referring to people that have experienced crime. VALS recognises the importance of terminology and acknowledges the implications of using the term "victim" in place of what many regard is the more appropriate term: "survivor". The utilisation of the former is for consistency purposes only.

and distinct needs of Aboriginal and Torres Strait Islander victims of crime must always be taken into consideration.⁸² We also noted that in order for victim compensation to be effective in terms of access and needs, it is critical that research is undertaken to reveal how the system engages Aboriginal and Torres Strait Islander peoples, especially victims of domestic violence, children and young people, and those with a mental illness or impairment. We recommended that this research should also consider the access to assistance and award issues as they apply in the long-term.

Hurdles that specifically affect Aboriginal and Torres Strait Islanders in translating their rights as victims of violent crime into practice result from:

- fear of reprisal and/or shame (especially for victims of domestic/sexual abuse);
- fear of being disbelieved;
- fear that nothing will be done;
- a lack of access to legal advice/representation; and
- a lack of knowledge about their rights and entitlements and/or absence of knowledge of the existence and availability of a compensation scheme.⁸³

VALS has argued for the maintenance of VOCAT's capacity to respond to specific types of victimisation and that this relies on the ability of VOCAT to retain a measured level of flexibility in addition to:

... a thorough understanding and appreciation of the victim's (and offender's) familial, social, cultural and economic circumstances (past and present). While aiming to be specific, the system should simultaneously and symbiotically operate as holistic in its dealings and understandings.⁸⁴

This should include thorough understandings of cognitive disabilities and the effect on the behaviour and experiences victim and/or the offender and their family.

Victoria is fortunate to have a Koori VOCAT list. While this list is resource intensive, the time, money and resources devoted to this list to address Aboriginal and Torres Strait Islander victim of crime issues is warranted due to the complex needs inherent in many of the situations

⁸² Victorian Aboriginal Legal Service Co-operative Limited, 'Submission to the Department of Justice Victoria in response to the Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards' (2010) at http://vals.org.au/static/files/assets/9acc07f3/VOC_Review_Sub_Final.pdf

⁸³ Ibid.

⁸⁴ Ibid.

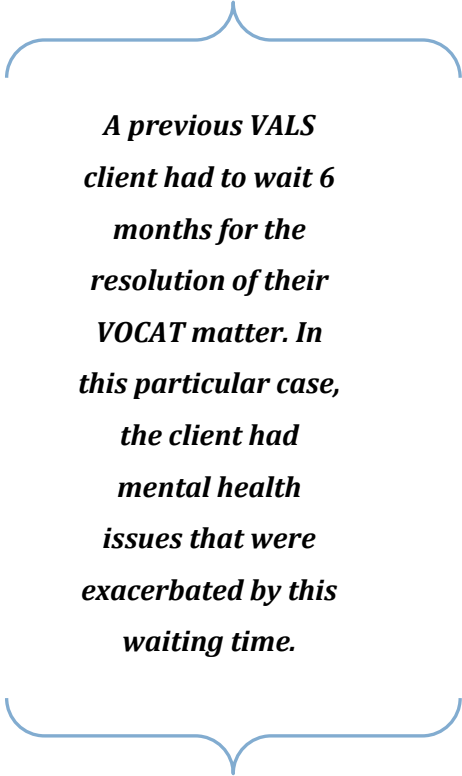
generally, and more so when a cognitive disability or mental illness is present for one or more of the parties.

The VOCAT Coordinating Committee of the Magistrates' Court's consideration in 2004 of the adequacy of the Tribunal's response to Aboriginal and Torres Strait Islander applicants was an important turning point. The Koori VOCAT List is a product of Tribunal's strong recognition of the historically fractured relationship between Aboriginal and Torres Strait Islander people and their experiences with all aspects of the justice system.⁸⁵ It is encouraging to see that the consistent use of less formal and more inclusive procedures, as seen and acknowledged in the Koori Court, were decided to be utilised.

VALS' Civil Law Section has mainly positive experiences with the current organisational arrangements for the Koori VOCAT List. This is especially the case of the registrar dedicated solely to matters involving Aboriginal and Torres Strait Islander victims. It is envisaged that further changes along the same lines of specialisation and enhancement of operation and service, such as dedicated registrars for other groups that may have difficulty in accessing VOCAT, be considered. This may include applicants who have a cognitive disability.

The advantages of the Koori VOCAT list are complimented by the role of the Aboriginal Liaison Officer (registrar) as the central intake person to liaise between the Tribunal and Aboriginal and Torres Strait Islander applicants. It should also be also noted that the Victims Support Agency (VSA) created a position for a Koori worker that expanded into two positions as part of an 'Indigenous Victims of Crime Support Strategy'.

In terms of getting compensation into the hands of victims of crime, VALS' Civil Law Solicitor experiences VOCAT as being in many ways more effective than civil action. This is mostly because the victim does not have to rely on the offender's income. A common disadvantage to VOCAT, however, is time delays. A previous VALS client had to wait 6 months for the resolution of their VOCAT matter. In this particular case,



A previous VALS client had to wait 6 months for the resolution of their VOCAT matter. In this particular case, the client had mental health issues that were exacerbated by this waiting time.

⁸⁵ Victorian Aboriginal Legal Service Co-operative Limited (2010) op cit.

the client had mental health issues that were exacerbated by this waiting time.

Another serious disadvantage mainly for women, especially Aboriginal and Torres Strait Islander women, is the potential for having to face their perpetrator at a hearing. This the potential to undermine the therapeutic benefit the Tribunal and the victim can also be traumatised by an increased likelihood of an adversarial encounter.

In the case of domestic violence victims, their perpetrator of violence is known to them and there may still be in contact with them (for example if they have children together). Therefore there exists the potential for retaliation and/or harassment. Women may be concerned that a recovery order will result in a new incident or an escalation of violence, or that retribution in other forms may occur, such as the withdrawal of child support.⁸⁶

Another difficulty in accessing VOCAT is highlighted by VOCAT Supervising Magistrate Susan Wakeling who identifies that a significant issue in accessing financial assistance and a symbolic expression by the State of the community's sympathy and condolence and recognition of their experience as a victim of crime is available subject to their participation and cooperation with a police investigation.⁸⁷

It is also worth noting that a determination on the eligibility for compensation is subject to past conduct and character to the scrutiny of a judicial officer. 'It is acknowledged by the Tribunal that the legal system has been experienced by many [I]ndigenous Australians as hostile and to be avoided'.⁸⁸

As is the case with ongoing cultural awareness training, education of magistrates sitting as a VOCAT member (or any court or tribunal) should include cognitive disability and mental illness components. These two forms of training are critical in the light of the fact that risk factors for victimisation are heavily related to systemic disadvantages for Aboriginal and Torres Strait Islander peoples in general, so therefore the risk factors are multiplied when cognitive disabilities are present for the victim and the offender.

⁸⁶ Barrett Meyering (2010) in Victorian Aboriginal Legal Service Co-operative Limited (2010) op cit.

⁸⁷ Susan Wakeling, 'National Indigenous Courts Conference: Initiatives within VOCAT for Koori Applicants' (2007) [www.aija.org.au/Ind%20Courts%20Conf%2007/Papers/VOCAT%20\(Wakeling\).pdf](http://www.aija.org.au/Ind%20Courts%20Conf%2007/Papers/VOCAT%20(Wakeling).pdf)

⁸⁸ Ibid, 6.

This level of victimisation needs to be appropriately addressed in the knowledge that Aboriginal and Torres Strait Islander people (especially juveniles) often experience repeat victimisation and are at risk of becoming offenders themselves.⁸⁹

In our 2010 submission to the Department of Justice⁹⁰ we provided some ideas for reform that could improve the operation of, and access to, VOCAT. VALS' Civil Law Solicitor suggested that one improvement could be to change the location of some VOCAT hearings. For example we asked what would change if a hearing was held in Mildura at an Aboriginal Co-operative (or equivalent) if it suited the victim and was in the victim's best interests.

Having a VOCAT hearing at a nearby and familiar location may be just as disadvantageous for one person as advantageous for another. For some, issues around stigmatisation (especially in smaller towns) and increased fear from engaging with VOCAT in a local area that may be near to, or associated with, the violent crime against them could be a significant concern. Others might be more inclined to attend a place that they know and are comfortable with. In addition, a Co-operative would be useful in terms of services and assistance as many are already linked in and connected with local supports and can provide culturally appropriate referrals and the like.

Drawing on VALS' submission to the Victim Support Agency in response to the *Victims' Charter Community Consultation Paper*,⁹¹ it is argued that in relation to VOCAT (and other courts and areas of the justice system), that restorative justice has the potential to benefit the victim, and in turn the community, by:

- giving victims the opportunity to have a say, as a space is created for victims to voice their opinion, such as in the Koori Court. Empowerment means listening to a victim, not just giving them information;
- having the potential to be a healing experience which ultimately enables a victim to get on with their lives (or in rare cases reconcile with the offender, although it should not be an expectation that this will occur);

⁸⁹ Victoria Department of Justice, 'Young Victims Strategy: Helping young victims of crime get justice, get help, and get on with their lives' *Victims Support Agency* (2009).

⁹⁰ Victorian Aboriginal Legal Service Co-operative Limited (2010) op cit.

⁹¹ Victorian Aboriginal Legal Service Co-operative Limited, 'Submission sent to the Victim Support Agency in response to the 'Victims' Charter Community Consultation Paper' (2005) at http://vals.org.au/static/files/assets/478687d3/VALS_Submission_re_Victims_Charter_sent_071205.pdf

- having the potential to prevent victims in turn becoming offenders. Within the Aboriginal and Torres Strait Islander community there is a high rate of victims becoming offenders. Given the rate at which victims go on to be offenders themselves, if victims are satisfied by a restorative justice approach and their needs are met the possibility that they will go on to reoffend is potentially reduced;
- having the potential to avoid re-victimisation by the process. This contrasts with the criminal justice approach which is criticised as having a re-victimising effect. For instance, the fact that the Koori Court is more flexible than a mainstream court reduces the potential of re-victimisation. Having said this, there are risks of revictimisation via a restorative justice approach and this risk needs to be monitored;
- empowering the Aboriginal and Torres Strait Islander community, such as Aboriginal Elders and Respected Persons who are involved in the Koori Court. The involvement of the community in turn makes the process more meaningful or relevant for the Aboriginal and Torres Strait Islanders than a mainstream process.
- being a model that, whilst not providing a panacea for all social problems facing Aboriginal and Torres Strait Islander communities, has highly encouraging early signs; and
- Having the potential to address the concern of Tom Calma that we need to take a broad approach to victimisation and address systemic issues. Calma stressed the importance of recognition that:
 - crime victimisation feeds a vicious cycle in communities. The problems in the community are as much a result of exposure to violence and crime, as drivers of it. Crime victimization feeds into a broader pattern of trauma experienced by many Aboriginal and Torres Strait Islander people; and
 - the high levels of victimisation of Aboriginal and Torres Strait Islanders by Aboriginal and Torres Strait Islanders reflect a real crisis - a breakdown of

community and family structures and a deterioration of traditional, customary law and practices.⁹²

The same VALS submission suggested a Koori friendly VOCAT might be more equipped to deal with issues associated with Aboriginal and Torres Strait Islander victimization by addressing the following issues:

- The number of Aboriginal and Torres Strait Islander applications to the VOCAT is relatively low and this is inconsistent with what we know about the incidence of family violence in the Aboriginal and Torres Strait Islander community. This suggests there are barriers in the way for Aboriginal and Torres Strait Islanders to access VOCAT.
- A barrier arises for Aboriginal and Torres Strait Islanders to receive compensation due to their reluctance to report their victim status to police or seek assistance, such as with a mainstream service provider.
- A barrier arises for Aboriginal and Torres Strait Islanders, who have criminal records, to receive compensation. This issues relates to the trend of victimization leading to offending. In the Aboriginal and Torres Strait Islander community sometimes the separation between 'victim' and 'offender' is not clear at all. In reality many Aboriginal and Torres Strait Islander people, both men and women, in the criminal justice system are both offenders and victims.⁹³ VALS notes that the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power sections on Compensation (12-13) does not limit who compensation is available to.

Recommendation 4: Research be undertaken to reveal how the system engages Aboriginal and Torres Strait Islander peoples with mental illness and/or cognitive disabilities in the VOCAT context. This research should consider the possibility of alternative locations for VOCAT hearings.

Recommendation 5: Specialist training be provided to magistrates sitting at VOCAT specific to cognitive disabilities.

⁹² Tom Calma 'Addressing the needs of Aboriginal and Torres Strait Islander peoples as the victims of crime' *A Peaceful Coexistence - Victims Rights in a Human Rights Framework Conference* (2005) at www.humanrights.gov.au/about/media/speeches/social_justice/victims_of_crime_speech.html

⁹³ Calma (2005) op cit.

Recommendation 6: The Koori VOCAT list be evaluated in light of human rights standards and restorative justice principles.

Neighbourhood Justice Centre (NJC)

The NJC is a unique example of an attempt to approach court proceedings in a holistic way using the principles of restorative justice. VALS understands that the NJC has been positively evaluated and we recommend the current Inquiry look to the ways in which restorative justice oriented court can be expanded to benefit victims and offenders with a cognitive disability.

Alternative Dispute Resolution (ADR)

ADR is used in the following contexts:

- Family law as it relates to child protection, such as Aboriginal Family Decision Making, and mediation required before lodging court.
- Civil law as it relates to discrimination, such as proceedings with the Victorian Equal Opportunity and Human Rights Commission (which relates to the scenario below).

ADR, however, may not be appropriate when one party has a cognitive disability due to the difficulties in identifying and articulating their own interests and the inequality between the parties to the dispute. ADR is often put forward as a more accessible process than formal court proceedings for both Aboriginal and/or Torres Strait Islander peoples and people with a disability for reasons such as it being less culturally alienating than the courts and a generally more informal atmosphere. It has been reported, however, that people with an cognitive disability may not have the capacity to participate effectively in mediation processes due to the complexity of some of the laws and rules involved and a lack of available information and guidance. In particular, in a process which may not include a legal representative or advocate, it may be difficult for cognitively impaired people to identify what is in their best interest, understand the process and then pursue their interest through the process, without appropriate assistance and support.

Recommendation 7: The current Inquiry consider the expansion of restorative justice models such as the Neighbourhood Justice Centre, the Koori Courts and the Assessment and Referral Court List to provide greater access to, and better outcomes for, offenders and victims experiencing a cognitive disability.

Recommendation 8: The current Inquiry look at the availability and cultural accessibility of services attached to courts and tribunals to assist victims and offenders with cognitive disabilities.

6. CUSTODY & CORRECTIONS

Over 50,000 prisoners pass through the Australian correction system each year, and this number is growing. Aboriginal and Torres Strait Islander people comprise 2.5% of Australia's population⁹⁴ yet made up 43% of prison entrants in the Census and 35% of the prison population on June 30 2010.⁹⁵ It is well documented that this over-representation has been a trend for decades and can be attributed to economic, social and cultural factors such as poor education outcomes, unemployment, poor health outcomes including prevalence of chronic conditions including mental health disorders, substance abuse, lack of appropriate social supports

A recent report from the Australian Institute of Health and Welfare (AIHW) notes the higher incidence of mental health problems (including cognitive disorders) in the Australian prison population than the general population.⁹⁶ The AIHW notes that this has been attributed to factors including: a lack of, or poor access to, mental health services; the misconception that all people with a mental health problem are a danger to the public; the intolerance of many societies to 'difficult or disturbing behaviour'; and the failure to promote treatment, care and rehabilitation.⁹⁷

The AIHW found that almost one-third of prison entrants (31%) reported that they have a mental health (including cognitive) disorder.⁹⁸ They also note that non-Aboriginal and Torres Strait Islander prison entrants (38%) were more likely than Aboriginal and Torres Strait Islander prison entrants (23%) to have been told they have a mental health disorder and that this may reflect cultural differences in recognising mental health issues, and problems associated with the cultural appropriateness of mental health screening, assessment and diagnostic tool.⁹⁹

Traditionally the Victorian correctional system has taken a differential management approach for offenders who are known to have an intellectual disability where such individuals who may be vulnerable or at risk to self-harm are kept safe.¹⁰⁰ More recently Corrections Victoria have developed

⁹⁴ Australian Bureau of Statistics, 'Health services: Patient experiences in Australia' (2009) cat. no 4839.0.

⁹⁵ Australian Bureau of Statistics, 'The health and welfare of Australia's Aboriginal and Torres Strait Islander peoples' (October 2010). cat. no. 4704.0.

⁹⁶ Australian Institute of Health and Welfare, 'The health of Australia's prisoners 2010' (2011) at <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=10737420108>

⁹⁷ World Health Organisation (2008a) in Australian Institute of Health and Welfare (2011) Id.

⁹⁸ Specific data on Victoria is not available in this regard as Victoria (and New South Wales) did not participate in the 2010 Census.

⁹⁹ Heffernan et al. (2009) in Australian Institute of Health and Welfare (2011) Ibid.

¹⁰⁰ Department of Justice Victoria, 'Intellectual Disability in the Victorian Prison System: Characteristics of prisoners with an intellectual disability released from prison in 2003-2006' *Corrections Research Paper Series Paper No 2* (2007).

a Disability Framework that seeks to ensure safety and security while additionally promoting their active engagement with programs and services to reduce re-offending.¹⁰¹

Corrections Victoria now acknowledge the broad and complex characteristics of offenders with an intellectual disability such as: socioeconomic variables; education and employment; substance abuse; and offending behaviour. They further note that offenders with an intellectual disability are treated differently from “mainstream” offenders throughout the criminal justice system in the following ways:

- offenders with and intellectual disability are apprehended by police are arrested at twice the rate of non-intellectually disabled prisoners;
- re-arrest rates are higher for offenders with an intellectual disability;
- offenders with an intellectual disability are more likely to be remanded in custody than non-intellectually disabled offenders; and
- offenders with an intellectual disability are more likely to be sentenced to imprisonment.¹⁰²

Corrections Victoria also acknowledge that people with intellectual disability in prison who suffer mental and physical abuse by other prisoners, have disciplinary problems and face potential regression in the prison environment can often lead to serving part or all of their sentence in maximum security.¹⁰³

Research from Correction Victoria¹⁰⁴ found that between 1 July 2003 and June 2006, 7,805 individuals were released from prison with 102 registered with the Department of Human Services as having an identified intellectual disability. A significantly greater proportion of those with an intellectual disability were Aboriginal and/or Torres Strait Islander. Prisoners with an intellectual disability from the same study differed markedly from prisoners without an intellectual disability in their most serious offence type. Significantly more prisoners with an intellectual disability had property offences as their most serious offence (46.1%) than non-intellectually disabled prisoners (27%). Also, of the 306 prisoners with security ratings recorded at release, significantly more prisoners with an intellectual disability were classified as medium security (89%) than prisoners without and intellectual disability (62.3%). Interestingly there were differences between the two groups when looking at security ratings at discharge and the security level of the prison they were released from.

¹⁰¹ Id.

¹⁰² Cockram (2005) and Cockram and Underwood (2000) in Department of Justice Victoria (2007) op cit.

¹⁰³ Cockram (2005) in Id.

¹⁰⁴ Department of Justice Victoria (2007) op cit.

68 per cent of prisoners with an intellectual disability were released from a prison with a higher security rating than their individual rating (compared with 30 per cent for the non-intellectually disabled group). Therefore while the vast majority of prisoners with an intellectual disability were classified as medium security prisoners, 72 per cent of them were released from a maximum security prison.

Recommendation 9: The current Inquiry investigate the extent to which prisoners with a cognitive disability are serving their sentence in maximum security for reasons relating to their personal safety, disciplinary issues and/or regression of condition.

Recommendation 10: The current Inquiry investigate the human rights implications of persons with cognitive and other disabilities serving their sentences in maximum security for reasons outlined in recommendation 9.

VALS is interested to know the progress of Corrections Victoria in their endeavours to have a treatment community for male prisoners with an intellectual disability. Corrections Victoria has noted the limitations to this aim, such as opportunities to prisoners being restricted due to being located in a maximum security prison where skills such as independent living cannot be provided. They also in the past noted a lack of a defined “pathway” for prisoners with an intellectual disability in a medium security prison.

We also note that Corrections Victoria, in identifying what a significant issue intellectual disability is for Aboriginal and Torres Strait Islander peoples and their contact with the justice system, were interested in the cultural appropriateness of program delivery and content of programs provided to Aboriginal and Torres Strait Islander peoples within the prison system. VALS is interested in up-to-date information in this regard.

7. PAROLE

Differences have been found in the parole of prisoners with an intellectual disability compared with non-intellectually disabled prisoners. Fewer prisoners with an intellectual disability received custodial terms with a minimum parole period set than the general prison population. Research noted that issues such as perceived dangerousness, a lack of transition programs and inadequate accommodation equate to prisoners with an intellectual disability spending more time in custody than compared to non-intellectually disabled prisoners due to difficulty in obtaining parole.¹⁰⁵

Parole is an area of the justice system that VALS has some serious concerns about. We are pleased that the Victorian Attorney-General has recently asked the Sentencing Advisory Council (SAC) to look at the functions of the Adult Parole Board in an aim to reduce reoffending, promote integration of prisoners and protect community safety. VALS made a submission to SAC for this inquiry and raised concerns relevant to procedural fairness, human rights and the importance of promoting positive engagement by Aboriginal and Torres Strait Islander offenders with justice systems as highlighted in the National Law and Justice Framework (NILJF).¹⁰⁶

The Adult Parole Board has decision-making criteria that is utilised in determining the appropriateness of parole. This involves risk assessment. VALS is concerned at decisions that are disproportionately based on risk when it comes to a person's liberty. In our submission to SAC, we argued that significant attention needs to be paid to the strengths, capabilities and protective factors of the prisoner.

Another area of parole proceedings that is of concern to VALS is the availability of interested parties, whether family or legal representatives, to make submissions and representations to parole boards. Legal representatives do not currently have standing to appear before the parole boards in Victoria. This has serious implications for a prisoner with a cognitive. For instance, a person with a cognitive disability may not be able to sufficiently understand the process before them, be unable to advocate effectively for themselves, and may not be able to provide the Board with options for reintegration plans that may assist the Board in granting parole.

The Victorian Adult Parole Board has acknowledged the presence of prisoners and parolees suffering a mental illness, an intellectual disability or who have an acquired brain injury. In our submission we

¹⁰⁵ Cockram (2005) in Department of Justice Victoria (2007) op cit.

¹⁰⁶ Victorian Aboriginal Legal Service Co-operative Limited, 'Review of Victoria's Adult Parole Framework: Submission to the Sentencing Advisory Council' (2011) at http://vals.org.au/static/files/assets/47a00c43/Review_Adult_Parole_Sub_Final.pdf

referred SAC to the current Inquiry as to the interaction with the parole system for people with a cognitive disability.

Cognitive disability and the impact it has on the ability to make decisions based on cause and effect critically impacts on the likelihood of parolees with cognitive disabilities in relation of breaching parole conditions. We refer the current Inquiry to our SAC submission on this issue and to the SAC Inquiry more broadly.

Research for Corrections Victoria¹⁰⁷ found that there was a significant difference in the proportion of prisoners with an intellectual disability who were granted and received parole at the earliest eligible date compared with prisoners without an intellectual disability. The study notes that only 6.4 per cent of non-intellectually disabled prisoners were denied parole while 15.3 per cent of prisoners with an intellectual disability were denied parole. Furthermore, of the prisoners with an intellectual disability who were granted parole, significantly fewer received parole at their earliest eligible date compared with prisoners without an intellectual disability (42 per cent compared to 67.6 per cent).

A third of the prisoners with an intellectual disability from this study who were denied parole was for reasons relating to lack of suitable accommodation.¹⁰⁸ None of the prisoners without an intellectual disability in this study were denied parole on the basis of suitable accommodation.

Recommendation 11: The current inquiry investigate the rate at which prisoners with an cognitive disability experience inequity in accessing parole and make recommendations to address any findings in this regard.

Recommendation 12: The current Inquiry consider the impact of risk assessments used by parole boards involves considerations of prisoners with cognitive disabilities.

Recommendation 13: The current Inquiry consider the impact of people with a cognitive disability before the parole board not having a right to access legal advice and representation.

Recommendation 14: The current Inquiry consider the impact cognitive disabilities has on the likelihood of parolees breaching parole.

¹⁰⁷ Corrections Victoria (2007) op cit.

¹⁰⁸ The remainder were due to previous parole breaches, insufficient time remaining on their sentence and at the prisoner's request.

8. CRIME PREVENTION & DIVERSION

The rights of Aboriginal and Torres Strait Islander young people with cognitive disabilities and mental health issues was identified by Tom Calma in his report, *Preventing Crime and Promoting Rights Indigenous Young People with Cognitive Disabilities and Mental Health Issues*. He notes that:

...Indigenous young people in the criminal justice system are some of the most disadvantaged young people in Australia but Indigenous young people with cognitive disabilities and mental health issues face an even greater burden of disadvantage. They are faced with institutions that fail to pick up on their disabilities, services that do not cater to their needs and a culture where they are simply forgotten or put in the 'too hard' basket.¹⁰⁹

The problems highlighted in this report are approached with optimism that through early intervention and diversion, default law and order approaches that criminalise the vulnerable can be abandoned and replaced with fulfilling the needs of young people.

The report not only considers front end diversion that takes place through police and court processes that aim to decrease the incidence of young people being formally charged in the first instance, but also looks at some positive actions that can be taken once a person has become further involved in the criminal justice system. For instance the report notes that the first time a cognitive disability is actually assessed, and therefore opportunities for assistance arise, is within the justice system. It is noted, however, that the earlier the diversionary option is applied the better.

...we know the likely consequences of juvenile detention: graduation to the adult criminal justice system; poor life outcomes; and the intergenerational transmission of disadvantage.¹¹⁰

For a detailed discussion of best practice for diversion for Aboriginal and Torres Strait Islander people with an intellectual disability we refer the Inquiry to the 2008 Australian Human Rights Commission report.¹¹¹

¹⁰⁹ Calma, (2008) op cit, 3.

¹¹⁰ Ibid, 10.

¹¹¹ Ibid.

9. HUMAN RIGHTS AS BEST PRACTICE

Human rights are particularly relevant to the current inquiry for many reasons, one being the disadvantage that is likely for people with a cognitive disabilities the need for law and policy to promote the rights and best interests of these people. There is also emerging jurisprudence on the rights of people with a disability. In the drafting of this submission, VALS has not had time to give a detailed account of the various human rights instruments that could be considered for the current Inquiry's purposes, however will provide the following few areas as an indication of further consideration:

- In considering how approaches to child protection can show respect for children, the Convention on the Rights of the Child, ratified by Australia, reinforces the importance of taking into account the view of children. Article 12 states that States Parties shall ensure that a child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child and the child shall be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body.

Too often, the dispute resolution process is overly legalistic, adversarial and effectively puts people on trial. VALS' Family Law Solicitor describes their experience as being much like in a contest hearing, i.e. it is all about winning the case and is not focused on the experience and needs of the child. An adversarial contest between parents and the Department of Human Services (DHS) allows no room for the voice of the person of central interest: the child.

- International framework for understanding human rights also includes, and the Declaration on the Rights of Disabled People.
- VALS has previously argued that in reforming the way that VOCAT considers the engagement of young victims of crime, the following should form the underlying principles and guide operations not only for VOCAT, but for the justice system at large as it applies to young people. The United Nation's Economic and Social Council's Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime¹¹² includes, inter alia:

¹¹² ECSOC Resolution 2005/20 of 22 July 2005, at www.un.org/en/pseataforce/docs/guidelines_on_justice_in_matters_involving_child_victims_and.pdf

Special considerations

- Recognition that children are vulnerable and require special protection appropriate to their age, level of maturity and individual special needs (article 7 b);
- recognition that girls are particularly vulnerable and may face discrimination at all stages of the justice system (article 7 c);
- that every effort must be made to prevent victimisation of children, including, among other things, through the implementation of Guidelines for the Prevention of Crime (article 7 d);
- awareness and understanding that children who are victims and witnesses may suffer additional hardship if mistakenly viewed as offenders when they are in fact victims and witnesses (article 7 e);
- the Convention on the Rights of the Child that sets forth requirements and principles to secure effective recognition of the rights of children and under the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power sets forth principles to provide victims with the right to information, participation, protection, reparation and assistance (article 7f);

Principles

- non-discrimination (article 8 b);
- the best interests of the child, considering protection, harmonious development and the right to participation (article 8 c: i-iii);

The right to be protected from discrimination

- that the justice process and support for services available to child victims and witnesses and their families should be sensitive to the child's age, wishes, understanding, gender, sexual orientation, ethnic, cultural, religious, linguistic and social background, caste, socio-economic condition etc. Professionals should be trained and educated about such differences (Article 16);
- claims that age should not be a barrier to a child's right to participate fully in the justice process. Every child should be treated as capable and his or her testimony should not be presumed invalid or untrustworthy by reason of the child's age alone (as long as his or her maturity allow the giving of intelligible and credible testimony, with or without communication aids and other assistance (Article 18);

The right to effective assistance

- that child victims should have access to assistance provided by professionals who have received relevant training. Assistance may take the form of financial, legal, counselling, health, social and educational services, physical and psychological recovery services and other services necessary for a child's reintegration. All such assistance should address the child's needs in enabling them to participate effectively at all stages of the justice system (Article 22);

The right to be protected from hardship during the justice process

- how professionals should take measures to prevent hardship during the detection, investigation, and prosecution process in order to ensure that the best interests and dignity of child victims are respected (Article 29);
- that child victims should be provided with certainty about the process, with clear expectations regarding their participation (Article 30b);
- the adoption of Child-sensitive procedures where interdisciplinary services for child victims are integrated at the same location, modified court environments take child victims into account, and hearings scheduled at times appropriate to the age and maturity of the child (Article 30d);

The right to safety

- the suggestion that professionals should be trained in recognising and preventing intimidation, threats and harm to child victims. Safeguards to ensure the safety of the child include measure such as avoiding direct contact between child victim and alleged perpetrator at any point of the justice process (Article 34e);

The right to reparation

- that wherever possible, child victims should receive reparation in order to achieve full redress, reintegration and recovery (Article 35); and
 - the acknowledgement that reparation proceedings should be combined with informal and community justice procedures such as restorative justice (Article 36).
- VALS notes that the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power sections on Compensation (12-13) does not limit who

compensation is available to. VALS has previously argued that the operation of VOCAT should be aligned with the following:¹¹³

- Convention on the Elimination of All Forms of Discrimination;
 - Declaration on the Rights of Indigenous Peoples;
 - Convention on the Rights of the Child;
 - International Covenant on Civil and Political Rights;
 - International Covenant on Economic, Social, and Cultural Rights;
 - Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power;
 - Declaration on the Elimination of Violence Against Women; and
 - Convention on the Elimination of All forms of Discrimination against Women.
- The service needs of people with a cognitive disability need to be rights based rather than focused on deficits.¹¹⁴

¹¹³ Victorian Aboriginal Legal Service Co-operative Limited (2010) Ibid.

¹¹⁴ Please refer to Calma (2008) p 87-90 for a further discussion on this issue.

10. COLLABORATIVE, CO-ORDINATED APPROACHES ACROSS GOVERNMENT DEPARTMENTS & AGENCIES

10.1. POLICY

The current Inquiry should have regard not only to local policy approaches that aim to co-ordinate Departments and Agencies in the justice arena, but also look to the national platform where a lot of work has been done to address to causes of negative interaction with the justice system.

Key current priorities for prisoner health care in Victoria include:

- managing the transition to a single lead service provider to manage health services across the justice system to create and ensure a streamlined, coordinated and integrated health service model;
- introducing an electronic health records system within the justice system to improve health information management;
- developing a framework to meet the needs of prisoners with mental health issues, intellectual disability or other cognitive impairment; and
- implementing aspects of the Victorian Government’s Mental Health Reform Strategy 2009–2019 that relate to the mental health issues facing Victorian prisoners.¹¹⁵

VALS notes the current disability framework of Corrections Victoria¹¹⁶ and is pleased to see initiatives in this framework such as:

- the pilot and full study to establish the prevalence of ABI amongst prisoners and the validation of a screening tool for the Victorian corrections system.
- the implementation of a central contact point for case management information for clients with an ABI entering the prison system;

¹¹⁵ Australian Institute of Health and Welfare (2011) op cit.

¹¹⁶ Department of Justice Victoria, ‘Committing to the challenges: Corrections Victoria disability framework 2010-2012’ (2009).

- the delivery of an ABI training calendar to correctional staff; and
- “disability” training being provided to Adult Parole Board Staff.

These developments are welcome, however the Victorian Government needs to recognise the critical work that needs to be done in order prevent negative interaction with the justice system for people with a cognitive disability.

Aboriginal Justice Agreement

The Victorian Aboriginal Justice Agreement Phase 2 (AJA2) aims to minimise Aboriginal and Torres Strait Islander over-representation in the justice system by improving accessibility and utilisation of justice-related programs in partnership with the Koori community.

The AJA2 is under review and the AJA3 in the process of determination. The aims of the AJA2 are very much aligned with the purposes of the current Inquiry and should be referred to for examples of best practice when it comes to using a variety of strategies and initiatives that are aimed at early intervention; diversion and alternatives to prison; reducing victimisation and re-offending; responsive and inclusive services; and stronger community responses.

National Law and Justice Framework

The National Indigenous Law and Justice Framework (NILJF) was endorsed by all state and territory governments, through SCAG, in 2009 and is the first nationally agreed approach to addressing the issues underpinning negative contact with the justice system common to many Aboriginal and Torres Strait Islander peoples.¹¹⁷ The NILJF includes a Good Practice appendix which provides a good overview of initiatives and programs that have been identified as good practice.

Close the Gap

One of the key Australian Government strategies set in 2008 was ‘closing the gap’ on Aboriginal and Torres Strait Islander disadvantage. The Australian Government is working with State and Territories through the National Partnership on Indigenous Health Outcomes to achieve these targets. Given the high proportion of Aboriginal and Torres Strait Islander prisoners, this policy objective has relevance for prisoner health and health services.¹¹⁸ VALS and other ATSILS are

¹¹⁷ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (2011) op cit.

¹¹⁸ Id.

encouraged to see the incremental introduction of justice-related measures being considered in the closing the gap campaign.

Because of the high number of Aboriginal and Torres Strait Islander people in prisons, the health of prisoners has also been a key strategic area for development in the National Advisory Group on Aboriginal and Torres Strait Islander Health Information and Data 2005–2008 strategic plan. It is a key priority area in 2010–2015 strategic plans.

10.2. DATA

The ability of government departments and agencies to respond in a collaborative and coordinated way is severely impaired by the lack of good quality data concerning the contact people with cognitive disabilities have with the justice system. As noted earlier, while there is some useful data in other Australian jurisdictions concerning the rate of people experiencing cognitive disabilities coming into contact with the justice system as offender, victim and witness, there is a significant lack of such data for Victoria.

The Royal Commission into Aboriginal Deaths in Custody had no doubts about the centrality of health, or lack thereof, in the pattern of Aboriginal and Torres Strait Islander disadvantage underpinning the high rates of custody.¹¹⁹ The Commission found that on virtually every health measure, the health of Aboriginal and Torres Strait Islander people was much worse than that of other Australians. Recent reports continue to indicate that 20 years later, much is the same.¹²⁰ A series of recommendations were formed by the Commission, designed to effect an improvement in health as part of a broader agenda to reduce custody rates and over-representation in the criminal justice system. More specifically, the intent of the recommendations was to improve the collection of accurate and comprehensive data concerning health issues and access to services, including mental health services.

VALS believes that a contemporary take on the Commission's recommendations in this regard would include governments collect comprehensive information regarding more recently emerging areas that lead to over-representation in custody, such as the rate and nature of cognitive disabilities including FASD and ABI. This evidence gathering should happen at the

¹¹⁹ Victorian Aboriginal Justice Agreement, 'Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody: Review Report 1' (2005).

¹²⁰ See Steering Committee for the review of Government Service Provision, 'Overcoming Indigenous Disadvantage: Key Indicators 2011' *Productivity Commission* (2011).

broad community level, as well as in instances of contact with police, courts, prison, parole and community corrections.

Furthermore, the Australian Institute of Health and Welfare who have recently released a report into the health of Australia’s prisoners, considers the importance of collecting good quality data and provides the following:

The AIHW suggest that good quality data ¹²¹ will:	VALS adds:
1. be aligned with national and international standards to allow comparison	This should include human rights instruments and best practice as identified in the AJA and NILJF.
2. be collected according to well-defined standards and evidence-based best practice research	This should include the AJA and NILJF.
3. be fit for the purposes for which they are collected	There must be appropriate methods to collect Aboriginal and Torres Strait Islander status information and cover all cognitive disabilities such as intellectual disability, ABI and FASD.
4. be used to monitor outcomes. ¹²²	

Recommendation 14: Justice Agencies be supported to collect data about the prevalence and nature of those with a cognitive disability that come into contact with the justice system.

¹²¹ Refers to data collection regarding prisoner health, however we believe this could be applied to beyond the prison or correctional element to the justice system.

¹²² Australian Institute of Health and Welfare (2011) op cit.