Victorian Aboriginal Legal Service Submission to the United Nations Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

August 2022

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Background to the Victorian Aboriginal Legal Service

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

Legal Services

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

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

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

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

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

Community Justice Programs

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

The Community Justice Team also run the following programs:

- Family Violence Client Support Program[1]
- Community Legal Education
- Victoria Police Electronic Referral System (**V-PeR**)[2]
- Regional Client Service Officers
- Baggarrook Women's Transitional Housing program[3]
- Aboriginal Community Justice Reports[4]

Policy, Research and Advocacy

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

Acknowledgements

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

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

- Andreea Lachsz – Head of Policy, Communications and Strategy
- Morgan O'Sullivan – Policy, Research and Data Officer
- Fergus Peace – Policy, Research and Advocacy Officer

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[1] VALS has three Family Violence Client Support Officers (FVCSOs) who support clients throughout their family law or civil law matter, providing holistic support to limit re-traumatisation to the client and provide appropriate referrals to access local community support programs and emergency relief monies.

[2] The Victoria Police Electronic Referral (V-PeR) program involves a partnership between VALS and Victoria Police to support Aboriginal people across Victoria to access culturally appropriate services. Individuals are referred to VALS once they are in contact with police, and VALS provides support to that person to access appropriate services, including in relation to drug and alcohol, housing and homelessness, disability support, mental health support.

[3] The Baggarrook Women's Transitional Housing program provides post-release support and culturally safe housing for six Aboriginal women to support their transition back to the community. The program is a partnership between VALS, Aboriginal Housing Victoria and Corrections Victoria.

[4] See https://www.vals.org.au/aboriginal-community-justice-reports/

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EXECUTIVE SUMMARY

VALS welcomes the opportunity to make a submission to the United Nations Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (**SPT**), prior to its visit to Australia, scheduled for 16 – 27 October 2022. We hope that this submission will provide the SPT with useful information as it plans its visit, both in terms of determining the places of detention it will prioritise, and in identifying the issues which disproportionately lead to the death, torture and cruel, inhuman or degrading treatment or punishment of detained Aboriginal and/or Torres Strait Islander people in Victoria.

The submission focuses on those factors which lead to the overincarceration of Aboriginal people, as well as the key issues of concern regarding treatment and conditions in detention. It also addresses concerns regarding the lack of progress in implementing OPCAT in Victoria, and we have recommended places of detention for the SPT to consider proritising in its visit schedule.

If the SPT has capacity, we would very much welcome an opportunity to meet with the SPT to discuss this submission further, either before or after the visit, depending on what suits the SPT best.

DETAILED SUBMISSIONS

Key Issues of Concern

Introduction

Across Australia, at least 512 Aboriginal and/or Torres Strait Islander people having died in custody since the watershed Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**).[5] In Victoria, and across Australia, the recommendations of RCIADIC have still not been implemented. A key finding of RCIADIC, whose report was handed down more than 30 years ago, was that the number of deaths in custody is due primarily to the extreme and disproportionate rate at which Aboriginal people are imprisoned.

The Victorian Sentencing Advisory Council has reported that "Aboriginal and Torres Strait Islander imprisonment rate almost doubled between 2011 and 2021, from 965.2 to 1903.5 per 100,000 adults. Overall, Victoria's imprisonment rate also grew, albeit to a smaller extent, from 110.2 in 2011 to 138.7 in 2021."[6] Data on the Victorian prisons system can be found on the Corrections Victoria website. It shows the substantial growth in the prison population in Victoria, driven by a rapid increase in the number of people held on remand. Both the scale of the increase in Victoria's imprisonment of Aboriginal people, and the concentration of that growth in the remanded population, are putting more and more Aboriginal lives at risk. A recent analysis found that, of the over 470 Aboriginal people who have died in custody since the Royal Commission's report, more than half had not been sentenced.[7]

The Government is committed under the Closing the Gap (**CTG**) Agreement to reducing the incarceration rate of Aboriginal adults by 15%, and of Aboriginal children by 30%, by 2031.[8] Given the increase in imprisonment of Aboriginal people in recent years, Victoria could meet the Closing the Gap target merely by returning to the incarceration rate of 2017.[9] The CTG targets are clearly inadequate, and reverting back to numbers from a few short years ago is much too unambitious a goal. But even such a conservative improvement will not be achieved without major policy change by the Victorian

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[5] Australian Institute of Criminology, Deaths in custody in Australia (June 2022), available at https://www.aic.gov.au/statistics/deaths-custody-australia

[6] Sentencing Advisory Council, Victoria's Indigenous Imprisonment Rates, available at https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/victorias-indigenous-imprisonment-rates#:~:text=The%20imprisonment%20rate%20for%20Aboriginal,to%20138.7%20in%20June%202021.

[7] The Guardian, 9 April 2021, 'The 474 deaths inside: tragic toll of Indigenous deaths in custody revealed'. Accessed at https://www.theguardian.com/australia-news/2021/apr/09/the-474-deaths-inside-rising-number-of-indigenous-deaths-in-custody-revealed.

[8] Coalition of Aboriginal and Torres Strait Islander Peak Organisations and Australian Governments, National Agreement on Closing the Gap (July 2020), pp31-32.

[9] Productivity Commission, *Closing the Gap: Information Repository*, Target 10. Accessed at https://www.pc.gov.au/closing-the-gap-data/dashboard/socioeconomic/outcome-area10.

Government. *Burra Lotjpa Dunguludja*, the Aboriginal Justice Agreement Phase 4, set a more ambitious target to fully close the gap by 2031.[10]

Oversight of Places of Detention in Victoria

Currently Existing Oversight

In 2019, the Commonwealth Ombudsman stated that, "[i]n Victoria, there is a patchwork of entities that fulfil various inspection, oversight, visiting and complaint-handling roles in places of detention. Several of them possess legislative and organisational characteristics that are consistent with OPCAT articles… However, there is not currently any one entity that fulfils a regular, preventive, independent prison inspection mandate."[11] Since that assessment, there has been no progress.

The Commonwealth Ombudsman listed the following bodies in its report: Commission for Children and Young People (**CCYP**), Independent Broad-based Anti-corruption Commission (I**BAC**), Justice Assurance and Review Office (**JARO**), Mental Health Complaints Commissioner, Office of the Chief Psychiatrist Office of the Public Advocate (**OPA**) and the Victorian Ombudsman.

VALS highlights the following:

- VALS, along with many other community legal centres in Victoria, is of the view that the police complaints-handling function at IBAC is ineffective, and that a new, independent police complaints body needs to be established. You can find further information on our concerns and our recommendations in our policy paper, 'Reforming Police Oversight in Victoria' (please see Addendum).
- JARO is not an independent body, and is described as follows by the Department of Justice and Community Safety: "The business unit operates as an internal assurance and review function to advise the Secretary of the Department of Justice and Community Safety… on ways to achieve higher performing, safer and more secure youth justice and adult corrections systems."[12] JARO, part of the Department of Justice, is tasked with conducting post-death investigations and improving the safety of Victoria's prison system. However, VALS considers that JARO reviews are grossly inadequate and lack any independence. In the investigation into the death of Veronica Nelson at the Dame Phyllis Frost Centre, JARO did not conduct interviews with crucial witnesses and failed to obtain evidence that was revealed in the coronial inquest process. In the Inquest, both Veronica's partner (whom VALS represents) and

[10] Aboriginal Justice Agreement, *Burra Lotjpa Dunguludja*, pp30-31. Accessed at https://files.aboriginaljustice.vic.gov.au/2021-02/Victorian%20Aboriginal%20Justice%20Agreement%20Phase%204.pdf.
[11] Commonwealth Ombudsman, Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT): Baseline Assessment of Australia's OPCAT Readiness (2019).
[12] Department of Justice and Community Safety, Justice Assurance and Review Office (JARO), available at https://www.justice.vic.gov.au/contact-us/justice-assurance-and-review-office-jaro

mother submitted that this review was grossly inadequate, misleading, and failed to identify health and safety issues which could have prevented subsequent deaths in custody.[13]

OPCAT Implementation in Victoria

VALS has repeatedly called for the Victorian Government to take steps to implement Australia's obligations under the *Optional Protocol on the Convention Against Torture, Cruel, Inhuman and Degrading Treatment and Punishment* (**OPCAT**).[14] Australia ratified OPCAT in December 2017 and missed its January 2022 deadline to fully implement its legal obligations under this protocol. Australia was granted an extension until January 2023 to implement OPCAT, but very little progress has been made in Victoria, and Victoria is on track to miss the extended deadline too.

The urgent need to implement OPCAT in Victoria has been identified by the Victorian Ombudsman, which carried out two OPCAT style investigations in custodial facilities in 2017 and 2019.[15] The Victorian Government had not responded to the Ombudsman's recommendation to establish, and properly resource, a NPM in Victoria.[16] According to the Ombudsman, "DJCS has advised that a considerable amount of work has been done on the government's implementation of its responsibilities under OPCAT, and that a lack of public statements about OPCAT is not an indicator that progress is not being made."[17]

Since June 2020, the Government has remained silent on its "considerable" progress. The only information on the public record regarding Victoria's NPM body is the allocation of $500,000 for OPCAT implementation between 2021-2025.[18] This is woefully inadequate, and VALS is concerned that this once in a generation opportunity is being squandered. Other than that, there has only been the introduction of the *Monitoring of Places of Detention by the United Nations Subcommittee on Prevention of Torture (OPCAT) Bill 2022.*

In August 2021, the Commonwealth Government released the Commonwealth Closing the Gap Implementation Plan, which dedicates funding over two years (2021-2022) to support states and

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[13] VALS, Submissions on behalf of Uncle Percy Lovett for the Coronial Inquest into the passing of Veronica Nelson, available at https://www.vals.org.au/wp-content/uploads/2022/06/2022.06.17-Submissions-of-Uncle-Percy-Lovett-Veronica-Nelson-Inquest.pdf

[14] Including - VALS, *Submission to the Commission for Children and Young People Inquiry: Our Youth Our Way*, p. 21; VALS, *Supplementary Submission to the Royal Commission on Victoria's Mental Health System*, p. 8-13; VALS, *Public Accounts and Estimates Committee COVID-19 Inquiry*, p. 44-45; VALS, *Building Back Better: COVID-19 Recovery Plan*, pp. 87-91, VALS Submission to the Inquiry into Victoria's Criminal Justice System, VALS Submission to the Prison Culture Review.

[15] Victorian Ombudsman, *Implementing OPCAT in Victoria: Report and inspection of Dame Phyllis Frost Centre*, 2017; Victorian Ombudsman, *OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people* (2019), p. 61.

[16] Victorian Ombudsman (2020). *Ombudsman's Recommendations – Third Report*, p. 14.

[17] Ibid., p. 14.

[18] VALS (2021), 'This International Day in Support of Victims of Torture, the Andrews Government must do better on OPCAT'. Available at https://www.vals.org.au/this-international-day-in-support-of-victims-of-torture-the-andrews-government-must-do-better-on-opcat/.

territories to implement OPCAT.[19] Although the document indicates the amount of funding for other actions under the Plan, it is silent on the amount of funding that will be provided to States and Territories for OPCAT implementation.[20] With a recent change in government at the Federal level, VALS hopes that there will be renewed interest in and commitment to the Federal and State Governments working together to meet their responsibilities under OPCAT.

VLAS is of the view that the Victorian Government must be transparent and provide a public update on its progress in implementing OPCAT. VALS expects the Victorian Government to engage in robust consultations in developing an appropriate model and legislation for Victoria.

VALS recommendations include:

- *The Victorian Government must urgently undertake robust, transparent and inclusive consultations with the Victorian Aboriginal community, its representative bodies and Aboriginal Community Controlled Organisations (ACCCOs) on the implementation of OPCAT in a culturally appropriate way.*
- *The operations, policies, frameworks and governance of the designated detention oversight bodies under OPCAT (National Preventive Mechanisms - NPMs) must be culturally appropriate for Aboriginal people.*
- *The Victorian Government must legislate for the NPM's mandate, structure, staffing, powers, privileges and immunities.*
- *The Victorian and Commonwealth Governments must ensure that the NPM is sufficiently funded to carry out its mandate effectively.*
- *In accordance with Article 3(1) of OPCAT, the NPM in Victoria must have jurisdiction over all places where individuals are or may be detained, including correctional facilities, youth detention facilities, all police places of detention (including cells and modes of transport), court custody, secure residential care facilities, forensic mental health hospitals and other places where people are or may be deprived of their liberty.*

The *Victorian Charter of Human Rights and Responsibilities Act 2006* and Protection Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment

Under section 22 of the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**),[21] all persons deprived of liberty have a right to be treated with humanity and dignity. The Charter also provides people in detention with a range of other human rights, such as to privacy, non-discrimination and cultural rights. Public authorities, including prison officials, must consider human rights when implementing prison policies and practices and cannot act incompatibly with human

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[19] Commonwealth of Australia (2021). *Commonwealth Closing the Gap Implementation Plan*, p. 48. The funding is linked to Targets 10 (By 2031, reduce the rate of Aboriginal and Torres Strait Islander adults held in incarceration by at least 15%) and Target 11 (By 2031, reduce the rate of Aboriginal and Torres Strait Islander young people (10-17 years) in detention by at least 30%).

[20] Ibid., pp. 152 and 157.

[21] Available at https://www.legislation.vic.gov.au/in-force/acts/charter-human-rights-and-responsibilities-act-2006/014

rights. While the Charter is undoubtedly important at a normative and policy level, it only provides very limited substantive remedies for breaches of human rights. According to the Victorian Government, the Charter does not introduce an independent cause of action or type of relief for a person whose human rights have been breached.[22]

Overincarceration of Aboriginal People

Bail and Remand

In response to the Bourke Street incident, bail laws[23] were drastically changed to remove the presumption of bail for over 100 'serious' offences. These reforms are contrary to international human rights laws and the Victorian *Charter of Human Rights and Responsibilities*. The 2017 reforms have disproportionately impacted Aboriginal men, women and children, and since the implementation of the reforms the number of Aboriginal people in prison on remand has increased by approximately 20%. The reforms inappropriately created multiple hurdles an accused person must overcome in order to be granted bail for many low-level non-violent offences, such as multiple charges of shoplifting or possession of drugs.[24]

When Aboriginal people are remanded, they become disconnected from family, community, Country and culture. Remanding Aboriginal people puts their health, wellbeing and safety at risk, and disrupts education and employment opportunities. Although the current legislation requires a person's Aboriginality to be considered during a bail hearing,[25] there is a lack of understanding amongst bail decision makers, prosecutors and defence practitioners regarding the scope and content of this obligation. In particular, the obligation is either not complied with, or if it is, a person's Aboriginality is regularly considered as a deficit rather than a strength. Where an Aboriginal person is self-represented in their bail hearing, the prosecution and judge should make enquiries as to whether the accused person is Aboriginal. If the unrepresented person is Aboriginal, the judicial decision maker must consider the person's cultural background, including ties to extended family or place, and any other relevant cultural issues.[26] These considerations should also extend to other bail decisions under the *Bail Act,* including where bail is granted by a police member, and with regards to what bail conditions are appropriate to be imposed as part of the person's undertaking. A person's Aboriginality and connection to culture is lifelong, and the obligations of bail decision makers under section 3A and 3AA of the *Bail Act* must always be considered, regardless of whether the person's connection to culture has been intermittent throughout their lives.[27]

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[22] Charter of Human Rights and Responsibilities Bill 2006 Explanatory Memorandum, 29

[23] *Bail Act 1977* (Vic). Accessed at: http://www5.austlii.edu.au/au/legis/vic/consol_act/ba197741/

[24] Victorian Aboriginal Legal Service, 'Policy Brief – Fixing Victoria's Broken Bail Laws', (Policy Brief, May 2022), https://www.vals.org.au/wp-content/uploads/2022/05/Fixing-Victorias-Broken-Bail-Laws.pdf.

[25] See Section 3A and 3AA Bail Act 1977 (Vic). Accessed at http://www5.austlii.edu.au/au/legis/vic/consol_act/ba197741/

[26] *Bail Act 1977* (Vic), (n11).

[27] Re Hooper (No 2) [2021] VSC 476. Accessed at https://www.jade.io/article/827250?at.hl=+%255B2021%255D+vsc+476.

Additionally, being detained on remand can affect sentencing outcomes and future contact with the legal system. If someone is remanded, they are more likely to receive a custodial sentence, because they have effectively already been "punished" for their offending.[28] Once someone has received a prison sentence, they are more likely to be refused bail if they are arrested again, and are more likely to receive a more severe sentence if they are sentenced again in the future.

Bail offences, including breaching bail conditions and failing to answer bail, carry maximum penalties that include custodial sentences, regardless of whether the primary charge that resulted in the person being on bail would lead to a custodial sentence. These bail offences serve no purpose other than to further criminalise people who are already criminalised. No person should ever be remanded for an offence that would not ultimately result in a custodial sentence.

VALS has advocated for bail reform for many years. We strongly support a bail system which includes a presumption in favour of bail for all offences, prohibits remand of people who will not ultimately receive a prison sentence, appropriately considers Aboriginality in relation to all bail decisions, provides culturally appropriate bail hearings in Koori Courts,[29] and provides culturally safe supports for Aboriginal people applying for bail. Any bail reform must be driven by self-determination and must be developed in conjunction with the Victorian Aboriginal community through Aboriginal Community Controlled Organisations (**ACCO**s) and relevant experts. The judiciary and bail decision makers must regularly undertake cultural awareness training and the Government must invest in appropriate services to support Aboriginal people facing bail hearings.

Low Age of Criminal Responsibility

The age of criminal responsibility is astonishingly low across Australia, at only 10 years old. The low age of criminal responsibility disproportioatley impacts Aboriginal children, who are more likely to come into contact with the youth justice system and less likely to receive a caution from police, compared to non-Aboriginal children. Target 11 of the National Agreement on Closing the Gap aims to reduce the rate of Aboriginal young people in detention by 30% by 2031.[30] Raising the age of criminal responsibility is an obvious way to contribute to this target, yet the government has not made meaningful progress towards this reform.

Evidence shows that children under 14 lack the maturity to meet legal standards of culpability. The existing protection of the presumption of *doli incapax,*[31] is ineffective and regularly misapplied in practice, which leads to criminalisation of children who are incapable of forming the relevant criminal

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[28] Sentencing Advisory Council, Time Served Prison Sentences in Victoria (February 2020). Accessed at: https://www.sentencingcouncil.vic.gov.au/publications/time-served-prison-sentences-victoria

[29] Victorian Koori Courts currently do not hear any matters prior to the sentencing stage of a matter.

[30] National Agreement on Closing the Gap. Accessed at: https://www.closingthegap.gov.au/national-agreement

[31] *Doli incapax* is the presumption that a child under the age of 14 years old is not capable of forming the *mens rea* required to form the basis of culpability of an offence.

intent. Children engaged with the criminal legal system regularly have complex needs that are not being met.

Many organisations across Australia, including VALS, are advocating for legislative amendments to raise the age of criminal reasponsibility to at least 14, and the minimum age of detention to 16 years. We are advocating for holistic wrap-around support systems for at-risk young people at the earliest stage, to prevent contact with the youth justice system, by identifying risk factors early and ensuring children have appropriate supports. It is imperative that this model is driven by Aboriginal self-determination, to ensure Aboriginal children's rights and wellbeing are front and centre.

Decriminalisation of Public Intoxication

Criminalisation of public intoxication in Victoria disproportionately impacts Aboriginal communities.[32] In 1991, the Royal Commission into Aboriginal Deaths in Custody investigated the deaths of 99 Aboriginal people who died in custody across Australia, 30% of whom had died whilst in custody in relation to public intoxication.[33] VALS' experience and data shows that Aboriginal people continue to be disproportionality affected by this offence.

In 2017, Aunty Tanya Day, a proud Yorta Yorta woman, passed away after falling and hitting her head in police custody in Castlemaine, Victoria. Aunty Tanya Day was being held in police custody for public intoxication after falling asleep on a train. In the Inquest into Aunty Tanya Day's death, the Coroner found that Victoria Police should have sought urgent medical care for Aunty Tanya instead of arresting her, and that her death was clearly preventable had she not been arrested. The Coroner also found that welfare checks conducted by the members on shift were inadequate, amounting to a failure to take proprer care. The Coroner also found that had these checks been conducted appropriately, Aunty Tanya's deterioration would have been identified and treated earlier.[34]

Since RCIADIC - which recommended decriminalisation of the offence of public intoxication - there have been multiple inquiries that have reaffirmed this recommendation, yet substantial reform is yet to occur.

In August 2019, the Victorian Government committed to decriminalising public drunkenness and replacing it with a public health response. The Government initially requested advice from an Expert Reference Group, which carried out extensive consultations and completed a final report in August 2020.

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[32] Aboriginal people make up 0.8% of the Victorian population, yet 6.5% of all public intoxication offences between 2014 and 2019 were recorded against Aboriginal people.
[33] Victorian Aboriginal Legal Service, 'Community Factsheet – decriminalising public intoxication', (Factsheet, 3 August 2022), https://www.vals.org.au/wp-content/uploads/2022/08/Community-fact-sheet-Decriminalisation-of-public-intoxication-August-2022.pdf.
[34] Ibid.

In March 2021, the Government passed legislation to decriminalise public intoxication, due to come into effect in November 2022. However, due to delays in developing and implementing the health response, decriminalisation has been pushed back to November 2023.

VALS has advocated for decriminalising public intoxication for decades, and continues to advocate for a health model for public intoxication that genuinely seeks to prioritise the safety, health and wellbeing of any person who is intoxicated in public.[35] We strongly oppose law enforcement approaches to public intoxication, including "protective custody", which has been implemented in many other states and territories across Australia, and which continues to disproportionality impact Aboriginal people in these jurisdictions.

Criminalisation of Drug Use and Possession

Charges for drug use and possession are disproportionately brought against Aboriginal people in Victoria, and this is an important factor in the overincarceration of Aboriginal people. The police-led response to drug use has led to a 215% increase in drug use/possession incidents involving Aboriginal people since 2012, compared to 94% for non-Aboriginal people.[36] Drug charges are particularly harmful under Victoria's onerous bail regime, as people arrested on drug charges are often held in prison awaiting trial for a charge which, even if they are found guilty, will not ultimately lead to a custodial sentence. This is especially problematic because it leads to very high numbers of Aboriginal people imprisoned on remand while under the influence of, or withdrawing from, drugs – a situation which increases the risk of health problems and, the Victorian Ombudsman has found, of prison officers using force against people in custody.[37]

Overpolicing of Aboriginal People and Lack of Police Accountability

The risks of ill treatment in police and prison custody are disproportionately high for Aboriginal people in Victoria because of the overpolicing of Aboriginal communities, and the lack of effective police accountability. Aboriginal people are disproportionately targeted in the enforcement of minor summary offences, and the use of police powers such as move-on orders and stop-and-search powers. There is no effective police oversight body to receive and adjudicate complaints about misconduct, with complaints instead being investigated by other police officers. This allows misconduct to persist, and increases the risks associated with police custody, because complaints about mistreatment are not independently investigated.

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[35] Victorian Aboriginal Legal Service, 'Community Factsheet – decriminalising public intoxication', (n18).

[36] Crime Statistics Agency, *Alleged offender incidents by Aboriginal and Torres Strait Islander Status – Tabular* Visualisation, Victoria – Principal offence. Accessed at https://www.crimestatistics.vic.gov.au/crime-statistics/latest-aboriginal-crime-data/alleged-offender-incidents-by-aboriginal-and-torres.

[37] Victorian Ombudsman (2022), *Report on investigations into the use of force at the Metropolitan Remand Centre and the Melbourne Assessment Prison.*

Systemic Racism

Systemic racism is when laws, policies and practices across agencies work together to produce a discriminatory outcome for racial or cultural groups. While the laws, policies and practices may appear to be neutral, they result in uneven or unfair outcomes. Systemic racism is different to individual or interpersonal racism, which takes place when individuals hold racist views and treat people differently based on those views, for example, hate speech or racial abuse. Laws, policies and practices can contribute to systemic racism, even if this is not acknowledged or recognised by the authorities that develop and implement them.

Systemic racism permeates all facets of the legal system in Victoria. Aboriginal people continue to be overrepresented in the criminal and youth justice systems and Aboriginal children are ten time more likely to be removed from their families and placed in out-of-home-care than non-Aboriginal children.[38] The racism Aboriginal communties endure is the result of the violent and racist colonial history of this country. Australia's colonial legal systems are built on foundations of violence and dispossession, denial of soverignty and humanity, and assimilation. The laws and policies that disproportionately impact Aboriginal people, such as public intoxication, bail laws and the low age of criminal responsibility, must be reformed and protective mechanisms must be implemented.

The implementation of protective mechanisms, such as accountability and oversight bodies, would allow systemic racism to be independently examined and investigated. Systemic racism must be considered by the NPM, as well as in coronial inquests of Aboriginal and Torres Strait Islander people who have passed away either in custody or in connection to a police operation, as we very often see the overarching role systemic racism plays in these circumstances.

Treatment and Conditions in Detention

The below is a snapshot of some of the key areas of concern including:

- Cultural Issues
- Solitary Confinement
- Use of Force and Restraints
- Strip Searching
- Equivalence of Healthcare
- Privatisation of Prisons
- Disciplinary Proceedings

Further information on these issues can be found in the Addendum (*Submission to the Cultural Review of the Adult Custodial Corrections System (December 2021)*), as well as information relating to parole, rehabilitation programs, transition support and post-sentence detention.

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[38] Family Matters, *The Family Matters Report 2021: Measuring Trends to Turn the Tide on the Over-representation of Aboriginal and Torres Strait Islander Children in Out-of-home Care in Australia* (Report, Month 2021) 5.

Cultural Issues

Victoria's prison system has become characterised by poor administration and deteriorating conditions, as the imprisoned population has increased. In 2020-21, one prison guard every week was suspended for reasons including the excessive use of force, smuggling of contraband and sexual harassment.[39] An IBAC inquiry into the corrections system found widespread corruption risks and "problematic workplace cultures", manifesting themselves in misconduct including the inappropriate use of force – including against people with disabilities – and in the lack of real accountability for that misconduct.[40]

Solitary Confinement

Solitary confinement has a particularly detrimental impact on Aboriginal people, with the Royal Commission into Aboriginal Deaths in Custody noting that it is "undesirable in the highest degree that an Aboriginal person in prison should be placed in segregation or isolated detention."[41] The excessive use and normalisation of solitary confinement throughout the pandemic, by way of Protective Quarantine, Transfer Quarantine, Isolation and lockdowns, has been of particular concern to VALS (also in the context of reduced family visits and court backlogs), leading to a deterioration in the mental health and wellbeing of detained Aboriginal people, including children. Despite a decrease in the population of incarcerated Aboriginal people during the pandemic, the number of incidents involving self-harm among detained Aboriginal people increased more than 50 per cent.[42] While the use of solitary confinement has increased during the pandemic, this practice predated COVID-19.

VALS is of the view that solitary confinement should be prohibited entirely, in all detention settings, let alone prolonged solitary confinement.

Use of Force and Restraints

VALS is of the view that excessive force and the inappropriate use of restraints are widespread practices throughout the Victorian prison system, but not fully captured by existing inquiries due to under-reporting, a lack of continuous monitoring, and the absence of an NPM.

The use of force and restraints in prisons may sometimes be necessary. However, the fact that prisons are closed environments where a severe power imbalance exists between detained people and staff means that there is a high potential for force to be used excessively and in inappropriate situations.

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[39] David Southwick MP, 20 July 2021, 'One prison guard a week suspended in Andrews' chaotic corrections system

[40] IBAC (2021), *Special report on corrections*, https://www.ibac.vic.gov.au/publications-and-resources/article/special-report-on-corrections.

[41] Human Rights Law Centre et al. (2021), *Joint open letter on ongoing and arbitrary use of 14 day quarantine in prisons*. Available at https://www.hrlc.org.au/s/Open-letter-29-March-2021.pdf

[42] Self-harm incidents among Victorian Aboriginal prisoners jump by more than 50 per cent (February 2022), available at https://www.theage.com.au/national/victoria/self-harm-incidents-among-victorian-aboriginal-prisoners-jump-by-more-than-50-per-cent-20220216-p59wyj.html

Aboriginal people are disproportionately subjected to violence in prison. In Victoria, the only investigation that examined and quantified this disproportionality was undertaken by the Commission for Children and Young People's analysis of the youth prison system, which found that "Aboriginal children and young people were alarmingly overrepresented in relation to injury as a result of a serious assault in custody"; and that force and restraints were used against Aboriginal children in youth prisons more than twice a day in 2018 and 2019.[43]

Ingrained problems with the excessive use of force and restraints can only by addressed by legislative reform of the thresholds for the use of force, not by tweaks to prison policy and inconsistently-delivered training programs.

VALS has repeatedly made detailed recommendations on how to improve protections for people in prison, including those outlined below:

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

[43] Commission for Children & Young People (2021), *Our youth, our way: Systemic inquiry into the over-representation of Aboriginal children and young people in Victoria's youth justice system*, p. 38. Accessed at https://ccyp.vic.gov.au/upholding-childrens-rights/systemic-inquiries/our-youth-our-way/.

- *When use of force/restraints may be permitted:*
    - *Use of force/restraints must only be permissible when necessary to prevent an imminent and serious threat of injury to the incarcerated person or others, and only as explicitly authorised and specified by law and regulation.*
    - *Use of force/restraints should be exceptional, as a last resort, when all other control methods (including de-escalation techniques) have been exhausted and failed.*
    - *The decision to use physical restraints must be made by more than one person, and must be authorised by senior management.*
    - *Use of force/restraints must be used restrictively, for no longer than is strictly necessary.*
    - *A minimum level of restraint/degree of force must be used.*
    - *Restraint instruments must be used appropriately/restraint techniques properly executed.*
    - *The safety of the incarcerated person must be a prime consideration.*
- *Additional safeguards:*
    - *The use of force/restraint should be under close, direct and continuous control of a medical and/or psychological professional.*
    - *The person who is restrained must be regularly observed, while subjected to restraint instruments, at least every 15 minutes.*
    - *Use force/restraint should be reported to senior management as soon as practicable.*
    - *The privacy of restrained people should be respected/protected when the person in restraints is in public.*
    - *Staff who use restraint or force in violation of the rules and standards should be disciplined and/or have their employment ceased. Staff should be prosecuted where appropriate.*

Strip Searching

This issue of strip searching is of particular concern to VALS because there is mounting evidence of the disproportionate rates at which Aboriginal people are subjected to strip searching. For example, in the ACT women's prison between October 2020 and April 2021, 58% of strip searches were of Aboriginal women, who made up only 44% of the prison population.[44]

The law in Victoria allows incarcerated people to be strip searched when there is a belief based on reasonable grounds that the search is necessary for the security or good order of the prison, or the safety or welfare of any incarcerated person, or that the incarcerated person being searched is hiding something that may pose a risk.[45] The standards for strip searching in Victoria are lower than those in

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[44] Dani Larkin (2021), 'Excessive strip-searching shines light on discrimination of Aboriginal women in the criminal justice system', *The Conversation*. Accessed at https://theconversation.com/excessive-strip-searching-shines-light-on-discrimination-of-aboriginal-women-in-the-criminal-justice-system-163969.

[45] S. 45 of the *Corrections Act 1986*.

other Australian jurisdictions. In adult prisons in New South Wales, strip searches can only be performed when absolutely necessary[46] and never involve body cavity searches.[47] Meanwhile, in the ACT, strip searching is only performed on reasonable grounds and in the least restrictive manner possible, while respecting the dignity of the detainee.[48]

Legal practitioners at VALS report that some clients had been required to be strip searched in front of multiple guards. These clients often had histories of abuse, and the practice of strip searching was re-traumatising. Some of these clients had medical evidence which suggested that a strip search could be re-traumatising, and this evidence was often not considered before the searches were undertaken. It is clear that the use of strip searching is not confined to situations where it is truly necessary or a last resort for prison staff. At the highest level, data on strip searches reveal that they are extremely ineffective in uncovering contraband. For example, in youth detention, figures obtained by the Human Rights Law Centre showed that "over a four month period between July and October 2019, 1,277 strip searches were conducted on children and young people at the two juvenile justice centres in Victoria [and]… Only 6 items were found as a result."[49] This strongly suggests that strip searches are used far more often than could be justified by any reasonable suspicion that they are necessary or likely to uncover contraband.

In 2017, the Victorian Ombudsman identified "a significant number of routine and unnecessary strip searches", including searches of detained people before and after receiving visits, in violation of the Victorian Charter, the Mandela Rules, and prison policy. The Ombudsman recommended this practice should immediately cease; that recommendation was not accepted by the Government.[50]

IBAC's recent report on the corrections system exposed serious misconduct in the way that strip searches are managed and conducted. Several specific incidents of inappropriate searches were investigated by IBAC, which found that staff were unfamiliar with the human rights standards supposed to govern their behaviour and that prison management did not properly investigate complaints about inappropriate searches.[51]

Most concerningly, IBAC reported that the General Manager of Port Phillip Prison told its investigators that strip searches were "one of the options available to assert control" over people in prison.[52] This is a clear demonstration that strip searches are used not out of necessity, but as a tool of discipline and to exert power over detained people – echoing the concerns of an earlier investigation in Western

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[46] Inspector of Custodial Services, New South Wales (2020). Inspection standards: For adult custodial services in New South Wales, at 40.9
[47] Ibid., at 40.13.
[48] Inspector for Custodial Services, ACT (2019). ACT Standards for Adult Correctional Services, Standard 28.
[49] Dani Larkin (2021), 'Excessive strip-searching shines light on discrimination of Aboriginal women in the criminal justice system', *The Conversation*. Accessed at https://theconversation.com/excessive-strip-searching-shines-light-on-discrimination-of-aboriginal-women-in-the-criminal-justice-system-163969.
[50] IBAC (2021), *Special report on corrections*, p54. Accessed at https://www.ibac.vic.gov.au/docs/default-source/special-reports/special-report-on-corrections---june-2021.pdf?sfvrsn=ee450c8c_2.
[51] IBAC (2021), *Special report on corrections*, p54, 62.
[52] Ibid, p53.

Australia.[53] The fact that the strip searches investigated by IBAC were conducted shortly after unrelated behavioural incidents reinforces this, as does the escalation of the searches into assaults on incarcerated people by staff. While the IBAC report is disturbing, issues concerning strip searches have been raised in other Australian jurisdictions

It is clear that strip searching is being used for general discipline and order in Victorian prisons. The legislative threshold for strip searching is too low, and training on human rights standards is wholly inadequate. Legislation needs to raise the bar so that strip searching is only to be used as a last resort, not as a routine tool for corrections staff.

VALS has repeatedly made recommendations on how to improve protections for people in prison, including those outlined below:

- *The threshold for authorising a strip search in adult prisons should be raised by legislation. 'Good order' and 'security of the facility' should be removed as grounds for a strip search and legislation should provide that strip searching must be a last resort and must be based on intelligence. Prior to strip searching, other means of searching such as pat searches, metal detectors and increased surveillance must be used. Strip searching must never be routinely conducted as part of the general routine of the centre or on entry to a centre.*
- *Prisons should adopt policies which require them to consider the effect of strip searches on re-traumatisation.*
- *Strip searching of children should be prohibited.*

Please also see our Community Fact Sheet on a relevant case on strip searching, in which we intervened.

Failure to Ensure Equivalence of Healthcare

Aboriginal people already have serious health conditions at a much higher rate than other parts of the Australian population. Aboriginal people detained in prisons are, according to research from the Victorian Aboriginal Community Controlled Health Organisation (**VACCHO**), less healthy than Aboriginal people in the community and less healthy than non-Aboriginal people in prison.[54] In youth detention, across the country, the majority of Aboriginal children are found to have multiple health and social issues upon entering detention.[55]

High-quality healthcare for people in prison is particularly important given the high rates of mental ill-health among the prison population and among Aboriginal people in Victoria. There is a lack of

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[53] Ibid, p. 55.
[54] Victorian Aboriginal Community Controlled Health Organisation. Keeping our mob healthy in and out of prison: Exploring Prison Health in Victoria to Improve Quality, Culturally Appropriate Health Care of Aboriginal People.(2015), 9, 13. Available at http://www.vaccho.org.au/assets/01-RESOURCES/TOPIC-AREA/RESEARCH/KEEPING-OUR-MOB-HEALTHY.pdf.
[55] Parliament of the Commonwealth of Australia. Doing Time – Time for Doing: Indigenous youth in the criminal justice system (2011),87-88. Available at https://www.aph.gov.au/binaries/house/committee/atsia/sentencing/report/fullreport.pdf.

sustainably resourced culturally appropriate health services and programs to meet the social and emotional wellbeing needs of Aboriginal people in prison.[56] VALS continues to call for increased access to culturally safe, trauma-informed forensic mental health services throughout the criminal legal system.[57]

The Australian Health Practitioner Regulation Authority has defined cultural safety as follows:

> Cultural safety is determined by Aboriginal and Torres Strait Islander individuals, families and communities. Culturally safe practise is the ongoing critical reflection of health practitioner knowledge, skills, attitudes, practising behaviours and power differentials in delivering safe, accessible and responsive healthcare *free of racism*.[58]

The Victorian *Charter of Human Rights and Responsibilities* requires that "[a]ll persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person".[59] The Victorian Coroners Court has found, in its inquest into the death of Yorta Yorta woman Ms Tanya Day, that in custodial settings this requires police and prison staff to ensure access to medical care, given that people detained are completely dependent on the state to provide for their health.[60]

The importance of equivalence of care to Aboriginal people in prison was recognised by the Royal Commission into Aboriginal Deaths in Custody more than thirty years ago. Recommendation 150 of the Royal Commission was that "health care available to persons in correctional institutions should be of an equivalent standard to that available to the general public," and specifically identified access to mental health and AOD services and the importance of culturally safe care. Equivalence of care is also the underlying goal of other RCIADIC recommendations regarding healthcare in prisons and police custody, including Recommendations 127, 252, 152, 154, 133, 265 and 283.[61]

A Guardian analysis of 474 Aboriginal and/or Torres Strait Islander Deaths in Custody since 1991, published in April this year for the 30th anniversary of the Royal Commission into Aboriginal Deaths in Custody, found that:

> For both Aboriginal and Torres Strait Islander people and non-Indigenous people, the most common cause of death was medical problems, followed by self-harm. However, Indigenous people who died in custody were three times more likely not to receive all necessary medical care, compared to non-Indigenous people.

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[56] Ibid., p.34.
[57] Ibid., p.43.
[58] Australian Health Practitioner Regulation Authority, National Scheme's Aboriginal and Torres Strait Islander Health and Cultural Safety Strategy, available at https://www.ahpra.gov.au/About-Ahpra/Aboriginal-and-Torres-Strait-Islander-Health-Strategy/health-and-cultural-safety-strategy.aspx
[59] Charter of Human Rights and Responsibilities Act 2006, s22(1).
[60] Coronial Inquest into the Death of Tanya Day, [533].
[61] Williams (2021), 'Comprehensive Indigenous health care in prisons requires federal funding of community-controlled services', The Conversation. Accessed at https://theconversation.com/comprehensive-indigenous-health-care-in-prisons-requires-federal-funding-of-community-controlled-services-158131.

> For Indigenous women, the result was even worse – less than half received all required medical care prior to death.[62]
> Aboriginal and Torres Strait Islander women were less likely to have received all appropriate medical care before death (54%) compared to men (36%)… Agencies such as police watch houses, prisons, and hospitals did not follow all of their own procedures in 43% of the cases in which Aboriginal and Torres Strait Islander people died, compared to 19% of the cases of non-Indigenous people.[63]

The principle of equivalency is not only applicable to prisons but to all places where people are deprived of their liberty. The sheer number of deaths in custody, from a variety of causes, are testament to the inadequate provision of health care – including mental health care – and the failure of Australian jurisdictions to enact the principle of equivalency. Victoria is not an exception to this pattern of failure. But Victoria is unusual among Australian states and territories in not providing healthcare in places of detention through its health department, but through private providers sub-contracted by the Department of Justice and Community Safety.[64] This arrangement falls short of international human rights standards which are themselves inadequate in many respects, and the lack of transparency around places of detention makes scrutiny of healthcare provision extremely difficult.

Equivalence of care, particularly for Aboriginal people with serious health issues, and a need for culturally safe healthcare services, can only be delivered with substantial resourcing. This requires greater investment from the state Government, but there is also a need for people in prison to have access to funding from Medicare and the Pharmaceutical Benefits Scheme, to ensure that resources are available to provide all the care needed to the same standard enjoyed in the community. This is particularly important for Aboriginal people, as there are a number of specific items in the Medicare Benefits Schedule which support enhanced screenings, assessments and health promotion activities for Aboriginal people. These streams of Medicare funding are critical to the operation of Aboriginal health services.[65] Access to Medicare funding for people in prison would enable the expansion of in-reach care in prisons by Aboriginal health services. It would also bring funding arrangements in line with those for people in the community. ACCHOs receive direct state and federal funding, as well as being eligible for Medicare funding streams. Similar funding arrangements should be available in relation to custodial settings to ensure the same quality of care can be provided.[66]

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[62] Allam, L. et al. (2021). The facts about Australia’s rising toll of Indigenous deaths in custody. Available at https://www.theguardian.com/australia-news/2021/apr/09/the-facts-about-australias-rising-toll-of-indigenous-deaths-in-custody.

[63] Ibid.

[64] For further information concerning contracted providers of healthcare in Victorian prisons, see https://www.corrections.vic.gov.au/justice-health.

[65] Ibid, p. 83.

[66] ABC News, 19 October 2020, ‘Greg Hunt rejects Danila Dilba's request for Medicare-funded health services in Don Dale’. Available at https://www.abc.net.au/news/2020-10-19/don-dale-medicare-health-services-rejected-by-greg-hunt/12776808.

VALS has repeatedly made recommendations on how to improve protections for people in prison, including those outlined below:

- *People in detention must be provided medical care that is the equivalent of that provided in the community. Medical care must be provided without discrimination, andmust be culturally safe.*
- *Health care should be delivered through Department of Health rather than DJCS, and not through for-profit organisations.*
- *A model of delivery of primary health services by Aboriginal Community Controlled Health Organisations in places of detention in Victoria should be considered, in consultation with VACCHO and member organisations.*
- *The Federal Government must ensure that incarcerated people have access to the Pharmaceutical Benefits Scheme (PBS) and the Medicare Benefits Schedule (MBS).*
- *The Federal and State Governments should ensure that incarcerated people have access to the National Disability Insurance Scheme (NDIS) and are assessed for eligibility for NDIS upon entry to a prison or youth justice centre.*

Privatisation of Prisons

Across Victoria, there are eleven public operated prisons and three privately operated prisons. The three privately managed prisons are Port Phillip Prison run by G4S, and Ravenhall Correctional Centre and Fulham Correctional Centre both run by the GEO Group. Around 40% of Victoria's prison population is held in private prisons, a significant proportion compared with 15% of people in privately managed prisons in the United States, and the highest number in Australia.

VALS is deeply concerned about the degree of privatisation in Victoria's prison system. In addition to the wholly privately-run prisons, particular services – including healthcare – are contracted to private operators in many public prisons. The effect of this is to weaken accountability, undermine democratic control of the prison system, and put private profits before the wellbeing of people in prison and the integrity of the system. It also puts private profit ahead of rehabilitation and reducing recidivism.

Challenges in Management and Accountability

In Victoria, a 2021 report by IBAC found issues with the arms-length approach to monitoring and managing prisons. IBAC concluded that "[i]ssues related to transparency are of particular concern in privately managed prisons", in part because of "commercial-in-confidence clauses in contracts between the state and private service providers which may affect the public's ability to identify contractual violations and any remedial actions taken".[67]

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[67] IBAC (2021), *Special report on corrections*. Accessed at: https://www.ibac.vic.gov.au/publications-and-resources/article/special-report-on-corrections

The lack of transparency and accountability means that even identified problems can be difficult to remediate in private prisons. Risk management and the response to serious incidents has been a particular cause of concern in Victoria. The Victorian Auditor-General has reported that "[s]erious incidents at both Port Phillip and Fulham have, in some instances, exposed weaknesses in how G4S and GEO manage safety and security risks," and that these incidents are not being investigated in a way that identifies or addresses their underlying causes.[68]

The absence of functional risk management, or processes to respond to serious incidents and prevent their recurrence, poses an enormous risk to the wellbeing of people in prison in Victoria.

Healthcare Contracting

Another important element of Victoria's troubling approach to privatisation in the prison system is the contracting of healthcare. As discussed above, equivalency of healthcare is an important principle for prisons, set out in the Mandela Rules, which establish minimum standards for the treatment of people in prison. Healthcare equivalency means that people held in prison must have access to an equivalent standard of healthcare as they would if living freely in the community.

This vital principle can be undermined by subcontracting. In Australia, all jurisdictions except Victoria have healthcare in prisons managed by the health department. In Victoria, healthcare is managed by the Department of Justice and Community Safety, and service delivery is contracted to six private providers. These providers also subcontract some services.[69] The effect is a patchwork system where continuity of care is very hard to provide, particularly since people in prison may move between facilities, and the reliability and quality of services is highly inconsistent. Reducing the quality of health services and the possibility for people in prison to receive consistent, comprehensive care further contributes to poor prison conditions, undermining rehabilitation and increasing the risk of reoffending.

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

Disciplinary Proceedings

As noted by the Victorian Ombudsman in her recent report, "[d]isciplinary hearings in Victorian prisons are still carried out 'in the dark' with insufficient scrutiny, oversight or transparency."[70] The disciplinary system in Victoria must operate in accordance with procedural fairness, and key protections derived from procedural fairness must be enshrined in legislation.

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[68] Victorian Auditor-General's Office (2018), *Safety and Cost Effectiveness of Private Prisons*, p45. Accessed at https://www.audit.vic.gov.au/sites/default/files/2018-03/20180328-Private-Prisons.pdf.
[69] Corrections Victoria, 'Justice Health', https://www.corrections.vic.gov.au/justice-health.
[70] Victoria Ombudsman (2021). Investigation into good practice when conducting prison disciplinary hearings, p. 4.

The prison disciplinary system deals with incarcerated people who break prison rules. The process has three stages: (1) investigation of the alleged offence, resulting in a decision to charge the incarcerated person; (2) a disciplinary hearing; and (3) determination of a penalty (if the person pleads guilty or is found guilty of the offence).[71] According to the Victorian Ombudsman, there are approximately 10,000 disciplinary hearings each year across Victoria's 14 prisons.[72]

Although the disciplinary process is bound by procedural fairness, the Ombudsman's report demonstrates that important protections derived from procedural fairness are not being respected in practice. VALS' is of the view that protections must be enshrined in legislation, with clear avenues for recourse when the rights of incarcerated people are not respected. This is particularly essential to ensure that the obligations on staff and rights of detainees are consistent across both public and private prisons in Victoria.

The Ombudsman's report notes that the "consequences for a prisoner can be serious, can impact on parole and include the loss of 'privileges' – such as telephone calls or out of cell time – and can even result in contact visits with family or children being withdrawn."[73] This is particularly concerning as contact with family is critical to rehabilitation. According to the Mandela Rules, "disciplinary sanctions or restrictive measures shall not include the prohibition of family contact."[74]

Regarding people with disability, the Mandela Rules provide that: "Before imposing disciplinary sanctions, prison administrations shall consider whether and how a prisoner's mental illness or developmental disability may have contributed to his or her conduct and the commission of the offence or act."[75] This is of particular importance, given the report's finding that there was inconsistent use of Corrections Independent Support Officer volunteers for incarcerated people with an intellectual disability.

Additional Material

Please find at the end of this submission, additional information, including links to relevant VALS submissions, policy briefs and papers, factsheets, webinars and other material, to assist the SPT in understanding the detention context in Victoria. The most significant of this material is also collated in an Addendum to this submission, for ease of reference.

[71] Ibid., p. 11.
[72] Ibid., p. 4.
[73] Ibid., p. 4.
[74] Rule 43(3) of the *Mandela Rules*.
[75] Rule 39(3) of the *Mandela Rules*.

Recommended Places of Detention for the SPT to Visit

VALS urges the SPT to visit Victoria during their visit to Australia in October 2022. We consulted our relevant legal practices and our Community Justice Programs, which provided information about the current state of detention facilities in Victoria. We have created a prioritised list for the SPT's consideration.

Our Community Justice Programs (**CJP**) department has recently received a marked increase in requests from community members who are concerned for their incarcerated family members' welfare at both Port Phillip Prison (**PPP**) and Parkville Youth Justice Precinct. As such, we have placed Parkville and PPP at the top of the list.

1. **Port Phillip Prison**
2. **Parkville Youth Justice Precinct**
3. **Dame Phyllis Frost Centre**
4. Geelong Police Station
5. Melbourne Assessment Prison
6. Corella Place – Hopkins Correctional Centre
7. Mildura Police Station

Prisons

Port Phillip Prison (PPP)

Our Civil and Human Rights, Criminal and Wirraway practices consistently identified PPP as the 'worst prison in Victoria'. PPP is a privately run prison by G4S Australia.

The infrastructure at PPP is outdated and below standard. VALS lawyers and community program staff who have visited clients and delivered outreach programs at the prison have agreed that the standard of infrastructure is unsafe. The PPP complex is entirely concreted with no green space or natural outdoor areas for the incarcerated men to enjoy. The protective bars within the prison are rusting and cells are locked with physical 'jangling' keys. In other Victorian prisons, there are some green outdoor areas for incarcerated people to use, the use of bars for cell doors is no longer standard and cells are divided by physical doors with glass panes for security, and the use of electronic swipe cards has replaced the use of physical keys.

Isolation cells at PPP are inappropriately used. VALS has assisted a man who was confined to his isolation cell for 14 months after he was violently assaulted by another man at the prison. who was attempting to fatally injure him. Our client suffered serious brain damage as a result of the assault and was subsequently kept in isolation for 14 months.

VALS' concerns regarding prison healthcare extend to PPP. VALS clients have reported a lack of access to medical services and professionals. We have heard reports from clients who have sustained major injuries being inappropriately treated with paracetamol.

Members of the Victorian Aboriginal Community have informed our service that instances of physical violence perpetrated by G4S staff against men incarcerated at PPP is rife. Our service has assisted multiple clients with prison complaints against PPP involving an excessive use of force by G4S staff. VALS is aware of instances where incarcerated men at the prison have suffered horrific lifelong injuries and disabilities at the hands of G4S staff, including acquired brain injuries.

Following an electrical fire in the prison's security office in 2017, G4S locked-down the prison for weeks whilst they repaired the damaged areas to the prison. Many incarcerated people were confined to their cells for up to 22-hours per day and prison visits for family and professional visitors ceased during the repairs period. The fire was a result of G4S's failure to maintain the electrical system at the prison. Many men who were incarcerated at PPP when the fire occurred continue to suffer ongoing traumas.

The Independent Broad-based Anti-corruption Commission (**IBAC**) published a *Special report on corrections* in 2021, with a particular focus on several incidents in PPP. The investigation found manifestly excessive use of force, including an assault of a person after a strip search, and the continued striking of a person with a disability after he had been taken to ground and restrained. IBAC found that the use of force "was excessive and inconsistent with Port Phillip Prison policy, which requires officers to use the minimum amount of force necessary to achieve control," and in one case amounted to inhuman or degrading treatment under the Victorian Charter.[76] In its investigation of one incident, IBAC found that two officers had intentionally kept their Body-Worn Cameras turned off, while two others had interfered with recordings to hide evidence of wrongdoing. After the incident, Corrections staff produced reports which were "incomplete or failed to give a full account of events." Furthermore, the supervisor's summary of the incident repeated those reports, without accounting for ways they contradicted video evidence, and made no attempt to critically examine the incident.[77] IBAC also pointed to "a culture of excessive use of force" among Tactical Operations Group officers, the specialist staff who receive training on the use of force and restraints.[78] IBAC found highly troubling practice in relation to strip searches. Many staff were unfamiliar with the human rights standards supposed to govern their behaviour and prison management did not properly investigate complaints about inappropriate searches.[79] Most concerningly, IBAC reported that the General Manager of Port Phillip Prison told its investigators that strip searches were "one of the options available to assert control" over people in prison. This is a clear demonstration that strip searches are used not out of necessity at PPP, but as a tool of discipline and to exert power over detained people.[80]

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[76] Independent Broad-based Anti-corruption Commission (2021), *Special report on corrections*, p34.
[77] Ibid, p9.
[78] Ibid, p34.
[79] Ibid, p54, 62.
[80] Ibid, p54.

- *Location: Metropolitan Melbourne (approx. 20 minutes from Melbourne CBD).*
- *Link - https://www.corrections.vic.gov.au/prisons/port-phillip-prison*

Dame Phillis Frost Centre (DPFC)

DPFC is one of two women's prisons in Victoria. DPFC is a maximum-security prison that detains up to 604 women on remand and serving sentence. VALS and the wider community have serious concerns about the welfare and treatment of women held at DPFC. Since 2018, four women and a 12-day old baby have died whilst detained at DPFC.[81] Of paramount concern is the consistent failure of DPFC to provide appropriate medical care to detained women and children. In at least three of the five deaths, issues of inadequate medical care have been raised in the coronial investigation.

VALS currently acts for Veronica Nelson's partner in the coronial inquest into her death at DPFC in 2020. During the coronial inquest into Veronica's death, the court heard she had cried for help dozens of times in the days preceding her death, and for several hours the night of her death. Ms Nelson was told by custodial staff to stop yelling for help because it was distressing other inmates, and that she needed to stop pressing emergency button in her cell. In the Inquest, medical experts unanimously found that Veronica's death was preventable and a result of DPFC's lack of care. The coroner is expected to deliver their findings in late 2022. Please see the Addendum for VALS' submissions to the Inquest into the Death of Veronica Nelson.

DPFC has received critical attention in multiple independent reports. In 2017, the Victorian Ombudsman conducted an 'OPCAT-style' inspecton of the prison. The Ombudsman observed use of restraints in circumstances where they clearly were not needed, "including reports of pregnant women being handcuffed when attending external medical appointments."[82] These instances were particularly acute in the Swan 2 management unit, where women are kept isolated. In this unit, "[i]ncident reports record instances where staff applied handcuffs to women who were incapacitated or unconscious after self-harming, and before medical assistance was provided" and women being handcuffed and escorted by five officers for a transfer of only a few metres.[83] The Ombudsman suggested that DPFC may be affected by "a culture within the prison where the application of restraints is prioritised over the provision of medical assistance."[84] The Ombudsman also found that although there were only five recorded allegations of assaults by staff in 2016-17, 11% of women surveyed in the prison said that they had been assaulted by staff.[85] This is a clear indication that assaults are under-reported by people in prison; 46% of women surveyed in DPFC said they did not feel safe to make a complaint in the prison.[86] Routine and unnecessary strip searching was also

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[81] Nadine Silva, 'Vigil held to remember women who died in Melbourne prison' (Article, 10 December 2021).
[82] Victorian Ombudsman (2017), *Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre*, p4.
[83] Ibid, p53.
[84] Ibid.
[85] Ibid, p63.
[86] Ibid, p68.

identified by the Ombudsman, and the Government did not accept the Ombudsman's recommendation to cease routine pre-visitation strip searches.

- *Location: Metropolitan Melbourne (30 minutes from Melbourne CBD).*
- *Link - https://www.corrections.vic.gov.au/prisons/dame-phyllis-frost-centre*

Parkville Youth Justice Precinct

Parkville is one of two youth detention facilities in Victoria. The Parkville Precinct detains young people, both male and female, aged 10 – 21, who are either remanded or serving sentence. The Victorian Government is currently constructing a third youth detention facility in Victoria's West.

Our specialist youth crime service, Balit Ngulu, has identified serious concerns with Parkville's ongoing staffing issues, that have resulted in ongoing lockdowns and isolation of children in custody at the precinct. Our lawyers have reported that clients as young as 13 have been held in isolation in their cells for extended periods, and provided with minimal entertainment or educational packages. The ongoing lockdowns are in addition to the required 7 days solitary quarantine all children endure when they are first taken to Parkville. A 14-day quarantine requirement was instituted in early 2020 in an attempt to manage COVID-19 outbreaks in prisons, however, as of 4 April 2022 the quarantine length has been reduced to 7 days across all prisons in Victoria. All prisons in Victoria require incarcerated people to be quarantined for 7 days before entering the general population of the prison. Incarcerated people are also required to quarantine for a further 7 days if they are moved custody locations (i.e. moved from a remand centre to a sentencing prison), regardless of whether they have had contact with the general public. The ongoing lockdowns and 7-days quarantine requirements at Parkville result in solitary confinement of incredibly vulnerable young people. Our young people should not be subjected to this treatment two and a half years into this pandemic. The Victorian Government has had ample time to develop disease-control mechanisms that does not result in the solitary detainment of children as young as 10.[87]

Further, the Minister for Youth Justice recently released data that stated there were 26,837 lockdowns in youth custodial settings in 2020-2021 due to security concerns, and 1,676 behavioural based lockdowns in the same period.[88] Lockdowns in any setting is harmful, but it is especially harmful in a youth setting.

Media reporting based on documents from the workplace safety regulator has revealed that "Victoria's youngest prisoners inside the Parkville Youth Justice Precinct are being regularly assaulted,

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[87] 10 is the youngest age that a young person can be to be detained at Parkville. The youngest client of VALS who was detained at Parkville is 13 years old, which is still far below international standards.

[88] The Hon. Natalie Hutchins MP, Minister for Youth Justice, 18 May 2022, *Presentation to the Budget Estimates Hearing of the Public Accounts and Estimates Committee*, p5.

hospitalised, and have tried to escape custody".[89] The documents showed that staff shortages were leading to regular lockdowns of the prison, exacerbating the trauma of children held at Parkville and creating dangerous conditions for both incarcerated children and staff.

- *Location: Metropolitan Melbourne (10 minutes from Melbourne CBD).*

Melbourne Assessment Prison (MAP)

MAP is a male assessment prison in the Melbourne CBD that holds recently remanded men for a short period, before they are moved to a longer-term remand facility. Most men who are remanded in Victoria are first sent to MAP before moving to a long-term prison.

Due to the short-length of many people's incarceration at MAP, access to appropriate support services is limited. VALS clients regularly inform our service that they are often left in their cells without any contact from the prison medical department, despite our clients regularly requesting medical review. The provision of medical and mental health supports at MAP is extremely poor. It is often reported that men who are received into MAP will not be assessed by a doctor or mental health service for several days following their admission to the prison. This is especially worrisome in the assessment prison setting, as men are regularly in the midst of a mental health crisis/episode or are withdrawing from drug use. Our service is consistently concerned about the lack of supervision and attention given to men who are requesting assistance and being left alone for several days.

Each prison in Victoria has an Aboriginal Liaison Officer (**ALO**), sometimes called an Aboriginal Welfare Officer (**AWO**). VALS regularly contacts the ALO and requests that they visit our clients to introduce themselves and ensure our clients are attended to by the relevant medical departments. Often, we find that the ALO will be able to arrange medical assessment far faster than is the standard timeframe. All people in custody should have prompt and appropriate access to medical treatment in custody. It should not fall on the legal services to advocate for our clients to receive appropriate medical care.

The ALO position at MAP is regularly vacant, and this results in a disconnect between the prison, our service and our clients. The ALO plays an important role in keeping Aboriginal people safe in the prison system.

The Victorian Ombudsman published a report in June 2022 examining allegations of inappropriate use of force at MAP and the Melbourne Remand Centre, another prison almost exclusively holding people on remand.[90] The report found that the enormous growth in Victoria's remand population has put significant strain on these prisons, and that use of force is far more common in these prisons than

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[89] ABC News, 10 March 2022, 'Documents reveal violence, self-harm and chaos inside Melbourne's Parkville Youth Justice Precinct'.
[90] Victorian Ombudsman (2022), *Report on investigations into the use of force at the Metropolitan Remand Centre and the Melbourne Assessment Prison*.

others. The Ombudsman examined eight specific incidents and found that there was evidence to substantiate complaints in four of them, while noting that "all [the incidents] showed concerning behaviour or poor decision-making by officers."[91] The investigation also revealed indicators of a dangerous culture among staff at MAP. No prison officer who completed an incident report after any of the eight cases included any material adverse to another officer, and interviews showed a strong anti-whistleblower culture.[92] There were also clear signs that prison officers were deliberately dealing with vulnerable people and volatile situations in parts of the prison where there is no CCTV coverage, and officers with Body-Worn Cameras did not activate them appropriately.[93]

- *Location: Melbourne CBD.*
- *Link - https://www.corrections.vic.gov.au/prisons/melbourne-assessment-prison*

Police Custody Cells

VALS has serious concerns about the safety of police cells as places of detention in Victoria. Due to the growth of the remand population, increasing court backlogs, and (throughout the pandemic) restrictions on transfers between detention locations, some people under arrest have been spending extended periods in police cells. In some cases, this includes serving their entire custodial sentence in these cells. This is highly concerning, because the design of police cells does not facilitate very basic welfare safeguards, such as the separation of detained people (men from women, vulnerable people from others, etc), the provision of healthcare, access to showers and exercise, and the right to have visitors or make phone calls.[94] Even for shorter periods of detention, police conduct frequently puts detained persons at risk.

Geelong Police Station

Our Criminal Solicitors and our Custody Notification Officers have identified Geelong Police Station as a concerning police custody location.

Our Custody Notification Officers (**CNO**s) have reported that Geelong Police Station routinely fails to provide adequate care for people they hold in custody, including a failure to ask people about their medical/medication requirements and failing to provide prescribed medication to people who are held in custody for extended periods. They have reported that Police Custody Officers (**PCO**s) have a disregard for the wellbeing of people held in custody at the station, and both our CNOs and solicitors have stated that the PCOs treat people in custody very poorly. Our solicitors have also reported that

[91] Ibid, p4.
[92] Ibid, pp69-78.
[93] Ibid, pp29-37.
[94] Ombudsman Victoria & Office of Police Integrity (2006), Conditions for persons in custody. Accessed at https://www.vgls.vic.gov.au/client/enAU/search/asset/1148071/0.

PCOs will refuse to allow detained people to speak with their legal representative following interview or prior to their remand court appearance.[95]

- *Location: Regional City of Victoria (approx. 1 hour from Melbourne CBD).*

Mildura Police Station

Mildura Police Station has been a concerning police custody location for several years. We would recommend visiting Mildura Police Station if the SPT has already planned a visit to border communities in New South Wales and South Australia. Aboriginal communities in Mildura and the surrounding regional suburbs (Robinvale and Swan Hill) regularly report racist policing practices to VALS. Mildura police over-police Aboriginal communities in the region, especially Aboriginal children.

- *Location: Regional Victoria (6 hours by car from Melbourne CBD, approx. 1 hour by aeroplane).*

Indefinite Detention Facilities

Corella Place (Hopkins Correctional Centre)

Corella Place is one of two post-sentence detention facilities in Victoria. It is a 40-bed post-sentence residential detention facility attached to Hopkins Correctional Centre in Victoria's North-West. The facility houses men who are subject to Supervision Orders under the *Serious Offenders Act.*[96] The Victorian Government purports the purpose of Corella Place is to 'enhance community safety' and provide rehabilitative programs for the residents. Corella Place is essentially an indefinite detention facility that allows men to be detained in a correctional setting following the completion of their sentence. Supervision Orders can be in place for up to 15 years,[97] and thus the 'pathway out' of Corella Place is not as accessible as it should be. Our legal practices report that Supervision Orders are often difficult to comply with for many clients, and that failure to comply with conditions of the Supervision Order will typically result in criminal charges and further criminalisation of the person.[98]

Corella Place does not provide the support and rehabilitation that it was intended to. Instead, it has become a place where men convicted of serious offences can be held out of sight, and out of mind. The men who are detained at Corella Place have completed their sentences and yet continue to be held in a quasi-prison setting for many years following the completion of their custodial sentences. VALS is concerned about the lack of appropriate rehabilitative programs, supports and pathways to

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[95] s464C(1)(b) of the Crimes Act 1958 (Vic) provides that a detained person must be afforded an opportunity to speak with their legal representative prior to interview. There are, however, no requirements under the Crimes Act that protects the right of a legal representative to speak with their client following interview.
[96] Serious Offenders Act 2018 (Vic).
[97] Ibid, s19.
[98] Ibid, s173.

release from Corella Place. We are also critical of the absence of appropriate cultural understanding by staff in both post-sentence detention facilities.[99] Ultimately, VALS is of the view that administrative, post-sentence detention is an unjust and ineffective, and should be abolished.

- *Location: Regional Victoria – attached to Hopkins Correction Centre in Ararat (2 hours from Melbourne CBD).*
- *Link – Hopkins Correctional Centre; https://www.corrections.vic.gov.au/prisons/hopkins-correctional-centre*

[99] Corella Place and Rivergum Residential Facility.

Key Material on the Detention Context in Victoria

In this section, we have provided **links to VALS submissions, policy briefs and papers, factsheets, webinars and other material, to assist the SPT in understanding the detention context in Victoria.** Outlined in these documents are concerns, challenges and opportunities, with regards to preventing the death, torture and ill-treatment of Aboriginal and/or Torres Strait Islander people deprived of their liberty in Victoria (including by way of reducing the overincarceration of Aboriginal people). Places of detention considered are prisons, youth prisons, police custody and mental health facilities.

For ease of reference, we have also included an Addendum with select material, to which VALS recommends the SPT pays particular attention.

OPCAT

1. Community Factsheet – OPCAT: An opportunity to prevent the ill-treatment, torture and death of Aboriginal and Torres Strait Islander people in custody ***(see Addendum)***
2. Dragging its feet on torture prevention: Australia's international shame
3. Victoria has spent billions on prisons, but has shirked its duty to oversight
4. Australia must act now to protect children and young people in detention
5. Webinar - Unlocking Victorian Justice: OPCAT
6. *See also Submission to the Inquiry into Victoria's Criminal Justice System (September 2021), Supplementary Submission to the Royal Commission into Victoria's Mental Health System (August 2020)*

Aboriginal Deaths in Custody

7. Community Factsheet - Ending Aboriginal Deaths in Custody ***(see Addendum)***
8. Submissions on behalf of Uncle Percy Lovett for the Coronial Inquest into the passing of Veronica Nelson ***(see Addendum)***
9. *See also Submission to the Inquiry into Victoria's Criminal Justice System (September 2021)*

Prisons (General)

10. Submission to the Cultural Review of the Adult Custodial Corrections System (December 2021) ***(see Addendum)***

Prisons (Healthcare)

11. Submission to the Consultation on the Royal Australian College of General Practitioners (RACGP) Standards for Health Services in Australian Prisons (May 2022) ***(see Addendum)***
12. Victoria's prison health care system should match community health care
13. *See also Submission to the Inquiry into Victoria's Criminal Justice System (September 2021)*

Prisons (Strip Searching)

14. Community factsheet: VALS intervention in Court of Appeal Strip Searching and Urine Testing Case ***(see Addendum)***
15. Strip searches in prison are traumatising breaches of human rights. So, why are governments still allowing them?

Places of Detention (Solitary Confinement)

16. Webinar – Unlocking Victorian Justice: Solitary Confinement
17. *See also Submission to the Inquiry into Victoria's Criminal Justice System (September 2021)*

COVID-19 Responses in Places of Detention

18. Submission to the Public Accounts and Estimates Committee COVID-19 Inquiry (September 2020)
19. Policy Paper - Building Back Better: Victorian Aboriginal Legal Service COVID-19 Recovery Plan (February 2021)
20. Submission to the Senate Legal and Constitutional Affairs Committee concerning the *Crimes Amendment (Remissions of Sentences) Bill* 2021 (Cth) (September 2021)
21. Community Factsheet - Managing the Pandemic in Victoria ***(see Addendum)***

Police Oversight and Accountability

22. Policy Brief – Reforming Police Oversight
23. Policy Paper – Reforming Police Oversight ***(see Addendum)***
24. Webinar – Who Polices the Police?

Bail

25. Policy Brief – Fixing Victoria's Broken Bail Laws ***(see Addendum)***

Decriminalising Public Intoxication

26. Community Factsheet - Decriminalising Public Intoxication ***(see Addendum)***

Criminal Legal System (General)

27. Submission to the Inquiry into Victoria's Criminal Justice System (September 2021)
28. Website - Aboriginal Community Justice Reports
29. Webinar – Unlocking Victorian Justice: Aboriginal Community Justice Reports
30. Submission to the Inquiry into the Use of Cannabis in Victoria (September 2020)
31. Submission to the Sentencing Act Reform Project (April 2020)
32. Submission to the Parliamentary Inquiry into Spent Convictions Scheme (July 2019)
33. Submission to the Inquiry into Children of Imprisoned Parents (May 2022) ***(see Addendum)***
34. Submission to the Victorian Law Reform Commission Project – Improving the Response of the Justice System to Sexual Offences (March 2021)

35. Policy Paper - Addressing Coercive Control Without Criminalisation – Avoiding Blunt Tools that Fail Victim-Survivors
36. Webinar - Addressing Coercive Control Without Criminalisation – Avoiding Blunt Tools that Fail Victim-Survivors

Mental Healthcare and Disability

37. Submission to the Royal Commission into Victoria's Mental Health System (July 2019)
38. Supplementary Submission to the Royal Commission into Victoria's Mental Health System (August 2020) ***(see Addendum)***
39. Submission on Current Proposals for the new *Mental Health and Wellbeing Act* (August 2021)
40. Submission to Department of Families, Fairness and Housing, Victoria Review of the *Disability Act* 2006 (October 2021)

Anti-Racism and Systemic Racism

41. Submission on Victoria's Anti-Racism Strategy (December 2021)
42. Supplementary Submission on Victoria's Anti-Racism Strategy (June 2022)
43. Submission on the National Anti-Racism Framework (February 2022)
44. Community Factsheet - Systemic Racism ***(see Addendum)***

Aboriginal Self Determination and UNDRIP

45. Community Factsheet – Aboriginal Self-Determination ***(see Addendum)***
46. Submission to the Inquiry on the Implementation of United Declaration of the Rights of Indigenous Peoples in Australia in Australia (June 2022)

ADDENDUM

1. Community Factsheet – OPCAT: An opportunity to prevent the ill-treatment, torture and death of Aboriginal and Torres Strait Islander people in custody (see Addendum)
2. Community Factsheet - Ending Aboriginal Deaths in Custody
3. Submissions on behalf of Uncle Percy Lovett for the Coronial Inquest into the passing of Veronica Nelson
4. Submission to the Cultural Review of the Adult Custodial Corrections System (December 2021)
5. Submission to the Consultation on the Royal Australian College of General Practitioners (RACGP) Standards for Health Services in Australian Prisons (May 2022)
6. Community factsheet: VALS intervention in Court of Appeal Strip Searching and Urine Testing Case
7. Community Factsheet - Managing the Pandemic in Victoria
8. Policy Paper – Reforming Police Oversight
9. Policy Brief – Fixing Victoria's Broken Bail Laws
10. Community Factsheet - Decriminalising Public Intoxication
11. Submission to the Inquiry into Children of Imprisoned Parents (May 2022)
12. Supplementary Submission to the Royal Commission into Victoria's Mental Health System (August 2020)
13. Community Factsheet - Systemic Racism
14. Community Factsheet – Aboriginal Self-Determination

The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)

An opportunity to prevent the ill-treatment, torture and death of Aboriginal and Torres Strait Islander people in custody.

What is OPCAT?

In 2017, Australia made a commitment to implement the United Nations *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (**OPCAT**) by January 2022. The Australian Government then sought a further one year extension, until January 2023. The objective of OPCAT is 'to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.'

OPCAT, ratified by Australia, requires States to 'set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment.' These bodies are called National Preventive Mechanisms (**NPM**s). NPMs can mitigate the risks of torture and ill-treatment of people who are detained in police vehicles and cells, prisons and youth detention facilities and other places where people may be deprived of their liberty.

Accountability and prevention are two sides of the same coin, but the only jurisdictions that have designated NPMs at this stage are the Commonwealth and Western Australia.

Australia's obligations also extend to facilitating visits by the UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (**SPT**), which has announced that it will be visiting Australia in the second half of 2022, inspecting places of deprivation of liberty and torture prevention measures in Australia.

Published July 2022. Go to vals.org.au/publications to check for updates.

The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)

Does OPCAT need to be culturally appropriate for Aboriginal and Torres Strait Islander People?

Yes. Effective prevention of the torture and ill-treatment of Aboriginal people in custody requires culturally appropriate OPCAT implementation.

Aboriginal and Torres Strait Islander people are grossly overrepresented in the criminal legal system. OPCAT is an opportunity to prevent torture and ill-treatment, but it will only achieve real outcomes for Aboriginal people if the operations, policies, frameworks and governance of the designated detention oversight bodies are always culturally appropriate and safe for our people.

Should the Government be consulting with Aboriginal communities and organisations about OPCAT implementation?

Culturally appropriate implementation of OPCAT simply cannot be realised without our participation, respecting the existing governance structures under the Aboriginal Justice Agreement and the expertise of Aboriginal Community Controlled Organisations such as VALS. VALS has been advocating for the Government to urgently undertake robust, transparent and inclusive consultations with the Victorian Aboriginal community, its representatives and Aboriginal Community Controlled Organisations (such as VALS) on the implementation of OPCAT in a culturally appropriate way.

What are some key features of a culturally appropriate NPM (OPCAT detention oversight body)?

The Victorian NPM must be culturally competent for Aboriginal and/or Torres Strait Islander people.

Published July 2022. Go to vals.org.au/publications to check for updates.

The NPM should appreciate
- the legacy and ongoing impacts of colonisation;
- that Aboriginal perspectives of what constitutes torture, or cruel, inhuman or degrading treatment or punishment may diverge from that of non-Aboriginal people; and
- that the long-term impact of torture and ill-treatment can be shaped by the survivors' culture and the historic-political context of the ill-treatment (including the history of colonisation).

It should also take into account systemic racism in its work.

You can find further information on culturally appropriate OPCAT implementation in the Churchill Fellowship report of our Head of Policy, Communications and Strategy, Andreea Lachsz, here.

How can the Victorian and Commonwealth Governments properly implement OPCAT in Victoria?

VALS has made a number of recommendations for proper implementation of OPCAT in Victoria, in accordance with an accurate interpretation of OPCAT and established best practice:
- The Victorian NPM's mandate should (in compliance with Article 4 of OPCAT and Recommendation 10 of the Australian Human Rights Commission's report), include any place under the Government's jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence.
- Places of detention should include both public and private custodial settings, which that person is not permitted to leave at will, by order of any judicial, administrative or other authority.
- The NPM's mandate should include (but not be limited to) forensic mental health hospitals, closed forensic disability facilities or units, correctional facilities, youth detention facilities, police custody, court custody, and residential secure facilities for children. It should also include circumstances such as the Victorian public housing towers that were subjected to hard lockdown during the pandemic.

The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)

- The Australian Human Rights Commission's expansive understanding of 'place of detention', including that temporal limits should not be erroneously imposed, is an accurate interpretation of OPCAT that should be adopted by the Victorian Government. The Commonwealth Government has suggested excluding from an NPMs' mandate places of detention where people are held for less than 24 hours. This is not only an inaccurate legal interpretation, it also fails to acknowledge research that has shown that the risk of torture is higher in police custody than in correctional facilities.
- The Victorian Government should legislate for the NPM's mandate, structure, staffing, powers, privileges and immunities.
- The Victorian Government must ensure that the NPM is sufficiently funded to carry out its mandate effectively and independently (recognising that this may include funding from the Commonwealth Government).

The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)

Where can I learn more about OPCAT?

You can watch the recording of our first webinar from our Unlocking Victorian Justice series: OPCAT - An opportunity to prevent the ill-treatment, torture and death of Aboriginal and Torres Strait Islander people in custody here.

Senator Lidia Thorpe gave the opening address for the OPCAT panel.

The panellists were:

- Dr Elina Steinerte, Vice-Chair United Nations Working Group on Arbitrary Detention
- Professor Sir Malcolm D Evans, Former Chair of the UN Subcommittee for Prevention of Torture
- Dr Matthew Pringle, Founder of the Canada OPCAT Project
- Ben Buckland, Senior Advisor at Association for the Prevention of Torture

You can find out more about the panellists here.

You can read more about OPCAT, and the prevention of and accountability for Aboriginal deaths in custody in the below VALS documents:

- Building Back Better – VALS COVID-19 Recovery Plan
- Submission to the Public Accounts and Estimates Committee – Inquiry into the Victorian Government's Response to COVID-19
- Supplementary submission to the Royal Commission into Victoria's Mental Health System
- Submission to the Inquiry into Victoria's Criminal Justice System
- Submission to the Cultural Review of the Adult Custodial Corrections System
- Submission to the Consultation on RACGP Standards for Health Services in Australian Prisons (2nd edition)

Community fact sheet: Ending Aboriginal Deaths in Custody

What was the Royal Commission into Aboriginal Deaths in Custody?

The Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**) was an inquiry called by the Australian Government in 1987, after growing public attention on the deaths of Aboriginal people in prisons and police stations. Over four years, it investigated 99 individual deaths across Australia and systemic problems which had helped cause them. The Commission's final report in April 1991 found major failures by governments, police and prison authorities, and made 339 recommendations to address these problems and end Aboriginal deaths in custody.

What has the Government done since the Royal Commission into Aboriginal Deaths in Custody?

Recommendations from the RCIADIC included changes to prison conditions and procedures, reforms to how police worked, and changes in the law to keep Aboriginal people out of prison. Governments have not done enough to implement these recommendations, and in many cases they have gone backwards. For example, the Victorian Government is only now decriminalising public drunkenness – more than 30 years after the RCIADIC's report – and has made it harder to access bail, when the RCIADIC recommended it should be easier.

The Commonwealth Government's own review found that only 64% of the RCIADIC's recommendations have been fully recommended – and an independent report by Aboriginal scholars found that number is much lower. Many recommendations have been implemented then reversed, or implemented on paper without leading to the intended outcomes.

Has the number of Aboriginal deaths in custody decreased?

No. The Royal Commission was established after public outcry about 99 Aboriginal deaths in custody between 1980 and 1989 – about one every month. Since the RCIADIC published its final report, at least 500 Aboriginal people have died in custody – about one every 22 days.

One of the key findings of the Royal Commission was that Aboriginal deaths in custody occur at such a high rate primarily because so many Aboriginal people are arrested and imprisoned. This problem also has not been addressed. In 1991, the incarceration rate of Aboriginal people in Victoria was 767.9 per 100,000 people. In 2019, it had risen to 2,219.9 per 100,000.

How can we end Aboriginal deaths in custody?

Reduce the number of Aboriginal people who are incarcerated

Aboriginal people now make up more than 10% of the people held in prison in Victoria, compared to less than 1% of the Victorian population. Reducing incarceration rates will require changes in housing, health and social support, not just the legal system. However, several simple changes would immediately make a difference.

Public drunkenness

Criminal charges of public drunkenness are disproportionately used by police against Aboriginal people. The tragic case of Tanya Day, who died in custody in December 2017 after being arrested for being drunk in public, shows how Aboriginal people are brought to police stations when they pose no danger to anyone.

After extensive advocacy by the Day family, Victoria passed a law to decriminalise public drunkenness. There will now be a health-based response to people who are drunk in public, but the details are still being worked out by the Government. It is crucial that the Government does not involve police in responding to people who are drunk in public, and that nobody is ever held in a police cell because they are drunk.

Community fact sheet: Ending Aboriginal Deaths in Custody

Reform Victoria's punitive bail laws

Over thirty years ago, the RCIADIC recommended that all governments should "revise any criteria which inappropriately restrict the granting of bail to Aboriginal people". Instead, Victoria has consistently tightened its bail laws. Changes in 2013, 2017 and 2018 have made it harder to access bail, especially for people without stable housing. As a result, the number of unsentenced Aboriginal people held in Victorian prisons quadrupled from June 2015 to June 2019.

More than half of the Aboriginal people who have died in custody since the Royal Commission had not been sentenced to jail time – they died while being held by police or on remand, after they were refused bail. The Victorian Government's punitive bail laws are putting more and more Aboriginal people in custody and at risk. It must urgently reform the Bail Act, invest in culturally appropriate bail accommodation and support, and allow Koori Courts to hear bail applications.

Raise the age of criminal responsibility

The minimum age for being charged with a criminal offence should be 14, and the minimum age for incarceration should be 16. Currently, children as young as 10 can be imprisoned. Aboriginal children are detained at nearly seven times the rate of non-Aboriginal children in Victoria. The Productivity Commission has found that, nationally, raising the age to 14 would reduce the number of Aboriginal children in prison by 15%.

Improve prison conditions through independent inspections and higher standards

Conditions in prisons and police cells can have devastating effects on the mental and physical health of Aboriginal people. While some lessons have been learned from the Royal Commission's report, many have not. The use of solitary confinement needs to be ended, and healthcare should be equivalent to what is available in the community – both recommended by the RCIADIC in 1991. An independent report highlighted repeated abuses in Victorian prisons, and found that prison staff do not understand their duty to care for the human rights of people in prison.

Improving conditions in prisons and police cells will only happen with independent oversight. Under an international treaty, the Optional Protocol to the Convention Against Torture (**OPCAT**), Australian governments have to establish an independent agency to inspect prisons and make recommendations for how conditions need to be improved.

Victoria will has missed the deadline for implementing OPCAT by January 2022. The Victorian Government needs to consult on how to make sure detention inspections are culturally appropriate for Aboriginal people, and implement OPCAT as a matter of urgency. You can read VALS' fact sheet on OPCAT here.

Create an Aboriginal and Torres Strait Islander Social Justice Commissioner

The RCIADIC made 339 recommendations, and in the thirty years since there have been countless recommendations from coronial inquests, parliamentary inquiries and other Royal Commissions. There is no transparency or accountability on the Government to put these recommendations into action and end Aboriginal deaths in custody. VALS and the Aboriginal Justice Caucus have consistently called for an independent Aboriginal Social Justice Commissioner to monitor the Government's progress in making the recommended changes. As long as the Government is not accountable for making change happen, the number of Aboriginal deaths in custody will continue to grow.

Where can I learn more about ending Aboriginal deaths in custody?

- Submission to the Parliamentary Inquiry on Victoria's Criminal Justice System
- VALS' Aboriginal deaths in custody information page
- Community fact sheet: the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)

IN THE CORONER'S COURT OF VICTORIA | **No: COR 2020 0021**

INQUEST INTO THE DEATH OF VERONICA NELSON

SUBMISSIONS ON BEHALF OF UNCLE PERCY LOVETT

A. INTRODUCTION

1. This submission is made on behalf of Veronica's partner, Uncle Percy Lovett. Percy is grateful to the Court for its time and diligence in its investigation of Veronica's passing and in the hearing of the Inquest. He is also grateful to the Court for the respect it has shown to Veronica, her family, her loved ones, and her Aboriginal culture throughout the hearing of the Inquest.

2. Percy is hopeful that any findings and recommendations the Coroner makes will bring about real change. Too many Aboriginal people have died and continue to die in custody. These repeated deaths are preventable. They must stop.

3. This year marked the 31st anniversary of the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**), which made 339 recommendations aimed at the prevention of Aboriginal deaths in custody. More than three decades on, over 512 Aboriginal and/or Torres Strait Islander people have died in custody.[1] Many of the recommendations of RCIADIC sit gathering dust while the unnecessary loss of life accumulates.[2]

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[1] Australian Institute of Criminology, 'Deaths in custody in Australia', 7 June 2022, available at <https://www.aic.gov.au/statistics/deaths-custody-australia>.
[2] Thalia Anthony et al, '30 years on: Royal Commission into Aboriginal Deaths in Custody recommendations remain unimplemented', 2021, accessed at <https://caepr.cass.anu.edu.au/sites/default/files/docs/2021/4/WP_140_Anthony_et_al_2021_0.pdf>.

4. As stated by Dr Amanda Porter, and supported by a consensus of the Administration of Justice Conclave, hollow words and hollow promises, including a "culture of denial, of not hearing and of impunity" are part of the problem.[3]

5. Had the Victorian Government listened to the advocacy of Aboriginal and Torres Strait Islander peoples and organisations, and enacted the genuine systemic reforms demanded by RCIADIC and by Aboriginal organisations since RCIADIC, Veronica would be alive. She would not have died alone, in pain, calling for her father and screaming out for help. More than mere words are required. Percy seeks real action and long-term change. He wants to make sure this does not happen again.

6. In these submissions, the factual evidence is recounted in brief terms, pausing at relevant stages to submit what findings should be made. Respectfully, Percy agrees with the Coroner's "Draft Findings and Recommendations" circulated by solicitors assisting on 30 May 2022. He does, however, submit that certain additions and amendments to the findings are open on the evidence and should be made.

7. Percy also respectfully submits that strong and direct criticism of individuals, organisations and Government agencies is both justified and required. Individuals who hold responsibility should be named. The total neglect of Veronica and the denial of her basic humanity and dignity by numerous individuals and by the private and Victorian government organisations with responsibility for her treatment and care, was more than merely 'inadequate' or 'deficient'. It was deliberate. It was grossly negligent. It was inhumane. It was brutal. It was tortuous. It killed her. As stated by Gomeroi writer Alison Whittaker, "[w]hile coroners can't impose any legal liability for the cases before them, they can and do use condemnatory language to express a sense of culpability –

[3] Collated Transcript of Inquest (**T**) 2718.

just like you and I might."[4] It is respectfully submitted that this approach is important for accountability and for prevention.

8. To achieve true accountability and justice for Veronica, and to ensure that this does not happen again, Percy submits that the Coroner should go further than making the findings proposed. Percy submits that the Coroner should refer Correct Care Australasia (**CCA**), and the individual doctors, nurses and prison officers who were responsible for Veronica's neglect and/or eventual passing through their neglect and inhumane treatment, to the Director of Public Prosecutions (**DPP**) for consideration of pursuing criminal charges. He also seeks referrals to regulatory bodies, as described below. In Percy's words, "we're held accountable when we do something wrong, so why shouldn't they be accountable when they killed Veronica".

9. In 1991, RCIADIC stated that "[n]on-Aboriginal Australia has developed on the racist assumption of an ingrained sense of superiority that it knows best what is good for Aboriginal people."[5] Percy submits that racist values and assumptions which exclude and inferiorise Aboriginal people impacted on Veronica's care and treatment by both individuals and agencies within systems. He submits that the Coroner can and should make findings regarding racial bias and systemic racism when considering the relevance of Veronica's Aboriginality to her treatment and care.[6] Systemic racism describes how laws, policies and practices across agencies work together to produce a discriminatory *outcome* for racial or cultural groups. It can be measured in the uneven or unfair manner in which certain apparently 'neutral' laws impact Aboriginal and/or Torres Strait Islander

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[4] Alison Whittaker, '"Dragged like a dead kangaroo": why language matters for deaths in custody', 8 September 2018, *The Guardian,* available at <https://www.theguardian.com/commentisfree/2018/sep/07/dragged-like-a-dead-kangaroo-why-language-matters-for-deaths-in-custody>.
[5] RCIADIC vol. 1, 1.4.10, available at <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol1/>.
[6] Item 4, Amended Scope of Inquest.

people.[7] Systemic racism operates because agents of institutions hold racial bias, including values or assumptions that exclude and inferiorise Aboriginal people.[8] Veronica received the grossly deficient treatment and care that she did because of intersecting discrimination she faced as an Aboriginal woman and a drug user. In the body of this submission, certain aspects of racial bias and systemic racism are discussed. Further, in Part D below, racism is addressed in further detail.

10. In order to address these matters, at the relevant points in this submission, the Coroner's draft findings are identified. Where Percy submits there should be amendments made to the Coroner's draft findings, the Coroner's draft finding number is indicated in square brackets, for example, "[4]". Where further findings are sought, they are indicated with "[#]". Percy's submitted amendments and additions to the Coroner's draft findings are marked in blue underlined font.

11. At Annexure 1, a marked-up version of the Coroner's draft recommendations is provided. As with the findings, the blue underlined text indicates the amendments and additions Percy seeks.

12. The submitted additions and amendments to the recommendations at Attachment 1 draw on the near 50 years of experience of the Victorian Aboriginal Legal Service (**VALS**) in delivering a dedicated, culturally safe legal service for Aboriginal and/or Torres Strait Islander people in Victoria. They are also drawn from the expertise of leading academics and Aboriginal advocacy and health organisations, as well as from the esteemed experts in the Medical and Administration of Justice Conclaves. Percy

[7] See Harry Blagg, Neil Morgan, Chris Cunneen and Anna Ferrante, 'Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Criminal Justice System', Report to the Equal Opportunity Commission and Aboriginal Justice Forum, 2005, 12;

[8] Thalia Anthony (2013), Indigenous People Crime and Punishment, Oxon: Routledge, 68; T. Gray, S. Burgess, and M. Hinton, (2008) 'Indigenous Australians in Sentencing', in E. Johnston, M. Hinton and D. Rigney (eds) Indigenous Australians and the Law, 2nd edn, New York: Routledge-Cavendish. Patricia Gray (2005) 'The Politics and Risk and Young Offenders' Experiences of Social Exclusion and Restorative Justice', British Journal of Criminology 45(6): 119.

acknowledges the leadership of Aboriginal and Torres Strait Islander people and organisations in pushing for the changes proposed in the recommendations.

B. VERONICA

13. In Percy's words:[9]

> Veronica was born on 3 March 1982, in Dandenong. She was a Gunditjmara, Dja Dja Wurrung, Wiradjuri and Yorta Yorta woman.
>
> She was the beloved daughter of Russell and Donna, and sister of Belinda, Russell, Dwayne, Tricia, Richard and Jodie.
>
> Veronica never used to let anyone, or anything get her down. She always tried to stay positive. A lot of times she was happy. It was her personality. A happy personality. She had a beautiful laugh. A happy laugh.
>
> Family was everything to her. Whenever the family got in trouble, she would be right there. No hesitations. She was mainly really proud of having the family together. Family came before everything. She was most proud of her family.

14. Veronica was a deeply spiritual woman, she was dignified, she was respectful, and she was dearly loved.

15. The evidence was clear that when Veronica needed to see a doctor, she would see a doctor.[10] When she needed to go to hospital, she would go to hospital.[11] Had she presented with similar symptoms to those she experienced at Dame Phyllis Frost Centre (**DPFC**) at home, Percy would have taken her to hospital.[12]

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[9] Final Inquest Brief (**IB**) 203.
[10] T48:14.
[11] T57:17-19.
[12] T57:15.

16. Veronica, suffering from obvious malnutrition, and severely withdrawing, continually vomited, causing electrolyte deficiencies and ultimately, her death. It is immaterial whether her vomiting was caused by severe withdrawal or Wilkie's Syndrome. Her vomiting and inability to hold down fluids could have been easily addressed with proper medical intervention. Her severe pain, terrible suffering and ultimate death were preventable.[13] No one should die while suffering the cruelty of "physical pain and psychological pain",[14] powerless, denied medical treatment, uncared for and ignored by those who held her life and welfare in their hands.

Findings:

[1] Veronica Marie Nelson (**Veronica**) died on 2 January 2020 at the Dame Phyllis Frost Centre (**DPFC**) of complications of withdrawal from chronic opiate use and Wilkie Syndrome in the setting of malnutrition.

[2] At the time of her passing, Veronica was a person in the custody of the Secretary of the Department of Justice and Community Safety (**DJCS**).

[3] Veronica's death was preventable.

[#] If Veronica had not been in custody, and was with her loved ones, she would not have died.

C. THE EVENTS

17. In the weeks and days leading up to her arrest, Veronica appeared to be happy, alert, her usual self and in good health.[15]

18. On 30 December 2020, Veronica left her home in Collingwood with Percy.

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[13] T2245-2247.
[14] T2236-2237.
[15] T48.

Veronica's arrest by Victoria Police

19. Veronica, an Aboriginal woman was walking in the city with her brother, minding her own business, when an off-duty police officer, Sgt Brendan Payne, a police officer of 23 years, (who had never arrested her before[16]) "recognised her".[17]

20. Prior to any enquiries or LEAP checks being undertaken, Sgt Payne "knew" that Veronica was wanted on outstanding warrants, he "knew she was Aboriginal",[18] and he decided to arrest Veronica. Veronica, who was always respectful to people in positions of authority, followed Sgt Payne's orders and walked with him to the police station without handcuffs.[19]

21. During her time in Police custody, Veronica did not speak to any other Aboriginal person or any legal representative.

22. Veronica was isolated and alone the entire time she was in Police custody.

23. That afternoon, one of Veronica's brothers told Percy that she had been arrested.[20]

24. In Victoria, numerous studies have found that Aboriginal and/or Torres Strait Islander women are more likely to be apprehended by Police than non-Aboriginal women.[21] This policing is most likely to focus on theft and breach of justice offences, which together

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[16] T68, T71.
[17] T67: 21.
[18] T68:4.
[19] T71.
[20] T44.
[21] The landmark report on systemic racism in Victoria's criminal justice system, commissioned by the Equal Opportunity Commission of Victoria, cited data that police are five times more likely to arrest Aboriginal women compared to non-Aboriginal women: Harry Blagg, Neil Morgan, Chris Cunneen, Anna Ferrante, 'Systemic Racism as a Factor in the Over-representation of Aboriginal people in the Victorian Criminal Justice System', Equal Opportunity Commission of Victoria, September 2005, available at <https://tr.uow.edu.au/uow/file/64419d5f-d183-49c2-90d9-d81c8dc44f17/1/2005-blagg-1-210.pdf>. See too Office of Police Integrity Victoria, 'Talking Together – relations between Police and Aboriginal and Torres Strait Islanders in Victoria: A Review of the Victoria Police Aboriginal Strategic Plan 2003-2008', available at <https://www.ibac.vic.gov.au/docs/default-source/reviews/opi/talking-together---relations-between-police-and-aboriginal-and-torres-strait-islanders-in-victoria-.pdf?sfvrsn=8>.

constitute almost 50% of all charges laid against Aboriginal women.[22] Systemic barriers contribute to Aboriginal people, and in particular Aboriginal women, finding it harder to attend Court and comply with onerous bail conditions. This issue was highlighted by RCIADIC, which emphasised the barriers faced by Aboriginal people in regard to complying with culturally inappropriate bail conditions and other court conditions.[23]

Findings:

[4] Veronica's arrest by Victoria Police (**Police**) on 30 December 2019 was lawful.

[#] Although lawful, Veronica's arrest was due to her visibility as an Aboriginal woman in public. Veronica would not have been arrested if she was not Aboriginal. Her arrest was the result of interpersonal racism.

[#] Veronica's arrest for shoplifting and breach of justice related offences was the result of systemic racism.

[5] The use of handcuffs by First Constable Eliza McMonigle and Senior Constable Rebecca Gauci (upon the Direction of Sgt Payne) was disproportionate in the circumstances and an unlawful use of force. It was also in breach of Veronica's rights under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the *Charter***) to liberty (s 21), privacy (s 13) and humanity and dignity in detention (s 22).

[22] Peta MacGillivray and Eileen Baldry, 'Australian Indigenous Women's Offending Patterns', June 2015, available at <https://www.indigenousjustice.gov.au/wp-content/uploads/mp/files/publications/files/rb19-indigenous-womens-offending-patterns-macgillivray-baldry-2015-ijc-webv2.pdf>.

[23] RCIADIC vol. 3, 21.4.15, 21.4.18, 21.4.27, available at <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol3/>. See too Blagg et al, 'Systemic Racism as a Factor in the Overrepresentation of Aboriginal People in the Victorian Criminal Justice System', 2005.

Bail in Victoria

25. Veronica would not have died, and would have been at home with her family, if it were not for Victoria's punitive and discriminatory bail laws.

26. The punitive bail system in Victoria is the single largest factor contributing to the growth in prison and remand populations and has disproportionately impacted Aboriginal and/or Torres Strait Islander peoples. Relevantly, in June 2019, 57.5% of Aboriginal women in prison in Victoria were on remand, compared to 48% in June 2017 and 29.6% in June 2010. Between 2009-2010 and 2019-2020, the number of Aboriginal women entering prison on remand increased by 440%, compared to a 210% increase for the total prison population.[24]

27. The discriminatory, and sometimes deadly impact of bail laws on Aboriginal and/or Torres Strait Islander women is not new. Of the 99 deaths investigated by RCIADIC, 30% involved unconvicted Aboriginal people being held in prison. Of the 11 Aboriginal women investigated by RCIADIC, 10 (91%) died in custody without a conviction or sentence. Of the 26 Aboriginal women who have died in custody since 2001, 23 (88%) were in custody without a conviction/sentence. Studies in other States have found that Aboriginal people (and in particular, Aboriginal women) are more likely to be refused bail by police and Courts than non-Aboriginal people.[25]

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[24] Corrections Victoria, 'Annual prisoner statistical profile 2009-10 to 2019-20: Dataset', December 2020, available at: <https://www.corrections.vic.gov.au/annual-prisoner-statistical-profile-2009-10-to-2019-20>, cited in E. Russell, B. Carlton and D. Tyson, "It's a Gendered Issue, 100 Per Cent': How Tough Bail Laws Entrench Gender and Racial Inequality and Social Disadvantage" *International Journal for Crime, Justice and Social Democracy is the* (2021), 2, available at <https://www.crimejusticejournal.com/article/view/1882/1151>.

[25] NSW Bureau of Crime Statistics and Research, 'What factors influence police and court bail decisions?', 23 March 2021, available at <https://www.bocsar.nsw.gov.au/Pages/bocsar_media_releases/2021/mr-What-factors-influence-police-and-court-bail-decisions-CJB236.aspx>.

28. Deputy Commissioner of DJCS, Melissa Westin, gave evidence regarding more recent statistics during the Inquest.[26]

Veronica's bail refusal by Victoria Police

29. Veronica was interviewed by Police. Before she had even finished being interviewed, Senior Constable Gauci started compiling the remand brief. No one obtained any relevant information from Veronica for the purpose of considering whether to grant bail or oppose bail.[27]

30. Sgt Nick McDonald, who had the power to grant Veronica bail, does not even remember Veronica. To him, her custody was entirely "routine".[28] He would never have granted her bail because she fell under the "exceptional circumstances threshold".[29]

Findings:

[#] Sgt Nick MacDonald failed to comply with Victoria Police policies, and the provisions of the *Bail Act 1977* (Vic) (***Bail Act***), in regard to Veronica.

[6] The Police Bail Decision Maker (**BDM**), Sgt Nick MacDonald, was empowered to grant bail to Veronica, as an Aboriginal and/or Torres Strait Islander person who was subject to the exceptional circumstances threshold, but failed to give proper consideration to granting Veronica bail. This included failure to consider relevant factors under s 3A and s 3AAA of the *Bail Act*.

[7] Police failed to gather information already in their possession relevant to a proper consideration of the surrounding circumstances and failed to present such matters to Police and Court BDMs.

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[26] T2519.
[27] T76; T77; T80:13; T83:4; T100.
[28] Additional Materials (**AM**) 841.
[29] AM843.

[#] Police failed to obtain information from Veronica and/or her legal representatives in order to enable them to give proper consideration to granting Veronica bail.

[#] Senior Constable Gauci acted improperly by preparing Veronica's remand brief while Veronica was in an interview.

[#] Victoria Police acted in accordance with an informal policy to oppose all remand bail applications involving the exceptional circumstances test. This informal policy is contrary to the *Bail Act* and human rights under the *Charter* to liberty (s 21), equality and non-discrimination under law (s 8), and cultural rights (s 19).

[#] Sgt MacDonald and Victoria Police acted incompatibly with Veronica's rights under the *Charter* to liberty (s 21(1)), not to be subject to arbitrary arrest or detention (s 21(2)), not to be detained except in accordance with law (s 21(3)), not to be automatically detained pending trial (s 21(6)), equality and non-discrimination under law (s 8), and cultural rights (s 19). Sgt MacDonald and Victoria Police also failed to give proper consideration to these rights under s 38 of the *Charter*.

Veronica's application for Bail at Melbourne Magistrate's Court

31. Victoria Police would never have granted Veronica bail and its members opposed her bail application. Victoria Police and its members wanted her jailed for shopstealing – an outcome they well-knew they would not achieve in sentencing, should she be found guilty of any of the relevant offences.

32. Police transported Veronica to the Melbourne Magistrates' Court (**MMC**). From around 3pm, until she was transported to DPFC, no Koori welfare officer, Aboriginal and/or Torres Strait Islander person, community member or welfare officer saw or spoke to her.

Audrey Walker, the Koori Court Officer who was working at MMC, was not contacted. Veronica was completely culturally isolated during her time at MMC from 30 December to 31 December.[30]

33. Veronica was lodged in the cells underneath the MMC around 7:30pm on 30 December 2019. She was utterly alone in the MMC cells for the 20 hours she was there.

34. Despite being lodged prior to the 8pm "cut off", Veronica was not provided any legal assistance, and did not appear before the Court on 30 December 2019. Magistrate Lamble did not bring Veronica into Court to explain what was happening. Magistrate Lamble did not seek clarification as to how long a hearing might take, nor did she call the matter on for mention or bail application that evening. Veronica was the only new remand not called on/reached on 30 December.

35. Veronica spent the night alone, in lockup, away from the safety of her loving family and community.

36. Between 30 and 31 December, the only person in a position to truly advocate on her behalf, and to act as her lifeline, was her barrister Tass Antos. He had been privately briefed to appear for Veronica. On 31 December, Mr Antos spent, at most, 6 minutes with Veronica.[31] In that time he did not take Veronica through the remand summaries, her prior history, the corrections report, the *Bail Act* requirements or relevant s 3A and s 3AAA matters.[32] He did not promote or protect her, her rights or her interests. His treatment of Veronica was dismissive.[33]

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[30] T533.
[31] T398.
[32] T411:9-T413:4.
[33] IB2111.1-2 (email to Jill Prior); IB2422:14.

37. Mr Antos persuaded[34] Veronica to appear unrepresented despite her obvious desire for legal representation.[35] He claimed in his evidence that he does not remember anything about the interaction, despite learning of Veronica's passing only days later.[36] His evidence as to his lack of recollection was not credible.

38. Percy came to Court on 31 December 2019 for Veronica. He sat in the body of the courtroom alone. He was there waiting for a few hours. No lawyer, no police officer, no Court employee and no support worker bothered to speak to him. He was there to take Veronica home. When Veronica came into Court, she did not look like herself,[37] she was not acting normal. She looked unwell. At the end of the hearing, Percy yelled out to Veronica to get medical help.[38]

39. The Prosecutor and Magistrate Bolger, between themselves, discussed Veronica's presumed drug use and criminal history.

40. Neither the Prosecutor nor Magistrate Bolger asked Veronica about her health nor her Aboriginality.

41. No one, including Magistrate Bolger, referred to Veronica's Aboriginality, s 3A, or its importance, at any time during the proceeding.

42. Veronica brought up illness in her family, which should have alerted Magistrate Bolger and the Prosecutor to kinship obligations, relevant to s 3A. This should have prompted further questions.

43. It is clear that Percy is correct when he says that Magistrate Bolger "had already made up her mind before Veronica even started talking … some of the questions that the

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[34] IB2111.1-2 (email to Jill Prior); T402, T406.
[35] IB2422.
[36] T399, T437, T439.
[37] T53.
[38] T54.

Magistrate asked Veronica didn't – she didn't even know how to answer … She didn't want to go to Shepparton for medical reasons. The Magistrate didn't even give her a chance to explain what – what – what she meant."[39]

44. Veronica was isolated and alone in her attempts to advocate for herself. Percy was scared for Veronica. This was the last time Percy and Veronica saw each other.

Findings:

[#] On 30 December 2019, Veronica was not provided any legal assistance by the Victoria Legal Aid (**VLA**) Duty Lawyer Service or any other lawyer. No adverse comment is made or sought regarding Peter Schumpeter of counsel.

[#] Despite being lodged prior to the "8pm cut off" and being an Aboriginal Woman in custody, the Magistrates' Court of Victoria (**MCV**) did not provide Veronica with an opportunity to appear before the court for a bail hearing on 30 December 2019.

[#] The actions of Peter Schumpeter of Counsel in assisting Veronica, by emailing Jillian Prior, and sending Veronica's remand documentation, were reasonable and appropriate.

[10] Given that Veronica's legal representative of record had been notified by VLA of her remand in custody on 30 December 2019 and arranged for a barrister to appear on her behalf on 31 December 2019, Veronica should not have appeared in person on that date.

[11] The legal services provided to Veronica on 31 December 2019 by Tass Antos of counsel were grossly inadequate.

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[39] T44.

[#] Mr Antos did not take Veronica through the remand summaries, her prior history, the corrections report, the *Bail Act* requirements and relevant s 3A and s 3AAA matters.[40]

[#] Mr Antos persuaded[41] Veronica to appear unrepresented.[42]

[#] Veronica was not aggressive, hostile or paranoid when she met with Mr Antos.[43]

[12] Section 4AA(2)(c), section 4A and clauses 1 and 30 of Schedule 2 of the *Bail Act 1977* (Vic) (***Bail Act***) are incompatible with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (***Charter***).

[#] Veronica was not provided any culturally safe or competent support when she appeared at the Bail and Remand Court (**BaRC**).

[#] Veronica's bail hearing before Magistrate Bolger was not culturally competent. Magistrate Bolger did not properly consider the health and kinship issues raised by Veronica, and that Veronica's partner, Percy Lovett, was in the courtroom.

[#] The Prosecutor, a model litigant, did not furnish the Court with accurate and fulsome matters for the Court to properly consider during the bail hearing.

[40] T411:9-T413:4
[41] IB2111.1-2 (email to Jill Prior); T402, T406.
[42] IB2422.
[43] Mr Antos claims he has no recollection of his interaction with Veronica and relies on his notes. Against this, it is so unlikely to the point of being fanciful that Mr Antos was the only person Veronica treated that way given the many audio and video recordings of Veronica which the Court has considered over the relevant period – even as she became more and more desperate for help. Moreover, it is not supported by the evidence of the people who dealt with Veronica over the relevant period, nor those who knew Veronica generally.

[#] The Prosecutor, a model litigant, did not properly discharge his duties as an officer of the Court.

[#] Magistrate Bolger did not properly consider Veronica's Aboriginality in accordance with s 3A or 3AAA(1)(h) of the *Bail Act* in Veronica's bail application on 31 December 2019.

[#] Veronica's treatment by Police, lawyers and Court staff at BaRC was culturally unsafe and incompetent.

[#] Veronica had no access to dedicated or culturally safe access to bail support services that may have increased her chances of being granted bail and would have been considered under s 5AAA of the *Bail Act*.

[#] From the time of her arrest, until her transfer to DPFC, Veronica was culturally isolated in custody.[44]

[#] Veronica's treatment by Victoria Police and its members, Court staff and MCV was in breach of her rights under the *Charter* to liberty (s 21), dignity and humane treatment in detention (s 22), equality and non-discrimination (s 8), and cultural rights (s 19). Victoria Police, its members, Court staff and MCV did not act compatibly with these rights or give adequate consideration to these rights when making decisions under s 38 of the *Charter*.

Veronica's treatment and care at DPFC

45. Veronica was transferred from MMC to DPFC in the afternoon of 31 December. During the trip, Veronica was very unwell, vomiting in the truck on the way. When Veronica

[44] T533.

arrived at DPFC reception, she was obviously unwell, climbing off the truck carrying a bag full of her vomit, and having to lean to support herself.

46. When Veronica arrived at DPFC, her weight was about 33kg.[45]

47. Veronica weighed the same as an average 10 year old girl. Prison officers, nurses and doctors all observed this, and many stated she was the most unwell person they had ever seen. But they did nothing.

48. The unanimous view of the medical conclave was clear: Veronica needed to be transferred to hospital immediately upon entry to DPFC.[46] Her medical care was grossly deficient in all respects. If she had been transferred to hospital, even on the night she died, her death could have been prevented. The conclave struggled to find strong enough words to describe the “utterly, appallingly undignified”[47] and “inhumane”[48] treatment of Veronica by medical staff and prison officers at DPFC.

49. Dr Sean Runacres conducted a reception medical assessment that could only have lasted 13 minutes at most. During the assessment, Veronica could barely sit up and was unresponsive to questions. She could not muster the strength to even fill out the relevant paperwork.[49] Despite stating in Court that he did weigh her, the evidence is clear that Dr Runacres did not weigh Veronica.[50] He did not conduct any physical examination of her. His JCARE record contained fabricated and deliberately misleading

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[45] This was Veronica’s weight only two days later, when she died: Dr Yeleina Baber, T2054-2055.
[46] While the medical conclave initially stated a majority view that Veronica needed to be transferred to hospital, the minority position was based on Dr Runacres recorded weight being accurate. The consensus of the conclave was that if Veronica weighed approximately 33kg, she needed to go to hospital immediately upon entry to DPFC: T2205: 27-29.
[47] T2239: 18-19.
[48] T2227:20-22; T2228:11.
[49] RN Hills' observations regarding Veronica’s clinical state was supported by the evidence of Bester Chisvo, who assessed Veronica only minutes after Dr Runacres, as well as PO Christine Fenech, PO Watts, Lee-Anne Reid, and PO Hermans.
[50] Dr Runacres recorded a weight of 40.7kg. Veronica’s weight two days later, when she died, was 33kg. It was impossible for Veronica to have weighed anywhere close to 40.7kg on 31.12.19. See Dr Yeleina Baber, T2054-2055.

information, including Veronica's weight, which Dr Runacres simply invented. His JCARE record also included details erroneously copied from a pro forma supplied by CCA. When Nurse Stephanie Hills suggested that Veronica be immediately transferred to hospital, Dr Runacres condescendingly dismissed her. Despite finding out about her death only days later, Dr Runacres claimed he had no memory of Veronica or his assessment of her. His evidence to the Inquest lacked all credibility and his responses were disrespectful and offensive to Veronica's family. His evidence as to his lack of recollection was not credible.

50. Percy wishes to specifically note that although RN Hills failed to send Veronica to hospital, she was in a difficult position to escalate Veronica's care given her role as a nurse and the dismissal of her concerns by Dr Runacres, who was more senior in the medical heirarchy. Mr Lovett also appreciates the concessions made by RN Hills, the difficult position she faced in providing evidence in the Inquest, and her sincere apology to Veronica's family.

51. The next day, Dr Alison Brown missed crucial and clear signs that Veronica had clinically deteriorated and continued to require urgent treatment at a hospital. Dr Brown conceded in her evidence that she should have followed up on Veronica's condition or checked in with a nurse, and she did not properly document her examinations of Veronica on 1 January 2020.[51] Opportunities to assess Veronica and monitor her symptoms were continuously missed throughout her time in custody.

52. During Veronica's time in DPFC, she was treated in a cruel and inhumane way which amounted to torture and degrading treatment. She was distressed. She shouted for help. She pressed the intercom button seeking help approximately 49 times.[52] Prison officers answered her calls, but only rarely actually assisted her. She was lied to,

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[51] AM1418.
[52] Multimedia Extract List.

provided incorrect medical advice, dismissed and was not referred for medical assistance.

53. She was in pain, had severe cramping and was suffering from hot and cold flushes. She vomited at least 15 times and had diarrhea.

54. This was while she was already considerably malnourished and considerably unwell and was extremely vulnerable from a mental health, cultural and social wellbeing perspective. All while she was locked behind a door.[53]

55. During this time, those who should have cared for and helped Veronica persistently ignored her cries for help.

56. Nurses, doctors, and Corrections staff dismissed Veronica's safety and welfare callously. They showed Veronica no basic respect or dignity, as though she was not human. They knew, and did not care, that she was suffering or that there was a possibility that she would become so unwell that she would pass away. Despite this treatment, Veronica remained courteous and polite throughout. She treated all who she interacted with with respect and dignity, even though she was provided none.

57. Prison officers lied to Veronica. They chastised her. They degraded her – for simply using the cell buzzer as her only lifeline. Despite PO Tracey Brown telling Veronica that her cries for help were keeping other prisoners awake, the evidence demonstrates that others who were imprisoned were the only ones actually trying to assist Veronica, despite their own difficulties of being locked down. Both Kylie Bastin and Bonnie McSweeney could hear Veronica screaming for help, and tried calling for assistance for her. The other women inside DPFC were the only people who treated Veronica with humanity and dignity on the night she died.

[53] T2227.

58. Nurse Athaena George spent almost her entire shift watching movies at her nursing station[54] whilst Veronica repeatedly screamed and pleaded for help. When she was taken to see Veronica, RN George did not bother to examine her; instead she simply looked through the small trap,[55] laughed at Veronica's nudity, and conceded she had to pry Veronica's fingers open to give her medication.[56]

59. RN George conceded she should have, but did not, ask for the cell door to be unlocked.[57]

60. Astonishingly, PO Brown, Veronica's only real lifeline on the night of 1 January 2020, did not know of, and said she had received no training from her employer, the Victorian Government, on the increased risks to Aboriginal and/or Torres Strait Islander people of passing away in prison for medical reasons compared to non-Aboriginal people.[58]

61. Between the last call from Veronica to PO Brown at 3:58am,[59] and her body being discovered at 7:30am on 2 January, PO Brown, who conducted inadequate patrols at 4:00am and 5:00am, failed to notice the shower consistently running in Veronica's cell.[60] The shower running behind the closed door of cell 40 was perfectly audible from the end of the hall during the day.[61] It must be that it was even more audible in the silence of the night.

62. Contrary to its own policies, Corrections Victoria (**CV**) staff did not ensure that Veronica was seen by the Aboriginal Liaison Officer upon entry to DPFC. Veronica was culturally and spiritually isolated throughout the entirety of her time at DPFC.

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[54] T1768:9-14.
[55] T1746:8.
[56] T1739:30-T1740:26, T1743:19.
[57] T1745:1.
[58] T1928:17.
[59] T1876:9.
[60] See T1616 where Heath noted that the shower was running as early as 1:30am. T1409, T1616, T1645, T1879, T1885-1886.
[61] This was clear duing the legal representatives' attendance at DPFC on 30 April 2022, when the shower was left running, the cell door was closed, and the attendees stood along the hallway listening to the shower running.

63. RCIADIC recommended prison health care be culturally safe and "be of an equivalent standard to that available to the general public".[62] This recommendation still has not been implemented.

Findings:

[#] Veronica would not have died if she had been provided with competent and culturally safe medical treatment and care in custody.

Correct Care Australasia

[14] The medical records maintained by Correct Care Australasia (**CCA**) staff were grossly incomplete and contained inaccurate and misleading information about Veronica's medical history and clinical presentation while at DPFC between 31 December 2019 and 2 January 2020.

[15] The CCA staff involved in Veronica's care between 31 December 2019 and 2 January 2020 all failed to keep proper documentary records of their observations and treatment of Veronica, and failed to complete proper handovers, including:

a. Dr Sean Runacres;

b. RN Stephanie Hills;

c. Dr Alison Brown;

d. RN Mark Minett; and

e. RN Atheana George.

[62] RCIADIC Rec 150, RCIADIC Report Findings and Recommendations, Vol 5, available at <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol5/5.html#Heading5>.

[16] The medical assessments, treatment and care provided to Veronica by CCA and its staff, in particular Dr Sean Runacres, Dr Alison Brown and RN Athaena George, were grossly deficient and causally contributed to her death.

[17] Dr Sean Runacres' treatment of Veronica was grossly deficient and neglectful and directly contributed to her death. Dr Sean Runacres failed to conduct an adequate comprehensive assessment of Veronica on 31 December 2019, and failed to identify Veronica's urgent need to be sent to hospital, by failing to:

a. conduct any physical assessment of Veronica;

b. identify Veronica's state of severe malnutrition;

c. identify Veronica's need for urgent medical treatment;

d. order ongoing observations of Veronica;

e. take any action to prevent Veronica's transfer to a mainstream prison cell;

f. send Veronica to hospital when concern was raised by RN Stephanie Hills; and

g. treat Veronica with dignity, respect and in a humane manner, as required under s 22 of the *Charter.*

[#] Dr Sean Runacres did not weigh Veronica or conduct any physical assessment of Veronica. He invented Veronica's weight on the relevant JCARE entry. He copied and pasted from pro forma notes and did not amend them as required. In relation to these matters, Dr Runacres's evidence and entries in JCARE was deliberately untruthful.

[18] RN Stephanie Hills failed to send Veronica to hospital on 31 December 2019, once she had formed the view that hospital treatment was required.

[19] Dr Alison Brown's healthcare to Veronica was grossly inadequate and directly contributed to her death. She failed to identify Veronica's urgent need for medical treatment on 1 January 2020 by failing to:

a. appreciate the significance of Veronica's tachycardia and send Veronica immediately to hospital;

b. weigh and assess Veronica for malnutrition;

c. follow up on Veronica's condition;

d. follow up on her request for afternoon nursing observations;

e. properly document her examination of Veronica on JCARE; and

f. take any action to prevent Veronica's transfer to a mainstream prison cell.

[20] RN Mark Minett's care of Veronica was inadequate. He failed to conduct a review of Veronica's condition on 1 January 2020 and failed to identify Veronica's need for urgent medical attention.

[#] RN Mark Minett failed to convey relevant information regarding Veronica's vomiting to Dr Brown.

[21] RN Atheana George's treatment of Veronica was grossly deficient, neglectful, inhumane, and directly contributed to her death. She failed to provide Veronica with adequate treatment and care by failing to:

a. inform herself of Veronica's health status or treatment needs on the nights of 31 December 2019 and 1 January 2020;

b. conduct any welfare checks;

c. direct CV staff to unlock Veronica's cell door;

d. conduct a proper assessment of Veronica when she attended her cell on 2 January 2020; and

e. treat Veronica with dignity, respect, and in a humane manner, as required under s 22 of the *Charter*.

[22] CCA clinicians, Dr Sean Runacres, RN Stephanie Hills, Dr Alison Brown, RN Mark Minett and RN Athaena George, failed to appropriately escalate Veronica's care on 31 December 2019, 1 January 2020 and 2 January 2020.

[#] Veronica was provided with grossly neglectful and inhumane medical treatment by CCA throughout the entirety of her time at DPFC.

[23] At the latest, Veronica should have been transferred to hospital immediately upon entry to DPFC, on the afternoon of 31 December 2019.

[24] There were many missed opportunities for the better capture and handover of significant clinical information about Veronica among CCA clinicians.

[25] There were many missed opportunities for the provision of further or better medical and nursing treatment, and escalation of Veronica's clinical care.

[26] The medical assessment, treatment and care provided to Veronica by CCA fell significantly short of equivalent care she would have received from the public health system in the community.

[#] CCA clinicians failed to follow CCA policies and guidelines in regard to Veronica's treatment and care.

[#] CCA clinicians, Dr Sean Runacres and Dr Alison Brown, failed to provide Veronica with adequate treatment and care for opiod dependence.

[#] CCA failed to conduct adequate cell-health checks on Veronica during the entirety of her time in custody.

[#] The deficiencies in Veronica's care by CCA clinicians, in particular Dr Sean Runacres and RN Athaena George, were due to both direct racism and systemic racism. This was in breach of Veronica's right to equality and non-discrimination under s 8 of the *Charter*.

[#] CCA clinicians failed to provide Veronica with culturally competent or culturally safe healthcare at DPFC. This was in breach of Veronica's cultural rights under s 19 of the *Charter* and right to humanity and dignity in detention under s 22 of the *Charter*.

[#] Veronica's treatment by CCA clinicians amounted to cruel, inhuman and degrading treatment and torture, contrary to s10 of the *Charter* and was incompatible with Veronica's right to dignity and humane treatment in detention under s22 of the *Charter*. CCA clinicians failed to give proper consideration to her human rights under s 38 of the *Charter*.

Corrections Victoria

[28] Whilst in custody at DPFC, Veronica was never well enough to be cleared for placement in a mainstream cell.

[29] Notification to the Aboriginal Wellbeing Officer of Veronica's reception at DPFC should have been undertaken shortly after her arrival on 31 December 2019. DPFC staff failed to comply with CV policies in this regard.

[#] Veronica was culturally and spiritually isolated at DPFC.

[30] There were many missed opportunities for better capture and handover of significant information about Veronica's health presentation among Corrections Victoria (**CV**) Prison Officers, including to Senior Prison Officers.

[31] There were many missed opportunities for the better capture and handover of information about Veronica that was of potential clinical significance from Prison Officers to CCA clinicians on 31 December 2019, 1 January 2020 and 2 January 2020.

[#] Prison Officers on duty in the medical centre from 31 December 2019 to 1 January 2020:

a. Treated Veronica in a way that was inhumane and breached her rights to dignity and humanity under s 22 of the *Charter*;

b. Lied to Veronica;

c. Provided Veronica with medical information that they were not qualified to give, such as directing her to consume salt;[63]

d. Failed to properly record information relevant to Veronica's medical condition, such as her repeated distressed calls and numerous vomits;

e. Failed to appropriately refer medical information, such as distressed calls and vomits, to medical staff;

f. Failed to call a Code Black when Veronica was repeatedly vomiting;

g. Failed to properly conduct cell-checks on Veronica.

[33] The Second Watch Prison Officer, PO Tracey Brown, failed to escalate or adequately escalate Veronica's care on at least three occasions on the morning of 2 January 2020, between 1:30 am and 4 am.

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[63] T2216:9-17, T2298:7, T2788.

[#] Between the last call from Veronica at least 3:58am[64] and her body being discovered at 7:30am on 2 January Prison Officers failed to notice the shower consistently running in Veronica's cell.[65]

[#] PO Tracey Brown should have called a Code Black on the morning of 2 January 2020 at 1.30am and should have called an ambulance at that time.

[34] The Second Watch Prison Officer, PO Tracey Brown's, failure to physically check on Veronica at any point overnight, but particularly after Veronica became unresponsive during the final intercom call around 3:58 am on 2 January 2020, was grossly inappropriate and contrary to DPFC policy.

[35] Communication with Veronica by PO Tracey Brown failed to treat Veronica with dignity and respect.

[36] Veronica was lied to by PO Tracey Brown multiple times on 2 January 2020 before she died.

[#] The treatment of Veronica by PO Tracey Brown between 1-2 January 2020 was grossly inadequate, neglectful, inhumane and in breach of her right to dignity and humanity under s 22 of the *Charter*.

[#] Veronica's treatment by CV staff at DPFC amounted to cruel, inhuman and degrading treatment and torture, in breach of s 10 of the *Charter* and was incompatible with her *Charter* rights to dignity and humane treatment in detention (s 22) and right to life (s 9). CV staff failed to give proper consideration to Veronica's human rights under s 38 of the *Charter*.

[64] T1876:9.

[65] See T1616 where Heath noted that the shower was running as early as 1:30am. T1409, T1616, T1645, T1886.

[#] CV staff failed to provide Veronica with culturally competent or culturally safe care at DPFC. This was in breach of Veronica's cultural rights under s 19 of the *Charter* and right to humanity and dignity in detention under s 22 of the *Charter*,

[#] The treatment of Veronica's body on 2 January 2020, relevant to the circumstances of her death, was culturally unsafe and incompetent and in breach of her cultural rights under s 19 of the *Charter*.

[#] Male prison officers viewed Veronica's naked body after she was found on 2 January 2020. They should not have been able to do so.

[#] Staff members moved items, placed new items into the room, mopped up the floor of Veronica's cell, and moved Veronica's body,[66] after she was found deceased on 2 January 2020. This was in breach of DPFC policies and procedures in relation to the preservation of crime scenes and the *Charter*.

The 'review' of Veronica's death by CCA and Justice Health

64. As emphasised at the first directions hearing, as Veronica was deemed to have died from 'natural causes',[67] a Coronial Inquest was not mandatory.[68] If there had been no Inquest, the only official review of Veronica's death would have been the grossly deficient and misleading JARO review, the Justice Health Death in Custody Report, and

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[66] T1409.

[67] We note that the term 'natural causes' was not used in the Coroner's draft findings. Percy urges the Coroner not to describe Veronica's death as due to 'natural causes'. Although this term has a particular legal meaning, it is apt to mislead as it suggests that Veronica was destined to die, and obscures culpability and preventability. See Alison Whittaker, 'Dragged like a dead kangaroo': why language matters for deaths in custody', 8 September 2018, *The Guardian,* available at <https://www.theguardian.com/commentisfree/2018/sep/07/dragged-like-a-dead-kangaroo-why-language-matters-for-deaths-in-custody>.

[68] See Transcript Directions Hearing 16 July 2020, T4-5. See too *Coroners Act 2008* (Vic) s52(3A).

the 'root cause analysis' by CCA. Put simply, if there was no Inquest, CCA, Justice Health and DJCS would have successfully swept the shocking circumstances of Veronica's death under the carpet. CCA would have gotten away with its central role in Veronica's death. Veronica's family and community, and the broader public, would never have known the truth.

65. Even once the Court confirmed it would hold an Inquest, at every stage, CCA acted to withhold information from the Court, despite consistent pleas for information from Veronica's family.

66. Whilst it is understood that the Coroner will provide a process for submissions regarding CCA's conduct concerning RN Hills's draft statement and what it knew about her likely evidence, the following paragraphs are provided as they also speak to CCA's conduct and approach more broadly.

67. CCA was aware of the central relevance of RN Stephanie Hills's evidence shortly following Veronica's death, and at least from the time that CCA's regional manager, Jeremy Limpens, was directed to interview all staff involved in Veronica's care (including RN Hills).[69] After interviewing RN Hills, who relayed relevant information, Mr Limpens was told by CCA executive management not to take a formal statement from her.[70] Information from RN Hills, or others interviewed by Mr Limpens, was not conveyed to Justice Health and was not included in any official review of Veronica's death.[71] CCA's Deputy CEO, Christine Fuller told the Court that at the time, CCA was not aware of the relevance of RN Hills evidence.[72] Given the statement of Mr Limpens, evidence of RN Hills, and RN Hill's signature on relevant paperwork, this is simply not credible. It is

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[69] Statement of Jeremy Limpens, AM1173.
[70] Statement of Jeremy Limpens, AM1173.
[71] T2908-2911.
[72] T2968.

submitted that the withholding of this information from Justice Health and JARO was misleading.

68. Deficiencies and gaps in Veronica's care, of which CCA must have been aware from the documents in its possession, were not disclosed to Justice Health, JARO, CV or DJCS.

69. Despite the Court apparently having issued requests for crucial information, such as contemporaneous notes and relevant CCTV, these were only provided during the Inquest itself, and many times after the conclusion of a witness' evidence.[73]

70. For two and a half years, CCA acted evasively. Four women and one baby have died at DPFC since January 2020. It will never be known whether those deaths would have occurred if CCA had immediately conducted a proper review into Veronica's death.

71. Percy submits that the same obligations stated by the Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**) to apply to the Coroner's Court in conducting investigations into a person's death should also apply to investigations into deaths conducted by CCA, Justice Health, JARO or any subsequent body established in its place.[74] This is particularly the case where an Inquest is not mandatory and may only take place years after a person has died in custody.

72. As public authorities under the *Charter*, which are tasked with conducting reviews following a person's death in custody, CCA, Justice Health, and JARO have functions under the right to life to conduct an effective investigation into deaths.[75] As submitted by VEOHRC, "an effective investigation is one that considers and properly investigates apparent breaches of human rights that might have caused or contributed to the death.[76]"

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[73] See for example, AM35, 37, 58, 62, 66, 67.
[74] See VHREOC "preliminary submissions on the Charter" dated 22 April 2022.
[75] See VHREOC "preliminary submissions on the Charter" dated 22 April 2022.
[76] See VHREOC "preliminary submissions on the Charter" dated 22 April 2022 at 8.1.1.

73. Percy submits that CCA's actions of apparently covering-up and/or failing to investigate Veronica's death, and the deficiencies in the JARO and Justice Health reviews, were in breach of Veronica's right to life under s 9 of the *Charter*.

Findings:

[27] CCA's failure to undertake a root cause analysis, or any similar internal review process, within a reasonable time of Veronica's passing was neglectful, misleading, grossly inappropriate and contrary to requirements of the Justice Health Quality Framework (**JHQF**). This failure was also in breach of its obligations to Veronica as a Public Authority under the *Charter* and Veronica's right to life under s 9 of the *Charter*.

[#] CCA's conduct, in failing to correct information in JCARE records it knew to be incorrect or misleading, was misleading.

[#] CCA was aware of the likely contents of a statement of RN Hills and instructed its regional manager, Jeremy Limpens, not to take a statement from RN Hills. This was deliberately misleading.

[#] CCA failed to provide all relevant information regarding Veronica's death and its investigation into Veronica's death, to Justice Health, JARO, CV or DCJS, within a reasonable timeframe after Veronica's death, for the purpose of a review into Veronica's death. This was deliberately misleading and in breach of its obligations to Veronica as a Public Authority under the *Charter* and Veronica's right to life under s 9 of the *Charter*.

[#] CCA's conduct, in failing to provide all relevant information regarding investigations into Veronica's death, including contemporaneous notes, to the Coroner's Court was misleading.

[#] CCA's conduct, in failing to provide a statement from RN Hills in a timely manner and failing to notify the Court that RN Hills was separately represented, was misleading.

Department of Justice and Community Safety

[37] Justice Health's failure to ensure CCA undertook a root cause analysis, or any similar internal review process, within a reasonable time of Veronica's passing, was grossly inappropriate and contrary requirements of the JHQF. This was also in breach of its obligations to Veronica as a Public Authority under the *Charter* and Veronica's right to life under s 9 of the *Charter.*

[38] The Justice Assurance and Review Office (**JARO**) review of Veronica's passing was grossly inadequate. This was also in breach of JARO's obligations to Veronica as a Public Authority under the *Charter* and Veronica's right to life under s 9 of the *Charter.*

[39] The Justice Health Death in Custody Report (**JHDIC**) of Veronica's passing was grossly inadequate. This was also in breach of Justice Health's obligations to Veronica as a Public Authority under the *Charter* and Veronica's right to life under s 9 of the *Charter.*

D. RACISM AND THE RELEVANCE OF VERONICA'S ABORIGINALITY

74. The MCV, Victoria Police, Magistrates Lamble and Bolger, Mr Antos, medical and prison staff who were involved with Veronica, did not treat her with humanity, dignity or respect.[77]

75. Many witnesses gave evidence about their training and policies, however, their attitudes and actions demonstrate they know *how to say* the right thing, but not *how to do* the right thing.

[77] T2421; T2422:12-18.

76. None of these people actually recognised or understood the impact of their (own personal or institutional) culture and values on Aboriginal people.[78]

77. Expert and lay witnesses gave evidence highlighting that, unfairly, the onus was shifted to Veronica to advocate for herself throughout her time in custody.[79] Despite being so sick, vulnerable, and isolated; she attempted to do so time and time again. She was disregarded and dismissed each time.

78. The Amended Scope of Inquest includes at item 4:

> *4. The relevance of …a. Ms Nelson's Aboriginality…to the decisions made in relation to her from her arrest on 30 December 2019 to her death on 2 January 2020.*

79. Systemic racism is 'the most insidious form of racism because it is difficult to quantify' and is performed by people 'who see themselves as "just doing their job".[80]

80. Given that blatant and overt forms of discrimination and subjective intentions tend to be relatively rare, an inquiry into systemic racism requires consideration of *circumstances* that infer unconscious beliefs and biases and the prejudicial *effect* of policies, procedures and practices.[81]

81. Among these dominant *assumptions* include that Aboriginal people are drunks, drug addicts, rude, uneducated, unruly or aggressive and of little utility. Among these dominant *values* is that a non-Aboriginal person's life is worth more than an Aboriginal person's life.

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[78] T2422.
[79] T2639; T2713.
[80] Harry Blagg, Neil Morgan, Chris Cunneen and Anna Ferrante (2005) Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Criminal Justice System, Report to the Equal Opportunity Commission and Aboriginal Justice Forum, Melbourne, 7.
[81] Gerry McNeilly, *Broken Trust: Indigenous People and the Thunder Bay Police Service*, Office of the Independent Police Review Director, December 2018, 181.

82. A key finding of RCIADIC is that the over-representation of Aboriginal people in the criminal justice system and in custody is a direct contributor to the over-representation of Aboriginal deaths in custody.[82]

83. Racism in the health system is compounded when a person is in custody. This can be due to the intersectional bias that medical and paramedical personnel bring to bear on Aboriginal people in custody, or where they uncritically accept prejudicial judgments on the part of the police, including that the Aboriginal person is fabricating their illness or that the Aboriginal person's pain or incapacity is attributed to alcohol and drugs.[83]

84. Any reasonable, open-minded view of the evidence of Veronica's treatment between 30 December 2019 and 2 January 2020 readily reveals that there was something more sinister at play than simple neglect. Clearly Veronica's drug use and criminal antecedents also played a role in the way she was treated; however, those factors are common to a larger number of the prison population than Aboriginality, which is the focus of this section of the submissions.

85. Clearly Veronica was denied simple humanity and dignity by each of the members of Victoria Police, the barrister briefed to represent her on 31 December 2021, MCV, the representatives of CCA and CV officers. The question is whether the Coroner can or should make a finding that the reason that Veronica was denied humanity and dignity was, in part, due to bias against her because she was an Aboriginal woman.

86. As to whether the Coroner can make such a finding, it is certainly supported by both lay and expert evidence. Percy, who has also spent time in prison, gave evidence that:

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[82] RCIADIC, National Report, Volume 1, 1.3.3, available at <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol1/>.
[83] See Thalia Anthony Report into Systemic Racism for the Tanya Day Inquest, at [38] citing the Inquest into the death of Robert Taylor Daly [2008] NTMC 055, [34] and Inquest into the Death of Ms Dhu, Coroner's Court of Western Australia, No. 11020-14, 16 December 2016, [857].

"It's bad, the way they look at us and treat us. They think they didn't care about her. They just thought she was a heroin addict and another blackfella, just wanting a quick fix. There's another black girl crying out for drugs, she wants a quick fix. I don't think she would've been treated that way if she wasn't a blackfella. I know how they treat us."[84]

87. Kylie Bastin's evidence was that:

"Are you able to say as an Aboriginal woman, do you experience in your view that you're treated any differently because you're Aboriginal?---They, they kind of - yeah, like they don't um - like they just assume that we're all, like, the same like just ruby (as said by witness). Like we don't - they don't care about us. Like they don't really, like - (indistinct) especially when it comes to our medications. Like, you know - like we - like they don't - they make us wait, like they don't - they say that we get this and that, like we don't - but we don't. It's, like, takes forever."[85]

88. Later in her evidence:

And Counsel Assisting asked you a few questions about Aboriginality. Given your evidence that you say, 'They treat us all like shit,' have you experienced or have you observed a worse treatment for Aboriginal - - - ?---No. - - - women than other women in the prison?---Oh, yeah, like, I believe that they've treated, like, especially with this situation, she was treated like, I've never seen a situation like that. That was pretty bad. Like, anyone else would be, you know, they'd rush, like, like, they would make sure, like, there'd be help for them,

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[84] T46:8-15.
[85] T1404-1405.

yeah? Where, like, see how you said the way they spoke to her? Like, that, yeah, I've never heard that, that happening to anyone else, yeah.

So understand that but are you talking about that in the context of Veronica being an Aboriginal woman?---Yeah.

All right?---Yeah.

So your answers are that you haven't seen them treat a white woman that same way?---No, no, no – that's right.[86]

89. Neither Percy nor Ms Bastin were challenged on their evidence in this regard.

90. Moreover, the expert evidence before the Coroner, provided by internationally recognised experts, strongly supports the making of such a finding. In the interests of brevity, only some of the relevant evidence is identified in short form in the following paragraphs.

91. Dr Amanda Porter's opinion on this point was clear, emphatic and uncontested.[87] So was Professor Megan Williams's opinion.[88] Based on this evidence, the Coroner should accept that at each of the stages at which Victoria Police, the legal system (with the exception of Ms Prior and Mr Schumpeter, but specifically including the MCV), CCA (with the exception of RN Hills) and CV dealt with Veronica, their conduct was affected by systemic racism, interpersonal racism, unconscious bias and structural racism.

92. The above lay and expert evidence supports the further submitted findings relevant to Veronica's Aboriginality indicated in the body of this submission.

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[86] T1415.

[87] See in particular the passages of Dr Amanda Porter's opinion in the Coroner's Brief, IB2311 onwards.

[88] See in particular the passages of Professor Megan Williams's opinion in the Coroner's Brief, IB4141 onwards.

Findings:

Systemic issues

[#] Veronica's healthcare was deficient due to systemic racism, racial bias and stereotyping.

[#] Veronica's treatment in custody was deficient due to systemic racism, racial bias and stereotyping.[89]

[#] The MCV, Victoria Police, Magistrates Lamble and Bolger, Mr Antos, medical (with the exception of RN Hills) and prison staff who were involved with Veronica, did not treat her with humanity, dignity or respect.

[40] Various entities failed to adequately take into account Veronica's greatly increased likelihood of dying in custody from inadequate medical care as an Aboriginal woman including:

a. Police;

b. the Magistrates' Court of Victoria (**MCV**);

c. CCA at DPFC; and

d. CV.

[41] Various entities failed to adequately take into account or make reasonable enquiries as to Veronica's vulnerability in custody as a person with opioid dependencies including:

a. Police;

b. the MCV;

[89] T2424.

c. CCA at DPFC; and

d. CV.

[42] Various entities failed to adequately take into account the minor and non-violent nature of Veronica's criminal antecedents in determining her treatment including:

a. Police;

b. the MCV;

c. CCA at DPFC; and

d. CV.

[43] Various entities failed to treat Veronica in a culturally competent and culturally safe manner including:

a. Victoria Police;

b. the MCV;

c. CCA at DPFC; and

d. CV.

[44] There existed no adequate procedure at DPFC for the medical clearance of a prisoner from the Health Centre to another accommodation unit, and this systemic failure causally contributed to Veronica's death.

[45] Cell placement decisions at DPFC were made on the basis of incomplete information.

[46] Clinical decisions at DPFC were made on the basis of incomplete information.

[47] The medical assessments, treatment and care Veronica received while at DPFC between 31 December 2019 and 2 January 2020 were not equivalent to the care she would have received in the community.

93. Veronica was loved and adored.

94. Percy felt safe with her. He felt loved by her. She felt loved by him. She knew he loved her. They were always happy. Only the two of them knew the relationship they had. Veronica was a young woman. She and Percy had plans for the future.[90]

95. Veronica loved her family. Veronica is missed every minute of every day.

96. Veronica deserved a life of dignity and respect, a life worthy of her.

E. REFERRALS TO THE DPP

97. Percy submits that the Coroner can (on the whole of the evidence) safely form a belief[91] that an indictable offence <u>may</u> have been committed and refer the matter to the DPP per s 49(1) of the Act. There is no requirement the Coroner be satisfied or hold a belief that an indictable offence <u>has</u> been committed.

98. The Coroner must, in discharging his duties, include whether any person contributed to Veronica's death,[92] however the Coroner must not record within his findings any belief of guilt for an offence,[93] consideration of sufficiency or admissibility[94] of evidence for a prosecution, nor prospects of a prosecution.

99. Percy submits that in relation to referrals to be made to the DPP, specific possible offences should be identified. Whilst those possible offences would not bind the DPP in

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[90] IB215.
[91] *Maksimovich v Walsh* (1985) 4 NSWLR 318 at 330, see also *George v Rockett* [1990] HCA 26 at [14].
[92] *Priest v West* [2012] VSCA 327.
[93] *Coroners Act* 2008 s69(1).
[94] *Leahy v Barnes* [2013] QSC 226 at [59]-[61].

considering the merits of prosecution, they would serve as guidance based on the significant evidence the Coroner has heard and considered.

100. Percy submits that on the evidence, the Coroner should form the belief that:

a. Dr Sean Runacres

b. Dr Alison Brown

c. RN Atheana George

d. PO Tracy Brown

e. CCA

f. CV

may have committed an indictable offence in connection with the death of Veronica, namely negligent manslaughter.

101. For the offence of manslaughter by criminal negligence, four elements need to be proven:

a. *First*, a duty of care was owed to Veronica. Given Veronica was in the custody of CV and in receipt of medical care by CCA staff, this element is not in doubt.

b. *Second*, the duty was breached, in that the acts of the accused fell so far short of the standard of care a reasonable person would have exercised, and involved such a high risk of death or really serious injury, that it deserves criminal punishment. Percy refers to his submissions above in respect of the conduct of the named individuals.

c. *Third*, the acts breaching the duty were voluntary and deliberate. This should not be controversial. There is no suggestion that the acts or omissions were accidental or unintended.

d. *Fourth*, that the breach caused Veronica's death. The breach need only be a substantial or significant cause, rather than the only, direct or immediate cause. Taking the evidence together, including the pathological evidence, the acts or omissions of the named parties were the substantial or significant cause of Veronica's death. The unanimous expert evidence was that Veronica would have survived had she been taken to hospital when she was first admitted into the prison system and for a significant time thereafter.

102. In addition, the Coroner should further form the belief that CV and CCA may have committed an indictable offence, being a breach of s 23 of the *Occupational Health and Safety Act 2004* which provides:

> *An employer must ensure, so far as is reasonably practicable, that persons other than employees of the employer are not exposed to risks to their health or safety arising from the conduct of the undertaking of the employer.*

103. Whilst their employees had the benefit of a certificate against self-incrimination, neither CCA and CV has such a benefit, and further, their employees can be compelled to give evidence, consistent with their Inquest evidence, as against their employers. If the matter is referred to the DPP against these bodies, there is no prejudice to them in having all the transcripts provided to the investigating bodies.

F. OTHER REFERRALS

104. Dr Runacres, Dr Brown, RN Minett and RN George are registered health practitioners subject to regulation by the Australian Health Practitioner Regulation Agency (**AHPRA**).

105. The Coroner should formally provide a copy of his findings to AHPRA, and make a notification of serious concerns regarding the medical care provided to Veronica by Dr Runacres, Dr Brown, RN Minett and RN George between 31 December 2019 and 2 January 2020.

106. It is understood that WorkSafe is currently investigating the circumstances of Veronica's passing, and in doing so is looking into systemic failures at DPFC. Percy supports that investigation occurring and supports the Coroner's Court providing all relevant information to WorkSafe, including the unredacted Coronial Brief and all transcripts, for the purpose of its investigation.

107. The Coroner should also formally provide a copy of his findings to:

   a. The DPP, to consider the conduct of any other person or witness in this proceeding not identified above;

   b. WorkSafe, to consider the conduct of CCA and CV;

   c. The Legal Services Board, to consider the conduct of Tass Antos.

G. RECOMMENDATIONS

108. Percy thanks the Coroner for listening to the expert voices presented throughout this Coronial Inquest in drafting the proposed recommendations. He seeks additions and amendments to the Coroner's recommendations below based on the experience of VALS and of experts.

109. Percy wishes to provide a short explanation as to two aspects of the proposed amendments to the recommendations.

Culturally appropriate bail proceedings

110. First, in its submissions dated 18 May 2022, VEOHRC made reference to 'Gladue Reports' and factors to be considered under s 3A of the *Bail Act*.

111. The Coroner is referred to the pre-existing project in Victoria, led by VALS, in collaboration with the University of Technology Sydney, and developed in consultation with Elders, the Courts and Judiciary, to implement Gladue-style reports, known as 'Aboriginal Community Justice Reports' (**ACJR**) in Victorian Courts.[95] VALS's work on ACJR reports dates back to 2015. This project exclusively relates to sentencing decisions and not bail. VALS has had initial conversations with its colleagues at Aboriginal Legal Services in Toronto to consider how this project might be extended to bail. VALS's preliminary view from these conversations is that Gladue-style reports are not appropriate for use in bail proceedings due to the potential for delay, the inappropriateness of commenting on offending prior to any offending being proven, and the imposition of burdens on an accused person. However, there have been positive results in Canada where specialised Indigenous courts have jurisdiction to hear bail proceedings. This includes in Ontario, where bail applications can be made in Gladue Courts, and Indigenous persons applying for bail have access to specialised Indigenous bail support programs.[96] Recommendations in regard to this are included below.

112. VALS has also commenced a scoping exercise with regard to producing a training guide and materials on consideration of Aboriginality under s 3A of the *Bail Act*, similar to the

[95] For further information on Aboriginal Community Justice Reports see 'Aboriginal Community Justice Reports Project', available at <https://www.vals.org.au/aboriginal-community-justice-reports/>; 'CPD Session: Aboriginal Community Justice Reports Pilot Project', 2020, available at <https://www.cpdinsession.com.au/wp-content/uploads/2020/10/Paper-and-Presentation.pdf>; Thalia Anthony, Andreea Lachsz and Nerita Waight, 'The role of re-storying' in addressing over-incarceration of Aboriginal and Torres Strait Islander peoples', 17 August 2021, *The Conversation,* available at <https://theconversation.com/amp/the-role-of-re-storying-in-addressing-over-incarceration-of-aboriginal-and-torres-strait-islander-peoples-163577>.

[96] For further information, see 'Indigenous Bail Verification Supervision Program', available at <https://tbifc.ca/program/indigenous-bail-verification-supervision-program/>; Jonathan Rudin, *Indigenous People and the Criminal Justice System* (Emond Montgomery Publications, 2nd ed, 2022) (forthcoming).

Bugmy Bar Book in NSW which applies to sentencing decisions.[97] It is noted that the principle of self-determination and the need for cultural oversight of the development of this resource.[98] Recommendations are added below on this topic.

Culturally safe medical care in prison

113. The first Aboriginal Community Controlled Health Organisation (**ACCHO**) was founded in Redfern in 1971, “in response to experiences of racism in mainstream health services and an unmet need for culturally safe and accessible primary health care.” Aboriginal-led health organisations are essential to ensuring culturally safe health services are provided to Aboriginal people, and are a manifestation of Aboriginal self-determination.[99]

114. In the Northern Territory[100] and the Australian Capital Territory,[101] ACCHO’s have begun delivering primary health services in adult and youth prisons. This is an important first-step to the provision of equivalent and culturally safe healthcare in prisons. Recommendations on this topic are included below.

115. Last year, a Guardian analysis of 474 Aboriginal and/or Torres Strait Islander Deaths in Custody since 1991, found that for both Aboriginal and Torres Strait Islander people and

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[97] ‘The *Bugmy* Bar Book’, available at <https://www.publicdefenders.nsw.gov.au/barbook>.
[98] The *Bugmy* Bar Book was developed by the Aboriginal Legal Service (NSW) and all chapters are reviewed by an Aboriginal and/or Torres Strait Islander member of an independent advisory panel. Chapters which relate specifically to the experiences of Aboriginal and Torres Strait Islander peoples are also researched and/or supervised, and subject to expert review, by appropriate Aboriginal and/or Torres Strait Islander researchers, supervisors, Committee members and experts.
[99] National Aboriginal Community Controlled Health Organisation, ‘Aboriginal Community Controlled Health Organisations’, available at <https://www.naccho.org.au/acchos>.
[100] In 2019, Danila Dilba Health Service took over the provision of primary healthcare services at Don Dale Detention Centre: Territory Families, Northern Territory Government, ‘Statement of Commitments’, April 2019, available at <https://nt.gov.au/?a=1048286%3Anewsroom%2F28947_11435__statement-of-commitments-1.pdf>. However, Danila Dilba has faced difficulties due to the lack of access to medicare for people in prison, see: Jesse Thompson, ‘Greg Hunt rejects Danila Dilba’s request for Medicare-funded health services in Don Dale’, *ABC News,* 19 October 2020, available at <https://www.abc.net.au/news/2020-10-19/don-dale-medicare-health-services-rejected-by-greg-hunt/12776808>.
[101] Heidi Shukralla, Julie Tongs, Nadeem Siddiqui, Ana Herceg, ‘Australian first in Aboriginal and Torres Strait Islander prisoner health care in the Australian Capital Territory’ (2020) 44(4) *Australian and New Zealand Journal of Public Health,* available at: <https://onlinelibrary.wiley.com/doi/full/10.1111/1753-6405.13007>.

non-Indigenous people, the most common cause of death was medical problems, followed by self-harm. However, Indigenous people who died in custody were *three times more likely not to receive all necessary medical care*, compared to non-Indigenous people. For Indigenous women, the result was even worse – *less than half received all required medical care* prior to death.[102]

116. This statistic is particularly egregious given that Aboriginal and/or Torres Strait Islander people have higher rates of underlying health conditions than the general population.[103] It demonstrates the systemic racism within prison healthcare and the need for culturally safe care within prisons.

117. The State of Victoria is unique in outsourcing its prison health care to private for-profit providers. This leads to a fragmented system of healthcare and the exact sort of gaps and failings which led to Veronica's death.

118. The conduct of CCA in relation to Veronica's death, and the gross lack of healthcare provided by all of its employees to Veronica, readily demonstrate the urgent need for Victoria to transfer back the provision of healthcare in prison to the Department of Health. Recommendations to this effect are also set out below.

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[102] Lorena Allam, Calla Wahlquist, Nick Evershed, 'The facts about Australia's rising toll of Indigenous deaths in custody', *The Guardian*, 9 April 2021, available at <https://www.theguardian.com/australia-news/2021/apr/09/the-facts-about-australias-rising-toll-of-indigenous-deaths-in-custody>.

[103] Australian Institute of Health and Welfare, 'The health of Australia's prisoners 2018', 2019, available at <https://www.aihw.gov.au/getmedia/2e92f007-453d-48a1-9c6b-4c9531cf0371/aihw-phe-246.pdf.aspx?inline=true>.

ANNEXURE A
PROPOSED AMENDMENTS AND ADDITIONS TO CORONER'S DRAFT RECCOMENDATIONS

Bail Act 1977 (Vic)

[1] That the Attorney General of Victoria urgently review the *Bail Act* and amend its terms such that:

a. section 4AA is repealed;[104]

b. section 4A is repealed;

c. section 4C is repealed;

d. section 4D is repealed;

e. Schedules 1 and 2 are repealed;

f. section 4E is amended so that –

i. subsection (1)(a)(ii) refers to the commission of a 'violent offence' while on bail;

ii. subsection (1)(a)(iv) refers to a risk that a person will "flee the jurisdiction" and not a risk that a person will fail to attend Court for other reasons;[105]

iii. subsection (1A) is added to state "A bail decision maker must not refuse bail for a person accused of any offence if the alleged offence is unlikely to result in a sentence of imprisonment";

g. section 18(4) is repealed;

h. section 18AA is amended so that --

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[104] The Administration of Justice Conclave reached a consensus view that the reverse onus provisions of the Bail Act 1977 (Vic) be repealed in their entirety: T2537:1-8.

[105] See Coronial Inquest into the death of Mr Ward, which recommended that breach of bail conditions by non-attendance at court should not be grounds for bail refusal and should be avoided due to the adverse impact on Aboriginal and/or Torres Strait Islander people: *Inquest into the death of Ian Ward*, State Coroner of Western Australia, 12 June 2009, available at: <http://www.abc.net.au/4corners/special_eds/20090615/ward/ward_finding.pdf>.

i. an applicant for bail need not establish 'new facts and circumstances' before making a second application for bail; and

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

i. section 30 is repealed;

j. section 30A is repealed;

k. section 30B is repealed;

l. Aboriginal and/or Torres Strait Islander people should always have the opportunity to be represented in all criminal legal proceedings, but particularly in bail proceedings, by a lawyer who provides culturally safe legal representation;

m. where an applicant for bail is not legally represented, BDMs are required --

i. to make inquiries as to whether the person is Aboriginal and/or Torres Strait Islander;

ii. to ensure, as far as possible, that an Aboriginal and/or Torres Strait Islander person has legal representation;

iii. to enquire about each of the matters specified in section 3A and 3AAA of the *Bail Act*, to enable them to comply with section 3A and the legislative obligation to take into account the surrounding circumstances and any issues arising due to a person's Aboriginality;

iv. keep a record of their enquiries; and

v. may direct an Informant (or nominal Informant) to interrogate any relevant database or other information in its possession to identify information relevant to a proper consideration of sections 3A and 3AAA of the *Bail Act*, particularly that which would favour a grant of bail, and present it to the BDM within a reasonable time;

n. BDMs who are Judicial Officers must articulate at the time of the decision, and with reference to sections 1B, 3A and 3AAA, the matters taken into account and reasons for any refusal to grant an application for bail made by a person to whom section 3A of the *Bail Act* applies; and

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

Training on section 3A of the *Bail Act*

[#] VALS should be funded to work with Aboriginal communities to develop a formal guide and training for BDMs, legal practitioners, prosecutors and Magistrates, so that they understand the relevance of Aboriginality for bail decisions. These resources should include information on the unique systemic and background factors affecting Aboriginal people in the justice system, including the way that colonisation has impacted on their lives, families and communities. They should also identify the strengths of Aboriginal communities, including connection to culture, language and Country, and non-custodial, culturally-appropriate and culturally safe alternatives to remand.

[#] All BDMs, legal practitioners who may represent Aboriginal and/or Torres Strait Islander people, prosecutors, and Magistrates must be required to undertake mandatory training on s 3A and cultural awareness that is developed by VALS in conjunction with Aboriginal and/or Torres Strait Islander communities. Training must be delivered on a regular basis, not just as a "one off".

Crimes Act 1958

[#] That the *Crimes Act 1958* (Vic) be amended so as to include a principle that arrest is a last resort and requiring police to initiate charges by summons rather than bail or remand where this is the most appropriate enforcement action.

[2] That section 464FA of the *Crimes Act 1958* (Vic) (***Crimes Act***) be amended so as to require an investigating official to actively facilitate an Aboriginal and/or Torres Strait Islander person taken into custody to speak to the Victorian Aboriginal Legal Service (**VALS**) and to inform the person not only that VALS has been notified that they are in custody but also that:

a. the purpose of the notification is for VALS to perform a welfare and wellbeing assessment on the person including –

i. identification of any medical, physical and mental health concerns, disability or impairment (including due to substance use); and

ii. communication of any identified risks to the person's safety while in custody to Police so that appropriate management and care is provided.

b. the person may communicate with a VALS Client Notification Officer (CNO);

c. with the person's consent, CNOs may advise their family members, partner or other people of their wellbeing and whereabouts; and

d. with the person's consent, CNOs will contact a VALS on-call solicitor to provide pre-interview legal advice.

e. Inform the person that this service and support is available at any time, including during an interview.

[3] That section 464FA of the *Crimes Act* be further amended to require that compliance with this section, and any response provided by the Aboriginal and/or Torres Strait Islander person taken into custody, be documented.

[4] That in accordance with the principles known as the *Anunga Rules*,[106] sections 464A(3) and 464C of the *Crimes Act* be amended, respectively, to require an investigating official to explain to an Aboriginal and/or Torres Strait Islander person in custody in simple terms:

a. the meaning of the caution and ask the person to tell the investigating official in their own words, phrase by phrase, what is meant by the caution to ensure that both the right to remain silent and that anything they do or say may be used in evidence is understood; and

b. the meaning of each communication right and ask the person to tell the investigating official in their own words, phrase by phrase, what is meant by the rights to ensure they are understood.

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[106] *R v Anunga and ors* and *R v Wheeler and another* (1976) 11 ALR 412.

[#] Aboriginal Community Justice Panels (**ACJP**) should be adequately funded to provide culturally safe support to Aboriginal and/or Torres Strait Islander people in police custody, including during police bail or bail justice hearings.[107]

Victoria Police

[5] That Police amend any Victoria Police Manual (**VPM**) policies in order to:

a. require all police BDMs to enquire about each of the matters in section 3AAA and section 3A of the *Bail Act*.

b. ensure an Aboriginal and/or Torres Strait Islander person under arrest has a meaningful opportunity to make an informed decision about whether to accept an offer to communicate with a VALS CNO, including providing the person with information about the purpose of that contact and what assistance the CNO may be able to provide;

c. ensure an Aboriginal and/or Torres Strait Islander person under caution has a meaningful opportunity to both:

i. consider whether to exercise their rights to communicate with a friend or relative and a legal practitioner; and

ii. to exercise those rights;

d. require Police members to initiate charges by summons rather than bail or remand where charging is considered the most appropriate enforcement action;

e. ensure that the Appendix 2: Police Bail Process flow chart, and other Bail and Remand VPMs, prominently identify the circumstances in which Police BDMs are permitted under the *Bail Act* to grant bail to an Aboriginal and/or Torres

[107] The ACJP Program is currently a volunteer-based community initiative supporting communities and individuals needing assistance in justice or legal related matters. The Panels take a diversionary approach in supporting preventative initiatives for community and individual participation as well as providing direct support through a 'Call-Out' service to individuals held in Police custody. ACJP should be adequately funded to provide culturally safe support to Aboriginal people in police custody, including in relation to bail. For further information on the ACJP Program, see: Victorian Aboriginal Legal Service, 'Aboriginal Community Justice Panels (ACJP) Program', available at <https://www.vals.org.au/aboriginal-community-justice-panels-acjp-program/#:~:text=Aboriginal%20Community%20Justice%20Panels%20%28ACJP%29%20Program.%20The%20ACJP,and%20individual%20participation%20as%20well%20as%20providing%20>.

Strait Islander person required to demonstrate the existence of exceptional circumstances;

f. require a record of all bail decisions made by Police BDMs which reflects who made the decision, the relevant charge(s), the reasons for the decision and the sources of the information that informed the decision as well as those party to the decision making process;

g. minimise and eliminate where possible the use of nominal Informants at remand/bail hearings before Judicial Officers; and

h. ensure Informants (or any other delegated member) preparing a remand brief makes appropriate enquiries to enable an accurate estimate of the length of time required to prepare the brief of evidence (including the likely time to obtain any forensic analyses).

i. State that handcuffs, a use of force, should only be used as a last resort, when other control methods (including de-escalation techniques) have been exhausted and failed; certainly not as a matter of course. Handcuffs should only be used where necessary (to prevent escape, or an individual harming themselves or another person), should be for as short a time as possible, should be applied in a manner that respects the privacy and dignity of the person, especially in public (acknowledging that being handcuffed is a humiliating experience), should not be applied in a manner that causes pain. Any use of handcuffs should be recorded by police officers, and police officers who do not comply with policies should be subject to disciplinary processes.

[6] That Police urgently, within three months, correct any misunderstanding and commence re-training members in respect of any informal policy which requires Police to oppose all remand bail applications involving the exceptional circumstances test, as such an informal policy is contrary to:

a. the requirement that Police exercise genuine discretion as a Public Authority under the *Charter*;

b. the requirement that Police Prosecutors (whether legal practitioner or not) behave as model litigants in the conduct of litigation.

c. The obligations of model litigants and their positive duties to the Court.

[7] That Police require training to be provided to members, which is developed in consultation with VEOHRC, which highlights:

a. the requirement that Police as a Public Authority under the *Charter* are required to act in accordance with the *Charter* when making decisions in the course of their duties;

b. the requirement that Police Prosecutors behave as model litigants in the conduct of litigation.

c. The obligations of model litigants and their positive duties to the Court.

[8] That Police collect and retain statistics that identify:

a. the number of people charged with an offence to which the 'exceptional circumstances test' applies and, of those, how many are:

i. bailed by Police;

ii. remanded into custody;

iii. Aboriginal and/or Torres Strait Islander people;

iv. Aboriginal and/or Torres Strait Islander women; and

v. women.

b. the number of people charged with an offence to which the 'compelling reasons test' applies and, of those, how many are:

i. bailed by Police;

ii. remanded into custody;

iii. Aboriginal and/or Torres Strait Islander people;

iv. Aboriginal and/or Torres Strait Islander women; and

v. women.

To ensure transparency and accountability, and in accordance with Aboriginal data sovereignty,[108] this data must be published and made publicly available on a regular basis and disaggregated by region and police station.

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[108] The concept of Aboriginal data sovereignty mandates that Aboriginal communities and ACCOs have a right to access and interpret information concerning Aboriginal individuals and communities, as well as the right to determine how the data is used and disseminated within mainstream society. The authority and control over such data not only ensures that the information is understood in its

Magistrates' Court of Victoria

[#] That the MCV implement a practice note requiring the prioritisation of Aboriginal and/or Torres Strait Islander applicants, and other vulnerable applicants, at the Bail and Remand Court.

[9] That the MCV collect and retain statistics that identify:

a. The number of people charged with an offence to which the 'exceptional circumstances test' applies and, of those, how many are:

i. bailed;

ii. remanded into custody;

iii. Aboriginal and/or Torres Strait Islander people;

iv. Aboriginal and/or Torres Strait Islander women;

v. Women; and

vi. Unrepresented persons (disaggregating this data).

b. The number of people charged with an offence to which the 'compelling reasons test' applies and, of those, how many are:

i. bailed;

ii. remanded into custody;

iii. Aboriginal and/or Torres Strait Islander people;

iv. Aboriginal and/or Torres Strait Islander women;

v. Women; and

vi. Unrepresented (disaggregating this data).

c. The percentage of Aboriginal and/or Torres Strait Islander people appearing before the BaRC who are able to access a Koori CISP worker.

To ensure transparency and accountability, and in accordance with Aboriginal data sovereignty, this data be made publicly available and published on a regular basis and disaggregated by region.

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appropriate context, but is also beneficial to ACCOs to ensure that the services and programs provided meet the demand and needs of Aboriginal communities. For further information, see AIATSIS, 'Delivering Indigenous Data Sovereignty', 2 July 2019, available at <https://aiatsis.gov.au/publication/116530>.

[10] That the MCV employ sufficient Aboriginal and/or Torres Strait Islander staff in roles (however described) within the court to provide assistance and, where necessary, advocacy, to Aboriginal and/or Torres Strait Islander court users including people remanded in custody, and develop and implement:

a. a process by which the Position Description for these roles is led by Aboriginal and/or Torres Strait Islander people with relevant expertise, in consultation with stakeholders including the end users of the service provided; and

b. robust processes to ensure timely notification of Aboriginal and/or Torres Strait Islander staff about the presence of any Aboriginal and/or Torres Strait Islander people at court or in the cells at the Melbourne Custody Centre.

[11] The MCV develop and implement a process to ensure that judicial officers determining applications for bail are informed of any custody management issues so that these are noted on remand warrants.

[12] The MCV ensure that the Court Integrated Services Program is available whenever the court is open, including throughout BaRC sessions, and is available at all Court locations in Victoria.

[#] The MCV ensure that leave of a Magistrate is not required for assessment for the Court Integrated Services Program at any location.

[#] The MCV review the Court Integrated Services Program assessment process, including any expiry periods for reports.

[#] The MCV ensure that a Koori Liaison support worker, as well as a Koori CISP worker, is available in person at all times when the Court is open, including throughout BaRC sessions.

[#] The MCV ensure that all Aboriginal and/or Torres Strait Islander people in court have access to a Koori Liaison support worker, as well as a Koori CISP worker.

[#] The Victorian Government should work with the MCV and with Koori Courts and Aboriginal communities to consider how Koori Courts can be expanded to hear bail applications in a culturally appropriate setting.[109]

[109] A consensus of the Administration of Justice conclave recommended an expansion of the Koori Court to hear bail hearings: T2647:5-31;T2648:1-25. Koori Courts were established in Victoria in 2002 in response to the RCIADIC. Currently, an Aboriginal person who has a matter at the Magistrates' Court, County Court or Children's Court, can choose to go to Koori Court rather than the generalist court. However, Koori Courts are sentencing courts; they do not hear contested matters and do not deal with bail applications.

[#] The Victorian Government provide sufficient funding for VALS to provide a culturally safe duty lawyer service at the BaRC.[110]

Drug and Alcohol Services

[13] The Victorian Department of Health (**DOH**), in collaboration with VACCHO and member organisations, and other stakeholders, design, establish and adequately resource multiple culturally safe, gender-specific, dually residential and out-patient rehabilitation facilities for Aboriginal and/or Torres Strait Islander women with drug and/or alcohol dependence. These facilities must be in locations which enable Aboriginal and/or Torres Strait Islander women to be able to choose to remain on country, close to their family and community, including their children.[111]

Victoria Legal Aid

[#] That Victoria Legal Aid implement mandatory minimum requirements for its summary criminal law panel, including

a. A requirement for a legal practitioner to have a minimum of two years practice experience in criminal law;

b. A requirement for mandatory training on s 3A and cultural awareness, developed in consultation with VALS;

c. A requirement for mandatory training on the prioritisation of Aboriginal and/or Torres Strait Islander people's bail applications.

In some parts of Canada, there are specialised bail courts for Aboriginal people. Similar to Koori Courts in Victoria, these specialised bail courts have judges/magistrates who are more familiar with the issues experienced by Aboriginal people, resulting in more culturally appropriate hearings and bail decisions than in generalist courts.

To reduce the number of Aboriginal people on remand and ensure that bail decision makers properly consider someone's Aboriginality, it is essential to provide access to culturally appropriate bail proceedings. The Government should work with Koori Courts and Aboriginal communities to look at how Koori Courts can be expanded to hear bail applications.

[110] Currently only Victoria Legal Aid is funded to provide a duty lawyer service at BaRC.

[111] The current Aboriginal Justice Agreement includes a commitment to "Develop and implement cultural and gender-specific supports for Aboriginal women involved in the corrections system to obtain bail and avoid remand", see Victorian Aboriginal Justice Agreement, 'Assist Aboriginal women with bail', available at <https://www.aboriginaljustice.vic.gov.au/the-agreement/aboriginal-justice-outcomes-framework/goal-23-fewer-aboriginal-people-progress-3>.

Custodial Health Services

[14] Oversight and management of custodial health services be undertaken by the Victorian Department of Health (DoH) not the DJCS.[112]

[#] Custodial health care should not be contracted to private, profit-driven corporations and should be delivered through the DoH.[113]

[#] Justice Health should immediately review the breach and termination mechanisms in its its contract with CCA with a view to considering termination based on its conduct concerning Veronica Nelson. Given its conduct in relation to Veronica's death, and the lack of confidence in its provision of healthcare in prisons, the Victorian Government should require CCA to immediately show cause as to why it should be permitted to deliver health services to people in prison in Victoria.

[#] The Federal Government must ensure that incarcerated people have access to the Pharmaceutical Benefits Scheme and the Medicare Benefits Schedule. The Victorian Government should advocate with the Commonwealth to enable this access, in order to provide equivalence of care to Aboriginal and/or Torres Strait Islander people and other vulnerable people held in prison.[114]

[#] The Victorian Government should provide funding for a model of delivery of primary health services by Aboriginal Community Controlled Health Organisations (ACCHOs) in all places of detention, in consultation with VACCHO and member organisations.[115]

[#] The Victorian Government, in partnership with ACCHOs, must prioritise the development, finalisation and implementation of standards for culturally safe, trauma informed health services in the criminal legal system, as required in the current Aboriginal Justice Agreement.[116]

[#] The Victorian Government should employ an adequate number of Aboriginal Health Workers and Aboriginal Wellbeing Officers at all levels of the justice health system (Victoria Police, Courts, Forensicare/MHARS, Community Corrections, Correctional Health Services) to ensure that Aboriginal people in the criminal legal

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[112] T2280:25-28.
[113] T2281-T2282.
[114] T2280-T2282; T368; T2390-T2393.
[115] RCIADIC Recs 63, 127, 150, 152, 258, RCIADIC Report Findings and Recommendations, Vol 5, available at <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol5/5.html#Heading5>.
[116] T2375-T2380. The current Aboriginal Justice Agreement also contains a requirement for the government to develop culturally safe standards for health services in the adult and youth justice systems. See Victorian Aboriginal Justice Agreement, 'Cultural safety standards', available at <https://www.aboriginaljustice.vic.gov.au/the-agreement/aboriginal-justice-outcomes-framework/goal-31-the-needs-of-aboriginal-people-are-13>.

system have 24 hour in-person access to trained Aboriginal Health Workers and Aboriginal Wellbeing Officers.

[#] Aboriginal Health Workers and Wellbeing Officers must see a person within 2 hours of their entry into police or prison custody.

[15] A reception medical assessment in respect of an Aboriginal and/or Torres Strait Islander person entering prison must always be undertaken by an Aboriginal Health Practitioner in person.

[16] Any relevant Local Operating Procedure and any policy applicable to staff of the Health Service Provider at DPFC be urgently amended to include a procedure for the medical clearance of a prisoner as a component of her reception assessment.

[17] The procedure for clearance of a prisoner from the Health Centre to a Unit at DPFC should involve written certification from a Medical Practitioner, who is qualified as a General Practitioner, which indicates:

a. An assessment has taken place, and include details of the assessment;

b. the prisoner is certified by the Medical Practitioner as medically fit to leave the Health Centre;

c. whether the Medical Practitioner recommends any medical or management observations in relation to the prisoner;

d. specific clinical deterioration risk indicators the Medical Practitioner recommends custodial and health staff monitor; and

e. instructions to guide the response, including escalation of the prisoner's care, if clinical deterioration risk indicators are observed.

and this certification should be maintained in both the prisoner's health and custodial files.

[18] Prisoners who are not medically fit to be transferred from the Health Centre to a Unit at DPFC should be placed on a medical hold and remain in the Health Centre with the Medical Practitioner documenting:

a. the recommended medical observations in relation to the prisoner; and

b. the specific clinical deterioration risk-indicators the Medical Practitioner recommends custodial and health staff monitor; and

c. instructions to guide the response if clinical deterioration risk indicators are observed, including under what circumstances the prisoner ought be transferred to hospital.

and this documentation should be maintained in both the prisoner's health and custodial files.

[#] CCA, should it continue delivering services in prison in Victoria, in collaboration with CV and Justice Health, should develop clear guidelines that emphasise the ability to call an ambulance by any custodial staff. All health providers, existing and future, must similarly develop guidelines.

[19] CCA, should it continue delivering services in prison in Victoria, in collaboration with CV and Justice Health, should develop clear guidelines to assist custodial and health care staff to identify a prisoner's clinical deterioration, and implement policies and procedures applicable to custodial and health care staff which identify the key indicators that must result in an escalation of a prisoner's care to the Medical Practitioner or transfer to hospital. All health providers, existing and future, must similarly develop guidelines.

[20] The Health Centre at DPFC should provide Point-of-Care testing in accordance with the Royal Australian College of General Practitioners Standards for Point-of-Care testing.

[21] To achieve equivalence of health services in the Health Centre at DPFC, it should be continuously accredited as a General Practice in accordance with the National General Practice Accreditation Scheme.

[22] Medical Practitioners employed by the Health Service Provider at DPFC should be General Practitioners who have completed the General Practice Training Program and gained Fellowship.

[23] Medical Practitioners employed by the Health Service Provider at DPFC should be required to have completed the Royal Australian College of General Practitioners' Alcohol and Other Drugs GP Education Program, including at minimum:

a. the Essential Skills training program; and

b. the Treatment Skills training program

in the current Continuing Professional Development triennium.

[24] Registered Nurses employed by the Health Service Provider at DPFC should be required to have completed the Australian College of Nursing's Continuing Professional Development modules in:

a. Addressing AOD Use in Diverse Communities; and

b. Opioid Withdrawal Nursing Care and Management

in the current Continuing Professional Development year.

[25] Medical Practitioners and Nurse Practitioners employed by the Health Service Provider at DPFC should be qualified to practise opioid pharmacotherapy, having completed the Royal Australian College of General Practitioners Medication Assisted Treatment for Opioid Dependence training.

[26] The Health Centre at DPFC should employ a full-time specialist who has completed Advanced Training in Addiction Medicine.

[27] The Health Centre at DPFC should include a subacute unit operated by the DoH, to provide for medically managed inpatient withdrawal and stabilisation, overseen by a specialist who has completed Advanced Training in Addiction Medicine.

[#] The Health Centre at DPFC should include onsite pathology,

[28] As an interim measure, until a subacute unit on site at DPFC is operational, an agreement or Memorandum of Understanding should be entered into as a matter of urgency between CV, Justice Health, the Health Service Provider and the most proximate public hospital, Sunshine Hospital, for the provision of equivalent community health services not provided at the Health Centre.

[29] CV, in consultation with the DPFC Health Service Provider, amend its policy that only two officers have access to cell keys during the Second Watch.

[#] CV, in consultation with the DPFC Health Service Provider, end its practice of placing "do not open" signage on cell doors.

[#] DJCS review JCARE usability, and cease any ability to "cut and paste" data.

[30] The Justice Health Opioid Substitution Therapy Guidelines should be revised to allow all prisoners the option of suitable maintenance or substitution pharmacotherapy at the point of reception, including the option of methadone or suboxone and their long-acting injectable buprenorphine formulations, irrespective of the length of incarceration

[31] An independent body, such as Safer Care Victoria, should review and, if necessary, update the JHQF.

[32] Given CCA's extensive portfolio of custodial health care services within Victoria, the jurisdiction of Safer Care ought to be expanded as a matter of urgency to allow it to conduct investigations into subcontracted private providers of health services where they are Public Authorities under the *Charter*, and thereupon for it to conduct an audit of CCA to advise on any gaps between policy and practice in the provision of those services.

[33] In the interim, or if this is not possible in the next 12 months, Australian Health Practitioner Regulation Agency should consider conducting an audit as proposed in paragraph 31.

[34] CV should contract Safer Care Victoria and fund the Victorian Aboriginal Health Service to conduct a review of the policies and procedures of CCA relevant to the delivery of health services in Victorian prisons. These reviews must be made publicly available and be completed prior to any further tendering process.

[35] CCA report the deficiencies in care identified in these Findings to its current accreditation providers before it participates in any further tendering for the provision of custodial health services in Victoria.

[#] That DJCS require that all persons who work in any prison in Victoria have regular, in-person cultural awareness, cultural safety, unconscious and conscious bias training that is led and developed by Aboriginal and/or Torres Strait Islander people.

[#] That DJCS require that all persons who work in any prison in Victoria have training, which is developed in consultation with VEOHRC, which highlights a person's rights to dignity and humanity in detention and their requirements as Public Authorities under the *Charter* to act in accordance with the *Charter* when making decisions in the course of their duties.

Custodial deaths – Response and Review

[#] The Victorian Government must create an independent body, separate to Victoria Police, JARO and Justice Health, with appropriate investigatory powers and functions, to investigate all Aboriginal and/or Torres Strait Islander deaths in custody.[117]

[117] In the Parliamentary review into Aboriginal and/or Torres Strait Islander deaths in custody in NSW, the Jumbunna Institute recommended: 'a new, indigenous-informed and led investigative and

Development of this body must be self-determined by Aboriginal and/or Torres Strait Islander communities, their representatives, the AJC and ACCOs such as VALS. The body and its practices must be culturally appropriate.

[36] That DJCS oversee the development and implementation of a policy, and deliver training to CV staff about the operation of that policy, to ensure that cultural considerations are incorporated into management of a deceased Aboriginal or Torres Strait Islander person and, to the extent possible, the scene of that person's passing. This policy must be developed by Aboriginal and/or Torres Strait Islander people, and in consultation with VALS and ACCOs.

[#] Where an Aboriginal and / or Torres Strait Islander person dies in custody, notification of relatives of their death should occur, as a matter of urgency, through an ACCO, and not Victoria Police.[118]

[#] That DJCS develop and implement a policy for taking formal statements from all relevant witnesses within two weeks after a death in custody. These statements must be taken by an independent body, separate to Victoria Police, CV, JARO and Justice Health.

[37] CCA, if it continues to provide healthcare in prisons, CV and Justice Health each review, and if necessary, amend, any policy or practice relating to staff 'debriefs' following a death in custody or other sentinel events. The review should consider and clarify:

a. the purpose of debriefs, including whether they are intended to serve a staff welfare function, evaluate practice and/or policy to identify systems or other deficits, or a combination of these matters; and

b. a process to optimise the participation of relevant staff in any debrief.

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prosecutorial institution in relation to First Nation Deaths in Custody that is tasked with the investigation, on behalf of the NSW Coroner, of First Nation Deaths in Custody'. The Aboriginal Legal Service (NSW/ACT) also preferred this proposal in comparison to others put forward during the inquiry. The ALSNSW stated that it is 'critical that the independent body/agency has a holistic understanding of the factors that lie behind deaths in custody, and has the scope to investigate the factors behind why a person is in custody in the first place, as well as the specific circumstances of their death'. It suggested, however, that the Coroner be provided with additional resources and powers until this body is established. See NSW Legislative Council: Select Committee on the High Level of First Nations people in custody and oversight and review of deaths in custody, 'The high level of First Nations people in custody and oversight and review of deaths in custody', April 2021, available at <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2602/Report%20No%201%20-%20First%20Nations%20People%20in%20Custody%20and%20Oversight%20and%20Review%20of%20Deaths%20in%20Custody.pdf>, at p 174-6.

[118] See Aunty Vicki Roach, T2026-T2027; Percy Lovett. T56:12-15.

c. A process to ensure transparency of information within these debriefs.

[38] That an independent body be established to take over JARO and JHDIC reviews to ensure they:

a. are independent;

b. receive input from relevant staff who interacted with or were responsible for decisions affecting the prisoner proximate to their death;

c. receive input from relevant experts they deem appropriate;

d. are comprehensive;

e. identify opportunities for improved practice and to enhance the wellbeing and safety of prisoners, rather than merely assess compliance with relevant policies;

f. if the deceased is an Aboriginal or Torres Strait Islander person, that adequacy of their cultural care (including post-death treatment) is assessed by an Aboriginal and/or Torres Strait Islander person appointed by an ACCO; and

g. are timely.

[#] The Victorian Government must urgently undertake robust, transparent and inclusive consultations with the Victorian Aboriginal community, its representative bodies and ACCOs on the implementation of the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* (**OPCAT**) in a culturally appropriate way.

[#] The Victorian Government must ensure the mandate of the National Preventive Mechanisms which will be established/designated under OPCAT includes police custody, places of detention in which people may be detained for less than 24 hours, such as police vehicles and cells. These systems should examine the role of racial bias and systemic racism when exercising their mandates.

Addressing Systemic Issues

[39] That the Victorian Government in cooperation with Victoria Police, the Department of Justice and Community Safety, the Department of Health, Aboriginal communities,

VALS, the Victorian Aboriginal Health Service, Aboriginal Community Controlled Organisations, and all relevant government departments, urgently implement the 339 recommendations of the 1991 *Final Report of the Royal Commission into Aboriginal Deaths in Custody.*

[#] That the Victorian Government, including all relevant government departments, meaningfully resource and support the work of VALS and the Aboriginal Justice Caucus, which are about to commence a review of the State's implementation of the 339 recommendations of the RCIADIC, including by providing access to data and information.

[40] That the Department of Justice and Community Safety partners with appropriate Aboriginal Community Controlled Organisations to develop and implement a strategy for ongoing cultural awareness training, monitoring and performance review, which is applicable to:

a. Police;

b. CV; and

c. the Health Care Provider at DPFC.

[42] That Practical Legal Training course providers require students to complete Aboriginal and Torres Strait Islander cultural awareness training, as well as training on systemic racism and unconscious bias, as part of the curriculum. This training must be developed and led by Aboriginal and/or Torres Strait Islander people with cultural oversight.

[#] That the Legal Services Board and Commissioner and the Victorian Bar require students to complete Aboriginal and Torres Strait Islander cultural awareness training, as well as training on systemic racism and unconscious bias, as part of the Bar Reader's Course. This training must be developed and led by Aboriginal and/or Torres Strait Islander people, with cultural oversight.

[43] That the Legal Services Board and Commissioner and the Victorian Bar require periodic mandatory completion of Aboriginal and Torres Strait Islander cultural awareness training, and training on systemic racism and unconscious bias, as part of the Continuing Professional Development of legal practitioners. This training must be developed and led by Aboriginal and/or Torres Strait Islander people with cultural oversight.

Charter

[44] That no later than 12 months from the date of these findings, CV, JARO, Justice Health and CCA, as Public Authorities under the *Charter* request the VEOHRC conduct a review under Section 41(c) of the *Charter* of any improvements to programmes, practises, and facilities made in response to the recommendations above, and that the results of that review will be published on the Coroner's Court website along with the responses to the Recommendations made in this Finding.

Dated: 17 June 2022

ANDREW WOODS
STEPHANIE WALLACE
Counsel for Uncle Percy Lovett

Signed by Sarah Schwartz, Victorian Aboriginal Legal Service
Solicitor for Uncle Percy Lovett

Victorian Aboriginal Legal Service Submission to the Cultural Review of the Adult Custodial Corrections System

December 2021

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BACKGROUND TO THE VICTORIAN ABORIGINAL LEGAL SERVICE

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

Legal Services

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

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

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

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

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

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

Community Justice Programs

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

The Community Justice Programs Team also operates the following programs:

- Family Violence Client Support Program;[8]
- Community Legal Education;
- Victoria Police Electronic Referral System (V-PeR);[9]
- Regional Client Service Officers;
- Baggarrook Women's Transitional Housing program;[10]
- Aboriginal Community Justice Reports.[11]

Policy, Research and Advocacy

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

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[5] In 2019-2020, VALS Wirraway provided legal services in relation to 2 legal matters. In 2020-2021, VALS Wirraway has provided legal services in relation to 53 legal matters (as of 19 March 2021).

[6] Ss. 464AAB and 464FA, Crimes Act 1958 (Vic).

[7] In 2019-2020, VALS CNS handled 13,426 custodial notifications. In 2020-2021, VALS CNS has handled 8,366 custodial notifications (as of 19 March 2021).

[8] VALS has three Family Violence Client Support Officers (FVCSOs) who support clients throughout their family law or civil law matter, providing holistic support to limit re-traumatisation to the client and provide appropriate referrals to access local community support programs and emergency relief monies.

[9] The Victoria Police Electronic Referral (V-PeR) program involves a partnership between VALS and Victoria Police to support Aboriginal people across Victoria to access culturally appropriate services. Individuals are referred to VALS once they are in contact with police, and VALS provides support to that person to access appropriate services, including in relation to drug and alcohol, housing and homelessness, disability support, mental health support.

[10] The Baggarrook Women's Transitional Housing program provides post-release support and culturally safe housing for six Aboriginal women to support their transition back to the community. The program is a partnership between VALS, Aboriginal Housing Victoria and Corrections Victoria.

[11] Read more about the Reports at https://www.vals.org.au/aboriginal-community-justice-reports/

ACKNOWLEDGEMENTS

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

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

- Andreea Lachsz (Head of Policy, Communications & Strategy)
- Kin Leong (Director of Legal Services)
- Dominique Lardner (Principal Managing Lawyer, Criminal Law Practice)
- Nik Barron (Principal Managing Lawyer, Wirraway Specialist Legal & Litigation Practice)
- Sarah Schwartz (Senior Lawyer, Wirraway Specialist Legal & Litigation Practice)
- Siobhan Doyle (Senior Lawyer, Civil Law and Human Rights Practice)
- Anna Potter (Civil Lawyer, Your Story Disability Legal Support)

SCOPE OF THE INQUIRY

Stream 1 – Staff

"The first stream of the review will focus on the experience of custodial staff.

- Addressing systemic behavioural and cultural challenges: Measures to address systemic behavioural and cultural challenges among and towards staff, impacting on staff wellbeing and safety.
- Preventing behavioural and cultural issues: The effectiveness and appropriateness of the Department of Justice and Community Safety's systems and processes that prevent and respond to behavioural and cultural issues to protect and preserve the wellbeing of all staff.
- Driving cultural change: Options to drive cultural change and promote respectful behaviour that is consistent with a culturally safe and integrity-based corrections system, including options to address workforce skills and key capabilities (including leadership capability)."[12]

Stream 2 – People in custody

"The second stream of the review will focus on the experience of people in custody.

- Access to culture, experiences of discrimination and self-determination for Aboriginal people living in prison: Whether systems and processes in prisons ensure that Aboriginal people in custody have the right to access and continue to practice culture, are free from discrimination, and are consistent with Aboriginal self-determination.

[12] Terms of Reference, available at https://www.correctionsreview.vic.gov.au/wp-content/uploads/2021/10/Doc-Terms_of_reference-Oct2021-2.pdf

- Safety in custody for vulnerable cohorts: The effectiveness and appropriateness of Department of Justice and Community Safety systems and processes to support the safety of people in custody (noting issues experienced by particular groups such as women, Aboriginal people, LGBTI people, people with disability, elderly people and people from Culturally and Linguistically Diverse backgrounds)."[13]

EXECUTIVE SUMMARY

We have recently marked a grim milestone, with 500 Aboriginal and Torres Strait Islander people having died in custody since the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**).[14] This year, on the 30-year anniversary of RCIADIC, two damning reports of Victoria's correctional system were released; one on disciplinary processes, by the Victorian Ombudsman,[15] and one on corruption, by IBAC.[16]

Many of RCIADIC's recommendations remain unimplemented.[17] Many of the recommendations of coronial inquests into Aboriginal deaths in custody remain unimplemented. The list of recommendations collecting dust grows ever longer, and some government decision-making directly contradicts those expert, evidence-based recommendations. This has created avoidable instances of torture and cruel, inhuman or degrading treatment or punishment and, tragically, deaths in Victoria's prisons.

VALS makes this submission in the expectation that our recommendations will be seriously considered by the Review, the Minister for Corrections and the Premier, and that our almost 50 years of experience delivering culturally safe legal services to Aboriginal communities across Victoria will encourage the Government to accept and implement our expert recommendations.

While a significant proportion of this submission focuses on the conditions and treatment in prisons, it is impossible to ignore Victoria's soaring prison population. The pressure on the adult correctional system is having very real, harmful consequences for incarcerated Aboriginal people, as well as their families and communities, to whom they ultimately return upon release. Tinkering with the edges of the prison system is not going to work. The current crisis must be met head on, with whole system overhaul. This must begin with targeted, genuine efforts to drastically reduce the prison population.

[13] Terms of Reference, available at https://www.correctionsreview.vic.gov.au/wp-content/uploads/2021/10/Doc-Terms_of_reference-Oct2021-2.pdf
[14] NATSILS, 500 Aboriginal and Torres Strait Islander people have died in custody since the Royal Commission 30 years ago (6 December 2021)
[15] Victorian Ombudsman, Investigation into good practice when conducting prison disciplinary hearings (July 2021)
[16] IBAC, Special report on corrections IBAC Operations Rous, Caparra, Nisidia and Molara (June 2021)
[17] Thalia Anthony et al, 30 years on: Royal Commission into Aboriginal Deaths in Custody recommendations remain unimplemented, accessed at https://caepr.cass.anu.edu.au/research/publications/30-years-royal-commission-aboriginal-deaths-custody-recommendations-remain

SUMMARY OF RECOMMENDATIONS

Part 1: Relevant Excerpts and Recommendations from VALS Submission to the Victorian Criminal Justice Inquiry

Aboriginal Self-Determination

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

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

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

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

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

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

Systemic Racism

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

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

Ending Aboriginal Deaths in Custody

Recommendation 9. The Victorian Government should immediately begin implementing the RCIADIC recommendations, and must not rely on the discredited Deloitte review on the status of implementation of the recommendations.

Recommendation 10. The Victorian Government should establish an independent, statutory office of the Aboriginal and Torres Strait Islander Social Justice Commissioner. This office should be properly funded and report directly to the Parliament. The mandate of the Commissioner should include monitoring the implementation of RCIADIC recommendations, as well as recommendations from coronial inquests into Aboriginal deaths in custody.

Addressing the Growth in Prison and Remand Populations

Recommendation 11. The Government must repeal the reverse-onus provisions in the *Bail Act 1977* (Vic), particularly the 'show compelling reason' and 'exceptional circumstances' provisions (sections 4AA, 4A, 4C, 4D and schedules 1 and 2).

Recommendation 12. There should be a presumption in favour of bail for all offences, with the onus on Prosecution to prove that there is a specific and immediate risk to the physical safety of another person.

Recommendation 13. There should be an explicit requirement in the Act that a person may not be remanded for an offence that is unlikely to result in a sentence of imprisonment.

Recommendation 14. The Victorian Government must amend the *Bail Act 1977* (Vic) to repeal the offences of committing an indictable offence while on bail (s. 30B), breaching bail conditions (s. 30A) and failure to answer bail (s. 30).

Recommendation 15. The Victorian Government should amend the *Bail Act 1977* (Vic) to include a consideration of the implications for dependent children, when making bail decisions for mothers and primary carers, in accordance with international law standards.

Recommendation 16. The Magistrates Court should expand the Court Integrated Services Program (CISP) so that it is available in all locations across Victoria. This includes ensuring sufficiency of Koori CISP workers to support Aboriginal people on bail across Victoria.

Recommendation 17. The use of cannabis and the possession of cannabis for personal use should be decriminalised.

Recommendation 18. The Government should consider decriminalising use and possession of all drugs for personal use, looking to good practices in other jurisdictions. VALS' upcoming research paper should be of assistance in canvassing what approaches could be considered for the Victorian context.

Recommendation 19. The new *Mental Health and Wellbeing Act* should create the basis for a mental health system which:

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

Recommendation 20. The Victorian Government should amend Section 5(2) of the *Sentencing Act 1991* (Vic) so that for the purposes of sentencing:

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

Recommendation 21. All Judges and Magistrates should be required to complete regular face-to-face training in cultural awareness, systemic racism and unconscious bias.

Recommendation 22. The Victorian Government must support self-determined initiatives to improve sentencing outcomes for Aboriginal people. This includes by directing dedicated funding from *Burra Lotjpa Dunguludja* to the Aboriginal Community Justice Reports project currently carried out by VALS and partners, as well as providing ongoing funding beyond the pilot Project.

Recommendation 23. The Victorian Government should support self-determined initiatives to improve sentencing outcomes for Aboriginal people, including by directing dedicated funding from *Burra Lotjpa Dunguludja* to the Aboriginal Community Justice Reports pilot project currently being carried out by VALS and its partners, as well as providing ongoing funding beyond the pilot Project.

Recommendation 24. The Victorian Government must amend the *Sentencing Act 1991* (Vic) so that, for the purposes of sentencing women who have offended, judicial decision-makers are required to:

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

Recommendation 25. The Victorian Government should equip magistrates with knowledge of factors to consider when dealing with matters in the adult criminal legal system that may directly or indirectly affect the interests of children.

Recommendation 26. The Victorian Government should repeal mandatory sentencing schemes under the *Sentencing Act 1991* (Vic), including for the following offences:

- Category 1 and Category 2 offences;
- Offences against "emergency workers";

- Category A and Category B "serious youth offences."

Recommendation 27. The Victorian Government should significantly increase funding for VALS' Community Legal Education. Funding should be provided for both staffing and creation of resources (using different media, to be disseminated on different platforms, to ensure the legal messages are accessible to and understandable for everyone in the Aboriginal community). The funding should be sufficient to enable CLE delivery across the state, including in places of detention.

Recommendation 28. The Government should amend the *Sentencing Act 1991* (Vic) to ensure that individuals with an acquired brain injury and/or with an intellectual disability that was not diagnosed before the age of 18 years, are eligible for a Justice Plan.

Recommendation 29. The Victorian Government should require that all people entering adult… prisons are screened for disability, particularly psychosocial or cognitive disabilities and other neurodiverse conditions such as an autistic spectrum condition, dyslexia and attention deficit hyperactive disorder.

Recommendation 30. The Victorian Government should establish safeguards against indefinite detention of people who are found unfit to plead or stand trial in line with those recommended by NATSILS, including:

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

Recommendation 31. The Victorian Government should fund VALS to restart and sustain the Disability Justice Support Program piloted as part of the Unfitness to Plead Project.

Parole

Recommendation 32. The Victorian Government should amend the *Corrections Act 1986* (Vic) to provide for automatic court-ordered parole for sentences under five years.

Recommendation 33. The Victorian Government should repeal Section 77C of the *Corrections Act 1986* (Vic) and adopt a new provision which provides that time spent on parole, before a parole order is cancelled, counts as time served.

Recommendation 34. The Victorian Government should amend the *Corrections Act 1986* (Vic) to include a legislative requirement to have Aboriginal people on the Adult Parole Board… Membership of the Parole Boards must include people with professional backgrounds and with relevant lived experience.

Recommendation 35. The Victorian Government should amend the *Corrections Act 1986* (Vic) and the Adult Parole Board Manual, to provide that parole cannot be denied on the basis that a required program has not been completed, where this program is unavailable or unsuitable for Aboriginal people.

Recommendation 36. The Victorian Government should work with Aboriginal organisations to ensure that Aboriginal people who are incarcerated, particularly Aboriginal women and girls, have access to culturally safe rehabilitation programs. Funding must be given to Aboriginal organisations to design and deliver these programs.

Recommendation 37. The Victorian Government must work with Aboriginal organisations to develop and provide culturally appropriate transitional housing and support for Aboriginal people exiting prison.

Recommendation 38. The Victorian Government must repeal regulation 5 of the *Charter of Human Rights and Responsibility (Public Authorities) Regulation 2013* (Vic), which exempts the Adult Parole Board from the operation of the Charter.

Recommendation 39. The Victorian Government must repeal section 69(2) of the *Corrections Act 1986* (Vic), which provides that the Adult Parole Board is not bound by the rules of natural justice.

Recommendation 40. The Victorian Government should amend the *Corrections Act 1986* to include the purpose of parole and the criteria on which parole decisions are made. The legislated purpose of parole should highlight that the release of the individual on parole will contribute to the protection of society by facilitating their rehabilitation and reintegration into society.

Recommendation 41. The Victorian Government must amend the *Corrections Act 1986* to provide for the following rights of incarcerated people in relation to any decisions made by the Adult Parole Board regarding parole:

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

Recommendation 42. The Victorian Government should provide funding to VALS to provide legal assistance, support and representation to Aboriginal people who are applying for parole.

Recommendation 43. The Victorian Government should amend the *Corrections Act 1986* (Vic) so that the Adult Parole Board is required to take into account cultural considerations when making decisions on parole applications, suspension and cancellation of parole for Aboriginal people. The Adult Parole Board Manual should be amended to provide guidance to the Adult Parole Board on complying with this requirement. All parole officers should be required to undertake mandatory and ongoing cultural awareness training.

Rehabilitation Programs

Recommendation 44. Rehabilitation programs, both in prisons and for people transitioning out of prison or diverted from prison, should be run on a voluntary basis, not penalising or threatening people for breaching behavioural requirements.

Recommendation 45. Funding for rehabilitation in prisons, including culturally safe rehabilitation support provided by Aboriginal organisations, should be significantly increased.
Recommendation 46. Rehabilitation services should be available to people held in prison on remand.

Conditions and Treatment in Custody

Recommendation 47. Prison complaints, including complaints against private prisons and contractors, should be handled by an appropriately resourced independent oversight body with sufficient powers to refer matters for criminal investigation.
Recommendation 48. All prison staff should receive extensive training, that is developed and delivered in collaboration with ACCOs, on trauma-informed care, anti-racism, and the specific needs of vulnerable groups including Aboriginal people and women.

COVID-19, Isolation and Prison Lockdowns

Recommendation 49. The Government should make publicly available the health advice, risk-assessment and human rights assessment upon which it relies in making decisions about the use of isolation and protective and transfer quarantine.
Recommendation 50. The use of protective and transfer quarantining, and the nature of the quarantine itself, should be

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

Recommendation 51. Legislation should be amended to require that incarcerated people in protective quarantine/transfer quarantine and isolation are regularly observed and verbally communicated with.
Recommendation 52. Legislation should explicitly provide for the rights of people in protective/transfer quarantine… including guaranteeing meaningful contact with other people and time out of cell, in fresh air, every day.
Recommendation 53. People in protective/transfer quarantine… should be provided supports and services (including mental health services and cultural supports and services provided by ACCOs), and means by which to contact family, lawyers, independent oversight bodies, and ACCOs.
Recommendation 54. The Victorian Government should maintain a register of all people placed in protective/transfer quarantine…:

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

- Any incidents, such as attempted self-harm, should also be included.

Recommendation 55. Facilities should not, by default, go into complete lockdown during a COVID-19 outbreak.

Recommendation 56. Staffing and other operational issues should be urgently addressed, to ensure lockdowns do not occur as a result of inadequate staff to safely manage the facility.

Recommendation 57. No one should be in effective solitary confinement as a result of lockdown, particularly… people with mental or physical disabilities, or histories of trauma.

Recommendation 58. If lockdowns occur, people should be provided supports and services (including mental health services and cultural supports and services provided by ACCOs), and means by which to contact family, lawyers, independent oversight bodies, and ACCOs, including VALS.

Recommendation 59. Information on how lockdowns are operationalised should be publicly available and regular updates should be shared.

Recommendation 60. The Victorian Government should add prisons… to the Surveillance Testing Industry List, with both employees and contractors subject to regular surveillance testing.

Recommendation 61. The Victorian Government should improve the COVID-19 vaccine rollout, and put in place preparations for a significantly more effective vaccine rollout for any future pandemic, including by:

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

Emergency Management Days

Recommendation 62. Corrections, in making decisions in relation to Emergency Management Days, should acknowledge that the pandemic has negatively impacted on all people in detention, albeit to different degrees. Emergency Management Days should be granted not only to people who have been subject to isolation or mandatory quarantine, but to others as well, in recognition of the additional hardships faced by everyone in detention.

Recommendation 63. Corrections policy should be amended so that people can be granted 4 Emergency Management Days for each day that the 'emergency exists', and the 14 days they could be entitled to due to 'circumstances of an unforeseen and special nature.'

Recommendation 64. Corrections policy should be clarified to provide that people in detention cannot 'lose' EMDs once they have been granted, including if they are bailed and subsequently re-remanded.

Recommendation 65. There should be greater transparency in relation to the process by which Emergency Management Days are granted. Information should also be made available in relation to the number of people released on Emergency Management Days, how many days they were granted (broken down per month and per facility), and how many Aboriginal and non-Aboriginal people were granted Emergency Management Days.

Recommendation 66. Decisions in relation to EMDs should be governed by natural justice. Applicants should be given clear particulars of any reasons as to why an application has been refused and be allowed to seek review.
Recommendation 67. Emergency Management Day assessments should occur on a regular basis, to allow adequate time to prepare for release.
Recommendation 68. No one should be denied Emergency Management Days due to a lack of housing.

Use of Force and Restraints

Recommendation 69. The regulation of use of force/restraints should be provided for in legislation, not regulations, policies/procedures, written notices, or in Gazette.
Recommendation 70. The default position must be that the use of restraints/force is prohibited, with exceptions where authorised.
Recommendation 71. Prohibitions on use of force/restraints that should be enshrined in legislation:

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

Recommendation 72. When use of force/restraints may be permitted:

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

Recommendation 73. Additional safeguards:

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

Solitary Confinement

Recommendation 74. Solitary confinement should be prohibited in all places of detention… by legislation.

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

Recommendation 75. Staffing and other operational issues in places of detention should be urgently addressed, to ensure no one is subjected to solitary confinement.

Strip Searching and Urine Testing

Recommendation 76. The threshold for authorising a strip search in adult prisons should be raised by legislation. 'Good order' and 'security of the facility' should be removed as grounds for a strip search and legislation should provide that strip searching must be a last resort and must be based on intelligence. Prior to strip searching, other means of searching such as pat searches, metal detectors and increased surveillance must be used. Strip searching must never be routinely conducted as part of the general routine of the centre or on entry to a centre.

Recommendation 77. Prisons should adopt policies which require them to consider the effect of strip searches on re-traumatisation.

Recommendation 78. Urine testing should only be required upon reasonable grounds and in a manner consistent with the inherent dignity and right to privacy of the detainee involved to the greatest extent possible.

Recommendation 79. Body cavity searches should never be performed on imprisoned people.

Recommendation 80. The Government should invest in technology which enables non-intrusive searching, to provide further alternatives and minimise the use of strip searching.

Equivalence of Healthcare

Recommendation 81. People in detention must be provided medical care that is the equivalent of that provided in the community. Medical care must be provided without discrimination.

Recommendation 82. Health care should be delivered through DHHS rather than DJCS, and not through for-profit organisations.

Recommendation 83. A model of delivery of primary health services by Aboriginal Community Controlled Health Organisations in places of detention in Victoria should be considered, in consultation with VACCHO and member organisations.

Recommendation 84. The Federal Government must ensure that incarcerated people have access to the Pharmaceutical Benefits Scheme (PBS) and the Medicare Benefits Schedule (MBS). The Victorian Government should advocate with the Commonwealth to enable this access in order to provide equivalence of care to Aboriginal people and other vulnerable people held in prison.

Recommendation 85. The Federal and State Governments should ensure that incarcerated people have access to the National Disability Insurance Scheme (NDIS) and are assessed for eligibility for NDIS upon entry to a prison or youth justice centre.

Recommendation 86. The Government should employ more Aboriginal Health Workers and Aboriginal Wellbeing Officers at all levels of the justice health system (Victoria Police, Courts, Forensicare/MHARS, Community Corrections, Correctional Health Services) to work with Aboriginal people at all stages of their engagement with the criminal legal system.

Recommendation 87. The Government should prioritise the development and finalisation of standards for culturally safe, trauma informed health services in the criminal legal system…

Mental Health & Mental Healthcare

Recommendation 88. The Government should ensure that all prison officers receive regular gender and culturally sensitive training on how to interact with people with cognitive disabilities.

Recommendation 89. The Government should commit significant resources to improving mental healthcare for Aboriginal people in custody in Victoria, including by:

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

OPCAT

Recommendation 90. The Victorian Government must urgently undertake robust, transparent and inclusive consultations with the Victorian Aboriginal community, its representative bodies and ACCOs on the implementation of OPCAT in a culturally appropriate way.

Recommendation 91. The operations, policies, frameworks and governance of the designated detention oversight bodies under OPCAT (National Preventive Mechanisms - NPMs) must be culturally appropriate and safe for Aboriginal people.

Recommendation 92. The Victorian Government must legislate for the NPM's mandate, structure, staffing, powers, privileges and immunities.

Recommendation 93. The Victorian and Commonwealth Governments must ensure that the NPM is sufficiently funded to carry out its mandate effectively.

Recommendation 94. In accordance with Article 3(1) of OPCAT, the NPM in Victoria must have jurisdiction over all places where individuals are or may be detained, including… forensic mental health hospitals and other places where people with cognitive disabilities are deprived of their liberty.

Recommendation 95. The Victorian Government must amend COVID-19 Emergency legislation to ensure that visits to correctional facilities and youth detention facilities by independent detention oversight bodies cannot be prohibited.

Disciplinary Proceedings

Recommendation 96. The Victorian Government should implement the recommendations of the Victorian Ombudsman in her July 2021 report on prison disciplinary hearings.

Recommendation 97. Protections relating to procedural fairness in disciplinary proceedings should reflect those outlined in the Mandela Rules and should be enshrined in legislation.

Recommendation 98. The rights of incarcerated people with disability must continue to be upheld during the pandemic and recovery period, including the right to be supported through the Office of the Public Advocate during disciplinary hearings.

Privatisation of Prisons

Recommendation 99. The Government should end privatisation of prisons in Victoria. This should include wholly privately-run prisons, as well as particular services, such as healthcare. The Government should move towards public control of all prison facilities as a matter of urgency.

Women in Prison

Recommendation 100. The Government should expand the availability of rehabilitation and reintegration supports for women in prison.

Recommendation 101. The Government should improve transitional supports for women, including through:

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

Recommendation 102. The Government should fund a dedicated residential diversion program for Aboriginal women, similar to Wulgunggo Ngalu Learning Place.

Recommendation 103. Victorian legislation should require that Corrections Victoria select a location for a woman to serve a custodial sentence that is as close as possible to the place or residence of the imprisoned woman's family and children.

Recommendation 104. Corrections Victoria should be required to maintain records and make statistical data publicly available about all aspects of the Living with Mum program, including applications and outcomes.

Recommendation 105. The time required for the processing of applications for the Living with Mums program by Corrections Victoria should be reduced to ensure that mothers desiring to maintain custody of their dependent children while in prison are not precluded from doing so on the basis of a short custodial sentence.

Older People in Prison

Recommendation 106. Corrections Victoria should recognise the unique needs of older incarcerated people and implement necessary policy, program and practice changes in relation to matters including:

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

Transition Support

Recommendation 107. The Government should provide long-term and stable funding to ACCOs to deliver pre- and post-release programs, including transitional housing programs run by ACCOs, such as VALS' Baggarrook program, to support men and women leaving prison.

Language, Stigma & Dehumanisation

Recommendation 108. The Victorian Government should undertake, in close consultation with civil society and people with lived experience of imprisonment, an evaluation and examination of the terminology employed in policies, programs, legislation and statements concerning people serving custodial sentences and who are justice system involved with the objective of mitigating the stigmatising effect of such terminology within the Victorian community.

Recommendation 109. The Victorian Government should ensure that specialised services are provided to imprisoned people and their families following the completion of their custodial sentence to address issues arising from stigma experienced within the community.

Voting Rights

Recommendation 110. Victoria should remove all restrictions in state law on the right of people in prison to vote in state and local elections.

Recommendation 111. Victoria should lead advocacy nationally, including at the Meeting of Attorneys-General, for a consistent, nationwide approach which grants full voting rights to people in prison, including in federal elections.

Independent Visitors Scheme

Recommendation 112. Visitors under the Independent Visitors Scheme (IPVS) should be appointed independently of the Justice Assurance and Review Office, the Minister for Corrections and prison management. The IPVS should be its own, independent statutory body, or sit within an independent statutory body (such as the Victorian Ombudsman or the NPM, once designated).

Post-Sentence Detention

Recommendation 113. The post-sentence detention order regime under the *Serious Offenders Act 2018* should be abolished.

DETAILED SUBMISSIONS

Part 1: Relevant Excerpts and Recommendations from VALS Submission to the Victorian Criminal Justice Inquiry

Recently, VALS made a submission to the Criminal Justice Inquiry, which provided a detailed account of issues within the prison system, and made extensive recommendations. For ease of reference, some of the key relevant sections have been included below.

Aboriginal Self-Determination

Issues concerning the self-determination of Aboriginal peoples are of particular importance in relation to the criminal legal system in Victoria. The increased frequency of the use of the term 'self-determination' in relation to Aboriginal peoples[18] in Victoria, however, is only partially reflected in existing policies and legislative practices.

The bearers of the right to self-determination under international law are 'peoples'. In practice, Victorian practice appears to continue to be premised upon the traditional concept of 'peoples' as the population of a state.[19] The international legal concept of 'Indigenous peoples' recognises Aboriginal communities as being distinct 'peoples' that exist alongside the rest of the population of a state.

The Commonwealth of Australia has drawn criticism from United Nations human rights bodies for its continuing failure to Constitutionally acknowledge the legal distinctiveness and status of Aboriginal peoples.[20] While constitutional recognition is a matter to be addressed at the Commonwealth level,

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[18] The present section utilises the legal definition of the term 'peoples', which, in essence, refers to a distinct community of persons.

[19] This is the traditional approach taken towards self-determination by States. For further information, see Kelsen, Hans. The Law of the United Nations. (1951) pp-50-53; Rigo Sureda, Andres. The Evolution of the Right to Self-determination: A Study of United Nations Practice. (1973) p. 215; and Knop, Karen. Diversity and Self-Determination in International Law. (2002) p. 99.

[20] United Nations Committee on the Elimination of Racial Discrimination. 'Concluding observations on the eighteenth to twentieth periodic reports of Australia' (2017). UN Doc. CERD/C/AUS/CO/18-20, at 19-20; United Nations Committee on the Elimination of Racial Discrimination. 'Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia' (2010). UN Doc. CERD/C/AUS/CO/15-17 at 15; United Nations Committee on Economic, Social and Cultural Rights. 'Concluding Observations on the fifth periodic report of Australia' (2017). UN Doc. E/C.12/AUS/CO/5 at 16(a); United Nations Human Rights Committee. 'Concluding observations on t
he sixth periodic report of Australia' (2017). UN Doc. CCPR/C/AUS/CO/6 at 50(b).

Victorian Parliament can provide *de facto* recognition of the distinctiveness and status of Aboriginal peoples within Victorian society through legislative practice. The legal distinctiveness of Aboriginal peoples in Victoria can be reflected in future legislation that affects members of Aboriginal communities, individually and collectively, by creating specific and dedicated legislative guidelines and frameworks.

While self-determination can be achieved by individuals, groups[21] and minorities[22] as a component of the population of a state in the traditional sense by ensuring participation in 'representative' governmental processes, the interests of minorities are often cast aside due to majority rule.[23] For example, a group or minority can overwhelmingly vote for an individual to be elected to office, but this does not guarantee an outcome in an election.

Self-determination in the context of Indigenous peoples differs as participatory rights are enhanced when juxtaposed against the general population of a given state. Aboriginal peoples are guaranteed more than just the opportunity to provide feedback and voice opinions on matters that affect their rights individually and collectively: they have the right to meaningful and effective consultation and a role in decision-making in relation to matters that affect their rights and interests.[24] In essence, they have more than a mere right to a seat at the table, but a say in the outcomes.

Aboriginal Community Controlled Organisations (**ACCO**s) play a significant role in the efforts towards the realisation of the right to self-determination of Aboriginal peoples. The first Aboriginal Legal Service, the Aboriginal Legal Service in Redfern, New South Wales was founded in 1970 as a response the injustices and oppression endured by Aboriginal peoples.[25] One year later, the first Aboriginal community controlled health organisation (**ACCHO**) was founded in Redfern as a response to Aboriginal experiences of racism in generalist health services and the need for culturally safe and accessible primary health care services.[26] ACCOs continue to play a vital role in addressing the need for the provision of culturally appropriate and safe services to Aboriginal peoples and as an invaluable tool to respond to continuing injustices and oppressive practices against Aboriginal peoples, individually and collectively, in contemporary Australian society.

Recommendation 188 of the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**) emphasised the need for governments to negotiate with Aboriginal organisations and communities to determine the guidelines pertaining to procedures and processes to be followed to ensure that self-determination played a role in the design and implementation, or modification, of policies and

[21] 'Groups' refers to individuals that fall within a given category based upon specific traits, characteristics or interests.
[22] 'Minorities' refers to groups of individuals that constitute either a numerical minority or a minority based upon power disparity (i.e., inability to influence governmental policies, practices and outcomes typically due to existing bias and discrimination within entrenched institutions).
[23] Raic, David. Statehood and the Law of Self-Determination (2002). pp. 277-281.
[24] Article 18 of the United Nations Declaration on the Rights of Indigenous Peoples.
[25] For more information, see https://www.alsnswact.org.au/about.
[26] For more information, see https://www.naccho.org.au/acchos.

programs that particularly affected Aboriginal peoples. Despite the recommendations made in 1991, Australia continues to receive criticism from UN human rights bodies for its failure to engage with Aboriginal peoples and ACCOs in relation to Closing the Gap (**CTG**),[27] despite the principal objectives of the Agreement including shared decision-making[28] and improved government engagement with Aboriginal communities when undertaking changes to policies and programs.[29] Similarly, the continued practices of the Victorian Government in relation to the participatory rights in the context of the self-determination of Aboriginal peoples in Victoria is contrary not only to their status as 'peoples', but to the objectives of the CTG Agreement.

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

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

Additionally, the inherent failure on the part of the Victorian Government in regards to the right to participation of Aboriginal peoples in Victoria enshrined in Article 18 of the *United Nations Declaration on the Rights of Indigenous Peoples* to be reflected in practice (much less engage in shared decision-making, resulting from meaningful and effective consultation directly with Aboriginal peoples at the community level and indirectly through ACCOs) undermines the ability to effectively and efficiently reduce inequities and improve outcomes within the Aboriginal communities of Victoria. This is particularly the case in relation to CTG targets concerning Aboriginal adults and youths entangled in the Victorian criminal legal system, and Aboriginal Justice Agreement (**AJA**) milestones.[30]

[27] United Nations Committee on Economic, Social and Cultural Rights. 'Concluding Observations on the fifth periodic report of Australia' (2017). UN Doc. E/C.12/AUS/CO/5 at 15-16; United Nations Committee on the Elimination of Racial Discrimination. 'Concluding observations on the eighteenth to twentieth periodic reports of Australia' (2017). UN Doc. CERD/C/AUS/CO/18-20, at 17-18.
[28] See, for example, Clause 17 and Priority Reform One of the National Agreement on Closing the Gap.
[29] Clause 59(f), ibid.
[30] Clause 38(a), ibid.

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

- The CTG Agreement recognises self-determination as the basis for shared decision making,[31] while further recognising ACCOs as self-determined institutions of Aboriginal peoples.[32]
- *Burra Lotjpa Dunguludja* is the 4th phase of the AJA in Victoria and the Victorian Government has committed to work towards self-determination and Treaty to serve as the basis for a new relationship between the Victorian Government and Aboriginal peoples.[33]
- The Victorian Aboriginal Affairs Framework (**VAAF**) recognises self-determination as not only the basis for the framework, but the basis of all future actions affecting Aboriginal peoples across Victoria.[34]
- The *Children, Youth and Families Act 2005* recognises the 'principle' of self-determination of Aboriginal peoples in Victoria.[35]

Furthermore, the pledge to support the effort for the right to self-determination to be realised by the Aboriginal peoples of Victoria is also part of the Victorian Labor Party Platform.[36]

Despite the emphasis placed on the self-determination of Aboriginal people in Victoria by the Victorian Government, the *Charter of Human Rights and Responsibilities 2006* (**the Charter**) – Victoria's core human rights document – is silent on the matter. The only references to Aboriginal peoples in the Charter appear in relation to the human rights of Aboriginal people in relation to the diverse relationships with their traditional lands and waters;[37] the definition of 'Aboriginal';[38] and the distinct cultural rights of Aboriginal peoples in Victoria.[39]

While the Charter required a review after four years to determine whether Aboriginal self-determination should be included in the Act,[40] the Scrutiny of Acts and Regulations Committee (**SARC**) recommended that the Victorian Government continue to consult with Victorian Aboriginal communities to continue to develop programs that foster improved outcomes for Aboriginal Victorians and not to include self-determination in the Charter because of the obscurity of the content of the right.[41] This was, again, in contradiction to submissions prepared concerning the matter by

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[31] Clause 32(c)(5), ibid.
[32] Clause 44, ibid.
[33] Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement Phase 4 – A partnership between the Victorian Government and Aboriginal community, p. 11. Available at https://files.aboriginaljustice.vic.gov.au/2021-02/Victorian%20Aboriginal%20Justice%20Agreement%20Phase%204.pdf.
[34] Victoria State Government (2019). Victoria Aboriginal Affairs Framework: 2018-2023, pp. 20-27. Available at https://content.vic.gov.au/sites/default/files/2019-09/Victorian-Aboriginal-Affairs-Framework_1.pdf.
[35] s. 12 of the *Children, Youth and Families Act 2005*.
[36] Victorian Australian Labor Party (2018). Victorian Branch Australian Labor Party Platform 2018, p. 86.
[37] Preamble of the *Charter of Human Rights and Responsibilities 2006.*
[38] s. 3(1), ibid.
[39] s. 15(2), ibid.
[40] s. 44(2), ibid.
[41] Scrutiny of Acts and Regulations Committee (2011). Review of the Charter of Human Rights and Responsibilities Act 2006, pp. 52-58. Available at https://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/report_response/20110914_sarc.charterreviewreport.pdf.

numerous ACCOs (including VALS[42]). The subsequent review of the Charter in 2015 concluded that the 'principle' of self-determination should be included in the Preamble of the Charter, but stopped short of recommending that the right to self-determination of Aboriginal peoples in Victoria be recognised in the Charter.[43] To date, the 'right' to self-determination of the Aboriginal peoples of Victoria has yet to be recognised in the Charter - or any other Victorian legislation.

Another principal area of concern relating to the self-determination of Aboriginal peoples in Victoria in the context of the criminal legal system relates to the continued lack of funding for ACCOs whose mandates includes advocating for the individual and collective interests of Aboriginal peoples. While issues concerning the funding and resourcing of Aboriginal organisations and institutions have been highlighted by United Nations human rights bodies in criticisms of the Commonwealth Government,[44] the issue has also been repeatedly identified by VALS in numerous submissions to the Victorian Government.[45] The ability of ACCOs to effectively advocate for the interests of Aboriginal communities in Victoria is considerably impeded by the lack of appropriate funding and resources to fulfil their respective mandates.

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

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[42] VALS (2011). Review of the Victorian Charter of Human Rights and Responsibilities, pp. 14-26. Available at https://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/submissions/258_VALS_1.7.2011.pdf

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

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

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

The Treaty process currently being undertaken in Victoria will undoubtedly have profound implications on the nature of relations between the Victorian Government and Aboriginal peoples in Victoria, particularly in relation to how the right to self-determination of Aboriginal peoples in Victoria will be exercised. Despite the fact that the Treaty process has not yet been concluded, the Victorian Government should work in anticipation of ensuring that its practices are consistent with the right to free, prior and informed consent (**FPIC**)[46] of Aboriginal peoples in relation to legislative and administrative measures that may affect them.[47]

While the right to FPIC generally refers to a requirement to consult with representative institutions (i.e., elected bodies), examples of FPIC practice include other Indigenous governance structures and organisations such as ACCOs, as well as engagement with Aboriginal persons and groups at the community level.[48] With regards to legislative and administrative measures relating to the Victorian criminal legal system, the implementation of policies and practices consistent with the right to FPIC would involve consultation with Aboriginal communities and ACCOs during the conceptualisation, development and drafting stages of such measures, rather than requesting feedback when such processes have been completed.

In practice, the concepts of Indigenous Data Sovereignty and Indigenous Data Governance are a specific exercise of the right to self-determination as enshrined in Article 3 (as well as numerous other Articles) of the *United Nations Declaration on the Rights of Indigenous Peoples*. The following key concepts relating to Indigenous Data Sovereignty were defined by consensus by delegates of the Indigenous Data Sovereignty Summit:[49]

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

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

data on or about Indigenous peoples reflects our priorities, values, cultures, worldviews and diversity.'[50]

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

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

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

RECOMMENDATIONS

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

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

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

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

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

[50] *Indigenous Data Sovereignty, Communique*. Indigenous Data Sovereignty Summit. 20 June 2018, p. 1.

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

Systemic Racism

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

> The Black Lives Matter movement has brought national attention to the long-standing injustice that is systemic racism, with the voices of Aboriginal and Torres Strait Islander people being amplified through the solidarity of non-Aboriginal Australians. Acknowledging how this country's colonial history has created and shaped structures and institutions characterised by racism, which so often fail to deliver true justice for Aboriginal people, is crucial. The legal system is built on a foundation of violence and dispossession, denial of sovereignty (and of course, humanity), with the colonial project continuing through policies of protection and assimilation. Today's injustices are inextricably linked to the injustices of the past, and achieving a collective understanding of Victoria's colonial legacy can help guide the reforms necessary for realising a truly equitable legal system.[51]

[…]

Systemic racism can be understood as how laws, policies and practices across agencies work together to produce a discriminatory outcome for racial or cultural groups. Cultural awareness training will not address the issue of racism and systemic racism, although this is frequently the proposed solution. Anti-racist or unconscious bias training cannot address systemic racism, although it may achieve results at an individual level. Cultural awareness and anti-racist training are crucial, but the issue of systemic racism is deep-rooted, complex and is ultimately not about individuals within a system that otherwise operates well. What is required is a strategy that addresses racism at both the individual and the systemic level.[52]

The nature of systemic racism is that it needs to be understood and tackled across different, interacting institutions **[…]** While changes to practice in the Coroners Court for inquests into the deaths of Aboriginal people in custody (made recently, almost 30 years after they were recommended

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

[52] VALS (2021), *Building Back Better: Victorian Aboriginal Legal Service COVID-19 Recovery Plan*, p100. Available at https://www.vals.org.au/wp-content/uploads/2021/02/Building-Back-Better-Victorian-Aboriginal-Legal-Service-COVID-19-Recovery-Plan-February-2021-FOR-DISTRIBUTION.pdf.

by the RCIADIC) will improve the thoroughness and cultural appropriateness of those inquiries, they did not extend to requiring inquests to fully consider the role that systemic racism plays in those deaths.[53] There is, however, an increasing appreciation of the importance of proper consideration of systemic racism, as demonstrated with the recent launch of VEOHRC/VALS' resource, 'Investigating Systemic Racism: A Tanya Day Inquest Resource for Advocates and Lawyers'. VALS emphasises that considerations in relation to systemic racism should be a key part of the function of all oversight bodies, including the Coroner and the monitoring bodies to be established under the *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (**OPCAT**), discussed further below.

RECOMMENDATIONS

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

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

Ending Aboriginal Deaths in Custody

This year we marked the 30 year anniversary of the Royal Commission into Aboriginal Deaths in Custody. On the anniversary, a paper was released, "outlin[ing] concerns with the 2018 Deloitte Access Economics review of the implementation of the 339 recommendations of [RCIADIC]… argu[ing] that there is a risk that misinformation may influence policy and practice responses to First Nations deaths in custody, and opportunities to address the widespread problems in Indigenous public policy in Australia may be missed."[54]

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

> We need an Aboriginal and Torres Strait Islander Social Justice Commissioner to ensure the unfinished work of the Royal Commission into Aboriginal Deaths in Custody is finally completed. The lack of

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

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

transparency and accountability by State and Federal Governments over the last 30 years is why there has been at least 470 Aboriginal deaths in custody since the Royal Commission.[55]

RECOMMENDATIONS

Recommendation 9. The Victorian Government should immediately begin implementing the RCIADIC recommendations, and must not rely on the discredited Deloitte review on the status of implementation of the recommendations.

Recommendation 10. The Victorian Government should establish an independent, statutory office of the Aboriginal and Torres Strait Islander Social Justice Commissioner. This office should be properly funded and report directly to the Parliament. The mandate of the Commissioner should include monitoring the implementation of RCIADIC recommendations, as well as recommendations from coronial inquests into Aboriginal deaths in custody.

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

[…]

Addressing the Growth in Prison and Remand Populations

In June 2015, there were 6,219 people held in Victorian prisons.[56] By June 2021, the prison population had swelled to 7,249.[57] These numbers, however, understate the increasing rate of imprisonment in Victoria because they reflect temporary reductions due to COVID-19 which will inevitably be reversed without a concerted policy shift towards decarceration. Prior to the pandemic, the prison population reached a high of 8,216 in 2019, an increase of 28.3% in just three years.[58]

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

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[55] VALS and Djirra, It is time for a Victorian Aboriginal and Torres Strait Islander Social Justice Commissioner (26 March 2021), available at https://www.vals.org.au/joint-media-release-from-djirra-and-victorian-aboriginal-legal-service/
[56] Corrections Victoria, *Annual Prisoner Statistical Profile 2019-20*, Table 1.3.
[57] Corrections Victoria, *Monthly Prisoner and Offender Statistics 2020-21*, Table 1.12
[58] Corrections Victoria, *Monthly Time Series Prisoner and Offender Data*, Table 1.

3,185, an increase of 122%. The proportion of people in prison who had received a sentence fell from 77% to just 56%.[59]

It is unsurprising, given the history of Victoria's criminal legal system and the overpolicing of Aboriginal communities, that these changes have particularly impacted Aboriginal people. The number of Aboriginal people held in Victorian prisons was 771 in June 2021.[60] Immediately prior to the pandemic, in February 2020, the Aboriginal prison population was as high as 890, up more than 85% from the 480 held in June 2015.[61] The number of unsentenced Aboriginal people held in Victorian prisons quadrupled from June 2015 to June 2019.[62] Aboriginal people now make up more than 10% of the people held in prison in Victoria, compared to less than 1% of the Victorian population.[63]

Aboriginal women have been particularly affected by Victoria's increasingly carceral approach to dealing with social problems. In June 2015, there were 42 Aboriginal women in Victorian prisons, 10% of the prison total.[64] By June 2019, before the onset of the pandemic, that number had nearly doubled to 80, making up a hugely disproportionate 13.9% of the female prison population.[65]

These trends run completely counter to the Victorian Government's commitments and responsibilities towards Aboriginal people. It has been clear for decades that reducing the incarceration rates of Aboriginal people is urgent. A key finding of the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**), whose report was handed down more than 30 years ago, was that the number of deaths in custody is due primarily to the extreme and disproportionate rate at which Aboriginal people are imprisoned. A recent analysis found that, of the over 470 Aboriginal people who have died in custody since the Royal Commission's report, more than half had not been sentenced.[66] Both the scale of the increase in Victoria's imprisonment of Aboriginal people, and the concentration of that growth in the remanded population, are putting more and more Aboriginal lives at risk.

The Government is committed under the Closing the Gap (**CTG**) Agreement to reducing the incarceration rate of Aboriginal adults by 15%, and of Aboriginal children by 30%, by 2031.[67] Given the increase in imprisonment of Aboriginal people in recent years, Victoria could meet the Closing the Gap

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[59] Ibid.
[60] Corrections Victoria, *Monthly Prisoner and Offender Statistics 2020-21*, Table 1.12
[61] Corrections Victoria, *Monthly Prisoner and Offender Statistics 2020-21*, Table 1.08.
Corrections Victoria, *Annual Prisoner Statistical Profile 2019-20*, Table 1.4.
[62] Corrections Victoria, *Annual Prisoner Statistical Profile 2019-20*, Table 1.4.
[63] Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians, June 2016*.
[64] Corrections Victoria, *Annual Prisoner Statistical Profile 2019-20*, Table 1.4.
[65] Ibid. The data released by Corrections Victoria does not allow the number of Aboriginal women in custody to be known for any date except June 30, making it impossible to see the continuing growth of numbers until immediately before the pandemic.
[66] The Guardian, 9 April 2021, 'The 474 deaths inside: tragic toll of Indigenous deaths in custody revealed'. Accessed at https://www.theguardian.com/australia-news/2021/apr/09/the-474-deaths-inside-rising-number-of-indigenous-deaths-in-custody-revealed.
[67] Coalition of Aboriginal and Torres Strait Islander Peak Organisations and Australian Governments, National Agreement on Closing the Gap (July 2020), pp31-32.

target merely by returning to the incarceration rate of 2017.[68] The CTG targets are clearly inadequate, and reverting back to numbers from a few short years ago is much too unambitious a goal. But even such a conservative improvement will not be achieved without major policy change by the Victorian Government. *Burra Lotjpa Dunguludja*, the Aboriginal Justice Agreement Phase 4, set a more ambitious target to fully close the gap by 2031.[69] No progress has been made towards that target since 2017.[70]

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

Bail

The punitive bail system in Victoria is the single largest factor contributing to the growth in prison and remand populations. By now, the "bail crisis" is well known and well documented. Across the adult prison population, 44% of people in prison are currently unsentenced,[71] versus only 28.9% in June 2016.[72] In the women's system, the situation is even more dire, with more women currently on remand than serving sentences.[73] In the youth justice system, the number of children on remand has more than doubled between 2010 and 2019.[74] Changing the punitive bail system and reducing remand rates is among the most critical reforms needed in the criminal legal system.

The evidence is clear that the current bail system disproportionality impacts Aboriginal people.[75] In June 2020, 44% of Aboriginal people in prison in Victoria were on remand, whereas only 35% of the

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[68] Productivity Commission, *Closing the Gap: Information Repository*, Target 10. Accessed at https://www.pc.gov.au/closing-the-gap-data/dashboard/socioeconomic/outcome-area10.

[69] Aboriginal Justice Agreement, *Burra Lotjpa Dunguludja*, pp30-31. Accessed at https://files.aboriginaljustice.vic.gov.au/2021-02/Victorian%20Aboriginal%20Justice%20Agreement%20Phase%204.pdf.

[70] The AJA reported a baseline of 1,495 Aboriginal people under adult justice supervision in 2017. At 30 June 2021, there were 1,468 Aboriginal people under supervision (771 in prison and 697 under community supervision.) Corrections Victoria, *Monthly Prisoner and Offender Statistics 2020-21*, Tables 1.12 and 2.12.

[71] Corrections Victoria, Monthly Time Series Prisoner and Offender Data: Monthly time series prisoner and offender data | Corrections, Prisons and Parole

[72] Corrections Victoria, Annual Prisoner Statistical Profile 2009-10 to 2019-20 | Corrections, Prisons and Parole, Table 1.3. Include data on average time on remand if it can be found.

[73] Corrections Victoria, Monthly Time Series Prisoner and Offender Data. In July 2021, 53% of women in Victoria's prisons are unsentenced.

[74] Sentencing Advisory Council (2020), *Children Held on Remand in Victoria*, p. ix. Accessed at https://www.sentencingcouncil.vic.gov.au/publications/children-held-on-remand-in-victoria.

[75] In 2017-2018, 15% of children on remand identified as Aboriginal, whereas 1% of Victoria's population identifies as Aboriginal. SAC, Children on Remand, p. xii. In June 2020, 44% of Aboriginal people in prison in Victoria were on remand, whereas only the 35% of the total prison population was on remand. See Corrections Victoria, Profile of Aboriginal People in Prison, Annual Prisoner Statistical Profile 2009-10 to 2019-20 | Corrections, Prisons and Parole; Corrections Victoria, Profile of People in Prison, Annual Prisoner Statistical Profile 2009-10 to 2019-20 | Corrections, Prisons and Parole

total prison population was on remand.[76] In 2017-2018, 15% of children on remand identified as Aboriginal[77] and in 2018-2019, 48% of all Aboriginal children in youth justice custody on an average day were on remand (versus 33% in 2014-2015).[78]

VALS has the following critical concerns regarding the bail system:

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

Since 2017, VALS has repeatedly raised concerns about the immediate and longer-term impacts of the bail laws for Aboriginal people in Victoria.[79] In July 2021, VALS sent an open letter[80] (signed by 55 organisations) and an expert petition[81] (signed by over 250 experts) to Ministers Symes, Hutchins and Williams calling for urgent bail reform. We have still not received a response.

The current bail laws are the product of major reforms in 2017 and 2018,[82] which followed the Bourke Street incident in 2017 and the Coghlan Review,[83] commissioned by the Government. Additionally, the bail laws were amended in 2013 to introduce two new criminal offences related to breaching bail.[84]

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

- Expansion of the "reverse-onus test": if an individual is arrested for an offence listed under Schedule 1 or 2 of the *Bail Act*, they must demonstrate that there are "exceptional circumstances" (for Schedule 1 offences) or "compelling reasons" (for Schedule 2 offences) to

[76] See Corrections Victoria, Profile of Aboriginal People in Prison, Annual Prisoner Statistical Profile 2009-10 to 2019-20 | Corrections, Prisons and Parole; Corrections Victoria, Profile of People in Prison, Annual Prisoner Statistical Profile 2009-10 to 2019-20 | Corrections, Prisons and Parole

[77] Sentencing Advisory Council (2020), *Children Held on Remand in Victoria*, p. xii. Available at https://www.sentencingcouncil.vic.gov.au/publications/children-held-on-remand-in-victoria.

[78] Commission for Children & Young People, *Our youth, our way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system*, p. 34. Between 2014–15 and 2018–19, the number of Aboriginal children and young people held on remand in Victoria on an average day almost doubled.

[79] Building Back Better: VALS COVID-19 Recovery Plan, February 2021.
VALS Submission to the Parliamentary Inquiry into the Government's Response to COVID-19, September 2020.
VALS Submission to the Sentencing Act Reform Project, April 2020.
VALS Submission to CCYP Inquiry, Our Youth Our Way, October 2019.
VALS submission to the Royal Commission into Victoria's Mental Health System, August 2019.

[80] VALS, Bail Reform is Urgently Needed, May 2021, available at Bail-Reform-Letter-May-2021-5.pdf (vals.org.au)

[81] VALS, Expert Petition calling for Urgent Reform of Victoria's Bail Laws, VALS-Bail-Reform-Petition.pdf

[82] *Bail Amendment (Stage One) Act 2017* (Vic) and *Bail Amendment (Stage Two) Act* 2018 (Vic)

[83] The Hon. Paul Coghlan QC, *Bail Review: First Advice to the Victorian Government*, 3 April 2017; The Hon. Paul Coghlan QC, *Bail Review: Second Advice to the Victorian Government*, 1 May 2017.

[84] In December 2013, the *Bail Act 1977* (Vic) was amended to include the following bail offences: breaching bail conditions (s. 30A); and committing an indictable offence while on bail (s. 30B). There are now three bail offences under the Act, including failure to answer bail (s. 30). The offence of breaching bail conditions (S. 30A) does not apply to children.

grant bail. Although this test existed prior to the 2017/2018 reforms, it only existed for a small number of offences. Since 2017/2018, the reverse-onus test applies to a broad range of offences, including if the individual commits an indictable offence whilst on bail, is subject to a summons for an indictable offence, is on parole, or is serving a Community Corrections Order for an indictable offence.[85]

- The "show cause" standard that existed previously, was replaced with a requirement to "show compelling reasons" (for Schedule 2 offences)
- In applying the "exceptional circumstances" test, the "compelling reasons" test, the "unacceptable risk" test and when considering bail conditions, the court must consider "surrounding circumstances," as defined in the Act.[86]
- Only a court can grant bail for a Schedule 1 offence[87] or where an accused is on two or more undertakings of bail.[88]

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

1. The accused person must demonstrate that there are "exceptional circumstances"[89] (for Schedule 1 offences) or "compelling reasons"[90] (for Schedule 2 offences) for granting bail. If this step is not satisfied, bail is refused.
2. If step one is satisfied, the court must also consider whether the person poses an "unacceptable risk" of endangering the safety or welfare of any person, committing an offence while on bail, interfering with a witness, obstructing the course of justice or not attending court.[91] The burden of proof lies with the prosecutor and the court can only grant bail if satisfied that the person does not pose an "unacceptable risk."

For offences not listed in Schedule 1 and 2, the court can only grant bail if satisfied that the person does not pose an "unacceptable risk" of endangering the safety or welfare of any person, committing an offence while on bail, interfering with a witness, obstructing the course of justice or not attending court. [92] The burden of proof lies with the prosecutor.

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[85] Offences in Schedule 1 include: aggravated carjacking and aggravated home invasion. Schedule 2 is much broader and includes: as armed robbery, aggravated burglary, intentionally causing serious injury and trafficking in a drug of dependence. It also includes any indictable offence alleged to have been committed while the person was on bail or subject to a summons for an indictable offence.

[86] *Bail Act 1977* (Vic), Sections 3AAA (definition of "surrounding circumstances"), 4A(3) (consideration of "surrounding circumstances" when applying "exceptional circumstances" test), 4C(3) (consideration of "surrounding circumstances" when applying "compelling reasons" test), 4E(3)(a) (consideration of "surrounding circumstances" when applying "unacceptable risk" test), and s 18AD (consideration of "surrounding circumstances" when considering bail conditions).

[87] *Bail Act 1977* (Vic), Section 13(3).

[88] *Bail Act 1977* (Vic), Section 13A.

[89] *Bail Act 1977* (Vic), Section 4A.

[90] *Bail Act 1977* (Vic), Section 4C.

[91] *Bail Act 1977* (Vic), Sections 4D and 4E.

[92] *Bail Act 1977* (Vic), Sections 4D and 4E.

Case Study – Veronica Marie Nelson

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

Three days after being remanded, Ms Nelson tragically died alone in her cell. On the night of her death, she was distressed and cried out for medical assistance a number of times. Her death is a piercing reminder "of the human cost of the current bail laws."[93]

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

> *"Veronica was a strong woman – stronger than me. She'd always help someone on the street. She taught me everything about our ways. It's got me beat how she knew what she knew. She knew everything."*
>
> *"I don't want it to happen again. I want to make it easier for the next women who gets locked up. I want them to be looked after more. I want them to get more support and treatment in the community."*[94]

The evidence is clear that the current bail system disproportionality impacts Aboriginal people.[95] Aboriginal people experience higher rates of housing instability,[96] and therefore face challenges in meeting the reverse onus provisions in the *Bail Act*. There is a significant shortage of culturally safe residential bail support and accommodation to address this issue.[97] Aboriginal people are also

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[93] VALS Media Release, Coronial Inquest into death of Veronica Marie Nelson to examine healthcare in Victorian prisons and bail laws – Victorian Aboriginal Legal Service (vals.org.au)

[94] VALS Media Release, "Coronial Inquest into death of Veronica Marie Nelson to examine healthcare in Victorian prisons and bail laws," 29 March 2021.

[95] In 2017-2018, 15% of children on remand identified as Aboriginal, whereas 1% of Victoria's population identifies as Aboriginal. SAC, Children on Remand, p. xii. In June 2020, 44% of Aboriginal people in prison in Victoria were on remand, whereas only the 35% of the total prison population was on remand. See Corrections Victoria, Profile of Aboriginal People in Prison, Annual Prisoner Statistical Profile 2009-10 to 2019-20 | Corrections, Prisons and Parole; Corrections Victoria, Profile of People in Prison, Annual Prisoner Statistical Profile 2009-10 to 2019-20 | Corrections, Prisons and Parole

[96] Parliament of Victoria, *Inquiry into homelessness in Victoria: Final report*, p58. Accessed at https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Homelessness_in_Victoria/Report/LCLSIC_59-06_Homelessness_in_Vic_Final_report.pdf.

[97] Under *Burra Lotjpa Dunguludja* (AJA4), the Victorian government and the Aboriginal Justice Caucus have committed to develop a residential bail support and a therapeutic program for Aboriginal young people that builds upon the Baroona Healing Place model. See AJA4 In Action. The government has also committed to develop and implement cultural and gender specific supports for Aboriginal women involved in the correctional system to obtain bail and avoid remand. In December 2021, the Koori Justice Unit is due to release a report identifying which cultural and gender specific supports need to be implemented for Aboriginal women involved in the correctional system to obtain bail and avoid remand. See Aboriginal Justice Forum #59 (July 2021), "Progress against AJA4 actions."

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

Additionally, Aboriginal people are disproportionately impacted by the criminalisation of bail offences, introduced in 2013,[98] which serve no purpose other than to further criminalise people who are already criminalised.

[…]

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

Aboriginal women make up 13% of the female prison population and are particularly at risk of harm caused by the draconian bail laws. Many Aboriginal women who are on remand are victim-survivors of family violence, and are further traumatised as a result of their incarceration. In accordance with the *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* (**Bangkok Rules**),[99] courts should be responding appropriately to the situation of women who have offended, which includes developing and implementing gender-specific pretrial alternatives that take into account their history of victimisation,[100] as well as the use of diversionary and alternative pretrial measures in lieu of custodial measures.[101]

Remanding women also has a significant impact on dependent children, who may be forced into alternative forms of care when their mother is in custody. There is no publicly available data on the number of women on remand in Victoria with dependent children, and the number of times that child protection becomes involved as a result of a mother going into custody. However, women are more likely to be primary caregivers to dependent children in Victoria,[102] and this trend particularly impacts Aboriginal children, families and communities.[103] Across Australia, at least 54% of women in prisons

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

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

[100] Ibid., Rule 57.

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

[102] Flynn, C. (2014). Getting there and being there: Visits to prisons in Victoria – the experiences of women prisoners and their children. 61(2) Probation Journal 176-191, p. 177.

[103] Walker, J. et al. (2021). Residential programmes for mothers and children in prison: Key themes and concepts. 21(1) Criminology & Criminal Justice 21-39, p.22.

have at least one dependent child.[104] While kinship care is a common outcome for the children of women in custody, it is reported that mothers are only able to regain custody of their children following their incarceration in as few as 28% of instances in Victoria.[105]

Detaining mothers on remand without considering the implications for their dependent children is contrary to international law standards. The Bangkok Rules provide that non-custodial pretrial alternatives for women "shall be implemented wherever appropriate and possible,"[106] and non-custodial sentences are explicitly preferred for pregnant women or women with dependent children in most cases.[107] Further, the Bangkok Rules require governments to develop and implement gender-specific pretrial alternatives that take into account the caretaking responsibilities of incarcerated women.[108]

In addition, the United Nations Convention on the Rights of the Child (**UNCRC**) obliges Australia to ensure that children not be separated from their parents against their will, unless necessary for the best interests of the child.[109] International legal norms indicate a clear preference towards continued family integrity, rather than fragmentation, as a result of bail hearings.

In addition to the immediate harmful effects for Aboriginal people on remand and their families, the bail system has significant flow-on effects for sentencing outcomes,[110] and future involvement in the criminal legal system. This includes an increased likelihood of receiving a custodial sentence.[111] According to the Sentencing Advisory Council, "offenders who *may* have otherwise received a non-custodial sentence might instead receive a time served prison sentence (with or without a CCO) because they have, in effect, already been punished for their offending."[112]

Time-served sentences are harmful for a number of reasons. They effectively mean that there is no opportunity for the individual to connect with or receive holistic support. Moreover, receiving a time-

[104] Australian Institute of Health and Welfare, *The Health of Australian Prisoners,* 2018, pp. 14 and 72.
[105] Stone, U. et al. (2017). Incarcerated Mothers: Issues and Barriers for Regaining Custody of Children. 97(3) The Prison Journal 296-317, pp. 297-298.
[106] United Nations (2011). Resolution adopted by the General Assembly on 21 December 2010. (2011) UN Doc. A/RES/65/229 ("Bangkok Rules"), Rule 58 (read in conjunction with para. 17).
[107] Ibid., Rule 64. The rule establishes that in the absence of a serious or violent offence or instances where a woman 'represents a continuing danger', such decisions should be made on the basis of the best interests of, and care for, dependent children.
[108] Ibid., Bangkok Rules, Rule 57.
[109] Article 9 of the UNCRC.
[110] According to the SAC, "a child's remand experience will often affect how the sentencing discretion is exercised and how the child's sentence is served."
[111] Research by the Sentencing Advisory Council indicates that there is an increased likelihood of a custodial sentence after spending time on remand: "Sentencing Advisory Council, State of Victoria, *Time Served Prison Sentences in Victoria* (2020), 10.
[112] Sentencing Advisory Council (2020), *Time Served Prison Sentences in Victoria*. Available at https://www.sentencingcouncil.vic.gov.au/sites/default/files/2020-02/Time_Served_Prison_Sentences_in_Victoria.pdf.
The SAC made similar conclusions in its recent report on Children in Remand: "Courts may consider imposing a custodial sentence, where they may not otherwise, if the child has already been exposed to the custodial environment and/or it would be 'unduly punitive' to impose a non-custodial order with conditions if the child has already been in custody for a period of time." p5.

served sentence means that there is a higher chance of the individual being remanded if they are arrested again.[113] It also increases the likelihood that they will receive a more severe sentence if they are sentenced again in the future.[114]

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

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

In addition to the human cost, the financial cost of the bail laws is enormous. In 2017-2018, 442 children were held on remand in Victoria for a combined period of 29,000 days, with a total cost was approximately $41 million.[115] Of this, approximately $15 million was spent remanding children who did not receive a custodial sentence.[116] According to information published in The Age in May 2021, the annual cost of managing prisons in Victoria (including people on remand and those serving sentences) is due to double to $3.5 billion by 2023-24.[117]

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

Although the calls for change have been loud and clear, the Victorian Government has continued to politicise bail laws and refuse to address the bail crisis. This is despite its commitment under *Burra Lotjpa Dunguludja* to reduce the number of Aboriginal people on remand,[118] and its commitment under the National Closing the Gap Agreement to reduce Aboriginal incarceration rates.[119] We note

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[113] Sentencing Advisory Council (2020), *Children Held on Remand in Victoria*, p5. Accessed at https://www.sentencingcouncil.vic.gov.au/publications/children-held-on-remand-in-victoria.
[114] Ibid., 11.
[115] Sentencing Advisory Council (2020), *Children Held on Remand in Victoria*, p. xi.
[116] Ibid.
[117] R. Millar, C. Vedelago, T. Mills, "New Prisons or looser bail laws? Labor's unpalatable choice," 15 May 2021.
[118] Under *Burra Lotjpa Dunguludja,* the Victorian government has committed to take action to ensure that there are fewer Aboriginal people in the criminal justice system (Goal 2), including fewer Aboriginal people on remand (Outcome 2.3.2). National Closing the Gap Agreement, targets 10 and 11.
[119] By 2031, Australia governments have committed to reduce the rate of Aboriginal adults held in incarceration by 15% (target 10) and reduce the rate of young people (10-17 years) held in incarceration by at least 30 (target 11).

that under *Burra Lotjpa Dunguludja,* the Government has committed to carrying out research on the impact of the bail reforms on Aboriginal people.[120] This research is currently being carried out by the Bail Data Working Group, chaired by the Crime Statistics Agency. We look forward to seeing the results of this research.

Over thirty years ago, the RCIADIC recommended that all governments should "revise any criteria which inappropriately restrict the granting of bail to Aboriginal people,"[121] and "legislate to enforce the principle that imprisonment should be utilised only as a sanction of last resort."[122] It is time for the government to stop paying lip service to its commitments and take action.

RECOMMENDATIONS

Recommendation 11. The Government must repeal the reverse-onus provisions in the *Bail Act 1977* (Vic), particularly the 'show compelling reason' and 'exceptional circumstances' provisions (sections 4AA, 4A, 4C, 4D and schedules 1 and 2).

Recommendation 12. There should be a presumption in favour of bail for all offences, with the onus on Prosecution to prove that there is a specific and immediate risk to the physical safety of another person.

Recommendation 13. There should be an explicit requirement in the Act that a person may not be remanded for an offence that is unlikely to result in a sentence of imprisonment.

Recommendation 14. The Victorian Government must amend the *Bail Act 1977* (Vic) to repeal the offences of committing an indictable offence while on bail (s. 30B), breaching bail conditions (s. 30A) and failure to answer bail (s. 30).

Recommendation 15. The Victorian Government should amend the *Bail Act 1977* (Vic) to include a consideration of the implications for dependent children, when making bail decisions for mothers and primary carers, in accordance with international law standards.

Recommendation 16. The Magistrates Court should expand the Court Integrated Services Program (CISP) so that it is available in all locations across Victoria. This includes ensuring sufficiency of Koori CISP workers to support Aboriginal people on bail across Victoria.

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[120] AJA4 In Action: Impact of bail reforms | Aboriginal Justice

[121] Royal Commission into Aboriginal Deaths in Custody National Report' (1991), Recommendation 91(b), available at http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol5/5.html#Heading19

[122] Royal Commission into Aboriginal Deaths in Custody National Report' (1991), Recommendation 92, available at http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol5/5.html#Heading19

[…]

Public Health Issues

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

[…]

Drug Decriminalisation

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

VALS has previously recommended the decriminalisation of cannabis in Victoria, as an important measure to reduce the disproportionate impacts of the criminal legal system on Aboriginal people and avoid unnecessary incarceration.[123] The Victorian Parliament made a number of important findings in the recent Inquiry into the use of cannabis in Victoria, which are highly relevant to this Inquiry's focus on the criminal legal system.[124] These include:

- That "[t]he harms that arise from the criminalisation of cannabis affect a larger number of people and have a greater negative impact than the mental health and other health harms associated with cannabis use."[125]
- That Victoria Police's cannabis cautioning program is inconsistently applied and is overly restrictive.[126]

[123] VALS (2020), *Submission to the Inquiry into the Use of Cannabis in Victoria*. Available at https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_the_use_of_Cannabis_in_Victoria/Submissions/S1398_-_Victorian_Aboriginal_Legal_Service.pdf.
[124] Parliament of Victoria, Legislative Council Legal and Social Issues Committee (2021), *Inquiry into the use of cannabis in Victoria*. Available at https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_the_use_of_Cannabis_in_Victoria/Report/LCLSIC_59-07_Use_of_cannabis_in_Vic.pdf.
[125] Ibid, p102.
[126] Ibid, p131.

- That Aboriginal people are "significantly overrepresented in sentencing statistics for minor cannabis offences compared to other Victorians"[127] and that Aboriginal people face particular trauma from interactions with the criminal legal system.[128]
- That criminal records for cannabis offences act as an obstacle to accessing housing, employment and other services, which raises the risk of further contact with the criminal legal system.[129]

These findings clearly support VALS' position that criminalisation of cannabis use in Victoria is harmful, particularly for Aboriginal people, and serves no reasonable public policy goal. We are deeply disappointed by the Andrews Government's moves to water down the strong recommendations these findings would have justified, and its response to the Inquiry's recommendations.[130] There is no need for further inquiries to investigate cannabis decriminalisation, which should be adopted as policy by the Victorian Government without delay.

Use of cannabis by Aboriginal people is slightly higher than by non-Aboriginal Australians. However, this gap has narrowed in recent years as the rate of use among Aboriginal Australians declines.[131]

Despite this, crime statistics show that there has been a growing police emphasis on this issue.[132]

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

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

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[127] Ibid, p141.
[128] Ibid, p163.
[129] Ibid, p158.
[130] The Age, 5 August 2021, 'Andrews government quashes push to legalise cannabis in Victoria'. Available at https://www.theage.com.au/politics/victoria/andrews-government-quashes-push-to-legalise-cannabis-in-victoria-20210804-p58fq1.html.
7 News, 5 August 2021, 'Vic premier dismisses call to legalise pot'. Available at https://7news.com.au/politics/report-into-cannabis-use-in-victoria-due-c-3598003.
[131] Australian Institute of Health and Welfare, National Drug Strategy Household Survey 2019, Supplementary data table 8.1.
[132] Crime Statistics Agency, *Alleged offender incidents by Aboriginal and Torres Strait Islander Status – Tabular* Visualisation, Victoria – Principal offence. Accessed at https://www.crimestatistics.vic.gov.au/crime-statistics/latest-aboriginal-crime-data/alleged-offender-incidents-by-aboriginal-and-torres.

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

- From 1 July 2016 to 30 June 2019, just 10.6% of proven cannabis possession charges resulted in custodial sentences.
- This is far fewer than the 29.4% which resulted in discharge, dismissal or adjournment.[133]

This phenomenon is not limited to cannabis charges. At June 2020:[134]

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

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

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

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

At present, access to these treatments is very inconsistent and the use of public health approaches is highly discretionary. This is a particular concern because discretion from police and prosecutors typically leads to worse outcomes for Aboriginal people. In NSW, more than 80% of Aboriginal people

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133 Sentencing Advisory Council, *SACStat Magistrate's Court – Possess cannabis*. Accessed at https://www.sentencingcouncil.vic.gov.au/sacstat/magistrates_court/9719_73_1.7.html.
134 Corrections Victoria, *Annual Prisoner Statistical Profile 2019-20*, Tables 1.10 & 1.11.

police dealt with for small-scale cannabis use were pursued through the courts, rather than given access to cautions and diversion programs, compared to 52% of the non-Aboriginal population.[135] The court system in Victoria does not enable equivalent data analysis, but case studies that VALS has presented show a similar pattern.

[…]

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

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

VALS also supports health responses such as supervised injecting services, as we believe that these services can save and transform lives. VALS stands with many other organisations in Victoria in supporting the establishment of a supervised injective service in the Melbourne CBD, embedded within a broader range of community health services such as mental health, housing, sexual health, oral health and allied health. Studies of injecting services around the world have shown that they are one of the most effective tools in combating the serious harm caused by drug dependence in our community.[136]

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

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

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

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

- Does not increase other crime."[137]

The Australian Lawyers Alliance (**ALA**) has also recently published a report endorsing a public health-led, harm minimisation response to drug use.[138] The ALA found that current drug policies in Australia are ineffective because criminalisation increases the dangers of drug use and limits opportunities for safe use and rehabilitation.

Victoria Police's new drug strategy issued in December 2020 takes some steps towards the need for a public health approach, recognising that "drug problems are first and foremost health issues."[139] However, the strategy still involves a too heavy focus on the role of policing and envisages a large role for Victoria Police in treatment, rehabilitation and community education functions, which would be better performed by other organisations with more relevant expertise. VALS is also concerned that the Drug Strategy appears to have been developed without consultation with Aboriginal community organisations, and contains no discussion of the particular impact that drug policing has on Aboriginal people in Victoria.

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

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

RECOMMENDATIONS

Recommendation 17. The use of cannabis and the possession of cannabis for personal use should be decriminalised.

Recommendation 18. The Government should consider decriminalising use and possession of all drugs for personal use, looking to good practices in other jurisdictions. VALS' upcoming research paper should be of assistance in canvassing what approaches could be considered for the Victorian context.

[137] UNSW, National Drug & Alcohol Research Centre and Drug Policy Modelling Program (2017), *Decriminalisation of drug use and possession in Australia – a briefing note*. Accessed at https://www.parliament.vic.gov.au/images/stories/committees/lrrcsc/Drugs_/Submissions/164_2017.03.17_-_NDARC_-_submission_-_appendix_a.pdf.
[138] Australian Lawyers Alliance (2021), *Doing More Harm Than Good: The Need for a Health-Focused Legal Response to Drug Use*.
[139] Victoria Police (2020), *Drug Strategy 2020-25*. Accessed at https://www.police.vic.gov.au/drug-strategy.

Mental Health Responses

People with mental illness are routinely subjected to inappropriate policing responses in moments of crisis. This is a major contributor to the overrepresentation of people with mental illness in the Victorian prison population. Given that Aboriginal people suffer from mental health issues at far higher rates than the non-Aboriginal population, this is also a significant factor in the disproportionate incarceration of Aboriginal people.[140]

RECOMMENDATION

Recommendation 19. The new *Mental Health and Wellbeing Act* should create the basis for a mental health system which:

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

[…]

Sentencing

"Sentencing courts are key gatekeepers for prisons and are therefore, in part, accountable for the high rates of Aboriginal incarceration."[141] In Victoria, Aboriginal people are more likely to receive a prison sentence than non-Aboriginal people, and less likely to receive a community-based sentence.[142]

Sentencing laws and decisions have contributed to the growing number of Aboriginal people in prisons in Victoria in the following ways:

1. Sentencing courts fail to take into account the unique systemic and background factors affecting Aboriginal peoples when making sentencing decisions. This means that sentences are often not

[140] McCausland et al (2017), 'Indigenous People, Mental Health, Cognitive Disability and the Criminal Justice System', *Indigenous Justice Clearinghouse*. Accessed at https://www.indigenousjustice.gov.au/wp-content/uploads/mp/files/publications/files/research-brief-24-final-31-8-17.pdf.

[141] T. Anthony, A. Lachsz and N. Waight, 'The role of 're-storying in addressing over-incarceration of Aboriginal and Torres Strait Islander Peoples,' 17 August 2021, The role of 're-storying' in addressing over-incarceration of Aboriginal and Torres Strait Islander peoples (theconversation.com)

[142] In 2019-2020, Aboriginal people made up 7.39% of the average daily community corrections offender population, although they only represent 0.8% of the total population (2016 census). See Productivity Commission, *Report on Government Services 2021*. Part C, Section 8: Corrective Services Data Tables, Table 8A.8 (data on CCOs). In contrast, Aboriginal people represent 8.6% of the sentenced prisoner population as at June 2020. See Corrections Victoria, Annual Prisoner Statistical Profile 2019-2020, Table 1.3. See also, Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, (2017), p. 91.

appropriate and fail to take into account Aboriginal community-based options which can support rehabilitation and reintegration of the individual.

2. Sentencing courts fail to take into account the rights of dependent children when sentencing Aboriginal women. Being separated from a primary carer often means that school and housing is disrupted, leading to an increased likelihood of contact with the youth justice system.
3. Community Corrections Orders (**CCO**s) often involve onerous and culturally inappropriate conditions, and there is a significant lack of culturally appropriate support for Aboriginal people on CCOs, particularly those who have disabilities. Aboriginal people are less likely to complete a CCO than non-Aboriginal people,[143] and more likely to receive a prison sentence as a result of breaching an order.[144]
4. Mandatory sentencing removes judicial discretion and requires judicial decision-makers to impose prison sentences for particular offences, without taking into account the circumstances of the individual and the offence.

Aboriginal Community Justice Reports

Since 2017, VALS has been calling for key changes to the sentencing process for Aboriginal people, in order to improve sentencing outcomes and reduce over-incarceration of Aboriginal people in Victoria.[145] Currently, sentencing processes regularly fail to consider the unique systemic and background factors affecting Aboriginal people in the justice system. We firmly believe that two critical changes are required to address this issue:

1. Sentencing laws should be amended to require judicial decision-makers to consider the circumstances related to the person's Aboriginal background and to demonstrate the steps taken to ascertain relevant information;
2. Aboriginal Community Justice Reports should be funded on a long-term basis as a mechanism to ensure that judges have access to relevant information regarding a person's Aboriginal background and Aboriginal-specific sentencing options.

In 2017, VALS released its discussion paper, *Aboriginal Community Justice Reports: Addressing Over-Incarceration*. In this paper, VALS proposed trialling "Aboriginal Community Justice Reports… a pre-sentence, community written report, which aims to gather information about underlying impacts on any Aboriginal offender… The purpose of preparing such reports is to identify possible underlying drivers of the individual's offending, in particular, those that may relate to the impacts of trauma and

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[143] In 2019-2020 in Victoria, 45.2% of Aboriginal people on CCOs completed their orders, versus 58.5% of non-Aboriginal people on CCOs. See Productivity Commission, *Report on Government Services 2021*, Part C, Section 8, Table 8A.21. See also, Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, (2017), pp. 254 and 113.

[144] Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, (2017) p. 113.

[145] VALS, *Aboriginal Community Justice Reports Addressing Over-Incarceration* (October 2017); VALS, *Aboriginal Considerations in Sentencing: Proposed Sentencing Act Amendment, Discussion Paper*, October 2017; VALS, *Submission to ALRC Inquiry on Incarceration of Aboriginal and Torres Strait Islander Peoples*, 2017; VALS, *Submission to the Sentencing Act Reform Project* (2020); VALS, *Submission to CCYP Inquiry, Our Youth Our Way*, October 2019.

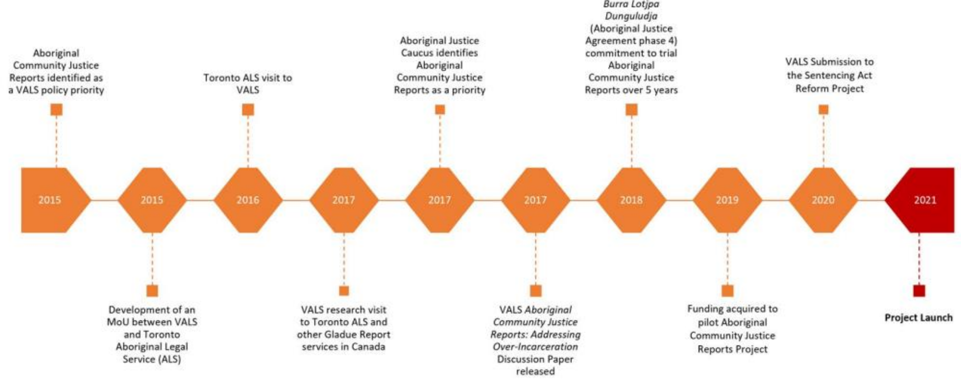
colonisation uniquely experienced as an Aboriginal person… [it] also provides a further voice to the offender, their family and community, and thus greater involvement in, and engagement with the justice system.”[146]

In 2018, the Victorian Government and the Aboriginal Justice Caucus committed to piloting Aboriginal Community Justice Reports over the five-year period of *Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement Phase 4*; to “[t]rial Aboriginal Community Justice Reports modelled on Canada’s Gladue reports to provide information to judicial officers about an Aboriginal person’s life experience and history that impacts their offending; and to identify more suitable sentencing arrangements to address these underlying factors.”[147]

VALS’ 2020 *Submission to the Sentencing Act Reform Project* recommended that the Government “[s]upport self-determined initiatives to improve sentencing outcomes for Aboriginal people, including by directing dedicated funding from Burra Lotjpa Dunguludja to the project currently being carried out by VALS and its partners on Aboriginal Community Justice Reports.”[148]

Additionally, in 2017, the Australian Law Reform Commission’s report, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* recommended that “State and territory governments, in partnership with relevant Aboriginal and Torres Strait Islander organisations, should develop and implement schemes that would facilitate the preparation of ‘Indigenous Experience Reports’ for Aboriginal and Torres Strait Islander offenders appearing for sentence in superior courts.”[149]

The below timeline outlines the development of the Aboriginal Community Justice Reports Project in Victoria:



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[146] VALS, Aboriginal Community Justice Reports Addressing Over-Incarceration (October 2017) 3-4.
[147] *Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement Phase 4*, 39.
[148] VALS, *Submission to the Sentencing Act Reform Project* (2020) 12.
[149] ALRC, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (2017) 214.

In addition to Victoria, progress is being made in other jurisdictions towards improving sentencing processes for Aboriginal people:

- In 2017, the ACT Government committed to trial the use of 'Aboriginal and Torres Strait Islander Experience Court Reports' in sentencing courts in the ACT.[150]
- In Queensland, Five Bridges have been developing Narrative reports for use in Murri Courts in Maroochydore, Brisbane and Ipswich since 2015, and other justice groups in Queensland also do similar reports.
- In NSW, Deadly Connections is running the Bugmy Justice Project, which seeks to improve the sentencing processes and outcomes for Aboriginal people identified as defendants, by providing courts with additional information that addresses the personal and community circumstances of the individual Aboriginal person and relevant sentencing options.[151]

Sentencing decisions are regularly informed by pre-sentence reports (**PSR**s), which do not adequately consider cultural identity or community circumstances of Aboriginal people.[152] PSRs are prepared by Corrections and do not address systemic issues linked to Aboriginality, including intergenerational trauma, impacts of child removal and land dispossession, and Aboriginal-specific sentence options are rarely identified.[153] Furthermore, they are informed by the language and measurements of "risk" and "use a deficit metric to influence decisions on sentencing. Rather than identifying strengths, community corrections treat First Nations peoples' backgrounds and circumstances as a problem."[154]

To address this gap, VALS has been advocating for a statutory obligation requiring judicial decision-makers to take into account the unique systemic or background factors for Aboriginal people in sentencing. This requires much more than simply taking into account a "disadvantaged upbringing," as was the case in *Bergman (a pseudonym) v The Queen.*[155] It requires courts to provide space within the sentencing process to better understand an Aboriginal person's life and circumstances, including their "aspirations, interests, strengths, connections, culture, and supports of the individual, as well as the adverse impact of colonial and carceral systems on their life."[156]

This proposal draws on the Canadian federal *Criminal Code* which requires that sentencing courts take into account: "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be

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[150] Michael Inman (Canberra Times) "ACT set to trial sentencing reports for indigenous offenders, like Canada's Gladue reports," 6 August 2017.
[151] Deadly Connections Australia, Bugmy Justice Project.
[152] S.M. Shepherd & T. Anthony (2018) Popping the cultural bubble of violence risk assessment tools, *The Journal of Forensic Psychiatry & Psychology*, 29:2, 211-220.
[153] Anthony, T., Marchetti, E. Behrendt, L. & Longman, C, 'Individualised Justice through Indigenous Community Reports in Sentencing,' (2017) 26(3) *Journal of Judicial Administration* 121, 135.
[154] T. Anthony, A. Lachsz and N. Waight, "The role of 're-storying' in addressing over-incarceration of Aboriginal and Torres Strait Islander Peoples," 17 August 2021.
[155] *Bergman (a pseudonym) v The Queen* [2021] VSCA 148.
[156] T. Anthony, A. Lachsz and N. Waight, "The role of 're-storying' in addressing over-incarceration of Aboriginal and Torres Strait Islander Peoples," 17 August 2021.

considered for all offenders, with particular attention to the circumstances of Aboriginal offenders."[157] In practice, this means that courts consider: (a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal person before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the person because of his or her particular Aboriginal heritage or connection.

Statutory reform has also been considered by the ALRC, which recommended in 2018 that sentencing legislation provide that, when sentencing Aboriginal and Torres Strait Islander people, courts take into account unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples.[158] VALS notes that the Department of Community Justice and Safety (**DJCS**) has been considering amendments to the *Sentencing Act 1991* (Vic) and strongly encourages DJCS to consider ALRC's proposal. We also note that the development of the new Youth Justice Act provides an important opportunity to require judicial decision-makers to consider the circumstances related to the child's Aboriginal background and to demonstrate the steps taken to ascertain relevant information.

Creating a statutory obligation is critical, but Section 3A of the *Bail Act 1977* (Vic)[159] has shown that statutory reform alone will not lead to systemic change; it must also be accompanied by practical reforms to ensure that judicial decision-makers have access to the necessary information to discharge their obligations.

Good Practice Model: Aboriginal Community Justice Reports

On 10th March 2020, VALS launched its Aboriginal Community Justice Reports (**ACJR**) Project.[160] The Project aims to reduce the overincarceration of Aboriginal people and improve sentencing processes and outcomes for Aboriginal defendants. Information in the Reports will include a more holistic account of individual circumstances, including as they relate to a person's community, culture and strengths and community-based options.

VALS is undertaking this Project, funded with an Australian Research Council grant, in partnership with the Australasian Institute of Judicial Administration, University of Technology Sydney and Griffith University. The Reports are modelled on Canada's Gladue Reports, and adapted for the Victorian context. In Victoria, 20 Aboriginal Community Justice Reports will be produced as part of

[157] Criminal Code RSC 1985, c C-46 s 718.2(e).
[158] ALRC, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, December 2017, Recommendation 6-1.
[159] Section 3A of the *Bail Act 1977* (Vic) provides that: "In making a determination…in relation to an Aboriginal person, a bail decision maker must take into account (in addition to any other requirements of this Act) any issues that arise due to the person's Aboriginality, including: (a) the person's cultural background, including the person's ties to extended family or place; and (b) any other relevant cultural issue or obligation.
[160] *Aboriginal Community Justice Reports Project: Improving sentencing outcomes and reducing overincarceration of Aboriginal people*, available at https://www.vals.org.au/unlocking-victorian-justice/

this pilot. Case works upport will be made available to each person who participates in order to provide support and care.

To be considered for an Aboriginal Community Justice Report, the following eligibility criteria must be met:

- The person must be Aboriginal and/or Torres Strait Islander;
- The matter must be listed:
  - For a plea hearing (matters that are listed for sentence appeal will not automatically be excluded from eligibility for the Project, but given the pilot will be producing only 20 reports, suitability for a report for a sentence appeal will be assessed on a case-by-case basis);
  - In the County Koori Court division or in the general list before a Judge who is eligible to sit in the Koori Court division;
  - At Melbourne or La Trobe Valley.
- The person must voluntarily consent to participating. The person whose matter is before the court should also be willing to participate in an interview after sentencing, for the purpose of researching the outcomes of the Report.

Suitability is assessed by Aboriginal Community Justice Report Project staff, situated in VALS' Community Justice Programs section. To enable assessment of suitability for an Aboriginal Community Justice Report:

- The lawyer must have an initial meeting with Aboriginal Community Justice Report Project staff;
- The person whose matter is before the court must have an initial meeting with Aboriginal Community Justice Report Project staff;
- There must be sufficient notice provided, to enable Aboriginal Community Justice Report Project staff to draft the report (at least 8 weeks). It is recommended that lawyers make a referral at the committal mention stage.

RECOMMENDATIONS

Recommendation 20. The Victorian Government should amend Section 5(2) of the *Sentencing Act 1991* (Vic) so that for the purposes of sentencing:

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

Recommendation 21. All Judges and Magistrates should be required to complete regular face-to-face training in cultural awareness, systemic racism and unconscious bias.

Recommendation 22. The Victorian Government must support self-determined initiatives to improve sentencing outcomes for Aboriginal people. This includes by directing dedicated funding from *Burra Lotjpa Dunguludja* to the Aboriginal Community Justice Reports project currently carried out by VALS and partners, as well as providing ongoing funding beyond the pilot Project.

Recommendation 23. The Victorian Government should support self-determined initiatives to improve sentencing outcomes for Aboriginal people, including by directing dedicated funding from *Burra Lotjpa Dunguludja* to the Aboriginal Community Justice Reports pilot project currently being carried out by VALS and its partners, as well as providing ongoing funding beyond the pilot Project.

Women with Dependent Children

The number of women in prisons in Victoria has increased dramatically over the past decade.[161] Between 2017 and 2019, the number of women in prison almost doubled, and incarceration of Aboriginal women almost tripled.[162] As discussed elsewhere in this submission, key drivers in the rising incarceration rate of women include changes to the *Bail Act*,[163] over-policing and punitive approaches to parole and CCO supervision.

Criminalisation and over-incarceration of Aboriginal women – both on remand and serving sentences – directly affects the rights of children and has significant and inter-generational impacts for Aboriginal families and communities. The majority of women in Australian prisons are parents, with 85 per cent having been pregnant at some point in their lives, and 54 per cent having at least one dependent child.[164]

As noted above, the Bangkok Rules emphasis the need to develop and implement gender-specific diversionary and sentencing alternatives for women who have offended,[165] particularly in regards to non-custodial measures being implemented in order to avoid the separation of women from their families and communities.[166] Furthermore, the Bangkok Rules emphasise the need to avoid custodial sentences for women with dependent children except for serious or violent offences that continue to pose a danger; and only after taking into account the best interests of the child.[167] In the practice of

[161] Corrections Victoria, *Annual Prisoner Statistical Profile*, June 2019. Include specific reference.
[162] Corrections Victoria, *Annual Prisoner Statistical Profile*, June 2019. Include specific reference.
[163] In June 2019, 46% of women in Victorian prisons were on remand (unsentenced) as compared with 25% in 2007. Corrections Victoria, *Annual Prisoner Statistical Profile*, June 2019
[164] Australian Institute of Health and Welfare, *The Health of Australian Prisoners,* 2018, pp. 14 and 72.
[165] Rule 57 of the Bangkok Rules.
[166] Rule 58 of the Bangkok Rules.
[167] Rule 64 of the Bangkok Rules.

Victorian courts, however, magistrates currently only modify sentences on the basis of childcare responsibilities in exceptional circumstances.[168]

While custodial measures are generally sought to be avoided under the Bangkok Rules, the need to ensure appropriate measures of care for children is emphasised where a custodial sentence is imposed by the court.[169] In Victoria, studies indicate that information concerning dependent children and their needs are rarely presented in court by defence counsel and, where such information is presented, magistrates lack any guidelines concerning sentencing decisions that affect children. Issues pertaining to ensuring appropriate measures of care for children can often fall by the wayside as a result since children are not the 'core business' of the adult criminal legal system, despite evidence of inconsistent practice among magistrates adjourning sentences for a day so that arrangements can be made for the child(ren) affected.[170]

Imposing custodial sentences on mothers directly impacts dependent children, including by separating children from their mothers or exposing a child to an unsafe prison environment. Children of women who are in prison are more likely to have disrupted education, unstable housing and poor health, and all of these factors increase the risk of contact with the youth justice system and intervention by child protection.[171] Children of incarcerated parents are five to six times more likely to be involved in criminal behaviour than the average child.[172] Meanwhile, anecdotal evidence indicates that magistrates do not feel any responsibility for the consequences of sentencing decisions on children.[173]

Australia's international human rights obligations require the Victorian Government to consider the rights and the best interests of children whose mothers have been imprisoned. This includes the *Convention on the Rights of the Child*, which enshrines the right to family life and requires that the best interests of the child shall be a primary consideration in all actions concerning children.[174] According to the Committee on the Rights of the Child: "[a]lternatives to detention should be made available and applied on a case-by-case basis, with full consideration of the likely impacts of different sentences on the best interests of the affected child(ren)."[175] Under the Victorian *Charter on Human*

[168] Flynn, C. et al. (2016). Responding to the needs of the children of parents arrested in Victoria, Australia. The role of the adult criminal justice system. 49(3) Australian & New Zealand Journal of Criminology 351-369, pp. 361.
[169] Rules 2(2) and 64 of the Bangkok Rules.
[170] Flynn, C. et al. (2016). Responding to the needs of the children of parents arrested in Victoria, Australia. The role of the adult criminal justice system. 49(3) Australian & New Zealand Journal of Criminology 351-369, pp. 361-362.
[171] J Sherwood et al, *Reframing Space by Building Relationships: Community Collaborative Participatory Action Research with Aboriginal Mothers in Prison*, 2013, p.83, 85
[172] Rowland. M & Watts, A (2007) Washing State's: Effort to Reduce the Generational Impact on Crime. Corrections Today 69(4) 34-42, cited in A. Shlonsky et al, *Literature Review of Prison-based Mothers and Children Programs: Final Report* (2016). See Prison-based mothers and children programs | Corrections, Prisons and Parole
[173] Flynn, C. et al. (2016). Responding to the needs of the children of parents arrested in Victoria, Australia. The role of the adult criminal justice system. 49(3) Australian & New Zealand Journal of Criminology 351-369, pp. 362.
[174] Convention on the Rights of the Child, Articles 3(1) and 9.
[175] Committee on the Rights of the Child, Report and Recommendations of the Day of General Discussion on "Children of Incarcerated Parents" (2011), p. 6. See OHCHR | Children of incarcerated parents. Replace with reference to General Comment if there is one.

Rights and Responsibilities, the Victorian Government is also required to protect families and children.[176]

In the UK, the Parliament is considering sentencing reform to protect the right to family life of children whose mothers are in prison.[177] The reform will require that:

- judicial decision-makers consider the best interests of the defendant's dependent children, when making sentencing decisions;
- judicial decision makers demonstrate how the best interests of the child were considered when sentencing a primary carer of a dependent child; and
- judicial decision makers consider the impact of not granting bail on the defendant's children.

When making decisions concerning the best interest of the child(ren) that may be adversely affected by sentencing decisions, a further step should be taken to ensure that the institutional 'invisibility' of affected children is minimised to the greatest extent possible, by providing them the opportunity to express their views, interests and concerns during sentencing proceedings. Not only do the decisions made by Victorian courts in relation to adult sentencing predominantly overlook the best interests of children when making decisions concerning sentences, current practices by magistrates indicate a tendency to physically remove children from the proceedings altogether by removing them from the courtroom in an effort to 'protect' them. Conversely, the UNCRC requires that children be given the opportunity to speak and be heard, either directly or through a representative, during administrative and judicial decisions that affect them.[178]

To give effect to Australia's human rights obligations, the Victorian Government should amend the *Sentencing Act* to require judicial decision-makers to take into account the best interests of any dependent children and to demonstrate how they have discharged this obligation.

RECOMMENDATIONS

Recommendation 24. The Victorian Government must amend the *Sentencing Act 1991* (Vic) so that, for the purposes of sentencing women who have offended, judicial decision-makers are required to:

- Take into account the best interests of the defendant's children, particularly dependent children;
- Ensure the provision of adequate time to women with dependent children prior to beginning a custodial sentence to make necessary arrangements for dependent children;
- Permit children to be present during sentencing proceedings;

[176] Victorian Human Rights Charter 2006, Section 17.
[177] Judges must consider interests of child when sentencing mother, urges Committee - Committees - UK Parliament
[178] Articles 9(2) and 12 of the UNCRC.

- Permit children to express their interests, views and concerns, either directly or through a representative, during sentencing proceedings involving a parent.

Recommendation 25. The Victorian Government should equip magistrates with knowledge of factors to consider when dealing with matters in the adult criminal legal system that may directly or indirectly affect the interests of children.

[…]

Mandatory Sentencing

Under the *Sentencing Act 1991* (Vic), the Court must impose a custodial order for "Emergency worker harm offences," which include the following offences[179] committed against an "emergency worker" on duty:[180]

- intentionally causing serious injury in circumstances of gross violence against an emergency worker on duty;
- recklessly causing serious injury in circumstances of gross violence against an emergency worker on duty;
- causing serious injury intentionally against an emergency worker on duty;
- causing serious injury recklessly against an emergency worker on duty;
- causing injury intentionally or recklessly against an emergency worker etc on duty intentionally exposing an emergency worker to risk by driving if the emergency worker is injured, and
- aggravated intentionally exposing an emergency worker to risk by driving if the emergency worker is injured.

Additionally, amendments were made to the *Sentencing Act* in 2017, requiring courts to issue a custodial order (imprisonment, drug treatment order of a youth justice detention order) for Category 1 offences.[181] Custodial orders must also be made for Category 2 offences, unless certain circumstances exist.[182]

[179] Section 10AA *Sentencing Act 1991* (Vic) requires the court to impose a term of imprisonment for the following offences under the *Crimes Act 1958* (Vic): Causing serious injury intentionally in circumstances of gross violence (s. 15A), Causing serious injury recklessly in circumstances of gross violence (s. 15B), Causing serious injury intentionally (s. 16) and Causing serious injury recklessly (s. 17).

[180] The definition of "Emergency worker" includes custodial officers (including prisoner officers and police custody officers), emergency workers and youth justice custodial workers. Section 10AA, *Sentencing Act 1991* (Vic).

[181] See Sections 3 and 5(2G) *Sentencing Act 1991* (Vic).

[182] See Sections 3 and 5(2H) *Sentencing Act 1991* (Vic).

Similarly, the *Sentencing Act* provides for mandatory uplifting of certain offences[183] committed by a young person (under the age of 21), meaning that the young person cannot receive a youth justice detention order under the dual track youth justice system; they must be sentenced to adult prison.

VALS continues to oppose mandatory sentencing schemes for the following reasons:

- They erode the fundamental principle of an independent judiciary and discretion in sentencing;
- They increase incarceration rates, and are therefore more costly;[184]
- Mandatory sentencing is not an effective deterrent;
- They contradict the principle of proportionality and imprisonment as a last resort;
- Mandatory sentencing schemes have proven to be an ongoing driver of the over-incarceration of Aboriginal and Torres Strait Islander people. In this regard, mandatory sentencing contradicts the Victorian Government's commitment to addressing over-incarceration of Aboriginal people;[185]
- Mandatory sentencing for offences against emergency workers acts as a deterrent and disincentive for Aboriginal people to call on emergency and protective services to assistance in a time of crisis.

RECOMMENDATION

Recommendation 26. The Victorian Government should repeal mandatory sentencing schemes under the *Sentencing Act 1991* (Vic), including for the following offences:

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

[…]

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[183] A young person being sentenced for a "Category A serious youth offences" cannot access youth detention, unless exceptional circumstances exist. See Sections 3 and 32(2C), *Sentencing Act 1991* (Vic). A court must not impose a youth justice centre order or a youth residential centre order on a young person being sentenced for a "Category B serious youth offence" if they have previously been convicted of a Category A or Category B serious youth offence, unless exceptional circumstances exist. See Sections 3 and 32(2D) *Sentencing Act 1991*.

[184] Australian Law Reform Commission (ALRC), Report 133, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander peoples,* December 2018, 273.

[185] Department of Justice and Community Safety (DJCS), *Burra Lotjpa Dunguludja, Aboriginal Justice Agreement: Phase 4 (AJA4)* 2018, 32. See goal 2.1 Aboriginal people are not disproportionately worse off under policies and legislation; goal 2.2 Fewer Aboriginal people enter the criminal justice system; goal 2.3 Fewer Aboriginal people progress through the criminal justice system; and goal 2.4 Fewer Aboriginal people return to the criminal justice system.

Community Legal Education

Community Legal Education (**CLE**) is an essential tool in reducing contact with the criminal legal system for marginalised people in Victoria. A key driver of continuing contact with police and the legal system, and consequently of overincarceration, is people's uncertainty about their rights in the face of a complex and regularly changing legal landscape. The preventative role of CLE in helping people understand their legal situation and avoid involvement in the legal system complements our client work.

This has been a particularly important issue during the pandemic, with regular changes to legal restrictions and police powers that are not communicated consistently or clearly by the Government to Aboriginal communities. The provision of culturally competent community legal education is therefore crucial to improving Aboriginal people's experience with the justice system, as has been emphasised by the UN's Special Rapporteur on the Rights of Indigenous Peoples.[186]

CLE can prompt individuals to recognise that they have existing legal issues, with which VALS can assist. This empowers individuals with the knowledge that they have rights, and that they can access culturally competent legal assistance in realising and protecting those rights. CLE can assist individuals already caught up in these legal systems to navigate their way with more confidence, taking proactive steps to mitigate risks and achieve better outcomes. CLE also has an important role to play in the prevention space, such as avoiding COVID-19 fines to begin with. Finally, CLE can play an important role in improving VALS' practice, as well as informing policy and law reform. CLE provides an opportunity for the Victorian Aboriginal community to highlight the legal issues which are particularly impacting on them, and their views on current laws or practices.

As part of our Community Justice programming, VALS provides this community legal education to Aboriginal communities across Victoria. For example, VALS welcomed the Victorian Government's provision of funding for *Stronger me, Stronger us*, a CLE program relating to family violence and healthy relationships.[187] Our CLE work consists of information sessions around the state as well as a library of resources available to Aboriginal people and organisations.

However, our CLE work has been strained in the past year due to a series of *Omnibus Bills* and other legislative reforms, and changes to regulations, which have introduced rapid change across VALS' practice areas, along with logistical difficulties in running CLE across the state under pandemic restrictions.

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[186] VALS (2021), *Building Back Better: Victorian Aboriginal Legal Service COVID-19 Recovery Plan*, p55. Available at https://www.vals.org.au/wp-content/uploads/2021/02/Building-Back-Better-Victorian-Aboriginal-Legal-Service-COVID-19-Recovery-Plan-February-2021-FOR-DISTRIBUTION.pdf.

[187] Victorian Government, 22 June 2021, 'Supporting Aboriginal Young People to Connect'. Accessed at https://www.premier.vic.gov.au/supporting-aboriginal-young-people-connect.

Maintaining and advancing Aboriginal people's knowledge of their legal rights and responsibilities is essential to minimising unnecessary contact with the justice system and reducing overincarceration. Sustainable, ongoing funding is crucial for us to continue operating effective, culturally safe CLE in a variety of formats to Aboriginal people around the state. Community Legal Education should also be made available in prisons, to help provide legal information to people who are particularly at risk of repeat contact with the criminal legal system, and funding should be made available to support this.

RECOMMENDATION

Recommendation 27. The Victorian Government should significantly increase funding for VALS' Community Legal Education. Funding should be provided for both staffing and creation of resources (using different media, to be disseminated on different platforms, to ensure the legal messages are accessible to and understandable for everyone in the Aboriginal community). The funding should be sufficient to enable CLE delivery across the state, including in places of detention.

People with Cognitive Disabilities

Research indicates that persons with cognitive disabilities are significantly over-represented in the justice system in Australia. In 2011 the Victorian DJCS reported 42% of incarcerated men and 33% of incarcerated women had an acquired brain injury, compared to 2.2% of the general population.[188] A 2013 Victorian parliamentary inquiry reported that individuals with an intellectual disability were "anywhere between 40 and 300 per cent more likely" to be jailed than those without an intellectual disability.[189]

Aboriginal people are overrepresented in the justice system and among people with cognitive disabilities, meaning that the way criminal legal processes treat people with disability is of huge significance to Aboriginal people's individual and collective wellbeing.[190] In 2019-2020, 16.9% of criminal matters opened by VALS' Criminal Team involved clients with a disability, although this figure relies on individuals to have received a diagnosis and identify their disability. In reality, a higher number of our clients have disabilities, including undiagnosed and untreated disabilities.

In addition to the support they may need while in police custody, detailed above, people with cognitive disabilities need substantial assistance to navigate the criminal legal system. It can be very difficult for people with cognitive disabilities to understand proceedings in a criminal trial and get access to justice

[188] Martin Jackson et al, 'Acquired Brain Injury in the Victorian Prison System', Corrections Research Paper No 4, Department of Justice (2011) 22.
[189] Law Reform Committee, Parliament of Victoria, Inquiry into Access to and interaction with the Justice System by People with an Intellectual Disability and their Families and Carers (2013).
[190] McCausland et al (2017), 'Indigenous People, Mental Health, Cognitive Disability and the Criminal Justice System', *Indigenous Justice Clearinghouse*. Accessed at https://www.indigenousjustice.gov.au/wp-content/uploads/mp/files/publications/files/research-brief-24-final-31-8-17.pdf.

on the same terms as other people charged with offences. Additionally, individuals with cognitive disabilities face significant challenges in complying with their sentences, including both prison and community-based sentences.

Lack of Support for Clients with Acquired Brain Injury

Under section 80 of the *Sentencing Act*, individuals who are on a CCO and have an intellectual disability (as defined under the *Disability Act 2006*) are eligible for a Justice Plan. Justice Plans are prepared by the Department of Families, Fairness and Housing, and identify treatment services and specialised support to help them comply with the conditions of the Order.[191]

However, due to the narrow definition of intellectual disability under the *Disability Act*, many of VALS' clients who are in need of additional support are not eligible for a Justice Plan. This includes clients with an Acquired Brain Injury (**ABI**), as well as clients who have an intellectual disability that was not diagnosed before the age of 18 years. This issue was also identified by the Centre for Innovative Justice in its recent report on Enabling Justice for People with an Acquired Brain Injury.[192]

Although the term 'ABI' encompasses a broad range of injuries, common symptoms can include problems with concentration and memory, difficulties in planning and organising, confusion, mood swings, and changes in personality and behaviour that may be viewed as irritable and inappropriate. These symptoms can often make it harder to comply with the conditions on a CCO and increases the likelihood that the client will breach the order and end up with a prison sentence.[193]

Unfitness to Stand Trial

Avenues available to people with severe cognitive disabilities, include the statutory scheme for people found unfit to plead or stand trial. In Victoria, people deemed unfit to stand trial are still subject to a 'special hearing' to determine whether they did the act that comprises the offence – with no guarantee that they will understand the proceedings against them, which are meant to be conducted "as nearly as possible as if they were criminal trials".[194] In some cases, people found unfit to stand trial end up facing indefinite detention, including for periods longer than if they had been convicted in an ordinary trial.[195]

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[191] Sentencing Advisory Council, 'Community Correction Order', https://www.sentencingcouncil.vic.gov.au/about-sentencing/community-correction-order

[192] Centre for Innovative Justice and Jesuit Social Services, *Recognition, Respect and Support: Enabling Justice for People with an Acquired Brain Injury*, September 2017, Recommendation 18.

[193] An offender who breaches a condition of a community correction order may be resentenced for the original offence and may face up to 3 months additional imprisonment for the breach. See section 83AD, *Sentencing Act (Vic)* 1991.

[194] Judicial College of Victoria, 'Special Hearings' paragraph 14. Accessed at https://www.judicialcollege.vic.edu.au/eManuals/CCB/29030.htm.

[195] NATSILS (2020), *Submission to the Disability Royal Commission's Criminal Justice Issues Paper*, p36. Available at https://disability.royalcommission.gov.au/system/files/submission/ISS.001.00157.PDF.

The number of people deemed unfit to plead or stand trial is generally low, particularly in comparison to the number of people with cognitive or intellectual disabilities in the prison system.[196] Clearly, unfitness to stand trial is not relevant to many people with disabilities going through criminal legal processes. For those who do come within the remit of the special hearings system, it provides no guarantee of procedural fairness or access to justice.

In 2017, VALS was a participant in the University of Melbourne's *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities* project. The project was built on the recognition that 'unfit to stand trial' provisions alone are not adequate to ensure people with cognitive disabilities have access to justice, and the principle that people should be supported to understand the process they are being subjected to wherever possible.

The research element of the project found a number of barriers to justice for people with cognitive disabilities, which mean they are not treated with procedural fairness, increasing the likelihood they will receive unjustified court outcomes and avoidable prison sentences. These include:

- inaccessible court proceedings that rely on complex language;
- the inconsistent availability of support through proceedings;
- legal services that are under-resourced and not necessarily prepared to respond to the access needs of persons with disabilities;
- long delays in proceedings involving accused persons with cognitive disabilities; and
- the 'criminalisation of disabilities', in which the environmental causes of difficult behaviour are ignored or played down, and/or disability is misinterpreted as deliberately difficult or defiant behaviour.[197]

VALS' role in the Unfitness to Plead project was to implement a 6-month Disability Justice Support Program, aiming to "optimise the participation of accused persons with cognitive disabilities in proceedings against them by focusing on the supports they may require to exercise legal capacity and access to justice on an equal basis with others."[198]

There was consensus among clients, their families, lawyers and support workers that the project delivered significantly better outcomes. Many clients served by the program were able to access support services rather than being given a custodial sentence. The program successfully bridged communications gaps between clients, lawyers, magistrates, police and court personnel. The support worker was also able to provide support beyond the legal process, thanks to their relationship with the clients and understanding of their disabilities, including referrals to other services or assistance in

[196] McSherry et al (2017), *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities*, p17. Accessed at https://socialequity.unimelb.edu.au/__data/assets/pdf_file/0006/2477031/Unfitness-to-Plead-Main-Project-Report.pdf.
[197] Ibid, p10
[198] Ibid, p30.

managing tasks that might otherwise compound the client's stress, such as paying bills and grocery shopping.[199]

A comprehensive costs analysis conducted by the research team confirmed significant short-term savings, with it being estimated that the long-term savings would be even greater. The research team published a detailed account of these findings with a full explanation of the costing's methodology.[200] In addition to the benefits of the support services, the report found that Victorian participants who were able to access Koori Court and the Assessment and Referral Court List were significantly better off. The supportive environment with the Elders and support worker present and the Magistrate sitting at the table with the client, assisted the client to feel less vulnerable throughout the hearing. The process was a conversation, without the confusing legal jargon, facilitating the client's ability to comprehend and actively participate in the process.[201]

The findings of the project strongly support our view that accused persons with cognitive disabilities should be provided with comprehensive support to understand and engage in the legal processes they are subject to. Legal support alone is inadequate, and a finding that someone is unfit to stand trial does not eliminate their right to have access to a fair process and the support they need to properly engage with it.

Aboriginal participants and lawyers from the two participating Aboriginal legal services identified that the success of the Disability Justice Support Program required the following:

- It must be delivered by an Aboriginal Community Controlled Organisation;
- It must be gender specific in its design;
- The support worker must be Aboriginal, or receive cultural training and work in partnership with an Aboriginal client service officer;
- Engagement must take into consideration historical distrust of social welfare services.[202]

This should be the basis of a renewed effort to improve access to justice for people with cognitive disabilities, building on the Disability Justice Support Program model. VALS and other organisations should receive funding to deliver these support services on an ongoing basis. Improving people with disabilities' experience of the criminal legal system protects their rights and will help to avoid continued growth in Victoria's prison population, by ensuring that people are connected with appropriate support services as an alternative to custodial sentences wherever possible.

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[199] VALS (2020), *Royal Commission into Victoria's Mental Health System Supplementary Submission*, p6. Accessed at https://www.vals.org.au/wp-content/uploads/2020/08/Royal-Commission-into-Victorias-Mental-Health-System-Supplementary-Submission.pdf.
[200] McCausland et al (2017), *Cost Benefit Analysis of Support Workers in Legal Services for People with Cognitive Disability*. Available at https://socialequity.unimelb.edu.au/__data/assets/pdf_file/0003/2477046/Unfitness-to-Plead-Project-Cost-Benefit-Analysis.pdf.
[201] VALS (2020), *Royal Commission into Victoria's Mental Health System Supplementary Submission*, p7.
[202] Ibid.

RECOMMENDATIONS

Recommendation 28. The Government should amend the *Sentencing Act 1991* (Vic) to ensure that individuals with an acquired brain injury and/or withan intellectual disability that was not diagnosed before the age of 18 years, are eligible for a Justice Plan.

Recommendation 29. The Victorian Government should require that all people entering adult… prisons are screened for disability, particularly psychosocial or cognitive disabilities and other neurodiverse conditions such as an autistic spectrum condition, dyslexia and attention deficit hyperactive disorder.

Recommendation 30. The Victorian Government should establish safeguards against indefinite detention of people who are found unfit to plead or stand trial in line with those recommended by NATSILS, including:

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

Recommendation 31. The Victorian Government should fund VALS to restart and sustain the Disability Justice Support Program piloted as part of the Unfitness to Plead Project.

[…]

Parole

Parole allows individuals serving a custodial sentence to serve part of the sentence in the community. When done effectively, parole plays a critical role in the rehabilitation and reintegration of incarcerated people, as it provides for supported transition from prison to the community,[203] which can in turn reduce recidivism.

[203] Research by the AIC indicates that incarcerated people who receive parole have significantly lower rates of recidivism or commit less serious offences than those released unsupervised. See Wan, W-Y, et al. (2014). Parole Supervision and Reoffending. Australian Institute of Criminology.. Available at https://www.aic.gov.au/sites/default/files/2020-05/tandi485.pdf

Since the reform of the Victorian parole system in 2015, parole has become harder to access, which is another factor contributing to the growing prison population.[204] The "tougher" parole system has had a disproportionate impact on Aboriginal people in prison, who are less likely to apply for parole than non-Aboriginal people, and also less likely to be released on parole.[205]

Significant reform is required to reverse the changes made in 2015 and establish a fair, transparent and equitable parole system that is genuinely committed to the rehabilitation and reintegration of incarcerated people. These reforms include:

- Replacing the discretionary adult parole system with automatic parole for certain sentences;
- Permitting time spent on parole to contribute to the head sentence, even if parole is cancelled;
- Amending the parole process to incorporate procedural fairness and natural justice;
- Investing in, and ensuring access to, culturally appropriate rehabilitation programs that are designed, developed and delivered by Aboriginal organisations;
- Ensuring that parole conditions are achievable and culturally appropriate;
- Investing in, and ensuring access to, culturally appropriate support for Aboriginal people on parole, including transitional housing and holistic support.

In 2015, the Victorian parole system was amended significantly to implement the recommendations of the Callinan Review.[206] Key changes included:

- Implementation of a discretionary parole system, whereby the onus is on incarcerated people to apply for parole. Prior to this, the presumption was that parole should be granted at the eligibility date, unless there was some compelling reason not to do so.
- A requirement that incarcerated people complete programs while in prison, in order to be eligible for parole, even if they have to wait for the programs to become available.[207]
- Tougher rules for people in prison who reapply for parole after having their parole cancelled for reoffending (including being convicted of the offence of breaching parole);[208]
- A two-layered review process for parole applications from "Serious Violent and Sexual Offenders."[209]

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[204] VALS has previously indicated its concerns with the adult parole system. See VALS (2017). Submission to ALRC Inquiry, 2017; VALS (2011). Submission to SAC review of parole in Victoria, 2011.

[205] Evaluation of AJA2 found that 67% of Aboriginal offenders released from prison were not released on parole. See Nous Group, *Evaluation of the Aboriginal Justice Agreement—Phase 2: Final Report* (2012) [10.2.5]; Australian Law Reform Commission (2019), *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, pp.268-269.

[206] The Callinan review was an independent review commissioned by DJCS, following a number of high profile violent crimes committed by individuals who were on parole. The review resulted in 23 recommendations, all of which were accepted by the government.

[207] Adult Parole Board (2020). Parole Manual: Adult Parole Board of Victoria, Sections 5.3.5 and 4.7. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20%20Board%20-%20Parole%20Manual%202020.pdf.

[208] Corrections Amendment (Parole Reform) Act 2013, s11. Include legislative provision. Law passed in May 2014. See AG report.

[209] Corrections Amendment (Parole Reform) Act 2013, s10(2). Law passed in May 2014, See AG report.

The Callinan Review also recommended that the Adult Parole Board (**APB**) should continue to be excluded from the application of the Human Rights Charter,[210] and that the rules of natural justice should not apply to parole decisions, as was the case prior to the Review.[211]

Discretionary Versus Statutory Parole

The discretionary parole system – whereby people in prison are required to apply for parole rather than being automatically considered at their earliest possible date – creates an unnecessary barrier to parole, resulting in some people not applying for parole even though they are eligible. In 2019-2020, 152 people were eligible for parole in Victoria but did not apply.[212] This is another factor contributing to the growing prison population. Additionally, it means that some people in prison are released at the end of their sentence without ongoing support in the community.

In contrast to Victoria, the adult parole systems in NSW,[213] QLD[214] and SA[215] combine both statutory parole and discretionary parole. Statutory parole is also used in the UK, NZ and Canada.[216] Accordingly, people on short sentences are automatically released on parole on the date set by the court, without having to apply. Those on longer sentences must apply for parole under a discretionary system. In South Australia, statutory parole applies to people serving sentences of less than five years.[217] Individuals must accept parole conditions before they are released on parole, and in NSW and QLD there is a mechanism for over-riding court-ordered parole.[218]

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[210] See Section 5(a) and (*c), Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2013*.

[211] Callinan Review, Recommendation 8. See Section 69(2) of the *Corrections Act 1986*.

[212] This represented 8% of the total number of incarcerated people who were eligible to apply for parole. In 2018-2019, 156 (8%) of incarcerated people who were eligible did not apply for parole, and in 2017-2018, there were 114. Adult Parole Board Victoria (2019). Annual Report: 2018-19, p. 24. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20Board%20Annual%20Report%202018-19.pdf.

[213] In NSW, people sentenced to 3 years or less are automatically released when the non-parole period expires, unless the State Parole Authority decides to revoke the automatic release. See *Crimes (Administration of Sentences) Act* 1999 (NSW), Section 158 and *Children (Detention Centres) Act* 1987 (NSW), Section 44.

[214] In QLD, incarcerated people sentenced to less than 3 years (and not a serious violent or sexual offence) are automatically released at the end of the non-parole period. See *Penalties and Sentences Act 1992* (Qld) s 160B(3).

[215] In South Australia, incarcerated people serving sentences of less than 5 years are generally released automatically at the end of the non-parole period. See C*orrectional Services Act 1982* (SA) s 66.

[216] In the UK, most incarcerated people serving a determinate sentence are now released automatically after expiry of one-half of their sentenced terms. See *Criminal Justice Act 2003* (UK) c 44, s 244. In NZ, incarcerated people with sentences of 2 years or shorter are automatically released after serving half of their sentence. Incarcerated people serving sentences of over 2 years become eligible for parole after serving one-third of their sentence (unless the court has imposed a longer minimum non-parole period). Naylor, B. and Schmidt, J. (2010), Do Prisoners have a Right to Fairness before the Parole Board? 32 Sydney Law Review 437-469, p. 440..

[217] C*orrectional Services Act 1982* (SA) s 66.

[218] For example, in NSW, an incarcerated person can request revocation, or the State Parole Authority can revoke court-ordered parole if the SPA decides that the offender is unable to adapt to normal lawful community life, or that satisfactory post-released accommodation or plans have not been made. See s. 222(1)(a)-(c) *Crimes (Administration of Sentences) Regulation 2014* (NSW), cited in ALRC Inquiry p. 307.

VALS strongly supports automatic parole for people serving sentences of less than five years imprisonment.[219] Automatic parole will increase access to parole for Aboriginal people,[220] who are more likely to be convicted of low-level offences and sentenced to shorter sentences.[221] However, an automatic parole must be accompanied by abolition of the parole revocation scheme and ensuring parole supervision is less punitive and more focused on rehabilitation.

RECOMMENDATION

Recommendation 32. The Victorian Government should amend the *Corrections Act 1986* (Vic) to provide for automatic court-ordered parole for sentences under five years.

Parole Revocation Schemes

In addition to the barriers created by the discretionary parole system, some people may be dissuaded from applying for parole because of the parole revocation system, whereby time on parole does not automatically count towards the head sentence if the parole order is cancelled, unless the APB[222] or the Youth Parole Board[223] directs otherwise. In 2019-2020, 54% of adults who had their parole cancelled did not have their time on parole counted towards their sentence.

According to an investigation by the Victorian Ombudsman in 2016, some incarcerated people were choosing not to apply for parole and instead serve the full sentence in prison because "they found the parole conditions to be too onerous and would rather spend extra time in prison than be released on parole and risk the chance of breaching parole and being reimprisoned."[224] As a result, people are being straight released back to the community without any supports and a much higher risk of recidivism.

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[219] VALS (2019*), Submission to Australian Law Reform Commission Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, p42. Available at https://www.alrc.gov.au/wp-content/uploads/2019/08/39._victorian_aboriginal_legal_service_vals.pdf.

[220] See Australian Law Reform Commission (2019), *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, p. 303. Available at https://www.alrc.gov.au/wp-content/uploads/2019/08/final_report_133_amended1.pdf

[221] Australian Law Reform Commission (2019), *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, pp.268-269.

[222] Adult Parole Board (2020). Parole Manual: Adult Parole Board of Victoria, Section 7.6. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20%20Board%20-%20Parole%20Manual%202020.pdf..

[223] The Youth Parole Board has the power, if cancelling parole, to deduct the time or part of the time spent on parole (having regard to the extent and manner in which the young person complied with the parole order) in determining the unexpired portion of detention, see s. 460(7) of the *Children, Youth and Families Act 2005*.

[224] Victorian Ombudsman (2015), *Investigation into the rehabilitation and reintegration of prisoners in Victoria,* p30. Available at https://assets.ombudsman.vic.gov.au/assets/Reports/Parliamentary-Reports/1-PDF-Report-Files/Investigation-into-the-rehabilitation-and-reintegration-of-prisoners-in-Victoria.pdf?mtime=20191217123824

In contrast to the situation in Victoria, the parole system in Queensland provides that time served on parole counts towards the head sentence.[225] This approach was also recommended by the ALRC Inquiry into Incarceration of Aboriginal and Torres Strait Islander People.[226]

VALS strongly recommends that the parole revocation scheme in Victoria be abolished.[227] We believe that this reform would lead to more Aboriginal people being released on parole, rather than being "straight released" back to the community without support. Provided there is effective and culturally appropriate support in place for Aboriginal parolees, parole offers a much better chance at successfully reintegrating back to the community rather than "straight release".

RECOMMENDATION

Recommendation 33. The Victorian Government should repeal Section 77C of the *Corrections Act 1986* (Vic) and adopt a new provision which provides that time spent on parole, before a parole order is cancelled, counts as time served.

Membership of the Parole Board

The Adult Parole Board is established under Section 61 of the *Corrections Act 1986* (Vic)[228] and consists of members appointed by the Government, including current and retired judicial officers, lawyers with at least 10 years' experience and community members. There are currently 32 members of the Adult Parole Board, including 15 community members.[229] The Board includes an Aboriginal Elder, although this is not required under the Act. Board panels normally comprise a presiding divisional chairperson, a community member and a full-time member.[230]

[…]

According to the 2019-2020 Annual Report of the Adult Parole Board, "the experience and background of the community members include:

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225 Sofronoff (2016), *Queensland Parole System Review: Final Report*, p300. Accessed at https://parolereview.premiers.qld.gov.au/assets/queensland-parole-system-review-final-report.pdf.
226 Australian Law Reform Commission (2019), *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples,* Recommendation 9(2).
227 VALS (2019*), Submission to Australian Law Reform Commission Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, p44. Available at https://www.alrc.gov.au/wp-content/uploads/2019/08/39._victorian_aboriginal_legal_service_vals.pdf.
Australian Law Reform Commission (2019), *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples,* Recommendation 9(2)
228 s. 61 of the *Corrections Act 1986* (Vic).
229 Adult Parole Board Victoria (2020). Annual Report: 2019-20, p. 13. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20Board%20Annual%20Report%202019-20.pdf.
230 Ibid.

- People who have been or have supported victims of crimes
- Retired police officers
- An Aboriginal Elder
- Mental health service provision
- Public administration
- Members of other decision-making Boards at tribunals, hospital administration, education and child protection."[231]

Whilst VALS acknowledges that.. the APB… includes one Aboriginal Elder, we believe that this position should be provided for in legislation. We also support additional representation from the Aboriginal community…

RECOMMENDATION

Recommendation 34. The Victorian Government should amend the *Corrections Act 1986* (Vic) to include a legislative requirement to have Aboriginal people on the Adult Parole Board… Membership of the Parole Boards must include people with professional backgrounds and with relevant lived experience.

Culturally Appropriate Rehabilitation Programs in Prisons

As noted above, incarcerated people are required to complete certain offending behaviour programs whilst in prison, in order to be eligible for parole. However, there is a shortage of programs, which means that there are long waiting lists for program participation, and in some cases, inability to access programs has prevented people in prison from applying for parole.[232] Similarly, there are long waiting lists for screening and assessment to determine program suitability and treatment needs.[233]

The Adult Parole Board Manual provides some discretion in granting parole where an individual has not completed the required programs. However this does not include situations where the program has not been completed because it is not available.[234]

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231 Adult Parole Board Victoria (2020). Annual Report: 2019-20, p. 13. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20Board%20Annual%20Report%202019-20.pdf.

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232 Victorian Ombudsman (2015), *Investigation into the rehabilitation and reintegration of prisoners in Victoria,* p30. Available at https://assets.ombudsman.vic.gov.au/assets/Reports/Parliamentary-Reports/1-PDF-Report-Files/Investigation-into-the-rehabilitation-and-reintegration-of-prisoners-in-Victoria.pdf?mtime=20191217123824

233 Ibid, p52.

234 Adult Parole Board Manual Section 4.7 - The Board would only consider paroling an incarcerated person that had been assessed as requiring treatment but has not done that treatment if there were significant factors to mitigate the risk to the community.

Aboriginal people are disproportionality affected by the requirement to complete offending behaviour programs for the following reasons:

- There are not enough culturally appropriate programs for incarcerated Aboriginal people.[235] This is an ongoing issue, but it is becoming even more accentuated due to restrictions on programs arising from the COVID-19 pandemic.[236]
- Incarcerated Aboriginal people are also more likely to serve shorter sentences,[237] which makes it harder to access pre-release programs because of long waiting times. Similarly, they are more likely to receive time-served sentences,[238] which means that they are not able to access programs as the entire sentence is served on remand.[239]

VALS has previously called for investment in culturally appropriate rehabilitation programs for incarcerated Aboriginal people.[240] This gap has also been identified by the Australian Law Reform Commission,[241] and by the Commonwealth Government in its *Prison to Work* Report in 2016.[242] Programs must be designed, developed and delivered by Aboriginal people, and supported by prison staff who are trained in cultural awareness.[243] Additionally, they must be trauma-informed, especially programs being delivered to Aboriginal women.[244]

RECOMMENDATIONS

Recommendation 35. The Victorian Government should amend the *Corrections Act 1986* (Vic) and the Adult Parole Board Manual, to provide that parole cannot be denied on the basis that a required program has not been completed, where this program is unavailable or unsuitable for Aboriginal people.

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[235] There are positive examples such as Dilly Bag, but overall the system is under strain. See also VO report, indicating 5 programs as at 2015. See p. 82. The Prison to Work Report also sets out

[236] Department of Justice and Community Safety, *Changes to coronavirus (COVID-19) restrictions: Factsheet for stakeholders*, 23 November 2020; Department of Justice and Community Safety, *Youth Justice coronavirus (COVID-19) update: Factsheet for stakeholders.*

[237] Australian Law Reform Commission (2018). Pathways to Justice – Inquiry into the Incarceration of Rate of Aboriginal and Torres Strait Islander Peoples (ALRC Report 133) at 9.16-9.2. Available at https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/.

[238] Sentencing Advisory Council (2020), *Time Served Prison Sentences in Victoria*. Available at https://www.sentencingcouncil.vic.gov.au/sites/default/files/2020-02/Time_Served_Prison_Sentences_in_Victoria.pdf.

[239] While there are some programs available for remandees, they are much more limited and delivery is inconsistent. See Victorian Ombudsman (2015), p50.

[240] VALS (2014), *Response from the Victorian Aboriginal Legal Service: Victorian Ombudsman Investigation into the rehabilitation and reintegration of prisoners in Victoria – Discussion Paper.* (

[241] Australian Law Reform Commission (2019), *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander People*, pp. 285-301.

[242] The Prison to Work report highlighted the importance of cultural competence in programs; coordination in the delivery of throughcare and post-release services; and the need for an increased focus on the delivery of programs to women in prison—with particular emphasis on Aboriginal and Torres Strait Islander women in prison.

[243] VALS (2019*), Submission to Australian Law Reform Commission Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, p37. Available at https://www.alrc.gov.au/wp-content/uploads/2019/08/39._victorian_aboriginal_legal_service_vals.pdf..

[244] Australian Law Reform Commission (2019), *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander People*, p. 297.

Recommendation 36. The Victorian Government should work with Aboriginal organisations to ensure that Aboriginal people who are incarcerated, particularly Aboriginal women and girls, have access to culturally safe rehabilitation programs. Funding must be given to Aboriginal organisations to design and deliver these programs.

Lack of Stable Accommodation for Parolees

Similar to bail, access to housing is a major factor preventing people from accessing parole. In 2019-2020, absence of suitable accommodation was one of the factors considered by the Board in 63% of cases in which parole was denied.[245] Aboriginal people are disproportionality impacted by housing issues, particularly homelessness, inadequate housing and overcrowding.[246]

Dedicated transitional housing for individuals exiting prison in Victoria – either on parole or at the end of their sentences – is woefully inadequate. According to an investigation by the Victorian Ombudsman in 2015, the transitional housing available through Corrections Victoria "would at best provide supported transitional housing for 1.7% of released prisoners."[247] In June 2019, over half of the prison population in Australia expected to be homeless when discharged from prison.[248] In 2019-2020, 51% of people exiting prison who accessed specialist homelessness services, accessed those services in Victoria.[249]

Transitional housing for Aboriginal people exiting prison in Victoria is even more limited. Through the Baggarrook program, VALS and Aboriginal Housing Victoria provide transitional housing and support for 6 Aboriginal women and their families.[250] A new facility is also being developed by Warrigunya Aboriginal and Torres Strait Islander Corporation in Gippsland, which will provide safe, affordable post-release housing for 12 Aboriginal men.[251] There are also several residential rehabilitation centres

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[245] Adult Parole Board Victoria (2020). Annual Report: 2019-20, p. 25. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20Board%20Annual%20Report%202019-20.pdf.. The Youth Parole Board has also indicated that housing remains an issue. See YPB Annual Report.

[246] Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2016—Report* (2016). Victorian Parliamentary Inquiry into Homelessness, p. 58.

[247] Victorian Ombudsman (2015), *Investigation into the rehabilitation and reintegration of prisoners in Victoria,* p107. Available at https://assets.ombudsman.vic.gov.au/assets/Reports/Parliamentary-Reports/1-PDF-Report-Files/Investigation-into-the-rehabilitation-and-reintegration-of-prisoners-in-Victoria.pdf?mtime=20191217123824p. 107.

[248] AIHW (2019), The Health of Australia's Prisoners 2018, p. 24.

[249] AIWH, Specialist Homelessness Services Annual Report.

[250] The Baggarrook program combines transitional housing and holistic support for Aboriginal women as they transition from prison. Housing is provided by Aboriginal Housing Victoria and holistic support is provided by VALS and allied organisations, as well as DHHS and Corrections Victoria. The program is funded by Corrections Victoria. See Baggarrook – Victorian Aboriginal Legal Service (vals.org.au)

[251] Warrigunya News, June 2021.

for Aboriginal people managing alcohol and/or drug dependencies,[252] however these are usually short-term and not specifically for people leaving prison.

As recommended by the Parliamentary Inquiry into Homelessness in March 2021, the Victorian Government must provide additional transitional housing for people leaving custodial settings.[253] VALS recommends further investment in Aboriginal controlled transitional housing and support, building on Baggarrook and the Wulgunggo Ngalu Learning Place, which provides residential support for Aboriginal men on Community Corrections Orders.

RECOMMENDATION

Recommendation 37. The Victorian Government must work with Aboriginal organisations to develop and provide culturally appropriate transitional housing and support for Aboriginal people exiting prison.

Natural Justice and Procedural Fairness

In both the adult and youth justice parole systems in Victoria, principles of procedural fairness and natural justice, as well as the *Charter of Human Rights and Responsibilities 2006*, do not apply to decisions of the parole boards.[254] This is not the case in jurisdictions such as NSW, QLD, ACT, UK, NZ, and Europe, where reforms have led to a more transparent and fair system in which individual rights derived from natural justice are provided for in legislation and/or regulations, and upheld in court.[255]

VALS strongly believes that there is a need for greater transparency, accountability and fairness in the parole process.[256] As VALS noted in its 2011 submission to the SAC review of the adult parole framework, people should be "afforded the same procedural fairness granted in criminal proceedings.

[252] Ngwala Willumbong Aboriginal Corporation runs the following Recovery Centres: Yitjawudik Men's Recovery Centre, Galiamble Men's Recovery Centre and Winja Ulupna Women's Recovery Centre. For young Aboriginal people, there is also Bunjilwarra (Koori Youth Alcohol and Drug Healing Service) and Baroona Youth Healing Centre. If an Aboriginal person is serving a Community Corrections Order after finishing their prison sentence, they may also be able to access Wulgunggo Ngalu Learning Place.

[253] Parliamentary Inquiry into Homelessness, Recommendation 22. Available at https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Homelessness_in_Victoria/Report/LCLSIC_59-06_Homelessness_in_Vic_Final_report.pdf.

[254] S. 69(2) of the Corrections Act 1986, s. 69(2); ; s. 449(2) of the *Children, Youth and Families Act 2005*; and Adult Parole Board (2020). Parole Manual: Adult Parole Board of Victoria, Section 3.3. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20%20Board%20-%20Parole%20Manual%202020.pdf.

[255] In 1988, "the European Court of Human Rights held that a refusal to grant parole is a deprivation of liberty and that, in England, natural justice is required for parole decisions." See Naylor, B. and Schmidt, J. (2010), Do Prisoners have a Right to Fairness before the Parole Board? 32 Sydney Law Review 437-469, p. 455.

[256] See VALS Submission to Review of the Adult Parole Board, VALS submission to ALRC Inquiry?

In both proceedings, decisions impacting on an individual's rights to liberty are at stake and therefore compel the employment of procedural fairness."[257]

Incorporating procedural fairness into the *Corrections Act* 1986 (Vic) and the new Youth Justice Act will increase community and incarcerated people's confidence in the parole process, increase incarcerated people's acceptance of parole board decisions, encourage positive behaviour by them and lead to better outcomes for incarcerated Aboriginal people.

Without procedural fairness and natural justice, there is also an increased risk of discriminatory practices that could impact on Aboriginal people, people with disabilities, and people with other characteristics that increase their vulnerability to discriminatory practices. Safeguards are critical to protect against systemic and institutional racism, including racialised understandings of risk.

Procedural Fairness

Procedural fairness is a core component of administrative law and includes:

- the right to be informed of and understand the case against you;
- the right to be heard and respond to the case against you;
- the right to have a decision affecting you made without bias;
- the right to be informed of and understand a decision in a case against you; and
- the right to appeal a decision in a case against you.

These principles ensure that decisions affecting the rights, interests or legitimate expectations of individuals are fair, transparent and equitable. The Victorian Human Rights Charter enshrines these principles as they relate to criminal proceedings.[258]

The Parole Decision-Making Process

The parole process is set out in the Manuals for the Adult Parole Board and the Youth Parole Board, but it is not enshrined in legislation. In both jurisdictions, the overarching purpose of parole is to promote public safety by supervising and supporting the transition of people from custody back into the community in a way that seeks to minimise their risk of reoffending, in terms of both frequency and seriousness, while on parole and after they complete their sentence.[259] In the youth justice system, the purpose of parole also includes support for the young person's continued rehabilitation.[260]

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[257] VALS (2011). Review of Victoria's Adult Parole Framework – Submission to the Sentencing Advisory Council.
[258] ss. 24-25 of the *Charter of Human Rights and Responsibilities 2006*.
[259] Adult Parole Board (2020). Parole Manual: Adult Parole Board of Victoria, p. 7. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20%20Board%20-%20Parole%20Manual%202020.pdf. Youth Parole Board (2020). Annual Report 2019-2020, p. 15. Available at https://files.justice.vic.gov.au/2021-06/YPB_Annual_Report_2020_0.pdf.
[260] Youth Parole Board (2020). Annual Report 2019-2020, p. 15. Available at https://files.justice.vic.gov.au/2021-06/YPB_Annual_Report_2020_0.pdf.

In the adult parole system, the parole decision making process includes both an application phase and a decision-making phase:

- Parole application: incarcerated people must apply for parole 12 months prior to their earliest eligibility date. Following the application, Corrections Victoria prepares a report which is considered by the APB, along with the incarcerated person's application. The APB can either deny or defer the application, or request a Parole Suitability Assessment.
- Parole decision: the APB considers the Parole Suitability Assessment Report and the incarcerated person's parole application. They may also interview them, although this is the exception rather than the rule,[261] and will take into account any victims' statements. The paramount consideration in deciding whether or not to grant parole is safety and protection of the community.[262] The APB Manual and Annual Report sets out a non-exhaustive list of factors that are also considered.[263] A two-tiered decision-making process exists for 'Serious Violent Offenders or Sexual Offenders'.[264]

In the youth justice system, the YPB is established under the CYFA, but the process for granting parole and any guidance on how the YPB exercises its discretion is not provided for in the public domain, other than a brief overview in the YPB Annual Reports. VALS is of the view it is critical that the new Youth Justice Act include more detailed provisions relating to youth parole.

Currently, parole for young people is automatically considered by the Youth Parole Board, which has discretion to grant parole at any time (subject to limited exceptions).[265] In practice, the YPB will set a review date part way through the young person's sentence. At the review, the YPB receives a report from the manager of the youth justice centre setting out how the young person has been going during their sentence and a recommendation on whether they should be granted parole.[266]

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[261] Adult Parole Board (2020). Parole Manual: Adult Parole Board of Victoria, Section 5.3. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20%20Board%20-%20Parole%20Manual%202020.pdf.

[262] s. 73A of the *Corrections Act 1986*.

[263] The factors include: the sentence imposed by the court including any comments by the court about parole and rehabilitation; psychiatric or psychological reports available to the court when it imposed the sentence; victim impact statements provided to the sentencing court; the nature and circumstances of the offence for which the incarcerated person is serving a sentence; the incarcerated person's criminal history, including performance on past parole orders or community-based orders' a submission received from a victim of the prisoner; the outcome of formal risk assessments conducted for the incarcerated person; whether the incarcerated person has undertaken treatment or programs and, if so, formal reports of their performance; psychiatric or psychological reports requested by the Board; whether proposed accommodation is suitable and stable; the incarcerated person's behaviour in prison, including outcomes of random drug tests.

[264] Adult Parole Board Victoria (2020). Annual Report: 2019-20. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20Board%20Annual%20Report%202019-20.pdf..

[265] CYFA. Exceptions are: where a young person has been sentenced to a term of imprisonment of over 12 months or with a non-parole period by a higher court and has subsequently been transferred to a youth justice centre, or; where a young person is subject to a mandatory minimum youth justice centre order imposed by a higher court for an assault against an emergency or custodial worker. In both cases, the Board must not release the young person on parole before the expiry of the relevant period or term. There are also some other very limited circumstances in which the Board's discretion to grant or cancel parole is curtailed in the context of terrorism-related offending.

[266] See Parole in the youth justice system | Department of Justice and Community Safety Victoria.

Furthermore, the YPB Annual Report indicates that in carrying out its functions, the Board:

- interviews young people in detention either at the request of centre management, a young person, or on the Board's own initiative;
- receives and considers case histories, summaries of offences, outcomes of risk assessments using validated tools and reports on young people's progress in custody and on parole to assist in their decision-making;
- requests and considers special reports and court documents, for example, court transcripts, victim impact statements, school reports, police summaries, psychiatric and psychological reports;
- hears from victims and/or their families;
- may warn a young person who is demonstrating non-compliance or problematic behaviour in a Youth Justice Centre that their behaviour is delaying or even jeopardising their prospects of being granted parole.[267]

The YPB Annual Report sets out a range of factors that are considered by the Board when making decisions concerning parole.[268]

The Right to be Informed of and Understand the Case Against You

In both the adult and youth justice parole systems, individuals do not have the right to view or receive copies of reports submitted about them to the APB/YPB. This includes reports from Corrections and Youth Justice officers, as well as other reports that may be considered by the APB when deciding whether to request a Parole Suitability Assessment and whether to grant parole. Additionally, information provided to the APB through interviews with prison staff is not shared with the incarcerated person.

[267] Youth Parole Board (2020). Annual Report 2019-2020, p. 16. Available at https://files.justice.vic.gov.au/2021-06/YPB_Annual_Report_2020_0.pdf

[268] The factors considered by the Board in making its decisions include: the young person's age and interests; the nature and circumstances of the offence; the young person's criminal history, outstanding charges, and compliance with any previous community-based orders; comments by the sentencing court; interests of or risk to the community; capacity for parole to assist rehabilitation; family and community support networks; reports, assessments and recommendations made by medical practitioners, psychologists and psychiatrists, custodial staff, parole officers and support agencies; submissions from the young person, their family and friends; and from victims and police informants.

In contrast, the parole systems in NSW, ACT,[269] QLD,[270] NZ,[271] UK[272] and Canada[273] provide for an incarcerated person to access all information that is being considered by the relevant parole authorities, subject to safety and security considerations. For example, in the ACT, the parole decision-making process includes an initial inquiry, following by a hearing if the parole authority decides not to grant parole at the inquiry stage.[274] The incarcerated person is given written notice of the hearing and is provided with copies of any report or other document that will be considered by the Board in deciding whether or not to grant parole.[275] The incarcerated person is invited to make a submission or appear at the hearing.[276]

VALS strongly recommends that Victoria follows the approach taken in these jurisdictions and creates a statutory right to access all information used by the Board to make a decision regarding parole, subject to limited exceptions. Relevant documents must be provided in a timely manner, so that incarcerated people have adequate time to consider the material and respond. Transparency in the parole decision-making process will increase incarcerated people's confidence in the parole process and acceptance of decisions by the Parole Boards.

The Right to be Heard and Respond to the Case Against You

The APB regularly interviews incarcerated people as part of the parole decision making process, but there is no right to appear in person before the APB. Even if the Board does interview the incarcerated person, the individual is not in a position to respond fully to the case against them if they have not previously been provided with all relevant documents and given appropriate time and support to prepare for the interview. Moreover, legal representatives do not have standing before the Parole board, and VALS is not funded to provide advice and support to people in prison regarding their parole applications.

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[269] *Crimes (Sentence Administration) Act 2005* (ACT) s 127.

[270] The Parole Board first forms a preliminary view. If the Board forms the view that parole should not be granted, the Board informs the incarcerated person in writing and discloses all relevant information and materials to the incarcerated person. The incarcerated person then has 14 days to submit additional information or make further submissions, before the Board reconsiders the application. See *Parole Board Queensland: Parole Board Manual* (2019), p. 16.

[271] *Parole Act 2002* (NZ) s 13. The Board must take all reasonable steps to ensure that the information received by the Board on which it will make any decision relating to an offender is made available to the offender—(a) at least 5 working days before the relevant hearing; or (b) if that is not possible, as soon as practicable before the hearing.

[272] Incarcerated people in the UK receive a dossier containing the documents going to the parole board. There is provision for withholding information if disclosure would adversely affect: (i) national security; (ii) the prevention of disorder or crime; or (iii) the health or welfare of the incarcerated person or any other person. Withholding of the information must be necessary and proportionate in the circumstances. See Parole Board Rules 2019, Rules 16-17

[273] *Corrections and Conditional Release Act*, SC 1992, c 20, s 141. At least fifteen days before the day set for the review of the case of an offender, the Board shall provide or cause to be provided to the offender, in writing, in whichever of the two official languages of Canada is requested by the offender, the information that is to be considered in the review of the case or a summary of that information.

[274] Crimes (Sentence Administration) Act 2005, (ACT) ss. 125-127.

[275] Crimes (Sentence Administration) Act 2005, (ACT) s. 127(3)(b).

[276] Crimes (Sentence Administration) Act 2005, (ACT), s. 127(2)(c).

In the Youth Justice parole system, the young person attends an interview on the day they are being released on parole, but they do not appear in person before the Board as part of the decision-making process.[277] They do not have a right to legal assistance or representation as part of the parole process.

The right to appear before the parole authority has been incorporated into other jurisdictions, both in Australia and abroad.[278] This means that incarcerated people are able to address any inaccuracies in the documents being considered by the parole authority. For this right to be effective however, it is critical that incarcerated people are able to access relevant support in preparing their submissions and have the right to be represented by a lawyer. This is the case in the ACT,[279] South Australia[280] and Canada,[281] which provide for a statutory right to legal representation at parole hearings. In NZ, incarcerated people are entitled to be represented by a lawyer, with leave of the board,[282] and in NSW, incarcerated people can access legal representation through Legal Aid and NSW ALS, although they do not have a statutory right.

As stated previously, VALS believes that "the right to appear before the board is central to the notion of positive engagement whereby the prisoner is involved in the decision-making process and is therefore more likely to help arrive at an informed and well-tailored plan for conditional release, or alternatively be more accepting of the decision of the Board if they decide not to grant parole."[283]

Given recent reports by IBAC and the Victorian Ombudsman – relating to serious misconduct by prison staff and challenges with the disciplinary process – we also believe that it is critical that incarcerated people in Victoria have the opportunity to test the accuracy of information before the Board. High illiteracy rates amongst incarcerated people[284] mean that access to legal assistance and representation is essential to ensure that incarcerated people are able to participate fully in this process.

The Right to be Informed of and Understand a Decision in a Case Against You

The right to be informed of and understand the parole decision requires both transparency in the criteria on which a decision is made, as well as the right to receive detailed reasons for the decision by the parole authority.

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[277] Youth Parole Board (2020). Annual Report 2019-2020, p. 18. Available at https://files.justice.vic.gov.au/2021-06/YPB_Annual_Report_2020_0.pdf

[278] s. 209 of the *Crimes (Sentence Administration) Act 2005* (ACT); s. 140 of the *Crimes (Administration of Sentences) Act 1999* (NSW), although limited to review hearings (s. 137C(2)); s. 77(2)(c) of the *Correctional Services Act 1982* (SA); s. 189 of the *Corrective Services Act 2006* (Qld)(if leave is granted);s.72(2) of the *Corrections Act 1997* (Tas) (if leave is granted).

[279] s. 209(a) of the *Crimes (Sentence Administration) Act 2005* (ACT).

[280] *Correctional Services Act 1982* (SA) s 77(3).

[281] *Corrections and Conditional Release Act*, SC 1992, c 20, s 140(7)–(9).

[282] *Parole Act 2002* (NZ) s 49(3).

[283] VALS (2011), *Review of Victoria's Adult Parole Framework: Submission to the Sentencing Advisory Council,* p10. Available at https://balitngulu.org.au/assets/2015/06/Review-of-Victoria's-Adult-Parole-System.pdf.

[284] Kendall & Hopkins (2019), 'Inside out literacies: literacy learning with a peer-led prison reading scheme', *International Journal of Bias, Identity and Diversities in Education*.

As noted above, the purpose of parole and the criteria that guide the decision-making process of the APB and the YPB in Victoria are now publicly available.[285] In the adult system, the paramount consideration in deciding whether or not to grant parole is the safety and protection of the community.[286] Other factors take into consideration by the Board include: formal risk assessments; criminal history; performance on other supervised sentencing orders served in the community; behaviour in prison; ability to address factors underlying offending behaviour; victims' submissions; and accommodation and release planning.[287]

In deciding whether to grant a youth parole order, the YPB considers the following factors in making a decision: the interests of, or risk to the community; the interests of the young person; comments by the sentencing court; the age of the young person; the capacity for parole to assist the young person's rehabilitation; the nature and circumstances of the offences; outstanding charges or pending court appearances; the young person's criminal history; previous community-based dispositions and compliance; risk assessments using validated tools; family and community support networks; access to appropriate and stable accommodation; reports from psychologists, psychiatrists, teachers, medical practitioners and other professionals; submissions made by victims and police informants; and submissions made by the young person, the young person's family, friends and potential employers. [288]

Although there is now further clarity in what guides the exercise of discretion by the Boards, such criteria should be legislated, as is the case in NSW[289] and ACT.[290] As in Canada, the legislated criteria in Victoria should include a requirement to consider how the release of the person will contribute to the protection of society by facilitating the reintegration of the person who has offended into society.[291] Legislating the criteria to be considered by the parole boards in their decision-making, and having flexible and individualised responses are not mutually exclusive.

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[285] Adult Parole Board (2020). Parole Manual: Adult Parole Board of Victoria, Sections 3.1 and 5.3. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20%20Board%20-%20Parole%20Manual%202020.pdf; Adult Parole Board Victoria (2020). Annual Report: 2019-20, pp. 20-21. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20Board%20Annual%20Report%202019-20.pdf.. The purpose of parole is to promote public safety by supervising and supporting the transition of offenders from prison back into the community in a way that seeks to minimise their risk of reoffending, in terms of both frequency and seriousness, while on parole and after they complete their sentence. The Board must treat the safety and protection of the community as its paramount consideration.

[286] s. 73A of the *Corrections Act 1986*.

[287] Adult Parole Board (2020). Parole Manual: Adult Parole Board of Victoria, Section 5.3. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20%20Board%20-%20Parole%20Manual%202020.pdf.

[288] Youth Parole Board (2020). Annual Report 2019-2020, pp. 15 and 18. Available at https://files.justice.vic.gov.au/2021-06/YPB_Annual_Report_2020_0.pdf

[289] s. 135 of the *Crimes (Administration of Sentences) Act 1999* (NSW).

[290] s. 120 of the *Crimes (Sentence Administration) Act 2005* (ACT).

[291] Canadian legislation provides the following criteria for granting parole: (a) "the offender will not, by reoffending, present an undue risk to society before the expiration according to law of the sentence the offender is serving; and (b) the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen." See c. 20, s. 102 of the *Corrections and Conditional Release Act*, SC 1992.

If parole is refused, individuals do not receive detailed reasons for the decision reached by the respective parole boards and decisions cannot be accessed through Freedom of Information requests.[292] As noted above, in the youth justice parole system, the young person does not appear at their parole review. The YPB makes a decision based on a report from the manager of the Youth Justice Centre, which includes a recommendation on whether the young person should be released on parole. If parole is not granted, the young person is not informed of the reasons for the decision.

In line with other jurisdictions,[293] Victoria should provide a statutory right for individuals to receive written reasons for the decision when parole is refused, including any matters that may assist the incarcerated person in further parole applications. We believe that providing detailed reasons setting out why parole was refused will increase confidence in the parole system, as well as understanding and acceptance of parole decisions.

The Right to Appeal a Decision in a Case Against You

The right to appeal a parole decision is fundamental for procedural fairness and must include review by a body that is independent to the body that made the original decision. In Victoria, the adult parole system currently provides for internal review by the APB, as well as judicial review by the Supreme Court in limited circumstances.[294] The APB Manual provides that incarcerated people can request an internal review of a board decision, and "if the Board determines that there is a proper basis for the review, it may review the original decision."[295] No further information is provided regarding the grounds for review or what will guide the decision of the Board in granting or refusing the request. Decisions of the APB are explicitly excluded from the jurisdiction of the Victorian Ombudsman.[296]

The right to appeal a parole decision in certain circumstances is provided for in the UK,[297] NZ[298] and Canada.[299] In NSW and WA, the person in prison can request the parole authority to review its decision.[300] This is similar to Victoria, but the right to review in NSW and WA is provided for in

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[292] The *Freedom of Information Act 1982* does not apply to the Adult Parole Board as it is not a 'prescribed authority' as defined in section 5 of the *Freedom of Information Act 1982*.
[293] *Crimes (Sentence Administration) Act 2005* (ACT) s.126(2B); *Corrective Services Act 2006* (Qld) s 193(5)(a); *Correctional Services Act 1982* (SA) s 67(9)(b); *Corrections Act 1997* (Tas) s 72(8); *Corrections and Conditional Release Act*, SC 1992, c 20, ss 143–144; *Parole Act 2002* (NZ) s 67; Parole Board Rules, rules 19(8), 21(12), 25(6) and 28(10); cited in Naylor,
[294] Currently, judicial review of a decision of the Adult Parole Board by the Supreme Court of Victoria is available on the grounds of jurisdictional error.
[295] Adult Parole Board (2020). Parole Manual: Adult Parole Board of Victoria, Section 3.3.2. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20%20Board%20-%20Parole%20Manual%202020.pdf.
[296] *Corrections Act 1986* (Vic).
[297] Individuals can request review of parole board decisions made since 2019, if parole was not review correctly, or the decision was unreasonable. The Parole Board will decide if the decision needs to be reconsidered, and if there needs to be a new hearing. If the Parole Board refuses to reconsider the decision, the individual can apply for judicial review.
[298] *Parole Act 2002* (NZ) ss 67–68.
[299] *Corrections and Conditional Release Act*, SC 1992, c 20, s 157.
[300] *Crimes (Administration of Sentences) Act 1999* (NSW) s 139; *Sentence Administration Act 2003* (WA) s 115A. In WA, the grounds for review are that the person who made the decision: (a) did not comply with the Act or regulations; or (b) made an error of law; or (c) used incorrect or irrelevant information or was not provided with relevant information.

legislation. Similar to other aspects of procedural fairness, VALS strongly recommends that the right to appeal to an independent body should be enshrined in legislation.

RECOMMENDATIONS

Recommendation 38. The Victorian Government must repeal regulation 5 of the *Charter of Human Rights and Responsibility (Public Authorities) Regulation 2013* (Vic), which exempts the Adult Parole Board from the operation of the Charter.

Recommendation 39. The Victorian Government must repeal section 69(2) of the *Corrections Act 1986* (Vic), which provides that the Adult Parole Board is not bound by the rules of natural justice.

Recommendation 40. The Victorian Government should amend the *Corrections Act 1986* to include the purpose of parole and the criteria on which parole decisions are made. The legislated purpose of parole should highlight that the release of the individual on parole will contribute to the protection of society by facilitating their rehabilitation and reintegration into society.

Recommendation 41. The Victorian Government must amend the *Corrections Act 1986* to provide for the following rights of incarcerated people in relation to any decisions made by the Adult Parole Board regarding parole:

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

Recommendation 42. The Victorian Government should provide funding to VALS to provide legal assistance, support and representation to Aboriginal people who are applying for parole.

Parole Conditions and Supervision: Setting People up to Fail

In addition to challenges in accessing parole, Aboriginal people face challenges in meeting parole conditions, which are often culturally inappropriate, excessive and inflexible. Furthermore, Corrections Victoria takes a rigid and punitive approach, which has a disproportionate impact on Aboriginal people.

Both youth and adult parole orders contain mandatory conditions,[301] including a requirement not to break the law and reporting conditions.[302] Additionally, the APB/YPB may also impose special conditions such as a requirement not to consume alcohol, to not contact specified persons or attend a specified place.[303] Similar to bail conditions, and conditions attached to a Community Corrections Order, parole conditions can often be culturally inappropriate, for example, requiring someone not to contact a specific person when they may have cultural obligations in relation that person.

Supervision of parole by Corrections Victoria is often punitive and rigid, and carried out by parole officers who have not undertaken cultural awareness training. Whilst there are some Aboriginal parole officers, there is no program whereby Aboriginal people on parole can access an Aboriginal parole officer. In VALS' experience, the rigid and inflexible approach taken by parole officers does not work for Aboriginal people and there is a high risk of breaching parole, resulting in cancellation of their parole, as well as an additional prison sentence (up to 3 months) on top of their original sentence and/or 30 penalty units.[304]

In 2019-2020, 19% of adults on parole had their parole cancelled.[305] Non-compliance with parole conditions - including breaches of conditions, loss of contact with CCS or unacceptable absences for scheduled appointments - was a factor in 73% of cancellations.[306] In the same time period, the Youth Parole Board issued 160 parole orders, 40 warnings and 83 parole cancellations.[307]

In other jurisdictions, including Queensland, the Parole Board is specifically directed to take into account cultural considerations when considering both parole applications and parole cancellations.[308] A similar approach should be taken in Victoria, including through guidance in the Parole Board Manuals, as well as a legislative requirement under the *Corrections Act 1986* and the new Youth Justice Act.

Changes must also be made to parole supervision, to ensure that Aboriginal people are not set up to fail, and to support rehabilitation and reintegration of parolees. The section below on transition support sets out additional recommendations for Aboriginal people leaving prison, including on parole and at the end of their sentence.

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301 s. 458(4) of the *Children, Youth and Families Act 2005*.
302 Adult Parole Board (2020). Parole Manual: Adult Parole Board of Victoria, Section 5.6.1. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20%20Board%20-%20Parole%20Manual%202020.pdf
303 Adult Parole Board (2020). Parole Manual: Adult Parole Board of Victoria, Section 5.6.2. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20%20Board%20-%20Parole%20Manual%202020.pdf
304 S. 78A of the *Corrections Act 1986*.
305 Adult Parole Board Victoria (2020). Annual Report: 2019-20, p. 26. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20Board%20Annual%20Report%202019-20.pdf..
306 Ibid., , p. 26.
307 Youth Parole Board (2020). Annual Report 2019-2020, pp. 23, 25 and 26. Available at https://files.justice.vic.gov.au/2021-06/YPB_Annual_Report_2020_0.pdf
308 See Queensland Parole Manual.

RECOMMENDATION

Recommendation 43. The Victorian Government should amend the *Corrections Act 1986* (Vic) so that the Adult Parole Board is required to take into account cultural considerations when making decisions on parole applications, suspension and cancellation of parole for Aboriginal people. The Adult Parole Board Manual should be amended to provide guidance to the Adult Parole Board on complying with this requirement. All parole officers should be required to undertake mandatory and ongoing cultural awareness training.

Rehabilitation Programs

An important part of reducing the risk of reoffending for people in prison is ensuring that adequate rehabilitation and reintegration programs are available. This includes, for Aboriginal people, access to culturally safe programs which support connection to culture, a protective factor against reoffending.[309]

VALS has observed a concerning lack of programs available for Aboriginal people in prison, contributing to disconnection from community and culture, in the past eighteen months. This is partly attributable to the effects of COVID-19 restrictions, which have limited in-person visits to prisons and consequently impacted face-to-face programs. Restrictions in the wider community have also had flow-on impacts for rehabilitation services – supplies for art programs, for example, have been disrupted, as have programs delivered in partnership with outside organisations that are heavily affected by the pandemic. The introduction of some restrictions is an important safety measure, but, as detailed further below, VALS is of the view that restrictions in prisons have gone beyond what is necessary to protect the health of people in prison, as demonstrated by their frequent lack of alignment with restrictions in place in the community. Prisons should be very hesitant about disrupting access to rehabilitative programming, especially for Aboriginal people. Furthermore, decisions to suspend any programs should not be taken unless truly necessary and suspended programs should be restored at the first opportunity.[310] In the interim, it is critical that detained people are not penalised – for example, in parole applications or treatment by prison authorities – for failing to participate in or complete programs when they are not being run.

Further shortcomings in the programs offered by Victorian prisons continue to exist that predate the current COVID-19 pandemic. Services for Aboriginal people (particularly Aboriginal women) are rarely able to meet demand because of insufficient funding to the ACCOs that provide these services. People

[309] Edwige & Gray (2021), *Significance of Culture to Wellbeing, Healing and Rehabilitation*. Available at https://www.publicdefenders.nsw.gov.au/Documents/significance-of-culture-2021.pdf.
[310] VALS (2021), *Building Back Better: Victorian Aboriginal Legal Service COVID-19 Recovery Plan*, p83. Available at https://www.vals.org.au/wp-content/uploads/2021/02/Building-Back-Better-Victorian-Aboriginal-Legal-Service-COVID-19-Recovery-Plan-February-2021-FOR-DISTRIBUTION.pdf.

on remand typically have no access to rehabilitation programs, an issue which has become even more serious as the remand population has grown and the amount of time people spend on remand has steadily increased.

The Victorian Government has formally recognised the inadequacy of rehabilitation offerings for Aboriginal people in prison before the Supreme Court. Perversely, however, this admission was used to argue for harsher sentences on the basis that, since the Government is not properly resourcing rehabilitation, community safety could only be protected by a longer prison term. VALS was satisfied to see this argument, which was tendered in a case involving one of our clients who had been convicted of serious charges, rejected by the court.[311] Nonetheless, it reflects a concerning attitude on the part of the Government. Rehabilitation programs should not be an afterthought for the Government, and the absence of such programs cannot be compensated for by longer sentences, which are unlikely, in and of themselves, to have any beneficial impact in reducing reoffending.[312]

VALS firmly believes that rehabilitation programs should operate on voluntary principles. Attempts to rehabilitate people are unlikely to be successful when they are premised upon a carceral logic that threatens people with punishment – such as being returned to court in formal breach of a community corrections order – for not meeting the requirements of a program. There needs to be recognition of the complex needs of people who have committed offences and of the fact that rehabilitation cannot be forced. This is particularly true for Aboriginal people, and rehabilitative programs which are focused on encouraging reconnection to culture; meaningful engagement with culture and community can only come voluntarily, not from activities undertaken under the threat of a formal breach of a community corrections order. It must also be recognised that disengagement from a program should be met with greater support to facilitate reengagement – a punitive approach simply will not enable rehabilitative objectives to be met.

An important model is Wulgunggo Ngalu Learning Place, a residential program for Aboriginal men on Community Corrections Orders.[313] Participation in Wulgunggo Ngalu is voluntary and participants are able to voluntarily 'discharge' themselves at any time. Rather than trying to compel participation, the program aims to facilitate it by removing barriers which, in other contexts, prevent Aboriginal people completing programs. This is reflected in the attitudes of participants, who feel they have a better chance of completing the terms of their CCOs at Wulgunggo Ngalu than other programs, according to a formal evaluation of the initiative.[314] Involuntary rehabilitation has very limited prospects of successfully integrating people into society or establishing meaningful connections with culture, and

[311] DPP v Herrman, https://www.supremecourt.vic.gov.au/case-summaries/judgment-summaries/director-of-public-prosecutions-v-codey-herrmann

[312] Centre for Innovative Justice (2021), *Leaving custody behind: Foundations for safer communities & gender-informed criminal justice systems*, p86. Available at https://cij.org.au/cms/wp-content/uploads/2021/09/leaving-custody-behind-issues-paper-july-2021-.pdf.

[313] Corrections Victoria (2015), Wulgunggo Ngalu Learning Place leaflet. Available at https://files.corrections.vic.gov.au/2021-06/wulgunggodl2015_acc.pdf.

[314] Clear Horizon (2013), *Wulgunggo Ngalu Learning Place: Final Evaluation Report*, p25. Available at https://files.corrections.vic.gov.au/2021-06/wnlp_evaluationfinal.pdf.

so its value is very low. The focus of the Victorian Government needs to be on programming which attracts willing participants and creates environments where they are empowered to complete their rehabilitation voluntarily. This principle extends to drug and alcohol rehabilitation, which is a medical treatment that should always be provided on the basis of informed consent, not made mandatory.[315]

Positive models for rehabilitation and reintegration are too often kept at a very small scale and not made accessible to enough people in prison, particularly Aboriginal people. Despite supportive feedback and research evaluations, Wulgunggo Ngalu remains a small-scale project. Corrections Victoria should establish similar programs that are accessible for the many Aboriginal people who cannot access Wulgunggo Ngalu, including women, people not assessed as suitable for CCOs, and people who cannot take a residential placement in Gippsland away from their family and community. Similarly, the Judy Lazarus Transition Centre – a pre-release centre for people in the last months of a custodial sentence appears to have a strong track record in reducing reoffending rates.[316] However, its small capacity limits the benefits it delivers, and tight restrictions on who can be admitted – including a security assessment – exclude too many Aboriginal people from being able to access this specialised support. There is also no equivalent centre for women, neglecting a population who are highly capable of reintegration if given adequate support, as discussed further below.

RECOMMENDATIONS

Recommendation 44. Rehabilitation programs, both in prisons and for people transitioning out of prison or diverted from prison, should be run on a voluntary basis, not penalising or threatening people for breaching behavioural requirements.

Recommendation 45. Funding for rehabilitation in prisons, including culturally safe rehabilitation support provided by Aboriginal organisations, should be significantly increased.

Recommendation 46. Rehabilitation services should be available to people held in prison on remand.

[315] Harm Reduction International (2010), *Human Rights and Drug Policy: Compulsory Drug Treatment*. Available at https://www.hri.global/files/2010/11/01/IHRA_BriefingNew_4.pdf.

[316] Victorian Ombudsman (2015), *Investigation into the rehabilitation and reintegration of prisoners in Victoria,* p102. Available at https://assets.ombudsman.vic.gov.au/assets/Reports/Parliamentary-Reports/1-PDF-Report-Files/Investigation-into-the-rehabilitation-and-reintegration-of-prisoners-in-Victoria.pdf?mtime=20191217123824.

Conditions in Custody

Conditions in prisons and other places of custody are critical to reducing reoffending rates. Contrary to a simplistic deterrence-based view of the causes of offending, harsh conditions in custody can increase the risk of reoffending for many people held in prisons.

Prison can be a deeply traumatising experience, and these harms are particularly acute for people already marginalised or living with a history of trauma, such as Aboriginal people, those living disability or mental illness and victim-survivors of family violence. Inducing this kind of trauma directly conflicts with the therapeutic approach to rehabilitation and social integration which is needed to address the underlying causes of offending for most people held in Victorian prisons. International evidence has shown that, because of this traumatising effect and the lost opportunity for productive rehabilitation that results, harsher prison conditions tend to raise reoffending rates.[317] Prison conditions are also the focus of international rights obligations and minimum standards, including the Mandela Rules and the Optional Protocol to the Convention Against Torture.[318]

Victoria's prison system has become characterised by poor administration and deteriorating conditions, as the imprisoned population has increased. In 2020-21, one prison guard every week was suspended for reasons including the excessive use of force, smuggling of contraband and sexual harassment.[319] An IBAC inquiry into the corrections system found widespread corruption risks and "problematic workplace cultures", manifesting themselves in misconduct including the inappropriate use of force – including against people with disabilities – and in the lack of real accountability for that misconduct.[320]

Addressing these seriously concerning conditions in custody is essential to upholding human rights and reducing rates of reoffending. A number of specific issues with prison conditions are identified in this subsection, with recommendations to address them. More generally, fuller safeguards against the emergence of systemic problems in prison workplace culture and inhumane conditions are urgently needed. These should include an effective, independent complaints system which people in prison feel genuinely able to access, and which must be culturally safe for Aboriginal people in prison. A functioning complaints and investigation system is an important check on deterioration of prison conditions.[321] It is also crucial that all prison staff are given training to develop their capacity for

[317] Ritchie, Sentencing Advisory Council (2011), *Does Imprisonment Deter? A Review of the Evidence*, p. 49; Cullen et al (2011), 'Prisons Do Not Reduce Recidivism', *The Prison Journal*, p. 58; and Chen & Shapiro (2007), 'Do Harsher Prison Conditions Reduce Recidivism?', *American Law & Economics Review*, p. 22. Accessed at https://www.anderson.ucla.edu/faculty/keith.chen/papers/Final_ALER07.pdf.
[318] United Nations System (2021), *Common Position on Incarceration*.
[319] David Southwick MP, 20 July 2021, 'One prison guard a week suspended in Andrews' chaotic corrections system
[320] IBAC (2021), *Special report on corrections*, https://www.ibac.vic.gov.au/publications-and-resources/article/special-report-on-corrections.
[321] Tomczak & McAllister (2021), 'Prisoner death investigations: a means for safety in prisons and societies', *Journal of Social Welfare and Family Law*.

trauma-informed approaches to working with incarcerated people, and to improve their cultural competency towards Aboriginal people held in Victorian prisons.

RECOMMENDATIONS

Recommendation 47. Prison complaints, including complaints against private prisons and contractors, should be handled by an appropriately resourced independent oversight body with sufficient powers to refer matters for criminal investigation.

Recommendation 48. All prison staff should receive extensive training, that is developed and delivered in collaboration with ACCOs, on trauma-informed care, anti-racism, and the specific needs of vulnerable groups including Aboriginal people and women.

COVID-19, Isolation and Prison Lockdowns

VALS has consistently advised that the use of quarantine, isolation and lockdowns as preventative measures in Victorian prisons needs urgent reform. Recommendations reflecting our sentiments concerning such issues have been made to the Public Accounts and Estimates Committee, in our COVID-19 Recovery Plan, and routinely in consultation with Government.

These recommendations have not been acted upon. Victoria's repeated lockdowns highlight that the preventative measures implemented in prisons during the COVID-19 pandemic have continued even after the most severe period of community transmission and restrictions have passed. Prisons continue to be subject to severe limitations, including bans on all visits at the smallest indication of community transmission and the ongoing use of Protective Quarantine (**PQ**) during periods without community transmission.

Solitary confinement has a particularly detrimental impact on Aboriginal people, with the Royal Commission into Aboriginal Deaths in Custody noting that it is "undesirable in the highest degree that an Aboriginal person in prison should be placed in segregation or isolated detention."[322] There is a very serious risk that the use of Protective and Transfer Quarantine (**TQ**) in prisons to limit the spread of COVID-19 can amount to solitary confinement, if these regimes are not implemented with the utmost care and accompanied extensive safeguards for the wellbeing of detained people. Examples VALS is aware of include people being permitted only 12 minutes out of their cell per day, with no opportunity to exercise.

[322] Human Rights Law Centre et al. (2021), *Joint open letter on ongoing and arbitrary use of 14 day quarantine in prisons*. Available at https://www.hrlc.org.au/s/Open-letter-29-March-2021.pdf.

Government practice in Victoria has not heeded the advice found in guidelines from the World Health Organization and Communicable Diseases Network Australia.[323] Over more than fifteen months since the introduction of Protective Quarantine, during which the restrictions in place in the community have varied substantially, the 14-day requirement has remained static. In early 2021, the protective quarantine requirement remained unchanged during a period of nearly three months without any cases of COVID-19 in the community. Plainly, in this period, the risk that a newly-detained person would bring COVID-19 from the general Victorian community into the prison population was almost non-existent. VALS is of the view that a 14-day quarantine is self-evidently not the least restrictive available measure in such circumstances, as opposed to isolation while awaiting test results or for a defined shorter period. We have previously noted that a different, commendable approach has been adopted in youth detention settings, where newly admitted children are isolated only while awaiting a negative test result.[324] There is no reason why this approach could not also be adopted in adult prisons.

VALS also wishes to reiterate our concerns about cycles of lockdown in places of detention. Both adult and youth prisons have been placed into immediate lockdowns on the detection of COVID-19 cases, without a careful assessment and balancing of the harm inflicted by confining people in prison to their cells.

A highly effective way of mitigating the risks of COVID-19 in prison settings, and thus reducing the use of harmful lockdown and quarantine requirements, is to improve the rollout of vaccines for people in prison. Given the high risks associated with detention settings and the pre-existing vulnerabilities of many people in prison, particularly Aboriginal people, the prison population should be a priority for vaccination in response to any pandemic disease. The vaccine rollout in Victorian prisons began in June 2021, and although some delay is associated with problems in the broader vaccine rollout, it is clear that prisons have not been appropriately prioritised. The Victorian Government told media that the rollout in prisons would be completed in August 2021.[325] Yet a recent update stated that, on September 10, after that deadline, only 45% of people in adult prisons were fully vaccinated.[326] VALS understands that the vaccination rate for Aboriginal people in prisons is significantly lower than this. Substantially more needs to be done to improve the rollout, including by involving ACCOs in addressing vaccine hesitancy (through both provision of information and administering the vaccine). Improving vaccine coverage is essential to reducing the use of lockdown and quarantine.

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[323] VALS (2021), *Building Back Better: COVID-19 Recovery Plan*, pp. 70-87. Available at https://www.vals.org.au/wp-content/uploads/2021/02/Building-Back-Better-Victorian-Aboriginal-Legal-Service-COVID-19-Recovery-Plan-February-2021-FOR-DISTRIBUTION.pdf.

[324] *Ibid.*, p. 76.

[325] Croakey Health Media, (2021), 'Survey raises serious concerns about COVID vaccination rollout to prisons'. Accessed at https://www.croakey.org/survey-raises-serious-concerns-about-covid-vaccination-rollout-to-prisons/.

[326] Bendigo Advertiser (2021), 'Victorian prison records COVID-19 case'. Available at https://www.bendigoadvertiser.com.au/story/7427629/victorian-prison-records-covid-19-case/.

Another important measure for mitigating COVID-19 risks in prisons is surveillance testing of staff and detained people. VALS has previously called for surveillance testing in prisons, in line with the approach in other high-risk environments such as hospitals, aged care facilities and hotel quarantine.[327] Surveillance testing of prison and youth detention employees and contractors is a proactive measure which can help reduce the risk of outbreaks in Victorian prisons without resorting to extremely harsh measures such as the suspension of in-person visits and the ongoing use of quarantine. Prison staff in the UK have been routinely tested for COVID-19 since at least November 2020.[328] Victoria should urgently adopt surveillance testing of prison staff.

Despite calls for reform from VALS and other legal and human rights organisations, the analysis of the serious problems with isolation, quarantine and lockdowns presented in our submission to the PAEC Inquiry remain relevant.[329] Many of the recommendations from that submission and our COVID-19 Recovery Plan are reiterated below. In the context of this Committee's Inquiry, the Government's failure to respond to these recommendations is significant because lockdowns and isolation have highly disruptive and sometimes traumatising effects on people in prison. The prospects for successful rehabilitation and reintegration are very poor when people have been isolated from meaningful human contact on a regular basis while in prison, have had little to no opportunity to engage with programs, and are subjected to the archaic and harmful practice of solitary confinement.

RECOMMENDATIONS

Recommendation 49. The Government should make publicly available the health advice, risk-assessment and human rights assessment upon which it reliesin making decisions about the use of isolation and protective and transfer quarantine.

Recommendation 50. The use of protective and transfer quarantining, and the nature of the quarantine itself, should be

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

Recommendation 51. Legislation should be amended to require that incarcerated people in protective quarantine/transfer quarantine and isolation are regularly observed and verbally communicated with.

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[327] VALS (2021), *Building Back Better: Victorian Aboriginal Legal Service COVID-19 Recovery Plan*, p81. Available at https://www.vals.org.au/wp-content/uploads/2021/02/Building-Back-Better-Victorian-Aboriginal-Legal-Service-COVID-19-Recovery-Plan-February-2021-FOR-DISTRIBUTION.pdf.

[328] UK Ministry of Justice, *HM Prison and Probation Service COVID-19 Official Statistics*, p5. Accessed at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/945608/HMPPS_COVID19_NOV20_Pub_Doc.pdf.

[329] VALS (2020), *Submission to the Public Accounts and Estimates Committee COVID-19 Inquiry*, pp. 16-25.

Recommendation 52. Legislation should explicitly provide for the rights of people in protective/transfer quarantine… including guaranteeing meaningful contact with other people and time out of cell, in fresh air, every day.

Recommendation 53. People in protective/transfer quarantine… should be provided supports and services (including mental health services and cultural supports and services provided by ACCOs), and means by which to contact family, lawyers, independent oversight bodies, and ACCOs.

Recommendation 54. The Victorian Government should maintain a register of all people placed in protective/transfer quarantine…:

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

Recommendation 55. Facilities should not, by default, go into complete lockdown during a COVID-19 outbreak.

Recommendation 56. Staffing and other operational issues should be urgently addressed, to ensure lockdowns do not occur as a result of inadequate staff to safely manage the facility.

Recommendation 57. No one should be in effective solitary confinement as a result of lockdown, particularly… people with mental or physical disabilities, or histories of trauma.

Recommendation 58. If lockdowns occur, people should be provided supports and services (including mental health services and cultural supports and services provided by ACCOs), and means by which to contact family, lawyers, independent oversight bodies, and ACCOs, including VALS.

Recommendation 59. Information on how lockdowns are operationalised should be publicly available and regular updates should be shared.

Recommendation 60. The Victorian Government should add prisons… to the Surveillance Testing Industry List, with both employees and contractors subject to regular surveillance testing.

Recommendation 61. The Victorian Government should improve the COVID-19 vaccine rollout, and put in place preparations for a significantly more effective vaccine rollout for any future pandemic, including by:

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

Emergency Management Days

Emergency Management Days (**EMD**s) are days deducted from an individual's sentence due to the impact of particular situations on the person held in custody. The situations identified in existing legislation include industrial disputes or emergencies within the prison or gaol where the sentence is being served; and other circumstances of an unforeseen and special nature provided the individual in question has exhibited 'good behaviour' during the situation.[330] The sentence reduction can amount to four (4) days for every day, or part of day, where industrial disputes and emergencies exist; and up to fourteen (14) days for circumstances of an unforeseen and special nature.[331] However, as noted by the PAEC, no such equivalent program exists in the Victorian youth justice system.[332]

The continuing COVID-19 pandemic is of particular concern in relation to EMDs. VALS has previously noted the negative impact of the suspension of programs and personal visits and the increased risks of COVID-19 in detention environments, as well as quarantine, isolation and lockdowns.[333] Additionally, VALS has previously noted concern with Corrections policies that allocate only the approximate equivalent of 1 EMD per day of preventative measures instead of allocating up to four (4) days per day in such cases of emergency, as well as failing to include further EMDs on the basis of circumstances of an unforeseen and special nature.[334]

More recently, further changes have occurred in relation to the allocation of EMDs to people on remand. Until 28 July 2021, people in prison on remand may have been granted EMDs before they received their sentence if they had been of good behaviour and suffered disruption or deprivation due to the response to COVID-19. If EMDs were granted, they were applied to any sentence of

[330] s. 58E(1) of the *Corrections Act 1986*. 'Emergencies', however, do not extend to emergencies, riots or other security incidents caused by incarcerated people under s. 58E(3) of the *Corrections Act 1986*.
[331] s. 100 of *Corrections Regulation 2019*.
[332] Parliament of Victoria: Public Accounts and Estimates Committee (2021). Inquiry in the Victorian government's response to the COVID-19 pandemic, p. 287.
[333] VALS, Submission to the Public Accounts and Estimates Committee's Inquiry into the Victorian Government's response to COVID-19 (September 2020) 35, available at https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Submissions/87._Victorian_Aboriginal_Legal_Service.pdf. See also Parliament of Victoria: Public Accounts and Estimates Committee (2021). Inquiry in the Victorian government's response to the COVID-19 pandemic, p. 291-292.
[334] Ibid., 36.

imprisonment they would receive as part of a continuous period of imprisonment. However, after 28 July 2021, people in prison on remand are eligible for EMDs if they have suffered disruption or deprivation due to the response to COVID-19, such as time spent in the protective quarantine unit following reception, but the EMDs are only granted after a person has been sentenced.[335]

VALS further reiterates its concerns regarding the lack of transparency in relation to policies concerning when and how individual EMD applications will be determined by Corrections. While Corrections has stated that incarcerated people who are of 'good behaviour' during preventative measures - including quarantine, isolation and lockdowns – will be eligible for EMDs, the lack and inconsistency of information regarding the process has been problematic for both detainees and their advocates.[336]

Furthermore, VALS is concerned by the introduction of the *Crime Amendment (Remission of Sentences) Bill 2021* (Cth), which, if passed, will eliminate the application of EMDs for people serving sentences for federal offending in a state or territory prison.[337] The proposed amendments to legislation concerning EMDs would result in greater uncertainty about measures available to reduce the sentences of incarcerated people adversely impacted by emergency situations within a prison, which include the preventative measures undertaken in relation to the current COVID-19 pandemic.

As noted in VALS submission to the Public Accounts and Estimates Committee (**PAEC**) in September 2020, situations have arisen where individuals with sentences shorter than one month have been denied EMDs. One such instance involved a client that filed an EMD application on the first day of a 28 day sentence, which was denied. The basis for the decision was EMD assessments only occurred fortnightly and, by the time the application was considered, Corrections needed time to prepare for the individual's release. Increased frequency of EMD assessments are important given that 25.5% of men and 40.9% of women are serving sentences of less than one month.[338]

VALS continues to advocate that disadvantage should not serve as a basis for the denial of EMDs to persons that have otherwise served their sentences. Of particular importance are reports that the lack of housing or the need for other support services for some individuals after being released from prison has served as the basis for the rejection of their EMD applications.[339]

[335] Department of Justice and Community Safety (2021). Emergency Management Days – COVID-19: Factsheet for remand prisoners, p. 1.
[336] Ibid., p. 36.
[337] Parliament of the Commonwealth of Australia (2021). *Crimes Amendment (Remissions of Sentences) Bill 2021*: Explanatory Memorandum, at 12.
[338] VALS (2020). Submission to the Public Accounts and Estimates Committee's Inquiry into the Victorian Government's response to COVID-19, pp. 35-36. Available at https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Submissions/87._Victorian_Aboriginal_Legal_Service.pdf
[339] Federation of Community Legal Centres Vic. A Just and Equitable COVID Recovery: A community Legal Sector Plan for Victoria, 40. Available at https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Submissions/101a._Federation_of_Community_Legal_Centres.pdf.

RECOMMENDATIONS

Recommendation 62. Corrections, in making decisions in relation to Emergency Management Days, should acknowledge that the pandemic has negatively impacted on all people in detention, albeit to different degrees. Emergency Management Days should be granted not only to people who have been subject to isolation or mandatory quarantine, but to others as well, in recognition of the additional hardships faced by everyone in detention.

Recommendation 63. Corrections policy should be amended so that people can be granted 4 Emergency Management Days for each day that the 'emergency exists', and the 14 days they could be entitled to due to 'circumstances of an unforeseen and special nature.'

Recommendation 64. Corrections policy should be clarified to provide that people in detention cannot 'lose' EMDs once they have been granted, including if they are bailed and subsequently re-remanded.

Recommendation 65. There should be greater transparency in relation to the process by which Emergency Management Days are granted. Information should also be made available in relation to the number of people released on Emergency Management Days, how many days they were granted (broken down per month and per facility), and how many Aboriginal and non-Aboriginal people were granted Emergency Management Days.

Recommendation 66. Decisions in relation to EMDs should be governed by natural justice. Applicants should be given clear particulars of any reasons as to why an application has been refused and be allowed to seek review.

Recommendation 67. Emergency Management Day assessments should occur on a regular basis, to allow adequate time to prepare for release.

Recommendation 68. No one should be denied Emergency Management Days due to a lack of housing.

[…]

Use of Force and Restraints

The use of force and restraints in prisons may sometimes be necessary. However, the fact that prisons are closed environments where a severe power imbalance exists between detained people and staff means that there is a high potential for force to be used excessively and in inappropriate situations.

Such abuses can have extremely harmful consequences, particularly for people already experiencing intergenerational trauma and dealing with mental health or substance use issues. The use of excessive force or unnecessary restraints is a human rights violation and can contribute to re-traumatisation and institutionalisation, worsening prospects for rehabilitation and increasing the risk of recidivism.

There are extensive national and international human rights standards governing the use of force and restraints in prisons that inform VALS' position on the safeguards needed in Victorian prisons. The Victorian Charter of Human Rights specifies that human rights should be limited only by the least restrictive means available. The Mandela Rules on the treatment of people in custody and the Havana Rules for young people both stipulate that restraints and force should be used only as a last resort, and for the shortest period of time possible.[340] The Mandela Rules also require that restraint never be used punitively or as a disciplinary method.[341] The Australian Children's Commissioners have stated that "[t]he use of restraints on a child or young person should be prohibited, except when necessary to prevent an imminent and serious threat of injury," and only after "all other means of control have been exhausted".[342] This is consistent with the views expressed by the UN Committee on the Rights of the Child.[343] These human rights standards also provide for the prohibition of chemical or medical restraints, the prohibition of certain kinds of physical restraints, the prohibition of force and restraints being used against people in certain circumstances such as during childbirth, and the prompt reporting and monitoring of all uses of force or restraints.

As Victoria has not established a prison inspections body to fulfil the state's obligations under OPCAT, discussed below, there is limited public reporting or transparency on the use of force and restraints in Victorian prisons. The Victorian Ombudsman conducted an inspection of the Dame Phyllis Frost Centre (**DPFC**) in 2017, and IBAC published a report in 2021 on several investigations of specific incidents. Regular monitoring and reporting, however, is still not in place. This limits the effectiveness of oversight as a mechanism for creating real accountability for abuses in custody.

The most pressing concern is the use of excessive force or the use of restraints when the situation does not call for them. At DPFC, the Ombudsman observed use of restraints in circumstances where they clearly were not needed, "including reports of pregnant women being handcuffed when attending external medical appointments."[344] These instances were particularly acute in the Swan 2 management unit, where women are kept isolated. In this unit, "[i]ncident reports record instances where staff applied handcuffs to women who were incapacitated or unconscious after self-harming,

[340] Rules 48 and 82 of the Mandela Rules. See also Rule 64 of the Havana Rules.
[341] Rule 43(2) of the Mandela Rules.
[342] Australian Children's Commissioners & Guardians (2017), *Statement on Conditions and Treatment in Youth Justice Detention*. Accessed at https://humanrights.gov.au/our-work/childrens-rights/publications/accg-statement-conditions-and-treatment-youth-justice.
[343] Committee on the Rights of the Child, *General comment No.24 (2019) on children's rights in the child justice system,* CRC/C/GC/24, paragraph 95.
[344] Victorian Ombudsman (2017), *Implementing OPAT in Victoria – report and inspection of Dame Phyllis Frost Centre*, p4. Available at https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/implementing-opcat-in-victoria-report-and-inspection-of-dame-phyllis-frost-centre/.

and before medical assistance was provided" and women being handcuffed and escorted by five officers for a transfer of only a few metres.[345] The use of restraints can be dehumanising and humiliating for people held in prison, and may impact their willingness to engage with medical or other support services while visibly restrained. An ongoing coronial inquest in Western Australia has heard that an Aboriginal man who died of a heart attack had been "too ashamed" to attend medical appointments for his chronic heart condition while handcuffed.[346] The unnecessary use of restraints is continuous with the use of force, as both interfere with detained people's right to humane treatment and reinforce power dynamics in the prison.

IBAC's investigation of particular incidents found manifestly excessive use of force on several occasions in Port Phillip Prison. These included an assault of a person after a strip search, and the continued striking of a person with a disability after he had been taken to ground and restrained. IBAC found that the use of force "was excessive and inconsistent with Port Phillip Prison policy, which requires officers to use the minimum amount of force necessary to achieve control," and in one case amounted to inhuman or degrading treatment under the Victorian Charter.[347]

VALS is of the view that excessive force and the inappropriate use of restraints are widespread practices throughout the Victorian prison system, but not fully captured by existing inquiries due to under-reporting and the lack of continuous monitoring. Reports by the Queensland Crime & Corruption Commission and the WA Inspector of Custodial Services have highlighted systemic issues with regard to assaults on incarcerated people.[348] The Ombudsman's inspection of DPFC found that although there were only five recorded allegations of assaults by staff in 2016-17, 11% of women surveyed in the prison said that they had been assaulted by staff.[349] This is a clear indication that assaults are under-reported by people in prison; 46% of women surveyed in DPFC said they did not feel safe to make a complaint in the prison.[350]

Aboriginal people are disproportionately subjected to violence in prison. In Victoria, the only investigation that examined and quantified this disproportionality was undertaken by the Commission for Children and Young People's analysis of the youth prison system, which found that "Aboriginal children and young people were alarmingly overrepresented in relation to injury as a result of a serious assault in custody"; and that force and restraints were used against Aboriginal children in youth

[345] Ibid, p53.
[346] ABC News, 4 September 2021, 'Inquest hears how prisoner Mr Yeeda was too ashamed to get medical help in handcuffs'. Accessed at https://www.abc.net.au/news/2021-09-04/mr-yeeda-inquest-ashamed-to-get-medical-help-in-handcuffs/100433356.
[347] IBAC (2021), *Special report on corrections*, p. 34. Accessed at https://www.ibac.vic.gov.au/docs/default-source/special-reports/special-report-on-corrections---june-2021.pdf?sfvrsn=ee450c8c_2.
[348] Queensland Crime and Corruption Commission (2018), *Taskforce Flaxton: An examination of corruption risks and corruption in Queensland prisons*. Accessed at https://www.ccc.qld.gov.au/sites/default/files/Docs/Public-Hearings/Flaxton/Taskforce-Flaxton-An-examination-of-corruption-risks-and-corruption-in-qld-prisons-Report-2018.pdf.
Office of the Inspector of Custodial Services (2021), *Use of force against prisoners in Western Australia*. Accessed at https://www.oics.wa.gov.au/wp-content/uploads/2021/05/Use-of-Force-Review-May-2021.pdf.
[349] Victorian Ombudsman (2017), *Implementing OPAT in Victoria – report and inspection of Dame Phyllis Frost Centre*, p. 63.
[350] Ibid, p. 68.

prisons more than twice a day in 2018 and 2019.[351] Investigations of adult prisons in other states have made similar findings. In WA, force was used against Aboriginal people more frequently than against non-Aboriginal people. Notably, the disproportionality was even more acute for Aboriginal women; while force was used against incarcerated women overall less often than against men, this was not the case for Aboriginal women.[352]

The use of excessive force is unlikely to become less common in Victoria without significant reform to legislation governing the conduct of prison staff. There is substantial evidence of a cultural problem in Victorian prisons that affords minimal accountability for abuses, including misuse of restraints and force. In its investigation of one incident, IBAC found that two officers had intentionally kept their BWCs turned off, while two others had interfered with recordings to hide evidence of wrongdoing.[353] After the incident, Corrections staff produced reports which were "incomplete or failed to give a full account of events." Furthermore, the supervisor's summary of the incident repeated those reports without accounting for ways they contradicted video evidence and made no attempt to critically examine the incident.[354] IBAC also pointed to "a culture of excessive use of force" among Tactical Operations Group officers, the specialist staff who receive training on the use of force and restraints.[355] The Victorian Ombudsman suggested that DPFC may be affected by "a culture within the prison where the application of restraints is prioritised over the provision of medical assistance."[356]

Ingrained problems with the excessive use of force and restraints can only by addressed by legislative reform of the thresholds for the use of force, not by tweaks to prison policy and inconsistently-delivered training programs. New safeguards and thresholds for the use of force must be actively monitored by an inspection body that is compliant with Victoria's OPCAT obligations, to ensure that they are properly implemented.

The analysis and recommendations concerning BWCs presented above, in relation to the use of BWCs by police officers, are also applicable to prison staff. The protection of BWC footage by the *Surveillance Devices Act 1999* obstructs people who face abuses in prison being able to pursue legal remedies. The person assaulted in one of the incidents examined in IBAC's report on the prison system has not been able to access BWC footage to support his legal claim against the prison.[357]

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[351] Commission for Children & Young People (2021), *Our youth, our way: Systemic inquiry into the over-representation of Aboriginal children and young people in Victoria's youth justice system*, p. 38. Accessed at https://ccyp.vic.gov.au/upholding-childrens-rights/systemic-inquiries/our-youth-our-way/.
[352] Office of the Inspector of Custodial Services (2021), *Use of force against prisoners in Western Australia*, pp. 13-15.
[353] IBAC (2021), *Special report on corrections*, p. 34.
[354] Ibid.
[355] Ibid, p. 9.
[356] Victorian Ombudsman (2017), *Implementing OPAT in Victoria – report and inspection of Dame Phyllis Frost Centre*, p. 53.
[357] The Age, 5 September 2021, 'Prisoner bashed by guards unable to access body-camera footage'. Accessed at https://www.theage.com.au/national/victoria/prisoner-bashed-by-guards-unable-to-access-body-camera-footage-20210831-p58nit.html.

RECOMMENDATIONS

Recommendation 69. The regulation of use of force/restraints should be provided for in legislation, not regulations, policies/procedures, written notices, or in Gazette.

Recommendation 70. The default position must be that the use of restraints/force is prohibited, with exceptions where authorised.

Recommendation 71. Prohibitions on use of force/restraints that should be enshrined in legislation:

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

Recommendation 72. When use of force/restraints may be permitted:

- Use of force/restraints must only be permissible when necessary to prevent an imminent and serious threat of injury to the incarcerated person or others, and only as explicitly authorised and specified by law and regulation.
- Use of force/restraints should be exceptional, as a last resort, when all other control methods (including de-escalation techniques) have been exhausted and failed.

- The decision to use physical restraints must be made by more than one person, and must be authorised by senior management.
- Use of force/restraints must be used restrictively, for no longer than is strictly necessary.
- A minimum level of restraint/degree of force must be used.
- Restraint instruments must be used appropriately/restraint techniques properly executed.
- The safety of the incarcerated person must be a prime consideration.

Recommendation 73. Additional safeguards:

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

Solitary Confinement

[…]

The UN Mandela Rules define solitary confinement as the "'confinement of prisoners for 22 hours or more a day without meaningful human contact," and define prolonged solitary confinement as solitary confinement for a time period in excess of 15 consecutive days.[358] They state that solitary confinement "shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority."[359] They prohibit the use of solitary confinement for people "with mental or physical disabilities when their conditions would be exacerbated by such measures."[360]

The UN Havana Rules, which focus on children, state that "all disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may

[358] Rule 44 of the Mandela Rules.
[359] Rule 45(1), ibid.
[360] Rule 45(2), ibid.

compromise the physical or mental health of the juvenile concerned."[361] The Committee on The Rights of the Child has reiterated that solitary confinement should not be used on children.[362]

Solitary confinement is a fundamentally harmful practice. As Lachsz and Hurley have noted:

> Solitary confinement is 'strikingly toxic to mental functioning' and can cause long-term, irreversible harm (Grassian, 2006, p. 354). As documented by Walsh et al. (2020), the cruel impact of the practice has been recognised in case law from Australia and across the world.
> Solitary confinement has a particularly detrimental impact on Aboriginal and Torres Strait Islander people, with the Royal Commission into Aboriginal Deaths in Custody noting the 'extreme anxiety suffered by Aboriginal prisoners committed to solitary confinement' and that it is 'undesirable in the highest degree that an Aboriginal prisoner should be placed in segregation or isolated detention'.[363]

Recently, VALS hosted a webinar on the harms of solitary as part of its *Unlocking Victorian Justice* webinar series. The recording of the webinar can be viewed here. VALS encourages Committee members to view this webinar, which outlines the medical evidence in relation to the harms of solitary confinement (both during and after incarceration) and includes the stories of people with lived experience of this archaic and barbaric practice.

RECOMMENDATIONS

Recommendation 74. Solitary confinement should be prohibited in all places of detention… by legislation.

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

Recommendation 75. Staffing and other operational issues in places of detention should be urgently addressed, to ensure no one is subjected to solitary confinement.

Strip Searching and Urine Testing

This issue of strip searching is of particular concern to VALS because there is mounting evidence of the disproportionate rates at which Aboriginal people are subjected to strip searching. For example, in the

[361] Rule 6.7 of the Havana Rules.
[362] United Nations Committee on the Rights of the Child (2019). General Comment No. 24 on children's rights in the child justice system, at (95(h).
[363] Lachsz and Hurley, 'Why practices that could be torture or cruel, inhuman and degrading treatment should never have formed part of the public health response to the COVID-19 pandemic in prisons' (2021)

ACT women's prison between October 2020 and April 2021, 58% of strip searches were of Aboriginal women, who made up only 44% of the prison population.[364]

The law in Victoria allows incarcerated people to be strip searched when there is a belief based on reasonable grounds that the search is necessary for the security or good order of the prison, or the safety or welfare of any incarcerated person, or that the incarcerated person being searched is hiding something that may pose a risk.[365] The standards for strip searching in Victoria are lower than those in other Australian jurisdictions. In adult prisons in New South Wales, strip searches can only be performed when absolutely necessary[366] and never involve body cavity searches.[367] Meanwhile, in the ACT, strip searching is only performed on reasonable grounds and in the least restrictive manner possible, while respecting the dignity of the detainee.[368]

Strip searching in prisons is an inherently harmful practice for detained people. Being subjected to an intrusive search can be degrading and a source of re-traumatisation for vulnerable people in the prison system. When time spent in prison serves to re-traumatise people, rather than providing an opportunity for rehabilitation and therapeutic care, the risk of recidivism is greatly increased. This is particularly important given the vulnerable profile of the prison population, in both youth and adult prisons. A large proportion of people held in prisons are victim-survivors of domestic abuse, sexual violence and other forms of trauma.

Legal practitioners at VALS report that some clients had been required to be strip searched in front of multiple guards. These clients often had histories of abuse, and the practice of strip searching was re-traumatising. Some of these clients had medical evidence which suggested that a strip search could be re-traumatising, and this evidence was often not considered before the searches were undertaken. It is clear that the use of strip searching is not confined to situations where it is truly necessary or a last resort for prison staff. At the highest level, data on strip searches reveal that they are extremely ineffective in uncovering contraband. For example, in youth detention, figures obtained by the Human Rights Law Centre showed that "over a four month period between July and October 2019, 1,277 strip searches were conducted on children and young people at the two juvenile justice centres in Victoria [and]… Only 6 items were found as a result."[369] This strongly suggests that strip searches are used far more often than could be justified by any reasonable suspicion that they are necessary or likely to uncover contraband.

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[364] Dani Larkin (2021), 'Excessive strip-searching shines light on discrimination of Aboriginal women in the criminal justice system', *The Conversation*. Accessed at https://theconversation.com/excessive-strip-searching-shines-light-on-discrimination-of-aboriginal-women-in-the-criminal-justice-system-163969.
[365] S. 45 of the *Corrections Act 1986*.
[366] Inspector of Custodial Services, New South Wales (2020). Inspection standards: For adult custodial services in New South Wales, at 40.9
[367] Ibid., at 40.13.
[368] Inspector for Custodial Services, ACT (2019). ACT Standards for Adult Correctional Services, Standard 28.
[369] Dani Larkin (2021), 'Excessive strip-searching shines light on discrimination of Aboriginal women in the criminal justice system', *The Conversation*. Accessed at https://theconversation.com/excessive-strip-searching-shines-light-on-discrimination-of-aboriginal-women-in-the-criminal-justice-system-163969.

In 2017, the Victorian Ombudsman identified "a significant number of routine and unnecessary strip searches", including searches of detained people before and after receiving visits, in violation of the Victorian Charter, the Mandela Rules, and prison policy. The Ombudsman recommended this practice should immediately cease; that recommendation was not accepted by the Government.[370]

Furthermore, in Minogue v. Thompson,[371] the Victorian Supreme Court held that random strip searches and urine testing to be performed within sight of prison officials were violations of Minogue's right to privacy under the *Victorian Charter of Human Rights and Responsibilities 2006*. Based upon the knowledge and experience of legal staff at VALS, people in prison who are required to submit to urine testing are required to do so in the presence of multiple prison guards. This can be re-traumatising for people who have histories of abuse. People in prison should be given an option of passing urine while not in the direct presence of guards (for example, in darkened rooms with the use of urine-sensitive dye in toilets).

IBAC's recent report on the corrections system exposed serious misconduct in the way that strip searches are managed and conducted. Several specific incidents of inappropriate searches were investigated by IBAC, which found that staff were unfamiliar with the human rights standards supposed to govern their behaviour and that prison management did not properly investigate complaints about inappropriate searches.[372]

Most concerningly, IBAC reported that the General Manager of Port Phillip Prison told its investigators that strip searches were "one of the options available to assert control" over people in prison.[373] This is a clear demonstration that strip searches are used not out of necessity, but as a tool of discipline and to exert power over detained people – echoing the concerns of an earlier investigation in Western Australia.[374] The fact that the strip searches investigated by IBAC were conducted shortly after unrelated behavioural incidents reinforces this, as does the escalation of the searches into assaults on incarcerated people by staff. While the IBAC report is disturbing, issues concerning strip searches have been raised in other Australian jurisdictions

Women in Tasmanian jails were subjected to 841 strip searches over a seven-month period, according to figures obtained under a Right To Information request. The Human Rights Law Centre obtained the data from Mary Hutchinson Women's Prison and the Risdon Prison Complex for the period between

[370] IBAC (2021), *Special report on corrections*, p54. Accessed at https://www.ibac.vic.gov.au/docs/default-source/special-reports/special-report-on-corrections---june-2021.pdf?sfvrsn=ee450c8c_2.
[371] [2021] VSC 56
[372] IBAC (2021), *Special report on corrections*, p54, 62.
[373] Ibid, p53.
[374] Ibid, p. 55.

October 2020 and April 2021. The documents show only three searches turned up concealed items: pain medication; tobacco and a lighter; and tobacco and matchsticks.[375]

It is clear that strip searching is being used for general discipline and order in Victorian prisons. The legislative threshold for strip searching is too low, and training on human rights standards is wholly inadequate. Legislation needs to raise the bar so that strip searching is only to beused as a last resort, not as a routine tool for corrections staff.

Inappropriate practices need to be reined in through legislative reform and the establishment of robust, independent prison oversight, in line with Australia's OPCAT obligations (discussed below). Prison staff and management have not responded to well-documented patterns of inappropriate searching. Changes to policy are inadequate in the face of a culture of disregard for the human rights concerns associated with strip searching. It is important to note that this culture is not unique to Victoria; reports from NSW also show prison staff conducting strip searches far beyond their legal authority to do so, including on visitors,[376] despite the stringent standards outlined above. These considerations have led human rights groups around Australia to conclude that a ban on routine strip searches, entrenched in legislation, is the only safeguard which can entrench proper protections for people in prison.[377]

RECOMMENDATIONS

Recommendation 76. The threshold for authorising a strip search in adult prisons should be raised by legislation. 'Good order' and 'security of the facility' should be removed as grounds for a strip search and legislation should provide that strip searching must be a last resort and must be based on intelligence. Prior to strip searching, other means of searching such as pat searches, metal detectors and increased surveillance must be used. Strip searching must never be routinely conducted as part of the general routine of the centre or on entry to a centre.

Recommendation 77. Prisons should adopt policies which require them to consider the effect of strip searches on re-traumatisation.

Recommendation 78. Urine testing should only be required upon reasonable grounds and in a manner consistent with the inherent dignity and right to privacy of the detainee involved to the greatest extent possible.

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[375] Alvaro, A. (2021). Female inmates in Tasmania subjected to 841 strip searches. ABC.net.au. Available at https://www.abc.net.au/news/2021-09-03/strip-searches-of-female-prisoners-in-tasmania/100431432.

[376] O'Brien Criminal & Civil Solicitors (2021), 'Damages awarded to woman strip-searched by Corrective Services officer'. Accessed at https://obriensolicitors.com.au/damages-awarded-woman-strip-searched-correctives-officer/.

[377] Lawyers Weekly (2021). 'Human rights lawyers call for end to "demoralising" strip searches'. Accessed at https://www.lawyersweekly.com.au/biglaw/31596-human-rights-lawyers-call-for-end-to-demoralising-strip-searches. Canberra Times, 5 August)2021, 'Call to ban routine strip searches on women in Canberra's prisons'. Accessed at https://www.canberratimes.com.au/story/7370668/call-to-ban-routine-strip-searches-on-women-in-canberras-prison/.

Recommendation 79. Body cavity searches should never be performed on imprisoned people.

Recommendation 80. The Government should invest in technology which enables non-intrusive searching, to provide further alternatives and minimise the use of strip searching.

Equivalence of Healthcare

The provision of high-quality healthcare in prison is essential to maintaining adequate conditions and treatment in custody, avoiding re-traumatisation, and reducing risk factors for reoffending. It is also necessary for upholding the human rights and wellbeing of people in prison. This is the basis of the 'equivalence of care' principle, according to which the Government has an obligation to provide equivalent access to medical care for people in detention as those in the community. People held in prisons are completely dependent on the state to provide adequate healthcare.

The *United Nations Standard Minimum Rules for the Treatment of Prisoners* (**the Mandela Rules**) make clear that "prisoners should enjoy the same standards of health care that are available in the community, and should have access to necessary healthcare services free of charge, without discrimination on the grounds of their legal status."[378] The obligation to provide equivalence of medical care to people deprived of their liberty is echoed in *the International Covenant on Economic, Social and Cultural Rights*, which emphasises "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[379]

The Victorian Charter of Human Rights and Responsibilities requires that "[a]ll persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person".[380] The Victorian Coroners Court has found, in its inquest into the death of Yorta Yorta woman Ms Tanya Day, that in custodial settings this requires police and prison staff to ensure access to medical care, given that people detained are completely dependent on the state to provide for their health.[381]

Equivalence of care is particularly important because people in prison are disproportionately likely to have pre-existing health conditions and vulnerabilities which exacerbate their healthcare needs. This is a characteristic common to prison populations across jurisdictions, and has been found in both

[378] United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), UN Doc A/RES/70/175 (17 December 2015).
[379] International Covenant on Economic, Social and Cultural Rights, Article 12.
[380] Charter of Human Rights and Responsibilities Act 2006, s22(1).
[381] Coronial Inquest into the Death of Tanya Day, [533].

Australian prisons[382] and by international organisations.[383] As discussed above, many incarcerated people have both diagnosed and undiagnosed disabilities. Victoria is no exception to this well-documented phenomenon, which makes the provision of healthcare in prisons an urgent matter for the state.[384] The same is generally observed in youth detention setting,[385] though data in Australia is more limited.[386] Existing evidence indicates that the health needs of incarcerated adolescents are greater than those in non-custodial settings.[387]

A recent tragic example of the lack of equivalence in healthcare in Victorian prisons involved the death of a 12-day-old baby in the mothers and children unit at Dame Phyllis Frost Centre on 18 August 2018. Despite efforts made by the mother and a fellow incarcerated person to elicit assistance to attempt to resuscitate the baby, the prison officers and nurse that arrived in the cell allegedly failed to engage in any efforts to perform CPR.[388] The failure of officers and healthcare staff to attempt to perform lifesaving measures on a newborn baby would be extremely unlikely if the situation had occurred within the greater Victorian community.

Aboriginal people already haveh serious health conditions at a much higher rate than other parts of the Australian population. Aboriginal people detained in prisons are, according to research from the Victorian Aboriginal Community Controlled Health Organisation (**VACCHO**), less healthy than Aboriginal people in the community and less healthy than non-Aboriginal people in prison.[389] In youth

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[382] Australian Institute of Health and Welfare (2019). The health of Australia's prisoners: 2018, p. vi. Available at https://www.aihw.gov.au/getmedia/2e92f007-453d-48a1-9c6b-4c9531cf0371/aihw-phe-246.pdf.aspx?inline=true; Royal Australian College of General Practitioners (2019). Custodial health in Australia: Tips for providing healthcare to people in prison, pp. 3-4. Available at https://www.racgp.org.au/FSDEDEV/media/documents/Faculties/SI/Custodial-health-in-Australia.pdf; and Australian Medical Association (2012). Position statement on Health and the Criminal Justice System, 3. Available at https://www.ama.com.au/sites/default/files/documents/Health_%26_the_Criminal_Justice_System_%28final%29.pdf.

[383] United Nations (2021). United Nations System Common Position on Incarceration, p. 12; and World Health Organisation Europe (2007). Health in Prisons: A WHO guide to the essentials in prison health, pp. 15-17. Available at https://www.euro.who.int/__data/assets/pdf_file/0009/99018/E90174.pdf.

[384] Deloitte Consulting. Victorian prisoner health study: Department of Justice, Government of Victoria (February 2003), 1-2. Available at https://files.corrections.vic.gov.au/2021-06/victorian_prisoner_health_study_february_2003_part1.pdf?VersionId=HvouyrKcAd05KLEQ4GICvOJkd_YvB2a6;

[385] See American Academy of Pediatrics. Policy Statement: Health Care for Youth in the Juvenile Justice System (2011), 1. Available at http://yvppolicyportal.safestates.org/wp-content/uploads/2015/09/Health-Care-for-Youth.pdf;

[386] Australian Institute of Health and Welfare. National data on the health of justice-involved young people: A feasibility study, 2016-17 (2018), vi. Available at https://www.aihw.gov.au/getmedia/4d24014b-dc78-4948-a9c4-6a80a91a3134/aihw-juv-125.pdf.aspx?inline=true;

[387] The Royal Australasian College of Physicians. The health and Wellbeing of Adolescents (2011), 4, available at https://www.racp.edu.au/docs/default-source/advocacy-library/the-health-and-wellbeing-on-incarcerated-adolescents.pdf;

[388] Schelle, C. (2021) Coroner to probe newborn baby's tragic death in Melbourne prison. News.com.au. Available at https://www.news.com.au/national/victoria/courts-law/coroner-to-probe-newborn-babys-tragic-death-in-melbourne-prison/news-story/0679b4ba482860ecf392dc6d3ce5ac3a.

[389] Victorian Aboriginal Community Controlled Health Organisation. Keeping our mob healthy in and out of prison: Exploring Prison Health in Victoria to Improve Quality, Culturally Appropriate Health Care of Aboriginal People.(2015), 9, 13. Available at http://www.vaccho.org.au/assets/01-RESOURCES/TOPIC-AREA/RESEARCH/KEEPING-OUR-MOB-HEALTHY.pdf.

detention, across the country, the majority of Aboriginal children are found to have multiple health and social problems upon entering detention.[390]

The principle of equivalency is not only applicable to prisons but – like the jurisdiction of OPCAT monitoring bodies, discussed below – to all places where people are deprived of their liberty. This includes police custody, where ensuring adequate healthcare is an important element in reducing deaths in custody. In July of this year, the Queensland Ambulance Service issued an apology for providing inadequate care before the death of an Aboriginal man detained by police in Townsville.[391] There are far more cases where no accountability has ever been established. The sheer number of deaths in custody, from a variety of causes, are testament to the inadequate provision of health care – including mental health care – and the failure of Australian jurisdictions to enact the principle of equivalency.

Victoria is not an exception to this pattern of failure. But Victoria is unusual among Australian states and territories in not providing healthcare in places of detention through its health department, but through private providers sub-contracted by the Department of Justice and Community Safety.[392] This arrangement falls short of international human rights standards which are themselves inadequate in many respects, and the lack of transparency around places of detention makes scrutiny of healthcare provision extremely difficult.

It should also be acknowledged that it becomes far more difficult to deliver high-quality healthcare in prisons when the prison population is growing and, as a result of the high proportion of people on remand, has high rates of people moving in and out of custody. In NSW, the Inspector of Custodial Services' review of health services noted:

> Overall inmate population increases, combined with high numbers of inmates moving through the custodial system each year even for short periods, has placed extra demand on health services […] This is because each person entering the correctional environment, even for the shortest period of time, needs to be fully assessed from a health, welfare and safety perspective. Previously prescribed medication needs to be confirmed, ordered and administered […] current and emerging acute and chronic health issues need to be identified, assessed and managed.
>
> This is different from what a health service in the community would be expected to do […] This is the predominate workload of health professionals working within the custodial environment. This also diverts nursing, medical and other health professional time from the delivery of acute and chronic

390 Parliament of the Commonwealth of Australia. Doing Time – Time for Doing: Indigenous youth in the criminal justice system (2011),87-88. Available at https://www.aph.gov.au/binaries/house/committee/atsia/sentencing/report/fullreport.pdf.

391 The Guardian (2021). 'Tragic on many levels': Queensland ambulance service apologises after death of Indigenous man'. Accessed at https://www.theguardian.com/australia-news/2021/jul/23/tragic-on-many-levels-queensland-ambulance-service-apologises-after-death-of-indigenous-man.

392 For further information concerning contracted providers of healthcare in Victorian prisons, see https://www.corrections.vic.gov.au/justice-health.

> health interventions this vulnerable and disadvantaged high needs population requires, both for themselves and for the community to which they will return.[393]

In Victoria, the tightening of bail laws has increased the number of unsentenced people in prison, which leads to higher numbers of admissions to prisons, more short spells in custody, and more transfers between facilities – putting intense pressure on the delivery of services VALS expects to deliver high-quality healthcare.

Equivalence of care, particularly for Aboriginal people with serious health issues, and a need for culturally safe healthcare services, can only be delivered with substantial resourcing. This requires greater investment from the state Government, but there is also a need for people in prison to have access to funding from Medicare and the Pharmaceutical Benefits Scheme, to ensure that resources are available to provide all the care needed to the same standard enjoyed in the community. This is particularly important for Aboriginal people, as there are a number of specific items in the Medicare Benefits Schedule which support enhanced screenings, assessments and health promotion activities for Aboriginal people. These streams of Medicare funding are critical to the operation of Aboriginal health services.[394] Access to Medicare funding for people in prison would enable the expansion of in-reach care in prisons by Aboriginal health services. It would also bring funding arrangements in line with those for people in the community. ACCHOs receive direct state and federal funding, as well as being eligible for Medicare funding streams. Similar funding arrangements should be available in relation to custodial settings to ensure the same quality of care can be provided.[395]

Good Practice Models

ACT: Since Medicare access is suspended for incarcerated people during incarceration, the ACT Government committed funding to establish an autonomous Winnunga AMC Health and Wellbeing Service to Aboriginal people in prison in Alexander Maconochie Centre (AMC), resulting in Winnunga Nimmityjah Aboriginal Health and Community Services being the first ACCHO to provide primary healthcare service to incarcerated people in 2019.[396]

[393] NSW Inspector of Custodial Services (2021), *Health services in NSW correctional facilities*, p. 14. Accessed at https://www.inspectorcustodial.nsw.gov.au/inspector-of-custodial-services/reports-and-publications/inspection-reports/adult-reports/health-services-in-nsw-correctional-facilities.html.
[394] Ibid, p. 83.
[395] ABC News, 19 October 2020, 'Greg Hunt rejects Danila Dilba's request for Medicare-funded health services in Don Dale'**.** Available at https://www.abc.net.au/news/2020-10-19/don-dale-medicare-health-services-rejected-by-greg-hunt/12776808.
[396] Shukralla, H. & Tongs, J. (2020). Austrailan first in Aboriginal and Torres Strait Islander prisoner health care in the Australian Capital Territory. 44(4) Australian and New Zealand Journal of Public Health 324. Available at https://onlinelibrary.wiley.com/doi/full/10.1111/1753-6405.13007

Northern Territory: Successes with in-reach care to Aboriginal children in detention following the commissioning of an Aboriginal community health organisation, Danila Dilba, to deliver healthcare in the Don Dale Youth Detention Centre.[397]

New South Wales: The inspector of Custodial Services made a firm recommendation that access to Medicare would facilitate the expansion of in-reach care in prisons by Aboriginal health services.[398]

The importance of equivalence of care to Aboriginal people in prison was recognised by the Royal Commission into Aboriginal Deaths in Custody more than thirty years ago. Recommendation 150 of the Royal Commission was that "health care available to persons in correctional institutions should be of an equivalent standard to that available to the general public," and specifically identified access to mental health and AOD services and the importance of culturally safe care. Equivalence of care is also the underlying goal of other RCIADIC recommendations regarding healthcare in prisons and police custody, including Recommendations 127, 252, 152, 154, 133, 265 and 283.[399]

A Guardian analysis of 474 Aboriginal and/or Torres Strait Islander Deaths in Custody since 1991, published in April this year for the 30th anniversary of the Royal Commission into Aboriginal Deaths in Custody, found that:

> For both Aboriginal and Torres Strait Islander people and non-Indigenous people, the most common cause of death was medical problems, followed by self-harm. However, Indigenous people who died in custody were three times more likely not to receive all necessary medical care, compared to non-Indigenous people. For Indigenous women, the result was even worse – less than half received all required medical care prior to death.[400]
>
> Aboriginal and Torres Strait Islander women were less likely to have received all appropriate medical care before death (54%) compared to men (36%)… Agencies such as police watch houses, prisons, and hospitals did not follow all of their own procedures in 43% of the cases in which Aboriginal and Torres Strait Islander people died, compared to 19% of the cases of non-Indigenous people.[401]

Addressing health care inequalities in prisons has been found to provide multiple broader-reaching benefits. Ensuring that the health needs of persons in detention benefits public health outcomes upon release of people in detention, since physical health issues, such as communicable diseases, and mental health issues, which may be a root cause of criminal behaviours in certain instances, are

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[397] For further information, see https://ddhs.org.au/services/don-dale-youth-support.

[398] NSW Inspector of Custodial Services (2021), *Health services in NSW correctional facilities*, p. 83. Accessed at https://www.inspectorcustodial.nsw.gov.au/inspector-of-custodial-services/reports-and-publications/inspection-reports/adult-reports/health-services-in-nsw-correctional-facilities.html.

[399] Williams (2021), 'Comprehensive Indigenous health care in prisons requires federal funding of community-controlled services', The Conversation. Accessed at https://theconversation.com/comprehensive-indigenous-health-care-in-prisons-requires-federal-funding-of-community-controlled-services-158131.

[400] Allam, L. et al. (2021). The facts about Australia's rising toll of Indigenous deaths in custody. Available at https://www.theguardian.com/australia-news/2021/apr/09/the-facts-about-australias-rising-toll-of-indigenous-deaths-in-custody.

[401] Ibid.

mitigated or resolved prior to release into the community.[402] Furthermore, addressing health and wellbeing issues increases the likelihood of good health during and following release, as well as decreasing the risk of death following release from custody.[403] Absolutely critical to the context of the present submission, the provision of adequate and appropriate physical and mental health services to persons in detention has also been demonstrated to increase the likelihood of positive reintegration into the community and decrease recidivism.[404]

RECOMMENDATIONS

Recommendation 81. People in detention must be provided medical care that is the equivalent of that provided in the community. Medical care must be provided without discrimination.

Recommendation 82. Health care should be delivered through DHHS rather than DJCS, and not through for-profit organisations.

Recommendation 83. A model of delivery of primary health services by Aboriginal Community Controlled Health Organisations in places of detention in Victoria should be considered, in consultation with VACCHO and member organisations.

Recommendation 84. The Federal Government must ensure that incarcerated people have access to the Pharmaceutical Benefits Scheme (PBS) and the Medicare Benefits Schedule (MBS). The Victorian Government should advocate with the Commonwealth to enable this access in order to provide equivalence of care to Aboriginal people and other vulnerable people held in prison.

Recommendation 85. The Federal and State Governments should ensure that incarcerated people have access to the National Disability Insurance Scheme (NDIS) and are assessed for eligibility for NDIS upon entry to a prison or youth justice centre.

Recommendation 86. The Government should employ more Aboriginal Health Workers and Aboriginal Wellbeing Officers at all levels of the justice health system (Victoria Police, Courts, Forensicare/MHARS, Community Corrections, Correctional Health Services) to work with Aboriginal people at all stages of their engagement with the criminal legal system.

[402] United Nations (2021). United Nations System Common Position on Incarceration, p. 12.
[403] Royal Australian College of General Practitioners (2019). Custodial health in Australia: Tips for providing healthcare to people in prison, p. 5. Available at https://www.racgp.org.au/FSDEDEV/media/documents/Faculties/SI/Custodial-health-in-Australia.pdf
[404] Ibid, p. 12; Australian Institute of Health and Welfare (2019). The health of Australia's prisoners: 2018, p. vi. Available at https://www.aihw.gov.au/getmedia/2e92f007-453d-48a1-9c6b-4c9531cf0371/aihw-phe-246.pdf.aspx?inline=true; Royal Australian College of General Practitioners (2019). Custodial health in Australia: Tips for providing healthcare to people in prison, p. 5. Available at https://www.racgp.org.au/FSDEDEV/media/documents/Faculties/SI/Custodial-health-in-Australia.pdf.

Recommendation 87. The Government should prioritise the development and finalisation of standards for culturally safe, trauma informed health services in the criminal legal system…

Mental Health & Mental Healthcare

High-quality healthcare for people in prison is particularly important given the high rates of mental ill-health among the prison population and among Aboriginal people in Victoria. As noted above, mental illness can cause or exacerbate engagement with the criminal legal system – by leading to police becoming involved, as well as leading to inadequate and insensitive engagement by police officers and courts.

The Mental Health Advice and Response Service (**MHARS**)[405] provides clinical mental health advice to courts concerning the appropriateness of mental health interventions and to Community Corrections concerning the appropriateness of mental health treatment and rehabilitation conditions on Community Corrections Orders (**CCO**) and people on parole with a mandated health order. Additionally, the MHARS also performs a consultation and education function for judges, community corrections officers and other court users on mental health services and issues. Phase 4 of the Aboriginal Justice Agreement includes a commitment to provide access to culturally safe mental health services for Aboriginal people who have a moderate mental health condition or disorder, and who have a CCO with a mental health treatment and rehabilitation condition or are on parole with a mandated health order. VALS reiterates its prior recommendation to establish a specialist Koori Unit within MHARS to lead service delivery for Aboriginal people coming into contact with the criminal legal system.[406]

VALS has also emphasised the need for high-quality, culturally safe mental health care in prisons previously, in work focused on the mental health system more broadly. These recommendations remain important to the context of this Committee's Inquiry. Without adequate care, people in prison may find their mental health problems worsening, creating circumstances which may lead to further contact with the justice system and reoffending upon release.

There is a lack of sustainably resourced culturally appropriate health services and programs to meet the social and emotional wellbeing needs of Aboriginal people in prison.[407] VALS continues to call for increased access to culturally safe, trauma-informed forensic mental health services throughout the criminal legal system.[408] Critically, this should involve resources for VACCHO to guide the development of culturally safe programs. VACCHO has long called for changes in correctional health service delivery, including

[405] For an overview of the MHARS, see https://www.forensicare.vic.gov.au/our-services/community-forensic-mental-health-services/court-mental-health-response-service/.
[406] VALS (2019). Submission to the Royal Commission into Victoria's Mental Health System, pp. 44-45.
[407] Ibid., p.34.
[408] Ibid., p.43.

recommendations around improving cultural safety across the clinical, programs and policy spheres, to decrease service barriers and increase health service utilisation by Aboriginal people in prison.[409]

RECOMMENDATIONS

Recommendation 88. The Government should ensure that all prison officers receive regular gender and culturally sensitive training on how to interact with people with cognitive disabilities.

Recommendation 89. The Government should commit significant resources to improving mental healthcare for Aboriginal people in custody in Victoria, including by:

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

OPCAT

VALS has repeatedly called for the Victorian Government to take steps to implement Australia's obligations under the *Optional Protocol on the Convention Against Torture, Cruel, Inhuman and Degrading Treatment and Punishment* (**OPCAT**).[410]

Effective and culturally appropriate implementation of OPCAT is critical to prevent many of the primary concerns in prison environments, including excessive use of force, inappropriate strip searching, excessive use of isolation and lockdowns and woefully inadequate healthcare and mental healthcare. As noted above in relation to protections in police custody, it is also a critical way of protecting the rights of individuals who are in police custody.

Australia ratified OPCAT in December 2017 and has until January 2022 to fully implement its legal obligations under this treaty. OPCAT will be implemented in Australia through a national network of bodies fulfilling the functions of a National Preventive Mechanism (**NPM**). To date, Western Australia is the only State or Territory to have formally designated an NPM.[411] Legislative processes are currently

[409] Victorian Aboriginal Community Controlled Health Organisation (2015). Keeping our mob healthy in and out of prison: Exploring Prison Health in Victoria to Improve Quality, Culturally Appropriate Health Care of Aboriginal People, pp. 9, 13. Available at http://www.vaccho.org.au/assets/01-RESOURCES/TOPIC-AREA/RESEARCH/KEEPING-OUR-MOB-HEALTHY.pdf; and VALS (2019). Submission to the Royal Commission into Victoria's Mental Health System, p. 43.

[410] VALS, *Submission to the Commission for Children and Young People Inquiry: Our Youth Our Way*, p. 21; VALS, *Supplementary Submission to the Royal Commission on Victoria's Mental Health System*, p. 8-13; VALS, *Public Accounts and Estimates Committee COVID-19 Inquiry*, p. 44-45; VALS, *Building Back Better: COVID-19 Recovery Plan*, pp. 87-91.

[411] The Western Australian Ombudsman and the Office of the Inspector of Custodial Services have been nominated as Western Australia's NPMs for mental health and other secure facilities, as well as justice-related facilities (including police

underway in Tasmania[412] and South Australia[413] to designate their respective NPMs. Very little progress has been made in Victoria.

The urgent need to implement OPCAT in Victoria has been identified by the Victorian Ombudsman, who carried out two OPCAT style investigations in custodial facilities in 2017 and 2019.[414] The Victorian Government had not responded to the Ombudsman's recommendation to establish, and properly resource, a NPM in Victoria.[415] According to the Ombudsman, "DJCS has advised that a considerable amount of work has been done on the government's implementation of its responsibilities under OPCAT, and that a lack of public statements about OPCAT is not an indicator that progress is not being made."[416]

Since June 2020, the Government has remained silent on its "considerable" progress. The only information in the public record is the allocation of $500,000 for OPCAT implementation between 2021-2025.[417] This is woefully inadequate, and VALS is concerned that this once in a generation opportunity is being squandered.

In August 2021, the Commonwealth Government released the Commonwealth Closing the Gap Implementation Plan, which dedicates funding over two years (2021-2022) to support states and territories to implement OPCAT.[418] Although the document indicates the amount of funding for other actions under the Plan, it is silent on the amount of funding that will be provided to States and Territories for OPCAT implementation.[419]

VALS takes this opportunity to reiterate the recommendations that it has made previously. The Victorian Government must be transparent and provide a public update on its progress in implementing OPCAT. VALS and the Aboriginal Justice Caucus expect the Victorian Government to engage in robust consultations in developing an appropriate model and legislation for Victoria.

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lock-ups). See Commonwealth Ombudsman (2019). *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT),* p. 3.

412 In November 2020 the Tasmanian Government announced that it would nominate the Tasmanian Custodial Inspector as its NPM. A draft Bill, the *Custodial Inspector Amendment (OPCAT) Bill 2020*, was released by the Department of Justice for information and comment in November-December 2020. A second draft Bill, the *OPCAT Implementation Bill* 2021, is currently open for submissions.

413 The *OPCAT Implementation Bill 2021* (South Australia) is currently before the South Australian House of Assembly. The Bill nominates multiple existing bodies as NPMs, each with jurisdiction in relation to different places of detention.

414 Victorian Ombudsman, *Implementing OPCAT in Victoria: Report and inspection of Dame Phyllis Frost Centre*, 2017; Victorian Ombudsman, *OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people* (2019), p. 61.

415 Victorian Ombudsman (2020). *Ombudsman's Recommendations – Third Report*, p. 14.

416 Ibid., p. 14.

417 VALS (2021), 'This International Day in Support of Victims of Torture, the Andrews Government must do better on OPCAT'. Available at https://www.vals.org.au/this-international-day-in-support-of-victims-of-torture-the-andrews-government-must-do-better-on-opcat/.

418 Commonwealth of Australia (2021). *Commonwealth Closing the Gap Implementation Plan,* p. 48. The funding is linked to Targets 10 (By 2031, reduce the rate of Aboriginal and Torres Strait Islander adults held in incarceration by at least 15%) and Target 11 (By 2031, reduce the rate of Aboriginal and Torres Strait Islander young people (10-17 years) in detention by at least 30%).

419 Ibid., pp. 152 and 157.

You can find out more about OPCAT from VALS' OPCAT factsheet and *Unlocking Victorian Justice* webinar, *OPCAT: An opportunity to prevent the ill-treatment, torture and death of Aboriginal and Torres Strait Islander people in custody*. VALS' Head of Policy, Communications and Strategy also completed a Churchill Fellowship on culturally appropriate OPCAT implementation for Aboriginal and Torres Strait Islander people.

RECOMMENDATIONS

Recommendation 90. The Victorian Government must urgently undertake robust, transparent and inclusive consultations with the Victorian Aboriginal community, its representative bodies and ACCOs on the implementation of OPCAT in a culturally appropriate way.

Recommendation 91. The operations, policies, frameworks and governance of the designated detention oversight bodies under OPCAT (National Preventive Mechanisms - NPMs) must be culturally appropriate and safe for Aboriginal people.

Recommendation 92. The Victorian Government must legislate for the NPM's mandate, structure, staffing, powers, privileges and immunities.

Recommendation 93. The Victorian and Commonwealth Governments must ensure that the NPM is sufficiently funded to carry out its mandate effectively.

Recommendation 94. In accordance with Article 3(1) of OPCAT, the NPM in Victoria must have jurisdiction over all places where individuals are or may be detained, including… forensic mental health hospitals and other places where people with cognitive disabilities are deprived of their liberty.

Recommendation 95. The Victorian Government must amend COVID-19 Emergency legislation to ensure that visits to correctional facilities and youth detention facilities by independent detention oversight bodies cannot be prohibited.

Disciplinary Proceedings

As noted by the Victorian Ombudsman in her recent report, "[d]isciplinary hearings in Victorian prisons are still carried out 'in the dark' with insufficient scrutiny, oversight or transparency."[420] The disciplinary system in Victoria must operate in accordance with procedural fairness, and key protections derived from procedural fairness must be enshrined in legislation.

[420] Victoria Ombudsman (2021). Investigation into good practice when conducting prison disciplinary hearings, p. 4.

The prison disciplinary system deals with incarcerated people who break prison rules. The process has three stages: (1) investigation of the alleged offence, resulting in a decision to charge the incarcerated person; (2) a disciplinary hearing; and (3) determination of a penalty (if the person pleads guilty or is found guilty of the offence).[421] According to the Victorian Ombudsman, there are approximately 10,000 disciplinary hearings each year across Victoria's 14 prisons.[422]

The prison disciplinary system is regulated through the *Corrections Act 1986* (Vic), *Corrections Regulations* 2019 (Vic), Commissioner's Requirements (setting out high-level policy requirements for all prisons in Victoria), Deputy Commissioner's Instructions (for public prisons) and Operating Instructions (for private prisons) and the Prison Disciplinary Handbook.[423] Prison staff involved in disciplinary hearings are also bound by the *Charter of Human Rights and Responsibilities 2006*, as well as procedural fairness principles arising under common law.[424] Under international law, the Mandela Rules provide detailed requirements for prison disciplinary systems,[425] including that "[n]o prisoner shall be sanctioned except in accordance with…. the principles of fairness and due process."[426]

A recent investigation by the Victorian Ombudsman revealed serious concerns regarding the investigation of prison offences and disciplinary hearings:

- Perception amongst incarcerated people that prison officers investigating the offence and conducting disciplinary hearings are not impartial;
- Use of undocumented pre-hearing discussions;
- Insufficient information provided to incarcerated people about the charge;
- Poor use of discretion in the decision to charge an incarcerated people or a prison offence;
- Limited availability of independent legal advice and support;
- No requirement for written reasons for a decision;
- Use of disciplinary hearings when other less severe options were reasonably are available;
- Inconsistent and disproportionate penalties;
- Limited right of review of the outcome of a disciplinary hearing (incarcerated people who want to challenge the outcome of a disciplinary hearing can only do so in the Supreme Court).[427]

Additionally, the Ombudsman's investigation identified the following concerns relating to disciplinary proceedings for incarcerated people with a cognitive disability or mental illness:[428]

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[421] Ibid., p. 11.
[422] Ibid., p. 4.
[423] Ibid., p. 20.
[424] Procedural fairness includes: the hearing rule, the bias rule, the notice rule and the evidence rule. Ibid., p. 16.
[425] *The United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules*), Rules 37 – 43 and Rule 46.
[426] Ibid., Rule 39(1).
[427] Victoria Ombudsman (2021). Investigation into good practice when conducting prison disciplinary hearings, p. 24.
[428] According to data from Corrections Victoria, as noted in the report by the Victorian Ombudsman, 4% of Victoria's 7,808 incarcerated people had a registered intellectual disability, over 54% of incarcerated people were considered at risk of suicide or self-harm, and 42% of incarcerated people had a psychiatric rating (indicating either a suspected or diagnosed psychiatric condition). Ibid., p. 54.

- over-representation of such incarcerated people in disciplinary processes;
- failure to identify and consider the condition of some incarcerated people;
- limited independent support for many incarcerated people with a disability;[429]
- inconsistent consultation with relevant professionals.[430]

Although the disciplinary process is bound by procedural fairness, the Ombudsman's report demonstrates that important protections derived from procedural fairness are not being respected in practice. VALS' is of the view that protections must be enshrined in legislation, with clear avenues for recourse when the rights of incarcerated people are not respected. This is particularly essential to ensure that the obligations on staff and rights of detainees are consistent across both public and private prisons in Victoria.

The Ombudsman's report notes that the "consequences for a prisoner can be serious, can impact on parole and include the loss of 'privileges' – such as telephone calls or out of cell time – and can even result in contact visits with family or children being withdrawn."[431] This is particularly concerning as contact with family is critical to rehabilitation. According to the Mandela Rules, "disciplinary sanctions or restrictive measures shall not include the prohibition of family contact."[432]

Regarding people with disability, the Mandela Rules provide that: "Before imposing disciplinary sanctions, prison administrations shall consider whether and how a prisoner's mental illness or developmental disability may have contributed to his or her conduct and the commission of the offence or act."[433] This is of particular importance, given the report's finding that there was inconsistent use of Corrections Independent Support Officer volunteers for incarcerated people with an intellectual disability.

RECOMMENDATIONS

Recommendation 96. The Victorian Government should implement the recommendations of the Victorian Ombudsman in her July 2021 report on prison disciplinary hearings.

Recommendation 97. Protections relating to procedural fairness in disciplinary proceedings should reflect those outlined in the Mandela Rules and should be enshrined in legislation.

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[429] The Office of the Public Advocate has also raised concerns about this. See: Hope, Z. (2020). "Intellectually disabled prisoners punished without oversight,"
[430] Victoria Ombudsman (2021). Investigation into good practice when conducting prison disciplinary hearings, p. 56.
[431] Ibid., p. 4.
[432] Rule 43(3) of the *Mandela Rules*.
[433] Rule 39(3) of the *Mandela Rules*.

Recommendation 98. The rights of incarcerated people with disability must continue to be upheld during the pandemic and recovery period, including the right to be supported through the Office of the Public Advocate during disciplinary hearings.

Privatisation of Prisons

The modern phenomenon of private, or for-profit prisons, originated in the United States in the mid-1980s in an effort to manage rapidly rising prison populations. The model was quickly adopted by Australia and the United Kingdom. In 2013, as the prison population in the United States reached a peak, approximately 15% or 30,000 people in prison were held in privately operated centres.[434]

Under the Obama Administration, the United States began moving away from having privately run prisons. The Biden Administration has continued the trend, with President Joe Biden this year signing a series of executive actions around racial equity which included a focus on prison reform. The President directed the Justice Department not to renew federal contracts with private prisons and has campaigned to eliminate the use of private prisons by the federal government. Notably, the motivation behind the shift is "the fact that prisons are not only encouraged profiteering off of human lives but more importantly, I've been shown by the Department of Justice Inspector General's report to be subpar in terms of safety and security for those incarcerated."[435]

Across Victoria, there are eleven public operated prisons and three privately operated prisons. The three privately managed prisons are Port Phillip Prison run by G4S, and Ravenhall Correctional Centre and Fulham Correctional Centre both run by the GEO Group. As of 31 May 2021, Corrections Victoria reported there were 7,274 people in prison, with 778 of those being Aboriginal people. Around 40% of Victoria's prison population is held in private prisons, a significant proportion compared with 15% of people in privately managed prisons in the United States, and the highest number in Australia.

VALS is deeply concerned about the degree of privatisation in Victoria's prison system. In addition to the wholly privately-run prisons, particular services – including healthcare – are contracted to private operators in many public prisons. The effect of this is to weaken accountability, undermine democratic control of the prison system, and put private profits before the wellbeing of people in prison and the integrity of the system. It also puts private profit ahead of rehabilitation and reducing recidivism.

Victoria's history with privately operated prisons should be a stark warning about the risks of privatisation. The Metropolitan Women's Correctional Centre was opened in 1996 as the first privately designed and operated prison in the state. In 2000, the State Government terminated the contracts

[434] U.S Department of Justice (2016) Memorandum for the Acting Director Federal Bureau of Prisons. Accessed at: https://www.justice.gov/archives/opa/file/886311/downloa d

[435] Vazquez, M. (2021) ''It's time to act': Biden moves to address racial inequality'. CNN. Accessed at: https://edition.cnn.com/2021/01/26/politics/executive-orders-equity-joe-biden/index.html

and took over the prison after serious concerns about the safety of people in the prison. A report by the Correctional Services Commissioner found "an unacceptably high number of prison incidents," "a disproportionate number of prisoners being classified as Protection Prisoners as they were, or felt unsafe," and up to 29% of the prison population being held in an overcrowded protection unit. Contractual benchmarks came nowhere near being met: "levels of attempted suicide [were] more than double the maximum allowed benchmark," "prisoner assaults on staff [were] almost double the maximum allowed benchmark," and "prisoner on prisoner assaults [were] significantly in excess of the maximum allowed benchmark." Issues with subcontractors led to the prison's health service losing its accreditation. Overall, the report found "an inability by the prison to implement strategies to ensure the welfare and safety of prisoners and staff."[436]

Despite this disastrous outcome of privatisation at what is now the Dame Phyllis Frost Centre, Victoria has continued to offer private contracts for managing prisons. G4S and GEO are global corporations with extensive records of mismanagement and scandal internationally – as was CCA, the contractor which ran the MWCC. The growing role of these corporations in Victoria's prison system should be a cause of serious concern.

Victoria's reliance on private prisons has increased in recent years, as the overall prison population has skyrocketed. The unacceptable incarceration rate is putting increasing numbers of people at risk of mistreatment in private prison environments. Privatisation, by raising the risk of mistreatment, abuse and corruption, increases the number of people who are at risk of leaving prison with traumatic experiences and inadequate progress towards rehabilitation.

Fundamentally, a question that needs to be asked is what incentive is there for a private company that profits from booming prison populations to truly commit to reducing recidivism rates? This concern is clearly demonstrated in the amounts of money that people in prison are charged for basic necessities – VALS has had a client asked by a private prison to pay around $1500 to have a computer in his cell in order to prepare for his trial. This is illustrative of the incentive for private prison operators to focus on financial issues rather than on giving detained people the best chance to leave prison and avoid reoffending. The extensive involvement of private companies in the prison system will, as a result, only serve to increase recidivism if it is not rapidly abandoned.

Challenges in Management and Accountability

Private prisons are monitored by Corrections Victoria using Service Delivery Outcomes, including some intended to measure safety and security. This is consistent with the approach to private prisons in other jurisdictions, where the state takes on an arms-length role in tracking the performance of private

[436] Correctional Services Commissioners' Report on Metropolitan Women's Correctional Centre's Compliance with its Contractual Obligations and Prison Services Agreement, Department of Justice, 1999-2000. Accessed at: https://www.parliament.vic.gov.au/papers/govpub/VPARL1999-2002No40.pdf

contractors. This approach, however, greatly reduces transparency and accountability, and undermines the Government's ability to address misconduct and abuses in prisons.

In its assessment of the prison system in Queensland, the Crime & Corruption Commission (CCC) found that

> [t]his marketised approach, where prisons are operated by private, profit-driven organisations, disconnects the State from direct responsibility for the delivery of privately operated prisons" and "creates challenges for the State in ensuring prisoners […] are treated humanely and have appropriate access to programs and services.[437]

In Victoria, a 2021 report by IBAC found similar issues with the arms-length approach to monitoring and managing prisons. IBAC concluded that "[i]ssues related to transparency are of particular concern in privately managed prisons", in part because of "commercial-in-confidence clauses in contracts between the state and private service providers which may affect the public's ability to identify contractual violations and any remedial actions taken".[438]

The lack of transparency and accountability means that even identified problems can be difficult to remediate in private prisons. Risk management and the response to serious incidents has been a particular cause of concern in Victoria. The Victorian Auditor-General has reported that "[s]erious incidents at both Port Phillip and Fulham have, in some instances, exposed weaknesses in how G4S and GEO manage safety and security risks," and that these incidents are not being investigated in a way that identifies or addresses their underlying causes.[439]

The absence of functional risk management, or processes to respond to serious incidents and prevent their recurrence, poses an enormous risk to the wellbeing of people in prison in Victoria.

Culture and Disciplinary Proceedings

A related problem with private prisons is the difficulty of influencing operational culture and establishing appropriate ethical standards.

Corruption in prisons is not only a risk to public funds and the integrity of the system. It also creates an environment where prison staff feel impunity about breaking rules, and so makes space for serious forms of misconduct including invasive strip-searching, use of force and inappropriate use of solitary confinement. The Queensland CCC found that "the public–private model makes developing a positive,

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[437] Queensland Crime & Corruption Commission (2018), *Taskforce Flaxton: An examination of corruption risks and corruption in Queensland prisons*, p10. Accessed at https://www.ccc.qld.gov.au/sites/default/files/Docs/Public-Hearings/Flaxton/Taskforce-Flaxton-An-examination-of-corruption-risks-and-corruption-in-qld-prisons-Report-2018.pdf

[438] IBAC (2021), *Special report on corrections*. Accessed at: https://www.ibac.vic.gov.au/publications-and-resources/article/special-report-on-corrections

[439] Victorian Auditor-General's Office (2018), *Safety and Cost Effectiveness of Private Prisons*, p45. Accessed at https://www.audit.vic.gov.au/sites/default/files/2018-03/20180328-Private-Prisons.pdf.

corruption-resistant culture difficult" because the government "has limited visibility of, and ability to influence, the culture of the private centres."[440] More generally, it reported that Queensland's Ethical Standards Unit (**ESU**) for prisons

> has limited influence in private prisons. Once a matter has been assessed, it is referred to the private prison to investigate and manage. The ESU has limited ability to influence professional standards or discipline outcomes in private prisons.[441]

These problems in Queensland are driven by structural features of prison privatisation, and the dynamics are no different in Victoria. IBAC's report identified serious misconduct in both public and private prisons, but it is notable that Port Phillip Prison – a private facility – saw the most inadequate disciplinary response, with some staff only disciplined when IBAC began its external investigation. Some staff at Port Phillip Prison were found to have interfered with their BWCs to obscure footage of misconduct, and investigations into incidents were not conducted in line with government or prison policy.[442]

Inadequate training and tokenistic efforts at investigating abuses are clear indications of a culture where the human rights and wellbeing of people in prison are not taken seriously. Though severe problems also exist in public prisons, privatisation makes it extremely difficult to address this culture in facilities which hold 40% of the prison population.

Healthcare Contracting

Another important element of Victoria's troubling approach to privatisation in the prison system is the contracting of healthcare. As discussed above, equivalency of healthcare is an important principle for prisons, set out in the Mandela Rules, which establish minimum standards for the treatment of people in prison. Healthcare equivalency means that people held in prison must have access to an equivalent standard of healthcare as they would if living freely in the community.

This vital principle can be undermined by subcontracting. In Australia, all jurisdictions except Victoria have healthcare in prisons managed by the health department. In Victoria, healthcare is managed by the Department of Justice and Community Safety, and service delivery is contracted to six private providers. These providers also subcontract some services.[443] The effect is a patchwork system where continuity of care is very hard to provide, particularly since people in prison may move between facilities, and the reliability and quality of services is highly inconsistent. Reducing the quality of health services and the possibility for people in prison to receive consistent, comprehensive care further

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[440] Queensland Crime & Corruption Commission (2018), *Taskforce Flaxton: An examination of corruption risks and corruption in Queensland prisons*, p27.
[441] Ibid, p. 43.
[442] IBAC (2021), *Special report on corrections*, pp34-36. Accessed at https://www.ibac.vic.gov.au/publications-and-resources/article/special-report-on-corrections.
[443] Corrections Victoria, 'Justice Health', https://www.corrections.vic.gov.au/justice-health.

contributes to poor prison conditions, undermining rehabilitation and increasing the risk of reoffending.

RECOMMENDATION
Recommendation 99. The Government should end privatisation of prisons in Victoria. This should include wholly privately-run prisons, as well as particular services, such as healthcare. The Government should move towards public control of all prison facilities as a matter of urgency.

Women in Prison

The female prison population is distinct in many ways from the male prison population, and there are important factors warranting a gender-sensitive approach to criminal justice reform. Women in prison should be provided with appropriate supports to reduce the risk of recidivism and increase successful reintegration into Victorian community. Additionally, the location of the custodial placement of women – particularly Aboriginal women – is critical. In instances where women desire to serve their custodial sentences with dependent children, efforts need to be undertaken to streamline the process and enhance its transparency.

Women in prison should be given particular attention in the design and implementation of programs to rehabilitate and reduce reoffending. This is essential because incarcerated women are, on the one hand, less likely to have committed serious offences, and on the other ,more likely to enter prison with past experiences that make them susceptible to re-traumatisation and cycles of offending without special care. Furthermore, specifically addressing the distinct needs of minorities and Indigenous peoples, the Bangkok Rules contain provisions mandating the development and provision of gender and culturally-relevant programs and services, designed in consultation with Aboriginal women and communities, for Aboriginal women (while in prison,[444] prior to and following release from custody[445]).

Upwards of three quarters of imprisoned women in Australia have suffered violence and abuse,[446] and rates of mental illness, substance use issues and histories of homelessness are higher than among men in prison.[447] These issues disproportionately affect Aboriginal women, and Aboriginal women are imprisoned at extremely high rates – 21 times more than non-Aboriginal women.[448] This is particularly

[444] Rule 54 of the Bangkok Rules.
[445] Rule 55 of the Bangkok Rules.
[446] Johnson, H. (2004). *Drugs and crime: A study of incarcerated female offenders, Research and public policy series*; Justice Health & Forensic Mental Health Network (2017), *2015 Network Patient Health Survey report*; M Wilson, M. et al, (2017). *Violence in the Lives of Incarcerated Aboriginal Mothers in Western Australia,* SAGE Open.
[447] Australian Institute of Health and Welfare (2020). *The Health of Australia's Prisoners*.
[448] Change the Record Coalition (2017). *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment*.

challenging in prison environments, which do not do enough to support women dealing with these vulnerabilities and can instead exacerbate them. Custodial sentences can also be highly traumatising for women because they involve family separation – more than half of women in prison have dependent children[449] – and this is an especially serious issue for Aboriginal women, many of whom live with the intergenerational trauma of state-enforced separation of families in previous generations.

At the same time, the offences that women are imprisoned for tend to be less serious crimes, associated with the vulnerabilities identified above. These include drug offending, theft and property offences, often committed in the context of struggling with addiction, homelessness or mental illness.[450] Women on average serve shorter prison sentences than men and are more likely to be held in prison on remand.[451]

These facts clearly show that women in prison are very often only offending out of necessity and are more likely to have vulnerabilities that make prison environments very damaging for their wellbeing. On the other hand, they are in a good position to be reintegrated into society, if given adequate supports. Many women in prison have sought help from support services prior to being incarcerated.[452] Together, these factors point to the importance of creating therapeutic, trauma-informed approaches to supporting women in prison.

In Victoria, however, support for women in prison is sorely lacking. Women often serve short sentences, or (due to Victoria's bail laws) are only held in prison on remand for offences which ultimately do not lead to prison time. As a result, they are often not given access to rehabilitation programs which have a longer duration.[453] Research evidence suggests that without dedicated rehabilitation support, incarceration alone tends to *increase reoffending* rather than reduce it.[454] Women serve shorter sentences because their offences are less serious and it is a perverse feature of the Victorian criminal legal system that the less serious nature of offending results in women receiving fewer social supports. Improving the provision of support in the community, including for women on Community Corrections Orders, would be a far more effective approach to reducing reoffending.[455] In this context, VALS wishes to emphasise our support for the Aboriginal Justice Caucus' goal of establishing a residential diversion programme for Aboriginal women. Drawing lessons from the

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449 Australian Institute of Health and Welfare (2020) *The Health and Welfare of Women in Australia's Prisons*.
450 Ibid.
451 Crime Statistics Agency (2019). *Characteristics and offending of women in prison in Victoria, 2012-2018*.
452 Victorian Ombudsman (2015). *Investigation into the rehabilitation and reintegration of prisoners in Victoria,* p. 94. Available at https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/investigation-into-the-rehabilitation-and-reintegration-of-prisoners-in-victoria/.
453 Ibid.
454 Centre for Innovative Justice (2021), *Leaving custody behind: Foundations for safer communities & gender-informed criminal justice systems*, p. 86. Available at https://cij.org.au/cms/wp-content/uploads/2021/09/leaving-custody-behind-issues-paper-july-2021-.pdf.
455 Ibid.

Wulgunggo Ngalu Learning Place model, this program could strengthen connections to culture and address causes of offending, with significant benefits over the existing carceral approach.[456]

There are also significant shortcomings in transitional support for women leaving prison. Given that women are more likely to be imprisoned for offences associated with poverty, homelessness and addiction, transitional support is essential to avoiding reoffending among women. However, Victoria's only dedicated transition facility, the Judy Lazarus Transition Centre, holds only men. A similar facility for women with up to a year of their sentence remaining would be highly beneficial, as VALS has previously noted.[457] Beyond transitional prison facilities, improved provision of post-release housing and transitional healthcare and alcohol and drug treatment would greatly reduce the risk of reoffending among women. In addition to the recommendations in this section, VALS highlights that the recommendations below on transition and throughcare are particularly important for women.

The prison where the custodial sentence is served is also an important issue for women. In Victoria, prisons where women are held are geographically isolated, which has considerable impacts on the ability of children and other family members to visit due to transportation time and costs, as well as other disadvantages.[458] The preference for the location of the prison selected to be close as possible to the home of the woman serving a custodial sentence is raised in Rule 3 of the Bangkok Rules. Furthermore, the Royal Commission into Aboriginal Deaths in Custody made similar recommendations concerning the issue in reference to Aboriginal people in custody, 30 years ago.[459]

Data is not publicly available on the number of women in Victorian prisons who have dependent children residing with them. Corrections Victoria runs the Living with Mum program for mothers and dependent children,[460] but prison can never be a healthy environment for a child. While VALS is fundamentally opposed to families being held in prison environments, the issue is addressed in this submission, given the fact that the Victorian criminal legal system makes provision for such circumstances.

While women can apply to have their children live in prison with them, the decisions concerning whether a child is permitted to live in prison with their mother are made by prison managers and senior executives within Corrections Victoria. The manner in which such matters are assessed, however, is far from transparent.[461] The situation is concerning, given the fact that in the recent study conducted by Walker et al., decisions made by corrections agencies resulted in two Aboriginal women

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[456] Aboriginal Justice Caucus (2021), submission to this Inquiry, p11.

[457] Victorian Ombudsman (2015)*, Investigation into the rehabilitation and reintegration of prisoners in Victoria,* p127.

[458] Sheehan, R. (2010). Parents as prisoners: A study of the parent-child relationships in the Children's Court of Victoria.11(4) Journal of Social Work 358-374, p. 361.

[459] Recommendation 168 of the Royal Commission into Aboriginal Deaths in Custody.

[460] Corrections Victoria runs the Living with Mum program in Dame Phyliss Frost Centre and the Tarrengower Prison, whereby dependent infants and pre-school age children can reside with their mothers in prison. See Pregnancy and childcare | Corrections, Prisons and Parole

[461] Walker, J. et al. (2021). Residential programmes for mothers and children in prison: Key themes and concepts. 21(1) Criminology & Criminal Justice 21-39, p.27.

not being allowed to keep their babies with them in prison (the only two women in the study to have such applications denied), which was implicitly attributed to the stigma endured by Aboriginal women in society generally. However, the lack of routine data collected concerning women with dependent children in prison presents further difficulties in determining whether such occurrences are widespread; and whether they are the intentional or unintentional consequence of systemic racism.[462]

Another obstacle noted regarding the application process is that mothers with dependent children frequently wanted to have their children with them if possible, but the processing time precluded the application – particularly for mothers who were on remand serving short sentences. Mothers desiring to have their children reside in prison with them in such circumstances face considerable barriers while trying to avoid the damage caused to the mother-child relationship as a result of separation; and the inherent risks associated with their children becoming swept up in the child protection system.[463]

RECOMMENDATIONS

Recommendation 100. The Government should expand the availability of rehabilitation and reintegration supports for women in prison.

Recommendation 101. The Government should improve transitional supports for women, including through:

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

Recommendation 102. The Government should fund a dedicated residential diversion program for Aboriginal women, similar to Wulgunggo Ngalu Learning Place.

Recommendation 103. Victorian legislation should require that Corrections Victoria select a location for a woman to serve a custodial sentence that is as close as possible to the place or residence of the imprisoned woman's family and children.

Recommendation 104. Corrections Victoria should be required to maintain records and make statistical data publicly available about all aspects of the Living with Mum program, including applications and outcomes.

[462] Ibid., p. 25.
[463] Stone, U. et al. (2017). Incarcerated Mothers: Issues and Barriers for Regaining Custody of Children. 97(3) The Prison Journal 296-317, pp. 304-305.

Recommendation 105. The time required for the processing of applications for the Living with Mums program by Corrections Victoria should be reduced to ensure that mothers desiring to maintain custody of their dependent children while in prison are not precluded from doing so on the basis of a short custodial sentence.

Older People in Prison

Similar to women in prison, older people in prisons are highly amenable to being successfully reintegrated into society and highly vulnerable if the prison system does not recognise and respond to their particular needs.

An ageing prison population poses many of the same challenges as the ageing population in Australian society more broadly. The effects, however, are accelerated. Research suggests an approximately 10-year gap in overall health between imprisoned people and people in the community – that is, people in prison suffer from age-related conditions around a decade sooner than people outside prison, because of a range of socioeconomic factors.[464] As a result, policy and practice frameworks for caring for older people in prison generally use a minimum age of around 50 to define the 'older' group, and as low as 45 for Aboriginal people.[465]

Empirical reasons for the lower age of an 'older' person in relation to Aboriginal people is that life expectancy that is approximately ten years less than the general population of Australia, owing in part to the early onset of health conditions and comorbidities,[466] which is attributable to disadvantage in relation to social determinants, including education, employment, income, and cultural determinants, including colonisation, racism, loss of language and loss of connection to land.[467] The socioeconomic factors associated with imprisoned people generally that lead to lower life expectancy and the documented sociocultural elements attributed to the lower life expectancy of Aboriginal people specifically raise concerns about the combined impact of such disadvantages resulting in a lower life expectancy for Aboriginal people in prison.

Older populations create pressure on services in prisons, not restricted to higher demand for healthcare. Mainstream services in prisons are generally targeted at younger people, meaning either

[464] Inspector of Custodial Services, Western Australia (2021). Older Prisoners, p. iv. Available at https://www.oics.wa.gov.au/wp-content/uploads/2021/05/Older-Prisoners-Review-April-2021.pdf.
[465] Corrections Victoria (2015), *Ageing Prisoner and Offender Policy Framework 2015-2020*. Accessed at https://files.corrections.vic.gov.au/2021-06/cv_ageing_prisoner%20offender_policyframework15_0.pdf?VersionId=mQntg8_TX5xFu6Prjpy4PJuza8rHxpWl.
[466] Temple, J. et al (2020). Ageing of the Aboriginal and Torres Strait Islander population: numerical, structural, timing and spatial aspects. 44(4) Indigenous Health 271-278, p. 273.
[467] Wettasinghe, P.M. et al. (2020). Older Aboriginal Australians' Health Concerns and Preferences for Healthy Ageing Programs. 17 International Journal of Environmental Research and Public Health 7390.

that prisons need to provide specialised services or – as is more often the case, including in Victoria – that older incarcerated people are unintentionally excluded from services and prison activities. According to the WA Inspector of Custodial Services, this can amount to a "double punishment" for older incarcerated people because being "isolated from the daily regime … intensifies the punishment of imprisonment."[468] To avoid this injustice and the harmful mental health effects it can engender, "adjustments to the regime are required to ensure that older incarcerated people are not routinely excluded from activities like employment, programs, or recreation."[469]

Research evidence generally suggests that, across the world, older incarcerated people are less likely to reoffend after their release than younger people.[470] In Victoria, data availability is limited, but reoffending rates for people under 25 were 8 percentage points higher than the overall rate, showing a strong age effect on the risk of reoffending.[471] At the same time, the Victorian Ombudsman has pointed to evidence that rehabilitation programs have less influence on older people.[472] This highlights the importance of strong supports and reintegration efforts for young people, but it also suggests the need for an alternative approach to older people in prison. Such an approach would recognise that older people generally do not need to be managed or monitored extensively, and are likely to reintegrate into society successfully as long as they are provided the tools to do so. Transitional support with finding housing, accessing healthcare, and navigating new technologies and social contexts may be particularly important for people who have served long sentences in prison.

In Victoria, the strategy for caring for older incarcerated people is set out in the *Ageing Prisoner and Offender Policy Framework 2015-2020*.[473] This document was published in 2015, and there have been no published updates. The 'action plan' proposed in the policy framework has also not been published. Although it is clear that Corrections Victoria and the Government are aware of the broad issues relating to caring for older people in prison, greater transparency is needed to enable accountability, monitoring and evaluation.

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[468] Inspector of Custodial Services, Western Australia (2021). Older Prisoners, p. v. Available at https://www.oics.wa.gov.au/wp-content/uploads/2021/05/Older-Prisoners-Review-April-2021.pdf.
[469] Ibid, p. 18.
[470] Rakes et al (2018), 'Recidivism among Older Adults: Correlates of Prison Re-entry', *Justice Policy Journal*. Accessed at http://www.cjcj.org/uploads/cjcj/documents/recidivism_among_older_adults_correlates_of_prison_reentry.pdf; Baidawi et al (2011), 'Older prisoners: a challenge for Australian corrections', Australian Institute of Criminology. Accessed at https://www.aic.gov.au/publications/tandi/tandi426.
[471] Victorian Ombudsman (2015). Investigation into the rehabilitation and reintegration of prisoners in Victoria, p. 34. Available at https://assets.ombudsman.vic.gov.au/assets/Reports/Parliamentary-Reports/1-PDF-Report-Files/Investigation-into-the-rehabilitation-and-reintegration-of-prisoners-in-Victoria.pdf?mtime=20191217123824.
[472] Ibid, p. 97.
[473] Corrections Victoria (2015), *Ageing Prisoner and Offender Policy Framework 2015-2020*. Accessed at https://files.corrections.vic.gov.au/2021-06/cv_ageing_prisoner%20offender_policyframework15_0.pdf?VersionId=mQntg8_TX5xFu6Prjpy4PJuza8rHxpWl.

RECOMMENDATION

Recommendation 106. Corrections Victoria should recognise the unique needs of older incarcerated people and implement necessary policy, program and practice changes in relation to matters including:

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

[…]

Transition Support

One of the most important factors in avoiding reoffending is supporting people released from prison to have a successful transition back into the community. Transitions can be extremely challenging. Access to housing and employment can be very difficult for people with criminal records. Accessing government services such as healthcare or social security payments is not straightforward for people who have been deprived of their liberty and responsibility over their own lives, often for long periods. In the absence of strong support through the transition period, there is a high risk that people released from prison will be drawn back into offending because of the return of health or social problems they were struggling to deal with before being imprisoned, or because they are forced into crimes of poverty. Most strikingly, these difficulties and the stresses of release from a highly institutionalised carceral environment contribute to making formerly incarcerated people 12 times more likely to die in the four weeks after they are released.[474]

VALS is extremely concerned about the significant unmet need for holistic and targeted culturally safe and responsive pre- and post-release programs for Aboriginal people in prison.[475] Of the incarcerated people in Victoria who were released in 2015-16, 43.7% had returned to prison under sentence within two years of release. We note that the lack of transitional support is acknowledged in *Burra Lotjpa Dunguludja*.[476] Pre- and post-release programs must be sufficiently flexible, recognising the complexity of individual needs and the barriers that exist in access to vital community services such as stable, safe and appropriate housing. They must also ensure continuity of culturally safe mental health care and take an early intervention approach to addressing barriers to opportunities for meaningful employment. Pre- and post-release programs must be designed, developed and implemented in consultation with the Aboriginal

[474] Victorian Ombudsman (2015). Investigation into the rehabilitation and reintegration of prisoners in Victoria, p. 102. Available at https://assets.ombudsman.vic.gov.au/assets/Reports/Parliamentary-Reports/1-PDF-Report-Files/Investigation-into-the-rehabilitation-and-reintegration-of-prisoners-in-Victoria.pdf?mtime=20191217123824.

[475] VALS (2019). Submission to the Royal Commission into Victoria's Mental Health System, pp. 45-46.

[476] Victorian Government (2018) *Burra Lotjpa Dunguludja*, p. 44.

community and in partnership with ACCOs. They need to be accessible at all prisons and at all stages of the custodial process.

From 2015 to 2017, VALS was involved in Corrections Victoria's main post-release transition program, ReConnect. VALS ReConnect workers were able to provide culturally safe, trauma-informed case management and support to people transitioning out of prison, helping to identify complex needs and address risk factors for reoffending. Resources for the ReConnect program, however, were not adequate to sustain a specialist culturally safe service of the kind VALS was delivering, and we were not able to continue providing services with ReConnect.

One of the most important elements in successful transitions is access to safe and stable housing. Homelessness can cause or exacerbate mental illness and is a key driver of reoffending. For Aboriginal people, stable housing is essential for the healthy functioning of family and community relationships.[477] In the most extreme circumstances, people may deliberately reoffend because returning to prison is preferable to ongoing homelessness.[478] More commonly, homelessness or housing insecurity may force people to live in family violence situations, associate with people they might prefer to avoid during a transition back into the community, or commit crimes associated with poverty or mental health issues.

Across Australia, housing support for people released from prison is wholly inadequate given the growing need. The overall strain on social housing providers has led to stricter targeting of their efforts, and a concentration on providing subsidies and support for clients to access private rentals – which many people released from prison simply will not be able to access, even with financial support. Providing public housing to a person released from prison provides them stability and kicks off a beneficial cycle, with long-term effects: police incidents fall by 8.9% each year after being housed, court appearances fall 7.6% each year, time in custody falls by 11.2% per year, and the justice system costs of engaging the person fall by more than $2000 each year.[479]

Victoria has, during the COVID-19 pandemic, expanded the availability of transitional housing to avoid people being released into homelessness amidst high levels of COVID-19 infection.[480] While this is a positive shift, efforts to reduce homelessness among people released from prison should not be limited to a pandemic period, and there are significant problems with how this support has been offered. The main facility developed to provide transitional housing in this period has been a centre at Maribyrnong run out of a former immigration detention centre. The built environment of this facility continues to clearly resemble a prison, and the centre is run by Corrections Victoria rather than

[477] VALS (2019). Submission to the Royal Commission into Victoria's Mental Health System, p. 47.
[478] ABC News (2021). 'Concerns ex-prisoners falling back into crime because of WA rental shortage'. Accessed at https://www.abc.net.au/news/2021-07-22/prisoner-housing-rental-woes/100314090.
[479] Martin et al (2021), *Exiting prison with complex support needs*, p. 4. Accessed at https://apo.org.au/sites/default/files/resource-files/2021-08/apo-nid313664.pdf.
[480] The Age (2021). 'I'm not scared any more: The unique halfway house helping ex-inmates adjust to the outside'. Available at https://www.theage.com.au/national/victoria/i-m-not-scared-any-more-the-unique-halfway-house-helping-ex-inmates-adjust-to-the-outside-20210530-p57wes.html.

by housing providers or support agencies.[481] There are serious limitations on how much reintegration into society can be achieved in such a setting. It would be more suited to being a pre-release transition facility (similarly to the Judy Lazarus Transition Centre) than to use in the post-release period, when a clearer transition away from the prison setting is important.

VALS is a key partner with Aboriginal Housing Victoria in operating Baggarrook, a transitional housing and holistic support program for Aboriginal women transitioning out of prison.[482] This is an important initiative which expands the transition supports for women, who face homelessness after release at about twice the rate men do, and have access to very few dedicated transitional housing supports.[483] Alongside ongoing support and funding for Baggarrook, the Government should work to expand other transition supports for women. These should include a pre-release transition facility equivalent to the Judy Lazarus Transition Centre for men in the last year of their sentence, whose recidivism rate is less than one-quarter the rate of the overall male prison population.[484]

Beyond housing, providing continuity of care is important for Aboriginal people held in prison who are disproportionately likely to have complex health and psychosocial needs. As noted above, the chronic underfunding of mental health services in the community means that prison may be the first time many incarcerated people are able to get the support they need. Ensuring that they are able to stay connected with health services, including ACCHOs, is critical. If support falls away, Aboriginal people may fall back into acute or chronic mental illness and the risk of reoffending is substantially higher. A Queensland initiative to connect people with NDIS support after their sentencing, run in the state's equivalent of Koori Court, has seen no reoffending among the small number of people it has helped to date, compared to a typical recidivism rate of 75%.[485] This is a clear demonstration of the importance of providing and maintaining connection to health and disability services through the transition period

This applies equally to other kinds of support services. Careful case management through pre-release and post-release phases would help Aboriginal people stay connected with healthcare, mental health support, or alcohol and drug programs, as well as empowering them to stay engaged with their legal matters and re-establish their connections with family and community.

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481 Ibid.
482 VALS, 'Baggarrook', https://www.vals.org.au/baggarrook/.
483 Victorian Ombudsman (2015). Investigation into the rehabilitation and reintegration of prisoners in Victoria, p.102. Accessed at https://assets.ombudsman.vic.gov.au/assets/Reports/Parliamentary-Reports/1-PDF-Report-Files/Investigation-into-the-rehabilitation-and-reintegration-of-prisoners-in-Victoria.pdf?mtime=20191217123824
484 Ibid, pp. 127-128.
485 SBS News (2021) 'A special program is helping Indigenous offenders with disability turn their lives around'. Accessed at https://www.sbs.com.au/news/a-special-program-is-helping-indigenous-offenders-with-disability-turn-their-lives-around/9cfa95bb-8866-4f50-9a54-8b70fa3bca93.

Good Practice Model: NAAJA Throughcare Service

The North Australian Aboriginal Justice Agency's (**NAAJA**) Throughcare service begins working with people in prison and youth detention six months prior to their release, with the aim of supporting people's transition back into the community. The support is provided in recognition of the various issues that might present challenges to a successful transition, including "Homelessness or marginal accommodation; No income, disengagement from Centrelink, or unstable income; Literacy and numeracy issues, and/or English as second, third or fourth language; Problematic family relationships, Involvement with welfare agencies, history of family violence; Cultural/payback issues; Lack of community supports; Substance misuse issues; and Health, including mental health issues, and/or physical disabilities."[486] Support can come in the form of "Ongoing rehabilitation, Accommodation, Employment, Education and training, Health, Life and problem solving skills, and Reconnection to family and community."[487]

In its 2018-2019 Annual Report, NAAJA reported that, "since commencing in February 2010, case management support has been provided to 1102 clients. Only 143 of which (approximately 13.3%) have been returned to prison for re-offending or a conditional breach while participating in the Program. This figure continues to compare favourably with the NT recidivism rate of 60%, notwithstanding the measures are not directly comparable."[488]

RECOMMENDATION

Recommendation 107. The Government should provide long-term and stable funding to ACCOs to deliver pre- and post-release programs, including transitional housing programs run by ACCOs, such as VALS' Baggarrook program, to support men and women leaving prison.

Language, Stigma & Dehumanisation

There is a growing recognition in criminal justice advocacy that stigma around people in prison can be a source of trauma and, after people's release, a barrier to their reintegration into the community. Alongside formal means of tackling stigmatisation, such as the spent convictions scheme discussed above, it is important to address the effects of language and nomenclature on societal perceptions of people who come into contact with the criminal legal system.

A particular area of focus is the use of 'person-first' language to avoid dehumanising people in prison. Referring to 'people in prison' or 'incarcerated individuals' emphasises that imprisonment is a

[486] NAAJA, Throughcare, accessed at http://www.naaja.org.au/law-and-justice/throughcare/
[487] NAAJA, Throughcare, accessed at http://www.naaja.org.au/law-and-justice/throughcare/
[488] NAAJA, Annual Report 2018-2019, accessed at http://www.naaja.org.au/wp-content/uploads/2020/02/BJ1938-NAAJA-Annual-Report-2018-2019-Web-Version.pdf

situation that the person is in, while terms like 'convict' and 'inmate' which treat being in prison as an overriding fact about a person. Some people who have lived experience of prison describe these terms as feeling like a "violat[ion of] their humanity", entrenching a "feeling of powerlessness" and providing implicit justification for poor prison conditions.[489]

In the United States, New York State has formally removed the word 'inmate' from all provisions of state law, in order to respond to and mitigate the stigmatising effect that language can have.[490] As the legislature highlighted in passing the bill, "studies have shown these terminologies have an inadvertent and adverse impact on individuals' employment, housing and other communal opportunities" and can increase the risk of recidivism as a result.[491]

VALS is of the view that changes to everyday terminology can affect social perception of people in prison and released from prison, and even marginal shifts in these perceptions make a difference to people's ability to reintegrate into society and avoid reoffending. VALS makes every effort in our own work to use terminology which avoid dehumanisation and stigma. A broader adoption of these efforts in government, the criminal legal system, and across legal service providers would help create a shift in perception which can have very important ramifications for people released from prison.

However, the question of what language is stigmatising or dehumanising cannot be answered in the abstract or by outside advocates. In the United States, for example, there is significant regional variation in what language is preferred by people in prison.[492] It is crucial that the voices of people with lived experience, and especially Aboriginal people who are profoundly affected by stigmatisation in many parts of society, are heard and respected in all conversations about the criminal legal system in Victoria.

The stigma that attaches to people following the completion of custodial sentences in detention facilities has further effects on their families following release. Families, including the children, of imprisoned people experience "social stigma, isolation and ostracism'" within their respective communities.[493]

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[489] Bamenga (2021), 'Good Intentions Don't Blunt the Impact of Dehumanizing Words', The Marshall Project. Accessed at https://www.themarshallproject.org/2021/04/12/good-intentions-don-t-blunt-the-impact-of-dehumanizing-words.

[490] Corrections1, 7 August 2021, 'NY governor signs bill ending use of 'inmate' in state law'. Accessed at https://www.corrections1.com/law-and-legislation/articles/ny-governor-signs-bill-ending-use-of-inmate-in-state-law-2qJIFSum9yza3pvl/.

[491] New York State Assembly, Bill A02395 – Memorandum in Support of Legislation. Accessed at https://assembly.ny.gov/leg/?bn=A02395&term=&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y.

[492] Bartley (2021), 'I am not your 'inmate'', The Marshall Project. Accessed at https://www.themarshallproject.org/2021/04/12/i-am-not-your-inmate.

[493] Sheehan, R. (2010). Parents as prisoners: A study of the parent-child relationship in the Children's Court of Victoria. 11(4) Journal of Social Work 358-374, p. 361.

RECOMMENDATIONS

Recommendation 108. The Victorian Government should undertake, in close consultation with civil society and people with lived experience of imprisonment, an evaluation and examination of the terminology employed in policies, programs, legislation and statements concerning people serving custodial sentences and who are justice system involved with the objective of mitigating the stigmatising effect of such terminology within the Victorian community.

Recommendation 109. The Victorian Government should ensure that specialised services are provided to imprisoned people and their families following the completion of their custodial sentence to address issues arising from stigma experienced within the community.

Voting Rights

Another area where broader social questions affect rehabilitation and reintegration is the issue of voting rights. Most jurisdictions in Australia prevent some people serving time in prison from voting in elections. Under Victorian law, people in prison on a sentence of more than five years are barred from voting.[494] People in Victorian prisons also cannot vote in federal elections if their sentence is more than three years.[495] Some Australian states impose harsher rules – banning voting at sentences of more than three years or, in NSW and WA, twelve months – while the ACT and South Australia do not restrict voting rights of people in prison.[496]

The restriction of voting rights for people in prison is a form of disenfranchisement which heavily affects already marginalised people. The over-incarceration of Aboriginal people means that disenfranchisement disproportionately affects Aboriginal communities which are already neglected by political processes. It has been estimated that 0.6% of Aboriginal people in Australia are disenfranchised by restrictions on voting from prison, compared to 0.075% of non-Aboriginal people.[497] In addition, people removed from the electoral roll while in prison may not re-enrol after their release, particularly in the absence of strong transitional supports, which means that the number of Aboriginal people not enrolled to vote because of their time in prison is much higher than the number in prison at any given time. In New Zealand, the Waitangi Tribunal found that Māori people

[494] Constitution Act 1975 (Vic), s48(2)(b). Accessible at http://classic.austlii.edu.au/au/legis/vic/consol_act/ca1975188/s48.html.
[495] Commonwealth Electoral Act 1918, s93(8AA). Accessible at http://classic.austlii.edu.au/au/legis/cth/consol_act/cea1918233/s93.html.
[496] Churchill (2020), *Voting Rights in Prison: Issues Paper*, University of Queensland, p4. Accessed at https://law.uq.edu.au/files/60196/REP_PBC_MsP_Voting_Rights_Australian_Prisons_FIN_20200715.pdf.
[497] Churchill (2020), Voting Rights in Prison: Issues Paper, University of Queensland, p8. Accessed at https://law.uq.edu.au/files/60196/REP_PBC_MsP_Voting_Rights_Australian_Prisons_FIN_20200715.pdf

removed from the electoral roll – particularly if this occurs when they are young – are less likely to *ever* vote.[498]

Denial of the right to vote to people serving prison sentences constitutes an additional punishment over the jail term itself.[499] It is dubious that this additional punishment is given adequate consideration, either in sentencing decisions or in any assessment of its effects on rehabilitation. Disenfranchisement explicitly treats incarcerated people as though they are not members of the Victorian community, at odds with the goal of rehabilitative interventions.

The Waitangi Tribunal – the body in New Zealand responsible for monitoring the government's treaty obligations to Māori people – has recommended that complying with the Treaty requires abolition of all limits on voting rights for people in prison.[500] This finding recognised both the disproportionate effect of disenfranchisement on Māori people, but also the potential "rehabilitative and reintegrative potential of the franchise."[501] Evidence at the Tribunal showed that people released from prison "are more likely to identify with a society they have had a stake in creating" and that disenfranchisement is inconsistent with an effective focus on reintegration and rehabilitation.[502] The Tribunal also found that restricting voting rights of people in prison had flow-on effects for the political participation of family members and wider Māori communities.

VALS is of the view that denying the right to vote to people in prison is inconsistent with human rights obligations and counterproductive. Disenfranchisement from the electoral roll contributes to a sense of broader social disenfranchisement which obstructs rehabilitation and stigmatises people who have been in prison.

RECOMMENDATIONS

Recommendation 110. Victoria should remove all restrictions in state law on the right of people in prison to vote in state and local elections.

Recommendation 111. Victoria should lead advocacy nationally, including at the Meeting of Attorneys-General, for a consistent, nationwide approach which grants full voting rights to people in prison, including in federal elections.

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498 Waitangi Tribunal (2020), *He Aha I Pera Ai? The Maori Prisoners' Voting Report*, p25. Accessed at https://waitangitribunal.govt.nz/news/tribunal-releases-report-on-maori-prisoners-voting-rights/.
499 Churchill (2020), Voting Rights in Prison: Issues Paper, University of Queensland, pp7-8. Accessed at https://law.uq.edu.au/files/60196/REP_PBC_MsP_Voting_Rights_Australian_Prisons_FIN_20200715.pdf
500 Waitangi Tribunal (2020).
501 Ibid, p. 25.
502 Ibid, p. 23.

Part 2: Spotlight on VALS' Clients' Experiences

Case Study on Lack of Access to Medical Services in Custody – Morgan* (pseudonym used)

Morgan has an intellectual disability. They have experienced delays in medical care, including:

- twelve hours for an ambulance to come when they were having heart problems and
- six weeks to get medical help after they fell in the shower.

Case Study on Safety in Prisons & Work in Prison – Jac* (pseudonym used)

"Officers have a culture of telling what other people are in for, it happens really frequently. **People get bashed**, it has happened quite a bit." Jac has been 'bashed' a few times, including when they were on remand. They have also been stabbed, after they advised that they were not safe (they were told that if they could not provide names, there was nothing that could be done for them). They had no choice regarding placement after this, and had to be moved to another prison and kept in **isolation**.

Jac was also placed in the long-term slot, spending two months in there while at MAP. They could not access any programs while in there, and there was no way of asking for any. They did not get proper recreational time (they did not get an hour, as it was too difficult because of COVID-19).

They get **paid** to assemble furniture, the work is ok. They get paid $6.50 per hour, which is not bad, as others get paid $4. They use their money at the canteen.

Case Study - Paul* (pseudonym used)

- ***Lack of Access to Medical Services in Custody &***
- ***Isolation &***
- ***Disciplinary Processes &***
- ***Programs***

Paul is an Aboriginal man in his 60s and is currently serving a long-term prison sentence. In 2017, he was assaulted by another prisoner, which caused him to have an acquired brain injury. The injury causes difficulty in his memory and speaking. Medical records of the assault show that Paul suffered bleeding in his brain, post traumatic amnesia and expressive dysphasia. Paul was admitted to hospital for a significant period following the assault.

When discharged from hospital, Paul was placed in isolation for 14 months. Paul was not exposed to any of the ordinary education programs during his lockdown period. He was put in this

lockdown and was told to 'shut up' and 'that was that'. The prison did not provide a reason for this isolation. During this period, his ability to speak deteriorated further.

Paul needs speech therapy to assist him with his speech and communication skills. After around two years of requesting such help, Paul was finally able see a speech therapist. However, there was only three video sessions with the therapist, which was not enough. Paul also needs to see a physiotherapist for his right arm, following the assault. The prison has not provided such assistance. They have instead provided him with an injection which was applied to his neck, but Paul said this did not help. Paul also needs access to a psychologist. A report conducted for Paul's legal matters showed that he lives with Post Traumatic Stress Disorder, anxiety, depression, adjustment disorder, panic attacks, suicidal ideation and nightmares pursuant to the assault that took place. Although the prison does provide access to a nurse, Paul is only able to see a psychologist monthly and if his condition is 'really bad'.

Paul stated the following regarding **medical care**:

> *I'm hoping that they can have more people to help properly, you know, not just give you a pill and that'll do you. Like me trying to get my speech therapy, why did it take so long? That's the sort of thing they need to get on top of, to supply that sort of help when it's really needed. I did ask the screws and the medical staff for help, but they weren't helpful. It was very frustrating trying to get anything happening. Need to look at the way they treat us for rehabilitation. For drug users, they give them a lot of help, like methadone, but they don't go helping people like me with a brain problem, they'd rather lock us up like they did with me. Put me in a thing for 14 months. We get locked up all the time you know. It's just an ongoing battle to try and get help when you really need. You put in a form to see the doctor or psych, you had to wait until it happened. Normally it would take a couple of weeks. I waited 3 months to the eye doctor to get glasses to see. Psych, I could only see him once a month.*

Paul stated the following regarding **isolation**:

> *When I got out of hospital, they put me in a lock down unit by myself for 14 months to put me out of everybody's way. In there I was miss out talking to normal people, just conversation which I needed in early days because the way my speech is. Doctor said that. Very hard being in lock up all the time. They didn't actually say any reason for putting me there. Out of hospital, then in lockup unit. I was put in a corner and told to shut up and that was that. Being in that unit, a lot of education program people don't like coming down there, wasn't good, wasn't a help at all.*

- While he was in isolation, he had access to a phone, when it was his time out of cell (1.5 hour per day). He could call a lawyer, family and other supports. His family knew where he was being kept.
- He did not know why he was in isolation, for how long he would be kept there, or what his rights were (eg. making a complaint).

- During the 1.5 hours out of cell, two people at a time could use the gym to exercise. In terms of time outside in fresh air, he had access to “a little air area outside, not big at all, only the size of a room, during our 1.5 hours.”
- The whole time while he was in isolation, he only spoke to one other detained person. He did not know him to start off with, but they became good friends. The Aboriginal Liaison Officer (ALOs) rarely came to visit him, as they “hate being in that unit.” When asked whether other staff came and spoke with him or spent time with him every day, James said “not really”.
- He “had a program person that came once a week for an hour, the Aboriginal heritage program.” His in-cell activity was homework from the Aboriginal heritage program.
- James said that sometimes isolation is needed, as “some people are just really toxic and they need to be taught that they can’t be like that.” However, James stated that isolation “does get used unfairly at times, it definitely need more checks. Anybody can put the paperwork in and that’s it.”

Paul stated the following regarding **disciplinary hearings**:

> *Yeah. That’s a thing. They just don’t let you out. That’s their punishment alright. If you behave yourself, it’s alright. Twice, I think I argued with them, so they just lock you up. That’s it. No meeting they just lock you up and that’s it. You are there until the next day or whenever they decide it’s enough.*

Paul stated the following regarding **programs**:

> *More support programs would be good. Things that keep us occupied save us getting in trouble. The uni people haven’t been here for months. That’s no one’s fault. It just makes it very hard for us. No teachers. No school, so not good [because of COVID-19].*

Case Study on Failure to provide opportunities to connect with culture – James*

James* is an Aboriginal man, with an intellectual disability, in his 50s who has completed his prison sentence but has been kept in a low security corrections facility for more than 10 years on a supervision order, with no prospects of transitioning into the community, due to adverse risk assessments. He has looked after injured birds that have been found at the facility and would like to become a wildlife carer. James sees looking after birds, in particular, as a way to practice his culture, learn new skills and assist with his rehabilitation. The Correctional facility however has refused this request and instead stated that a caged pet bird would be the only thing permitted, which fails to recognise and support James’ connection to his culture.

James said “I have been in the system so long – feels one sided. Only one Indigenous worker. No Indigenous case workers. If we had more Indigenous support we’d be able to learn more about our

cultures. I wouldn't mind finding out about my cultural ways traditional ceremonies, dances. Way things are now, it's not really happening."

Case Study on Parole Applications – Kelly* (pseudonym used)

Kelly knew that their parole date was coming up in July 2021, and they wanted to apply for parole. They did apply for parole, but ultimately withdrew their application.

Kelly thinks that people should be entitled to **legal assistance to apply for parole**. This is important to understand the system, as even "the officers themselves don't understand it." The Aboriginal Liaison Officers (**ALO**s) do not help with parole, they mainly just do programs and art. Kelly was provided no support to fill out the parole form. "They just gave me my parole application form. The case worker told me about applying for parole, gave me the piece of paper, and that was pretty much it. There was no information guides or guidance."

Kelly was **moved around a lot**, and that made things more complex. They moved around 4-5 times. The parole form went missing, and then the other prisons didn't know anything about it.

Kelly does not have any family that they could stay with while on parole. Kelly would be happy to go anywhere, they "[j]ust want to get on with life." CCS does the parole planning, and they do a scan of the proposed property, up to 6 months before. But in Kelly's case, they "didn't have any property to scan." Kelly was not provided any support in organising **housing or residence for their parole application**. Kelly stated that, "[i]f I had housing I think I would get parole. I don't see why not. I got approved to go to the next step of parole planning."

Kelly was not provided information about what **programs they were expected to complete for parole**. **During COVID-19 all programs were suspended**, including AOD. The AOD program was important to Kelly, and the program suspension made it harder for them to apply for parole: "I haven't been able to start it. If had been able to do that program, I would have a better chance at parole." Kelly is not sure when they will be able to start the program. They have been abstinent from drug use while incarcerated, but they are worried that they will start using again on release. The biggest problem for them has been alcohol, but they used other drugs too.

"If they wanted people to get parole, they should help us out. **They need proper programs, there is only group counselling**. Nobody wants to talk about the stuff they did in front of other people. We all did bad stuff, but we want to get better." Kelly wants to improve their own mental health, as they have bad PTSD, which leads them to drink and black out, and then "do bad stuff." Kelly says that "[i]f I could get on top of my PTSD, then I might be alright." They highlighted the shortcomings

of **mental health care in prison**: "There is a psych nurse, but that's only about getting your medication. There is no psychologist."

Part 3: Additional Recommendations

Independent Visitors Scheme

Independent, culturally appropriate detention oversight is critical to improving conditions and treatment in prisons. Safeguards, that are legislated for, must be accompanied by a robust complaints system, auditing, monitoring and inspections.

The current Independent Visitors Scheme (**IPVS**) needs extensive remodelling if it is to continue its monitoring function as an NPM member under OPCAT, in order to ensure that the scheme truly operates independently. Currently:

- volunteers *may* be appointed by the Minister,[503] on the recommendation of the Justice Assurance and Review Office (**JARO**, which advises the Secretary of the Department of Justice and Community Safety),[504] and "[p]rison management has the authority to accept or deem as unsuitable volunteer candidates who do not satisfy the prison's internal security check."[505]
- volunteers provide advice to the Minister.

This is to be contrasted with the Independent Visitor Program that operates at the Commission for Children and Young People (**CCYP**), which recruits its volunteers, who are required to report to the Principal Commissioner seven days after each visit.[506] Through this program, the "Commission seeks to resolve issues either at unit level or by raising them with senior Youth Justice managers. Serious issues are escalated when required."[507]

Currently there is a DJCS review of "the Aboriginal Independent Prison Visitor scheme and how it can best support Aboriginal prisoners."[508]

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[503] s35 *Corrections Act 1986 (Vic)*

[504] Corrections Victoria, Justice Assurance and Review Office (JARO), available at https://www.justice.vic.gov.au/contact-us/justice-assurance-and-review-office-jaro

[505] Corrections Victoria, Independent Prison Visitor Scheme, available at https://www.corrections.vic.gov.au/volunteering/independent-prison-visitor-scheme

[506] Commission for Children and Young People, Independent Visitor Program, available at https://ccyp.vic.gov.au/monitoring-and-advocacy/independent-visitor-program/

[507] Commission for Children and Young People, Annual Report 2020 – 2021, available at https://ccyp.vic.gov.au/assets/corporate-documents/Annual-report-2020-21.pdf

[508] Department of Justice and Community Safety, Annual Report 2020 – 2021, available at https://files.justice.vic.gov.au/2021-10/DJCS-Annual-Report-20-21_0.pdf

RECOMMENDATION

Recommendation 112. Visitors under the Independent Visitors Scheme (IPVS) should be appointed independently of the Justice Assurance and Review Office, the Minister for Corrections and prison management. The IPVS should be its own, independent statutory body, or sit within an independent statutory body (such as the Victorian Ombudsman or the NPM, once designated).

Post-Sentence Detention

Victorian Legislation

Victorian legislation allows post-sentence detention (the *Serious Sex Offenders (Detention and Supervision) Act 2009* was replaced by the *Serious Offenders Act 2018*). A person can an 'eligible offender' if they have been found guilty or have been convicted for a serious sex offence or a serious violence offence.[509]

In 2007, the Victorian Sentencing Advisory Council (**SAC**) advised against a continuing detention scheme, post-sentence completion. The Attorney-General at the time had asked the SAC to "advise him on the merits of introducing a scheme that would allow for the continued detention of offenders who have reached the end of their custodial sentence, but who are considered to pose a continued and serious danger to the community."[510] The final SAC report stated that:

> In the end, a majority of the Council has concluded that regardless of how a continuing detention scheme were to be structured, the inherent dangers involved outweigh its potential benefits, particularly taking into account the existence of less extreme approaches to achieving community protection, such as extended supervision.
>
> A majority of the Council is persuaded by the many submissions that have been made to us expressing serious concern about whether such an extreme measure as continuing detention can be justified, particularly when less draconian means exist to promote community safety. We share concerns about the inability of clinicians to predict risk accurately, the potential of such schemes unjustifiably to limit human rights and due process, and the lack of evidence to support claims that continuing detention will reduce overall risks to the community. We agree that there are other, more cost-effective means of reducing risk. In doing so we acknowledge that these issues are complex and that support in the community for the introduction of such measures is far from universal.[511]

[509] See s8.
[510] Victorian Sentencing Advisory Council, 'High-Risk Offenders: Post-Sentence Supervision and Detention Final Report' (May 2007) [2.5.81 -82]
[511] Victorian Sentencing Advisory Council, 'High-Risk Offenders: Post-Sentence Supervision and Detention Final Report' (May 2007) [2.5.81 -82]

Despite this advice, the Victorian Government enacted legislation that enabled post-sentence detention for people who had committed serious sexual offences (*Serious Sex Offenders (Detention and Supervision) Act 2009).*

Following the Harper Review, that recommended that "eligibility for the post-sentence detention and supervision order scheme should be broadened to include serious violent offenders, in addition to sex offenders,"[512] the post-sentence detention scheme was expanded. Liberty Victoria and others opposed the expansion of the detention and supervision order regime under the *Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)* to violence offences.[513]

International Law

Article 9 of *International Covenant on Civil and Political Rights* requires that "[no one shall be subjected to arbitrary arrest or detention." These protections against arbitrary detention are reflected in Victoria too, in s21(2) of the *Charter of Human Rights and Responsibilities Act 2006*: "A person must not be subjected to arbitrary arrest or detention."

In its General Comment, the UN Human Rights Committee (**HRC**) has stated that:

- "If a prisoner has fully served the sentence imposed at the time of conviction, articles 9 and 15 prohibit a retroactive increase in sentence and a State party *may not circumvent that prohibition by imposing a detention that is equivalent to penal imprisonment under the label of civil detention*."[514] (emphasis added)
- "Any substantive grounds for arrest or detention must be prescribed by law and should be defined with *sufficient precision to avoid overly broad or arbitrary interpretation or application*."[515] (emphasis added)

In *Tillman v Australia*, the Human Rights Committee considered a preventive detention order, after completion of initial prison sentence for sexual offences, in NSW.

- The HRC stated that: "The Committee observes that article 9, paragraph 1 of the Covenant recognises for everyone the right to liberty and the security of his person and that no-one may be subjected to arbitrary arrest or detention. The article, however, provides for certain permissible limitations on this right, by way of detention, where the grounds and the procedures for doing so are established by law… However, limitations as part of, or consequent upon, punishment for criminal offences may give rise to particular difficulties. *In the view of the Committee, in these cases, the formal prescription of the grounds and procedures in a law which is envisaged to render these limitations permissible is not sufficient*

[512] Complex Adult Victim Sex Offender Management Review Panel, 'Advice on the legislative and governance models under the Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)' November 2015
[513] Liberty Victoria, 'Comment on *Serious Offenders Bill 2018 (Vic*)" (21 May 2018)
[514] UN Human Rights Committee, General Comment No. 35: Article 9 (Liberty and security of person)* (2014) [22]
[515] Ibid [23]

if the grounds and the procedures so prescribed are themselves either arbitrary or unreasonably or unnecessarily destructive of the right itself."[516] (emphasis added)

- It followed on to conclude that: "The "detention" of the author as a "prisoner" under the CSSOA was ordered because it was feared that he might be a danger to the community in the future and for purposes of his rehabilitation. *The concept of feared or predicted dangerousness to the community applicable in the case of past offenders is inherently problematic. It is essentially based on opinion as distinct from factual evidence, even if that evidence consists in the opinion of psychiatric experts.* But psychiatry is not an exact science. The CSSOA, on the one hand, requires the Court to have regard to the opinion of psychiatric experts on future dangerousness but, on the other hand, requires the Court to make a finding of fact of dangerousness. While Courts are free to accept or reject expert opinion and are required to consider all other available relevant evidence, the reality is that the Courts must make a finding of fact on the suspected future behaviour of a past offender which may or may not materialise. *To avoid arbitrariness, in these circumstances, the State party should have demonstrated that the author's rehabilitation could not have been achieved by means less intrusive than continued imprisonment or even detention, particularly as the State party had a continuing obligation* under article 10, paragraph 3, of the Covenant *to adopt meaningful measures for the reformation, if indeed it was needed, of the author throughout the 10 years during which he was in prison*." [517]

In *Fardon v Australia,* the Human Rights Committee considered preventive detention order, after completion of prison sentence for sexual offences, this time in Queensland, and came to a similar conclusion.[518]

RECOMMENDATION

Recommendation 113. The post-sentence detention order regime under the *Serious Offenders Act 2018* should be abolished.

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[516] Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights (Ninety-eighth session) concerning Communication No. 1635/2007 (10 May 2010).
[7.3]
[517] Ibid [7.4]
[518] Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights (Ninety-eighth session) concerning Communication No. 1629/2007 (10 May 2010)

Appendices

VALS Factsheet on Strip Searching and Urine Testing

Community fact sheet: VALS intervention in Court of Appeal Strip Searching and Urine Testing Case

On 21-22 October 2021, the Court of Appeal is hearing an appeal in the matter *Thompson v Minogue.* That case is about whether strip searching and urine testing practices in Victorian prisons comply with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**). VALS has been granted leave to intervene in the matter, so that we can advocate for the rights of Aboriginal and Torres Strait Islander people in prison in Victoria.

What is this case about?

Everyone deserves the right to privacy and to be treated with dignity and respect. This case is about the right of people in prison to be treated with dignity and humanity.

Strip searches and Urine Testing

People in prison are far more likely to have a history of trauma than the general population. Upwards of three quarters of imprisoned women in Australia are victim-survivors of domestic abuse and sexual violence. These issues disproportionately affect Aboriginal and Torres Strait Islander people, who are 13.9 times more likely to be imprisoned in Victoria than non-Aboriginal people.

Both strip searches and urine testing, requiring a person to take off their clothing and urinate into a container in full view of prison officers, are inherently harmful. Being subjected to intrusive searches can compound trauma, seriously undermine trust in the system, and impede a person's ability to recover and heal. Not only are strip searches harmful and degrading, but evidence shows they are often over-used, ineffective in uncovering contraband, and unnecessary. There is also evidence that strip searching practices and powers are prone to abuses of power by prison guards. Some data shows that Aboriginal people in prison are subjected to disproportionate rates of strip searching compared to non-Aboriginal people.

Community fact sheet: VALS intervention in Court of Appeal Strip Searching and Urine Testing Case

What the Supreme Court said

Last year, Craig Minogue, who is detained in Barwon Prison, successfully challenged an order by a prison officer that he submit to a urine test and a strip search before that urine test. Dr Minogue successfully argued that this direction was in breach of his rights under sections 13 and 22 of the Charter to privacy and dignity and humane treatment.

In the Supreme Court, Justice Richards held that the order that Dr Minogue submit to urine testing and strip searches before urine testing breached his rights to privacy and dignity and humane treatment under the Charter. Her Honour held that government authorities had failed to properly consider relevant human rights under s 38(1) of the Charter when making policies regarding urine testing and strip searching.

Her Honour said that there was no evidence demonstrating that the practice of random urine testing was effective in minimising drug or alcohol use in prison. Her Honour noted that urine testing was applied regardless of a person's history with drugs or alcohol. There was also no explanation why urine tests were used instead of less invasive tests, such as breath tests used on motorists. Similarly, her Honour held that the Manager of Barwon prison did not provide reasonable grounds for his belief that strip searches before urine tests were necessary for security and welfare. There was no evidence that alternatives, such as x-ray scanners, used in other prisons, were considered, or that strip searches were necessary. On that basis, her Honour held that these infringements on human rights were not proportionate or justified under s 7(2) of the Charter.

The State of Victoria has appealed the decision and the matter will be heard in the Court of Appeal on 21-22 October 2021.

Community fact sheet: VALS intervention in Court of Appeal Strip Searching and Urine Testing Case

What rights do people in prison have to privacy and dignity under the Victorian Charter of Human Rights?

People in prison are entitled to the same human rights as other people. This is enshrined in the Preamble to the Charter, which states that "human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community."

The Preamble also states that "human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters".

Under international law, people in prison retain all of their human rights and fundamental freedoms, apart from those unavoidably lost by virtue of their imprisonment.

Under section 38(1) of the Charter, public authorities cannot act incompatibly with human rights. Public authorities must also properly consider human rights when making decisions.

Under section 13(a) of the Charter, all people have the right not to have their privacy arbitrarily interfered with. This right protects a person against invasions into their physical, social or psychological sphere. It protects a person's individual identity, bodily and psychological autonomy and inherent dignity.

Under section 22(1) of the Charter, all people deprived of their liberty have the right to be treated with humanity and respect for the inherent dignity of the human person. Section 22(1) recognises the importance of upholding human rights for persons imprisoned.

Under section 7(2) of the Charter, human rights can only be limited in strict circumstances, when these limits are reasonable and demonstrably justified.

All of these aspects of the Charter are relevant to the current case.

Community fact sheet: VALS intervention in Court of Appeal Strip Searching and Urine Testing Case

Why this case is important for VALS and Aboriginal and Torres Strait Islander people in Victoria?

The Court of Appeal's decision in this case will impact the human rights of every adult in prison in Victoria. If the case is successful, the decision may mean that current strip searching and urine testing practices in prisons in Victoria will be deemed unlawful.

Through our work with Aboriginal and Torres Strait Islander people who have been imprisoned, we know the devastating impacts of degrading practices such as strip searching and urine testing. These practices can often be used as a tool of power and control by police and prison officers. They can also re-traumatise people in prison and can be used discriminatorily against Aboriginal and Torres Strait Islander people. Harmful practices in prison can impact a person's ability to heal even once they are back in the community.

There are alternatives, such as x-ray scanners, which are more effective at locating contraband and are less likely to be used as a form of re-traumatisation, abuse and control.

Given what we know about the harm caused by strip searching and urine testing, VALS considered it important to provide the Court with information on the impact of strip searching and urine testing on Aboriginal and Torres Strait Islander people in prison, and the importance of upholding the human rights of Aboriginal and Torres Strait Islander people in prison.

Community fact sheet: VALS intervention in Court of Appeal Strip Searching and Urine Testing Case

What is VALS arguing?

We have been granted leave to intervene in the appeal, and VALS is arguing that:

1. People in prison are entitled to equal protection of their human rights;
2. Courts should stringently scrutinise human rights decisions affecting people in prison under sections 38(1) and 7(2) of the Charter, given the vulnerability of persons in prison to decisions affecting their human rights, systemic racism, and the potential for abuses of power in the prison context;
3. People in prison are entitled to equal protection of their right to privacy under section 13 of the Charter as people outside of prison, and strip searches and urine testing practices breach the right to privacy;
4. People in prison are entitled to dignity and humane treatment under section 22 of the Charter, and strip searches and urine testing clearly breach this right.

Read VALS' Submissions Seeking Leave to Intervene here.

Read VALS' Submissions on the Appeal here.

VALS Factsheet on OPCAT

The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)

An opportunity to prevent the ill-treatment, torture and death of Aboriginal and Torres Strait Islander people in custody.

What is OPCAT?

In 2017, Australia made a commitment to implement the United Nations *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (**OPCAT**) by January 2022. The objective of OPCAT is 'to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.'

OPCAT, ratified by Australia, requires States to 'set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment.' These bodies are called National Preventive Mechanisms (**NPMs**). NPMs can mitigate the risks of torture and ill-treatment of people who are detained in police vehicles and cells, prisons and youth detention facilities and other places where people may be deprived of their liberty.

Accountability and prevention are two sides of the same coin, but the only jurisdictions that have designated NPMs at this stage are the Commonwealth and Western Australia.

Does OPCAT need to be culturally appropriate for Aboriginal and Torres Strait Islander People?

Yes. Effective prevention of the torture and ill-treatment of Aboriginal people in custody requires culturally appropriate OPCAT implementation.

Aboriginal and Torres Strait Islander people are grossly overrepresented in the criminal legal system. OPCAT is an opportunity to prevent torture and ill-treatment, but it will only achieve real outcomes for Aboriginal people if the operations, policies, frameworks and governance of the designated detention oversight bodies are always culturally appropriate and safe for our people.

The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)

Should the Government be consulting with Aboriginal communities and organisations about OPCAT implementation?

Culturally appropriate implementation of OPCAT simply cannot be realised without our participation, respecting the existing governance structures under the Aboriginal Justice Agreement and the expertise of Aboriginal Community Controlled Organisations such as VALS. VALS has been advocating for the Government to urgently undertake robust, transparent and inclusive consultations with the Victorian Aboriginal community, its representatives and Aboriginal Community Controlled Organisations (such as VALS) on the implementation of OPCAT in a culturally appropriate way.

What are some key features of a culturally appropriate NPM (OPCAT detention oversight body)?

The Victorian NPM must be culturally competent for Aboriginal and/or Torres Strait Islander people.

The NPM should appreciate

- the legacy and ongoing impacts of colonisation;
- that Aboriginal perspectives of what constitutes torture, or cruel, inhuman or degrading treatment or punishment may diverge from that of non-Aboriginal people; and
- that the long-term impact of torture and ill-treatment can be shaped by the survivors' culture and the historic-political context of the ill-treatment (including the history of colonisation).

It should also take into account systemic racism in its work.

You can find further information on culturally appropriate OPCAT implementation in the Churchill Fellowship report of our Head of Policy, Communications and Strategy, Andreea Lachsz, here.

The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)

How can the Victorian and Commonwealth Governments properly implement OPCAT in Victoria?

VALS has made a number of recommendations for proper implementation of OPCAT in Victoria, in accordance with an accurate interpretation of OPCAT and established best practice:

- The Victorian NPM's mandate should (in compliance with Article 4 of OPCAT and Recommendation 10 of the Australian Human Rights Commission's report), include any place under the Government's jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence.
- Places of detention should include both public and private custodial settings, which that person is not permitted to leave at will, by order of any judicial, administrative or other authority.
- The NPM's mandate should include (but not be limited to) forensic mental health hospitals, closed forensic disability facilities or units, correctional facilities, youth detention facilities, police custody, court custody, and residential secure facilities for children. It should also include circumstances such as the Victorian public housing towers that were subjected to hard lockdown during the pandemic.
- The Australian Human Rights Commission's expansive understanding of 'place of detention', including that temporal limits should not be erroneously imposed, is an accurate interpretation of OPCAT that should be adopted by the Victorian Government. The Commonwealth Government has suggested excluding from an NPMs' mandate places of detention where people are held for less than 24 hours. This is not only an inaccurate legal interpretation, it also fails to acknowledge research that has shown that the risk of torture is higher in police custody than in correctional facilities.
- The Victorian Government should legislate for the NPM's mandate, structure, staffing, powers, privileges and immunities.
- The Victorian Government must ensure that the NPM is sufficiently funded to carry out its mandate effectively and independently (recognising that this may include funding from the Commonwealth Government).

The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)

Where can I learn more about OPCAT?

You can watch the recording of our first webinar from our Unlocking Victorian Justice series: OPCAT - An opportunity to prevent the ill-treatment, torture and death of Aboriginal and Torres Strait Islander people in custody here.

Senator Lidia Thorpe gave the opening address for the OPCAT panel.

The panellists were:

- Dr Elina Steinerte, Vice-Chair United Nations Working Group on Arbitrary Detention
- Professor Sir Malcolm D Evans, Former Chair of the UN Subcommittee for Prevention of Torture
- Dr Matthew Pringle, Founder of the Canada OPCAT Project
- Ben Buckland, Senior Advisor at Association for the Prevention of Torture

You can find out more about the panellists here.

You can read more about OPCAT, and the prevention of and accountability for Aboriginal deaths in custody in the below VALS documents:

- Building Back Better – VALS COVID-19 Recovery Plan
- Submission to the Public Accounts and Estimates Committee – Inquiry into the Victorian Government's Response to COVID-19
- Supplementary submission to the Royal Commission into Victoria's Mental Health System

Culturally Appropriate OPCAT Implementation

See ‘OPCAT in Australia: Will Aboriginal and Torres Strait Islander People be Left Behind?’

Diagrama

While Diagrama is an NGO-run youth detention facility, there are certainly parts of the model which could be utilised and adapted in the adult custodial environment.

Good Practice Model: Diagrama

The NGO, Fundacion Diagrama, runs re-education centres in Spain. In Diagrama-run centres children and young people aged 14 to 23 are detained. In Spain, children who are subject to a custodial order may have an order that is closed, semi-open, open regime or weekend custody. If children are subject to the open regime, for example, they attend school, training and employment in the community, and reside in the centre.

David McGuire, CEO of Diagrama Foundation, has compared the UK youth detention system with that in Spain, concluding that in the UK, “there needs to be a cultural shift, not least in the perception of children who offend. Other changes that would be needed include:

- The perception of the purpose of custody – becoming more receptive to the importance of rehabilitation and education, and recognising the need for a highly skilled workforce…
- The regionalisation of facilities to allow children to be placed within their own area, avoiding disconnection of support and improving integration in the community.
- Moving away from the risk-adverse culture that restricts innovation and outcomes.”[519]

“Re-education centres provide cognitive and emotional support. As well as being provided with social education, children in the centres receive an average of 30 hours of formal education every week and are encouraged to achieve additional qualifications in sports and leisure activities… The focus is on re-education to rehabilitate. Staff are highly qualified (social educators, social workers, psychologists and teachers will all be at degree-level educated or equivalent).”[520]

A 2009 study found that recidivism rates for children in Diagrama run centres was 28.2%, as opposed to State-run centres, for which it was 50.3%.[521] Diagrama-run centres are cheaper than government-run ones, although cost depends on a number of factors. Generally the cost is It is 80-120K Euro per child per year.

[519] Derren Hayes, ‘Tackling youth offending in Spain’ (April 2017) Children & Young People Now
[520] Derren Hayes, ‘Tackling youth offending in Spain’ (April 2017) Children & Young People Now
[521] Dr Antonio Velandrino Nicolás, Study on the effectiveness of the educational intervention with children and young people in custody in Murcia County Council.

The average length of stay for young people in Diagrama-run centres is 9 months, and about 30% of children in centres run by Diagrama are on remand, 70% have been sentenced. In 2018, there were 954 children (14 – 17yo) detained, and 544 young people (18 – 23yo). In that year, 86.7% were male and 13.3% were female. The offences for which children were detained included: 22.04% for violence against the person, 33.79% for robbery, and 15.30% for domestic violence.

Diagrama cannot refuse any children, and some children are only in the centres for a few days, although this is an infrequent occurrence. Diagrama's view is that it is difficult to achieve positive results with children in less than 6 months; the recommendation is 9-12 months to achieve positive outcomes.

Victorian Aboriginal Legal Service Submission to the Consultation on RACGP Standards for Health Services in Australian Prisons (2nd edition)

May 2022

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BACKGROUND TO THE VICTORIAN ABORIGINAL LEGAL SERVICE

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

Legal Services

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

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

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

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

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

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

Community Justice Programs

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

The Community Justice Programs Team also operates the following programs:

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

Policy, Research and Advocacy

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

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

ACKNOWLEDGEMENT

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

SUMMARY OF RECOMMENDATIONS

Recommendation 1. The Guidelines must incorporate obligations and guidance from relevant international instruments relating to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, including, but not limited to, the following:

- *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;*
- *UN Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;*
- *United Nations Istanbul Protocol - Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

Recommendation 2. The Guidelines must explicitly require that incarcerated people "enjoy the same standards of health care that are available in the community, and should have access to necessary healthcare services free of charge, without discrimination on the grounds of their legal status," and state that the right "to the enjoyment of the highest attainable standard of physical and mental health".

Recommendation 3. The Federal Government must ensure that incarcerated people have access to the Pharmaceutical Benefits Scheme (PBS) and the Medicare Benefits Schedule (MBS).

Recommendation 4. The Federal and State Governments must ensure that incarcerated people have access to the National Disability Insurance Scheme (NDIS) and are assessed for eligibility for NDIS upon entry to a prison or youth prison.

Recommendation 5. Health care must be delivered through Health Departments rather than Justice Departments, and not through private, for-profit organisations (particularly noting the issue of inconsistent, fragmented service provision across prison systems).

Recommendation 6. The Guidelines must properly address the issue of individual and systemic racism, as this is essential to preventing Aboriginal and/or Torres Strait Islander deaths in custody. The medical care provided to people in custody must be provided in a manner that is competent, culturally safe and free from racism or discrimination.

Recommendation 7. "Cultural safety is determined by Aboriginal and Torres Strait Islander individuals, families and communities. Culturally safe practise is the ongoing critical reflection of health practitioner knowledge, skills, attitudes, practising behaviours and power differentials in delivering safe, accessible and responsive healthcare free of racism."

Recommendation 8. The Guidelines must mandate that healthcare providers respect Aboriginal and/or Torres Strait Islander people's culture.

Recommendation 9. The Guidelines must mandate that healthcare providers maintain a publicly available cultural safety policy and require staff to undertake appropriate training and education (including cultural awareness, anti-racism and human rights training), which is co-created and co-delivered with Aboriginal Community Controlled Organisations. Training must be delivered at regular intervals, as refreshers are essential.

Recommendation 10. The Guidelines must mandate that healthcare providers employ Aboriginal health, and social & emotional wellbeing officers at all prisons. Aboriginal Health Workers and Wellbeing Officers should see an Aboriginal person within hours of their entry into prison or youth prison. Under *Criterion C1.1 – Information about your health service* ("Our patients can access up-to-date information about the health service"), it should be made clear that this information must be provided upon reception.

Recommendation 11. The Guidelines must address the importance of Aboriginal Self Determination and the role of Aboriginal Community Controlled Health Organisations (ACCHOs). A model of delivery of primary health services by Aboriginal Community Controlled Health Organisations in places of detention should be supported, in consultation with ACCHOs.

Recommendation 12. The Guidelines must prohibit requiring incarcerated people to pay out-of-pocket medical expenses. Incarcerated people have been deprived of their liberty by the State, and are entirely dependent on the State for both their (drastically reduced) income and healthcare provision.

Recommendation 13. Incarcerated people must be entitled to a second medical opinion.

Recommendation 14.

- The Guidelines must be amended to reflect a higher threshold for the use of restrictive practices, as a patient being 'uncooperative' or 'disruptive' is an inappropriately low threshold.
- Restraints must not be used:

  - "unless a procedure is determined in accordance with purely medical criteria as being necessary for the protection of the physical or mental health or the safety" of the incarcerated person or others, and
  - it "presents no hazard to [the incarcerated person's] physical or mental health."
- Use of restraints must not be used for punishment, discipline, or to facilitate compliance with an order or direction.
- Any use of force/restraint should be exceptional, as a last resort, when all other control methods (including de-escalation techniques) have been exhausted and failed.
- The safety of the patient must be a prime consideration.
- Use of force should be used restrictively, for no longer than is strictly necessary.
- A minimum level of restraint/degree of force should be used.
- Use of force/restraint should never involve deliberate infliction of pain and should not cause humiliation or degradation.
- The "use of methods of chemical restraint must be avoided. When sedation is used as chemical restraint it must be strictly controlled and limited solely to the prevention of acts of violence against others or of self-harm."[11] The use of chemical (medical and pharmacological) restraints on children must be prohibited.
- Staff who use restraint or force in violation of the rules and standards should be punished.

Recommendation 15. The Guidelines must provide guidance on the use of solitary confinement in all prisons and youth prisons, including for the purposes of controlling infectious diseases.

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

Recommendation 16. The Guidelines must clearly state that any adverse impact/reprisals as a result of an incarcerated person making a complaint are prohibited (including, but not limited to, the quality of healthcare provided), and will lead to staff disciplinary processes, including termination in serious instances.

Recommendation 17. The Guidelines must clearly state that the health care staff's clinical autonomy must take precedence over operational considerations of the prison/youth prison, except in exceptional circumstances.

Recommendation 18. The need and priority for clinical care must not to be determined by prison staff. They do not have the qualifications to make such critical decisions. Prisons must provide 24 hours a

[11] Means of restraint, available at https://www.apt.ch/en/knowledge-hub/detention-focus-database/safety-order-and-discipline/means-restraint

day access to appropriately qualified medical practitioners and nursing staff, who are adequately equipped and available to conduct a meaningful physical review of the person on the premises. This is also essential to enable clinical handover, addressed in the Guidelines.

Recommendation 19. The Guidelines must make the following harm reduction programs mandatory:

- an opioid agonist therapy program;
- access to substance misuse counselling;
- information on the prevention of transmission of blood-borne viruses;
- the distribution of condoms and lubricant.

Recommendation 20. The Guidelines must make the following mandatory:

- Physical cell checks of persons in custody must be frequent and thorough, including meaningful assessments of health and wellbeing. People who are identified as at-risk must be regularly monitored.
- Where a person has exhibited any signs or symptoms of illness, cell checks must be completed by qualified medical staff.
- Cell checks should never be conducted in a cursory fashion through a cell 'peep hole', under any circumstances.
- Where prison officers or medical staff observe behaviour during routine cell checks, whether by reason of its unusualness or because it is inexplicable on the known facts, that is sufficient to cause concern, the incarcerated person should be taken immediately to a hospital, or a doctor summoned, so that a proper diagnosis can be made.

Recommendation 21. In all cases where there are known health conditions, or the person reports any unexplained symptom or pain, it is incumbent on officers to act with urgency when the condition manifests and provide urgent review by a qualified medical practitioner.

Recommendation 22. In all cases where a person in custody reports a sudden, unexpected, or medically significant increase in pain, or new or changing symptoms, the person should be immediately conveyed to hospital by ambulance.

DETAILED SUBMISSIONS

Torture and Cruel, Inhuman or Degrading Treatment or Punishment

The *UN Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[12] are not addressed in the Guidelines. VALS particularly highlights Principle 4(b):

> It is a contravention of medical ethics for health personnel, particularly physicians… To certify, or to participate in the certification of, the fitness of prisoners or detainees for any form of treatment or punishment that may adversely affect their physical or mental health and which is not in accordance with the relevant international instruments, or to participate in any way in the infliction of any such treatment or punishment which is not in accordance with the relevant international instruments.

The Guidelines also make no mention of the *United Nations Istanbul Protocol - Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,[13] which are "intended to serve as international guidelines for the assessment of persons who allege torture and ill-treatment, for investigating cases of alleged torture and for reporting findings to the judiciary or any other investigative body." The Protocol states that:

> This manual was developed to enable States to address one of the most fundamental concerns in protecting individuals from torture—effective documentation. Such documentation brings evidence of torture and ill-treatment to light so that perpetrators may be held accountable for their actions and the interests of justice may be served.

RECOMMENDATION

Recommendation 1. The Guidelines must incorporate obligations and guidance from relevant international instruments relating to the prohibition of, and accountability for, torture and other cruel, inhuman or degrading treatment or punishment, including, but not limited to, the following:

- *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;*
- *UN Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;*
- *United Nations Istanbul Protocol - Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

[12] Available at https://www.ohchr.org/en/instruments-mechanisms/instruments/principles-medical-ethics-relevant-role-health-personnel
[13] Available at https://www.ohchr.org/sites/default/files/documents/publications/training8rev1en.pdf

Equivalency of Healthcare

The Guidelines state the following:

> All people in prison must be able to access timely and effective primary healthcare, commensurate with the healthcare that would be available in the Australian community for their condition/s and identified level of vulnerability.

The Guidelines must, instead, require that the healthcare provided is equivalent to that provided in the community. The Guidelines must reflect the language used in international law. The *United Nations Standard Minimum Rules for the Treatment of Prisoners*[14] (the Mandela Rules) make clear that "prisoners should enjoy the same standards of health care that are available in the community, and should have access to necessary healthcare services free of charge, without discrimination on the grounds of their legal status." The obligation to provide equivalence of medical care to people deprived of their liberty is echoed in the *International Covenant on Economic, Social and Cultural Rights*,[15] which emphasises "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

The Guidelines discuss comparable medical care to that in the community, but fail to address some of the fundamental issues that impede truly equivalent care being provided to incarcerated people. There is a passing mention of Medicare, and no mention of either the Pharmaceutical Benefits Scheme (**PBS**) or National Disability Insurance Scheme (**NDIS**). The need for Health Departments to provide healthcare in prisons, and the problematic privatisation and fragmentation of healthcare across prison systems are not given the requisite attention.

The challenges inherent to a fragmented, privatised system are alluded to in the Guidelines:

> Prisoners may be frequently and rapidly transferred to alternative locations. To ensure continuity of care across health services in different prisons, your health service needs to develop a routine procedure for the way in which health information is transferred to a new location.

RECOMMENDATIONS

Recommendation 2. The Guidelines must explicitly require that incarcerated people "enjoy the same standards of health care that are available in the community, and should have access to necessary healthcare services free of charge, without discrimination on the grounds of their legal status," and state that the right "to the enjoyment of the highest attainable standard of physical and mental health".

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[14] Available at https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf
[15] Available at https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights

Recommendation 3. The Federal Government must ensure that incarcerated people have access to the Pharmaceutical Benefits Scheme (PBS) and the Medicare Benefits Schedule (MBS).

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Recommendation 5. Health care must be delivered through Health Departments rather than Justice Departments, and not through private, for-profit organisations (particularly noting the issue of inconsistent, fragmented service provision across prison systems).

Systemic and Individual Racism

The Guidelines only mention racism once: "As a peak representative body for Australian general practitioners, the RACGP plays a critical leadership role in challenging discrimination and institutional racism in healthcare."

Last year, a Guardian analysis of 474 Aboriginal and/or Torres Strait Islander Deaths in Custody since 1991, on the 30th anniversary of the report of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), found that:

> For both Aboriginal and Torres Strait Islander people and non-Indigenous people, the most common cause of death was medical problems, followed by self-harm. However, Indigenous people who died in custody were *three times more likely not to receive all necessary medical care*, compared to non-Indigenous people. For Indigenous women, the result was even worse – *less than half received all required medical care* prior to death.[16]

The Australian Health Practitioner Regulation Authority has defined cultural safety as follows:

> Cultural safety is determined by Aboriginal and Torres Strait Islander individuals, families and communities. Culturally safe practise is the ongoing critical reflection of health practitioner knowledge, skills, attitudes, practising behaviours and power differentials in delivering safe, accessible and responsive healthcare *free of racism*.[17]

The Guidelines must more comprehensively address the issue of individual and systemic racism.

[16] Allam, L. et al. (2021). The facts about Australia's rising toll of Indigenous deaths in custody. Available at https://www.theguardian.com/australia-news/2021/apr/09/the-facts-about-australias-rising-toll-of-indigenous-deaths-in-custody.

[17] Australian Health Practitioner Regulation Authority, National Scheme's Aboriginal and Torres Strait Islander Health and Cultural Safety Strategy, available at https://www.ahpra.gov.au/About-Ahpra/Aboriginal-and-Torres-Strait-Islander-Health-Strategy/health-and-cultural-safety-strategy.aspx

We also note that the number of Aboriginal deaths in custody since the Royal Commission into Aboriginal Deaths in Custody is incorrect; the figure is, devastatingly, now more than 500.

RECOMMENDATION

Recommendation 6. The Guidelines must properly address the issue of individual and systemic racism, as this is essential to preventing Aboriginal and/or Torres Strait Islander deaths in custody. The medical care provided to people in custody must be provided in a manner that is competent, culturally safe and free from racism or discrimination.

Culturally Safe Healthcare

VALS notes the above definition of cultural safety.

VALS also brings to the RACGP's attention the following:

> Cultural safety is an environment that is spiritually, socially and emotionally safe, as well as physically safe for people; where there is no assault, challenge or denial of their identity, of who they are and what they need. It is about shared respect, shared meaning, shared knowledge and experience, of learning together with dignity, and truly listening.[18]

Under *Criterion C2.1 – Respectful and culturally appropriate care*, we recommend elevating the obligation from "considers" to "respects":

> Our health service, in providing patient healthcare, considers patients' rights, beliefs, and their religious and cultural backgrounds.

The following should be mandatory (in the Guidelines, this is discretionary):

> maintain a cultural safety policy for the health service team and patients so that your health service team knows they are required to provide care that is respectful of a person's culture and beliefs, and that is free from discrimination
> provide appropriate training and education so that the health service team knows how to help patients feel culturally safe in the service provide access to cultural awareness and cultural safety training for the health service team and keep records of the training in the health service's training register.

VALS also highlights that there is no mention of Aboriginal Self Determination in the Guidelines, nor is there any mention of Aboriginal Community Controlled Health Organisations (ACCHOs). This is a glaring oversight, that should be addressed.

[18] Robyn Williams, 'Cultural Safety – What does it mean for our work practice?' (1999) 23 Australian and New Zealand Journal of Public Health 2.

RECOMMENDATIONS

Recommendation 7. "Cultural safety is determined by Aboriginal and Torres Strait Islander individuals, families and communities. Culturally safe practise is the ongoing critical reflection of health practitioner knowledge, skills, attitudes, practising behaviours and power differentials in delivering safe, accessible and responsive healthcare free of racism."

Recommendation 8. The Guidelines must mandate that healthcare providers respect Aboriginal and/or Torres Strait Islander people's culture.

Recommendation 9. The Guidelines must mandate that healthcare providers maintain a publicly available cultural safety policy and require staff to undertake appropriate training and education (including cultural awareness, anti-racism and human rights training), which is co-created and co-delivered with Aboriginal Community Controlled Organisations. Training must be delivered at regular intervals, as refreshers are essential.

Recommendation 10. The Guidelines must mandate that healthcare providers employ Aboriginal health, and social & emotional wellbeing officers at all prisons. Aboriginal Health Workers and Wellbeing Officers should see an Aboriginal person within hours of their entry into prison or youth prison. Under *Criterion C1.1 – Information about your health service* ("Our patients can access up-to-date information about the health service"), it should be made clear that this information must be provided upon reception.

Recommendation 11. The Guidelines must address the importance of Aboriginal Self Determination and the role of Aboriginal Community Controlled Health Organisations (ACCHOs). A model of delivery of primary health services by Aboriginal Community Controlled Health Organisations in places of detention should be supported, in consultation with ACCHOs.

Out-of-Pocket Healthcare Costs

Under *Criterion C1.5 – Costs associated with care initiated by the health service*, the following is stated:

> Where a referral is required to an external service, patients must be informed that there may be a cost of engaging private services. Such referrals may also incur transport costs to the patient.

Yet, earlier in the Guidelines, the following was highlighted:

> People who are detained in prison are considered to be one of the most vulnerable and disadvantaged groups in Australia. Compared to the general population, a large proportion of the prison population have experienced homelessness and periods of long-term unemployment. Many of those who end up in prison are also likely to be or have been victims of sexual and/or domestic abuse and violence.

Incarcerated people do not receive welfare benefits. Those who are able to work while incarcerated, earn very little, much less than they would earn in the community. For example, in Victoria, at Level 1 people earn $8.95 per day, at Level 2 $7.75 per day and at Level 3 $6.50 per day. People on remand or with short-term illnesses (less than 4 weeks) earn $3.30 per weekday, and incarcerated people aged over 65 years or with a long-term certified illness earn $6.00 per weekday.[19]

Incarcerated people's families are frequently not in a position to pay for medical costs. Requiring incarcerated people to pay out-of-pocket medical expenses when they are in such a disadvantageous position is not equivalency of medical care, and puts their health and lives at risk.

RECOMMENDATION

Recommendation 12. The Guidelines must prohibit requiring incarcerated people to pay out-of-pocket medical expenses. Incarcerated people have been deprived of their liberty by the State, and are entirely dependent on the State for both their (drastically reduced) income and healthcare provision.

Second Opinions

Criterion C2.1 – Respectful and culturally appropriate care states the following:

> Patients with decision-making capacity have the right to refuse a recommended treatment, medicines, advice or procedure and to seek clinical opinions from other healthcare providers. However, there may not be an obligation on the health service to enact such a request in the prison setting.

It also states the following regarding second opinions:

> If the practitioner is aware that the patient wishes to seek another clinical opinion they could offer to provide a referral to the provider who is to give that opinion. Document in the patient's health record:
>
> - the patient's decision
> - the actions taken by the practitioner
> - any referrals to other care providers.
>
> You can also encourage patients to notify their practitioner when they decide to follow another healthcare provider's advice so that the practitioner can discuss any potential risks of this decision. In prison settings, there are scenarios where it may not be possible to refer a patient for a second opinion. If this is the case, practitioners must explain to the patient the reasons for not being able to refer and document this in the patient's health record.

RECOMMENDATION

Recommendation 13. Incarcerated people must be entitled to a second medical opinion.

[19] Corrections Victoria, Deputy Commissioner's Instruction - 3.03 Prison Industries

Restrictive Practices

Restraints

Under *Criterion PHS 2.4 – Transfer of care and the patient–practitioner relationship,* the Guidelines state the following:

> The health service must uphold the rights of an individual in prison to be treated in the least restrictive environment and to the extent that it does not impose serious risk to the individual or others. The safety of the patient, health service and prison staff, and any staff transporting a patient are paramount. In instances such as where an individual in prison is uncooperative, disruptive or violent, restraints could be considered as a last resort by clinical staff. If so, restraint must be used to the minimum extent necessary to provide care or transfer a patient. In prison, restraints are administered by prison staff under the advice of a member of the clinical team. If a chemical restraint is used, it must be administered and supervised by a member of the clinical team.
>
> The health service must maintain a policy on the use of restraints and comply with relevant state and territory legislation.
>
> Your health service will not make decisions regarding restraint in isolation of a governing body's policy. Your health service must:
>
> • maintain a policy on the use of restraints
>
> • respect the safety and dignity of any individual being restrained
>
> • demonstrate how the health service policy on the use of restraints integrates with any policies
> enforced by an agency (eg the Department of Justice)
>
> • document all use of restraints, including:
>
> o the assessment for use of restraint
>
> o the reasons for restraint
>
> o the instruments and method used to restrain an individual
>
> o any injury received as a result of restraint
>
> o any further reporting of the use of restraint outside of the health service.

The threshold identified above is too low – "In instances such as where an individual in prison is *uncooperative, disruptive* or violent, restraints could be considered as a last resort by clinical staff" – and there is insufficient guidance in the Guidelines regarding the use of force.

VALS brings to the RACGP's attention Principle 5 of the *Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:*

> It is a contravention of medical ethics for health personnel, particularly physicians, to participate in any procedure for restraining a prisoner or detainee unless such a procedure is determined in accordance with purely medical criteria as being necessary for the protection of the physical or mental health or

> the safety of the prisoner or detainee himself, of his fellow prisoners or detainees, or of his guardians, and presents no hazard to his physical or mental health.[20]

VALS also highlights the position of the Association for the Prevention of Torture, that the

> use of methods of chemical restraint must be avoided. When sedation is used as chemical restraint it must be strictly controlled and limited solely to the prevention of acts of violence against others or of self-harm.[21]

RECOMMENDATION

Recommendation 14.

- The Guidelines must be amended to reflect a higher threshold for the use of restrictive practices, as a patient being 'uncooperative' or 'disruptive' is an inappropriately low threshold.
- Restraints must not be used:
  - "unless a procedure is determined in accordance with purely medical criteria as being necessary for the protection of the physical or mental health or the safety" of the incarcerated person or others, and
  - it "presents no hazard to [the incarcerated person's] physical or mental health."
- Use of restraints must not be used for punishment, discipline, or to facilitate compliance with an order or direction.
- Any use of force/restraint should be exceptional, as a last resort, when all other control methods (including de-escalation techniques) have been exhausted and failed.
- The safety of the patient must be a prime consideration.
- Use of force should be used restrictively, for no longer than is strictly necessary.
- A minimum level of restraint/degree of force should be used.
- Use of force/restraint should never involve deliberate infliction of pain and should not cause humiliation or degradation.
- The "use of methods of chemical restraint must be avoided. When sedation is used as chemical restraint it must be strictly controlled and limited solely to the prevention of acts of violence against others or of self-harm."[22] The use of chemical (medical and pharmacological) restraints on children must be prohibited.
- Staff who use restraint or force in violation of the rules and standards should be punished.

[20] Available at https://www.ohchr.org/en/instruments-mechanisms/instruments/principles-medical-ethics-relevant-role-health-personnel

[21] Means of restraint, available at https://www.apt.ch/en/knowledge-hub/detention-focus-database/safety-order-and-discipline/means-restraint

[22] Means of restraint, available at https://www.apt.ch/en/knowledge-hub/detention-focus-database/safety-order-and-discipline/means-restraint

Isolation

The Guidelines are silent on solitary confinement and prolonged solitary confinement.

The UN Mandela Rules define solitary confinement as the "'confinement of prisoners for 22 hours or more a day without meaningful human contact," and define prolonged solitary confinement as solitary confinement for a time period in excess of 15 consecutive days.[23] They state that solitary confinement "shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority."[24] They prohibit the use of solitary confinement for people "with mental or physical disabilities when their conditions would be exacerbated by such measures."[25]

The UN Havana Rules, which focus on children, state that "all disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned."[26] The Committee on The Rights of the Child has reiterated that solitary confinement should not be used on children.[27]

Solitary confinement has a particularly detrimental impact on Aboriginal people, with the Royal Commission into Aboriginal Deaths in Custody noting that it is "undesirable in the highest degree that an Aboriginal person in prison should be placed in segregation or isolated detention."[28]

RECOMMENDATION

Recommendation 15. The Guidelines must provide guidance on the use of solitary confinement in all prisons and youth prisons, including for the purposes of controlling infectious diseases.

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

[23] Rule 44 of the Mandela Rules.
[24] Rule 45(1), ibid.
[25] Rule 45(2), ibid.
[26] Rule 6.7 of the Havana Rules.
[27] United Nations Committee on the Rights of the Child (2019). General Comment No. 24 on children's rights in the child justice system, at (95(h).
[28] Available at http://www.austlii.edu.au/au/other/IndigLRes/rciadic/

Complaints Processes

Under *Core Standard 3: Health service governance and management*, *C 3.1 Our health service has a complaints resolution process*, the Guidelines state that, "[y]ou must maintain a complaints resolution process." While the Guidelines do require "ensuring the complaint does not adversely affect the patient's care", the Guidelines do not address the risk of broader reprisals.

RECOMMENDATION

Recommendation 16. The Guidelines must clearly state that any adverse impact/reprisals as a result of an incarcerated person making a complaint are prohibited (including, but not limited to, the quality of healthcare provided), and will lead to staff disciplinary processes, including termination in serious instances.

Clinical Autonomy

Under *Criterion C5.2 – Clinical autonomy for practitioners*, it states that:

> Our clinical team can exercise autonomy, to the full scope of their practice, skills and knowledge, when making decisions that affect clinical care.
>
> You must give practitioners autonomy in relation to
>
> - overall clinical care of their patients
> - referrals to other health professionals
> - requesting investigations
> - duration and scheduling of appointments.

Under *Criterion PHS 1.3 – Care outside of normal hours of health service operation,* the Guidelines state that:

> Patients sometimes require medical care outside the normal hours of health service operation. Individuals in prison are unable to access community after hours health service providers and thus require a system to access urgent care if needed. Where possible and practicable, the need and priority for clinical care is not to be determined by prison staff.
>
> The prison health service may be the only way for individuals in prison to receive medical attention. If this is the case, your health service must have arrangements in place with the clinical team to ensure care can be provided at any time.

RECOMMENDATIONS

Recommendation 17. The Guidelines must clearly state that the health care staff's clinical autonomy must take precedence over operational considerations of the prison/youth prison, except in exceptional circumstances.

Recommendation 18. The need and priority for clinical care must not to be determined by prison staff. They do not have the qualifications to make such critical decisions. Prisons must provide 24 hours a day access to appropriately qualified medical practitioners and nursing staff, who are adequately equipped and available to conduct a meaningful physical review of the person on the premises. This is also essential to enable clinical handover, addressed in the Guidelines.

Harm Reduction Programs

The Guidelines permit discretion, in relation to harm reduction programs, where they should be mandated. The Guidelines state:

> Your health service could implement a range of harm reduction programs relevant to its patient population… the distribution of condoms and lubricant…
> You could provide access to an opioid agonist therapy program… access to substance misuse counselling… information to patients on the prevention of transmission of blood-borne viruses (eg HIV, hepatitis B, and hepatitis C).

RECOMMENDATION

Recommendation 19. The Guidelines must make the following harm reduction programs mandatory:

- an opioid agonist therapy program;
- access to substance misuse counselling;
- information on the prevention of transmission of blood-borne viruses;
- the distribution of condoms and lubricant.

Cell Checks

The Guidelines should provide robust guidance on cell checks.

RECOMMENDATION

Recommendation 20. The Guidelines must make the following mandatory:

- Physical cell checks of persons in custody must be frequent and thorough, including meaningful assessments of health and wellbeing. People who are identified as at-risk should be regularly monitored .
- Where a person has exhibited any signs or symptoms of illness, cell checks must be completed by qualified medical staff.
- Cell checks should never be conducted in a cursory fashion through a cell 'peep hole', under any circumstances.
- Where prison officers or medical staff observe behaviour during routine cell checks, whether by reason of its unusualness or because it is inexplicable on the known facts, that is sufficient to cause concern, the incarcerated person should be taken immediately to a hospital, or a doctor summoned, so that a proper diagnosis can be made

Urgent Medical Attention

PHS 2.4 - Our health service identifies the need for and facilitates the timely transfer of patients that require urgent medical attention should include the below recommendations.

RECOMMENDATIONS

Recommendation 21. In all cases where there are known health conditions, or the person reports any unexplained symptom or pain, it is incumbent on officers to act with urgency when the condition manifests and provide urgent review by a qualified medical practitioner.

Recommendation 22. In all cases where a person in custody reports a sudden, unexpected, or medically significant increase in pain, or new or changing symptoms, the person should be immediately conveyed to hospital by ambulance.

Community fact sheet: VALS intervention in Court of Appeal Strip Searching and Urine Testing Case

On 21-22 October 2021, the Court of Appeal is hearing an appeal in the matter *Thompson v Minogue.* That case is about whether strip searching and urine testing practices in Victorian prisons comply with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**). VALS has been granted leave to intervene in the matter, so that we can advocate for the rights of Aboriginal and Torres Strait Islander people in prison in Victoria.

What is this case about?

Everyone deserves the right to privacy and to be treated with dignity and respect. This case is about the right of people in prison to be treated with dignity and humanity.

Strip searches and Urine Testing

People in prison are far more likely to have a history of trauma than the general population. Upwards of three quarters of imprisoned women in Australia are victim-survivors of domestic abuse and sexual violence. These issues disproportionately affect Aboriginal and Torres Strait Islander people, who are 13.9 times more likely to be imprisoned in Victoria than non-Aboriginal people.

Both strip searches and urine testing, requiring a person to take off their clothing and urinate into a container in full view of prison officers, are inherently harmful. Being subjected to intrusive searches can compound trauma, seriously undermine trust in the system, and impede a person's ability to recover and heal. Not only are strip searches harmful and degrading, but evidence shows they are often over-used, ineffective in uncovering contraband, and unnecessary. There is also evidence that strip searching practices and powers are prone to abuses of power by prison guards. Some data shows that Aboriginal people in prison are subjected to disproportionate rates of strip searching compared to non-Aboriginal people.

Community fact sheet: VALS intervention in Court of Appeal Strip Searching and Urine Testing Case

What the Supreme Court said

Last year, Craig Minogue, who is detained in Barwon Prison, successfully challenged an order by a prison officer that he submit to a urine test and a strip search before that urine test. Dr Minogue successfully argued that this direction was in breach of his rights under sections 13 and 22 of the Charter to privacy and dignity and humane treatment.

In the Supreme Court, Justice Richards held that the order that Dr Minogue submit to urine testing and strip searches before urine testing breached his rights to privacy and dignity and humane treatment under the Charter. Her Honour held that government authorities had failed to properly consider relevant human rights under s 38(1) of the Charter when making policies regarding urine testing and strip searching.

Her Honour said that there was no evidence demonstrating that the practice of random urine testing was effective in minimising drug or alcohol use in prison. Her Honour noted that urine testing was applied regardless of a person's history with drugs or alcohol. There was also no explanation why urine tests were used instead of less invasive tests, such as breath tests used on motorists. Similarly, her Honour held that the Manager of Barwon prison did not provide reasonable grounds for his belief that strip searches before urine tests were necessary for security and welfare. There was no evidence that alternatives, such as x-ray scanners, used in other prisons, were considered, or that strip searches were necessary. On that basis, her Honour held that these infringements on human rights were not proportionate or justified under s 7(2) of the Charter.

The State of Victoria has appealed the decision and the matter will be heard in the Court of Appeal on 21-22 October 2021.

Community fact sheet: VALS intervention in Court of Appeal Strip Searching and Urine Testing Case

What rights do people in prison have to privacy and dignity under the Victorian Charter of Human Rights?

People in prison are entitled to the same human rights as other people. This is enshrined in the Preamble to the Charter, which states that "human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community."

The Preamble also states that "human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters".

Under international law, people in prison retain all of their human rights and fundamental freedoms, apart from those unavoidably lost by virtue of their imprisonment.

Under section 38(1) of the Charter, public authorities cannot act incompatibly with human rights. Public authorities must also properly consider human rights when making decisions.

Under section 13(a) of the Charter, all people have the right not to have their privacy arbitrarily interfered with. This right protects a person against invasions into their physical, social or psychological sphere. It protects a person's individual identity, bodily and psychological autonomy and inherent dignity.

Under section 22(1) of the Charter, all people deprived of their liberty have the right to be treated with humanity and respect for the inherent dignity of the human person. Section 22(1) recognises the importance of upholding human rights for persons imprisoned.

Under section 7(2) of the Charter, human rights can only be limited in strict circumstances, when these limits are reasonable and demonstrably justified.

All of these aspects of the Charter are relevant to the current case.

Why this case is important for VALS and Aboriginal and Torres Strait Islander people in Victoria?

The Court of Appeal's decision in this case will impact the human rights of every adult in prison in Victoria. If the case is successful, the decision may mean that current strip searching and urine testing practices in prisons in Victoria will be deemed unlawful.

Through our work with Aboriginal and Torres Strait Islander people who have been imprisoned, we know the devastating impacts of degrading practices such as strip searching and urine testing. These practices can often be used as a tool of power and control by police and prison officers. They can also re-traumatise people in prison and can be used discriminatorily against Aboriginal and Torres Strait Islander people. Harmful practices in prison can impact a person's ability to heal even once they are back in the community.

There are alternatives, such as x-ray scanners, which are more effective at locating contraband and are less likely to be used as a form of re-traumatisation, abuse and control.

Given what we know about the harm caused by strip searching and urine testing, VALS considered it important to provide the Court with information on the impact of strip searching and urine testing on Aboriginal and Torres Strait Islander people in prison, and the importance of upholding the human rights of Aboriginal and Torres Strait Islander people in prison.

Community fact sheet: VALS intervention in Court of Appeal Strip Searching and Urine Testing Case

What is VALS arguing?

We have been granted leave to intervene in the appeal, and VALS is arguing that:

1. People in prison are entitled to equal protection of their human rights;
2. Courts should stringently scrutinise human rights decisions affecting people in prison under sections 38(1) and 7(2) of the Charter, given the vulnerability of persons in prison to decisions affecting their human rights, systemic racism, and the potential for abuses of power in the prison context;
3. People in prison are entitled to equal protection of their right to privacy under section 13 of the Charter as people outside of prison, and strip searches and urine testing practices breach the right to privacy;
4. People in prison are entitled to dignity and humane treatment under section 22 of the Charter, and strip searches and urine testing clearly breach this right.

Read VALS' Submissions Seeking Leave to Intervene here.

Read VALS' Submissions on the Appeal here.

Managing a pandemic in Victoria: Support, proper process and transparency as the foundations of a good government response to the COVID-19 pandemic

The importance of good government during the COVID-19 pandemic

The COVID-19 pandemic has highlighted the important role that government plays in our lives. A pandemic is a crisis that cannot be navigated by any individual or corporation. A pandemic requires large scale coordination of people and resources to ensure an effective public health response that can prevent the worst-case scenarios that have wreaked havoc on societies that have faced similar crises throughout human history.

Government has the tools to manage the necessary coordination of an effective public health response. The extraordinary powers that Government has in a pandemic require strong safeguards, transparency and oversight. This helps to identify, prevent and mitigate any unintended and harmful impacts. These harmful impacts fall hardest on already marginalised groups like Aboriginal and Torres Strait Islander people. It is crucial that Government does all it can to ensure that these harmful impacts do not deepen and further entrench disadvantage.

The basis of a good government response to a pandemic

A pandemic is a public health crisis. Everyone is vulnerable during a pandemic and large-scale outbreaks can lead to huge death tolls and massive economic loss if people do not have confidence that the pandemic is being properly managed.

A public health issue must be managed with a public health response.

Around the world, and particularly in Victoria, there has been a heavy reliance on policing responses to the pandemic. Indeed, when policing responses go beyond what is justified by the health risks, these measures can worsen a pandemic by undermining community confidence and compliance with public health measures.

A police-led response also undermines public health education which needs a single, clear set of messages about what we can do to keep ourselves and our families and communities safe.

A supportive, effective and inclusive public health response is the only way to manage a good government response to the pandemic.

Increased powers must be accompanied by increased transparency and accountability. The advice, analysis and reasoning of government decision-making must be made publicly available.

Oversight and governance

Recommendation 1. Restrictions in response to the pandemic must

- be based on specific health advice - there must a clear nexus between the medical/ health advice and the restrictive measures to be imposed;
- must be assessed for compliance with the *Charter*, with the Government to produce a document similar to a Statement of Compatibility.

Pandemic legislation should require the Government to publish the specific health advice and human rights compatibility assessments on which public health orders are based. The advice, analysis and reasoning must be made publicly available. Curfews should not form part of the Government's response unless the above stipulations are met.

Recommendation 2. The Victorian Parliament should sit throughout any pandemic. Procedures to facilitate remote work should be put in place to facilitate this.

Recommendation 3. Pandemic legislation should provide for the establishment of a special Parliamentary Committee whenever a pandemic is declared, to conduct ongoing investigations and monitoring of the pandemic response. Legislation should create opportunities for the review of public health orders and health advice, potentially by an independent body with both public health and human rights expertise. While

the expectation is not that such a review be immediate, it should be done in a timely fashion.

Recommendation 4. To strengthen human rights protections, there should be a provision in legislation like that found in the *Commonwealth Biosecurity Act 2015 s477(3)* which relates to emergency requirements during a human biosecurity emergency period.

For example, that 'the requirement is likely to be effective in, or to contribute to, achieving the purpose for which it is to be determined; that the requirement is appropriate and adapted to achieve the purpose for which it is to be determined; that the requirement is no more restrictive or intrusive than is required in the circumstances; that the manner in which the requirement is to be applied is no more restrictive or intrusive than is required in the circumstances; that the period during which the requirement is to apply is only as long as is necessary.'

Recommendation 5. Pandemic legislation must ensure that it is not an offence to leave home to take part in a pandemic-safe protest. This applies to periods other than when stay at home directions are in place, and only in compliance with the *Charter*. Victoria Police should be required to plan for and facilitate *pandemic-safe* protest actions.

Recommendation 6. There should be genuine, independent merits review before VCAT available. Judicial review should be timely and not cost-prohibitive.

Policing and enforcement response

Recommendation 7. Legislation should require that, in a pandemic, achieving compliance with public health regulations is focused on:

- Explaining rules and their justification;
- Encouraging compliance and providing support to enable community members to comply; and
- Issuing fines only as a last resort, where the above steps can be demonstrated.

Recommendation 8. Legislation should bar police from issuing public health fines to children.

Recommendation 9. Legislation should reduce the size of financial penalties for public health offences, recognising the substantial hardship caused by large fines and the low likelihood of full amounts being recovered.

Recommendation 10. When police have stopped someone in relation to public health rules, they should not be permitted to:

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

Recommendation 11. Police should be required to record the Indigenous status for all people they record public health-related offences against.

Recommendation 12. The Crime Statistics Agency should be required to publish regular and timely data on public health offences, with breakdowns by Indigenous status; Local Government Authority; and age.

Recommendation 13: In conducting internal review of COVID-19 fines, police should be required to provide reasons for their decisions.

Recommendation 14. Fines Victoria should utilise non-statutory arrangements in accordance with s.20 of the *Fines Reform Act 2014* to enhance review options so that COVID-19 fines are not enforced against Aboriginal people, young people, financially disadvantaged people, and other vulnerable groups.

Recommendation 15. Amendments introduced by the *Police and Emergency Legislation Amendment Act 2020*, expanding and permitting the expansion of designated areas in which Protective Services Officers (**PSOs**) operate, should be repealed.

Recommendation 16. Pandemic legislation should not include any provisions to expand the role or powers of PSOs.

Recommendation 17. VALS supports Liberty Victoria's recommendation that '[i]f PSOs are used as de facto police, they should receive the same level of training. Further, the expansion of the definition of "designated place" under the *Victoria Police Regulations 2014* should be rolled back.'

Recommendation 18. Legislation should require that, where health regulations make check-in or registration compulsory in any setting, this check-in data cannot be accessed by anyone except health authorities, and can only be accessed and used for the purposes of contact tracing. Similarly, protections in relation to contact tracing data and information must be legislated for.

Prison management

Recommendation 19. Decreasing the number of people in places of detention is part of a responsible and comprehensive public health strategy. Pandemic legislation should include an automatic trigger requiring authorities to consider ways of reducing the incarcerated population, including through:

- Release of people held on remand;
- Use of administrative leave and Emergency Management Days;
- Use of permits, particularly for people with chronic health conditions, disabilities and mental health conditions, elderly people and Aboriginal people;
- Increased use of temporary leave for children and young people;
- Increased frequency of Parole Board hearings to allow for the processing of more parole applications;
- Increased grants of parole.

Recommendation 20: Pandemic legislation should include specific provisions concerning bail, including:

- Making bail should be made easier and more accessible for children, young people and adults;
- A presumption in favour of bail for all offences, with the onus on prosecution to prove there is a specific and immediate risk to the physical safety of another person; and

- Increased and mandated guidance and oversight for police officers to ensure they are capable of appropriately determining when bail should be granted by a police decision maker and when a person should be taken before a court.

Recommendation 21. Pandemic legislation should direct police to consider the personal and public health impacts of detention, with the aim being police using powers to curb further admissions to places of detention. For example, making significant use of cautions, diversions and summons. There should also be a moratorium on pursuing prosecution for low-level offences and breaches of bail and conditional breaches of community correction orders where there is a low risk to community safety.

Recommendation 22. Pandemic legislation should include in bail considerations for Victoria Police, bail justices and the Courts:

- the personal and public health impacts of detaining people during a pandemic;
- the negative impact of restrictive measures enacted by detaining authorities in an effort to exclude and contain the spread of the infectious disease, COVID-19, in detention (such as the use of protective and transfer quarantine, suspension of personal visits and suspension or reduction of programs and services).

Recommendation 23. Pandemic legislation should automatically direct resources to improve accommodation options for people facing homelessness, recognising the connection between homelessness and the denial of bail and parole, and offending.

Recommendation 24. Legislation should be amended to require that incarcerated people in quarantine and isolation are regularly observed and verbally communicated with.

Recommendation 25. Legislation should be amended to ensure that no person is placed in solitary confinement as part of a pandemic response, particularly people with mental or physical disabilities.

Recommendation 26. Legislation should explicitly provide for the rights of people in protective and transfer quarantine, including guaranteeing meaningful contact with other people and time out of cell.

Managing a pandemic in Victoria: Support, proper process and transparency as the foundations of a good government response to the COVID-19 pandemic

Recommendation 27. Pandemic preparedness plans should include adequate planning to address staffing and other operational issues, to ensure no one is subjected to solitary confinement and lockdowns of prisons are avoided.

Recommendation 28. People in protective quarantine, transfer quarantine and isolation must be provided supports and services. This includes mental health services and cultural supports and services provided by Aboriginal Community Controlled Organisations (**ACCO**s). They must also be provided the means to contact family, lawyers, independent oversight bodies, and ACCOs, including VALS.

Recommendation 29. Corrections Victoria should maintain a register of all people placed in protective quarantine, transfer quarantine and isolation that includes:

- Information such as age, gender, disabilities, medical conditions, mental health
- conditions and Aboriginality;
- Information concerning the length and the nature of meaningful contact provided on a daily basis, how much time people spend out of cell, and the services made available to them and used by them; and
- Any incidents, such as attempted self-harm.

Recommendation 30. Legislation should provide that the use of protective and transfer quarantine in prisons, and the conditions associated with quarantine, are regularly reviewed and modified where necessary. Reviews should:

- Be guided by up-to-date medical advice which establishes a clear nexus between the quarantine requirements for prisons and the public health situation in the Victorian community;
- Include consultation with civil society stakeholders;
- Ensure that the least restrictive possible measure is adopted, in accordance with the *Victorian Charter of Human Rights and Responsibilities*;
- Make publicly available the evidence, expert advice and analysis in relation to *Charter* compliance and health advice relied upon.

Reviews should not include revisiting protections such as the proposed absolute prohibition on the use of solitary confinement. Certain protections should be absolute.

Recommendation 31. All approved vaccines must be made available, as a matter of urgency, to all people in prison and youth detention centres, and all staff and contractors working in these facilities. Pandemic legislation should require the Victorian Government to develop a vaccination rollout plan which makes vaccinations of people in prison and prison staff a high priority, and includes targets for vaccinations of people in prison and prison staff.

Recommendation 32. In line with the principle of equivalence, legislation should ensure that no person in prison is offered a vaccine later than they would if living freely in the community. This includes providing early and appropriate access for those people in prison eligible due to their Aboriginality, age, health status or other factors.

Recommendation 33. Legislation should mandate that the progress of the vaccination rollout is considered when reviewing of quarantine and isolation arrangements in prisons. Meeting vaccination rollout targets should trigger an automatic review and relaxation of restrictions.

Recommendation 34. Legislation should mandate that the Victorian Government's vaccine rollout plan for prisons provides for Aboriginal Community Controlled Organisations, which have the necessary trust with detained Aboriginal people and capacity to deliver culturally safe services, to be involved in delivering health information.

Recommendation 35. The Government should be required to make publicly available the vaccination rollout plan, including how this will impact restrictions in prisons, and provide regular updates on the status of the vaccination rollout, including demographic information such as Aboriginality. The number of people, and the number of Aboriginal people, who have tested COVID-19 positive in prison and youth detention facilities should be be made publicly, regularly, available.

Lockdowns and detention orders

Recommendation 36. Pandemic legislation should require the Victorian Government to develop, in advance, specific plans for preventing, managing and responding to outbreaks in high-density residential settings, particularly public and social housing.

Recommendation 37. In line with Recommendation 36 above, any plans for responding to outbreaks in residential settings must emphasise a cooperative public health approach, with policing and enforcement used to a minimum extent.

Recommendation 38.

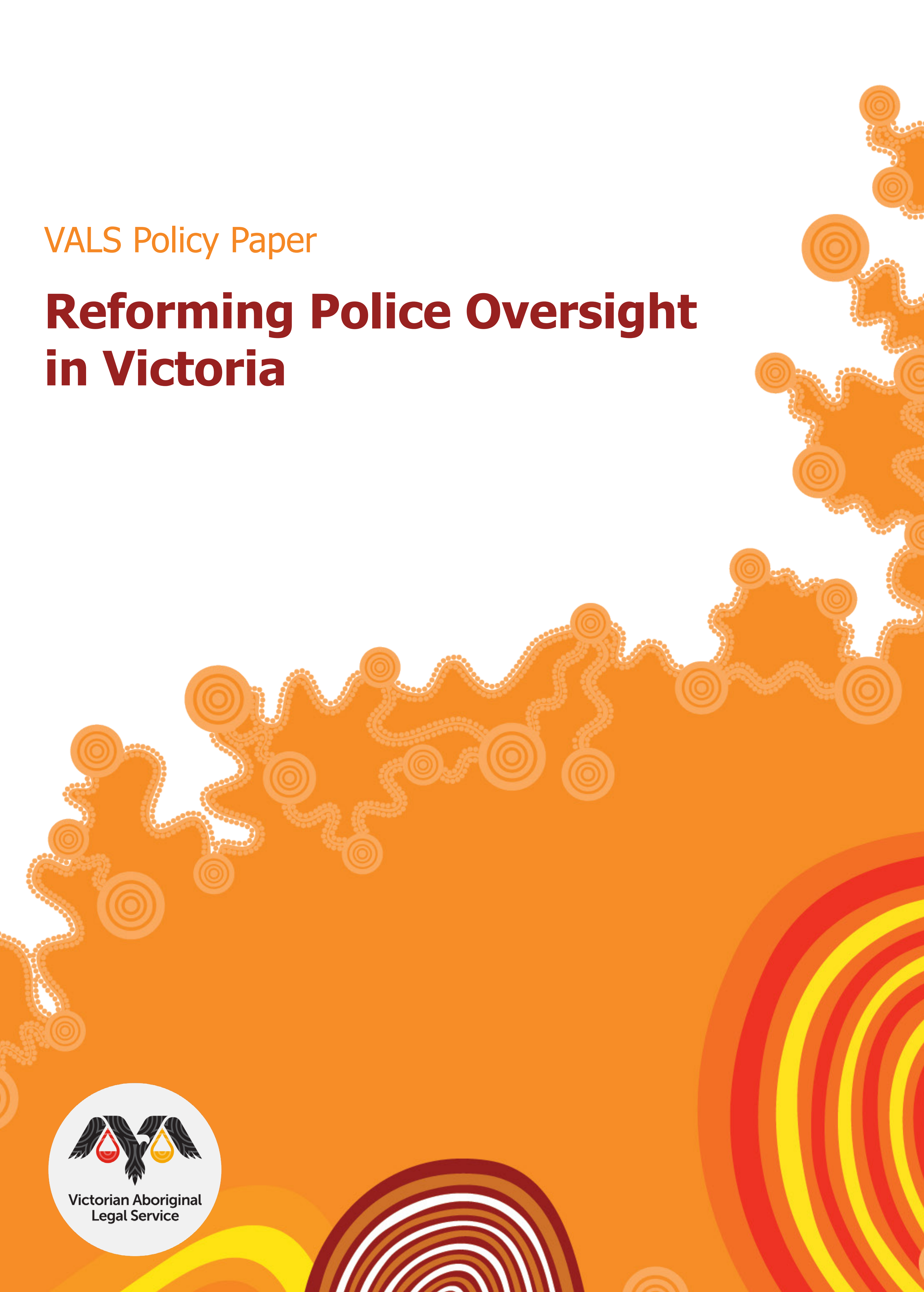
- Legislation should require that when detention directions are published, the specific health advice they are based on is published simultaneously, and that there is a clear nexus between the advice and the restrictive measures to be imposed.
- Information in relation to detention directions, and any other restrictions or directions, should be provided in an understandable and accessible way to the public.
- Sufficient notice of any lockdowns must be provided, to enable people to make the necessary arrangements and preparations (such as buying medication).

Recommendation 39. With the public housing lockdown meeting the definition of deprivation of liberty under OPCAT, any future lockdowns should fall within the mandate of the NPM, once established. There should also be clear, accessible avenues for seeking review of detention orders.

Recommendation 40. Any deprivation of liberty, even during a public health emergency, must not be arbitrary. Preventative detention should be legislatively prohibited as a restrictive measure in the Government's strategy to combat pandemics.

Also see:

- Building Back Better: Victorian Aboriginal Legal Service COVID-19 Recovery Plan
- VALS submission to the Public Accounts and Estimate Committee COVID-19 Inquiry



VALS Policy Paper

Reforming Police Oversight in Victoria

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Acknowledgement of Traditional Owners

The Victorian Aboriginal Legal Services acknowledges all of the traditional owners in Australia and pay our respects to their Elders, past and present. Soveriegnty was never ceded. Always was, always will be, Aboriginal land.

Glossary

Civilian control: A structure for a police complaints system, in which a civilian agency (independent of police) is fully in control of the receipt and investigation of complaints about police.

Civilian review: A structure for a police complaints system, in which a civilian agency (independent of police) reviews the investigation of complaints by an internal police process.

IBAC: The Independent Broad-based Anti-corruption Commission, the body established in 2010, which is responsible for oversight of police complaints, as well as a range of broader anti-corruption functions.

Mixed civilian review: A structure for a police complaints system, in which a civilian agency fulfils a review role (described above) and also investigates some complaints in its own right.

OPCAT: *The Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, an international treaty that Australia has ratified, which requires the establishment of a dedicated body to inspect the treatment of people who are deprived of their liberty by police or the government.

Police-contact death and serious injury: Any death or serious injury which follows contact with police, including shootings or assault by police, deaths in hospital after an incident with police, deaths or serious injuries sustained or aggravated in police custody, and deaths or serious injuries sustained during a police pursuit.

Professional Standards Command (or PSC): The internal investigations unit of Victoria Police, which investigates complaints against police or refers complaints to local or regional level for investigation.

Summary of Recommendations

The Police Oversight System

Recommendation 1. In addition to the current review, the Government must undertake a more comprehensive reform process to consult on, design and implement all the core pillars of a police oversight system.

Recommendation 2. The reform process must examine accountability and oversight mechanisms for addressing systemic racism within Victoria Police.

Recommendation 3. The reform process must prioritise the voices of people and communities who are disproportionately affected by systemic racism and the lack of police accountability.

Police Complaints

Recommendation 4. The Victoria Government must establish a new independent police complaints body that is complainant-centred, transparent, has adequate powers and resources to carry out independent investigations, and responds to the needs of Aboriginal complainants.

Recommendation 5. Police must not be responsible for investigating and handling police complaints, except minor customer service matters. All police complaints other than minor customer service matters must be investigated and managed by the independent police complaints body.

Definitions and Classification of Police Misconduct

Recommendation 6. The legislation establishing the new independent body should define 'conflict of interest'. The definition must encompass actual, potential and perceived conflicts.

Recommendation 7. The legislation establishing the new independent police complaints body should define 'customer service complaint' and specifically exclude the following:

(a). Any complaint about the exercise of any police power (including powers to stop, question, search, arrest, use force) or issue any kind of infringement or direction;

(b). Any complaint about a decision not to exercise a police power (for example, a decision not to investigate an alleged offence);

(c). Any complaint which makes reference to Aboriginality, or to any protected attribute under Section 6 of the *Equal Opportunity Act 2010*.

Recommendation 8. Legislation must require that complaints classified as customer service matters by Victoria Police must be reported to the independent police complaints body, with the report including, at a minimum, the race and gender of the complainant, or their Aboriginality, the officers subject to the complaint, and the broad context (for example, whether the conduct occurred during a phone call, on patrol, during a call-out, etc.)

Recommendation 9. Complainants must have the right to request a review of the classification of their complaint.

Recommendation 10. The legislation establishing the new independent police complaints body must define 'serious police misconduct', to enable the independent body to prioritise and appropriately investigate all complaints. The definition must include:

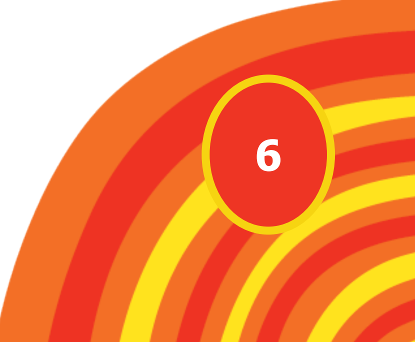
(a). any allegations regarding assault, mistreatment or failure of duty of care in custody, and excessive use of force;
(b). any misconduct accompanied or motivated by discrimination, or that has a discriminatory outcome;
(c). the use of coercive techniques during questioning and interviews, and any failure to contact a person's lawyer, the Custody Notification Service, the Independent Third Persons program, or the Youth Referral and Independent Person Program;
(d). any retaliation or reprisals against a person who has made a complaint about police.

Systemic Police Misconduct

Recommendation 11. Systemic police misconduct must not be investigated by Victoria Police; it must be investigated by a new independent police complaints body. The legislation establishing the new independent police complaints body should define 'Systemic police misconduct' in its own right, not as a sub-type of 'serious police misconduct'.

(a). The definition of systemic police misconduct should include:

- A pattern of behaviour or omissions indicative of systemic issues;
- A culture indicative of systemic issues, or a culture that allows or encourages patterns of behaviour or omissions indicative of systemic issues; and



- The aggregate impact of a pattern of behaviour or omissions, where that impact is indicative of systemic issues.

(b). The definition of 'systemic issues' should include issues involving discrimination, a disproportionate impact on particular communities, or inadequate police responses to particular issues (such as family violence).

Recommendation 12. The independent complaints body should have own-motion powers to conduct investigations of individual incidents, thematic investigations of related incidents, and systemic investigations of wider problems within Victoria Police. These powers must be provided for in the legislation establishing the new independent police complaints body.

Recommendation 13. To ensure the independent police complaints body is capable of identifying and investigating systemic issues, the body must:

(a). Have access to: the complaints history of police officers, information from any civil litigation involving a police officer, and information on any impropriety or illegality by a police officer raised as part of a criminal proceeding; and be required to consider this information in the initial classification of a complaint and in the assessment of possible systemic misconduct;

(b). Initiate an early intervention and complaint profiling system, with a particular focus on officers or units that have received multiple complaints from Aboriginal people;

(c). Provide transparency and routinely publish data in relation to police complaints.

Recommendation 14. The independent complaints body should have a 'super-complaints' process which allows representative organisations to make complaints about systemic issues on behalf of a group of affected people. Those representative organisations must include Aboriginal Community Controlled Organisations.

Recommendation 15. The independent complaints body should develop a strategy for identifying and investigating systemic racism, in consultation with Aboriginal Community Controlled Organisations.

Improving the Complainant Experience

Recommendation 16. The legislation establishing a new, independent police complaints body must enshrine a complainant-centred approach throughout the complaints process.

Procedural Fairness

Recommendation 17. The legislation establishing a new independent police complaints body must incorporate procedural fairness for complainants, including:

(a). Right to review of classification decision;
(b). Right to receive written and oral communication throughout the complaint process, including when the complaint is first received, after the initial assessment of the complaint, and when the complaint is resolved;
(c). Right to access the investigation file;
(d). Right to have complaint resolved in a reasonable time;
(e). Right to participate in the investigation process, including the opportunity to provide additional information and/or correct false assumptions throughout the investigation process and comment on any adverse material before a complaint is dismissed;
(f). Right of review if the complaint is dismissed or referred;
(g). Right of review of outcome of the complaint.

Any relevant policies and procedures should be made publicly available.

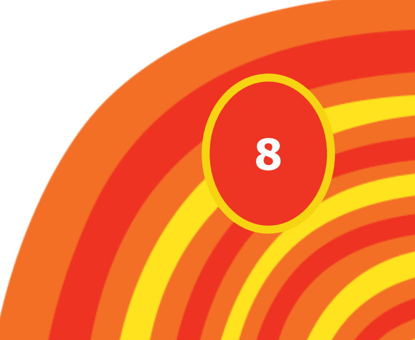
A Prompt Complaints Process

Recommendation 18. The legislation establishing a new independent body must establish specific timeframes for dealing with complaints. The body should develop publicly available policies on setting out the expected timeframes for dealing with the complaint, including the initial assessment, investigation and final resolution of the complaint.

Culturally Appropriate Handling of Complaints

Recommendation 19. A new independent police complaints body must respond to the needs of Aboriginal complainants, including by establishing a Koori Engagement Unit, with responsibility for:

(a). Raising awareness of the complaints process within Aboriginal communities, including through outreach sessions;
(b). Establishing culturally appropriate options for lodging a complaint;
(c). Liaising with Aboriginal complainants throughout the complaint process, including to provide regular updates;
(d). Providing and/or coordinating access to culturally safe support for complainants, including through warm referrals to culturally safe providers;



(e). Coordinating access to culturally safe legal assistance, including through warm referrals to VALS and other legal service providers.

Recommendation 20. A new independent police complaints body must ensure that Aboriginal communities are aware of and understand the police complaints process, including by:

(a). Providing culturally appropriate and easily accessible information about the complaints process, including on the website and in public locations;
(b). Developing publicly available policies setting out values and standards for handling complaints, including a commitment to provide a culturally appropriate service.

Recommendation 21. The Victorian Government should provide funding to VALS to develop and implement targeted community legal education (**CLE**) on police powers, interacting with police and police complaints.

Recommendation 22. Victoria Police must provide publicly available and culturally appropriate information on the process for handling customer service complaints.

Recommendation 23. A new independent police complaints body should establish culturally appropriate avenues for submitting a police complaint, including online, in person, over the phone and by post. The Koori Engagement Unit at the new body should lead this process, in collaboration with ACCOs and the Aboriginal Justice Caucus.

Recommendation 24. A new independent police complaints body must communicate regularly with complainants throughout the complaints process, including written notification:

(a). When the complaint is first submitted (advising on the process);
(b). After the initial classification and assessment (advising of how the complaint has been classified, whether the complaint will be investigated, referred or dismissed, and providing information on rights to review/respond);
(c). Throughout the investigation or restorative justice process (at least every 4 weeks);
(d). Written notification of the outcome of the complaint, including a description of each allegation forming the complaint, a brief summary of the evidence in relation to each allegation, the determination reached and how the investigator reached that conclusion (including the steps taken to investigate that allegation), and the action taken in response to the complaint, as well as information on review rights.

Recommendation 25. A new independent police complaints body should establish mechanisms to receive feedback from complainants about their experiences and continually improve processes based on this feedback. The Koori Engagement Unit at the new body should establish mechanisms for receiving feedback from Aboriginal complainants and Aboriginal communities more broadly, for example, outreach sessions with Aboriginal communities, or by liaising with service providers such as VALS, about the experiences of our clients.

Recommendation 26. To ensure that the new independent police complaints body is able to provide a culturally appropriate complaints process, it should:

(a) Employ Aboriginal investigators and/or involve Aboriginal staff in the classification process for complaints submitted by Aboriginal people;
(b) Ensure that there are Aboriginal people in management positions;
(c) Require all non-Aboriginal staff to undergo substantive training in cultural awareness, systemic racism, anti-racism, unconscious bias and trauma-informed approaches;
(d) Adopt a de-centralised model, with regional offices around the State.

Recommendation 27. The Victorian Government should provide funding to VALS to provide culturally safe legal advice and representation for Aboriginal complainants.

Access to Documents and Footage

Recommendation 28. Complainants should be able to access documents relating to the police complaint, including the investigation file:

(a). The legislation establishing a new independent body should not exempt documents and footage relating to the police complaint from the *Freedom of Information Act 1982*, as is currently the case for IBAC;
(b). The *Freedom of Information Act 1982* should be amended to ensure that documents and footage relating to the police complaint are not exempted from this Act.

Recommendation 29. The Victorian Government should take measures to ensure that Victoria Police comply with timeframes set out in the *Freedom of Information Act 1982* (Vic).

Restorative Justice

Recommendation 30. The new independent police complaints body and Victoria Police should work with Aboriginal communities and ACCOs to develop restorative justice processes at each agency.

Recommendation 31. Restorative justice approaches for resolving police complaints should meet the following international best practice principles:

(a). All parties must consent and parties can withdraw consent at any time;
(b). The process should be driven by the complainant;
(c). There should be safeguards in place to guarantee fairness for both parties;
(d). Neither party should be coerced or induced by unfair means to participate in the process;
(e). Disparities leading to power imbalances, as well as cultural differences among the parties, should be taken into consideration at all stages;
(f). The processes must be designed to maximise a sense of justice and healing and minimise chances of harm;
(g). Both parties have a right to legal advice and representation, including culturally safe legal services;
(h). Discussions should be confidential, and should not be disclosed subsequently, except with the agreement of the parties or as required by law.

Recommendation 32. Not all police complaints are appropriate for resolution through restorative justice approaches. The new independent body for police complaints should develop clear guidelines on when a restorative justice approach may be appropriate.

Recommendation 33. Restorative justice processes used by Victoria Police to resolve customer service complaints should be legislated, and guidelines regulating the process should be publicly available. The mediator or conciliator must be independent from police and the new independent police complaints body should have strict oversight of the processes.

Protections for Complainants

Recommendation 34. Legislation establishing a new independent body for police complaints should include robust protections for complainants, including:

(a). Making it an offence to threaten or intimidate, persuade or attempt to persuade another person not to make a complaint, or subject them to any detriment;

(b). Monitoring charges laid against a complainant once they have submitted a complaint.

Recommendation 35. The new independent body for police complaints should recognise in its policies and procedures that investigations may need to be deferred to avoid interfering with the defence in a criminal prosecution. These procedures should include:

- Advising complainants that they may wish to seek legal advice;
- Highlighting the importance of legal advice where there may be related matters before a court;
- With consent, putting a complainant in touch with an appropriate legal service (VALS in the case of Aboriginal complainants).

Complaint Outcomes

Recommendation 36. The independent complaints body should have the power to refer matters for prosecution. The Office of Public Prosecutions should be required to provide a written explanation to the complaints body and the complainant if it declines to prosecute after a referral.

Recommendation 37. Complainants and their legal representatives should have a legal right to access the complaint investigation file once a matter has been finalised, and evidence from the file should be admissible in civil litigation.

Recommendation 38. Victoria Police should be required to consider the findings of an independent investigation when deciding whether to settle a civil suit.

Recommendation 39. Findings of the independent police complaints body should be reviewable by an external, public tribunal. Review rights should be available to both the complainant and the police officer(s) subject to the complaint.

Recommendation 40. The independent complaints body must have the power to make recommendations for reform of systems, policies and procedures within Victoria Police.

Recommendation 41. Victoria Police should be required to submit an annual report to the independent complaints body, providing details on its implementation of recommendations from the complaints body, including plans for ongoing implementation and any barriers to successful implementation.

Complaints Data

Recommendation 42. Data relating to police complaints from Aboriginal complainants must be gathered, managed and used in accordance with the principles of Indigenous Data Sovereignty and Indigenous Data Governance.

Powers of Police Complaints Bodies

Recommendation 43. Victoria Police should be legislatively prohibited from investigating any matter that is being investigated by the new independent complaints body. The complaints body should have a power to order police to cease any related investigation if it could interfere with an ongoing complaint investigation.

Recommendation 44. Where Victoria Police is investigating a complaint (i.e. the complaint is assessed as a customer service matter), the independent body must have the power to take over the investigation of any complaint at any time – both complaints received directly by police and those referred by the independent body – and to require police to suspend their investigation.

Recommendation 45. Investigators employed by the independent complaints body should be granted all the investigative powers of a police officer while they are investigating a complaint.

Police-Contact Deaths and Serious Injuries

Recommendation 46. Police-contact deaths and incidents involving serious injuries must not be investigated by police; they must be investigated by a new independent police-complaints body.

Recommendation 47. Coronial investigations into police-contact deaths must not be carried out by police. They must be carried out by a specialist civilian investigation team that is independent from police, is culturally appropriate and includes Aboriginal staff and leadership.

Recommendation 48. The Government should consult with the families of Aboriginal people who have died in custody regarding the mechanism for independent coronial investigation of police-contact deaths.

Recommendation 49. Family members of an Aboriginal person who has died in police custody should be given the option of providing a statement through the Koori Engagement Unit at the Coroners Court or VALS lawyers.

Recommendation 50. The Government should establish an Aboriginal Social Justice Commissioner to provide independent oversight for Aboriginal justice outcomes in Victoria. One of the key functions of the Commissioner should be to provide independent oversight for implementation of all coronial recommendations arising from the police-contact death of an Aboriginal person.

Legal and Disciplinary Sanctions

Civil Litigation

Recommendation 51. Complainants should be able to access footage from body-worn cameras (**BWC**s) worn by police and Protective Service Officers (**PSO**s). To enable access to this footage, Sections 30D and 30F of the *Surveillance Devices Act 1999* should be amended, to remove BWCs from the ambit of this legislation.

Police Disciplinary System

Recommendation 52. As recommended by the IBAC Committee Inquiry, the Victorian Government should "review the disciplinary system for Victoria Police, including the nature and operation of the *Victoria Police Act 2013* (Vic) with respect to that system." The review should be open to submissions from the public and stakeholder organisations and should publish its final report.

Recommendation 53. The review of the police disciplinary system should make recommendations for linking the disciplinary system with the police complaints system, to avoid re-investigation of matters that have been independently investigated through the complaints process.

Recommendation 54. The review of the police disciplinary system should make recommendations to provide for greater transparency and accountability in the operation of the disciplinary process.

Monitoring, Auditing and Record-Keeping

Recommendation 55. Monitoring of Victoria Police should be conducted by a single dedicated monitoring body, not fragmented between agencies. The monitoring function should be carried out by a body that is separate to the independent police complaints body. If the complaints and monitoring functions are located in a single agency, there should be a strict information firewall.

Recommendation 56. Monitoring must not be limited to procedural monitoring, but should also include substantive, outcome-focused monitoring of the exercise of police powers. The monitoring body should significantly expand the use of substantive monitoring, through a merits review of documented police decision-making.

Recommendation 57. The monitoring body should use reporting obligations of Victoria Police as the basis for regular and timely publishing of statistical analysis of the exercise of police powers.

Recommendation 58. Data published by the monitoring body should be disaggregated to the greatest extent possible, and published in consistent formats, which facilitate analysis and comparison over time.

Recommendation 59. The scope of procedural and substantive monitoring should be expanded to a wider range of police powers than the currently monitored major investigative powers, including powers that are frequently exercised in the community or disproportionately impact on Aboriginal people and other marginalised communities. These should include:

- Police stops and searches
- Move-on orders
- Any new police powers relating to public intoxication
- Powers under the Mental Health Act and future relevant Acts
- Charges against children in out-of-home care
- Arrest of child or young person rather than proceeding by way of summons
- Cautioning
- Diversion
- Use of weapons at rallies/protests (rubber bullets, OC spray, armoured vehicles etc.)
- Use of force during arrest
- Treatment in police custody, including use of force, drug testing, strip searching and provision of medical care
- Police bail decisions
- Police use of Custody Notification Service (**CNS**), bail justices, Aboriginal Community Justice Panels (**ACJP**) and Independent Third Person services.

Recommendation 60. The monitoring body should be granted the flexibility to establish monitoring arrangements in new areas of police conduct as appropriate, not restricted to an established list of monitoring areas.

Recommendation 61. Victoria Police should be required by legislation to keep detailed records in relation to the exercise of specific police powers, and provide disaggregated data to an independent body for the purposes of monitoring. Data collection and collation should adhere to the principles of Indigenous Data Sovereignty.

Detention Inspections in Compliance with OPCAT

Recommendation 62. The operations, policies, frameworks and governance of the designated detention oversight bodies under OPCAT (NPMs) must be culturally appropriate and safe for Aboriginal people.

Recommendation 63. The Victorian Government must urgently undertake robust, transparent and inclusive consultations with the Victorian Aboriginal community, its representative bodies and ACCOs on the implementation of OPCAT in a culturally appropriate way.

Recommendation 64. In accordance with Article 3(1) of OPCAT, the NPM in Victoria must have jurisdiction over all places where individuals are or may be detained by Victoria Police or Protective Service Officers, regardless of the length of time of detention.

Recommendation 65. The Victorian Government must legislate for the NPM's mandate, structure, staffing, powers, privileges and immunities.

Recommendation 66. The Victorian and Commonwealth Governments must ensure that the NPM is sufficiently funded to carry out its mandate effectively. OPCAT implementation is a joint responsibility of the Commonwealth and State Governments.

Accountability for Implementation

Recommendation 67. The Victorian Government should establish an independent, statutory office of the Aboriginal Social Justice Commissioner. This office should be properly funded and report directly to the Parliament. The mandate of the Commissioner should include monitoring the implementation of RCIADIC recommendations, as well as recommendations from coronial inquests into Aboriginal deaths in custody.

Introduction

Systemic racism[1] in Victoria Police impacts Aboriginal communities on a daily basis and manifests itself in the way that Aboriginal people are over-policed, over-represented in police custody and under-served when they need assistance from police. It also evident in police use of force and assaults against Aboriginal people and explicit racial abuse.

An effective police oversight system is crucial to holding police accountable for this systemic racism and violence. But the mechanisms for police oversight in Victoria are fundamentally failing. Individual victims of police misconduct – including those who die or are seriously injured after contact with the police – almost never see justice done, even in their individual cases. Real systemic reform is even more lacking, despite the indisputable evidence of systemic problems that has accumulated for many years.

There is an urgent need for meaningful police oversight, to hold police accountable and help drive change to fix the deep problems with policing in Victoria. The Government is conducting a review of the police oversight system, which provides an opportunity to address some issues – but the scope of the review is too narrow, with a heavy focus on police complaints, and is unlikely to result in the wider changes to the oversight system that Victoria needs.

This Policy Paper sets out VALS' position on the reforms that are needed across all the different pillars of an effective oversight system. The paper has a particular focus on the police complaints system, because this is the main subject of the Government's current systemic review of police oversight.[2] VALS' strong view, however, is that this systemic review is too narrow. It does not respond to the true intention of the Royal Commission into the Management of Police Informants when it called for a systemic review,[3] and it does not cover many crucial aspects of an effective police oversight system. VALS has been advocating strongly for the necessary, more extensive reform of the wider police oversight system. While this paper addresses the Government's immediate priorities in more detail, VALS will be doing more work in future on other fundamental pillars of the oversight system, particularly on criminal prosecutions of police.

1 Systemic racism refers to the way that laws, policies and practices across agencies work together to produce a discriminatory outcome for racial or cultural groups.

2 Engage Victoria, 'Consultation: Systemic review of police oversight', web page accessed 20 April 2022.

3 Royal Commission into the Management of Police Informants, *Final Report*, Recommendation 61.

Aboriginal People and the Police Oversight System

Aboriginal communities, including VALS clients, Aboriginal Community Controlled Organisations (**ACCO**s) and the Aboriginal Justice Caucus (**AJC**), have consistently shared their experiences and proposed solutions as part of numerous inquiries and reviews. In particular, the AJC has repeatedly called for an Aboriginal Social Justice Commissioner, to oversee Aboriginal justice outcomes in Victoria and operate as an oversight mechanism for implementation of the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**) recommendations and coronial recommendations.[4] Establishing an independent and well-resourced Aboriginal Social Justice Commissioner continues to be a priority for VALS and the AJC.

The following extract from the Coronial findings into the passing of Raymond Noel Lindsay Thomas, a proud Gunnai, Gunditjmara and Wiradjuri man, is a poignant reminder of the historical and contemporary violence and abuse perpetrated against Aboriginal people by police. Reflecting on the fear that his son must have felt whilst being pursued by police, Raymond Noel's father recounted the following incident from his son's childhood:

> **"... the boys were playing on a woodchip mound, you know, on the docks with a couple of other cousins. Just being young boys, ten or eleven years old. Just what they do. And two police officers came along and their cousins run off and two police apprehended our boys, handcuffed them and made them sit on the gutter and one of the officers said, "If you move I'll shoot ya". Now, that's the first interaction with police for a ten year old, eleven year old. So you could imagine the fear they must have felt..."[5]**

Aboriginal people are far more likely to suffer police misconduct, and to experience negative interactions with police. In Victoria, Aboriginal people are more likely to be apprehended and arrested by police, and report higher rates of being hassled by police.[6] The recent Inquiry by the Commission for Children and Young People (**CCYP**) found that

4 Establishing an Aboriginal Social Justice Commissioner has been one of the AJC's key priorities since it was recommended by the Victorian RCIADIC Review in 2005.

5 Raymond Noel Thomas passed away on 25 June 2017 during a police pursuit in Thornbury, Melbourne. See *Finding into the Death of Raymond Noel Lindsey Thomas*, COR 2017 003012, p. 28.

6 H. Blagg, N. Morgan, C. Cunneen, A. Ferrante (2005), "Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Criminal Justice System".

Aboriginal children and young people were substantially over-represented in arrests.[7] Over 70% of Aboriginal children and young people consulted throughout the Inquiry spoke about racism, violence or mistreatment by police; 25 Aboriginal children mentioned racism and racial abuse in the context of police interactions.[8] Excessive policing of Aboriginal women has been noted by the Coronial Inquest into the death of Tanya Day.[9]

Given this record of maltreatment, it is not surprising that complaints made by Aboriginal people are typically more serious than those made by non-Aboriginal people. The Koori Complaints Project found that, in the files it reviewed, the largest number of allegations related to assaults by police.[10] Complaints about racist abuse and failure to provide medical treatment were also common.[11] At the same time, Aboriginal people report being under-served by police when they need support – research by VALS and the Centre for Innovative Justice found VALS clients made complaints about police failure to investigate reports or respond adequately to family violence callouts.[12]

Despite the fact that Aboriginal people in Victoria are routinely subjected to racism and misconduct by police, they are less likely to bring a complaint than non-Aboriginal people.[13] This is a clear sign of a police oversight system which is failing. A recent audit found that Victoria Police systematically mishandles complaints made by Aboriginal people, including by failing to consider the human rights of complainants or to properly gather evidence to investigate their complaints.[14] After two hundred years of police violence against Aboriginal communities in Victoria, the continuing lack of accountability means that Aboriginal people have lost faith in

7 CCYP (2020), _Our Youth Our Way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system_ ("Our Youth, Our Way"), p. 430.

8 Ibid, p433.

9 *Finding into Death with Inquest: Inquest into the Death of Tanya Louise Day,* 9 April 2020, COR 2017 6424.

10 _Koori Complaints Project 2006-2008: Final Report_, p18.

11 Ibid.

12 VALS and the Centre for Innovative Justice, *The Effectiveness of the Victoria Police Complaints System for VALS Clients* (2016).

VALS, *Submission to the Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria* ("Submission to IBAC Inquiry") (2017).

13 See _Koori Complaints Project_, pp. 18-21; Victorian Parliament (2019), _Inquiry into the external oversight of police corruption and misconduct in Victoria_, pp. 152 – 154; VALS (2017), _Submission to the Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria_, p. 8.

14 IBAC (2022), _Victoria Police handling of complaints made by Aboriginal people: Audit report_.

both police and the police oversight system. Reform is urgently needed.

Pillars of Police Oversight

There have been many inquiries and royal commissions examining police violence and the accountability mechanisms that are meant to address and prevent it.[15] No doubt, the ongoing lack of police accountability will continue to be a key theme in future processes, including in the work of the Yoo-rrook Commission. This will remain the case until an adequate oversight system for police is put in place.

The police oversight system in Victoria needs to be capable of responding to both individual instances of misconduct and to the systemic problems that plague Victoria Police and its relationship with Aboriginal people. A complaints system is not enough. Neither are oversight procedures limited to the specialised, rarely-used coercive powers that police have for dealing with organised crime and terrorism.

Oversight needs to be built into every part of Victoria Police's operations, from its most everyday policing activity, to its special operations, to the way it engages with coronial inquests. This Paper examines each of the key pillars of a police oversight system. These are:

- **Police complaints:**
  - Independent investigation of individual police complaints
  - Independent investigation of systemic issues (including through own motion investigations)
  - Legislative mechanisms for accessing documents and footage from Body Worn Cameras (**BWC**s), for the purposes of making a complaint against police
- **Investigation of police-contact deaths and serious injuries**
  - Independent investigation of police-contact deaths and serious injuries, including for the purposes of assessing whether disciplinary or criminal offences have been committed, as well as for the coronial process

15 *Royal Commission into Aboriginal Deaths in Custody National Report* (1991); *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody* (2005); IBAC Committee (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, pp. 152 – 154; Victorian Parliament (2022), *Inquiry into Victoria's Criminal Justice System*.

- **Legal and disciplinary sanctions**
    - A robust police disciplinary system, to ensure that officers are held accountable for disciplinary offences
    - Criminal prosecution of police officers
    - Civil litigation against police officers and/or Victoria Police
- **Monitoring, Auditing & Reporting**
    - *Record-keeping and reporting*: Robust legislative provisions for comprehensive record-keeping practices, including in relation to body worn cameras (**BWC**s); publicly available and transparent reporting on police activity and the use of police powers
    - *Auditing*: Independent auditing of police record-keeping and public reporting requirements; independent auditing of the police complaints system
    - *Monitoring*: Independent monitoring of police decisions and exercise of police power
- **Detention Inspections in Compliance with OPCAT**
    - Independent visits to places where police or the government may deprive people of their liberty (implementation of the *Optional Protocol to Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (**OPCAT**))
- **Accountability for Implementation**
    - Independent oversight of implementation of police-related recommendations, including Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**) recommendations, coronial recommendations and recommendations from police complaints.

It is also important that all parts of the police oversight system attend to the conduct of Protective Service Officers (**PSO**s) who operate with many of the same powers as sworn police officers, but without the same degree of training. VALS has repeatedly raised concerns about over-policing of "antisocial behaviour" by PSOs, which disproportionately impacts Aboriginal people, homeless people, people with mental health or substance use issues, and children.[16] Police contact which starts with needless over-policing of "antisocial behaviour" can easily lead to detention, further police contact and entrenchment within the criminal legal system.

16 VALS (2021), *Submission to the Inquiry into Victoria's Criminal Justice System*. See also IBAC (2016), *Transit Protective Services Officers: An exploration of corruption and misconduct risks*.

As noted above, the Government's current systemic review does not address many of these pillars of an effective oversight system.

RECOMMENDATIONS

Recommendation 1. In addition to the current review, the Government must undertake a more comprehensive reform process to consult on, design and implement all the core pillars of a police oversight system.

Recommendation 2. The reform process must examine accountability and oversight mechanisms for addressing systemic racism within Victoria Police.

Recommendation 3. The reform process must prioritise the voices of people and communities who are disproportionately affected by systemic racism and the lack of police accountability.

Challenges for Oversight Reform

Any reform to the police oversight system needs to prioritise the voices of people and communities who are disproportionately affected by systemic racism and the inadequacies in Victoria's systems of police accountability.

Too often, the powerful voices of Victoria Police and the Police Association Victoria (**TPAV**) overshadow the perspective of those most affected by police misconduct. Victorian politics has come to feature law and order issues at almost every election.[17] The current Labor Government has invested heavily in police personnel and equipment (including tasers).[18] The Government has been focused on defeating Opposition attacks over crime issues, which have been a major

17 The Guardian, 20 November 2018, 'Victorian election: what the parties are promising'. Available at https://www.theguardian.com/australia-news/2018/nov/20/victorian-election-what-the-parties-are-promising.

18 Premier of Victoria, 21 April 2017, Media release: 'Frontline Police Numbers Keep Climbing'. Available at https://www.premier.vic.gov.au/frontline-police-numbers-keep-climbing.

The Age, 23 December 2021, 'Victoria to issue all frontline police with Tasers'. Available at https://www.theage.com.au/national/victoria/victoria-to-issue-all-frontline-police-with-tasers-20211223-p59jrp.html.

focus of Liberal campaigning at the 2014 and 2018 elections.[19] There are also close personal ties to the police force, with Daniel Andrews' former chief of staff Brett Curran now an Assistant Commissioner with Victoria Police.[20]

The Police Association Victoria

The Police Association has historically been a particularly significant obstacle to establishing greater oversight of police. Around 98% of Victoria Police's sworn staff (officers and PSOs) are members of the Police Association. This is far above the density of most trade unions and means the Association is regarded as a strong representative voice of police officers.

Resisting greater oversight and accountability has been one of the Police Association's key aims throughout its history.[21] The Association has grown in strength when it has had opportunities to advocate for stronger protections for police officers against disciplinary and other sanctions. In 1946, the Police Association's advocacy was instrumental in legislation to remove the Chief Commissioner's power to dismiss officers and the creation of a separate Police Discipline Board.[22] In 1965, TPAV publicly attacked the credibility of a police informer turned whistleblower, and supported the defence of a small number of officers charged with misconduct.[23] In 1976, the specially constituted Beach Inquiry made adverse findings against 55 police officers and recommend "beyond doubt the undesirability of police investigating complaints against police.[24] It recommended an increase in the Ombudsman's powers to investigate complaints and the creation of a tribunal, independent of police, to make findings and impose disciplinary and other

19 The Guardian, 26 October 2018, 'Victorian election roundup: Dutton reprises 'gang' fears as Liberals run on crime'. Available at https://www.theguardian.com/australia-news/2018/oct/26/victorian-election-roundup-dutton-reprises-gang-fears-as-liberals-run-on.

The Guardian, 14 November 2014, 'Victorian election: why 'tough on crime' has failed the crucial test'. Available at https://www.theguardian.com/australia-news/victorian-election-the-countdown/2014/nov/14/victorian-election-why-tough-on-has-failed-the-crucial-test.

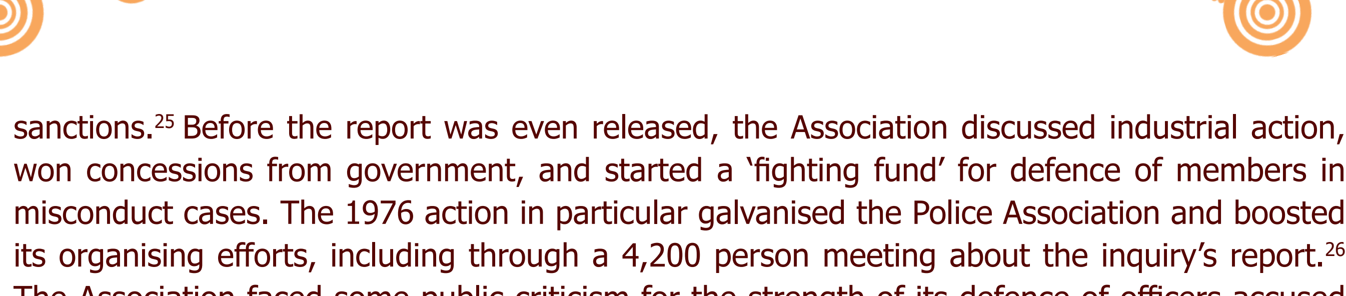
20 The Australian, 2 December 2019, 'Daniel Andrews' ex-staffer Brett Curran now assistant police commissioner'. Available at https://www.theaustralian.com.au/nation/politics/daniel-andrews-exstaffer-brett-curran-now-assistant-police-commissioner/news-story/4c156005c4961dad92e8beb08e842a65.

21 Office of Police Integrity (2007), *Past Patterns – Future Directions: Victoria Police and the problem of corruption and serious misconduct*, pages 27, 41, 47-50, 107-9, 111.

22 Ibid, pp33-4.

23 Ibid, pp41-2.

24 Ibid, p49.



sanctions.[25] Before the report was even released, the Association discussed industrial action, won concessions from government, and started a 'fighting fund' for defence of members in misconduct cases. The 1976 action in particular galvanised the Police Association and boosted its organising efforts, including through a 4,200 person meeting about the inquiry's report.[26] The Association faced some public criticism for the strength of its defence of officers accused of misconduct, but its standing among police generally grew.

Since that time, the Police Association has continued to dedicate major efforts to misconduct defence and to preventing any strengthening of the disciplinary or complaints investigation systems. When the Police Complaints Authority (**PCA**) was established in 1986 it was fiercely criticised by the Association.[27] The PCA had around five staff and fell far short of the powers of an adequate oversight body, but the Police Association and Victoria Police command nevertheless viewed it as an intrusion on internal policing matters. The PCA was also highly critical of police, in particular the way Victoria Police managed internal affairs investigations. An independent review in 1987 largely supported the PCA against its critics, but the Police Association's advocacy continued and the PCA was abolished in 1988, after less than two years of operation.

This historic focus on opposing stronger oversight has persisted to this day. The Police Association supported the abolition of the Office of Police Integrity, and its replacement by the Independent Broad-Based Anti-corruption Commission (**IBAC**), on the grounds that it was unfair to have an agency focused on police in particular, when other public officials also commit misconduct.[28] In 2017, the Association made a written submission to Parliament arguing that the only reform needed to IBAC is "a diminution of the IBAC's investigative capacity", not any strengthening of independent investigation.[29] Many people who make complaints about police feel that they are not listened to, but the head of the Police Association told MPs that those people are "hopelessly conflicted" and their judgement should not be relied on.[30]

25 Parliament of Victoria (1978), *Report of the Board of Inquiry into Allegations against Members of the Victoria Police Force*, pp107-111.

26 Office of Police Integrity (2007), *Past Patterns – Future Directions: Victoria Police and the problem of corruption and serious misconduct*, p49.

27 Ibid, pp105-6.

28 Herald Sun, 6 January 2010, 'Don't point finger at us, says Police Association boss Greg Davies'.

The Age, 5 December 2007, 'Police union wants new watchdog'.

29 The Police Association Victoria (2017), *Submission to the IBAC Committee Inquiry into the external oversight and investigation of police corruption and misconduct*.

30 IBAC Committee, *Transcript: Inquiry into the external oversight and investigation of police corruption and misconduct in Victoria – 19 February 2018*.

As long as the voices of the Police Association, Victoria Police and law-and-order proponents are prioritised, there will not be adequate reform of the police oversight system. The Government needs to recognise that a functioning oversight system is necessary for Victoria Police to regain the trust of the Victorian community, and that opposition to reform is short-sighted and self-defeating.

We appreciate that the task of reforming the police oversight system is immense. However, it is not as immense as the legacy created by over two centuries years of racist policing. Over thirty years ago, the Royal Commission into Aboriginal Deaths in Custody found that "far too much police intervention in the lives of Aboriginal people throughout Australia has been arbitrary, discriminatory, racist and violent."[31] The recommendations of that Royal Commission have not been implemented. Police intervention in the lives of Aboriginal people continues to be discriminatory and violent, but real accountability for police misconduct is still absent. The creation of a robust police oversight system is long overdue.

31 *RCIADIC National Report*, Volume 2, Section 13.2.3.

Police Complaints

A Broken System

The police complaints system in Victoria is broken, falls drastically short of international human rights standards and fundamentally fails to respond to the needs of Aboriginal people. To ensure a police complaints mechanism that complies with international principles, the Government must establish a new independent police complaints body that is complainant-centred, transparent, has adequate powers and resources, and responds to the needs of Aboriginal complainants.

International human rights law[32] requires that a police complaints system must comply with the following standards:[33]

- *Independent*: the investigating body must be institutionally, functionally, culturally and politically independent from police.
- *Capable of conducting adequate investigations*: adequately resourced to be able to ascertain whether police have breached legal or disciplinary standards, and whether they have acted in compliance with human rights;
- *Prompt*: the investigation should be conducted promptly and in an expeditious manner in order to maintain confidence in the rule of law. Enforceable timelines for investigations are critical;[34]
- *Transparent*: regular and public reporting of police complaints including outcomes, disciplinary action, civil litigation and prosecutions;
- *Victim-centred and victim participation*: the complainant should be protected against reprisals or harassment after making a complaint and should be involved in the complaints process in order to safeguard their legitimate interests.

32 The right to remedy under international human rights law provides that individuals whose rights have been violated must be able to access an effective remedy through a competent authority. See Article 2(3) *International Covenant on Civil and Political Rights* (ICCPR).

33 See: Council of Europe (2009), *Opinion of the Commissioner for Human Rights concerning independent and effective determination of complaints against the police*; UN Office on Drugs and Crime (2011), *Handbook on police accountability, oversight and integrity*; Police Accountability Project (2017), *Independent Investigations of Complaints Against Police*. They have also been applied by the UN Human Rights Committee in: Corinna Horvath, Individual communication to the United Nations Human Rights Committee in Horvath v Australia, 19 August 2008; UN Human Rights Committee, Views: Communication No. 1885/2009 (5 June 2014), 110th sess (Horvath v Australia).

34 Police Accountability Project (2017), *Independent Investigations of Complaints Against Police*.

The experience of VALS, our clients and the legal assistance sector is that the current police complaints system does not comply with these standards. The current system provides for almost no independent investigation of complaints by IBAC, which is severely underfunded and does not have adequate powers or resources. There is a complete lack of transparency and public scrutiny of IBAC investigations into police misconduct.

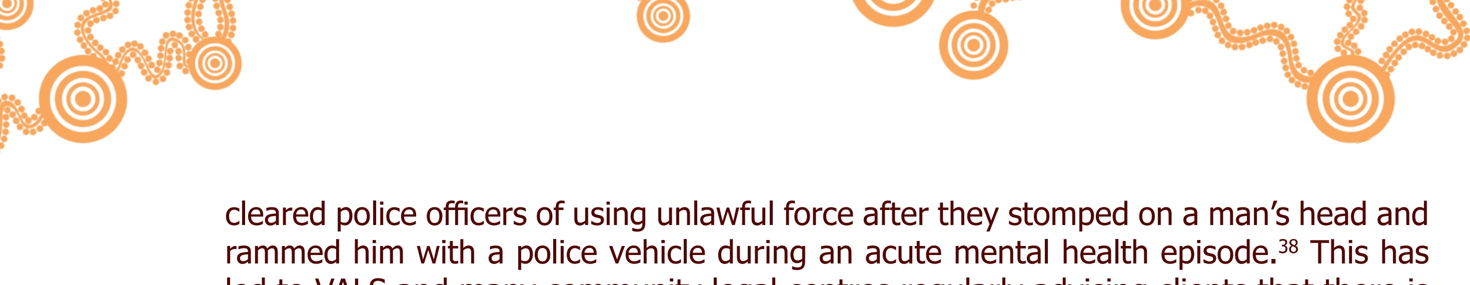
In Victoria's current police complaints system, complaints can be made either to Victoria Police or directly to IBAC. Victoria Police is required to notify IBAC of all complaints it receives; conversely, IBAC can – and in the majority of cases does – refer complaints back to Victoria Police for investigation. Very few complaints are investigated by IBAC itself. Shortcomings of the existing approach include:

- ***Failure to serve Aboriginal complainants***: Despite clear evidence that Aboriginal people face more frequent and more serious police misconduct, IBAC has consistently failed to respond to the needs of Aboriginal complainants. IBAC has not established culturally appropriate complaints-handling processes or recognised the need to liaise with Aboriginal complainants and communities.
- ***Lack of independence***: IBAC has developed a cooperative and trusting relationship with Victoria Police through its anti-corruption investigations, which is not appropriate for a complaints-investigating body. This culture of collaboration with police is reflected in the high number of referrals back to Victoria Police for investigation (94.3% of allegations in 2020-21)[35], and in the limited trust that community members have in IBAC as an independent investigator.
- ***Lack of complaints-handling culture***: IBAC does not consider itself a complaints-handling body.[36] Much of its organisational culture and the legislation which governs it are intended for public sector corruption investigations, which require secrecy. It is not well suited for complaints investigations which require transparency and clear communication with complainants.
- ***Investigations are inadequate***: The above shortcomings, combined with insufficient resourcing, mean that IBAC's investigations into police complaints are not adequate. Investigations rarely deliver meaningful outcomes, even when there is sufficient evidence to pursue civil litigation. For example, in Operation Turon, IBAC found that the Assistant Commissioner for Professional Standards Command had posted racist and homophobic material on the internet over a period of several years and faced civil litigation for using racist language in person, but concluded that this had no bearing on his decision-making about complaints investigations.[37] In another investigation, IBAC

35 IBAC (2021), *Annual Report 2020/21*, p. 26.

36 Police Accountability Project (2017), *Independent Investigations of Complaints Against Police*, p. 5.

37 IBAC (2021), *Operation Turon: special report*.



cleared police officers of using unlawful force after they stomped on a man's head and rammed him with a police vehicle during an acute mental health episode.[38] This has led to VALS and many community legal centres regularly advising clients that there is no value in making complaints to IBAC. VALS has experience of cases where IBAC has referred complaints back to Victoria Police, or found them not substantiated, when the same incidents were later pursued successfully in civil litigation.

The failings of IBAC are so dire that many complainants and legal services see no reason to engage with it.[39] This is primarily due to the lack of independence in its investigations, but also because IBAC consistently fails to provide tangible outcomes, both in relation to individual complaints and systemic issues.

Further, IBAC is completely incapable of dealing with systemic issues, including systemic racism. As noted above, systemic racism within Victoria Police affects Aboriginal people on a daily basis and must be addressed through significant cultural and institutional change. IBAC's current annual plan and five-year strategy do not make any reference to racism, in Victoria Police or in society more broadly.[40] The profound change needed in Victoria Police can only be catalysed by a police complaints system that is seriously committed to addressing systemic racism.

The existing complaints system has also repeatedly failed victim-survivors of family violence, particularly family violence committed by police officers. IBAC and the Victorian Equal Opportunity and Human Rights Commission have identified that Victoria Police are less likely to lay family violence charges against a serving police officer than against other people.[41] Complaints about police handling of family violence matters – like other complaints – are almost always investigated by police themselves. This approach has led to major procedural and substantive failures: in one recent investigation, the victim-survivor of family violence at the hands of police officer was not told that a complaint investigation was under way, and her child's testimony was dismissed as unreliable in a manner that re-traumatised him.[42] These failings necessitate major reform. The Victorian Parliament's recent Inquiry into the Criminal Justice System received extensive

38 ABC News, 16 July 2021, 'Watchdog finds police acted lawfully when head-stomping mentally ill man during arrest'.

39 VALS (2017), *Submission to the Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria, Koori Complaints Project 2006-2008: Final Report*, p. 23; CCYP (2020), *Our Youth Our Way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system*, p. 436.

40 IBAC (2021), *The IBAC Plan 2021-25*.

IBAC (2021), *IBAC Annual Plan 2021/22*.

41 Ibid, p11.

42 ABC News, 14 April 2022, 'Child survivor of family violence says police 'essentially' called him a 'liar' during misconduct probe'.

evidence on the problems with the current police complaints system, but recommended only that the Government 'consider' establishing a new body, as well as considering possible reforms to strengthen IBAC.[43] That recommendation does not go far enough; the evidence clearly shows that IBAC must no longer be responsible for investigating complaints against police in Victoria. A new body must be established to rectify the current system's shortcomings and ensure independent investigation of complaints against police.

RECOMMENDATIONS

Recommendation 4. The Victoria Government must establish a new independent police complaints body that is complainant-centred, transparent, has adequate powers and resources to carry out independent investigations, and responds to the needs of Aboriginal complainants.

Recommendation 5. Police must not be responsible for investigating and handling police complaints, except minor customer service matters. All police complaints other than minor customer service matters must be investigated and managed by the independent police complaints body.

43 Victorian Parliament (2022), *Inquiry into Victoria's Criminal Justice System*, pp255-6.

A New Independent Body for Police and PSO Complaints

Victoria needs a new independent body to take on the police complaints functions, currently carried out by IBAC. There are profound problems with the way IBAC approaches police complaints. Some of these are structural problems with the integration of corruption and police complaints functions, while others are cultural problems with IBAC specifically. Given these insurmountable challenges, IBAC must not handle complaints even under reformed legislation.

There are three models for a police complaints body commonly discussed in Victoria, including in the report of the IBAC Committee. The existing model is an oversight body that has within its mandate both police misconduct and public sector corruption. A second model would require only a slight modification: the creation of a dedicated police misconduct division within the single oversight body was the recommendation of the IBAC Committee's inquiry. A third model is a standalone police complaints body.

Public Sector Corruption vs Police Misconduct

Treating public sector corruption and police misconduct under the same legislation, through the same oversight body, is a major impediment to an effective police complaints system. While investigation of police misconduct must be independent, public sector corruption can be appropriately investigated by police under the direction or supervision of a specialist institution. An agency tasked with investigating public sector misconduct is likely to develop a collaborative and trusting relationship with police, which can undermine the independence required of a police complaints body. From VALS' perspective, the IBAC Committee's recommendation – to establish a separate, dedicated division at IBAC to specialise in the investigation of police misconduct[44] – does not address this issue, when IBAC has repeatedly demonstrated that it places a high value on collaboration with police.

Treating public sector corruption and police misconduct through the same oversight body also means that police complaints do not receive the necessary resources and do not prioritise the requisite complainant-centred approach. IBAC has repeatedly demonstrated that its institutional culture prioritises anti-corruption work,[45] and that it "does not currently consider itself to be a complaint handling body."[46] Accordingly, the IBAC Committee concluded "that serious police

44 Victorian Parliament (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, p. xxix.

45 Under s.15(1A) of the Independent Broad-based Anti-corruption Commission Act 2011, ("IBAC Act"), IBAC is required to prioritize serious corrupt conduct or systemic corrupt conduct, not police misconduct.

46 Police Accountability Project (2017), *Independent Investigations of Complaints Against Police*, p. 5.

misconduct has been neglected by IBAC relative to its functions [relating to] corruption and misconduct in other parts of the public sector."[47] This has included both insufficient priority for police misconduct issues, and a mode of working designed for public sector corruption investigations, which is wholly inappropriate for dealing with complaints from community members. IBAC's broad exemptions from Freedom Of Information legislation,[48] lack of transparency and poor communication with complainants – discussed in more detail below – are emblematic of how the agency is built around its anti-corruption functions, not its police complaints role. Although the IBAC Committee's inquiry recommended legislative changes so that IBAC is required to prioritise police misconduct,[49] the reality is that priority will always be given to high-profile, public sector corruption cases.

The model of a combined police and public sector oversight body is used in several Australian jurisdictions but not, to the best of VALS' knowledge, anywhere outside Australia. In New South Wales, the Independent Commission Against Corruption (**ICAC**) originally had responsibility for police oversight at its establishment, but "was unable to devote sufficient resources to adequately address police misconduct."[50] This led to the creation of the Police Integrity Commission, which later evolved into the current Law Enforcement Conduct Commission, "when the Wood Royal Commission found corruption in the Police Force that the ICAC had failed to detect."[51] This experience demonstrates that a general public sector oversight body is unlikely to have the culture, expertise or resourcing to tackle corruption in the police force, let alone police misconduct more broadly. That has been Victoria's experience with IBAC, which has repeatedly demonstrated that it places a high value on collaboration with police.

It is also worthy of note that one of the strongest advocates for a combined police-and-public-sector oversight model in Victoria was the Police Association.[52] The Police Association has historically been associated with a strong opposition to oversight of the police force, including being the primary driving force (along with Victoria Police itself) behind the abolition

47 Victorian Parliament (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, p. 51.

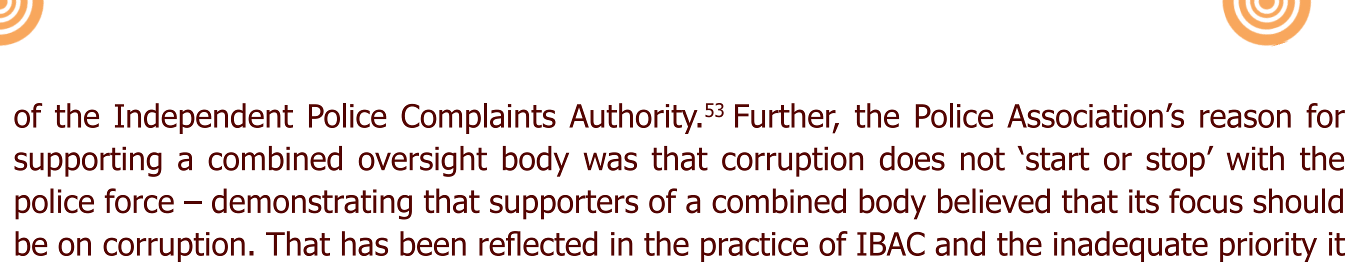
48 VALS (2017), *Submission to the Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria*, p. 19.

49 Victorian Parliament (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, Recommendation 36.

50 Prenzler (2011), 'The evolution of police oversight in Australia', Policing & Society 21(3), p287.

51 Prenzler & Faulkner (2010), 'Towards a Model Public Sector Integrity Commission', Australian Journal of Public Administration 69(3), p253.

52 Prenzler (2011), 'The evolution of police oversight in Australia', Policing & Society 21(3), p. 290.



of the Independent Police Complaints Authority.[53] Further, the Police Association's reason for supporting a combined oversight body was that corruption does not 'start or stop' with the police force – demonstrating that supporters of a combined body believed that its focus should be on corruption. That has been reflected in the practice of IBAC and the inadequate priority it has given to police misconduct.

Police Complaints Agencies in Victoria

Victoria did not have a complaints or oversight body separate from the police force for many decades. One-off commissions and boards of inquiry were convened to investigate misconduct on several occasions, such as the 1976 Beach Inquiry.

Victoria Police created an internal complaints investigation process in 1965. Prior to this, complaints were investigated by the local section where they had been made. The internal investigations function grew with time, notably with the creation of the Internal Investigations Bureau in 1975, and its elevation into a separate Internal Investigations Department in 1985.

The Victorian Ombudsman was responsible for reviewing the investigation of complaints against police starting from 1971, though it had very limited formal powers to conduct these reviews.

The **Police Complaints Authority (PCA)** was established in 1986 as an independent body. It had around five staff and primarily functioned to review and supervise police investigation of complaints, rather than investigating matters itself. The PCA was fiercely criticised by Victoria Police and the Police Association, in particular for its lack of investigative expertise, and was abolished in 1988.

After the abolition of the PCA, the office of **Deputy Ombudsman (Police Complaints)** was established within the Victorian Ombudsman. The Deputy Ombudsman similarly was responsible for overseeing and reviewing police investigation of complaints, and only rarely for conducting its own investigations.

The **Office of Police Integrity** (**OPI**) was established in 2004 amid growing concern about police corruption in relation to the Melbourne gangland wars. The OPI had greater powers than the Ombudsman to conduct its own investigations, including own-motion investigations where a complaint had not been submitted. The OPI lost significant public credibility from around 2007, with a series of prosecutions collapsing due to procedural errors and accusations of misconduct within the office itself.

53 Office for Police Integrity (OPI), *Past Patterns – Future Directions: Victoria Police and the Problem of Corruption and Serious Misconduct (2007) p. 106*.

At the same time, there were calls for a more effective public sector corruption watchdog to be established in Victoria. The legislation establishing the **Independent Broad-based Anti-corruption Commission** (**IBAC**) was passed in 2011. IBAC has jurisdiction over both public sector corruption and police misconduct, and took over the functions of the OPI.

Sources:

Office of Police Integrity (2007), *Past Patterns – Future Directions: Victoria Police and the problem of corruption and serious misconduct*.

The Age, 11 December 2011, 'Lessons from a troubled anti-corruption body'.

The Age, 9 February 2012, 'OPI staff misconduct claims'.

Herald Sun, 4 March 2013, 'Office of Police Integrity not corrupt, says former director Michael Strong'.

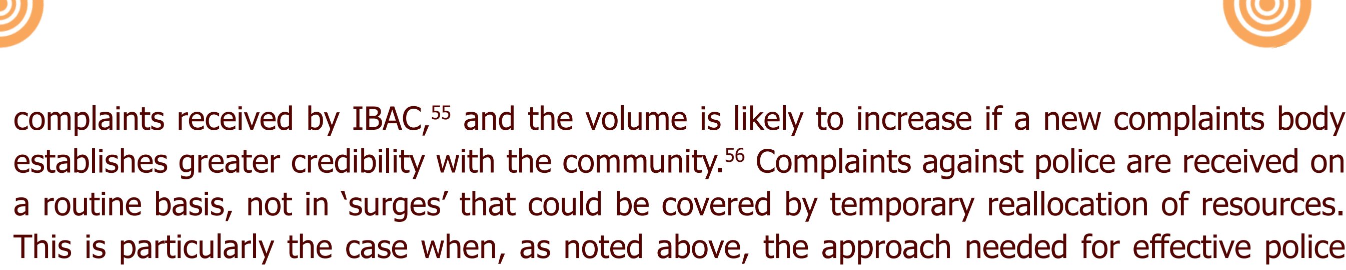
These problems are also reasons why it would be inadequate to create a dedicated police complaints division within IBAC. An internal division is unlikely to create a sufficiently distinct organisational culture to address the challenges identified above, particularly if – as the IBAC Committee report suggested, in highlighting the need for a flexible allocation of resources[54] – staff work across both divisions, or regularly rotate between them. In addition, IBAC's history of failings means that a wholly new and distinct agency would have a far better chance of establishing community trust in the complaints system.

For these reasons, it is clear that Victoria needs a new, standalone police complaints body.

One challenge highlighted by opponents of a new standalone body is that a more focused agency would have less capacity and flexibility than a broad-based body, and face a risk of duplicating or 'siloing' functions that the public sector corruption body also fulfils.

This challenge for the standalone body model is greatly overstated. The question of resourcing and capacity is not related to whether police complaints investigation is undertaken by a standalone body or a broad-based agency. The IBAC Committee Report found that too many complaints are referred to Victoria Police and that there must be a greater number of independent investigations. If resourcing is inadequate to enable this, it is not a solution to 'flexibly' take resources away from the investigation of public sector corruption to support police complaints investigation, or vice versa. Police complaints already outnumber all other types of public sector

54 Victorian Parliament (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, Recommendation 2.



complaints received by IBAC,[55] and the volume is likely to increase if a new complaints body establishes greater credibility with the community.[56] Complaints against police are received on a routine basis, not in 'surges' that could be covered by temporary reallocation of resources. This is particularly the case when, as noted above, the approach needed for effective police complaints investigation is very different to the approach to corruption investigations.

The Government must provide the resources to enable this expansion, as it has continually been willing to dedicate billions of dollars to expand the resourcing of police and PSOs.[57] VALS does not accept that there are hard constraints on either financial resources or qualified staff which would prevent the creation of a new independent body. The Police Ombudsman for Northern Ireland employs a full-time staff of 141 people, of whom 102 work in complaints and investigation.[58] This is approximately equal to the staffing of IBAC across all of its functions, and greater than the staff numbers at the former Office of Police Integrity, even though Victoria's population is more than three times larger than Northern Ireland's.[59] Victoria clearly has the capacity to properly resource and staff a standalone police complaints body.

Another concern often raised is the risk of duplication or siloing between a standalone complaints agency and an anti-corruption body. Given that the functions and key skills of these two agencies would be very different, this risk is, in reality, very low. The knowledge, experience and approaches needed for handling police complaints are very different to those appropriate for anti-corruption work – as is recognised in the IBAC Committee's Report, which identifies a number of areas in which IBAC needs to develop greater expertise and capacity in handling police complaints because its anti-corruption expertise is not applicable. If police misconduct and public sector corruption were handled by different agencies, those agencies would have staff with different knowledge, skills and experience. There is no reason why there should be duplication of functions between the two bodies in this context. This critique of the independent agency model is also overstated.

55 IBAC (2021), *Annual Report 2020/21*, p2.

56 For example, the Police Ombudsman for Northern Ireland received more allegations of misconduct in 2020/21 than IBAC did, despite the fact that Northern Ireland's population is more than 70% smaller than Victoria's. See Police Ombudsman for Northern Ireland, *Annual Statistical Bulletin 2020/21*, p17.

57 Victorian Government, 23 December 2021, 'Statewide Rollout of Conducted Energy Devices for Police'.

58 Police Ombudsman for Northern Ireland (2021), *Annual Report & Accounts for the year ended 31 March 2021*, p57

59 Victorian Parliament (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, p365.

VALS strongly supports a new standalone police complaints body for these reasons. However, creating a standalone body is not enough if that body continues to play a reviewing role, and many complaints are still referred back to be investigated by police.

Independent Investigations

Key Data

- In 2020-2021, 94.3% of complaints against police were investigated by Victoria Police without meaningful involvement from IBAC, or not investigated.[60]
- In 17% of regional command level complaint files audited by IBAC in 2016, Victoria Police's choice of investigator was not appropriate.[61]
- In 95% of Professional Standards Command complaint files audited by IBAC in 2018, potential and actual conflicts of interest were not considered.[62]
- 22% of audited complaints treated as customer service issues by police had been misclassified.[63]

Independent investigation of police complaints is essential if both Victoria Police and the complaints body are to earn and retain the trust of the community. This is particularly important for VALS' clients. Aboriginal people in Victoria are frequently victimised by police misconduct but are less likely to make formal complaints.[64] Aboriginal communities' trust in police and the complaints system is almost non-existent. VALS supports independent investigation of all police complaints except for genuine customer service issues.[65]

60 IBAC (2021), *Annual Report 2020/21*, p. 26.

61 IBAC (2016), *Audit of Victoria Police Complaints Handling Systems at Regional Level: Summary Report*, p. 11.

62 IBAC (2018), *Audit of Complaints Investigated by Professional Standards Command, Victoria Police*, p. 5.

63 Victorian Parliament (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, p. 128.

64 *Koori Complaints Project 2006-2008: Final Report*, pp. 18-21; Victorian Parliament (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, pp. 152 – 154; VALS (2017), *Submission to the Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria*, p. 8.

65 It is critical that a strict legislative definition of customer service issues governs this exception, as discussed below.

The need for fully independent investigation of complaints against police is amply demonstrated by the failings of the current system in Victoria. Audits of Victoria Police's handling of complaints[66] have highlighted a serious and systematic disregard for conflicts of interest, including within the Professional Standards Command (the specialist division which is meant to provide for more rigorous complaints investigation).[67] This is clear evidence that proper investigation of police misconduct cannot be achieved through Victoria Police.

The current oversight system provides for almost no independent investigation of complaints against police. In 2020-21, IBAC assessed 2,726 allegations against police and determined that 1,217 required investigation.[68] However, only 5 were investigated directly by IBAC, and of those referred to other bodies – mostly Victoria Police – only 64 were comprehensively reviewed. This leaves 94.3% of allegations which were either investigated by Victoria Police without any meaningful involvement from IBAC, or not investigated at all.[69] The equivalent figure for 2019-20 was 93.5%, demonstrating a continuing problem.[70]

Independent investigation is important both for the fair treatment of individual complaints, and for the proper recognition of systemic issues. For individual complainants, investigation by police creates no confidence that their complaints are being fairly assessed. Complainants may feel that their matters are not being taken seriously because they are being investigated by colleagues of the officer subject to the complaint. In some cases, they may feel that police are closing ranks to protect their own, or to avoid substantiating a complaint about behaviour that is widespread. These doubts about the investigative process are virtually impossible to address without an independent complaints body. The importance of ensuring the public is confident that their complaints are fairly investigated is discussed further below.

66 Office of Police Integrity (2010), *Managing conflict of interest in Victoria Police*; IBAC (2016), *Audit of Victoria Police Complaints Handling Systems at Regional Level: Summary Report*, p. 11; IBAC (2018), *Audit of Complaints Investigated by Professional Standards Command, Victoria Police*, p. 5.

67 "Professional Standards Command is the central area within Victoria Police responsible for the organisation's ethical health and integrity. As at March 2018, PSC employed 200 full-time equivalent (FTE) staff and is comprised of five divisions: Conduct and Professional Standards Division; Investigations Division; Intelligence, Innovation and Risk Division; Support Services Division; Forensic Investigations Division." Professional Standards Command is meant to be independent and specifically constituted to provide for more independent investigation. See IBAC (2018), *Audit of Complaints Investigated by Professional Standards Command, Victoria Police*, p. 10.

68 IBAC (2021), *Annual Report 2020/21*, p. 26.

69 Ibid., p. 26.

70 IBAC (2020), *Annual Report 2019/20*, p. 44.

The lack of independent investigation also impacts on the ability of the oversight body to identify and respond to systemic issues. The excessive use of referrals to Victoria Police has contributed to IBAC's failure to grapple with systemic issues in the police force, because there is limited capacity to identify patterns and systemic issues when investigations into individually 'minor' incidents are conducted by police rather than IBAC itself. This is particularly problematic if referrals to Victoria Police lead to investigations of such 'minor' complaints being conducted by officers affected by the same cultural and systemic factors, making it unlikely the complaints will be treated seriously or identified as part of a wider problem. VALS is particularly concerned about this issue because Aboriginal people are routinely affected by systemic issues in the criminal legal system. The perception among Aboriginal people that making complaints to police is futile strongly suggests that the complaints system is not equipped to identify structural issues or take complaints about systemic racism seriously.

There is ample evidence that complaints by Aboriginal people are systematically mishandled by a system which refers most matters back to Victoria Police. IBAC has published, after a long delay, an audit of Victoria Police's handling of complaints made by Aboriginal people.[71] The audit's findings show that complaints from Aboriginal people are routinely treated even less appropriately than other complaints. For example, the audit found an inappropriate investigator was appointed in 45% of files,[72] compared to 17% of files in the 2016 audit of regional complaints-handling systems.[73] The data strongly suggest that these complaints are not being seriously investigated: in more than half of audited files, relevant evidence was not collected or analysed.[74] In 41% of audited files, there were indicators of bias from the investigator – including the complaints investigator irrelevantly starting to investigate the complainant, or downplaying the conduct they are meant to be investigating.[75] There is an ongoing failure to consider the complaint histories of officers subject to a new complaints – a problem which has been identified in previous IBAC audits, and is particularly significant for Aboriginal complainants, but has still not been addressed by Victoria Police.

It is clear that the current police complaints process cannot address systemic racism in Victorian policing. Independent investigation of police complaints is crucial if the oversight system is going to respond to the needs and experiences of Aboriginal people in Victoria.

71 IBAC (2022), *Victoria Police handling of complaints made by Aboriginal people: Audit report*.

72 Ibid, p11.

73 IBAC (2016), *Audit of Victoria Police complaints handling systems at regional level*, p11.

74 IBAC (2022), *Victoria Police handling of complaints made by Aboriginal people: Audit report*, p12.

75 Ibid, p11.

Mixed Civilian Review is Inadequate

The police complaints system in Victoria, as in other Australian jurisdictions, currently operates as a 'mixed civilian review' model. This means that an external (civilian) agency is responsible for reviewing police's own internal investigations. The system is referred to as 'mixed' because IBAC sometimes investigates complaints itself, though this is very rare. An alternative model of operation is often called 'civilian control', in which the independent body has full control of the entire complaints and investigation process.

VALS' position is that civilian review cannot be an adequate model for police complaints in Victoria. The IBAC Committee has cited research identifying that civilian review models "hold out a false promise" to the public by suggesting independent investigation when the reality is that most complaints are investigated by police.[76] This is particularly important in a context where the police complaints system has lost credibility with the community, as is clearly the case in Victoria. Building trust in these circumstances will be a difficult task for a new complaints body, and it will be effectively impossible if many complainants' first experience with the body is that it remits their complaint to Victoria Police.

It is worth noting the rationale for the introduction of a civilian control approach in Northern Ireland. Authorities in Northern Ireland have recognised that fully independent investigation is necessary to rebuild trust in the police complaints system and the police force, after decades of police misconduct and a breakdown in police-community trust.[77] The Police Ombudsman for Northern Ireland (**PONI**) investigates all complaints. This model has been adopted despite the fact that its governing legislation allows for the possibility of referrals to police.[78] Civilian review has been recognised as inadequate in the context of a police force with a history of sectarianism, bias and brutality.

The same considerations make civilian review inappropriate for Victoria's police complaints system. While the loss of faith in police is not as widely spread in Victoria's population as it was in Northern Ireland, it is profound among the communities affected by over-policing – including Aboriginal people and racialised minorities. These communities are more likely to be affected by police misconduct and less likely to make a complaint. This is a deep failing of both policing

76 Prenzler (2016), 'Scandal, Inquiry, and reform: the evolving locus of responsibility for police integrity', in Prenzler & den Heyer (eds), Civilian oversight of police: advancing accountability in law enforcement, p5. Cited in Victorian Parliament (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, p34.

77 Victorian Parliament (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, p15. See also p34.

78 Ibid, p34.

and police complaints, which can only be rectified through a fundamental 'reset', of the kind pursued in Northern Ireland.

Secondly, even defenders of civilian review admit that certain conditions must be met for this model to provide adequate independence. The IBAC Committee's report, for example, stated that a complaints body did not need to investigate all complaints itself but must "exercise oversight over the entire police complaints system and be informed about all complaints".[79] These conditions are clearly not met by IBAC, and there is well-founded reason to doubt they could be met by any civilian review-style body in Victoria. In particular, aside from the fact that it investigates very few complaints itself, IBAC does effectively no work to monitor complaints which are referred back to Victoria Police. While IBAC annual reports have sometimes stated that IBAC has "oversight of all complaints received in relation to police", this oversight is purely nominal for the overwhelming majority of complaints. In 2020-21, there were 1,212 allegations against police which were not investigated directly by IBAC, and only 64 of these were comprehensively reviewed by IBAC.[80] This is not a level of monitoring which can provide any assurance that complaints are being properly handled. To the contrary, when IBAC has conducted occasional audits – of Professional Standards Command or of regional complaints handling – it has consistently found major problems with police investigation of complaints.[81] The fact that those problems persist strongly indicates that IBAC does not exercise meaningful oversight over the complaints handling system.

In addition, lack of direct involvement makes it extremely difficult for the complaints body to identify systemic problems. This is a problem which will continue to affect any complaints body that is limited to investigating serious incidents on an individual basis. Given that systemic racism and other forms of systemic misconduct are among the most serious issues with policing in Victoria, this means that no agency operating on a civilian review model could effectively hold police accountable and drive improvements in conduct.

The Role of Victoria Police

Defenders of the current police complaints system frequently state that involving police in the investigation of complaints is important, because fully independent investigation amounts to

79 Victorian Parliament (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, p45.

80 IBAC (2021), *Annual Report 2020/21*, p26.

81 IBAC (2018), *Audit of Complaints Investigated by Professional Standards Command, Victoria Police*.
IBAC (2016), *Audit of Victoria Police Complaints Handling Systems at Regional Level: Summary Report*.
IBAC (2018), *Audit of Victoria Police's oversight of serious incidents*.

outsourcing Victoria Police's organisational ethics.[82]

It is crucial that Victoria Police is responsive to complaints and findings of misconduct, and that police leadership is responsible for upholding standards of conduct and addressing systemic problems with policing in Victoria. However, this does *not* require Victoria Police to be actively involved in the handling of complaints.

A civilian control system which excludes police from the investigation of complaints does not mean that police have no role in managing ethical and professional standards. The disciplinary system would remain separate from the independent complaints body and could (subject to the outcome of a review of the disciplinary system, discussed further below) continue to give Victoria Police organisational responsibility for responding to misconduct. Victoria Police will also be responsible for training and professional development, which are critical to proactively addressing and reducing misconduct, under any form of police oversight system. Police will also be responsible for implementing recommendations from the independent complaints body, arising from investigations into systemic issues, and recommendations from other inquiries, reviews and coronial inquests. The desire to maintain a role for police in upholding ethical and professional standards is understandable, but it does not mean that Victoria Police should be involved in the investigation of complaints.

Definitions and Classification of Police Misconduct

The IBAC Committee Inquiry proposed a three-category definition of the kinds of police wrongdoing that can be complained about.[83] The purpose of this approach is to allow for complaints to be directed along different 'pathways' and given different levels of priority.

VALS supports a change to legislative definitions to improve clarity and address overlaps and important gaps within the existing definitions. As identified by the IBAC Committee, the current definitions are unclear, with similar misconduct being covered under three different pieces of legislation. While these overlaps exist, they create a risk that complaints against police will be classified as complaints about corruption or misconduct in public office, and be investigated without the necessary independence from police.

82 Hansard, 19 February 2018, *Transcript of evidence to the IBAC Committee: The Police Association Victoria*, p11.

83 Victorian Parliament (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, p. 189. See Recommendation 20. The Committee recommended that complaints should be classified into the following three categories: customer service and similar matters (generally dealt with by police); misconduct (dealt with by either police or IBAC) and serious police misconduct (generally dealt with by IBAC).

However, for the reasons given above, a reformed police oversight system in Victoria must ensure independent investigation of all complaints. As such, VALS does not support the proposed definitions and classification approach recommended by the IBAC Committee Inquiry. Complaints should be classified such that all complaints of misconduct, serious misconduct or systemic misconduct are investigated by an independent complaints body.

Conflicts of Interest

VALS supports a clarified definition of conflicts of interest and a strong legislative requirement that actual, potential and perceived conflicts be identified and addressed before any response to a police complaint, whether that is a formal investigation or an alternative approach to resolving a customer service issue.

However, the steps needed to address conflicts of interest in police complaints investigations go far beyond definitional clarifications. Victoria Police has longstanding problems with addressing conflicts of interest, which illustrate the deeper need for independent investigation. Audits of the police complaints process since 2010 have identified serious problems which remain unaddressed.

The Office of Police Integrity found in 2010 "a persistent failure by some within Victoria Police to properly identify and appropriately deal with conflict of interest."[84] In 2016, IBAC's audit of complaint handling systems at the regional command level found that the form designed to identify and manage conflicts of interest "was rarely completed." As a result of this and other reasons, the audit found that "the choice of investigator was not appropriate" in 17% of audited files.[85] IBAC's 2018 audit of Professional Standards Command – which is meant to be independent and specifically constituted to provide for more independent investigation[86] – found that "the vast majority of files (95 per cent) did not explicitly address potential or actual conflicts of interest".[87] The report noted that:

84 Office of Police Integrity (2010), *Managing Conflict of Interest in Victoria Police*.

85 IBAC (2016), *Audit of Victoria Police Complaints Handling Systems at Regional Level: Summary Report*, p. 11.

86 "Professional Standards Command is the central area within Victoria Police responsible for the organisation's ethical health and integrity. As at March 2018, PSC employed 200 full-time equivalent (FTE) staff and is comprised of five divisions: Conduct and Professional Standards Division; Investigations Division; Intelligence, Innovation and Risk Division; Support Services Division; Forensic Investigations Division." Professional Standards Command is meant to be independent and specifically constituted to provide for more independent investigation. See IBAC (2018), *Audit of Complaints Investigated by Professional Standards Command, Victoria Police*, p. 10.

87 IBAC (2018), *Audit of Complaints Investigated by Professional Standards Command, Victoria Police*, p. 5.

While PSC may be physically removed from other areas of Victoria Police, its officers are not immune from potential conflicts of interest. Most, if not all, PSC investigators have previously worked elsewhere in Victoria Police and may have come into contact with officers who are the subject of a complaint.[88]

A separate IBAC report in 2018, on Victoria Police's oversight processes for serious incidents, found that "[c]onflicts of interests… were generally poorly identified and managed."[89] The mandatory conflict of interest form was not completed in one-third of cases, and the forms which were filled out had "significant shortcomings".[90] Of particular concern, a "pattern of deficiencies" and serious conflicts of interests were identified in oversight of serious incidents involving the heavily armed and specialised officers of the Special Operations Group.[91] Although Victoria Police has taken steps to respond to each of these findings, the IBAC Committee's report noted "the persistence of the serious problems with Victoria Police's management of conflicts of interest".[92]

These findings strongly indicate a systematic disregard in Victoria Police for the importance of adequate investigation. Over a period of more than a decade, oversight bodies have consistently found, not only that conflicts of interest are going unaddressed, but that in many cases Victoria Police is not even considering whether any conflicts might exist. The nominal independence of the Professional Standards Command within Victoria Police has clearly not been an adequate safeguard.

An oversight system in which almost all complaints are investigated by police themselves, and the overwhelming majority are not even investigated by the dedicated Professional Standard Command,[93] but by officers in the same station or region, cannot instil in police the importance of independent investigation. It is unsurprising that police officers working in this system frequently fail to address clear and direct conflicts of interest. This is not a problem which can be effectively addressed while the oversight system continues to be built on the premise that police can adequately investigate their colleagues.

88 Ibid., p. 14.

89 IBAC (2018), *Audit of Victoria Police's oversight of serious incidents*, p. 6.

90 Ibid.

91 Ibid.

92 Victorian Parliament (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, p. 301.

93 Ibid, p79.

The appropriate solution to Victoria Police's ongoing problems with conflicts of interest is to adopt a fundamentally different approach to handling complaints, which removes police from the process, except in minor customer service matters.

RECOMMENDATION

Recommendation 6. The legislation establishing the new independent body should define 'conflict of interest'. The definition must encompass actual, potential and perceived conflicts.

Customer Service Matters

Under any approach to classifying and triaging complaints, those defined as 'customer service matters' will be deprioritised and investigated less rigorously – or not at all, particularly if alternative dispute resolution processes are preferred. A clear definition of customer service matters is especially vital to avoid significant issues being dealt with through an inappropriate complaint pathway.

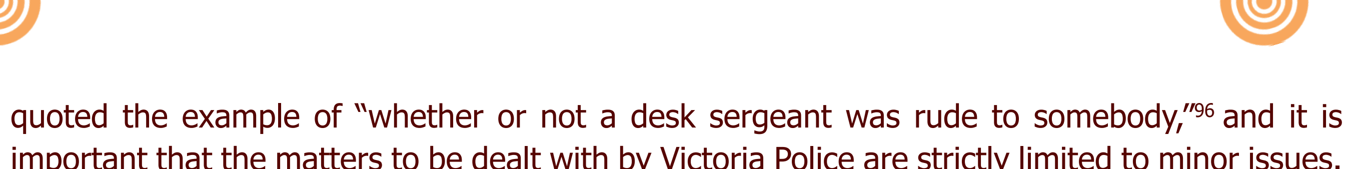
At present, there is no clear definition of customer service matters in the *Independent Broad-based Anti-corruption Commission Act 2011* (**IBAC Act**) or the *Victoria Police Act 2013*; the procedures for these types of complaints are a matter for Victoria Police policy, currently as part of the Victoria Police Manual.[94] IBAC has previously raised issues about Victoria Police misclassifying complaints as customer service matters, and these concerns have been reflected in the IBAC Committee's findings. IBAC's audit found an extraordinary misclassification rate of 22%.[95]

VALS has particular concerns about the use of the 'customer service' category because of its implications for Aboriginal complainants. There is a high risk that the kinds of police misconduct frequently faced by Aboriginal people will be misclassified as customer service issues. For example, a police officer using racist language could be inappropriately classed as merely using inappropriate language, rather than treated as a serious form of racism warranting a more serious response. Similarly, over-policing of Aboriginal people is one of the most pervasive forms of systemic racism, but individual instances could be treated as rudeness or "over-zealousness" and dealt with as customer service issues.

Customer service matters can be handled by Victoria Police, provided that the definition of these matters is limited and appropriate safeguards are in place. The IBAC Committee's report

94 Ibid., p. 65.

95 Ibid., p. 128.



quoted the example of "whether or not a desk sergeant was rude to somebody,"[96] and it is important that the matters to be dealt with by Victoria Police are strictly limited to minor issues.

In light of these concerns, customer service complaints need to be clearly defined in legislation, including relevant police legislation and the legislation establishing a new independent police complaints body. This definition should specifically:

- Exclude any complaint about the exercise of a police power from being treated as a customer service matter – including powers to stop, question, search or issue any kind of infringement or direction;
- Exclude any complaint about a decision not to exercise a police power (for example, a decision not to investigate an alleged offence or not to intervene in a situation);
- Exclude any complaint which makes reference to Aboriginality, or to any protected attribute under Section 6 of the *Equal Opportunity Act 2010* (Vic.)

Conduct falling under these exclusions should automatically be classified as misconduct or serious misconduct.

There should be safeguards in place to ensure this definition is strictly applied, discussed further below under 'Complaint Pathways'.

RECOMMENDATIONS

Recommendation 7. The legislation establishing the new independent police complaints body should define 'customer service complaint' and specifically exclude the following:

(a). Any complaint about the exercise of any police power (including powers to stop, question, search, arrest, use force) or issue any kind of infringement or direction;
(b). Any complaint about a decision not to exercise a police power (for example, a decision not to investigate an alleged offence);
(c). Any complaint which makes reference to Aboriginality, or to any protected attribute under Section 6 of the *Equal Opportunity Act 2010*.

Recommendation 8. Legislation must require that complaints classified as customer service matters by Victoria Police must be reported to the independent police complaints body, with the report including, at a minimum, the race and gender of the complainant, or their Aboriginality, the officers subject to the complaint, and the broad context (for example, whether the conduct occurred during a phone call, on patrol, during a call-out, etc.)

96 Ibid., p. 187.

Recommendation 9. Complainants must have the right to request a review of the classification of their complaint.

Serious Police Misconduct

The threshold of serious police misconduct would be less significant to the operation of the oversight system if, as VALS recommends, all misconduct complaints (except customer service issues) are independently investigated. However, a category of serious police misconduct could remain important for triage and to emphasise findings of serious wrongdoing. It would support the independent police complaints body to dedicate appropriate resources to different complaints, without implying that any police misconduct is insignificant or not worthy of independent investigation.

The IBAC Committee recommended to define serious police misconduct as "conduct… that could result in the prosecution… for a serious indictable offence or serious disciplinary action," including corrupt conduct, 'serious assault', use of excessive force, 'serious mistreatment in police custody', and human rights violations.[97]

VALS firmly believes that this definition sets the bar for serious misconduct far too high. The threshold of prosecution for a serious indictable offence excludes highly problematic police misconduct. Police officers are public officials granted extensive coercive powers, and they should be held to a higher standard than ordinary citizens. A definition which provides that only serious criminal behaviour constitutes serious police misconduct fails to achieve this.

The definition of serious police misconduct must reflect the concerns of people subject to that misconduct – in particular, Aboriginal people and other marginalised communities – and the matters they consider to be serious. A definition which is tilted towards Victoria Police's view of what issues are or are not serious will not succeed in engendering public confidence in police or the oversight system.

Certain types of conduct should always be classified as serious police misconduct. Police assaults, excessive use of force, wrongful arrest, false imprisonment and mistreatment in custody are serious forms of misconduct, which are experienced frequently by Aboriginal people. An assault does not need to be 'serious' in itself to constitute a serious form of misconduct and a grave failure of police's duty.

The definition should also explicitly provide that any misconduct accompanied by or motivated

97 Victorian Parliament (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, Recommendation 20, p. 189.

by discrimination constitutes serious police misconduct. The inappropriate use of any police power is significantly aggravated when it is to the detriment of people and communities already marginalised by the criminal legal system and in society overall. This should be recognised by the definition of serious police misconduct.

The inclusion of human rights violations in the definition of serious police misconduct is welcome, but leaves significant ambiguity. A legislated definition should provide more specific detail of what constitutes a human rights violation. VALS would welcome a definition which incorporated breaches of the full range of rights under the *Victorian Charter of Rights and Responsibilities*, but not a definition which saw 'human rights violations' as limited to particularly egregious infringements of a few key rights.

RECOMMENDATION

Recommendation 10. The legislation establishing the new independent police complaints body must define 'serious police misconduct', to enable the independent body to prioritise and appropriately investigate all complaints. The definition must include:

(d). any allegations regarding assault, mistreatment or failure of duty of care in custody, and excessive use of force;
(e). any misconduct accompanied or motivated by discrimination, or that has a discriminatory outcome;
(f). the use of coercive techniques during questioning and interviews, and any failure to contact a person's lawyer, the Custody Notification Service, the Independent Third Persons program, or the Youth Referral and Independent Person Program;
(g). any retaliation or reprisals against a person who has made a complaint about police.

Complaint Pathways

Appropriate definitions are only one part of ensuring that complaints are properly treated and investigated. A new complaints system will also need to clearly establish 'pathways' for different types of complaints. The issue of complaint pathways is considerably simplified by adopting a fully independent model, under which only customer service matters are handled directly by Victoria Police. Any complaint that is assessed as not being a customer service issue should be fully investigated by the independent complaints body.

As a further safeguard, VALS supports the IBAC Committee's recommendation that there should be a legislative requirement for the independent oversight body to be notified of all customer service complaints.[98] This notification should report enough information to enable the oversight body to monitor for systemic issues: this should include at a minimum the race and gender of the complainant, identities of the officers subject to the complaint, and the broad context (for example, whether the conduct occurred during a phone call, on patrol, during a call-out, etc.) When a complaint is classified as a customer service complaint, complainants should also have the right to a review of the classification decision by the independent body.

The appropriate pathway for the handling of police complaints is as follows:

- If police receive a complaint, a senior officer at a different police station assesses whether it is a customer service matter. If it is not, the complaint is referred to the independent complaints body. This assessment should not involve any judgement about whether the complaint is likely to be true – it should be classified on the basis that all the matters raised by the complainant are true.
    - When a complaint is assessed as a customer service matter, the complainant is promptly informed of this and of their right to appeal the classification to the independent body. The complainant should also be provided with information about supports, including community legal centres, which could assist them with their complaint.
    - If no appeal is made, the complaint can be investigated and resolved by Victoria Police. Regular updates must be given to the complainant during the Victoria Police resolution process.
    - Key information on the complaint must be passed on to the independent body to enable monitoring of customer service complaints.
- Complaints are received by the independent body, both directly and on referral from Victoria Police.
    - For complaints received directly, the independent body assesses whether it is a customer service matter. If it is assessed as a customer service matter, the complainant is promptly informed of the classification and their right to request the independent body review the classification.
    - If no review is requested or the review confirms the classification, the complaint is referred back to Victoria Police for investigation and resolution.
    - If the complaint is classified as relating to misconduct, or the complaint has been referred from Victoria Police, the independent body conducts the investigation.

98 Ibid, Recommendation 18, p. 184.

- The independent body provides regular updates to the complainant on the investigation & monitors for police retaliation against the complainant.

Figure 1. Complaint pathways

Member of the public decides to make a complaint

Complaint received by the independent complaints body

Complaint received by Victoria Police

Classified as relating to misconduct

Classified as relating to misconduct

Appeal considered by the independent body

Classified as customer service

- Complainant informed of right to appeal classification
- Key information for monitoring passed to independent body

Complaint investigated by the independent body

Classified as customer service

- Complaint passed to Victoria Police
- For initial classification by the independent body, internal review available

If no appeal

- Regular updates to complainant on investigation progress
- Monitoring for police retaliation

Independent body makes findings

- Misconduct found or not found
- Recommendations for disciplinary sanctions
- Recommendations for Victoria Police reforms
- Referral to OPP for prosecution

External review by a public tribunal

- On appeal by complainant or police officer

Complaint investigated and resolved by Victoria Police

- Regular updates to complainant on progress

Victoria Police must not conduct any investigation into a complaint while the independent body has carriage of a matter. Where Victoria Police is investigating (i.e. the complaint is assessed as a customer service matter), the independent body must have the power to take over the investigation of any complaint at any time – both complaints received directly by police and those referred by the independent body – and to require police to suspend their investigation. This might be done, for example, if the independent body's ongoing monitoring of customer service complaints indicates a possible misclassification or an officer with a track record of

complaints being made against them.

Referrals

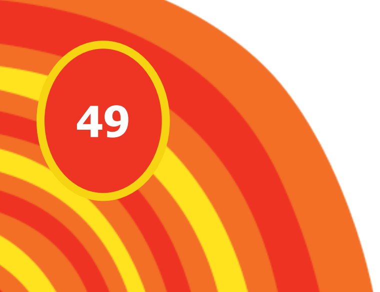
The complaint pathways under the current system are structured around referrals between IBAC and Victoria Police, and within Victoria Police between Professional Standards Command and local police commands. VALS' position is that the system of referrals is fundamentally flawed, both because it cannot achieve independent investigation and because of numerous more specific deficiencies. These failings are endemic both to referrals from IBAC to Victoria Police, and internal referrals within Victoria Police (from Professional Standards Command to regional and local commands.)

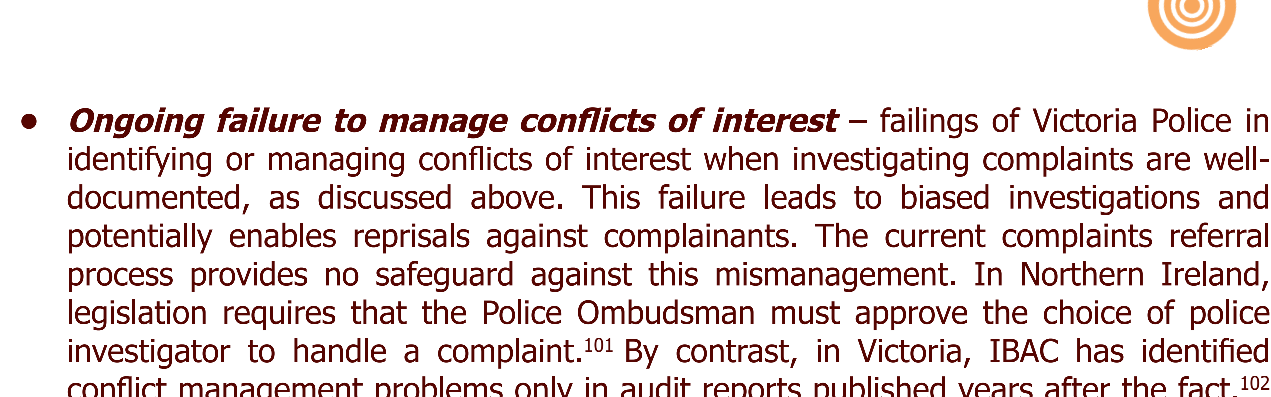
Problems with the current system of referrals include:

- ***Lack of transparency*** – there is no transparency about the fact that the vast majority of complaints are referred to Victoria Police and then further referred to local commands. Complainants have little understanding of, or ability to influence, the referral process, and are frequently surprised to find their complaint to IBAC ends up being investigated by police. Complainants should have rights in relation to referral of customer service matters, including a legislated definition of 'customer service matter', a right to appeal the classification, and monitoring of customer service complaints by the independent body.
- ***No active oversight by IBAC*** – while IBAC sometimes claims that it 'has oversight' of all complaints, the reality is that almost no complaints referred to Victoria Police are ever reviewed by IBAC, as noted above. This provides no safeguard against the risk that a referral to Victoria Police will lead to an inadequate or biased investigation. In Northern Ireland, the Police Ombudsman has an explicit power to supervise any complaint investigation and to impose requirements on how the investigation is conducted.[99] Police investigators are also required to submit a report to the Ombudsman.[100] As noted above, in practice, PONI conducts all investigations itself and does not make referrals to police, but the legislation governing potential referrals is still instructive.
- ***Regular referral of serious matters*** – IBAC consistently investigates misconduct that has attracted media attention, but complaints without a high profile are regularly referred to Victoria Police, even when they involve serious misconduct. VALS has experience of complaints being referred to Victoria Police, and found unsubstantiated, in instances where subsequent civil litigation led to a court finding serious misconduct and awarding damages.

99 *Police (Northern Ireland) Act 1998*, ss 57(4) and (7).

100 *Police (Northern Ireland) Act 1998*, ss 57(8).





- ***Ongoing failure to manage conflicts of interest*** – failings of Victoria Police in identifying or managing conflicts of interest when investigating complaints are well-documented, as discussed above. This failure leads to biased investigations and potentially enables reprisals against complainants. The current complaints referral process provides no safeguard against this mismanagement. In Northern Ireland, legislation requires that the Police Ombudsman must approve the choice of police investigator to handle a complaint.[101] By contrast, in Victoria, IBAC has identified conflict management problems only in audit reports published years after the fact.[102] Later audits have credited Victoria Police with improvements, but also found new problems, and there is no transparency about the implementation of any changes within Victoria Police.

All complaints about police misconduct warrant fully independent investigation. The chronic problems with the referral of complaints to Victoria Police under the existing system, and the fact that they have not been addressed despite being repeatedly identified, demonstrate the fundamental shortcomings of a complaints system in which complaints are handled by police. This type of system cannot instil in the police force a culture which respects the value of properly independent investigation. The result is that deficiencies in appointing appropriate investigators and managing conflicts of interest will remain endemic, unless there is a fundamental shift in the complaints system towards fully independent investigation.

Systemic Police Misconduct

The inclusion of systemic police misconduct in the remit of the police oversight system is essential, and the failure to properly respond to it is a major shortcoming of the current system. VALS has previously recommended to IBAC that it needs to expand its investigation of systemic misconduct issues. These problems often evade oversight because the individual matters do not constitute 'serious misconduct', even though they would have collectively demonstrated systemic issues.

Effective treatment of systemic police misconduct requires both a robust definition and an appropriate set of investigation powers and procedures, to facilitate the investigation of issues which may not always be the subject of individual complaints.

101 *Police (Northern Ireland) Act 1998*, s57(3).

102 The *Audit of complaints investigated by Professional Standards Command, Victoria Police* was published in June 2018 and dealt with investigations conducted in 2015 and 2016.

The *Audit of Victoria Police complaints handling systems at regional level* was published in September 2016 and dealt with investigations conducted in 2014 and 2015.

Definition

Systemic police misconduct must be defined in its own right, rather than as a sub-type of 'serious police misconduct' as in the IBAC Committee's recommendation. An investigation into systemic police misconduct may, in many cases, be sparked by complaints which are individually not classified as serious misconduct, or not addressed by the oversight body at all. Incorporating systemic police misconduct within the definition of serious police misconduct will obscure this distinction for potential complainants, police officers and independent investigators. This would create a risk that opportunities to investigate systemic issues are missed because of confusion about the thresholds involved and their relationship to serious police misconduct.

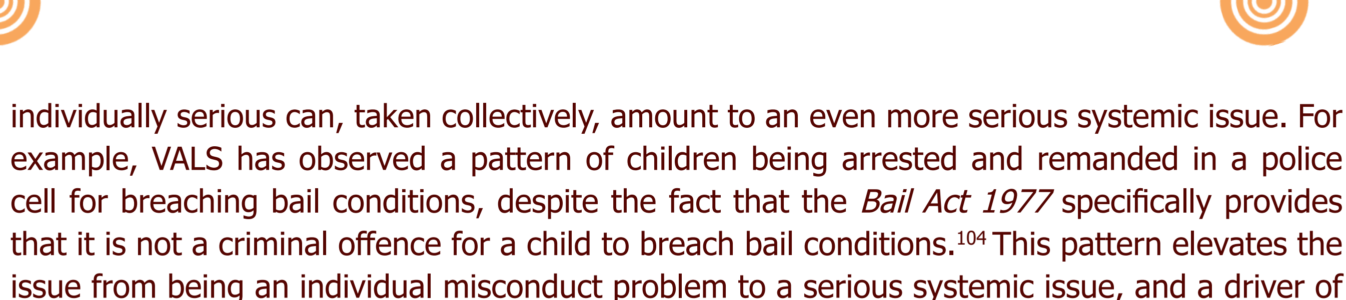
The IBAC Committee's proposed definitions incorporate systemic police misconduct issues as follows:

> **a pattern of officer misconduct carried out on more than one occasion, or that involves more than one participant, that is indicative of systemic issues.**

This definition would not adequately cover the full range of systemic problems that can arise in Victoria Police. The nature of systemic problems in a police force is that they are composed of a pattern of conduct which may not, in individual cases, be recognised as problematic. The Committee's recommendation does recognise that a pattern of incidents which are not individually 'serious misconduct' can, overall, be a serious issue. This logic needs to be extended, to further recognise that a serious systemic problem can be made up of incidents which are individually classified as customer service issues, or otherwise fall short of 'officer misconduct'. For some VALS clients, police misconduct takes the form of police constantly being outside their house, checking on them, and giving out noise complaints. It may be argued that these isolated incidents do not constitute 'misconduct' in single cases, but their repetition, without justification, can have serious adverse effects and clearly amounts to misconduct in aggregate.

Other systemic problems of concern to VALS include the use of move-on powers[103] and the arrest of Aboriginal children for breaching bail conditions. Move-on powers involve a margin of police discretion, and it may not be possible to demonstrate that their use in a single incident constitutes misconduct, but it would be a systemic issue of great concern if these orders were used disproportionately against Aboriginal people. In other cases, incidents which are

103 Under Section 6 of the *Summary Offences Act* 1966, police officers (and PSOs in some circumstances) can direct a person to leave a public place if they reasonably suspect that one of a range of criteria apply. These include suspecting that someone is likely to breach the peace, likely to endanger a person's safety, likely to damage property or pose a risk to public safety.



individually serious can, taken collectively, amount to an even more serious systemic issue. For example, VALS has observed a pattern of children being arrested and remanded in a police cell for breaching bail conditions, despite the fact that the *Bail Act 1977* specifically provides that it is not a criminal offence for a child to breach bail conditions.[104] This pattern elevates the issue from being an individual misconduct problem to a serious systemic issue, and a driver of ongoing overincarceration of Aboriginal people.

Systemic problems in the police force can also emerge from a policing culture which allows or encourages inappropriate conduct, or discourages officers from reporting or speaking up about it. VALS understands that some police officers feel unable to report or intervene in even serious misconduct because of a culture within Victoria Police which licences that conduct and shuns people who speak out. The emergence and maintenance of this kind of problematic culture should be identified as a systemic problem, able to be complained about and investigated. This would allow pre-emptive investigation of problematic culture before it has led to widespread acts of misconduct.

The definition should also take a different approach to identifying which systemic issues are of concern. The IBAC Committee's definition was limited to systemic issues "that could adversely reflect on the integrity and good repute of Victoria Police." While this is a potentially broad definition, it is inappropriately inward-looking: the focus of the oversight system should be on the impact of policing on the community, not on the reputation of Victoria Police. The legislated definition should instead focus on systemic issues which involve discrimination, a disproportionate impact on particular communities, or inadequate police responses to particular issues, such as family violence.

RECOMMENDATIONS

Recommendation 11. Systemic police misconduct must not be investigated by Victoria Police; it must be investigated by a new independent police complaints body. The legislation establishing the new independent police complaints body should define 'Systemic police misconduct' in its own right, not as a sub-type of 'serious police misconduct'.

(a). The definition of systemic police misconduct should include:

- A pattern of behaviour or omissions indicative of systemic issues;
- A culture indicative of systemic issues, or a culture that allows or encourages patterns of behaviour or omissions indicative of systemic issues; and

104 Section 30A(3), *Bail Act 1977* (Vic).

- The aggregate impact of a pattern of behaviour or omissions, where that impact is indicative of systemic issues.

(b). The definition of 'systemic issues' should include issues involving discrimination, a disproportionate impact on particular communities, or inadequate police responses to particular issues (such as family violence).

Recommendation 12. The independent complaints body should have own-motion powers to conduct investigations of individual incidents, thematic investigations of related incidents, and systemic investigations of wider problems within Victoria Police. These powers must be provided for in the legislation establishing the new independent police complaints body.

Recommendation 13. To ensure the independent police complaints body is capable of identifying and investigating systemic issues, the body must:

(a). Have access to: the complaints history of police officers, information from any civil litigation involving a police officer, and information on any impropriety or illegality by a police officer raised as part of a criminal proceeding; and be required to consider this information in the initial classification of a complaint and in the assessment of possible systemic misconduct;
(b). Initiate an early intervention and complaint profiling system, with a particular focus on officers or units that have received multiple complaints from Aboriginal people;
(c). Provide transparency and routinely publish data in relation to police complaints.

Recommendation 14. The independent complaints body should have a 'super-complaints' process which allows representative organisations to make complaints about systemic issues on behalf of a group of affected people. Those representative organisations must include Aboriginal Community Controlled Organisations.

Recommendation 15. The independent complaints body should develop a strategy for identifying and investigating systemic racism, in consultation with Aboriginal Community Controlled Organisations.

Powers and Procedures

The police complaints body needs to have extensive powers and appropriate procedures for responding to systemic misconduct in Victoria Police, to complement the system of classification for individual complaints.

Legislation should provide that the independent complaints body may conduct thematic investigations of multiple related or similar incidents, and systemic investigations of widespread problems within Victoria Police. To make these investigations effective, the complaints body will need specific powers.

First, *own-motion investigative powers* are critical. Some police misconduct will not be the subject of formal complaints, for a range of reasons. The victims of misconduct may be unwilling to proactively engage with the complaints process, or may not see an individual incident as worth the effort of complaining. Systemic problems generally involve many small incidents, and are highly likely to affect marginalised individuals who are less willing to engage with the complaints process. Without effective own-motion powers, these issues are likely to fall through the cracks of the complaints system.

Secondly, the complaints body should have *access to the complaint histories of police officers*. Complaint history should be available to the person making the initial assessment and classification of the complaint, as well as later in the investigation process. If an officer is found to have had multiple complaints made against them by Aboriginal people, an immediate risk assessment should be undertaken.

Thirdly, the independent body should initiate an *early intervention and complaint profiling system*, with a particular focus on police or units that have received multiple complaints from Aboriginal people. This system should support the body in using its own-motion powers to identify possible systemic issues and properly investigate them.

Fourth, effective investigation of systemic misconduct requires the *production and transparent release of data on police complaints*. As noted in the UN Office on Drugs and Crime's *Handbook on Police Accountability, Oversight and Integrity*, this data can "be used to identify the operational areas where the abuse of police powers is most likely to occur and also which officers are subject to an unusually high number of allegations."[105]

Finally, in addition to own-motion powers, the police complaints body should have a *'super-complaints' process*. For the reasons identified above, individual complaints about systemic problems may not be forthcoming or adequate to initiate a broad investigation. It is therefore important that the police complaints body can receive complaints from representative bodies raising systemic issues. The super-complaints system used in the United Kingdom is a good practice model and is discussed in the box below.

105 UN Office on Drugs and Crime (2011), Handbook on police accountability, oversight and integrity, p. 43.

Good Practice: Super-complaints in the United Kingdom

The United Kingdom has adopted a super-complaints system in a wide range of consumer affairs areas, and more recently introduced it for policing. This model allows designated organisations to bring a complaint about general or systemic issues that are harming the community, and have this complaint be treated as a priority by the relevant regulatory body.

In policing, super-complaints are received by Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services – a monitoring and inspection body which does not receive individual complaints – and then assessed by HMICFRS, the Independent Office for Police Conduct, and the College of Policing.[106] Since the introduction of the super-complaints system for policing in 2018, HMICFRS has investigated super-complaints on matters including police cooperation with immigration authorities,[107] the treatment of victims of modern slavery,[108] and the protection of women and girls from domestic violence.[109] Sixteen organisations are 'designated' by the government as able to make super-complaints.[110]

A reformed police oversight system in Victoria should include an avenue for super-complaints to be made, to assist in identifying and addressing systemic problems in Victoria Police. The model of designated bodies is a useful safeguard to ensure that super-complaints are not abused and can therefore be urgently investigated. However, it is concerning that the UK Government designated sixteen bodies and does not appear to have allowed any other organisations to apply for designation since 2018. The approach to designating bodies should be more flexible. Aboriginal Community Controlled Organisations and Aboriginal representative bodies should be designated bodies for the purposes of the police super-complaints system, reflecting the disproportionate harms inflicted on Aboriginal people by police in Victoria.

More broadly, the independent complaints body should develop a specific strategy for identifying and investigating systemic racism, utilising all the powers identified above. This strategy should be developed in consultation with Aboriginal Community Controlled Organisations and other key stakeholders. IBAC has repeatedly failed to recognise the centrality of systemic racism to police misconduct issues in Victoria, and a new complaints body must not repeat that shortcoming.

106 Independent Office for Police Conduct (IOPC), *'Super-complaints and working with other policing oversight bodies'*.

107 HMICFRS, *Safe to share? Liberty and Southall Black Sisters' super-complaint on policing and immigration status* (2020).

108 HMICFRS, *Report on Hestia's super-complaint on the police response to victims of modern slavery* (2021).

109 HMICFRS, *A duty to protect: Police use of protective measures in cases involving violence against women and girls* (2021).

110 UK Government, *Police super-complaints.*

Improving the Complainant Experience

A reformed police complaints system in Victoria needs to put the experience of complainants at the centre of its design and operations. As discussed above, Aboriginal communities and Aboriginal complainants do not have confidence in the existing police complaints system. As well as the lack of independent investigation, this lack of trust has emerged because the current process is culturally unsafe, there is a lack of transparency and poor communication with complainants, and potential complainants may also be afraid of reprisals. A new complaints body must recognise these failings and respond to the specific experiences of Aboriginal complainants throughout the entire complaint process.

Complainant-Centred Approach

A new independent police complaints body must be grounded in a complainant-centred approach. As noted in the IBAC Committee Inquiry, this will help to build the confidence of Aboriginal communities in the complaints process and improve the experiences of Aboriginal complainants who engage with the body.

The complainant-centred approach of a new, independent police complaints body must be established in legislation, as well as publicly available policies. While a Complaints Charter will not achieve systemic change in and of itself, it is important that a new police oversight body publicly communicate its commitment to Aboriginal complainants from the outset. This could include a Complaints Service Charter that acknowledges the specific experience of Aboriginal complainants, and commits to providing a culturally appropriate complaint service, including culturally appropriate support for complainants.

RECOMMENDATION

Recommendation 16. The legislation establishing a new, independent police complaints body must enshrine a complainant-centred approach throughout the complaints process.

Procedural Fairness

A new independent body for police complaints must incorporate rights and principles derived from procedural fairness, as provided by the international standards for police complaints bodies discussed above.

RECOMMENDATION

Recommendation 17. The legislation establishing a new independent police complaints body must incorporate procedural fairness for complainants, including:

(a). Right to review of classification decision;
(b). Right to receive written and oral communication throughout the complaint process, including when the complaint is first received, after the initial assessment of the complaint, and when the complaint is resolved;
(c). Right to access the investigation file;
(d). Right to have complaint resolved in a reasonable time;
(e). Right to participate in the investigation process, including the opportunity to provide additional information and/or correct false assumptions throughout the investigation process and comment on any adverse material before a complaint is dismissed;
(f). Right of review if the complaint is dismissed or referred;
(g). Right of review of outcome of the complaint.

Any relevant policies and procedures should be made publicly available.

A Prompt Complaints Process

Timely resolution of complaints is required by international principles and is critical to building trust and confidence of complainants in the police complaints system.[111] The legislation establishing a new independent body must specify the timeframes for dealing with a complaint. The body should also adopt publicly available policies setting out the expected timeframes for dealing with the complaint, including the initial assessment, investigation and final resolution of the complaint. The body must be adequately resourced to be able to complete investigations in a timely manner.

The following international examples provide some guidance on timeframes for dealing with complaints:

- The Civilian Office of Police Accountability (**COPA**) in Chicago[112] seeks to resolve all investigations in a timely manner and expects most investigations will be concluded within six months. Some investigations, such as officer-involved shootings are more

111 See Council of Europe, *Opinion of the Commission for Human Rights*, ("The promptness principle plays a crucial part in preserving trust and confidence in the rule of law and upholding the core policing principle that police officers are accountable to and protected by the law throughout the police complaints process."), para 72.

112 Home - Civilian Office of Police Accountability

complex and may require additional time. For cases that are ongoing after six months, COPA must notify the complainant(s) and involved officer(s) with reasons why the case is still ongoing. Such notice is required every six months that the case remains open.[113] COPA notify a complainant within five business days of receiving a complaint or incident notification, identifying whether the incident will be investigated by COPA and explaining the next steps.[114]

- The Special Investigations Unit (**SIU**) in Ontario[115] aims to conclude investigations within 120 days and is required to publish information about investigations that exceed this timeframe. Reports must be published every 30 days following the expiry of the initial 120-day period unless doing so may compromise the integrity of the investigation.[116]

To facilitate a prompt complaints process, it is also important to ensure that relevant information to support police complaints can be accessed in a timely manner. The *Freedom of Information Act 1982* provides that a decision on a Freedom of Information (**FOI**) request should be made within 30 days of receiving the request, although the Act provides avenues for extending this timeframe.[117] Currently VALS clients are experiencing delays of up to 20 weeks with FOI requests, which undermines their ability to submit a complaint in a timely manner. FOI requests can be even further delayed because of the way that record-keeping practices vary significantly between police stations.

RECOMMENDATION

Recommendation 18. The legislation establishing a new independent body must establish specific timeframes for dealing with complaints. The body should develop publicly available policies on setting out the expected timeframes for dealing with the complaint, including the initial assessment, investigation and final resolution of the complaint.

113 *Municipal Code of Chicago*, Chapter 2-78-135.

114 *Municipal Code of Chicago*, Chapter 2-78-130.

115 Special Investigations Unit -- SIU Homepage

116 *Special Investigations Unit Act*, S.O. 2019, c. 1, Sched. 5, s. 35.

117 *Freedom of Information Act 1982* (Vic), Section 21.

Koori Engagement Unit

The IBAC Committee Inquiry acknowledged the barriers faced by Aboriginal complainants and made the following two recommendations to improve the experience of Aboriginal complainants:

1. Victoria Police and IBAC should create a role for a complainant welfare manager, who is authorised to assist the complainant in making a complaint and provide support throughout the process, including providing culturally appropriate information and support (recommendation 17);[118]
2. Victoria Police and IBAC should ensure that they take proper account of the particular needs and backgrounds of diverse, and sometimes marginalised and vulnerable, Victorians. This includes taking proper account of the needs and backgrounds of Aboriginal people (recommendation 16).[119]

While these recommendations are a step in the right direction, they are insufficient to improve the experience of Aboriginal complainants, build the confidence of Aboriginal communities and complainants in the system and increase reporting of police complainants by Aboriginal complainants.

The new independent police complaints body should have a Koori Engagement Unit, to operate as the point of contact for Aboriginal complainants throughout the entire complaint process. Appointment of an Aboriginal Liaison Officer was first recommended by the Victorian Government 10-year implementation review of the RCIADIC in 2005, to assist Aboriginal complainants in lodging complaints.[120] This role could be positioned within a broader Koori Engagement Unit, modelled off the Koori Engagement Unit at the Coroners Court.

The role of this unit could include:

- Raise awareness of the body and the complaints process within Aboriginal communities;
- Provide support (in person and over the phone) for Aboriginal complainants who wish to lodge a complaint;
- Liaise with Aboriginal complainants throughout the complaint process, including to provide regular updates;
- Provide and/or coordinate culturally safe support for complainants, including through warm referrals to culturally safe providers;[121]

118 Victorian Parliament (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, p. 179.

119 Ibid.

120 *Victorian RCIADIC Review: Conclusions and Recommendations*, p. 711.

121 See Council of Europe, *Opinion of the Commission for Human Rights*, para 78.

- Coordinate access to culturally safe legal assistance, including through warm referrals to VALS and other legal service providers;
- Respond to feedback from Aboriginal complainants about their experiences with the complaints process.

The Special Investigations Unit in Ontario provides an interesting model for support through the Affected Persons Program, which is a 24 hour service providing: crisis response and intervention; psychological first aid and emotional support; practical support; referrals/advocacy for navigating social welfare and justice systems, legal support, medical support and victim assistance programs; court support.[122] The Special Investigations Unit also has a First Nations, Inuit and Métis Liaison Program (**FNIMLP**) to develop cultural competence within the Unit, and a protocol for incidents involving Indigenous communities.[123]

RECOMMENDATION

Recommendation 19. A new independent police complaints body must respond to the needs of Aboriginal complainants, including by establishing a Koori Engagement Unit, with responsibility for:

(a). Raising awareness of the complaints process within Aboriginal communities, including through outreach sessions;
(b). Establishing culturally appropriate options for lodging a complaint;
(c). Liaising with Aboriginal complainants throughout the complaint process, including to provide regular updates;
(d). Providing and/or coordinating access to culturally safe support for complainants, including through warm referrals to culturally safe providers;
(e). Coordinating access to culturally safe legal assistance, including through warm referrals to VALS and other legal service providers.

Communicating with Aboriginal Complainants

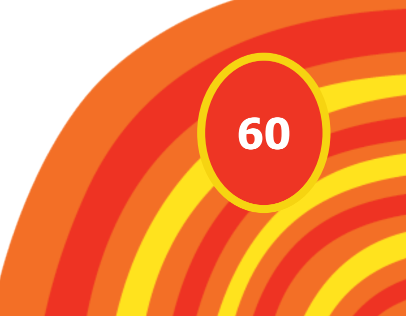
Culturally Appropriate Information about the Complaints Process

To be accessible for Aboriginal communities and complainants, a new independent police complaints body must be known and understood. Raising awareness about this body and building the trust of Aboriginal people to make a formal complaint can be achieved by:

- Culturally appropriate and easily accessible information regarding the complaints

122 Special Investigations Unit, *Quarterly Report Jan – March 2020*, 5-6. (SIU 2020).

123 Ibid, 6-7.



process, available on the website and in relevant locations, including police stations, youth hubs, correctional centres, court houses and other community/social services;[124]
- Publicly available and easily accessible policies, setting out values and standards for handling complaints, including a commitment to provide a culturally appropriate service;
- Outreach sessions carried out by the Koori Engagement Unit to build public awareness of and confidence in the system;
- Providing Community Legal Education (**CLE**) for Aboriginal communities, carried out by VALS, on police powers, interacting with police and police complaints. VALS should receive funding to develop and deliver targeted CLE on these topics.

If customer service complaints continue to be handled by Victoria Police, there must also be publicly available and culturally appropriate information on the process for handling these complaints, including information on the Victoria Police website and in police stations. The Victoria Police policy for handing these complaints must be publicly available on the Victoria Police website.

RECOMMENDATIONS

Recommendation 20. A new independent police complaints body must ensure that Aboriginal communities are aware of and understand the police complaints process, including by:

(a). Providing culturally appropriate and easily accessible information about the complaints process, including on the website and in public locations;
(b). Developing publicly available policies setting out values and standards for handling complaints, including a commitment to provide a culturally appropriate service.

Recommendation 21. The Victorian Government should provide funding to VALS to develop and implement targeted community legal education (**CLE**) on police powers, interacting with police and police complaints.

Recommendation 22. Victoria Police must provide publicly available and culturally appropriate information on the process for handling customer service complaints.

124 UN Office on Drugs and Crime (2011), *Handbook on police accountability, oversight and integrity*, p. 35; Council of Europe, *Opinion of the Commission for Human Rights*, p. 9.

A Culturally Appropriate Process for Submitting a Complaint

A new police complaints body must ensure that it is accessible for all potential Aboriginal complainants by developing culturally appropriate ways of submitting a complaint, and ensuring warm referrals to organisations that can provide culturally safe legal assistance and support. As noted above, the Koori Engagement Unit should develop these processes, in collaboration with ACCOs and the Aboriginal Justice Caucus. As previously recommended by the Koori Complaints Project, this should include:

- A 1800-Freecall number that is accessible 24 hours a day;
- A culturally appropriate, friendly, sealable, postage-paid complaints form that: is drafted in easy English; explains the complaints process; includes a guided complaints form; and is widely available.[125]

It should also be possible for complainants to lodge a complaint online, and complaints should be provided with information and warm referrals for culturally safe legal assistance and non-legal support.

RECOMMENDATION

Recommendation 23. A new independent police complaints body should establish culturally appropriate avenues for submitting a police complaint, including online, in person, over the phone and by post. The Koori Engagement Unit at the new body should lead this process, in collaboration with ACCOs and the Aboriginal Justice Caucus.

Communication with Complainants Throughout the Investigation

A new police complaints body must learn from the significant failure of IBAC and Victoria Police to communicate with complainants throughout the complaint process.[126] As discussed above, the Koori Engagement Unit should play a lead role in liaising with Aboriginal complainants at all stages of the complaints process.[127] Similar to the Victorian Ombudsman,[128] the requirement to notify the complainant if the complaint is referred, and to provide written notice of the outcome

125 *Koori Complaints Project 2006-2008: Final Report*, p. 2.

126 Victorian Parliament (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, pp. 175-177; VALS (2017), *Submission to the Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria*, pp. 20-22.

127 Council of Europe, *Opinion of the Commission for Human Rights*, para 77. ("The complainant should be consulted and kept informed of developments throughout the determination of his or her complaint").

128 Section 24, Ombudsman Act 1973 (Vic).

of the complaint, must be provided for in legislation.

Complainant Survey and Feedback

As recommended by the IBAC Committee Inquiry, a new independent police complaints body should establish mechanisms to receive feedback from complainants about their experiences and continually improve processes based on this feedback. Although a complainant survey may be a useful tool to gather feedback from complainants, surveys are often not accessible for Aboriginal people and communities.

The Koori Engagement Unit should establish additional mechanisms for receiving feedback from Aboriginal complainants and Aboriginal communities more broadly, for example, through outreach sessions with Aboriginal communities, or by liaising with service providers such as VALS, about the experiences of our clients.

RECOMMENDATIONS

Recommendation 24. A new independent police complaints body must communicate regularly with complainants throughout the complaints process, including written notification:

(a). When the complaint is first submitted (advising on the process);
(b). After the initial classification and assessment (advising of how the complaint has been classified, whether the complaint will be investigated, referred or dismissed, and providing information on rights to review/respond);
(c). Throughout the investigation or restorative justice process (at least every 4 weeks);
(d). Written notification of the outcome of the complaint, including a description of each allegation forming the complaint, a brief summary of the evidence in relation to each allegation, the determination reached and how the investigator reached that conclusion (including the steps taken to investigate that allegation), and the action taken in response to the complaint, as well as information on review rights.

Recommendation 25. A new independent police complaints body should establish mechanisms to receive feedback from complainants about their experiences and continually improve processes based on this feedback. The Koori Engagement Unit at the new body should establish mechanisms for receiving feedback from Aboriginal complainants and Aboriginal communities more broadly, for example, outreach sessions with Aboriginal communities, or by liaising with service providers such as VALS, about the experiences of our clients.

Culturally Appropriate Investigation

To be accessible for Aboriginal communities and complainants, a new independent police complaints body must have the skills, experience and expertise to respond to the needs of Aboriginal complainants. As discussed above, the IBAC Committee Inquiry recommended that IBAC and Victoria Police ensure that the particular needs and backgrounds of diverse, and sometimes marginalised and vulnerable, Victorians are taken into account.[129]

RECOMMENDATION

Recommendation 26. To ensure that the new independent police complaints body is able to provide a culturally appropriate complaints process, it should:

(a). Employ Aboriginal investigators and/or involve Aboriginal staff in the classification process for complaints submitted by Aboriginal people;
(b). Ensure that there are Aboriginal people in management positions;
(c). Require all non-Aboriginal staff to undergo substantive training in cultural awareness, systemic racism, anti-racism, unconscious bias and trauma-informed approaches;
(d). Adopt a de-centralised model, with regional offices around the State.

Culturally Safe Legal Assistance

International standards require that complainants should be able to access legal advice and representation from a legal representative of their choice. Complainants should receive financial assistance to facilitate this.[130]

VALS receives a large volume of requests for advice and assistance with lodging police complaints, and is often unable to meet demand in full.[131] Consequently, we have had to prioritise assistance for more serious complaints, while providing self-help kits to those people we cannot assist. VALS should receive dedicated funding to provide culturally safe legal advice and assistance regarding police complaints.

129 Victorian Parliament (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, p. 179.

130 Council of Europe, *Opinion of the Commission for Human Rights*, p. 10.

131 VALS, *Submission to IBAC Inquiry*, above note 14, p. 22.

RECOMMENDATION

Recommendation 27. The Victorian Government should provide funding to VALS to provide culturally safe legal advice and representation for Aboriginal complainants.

Access to Documents and Footage Relating to the Complaint

Unlike IBAC, a new independent police complaints body must facilitate access to documents relating to the complaint, including the investigation file. This is necessary to ensure that complainants are able to participate in the investigation, including to correct false assumptions or provide additional information. Additionally, access to the investigation file is essential to ensure that complainants can effectively exercise their right of review and challenge the way in which their complaint was handled or resolved.[132]

As noted previously, one of the main barriers to accessing documents relating to a police complaint is s194 of the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), which includes a broad exemption from the *Freedom of Information Act 1982* (Vic) for documents that disclose information about a complaint, investigation or a notification to IBAC.[133] Legislation establishing a new independent police complaints body should not include a similar exemption.[134]

RECOMMENDATIONS

Recommendation 28. Complainants should be able to access documents relating to the police complaint, including the investigation file:

(e). The legislation establishing a new independent body should not exempt documents and footage relating to the police complaint from the *Freedom of Information Act 1982*, as is currently the case for IBAC;

(f). The *Freedom of Information Act 1982* should be amended to ensure that documents and footage relating to the police complaint are not exempted from this Act.

132 See Council of Europe, *Opinion of the Commission for Human Rights*, ("Without access to reports and documents after completion of the complaints process complainants may be denied the opportunity to challenge the way in which their complaint was handled or resolved.") para 76.

133 VALS (2017), *Submission to the Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria*, p. 19.

134 Section 194, *IBAC Act 2011* (Vic).

Recommendation 29. The Victorian Government should take measures to ensure that Victoria Police comply with timeframes set out in the *Freedom of Information Act 1982* (Vic).

Restorative Justice

VALS supports the use of restorative justice approaches[135] in relation to police complaints.[136] A new independent body on police complaints should work with Aboriginal communities and ACCOs to design and implement legislated restorative justice processes that are culturally appropriate. Restorative justice processes can empower complainants and achieve more meaningful resolution of the complaint.[137] They may also help to improve relationships between Aboriginal communities and the police.

Restorative justice approaches must only be used if the complainant consents, and should only be used for less serious complaints that will not lead to criminal charges or disciplinary action. They should also comply with the following international best practice principles for use of restorative justice processes in criminal matters:[138]

- Both parties must consent and parties can withdraw consent at any time;
- The process should be driven by the complainant;
- There should be safeguards in place to guarantee fairness for both parties;
- Neither party should be coerced or induced by unfair means to participate in the process;
- Disparities leading to power imbalances, as well as cultural differences among the parties, should be taken into consideration at all stages;

135 "'Restorative process' means any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles." See *UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, ECOSOC Resolution 2002/12.

136 VALS (2017), *Submission to the Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria*, Recommendation 4 ("Culturally appropriate mediation should be developed for police complaints, to be available where both parties consent. This should be developed in partnership with Aboriginal and Torres Strait Islander communities and organisations, including VALS.")

137 Benefits of restorative justice approaches include: victims can participate and be treated fairly and respectfully; victims are able to participate in decision-making; receive restoration and redress; victim has a say in determining acceptable outcome(s). See UNODC, *Handbook on Restorative Justice Programs* (2020), p. 10.

138 *UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, ECOSOC Resolution 2002/12

- The processes must be designed to maximise a sense of justice and healing and minimise chances of harm;[139]
- Both parties have a right to legal advice and representation, including culturally safe legal services;
- Discussions should be confidential, and should not be disclosed subsequently, except with the agreement of the parties or as required by law.[140]

Victoria Police should also work with Aboriginal communities and ACCOs to develop restorative justice processes for resolving complaints that continue to be managed by Victoria Police (i.e. customer service complaints). This process should be legislated, and guidelines regulating the process should be publicly available. The mediator or conciliator must be independent from police and the new independent police complaints body should have strict oversight of the processes.

RECOMMENDATIONS

Recommendation 30. The new independent police complaints body and Victoria Police should work with Aboriginal communities and ACCOs to develop restorative justice processes at each agency.

Recommendation 31. Restorative justice approaches for resolving police complaints should meet the following international best practice principles:

(a). All parties must consent and parties can withdraw consent at any time;
(b). The process should be driven by the complainant;
(c). There should be safeguards in place to guarantee fairness for both parties;
(d). Neither party should be coerced or induced by unfair means to participate in the process;
(e). Disparities leading to power imbalances, as well as cultural differences among the parties, should be taken into consideration at all stages;
(f). The processes must be designed to maximise a sense of justice and healing

139 See also, the *Mental Health Act 2014* which obliges the Mental Health Complaints Commissioner to take reasonable steps to ensure that the conciliation is conducted in a manner that promotes the wellbeing of the complainant. Mental Health Act 2014 (Vic), s 244(5).

140 See also, s. 43 *Health Complaints Act 2016* (information given or agreement made in conciliation must not be disclosed); s 13G(9) *Ombudsman Act 1973* (information provided during alternative dispute resolution is not admissible in proceedings); s. 117, *Equal Opportunity Act 2010* (evidence from conciliation is not admissible before VCAT or in other legal proceedings); s. 249, *Mental Health Act 2014* (evidence from conciliation is not admissible before a court or tribunal, unless it is information required to be disclosed to the Commissioner to prevent serious and imminent harm).

and minimise chances of harm;

(g). Both parties have a right to legal advice and representation, including culturally safe legal services;

(h). Discussions should be confidential, and should not be disclosed subsequently, except with the agreement of the parties or as required by law.

Recommendation 32. Not all police complaints are appropriate for resolution through restorative justice approaches. The new independent body for police complaints should develop clear guidelines on when a restorative justice approach may be appropriate.

Recommendation 33. Restorative justice processes used by Victoria Police to resolve customer service complaints should be legislated, and guidelines regulating the process should be publicly available. The mediator or conciliator must be independent from police and the new independent police complaints body should have strict oversight of the processes.

Protections for Complainants

One of the reasons for under-reporting by Aboriginal complainants is that they may be too scared to make a complaint because they fear harassment and/or other repercussions.[141] This is particularly the case when complainants are facing criminal charges in relation to the same set of facts. For example, a person facing charges of resist or assault police, where the person complains that the arrest involved excessive use of force, or some other type of misconduct.[142] Potential complainants may also fear that their anonymity cannot be properly protected during a complaints investigation, especially if the complaint is investigated by other Victoria Police officers. This is a particularly serious issue in rural areas where communities have a smaller population and an investigating officer is very likely to know the officer who is the subject of the complaint.[143]

The IBAC Committee acknowledged the need to provide protections for complainants and recommended that the *Victoria Police Act* be amended to prohibit Professional Standards Command referring a complaint back to regions, departments or commands if there is an

141 VALS and Centre for Innovative Justice, *The Effectiveness of the Victoria Police Complaints System for VALS Clients*; VALS, VALS (2017), *Submission to the Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria*, p. 23.

142 VALS (2017), *Submission to the Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria*, p. 23.

143 Victorian Parliament (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, pp228-230.

unreasonable risk of serious harm to the complainant's health, safety or welfare due to a reprisal.[144] Similarly, the IBAC Committee recommended that the *Independent Broad-based Anti-corruption Commission Act 2011* (**IBAC Act**) be amended to prohibit IBAC from referring a complaint back to Victoria Police if there is an unreasonable risk of serious harm to the complainant's safety, health or welfare due to a reprisal.[145]

While the IBAC Committee recommendations would provide some protection for complainants, VALS does not believe that the proposals are sufficient. We recommend that the Victorian Government establish a criminal offence for victimising a complainant and consistent monitoring of any charges laid after a complaint is made for possible misconduct.[146] The *Health Complaints Act 2016* - which makes it an offence threaten or intimidate, persuade or attempt to persuade another person not to make a complaint, or subject them to any detriment[147] – provides a good model. Similarly, the legislation establishing the Civilian Office of Police Accountability in Chicago protects complainants through an express prohibition on harassment or retaliation against a complainant by any officer.[148]

People who make complaints about police will often be facing criminal charges relating to the same incident, since many complaints are about police conduct during an arrest. A key part of ensuring that the system is complainant-centred is ensuring that making a complaint does not interfere with a complainant's defence against criminal charges. This is particularly important when, as VALS has seen occurring with growing frequency, the initial complaint is not made by the victim of misconduct, but rather by a bystander (including someone who may only have seen the incident via video posted to social media.) The independent police complaints body must recognise that, in some cases, interviews with the victim of police misconduct may need to be deferred until after the resolution of a criminal matter.

144 Ibid, Recommendation 32, p. 230.

145 Ibid, Recommendation 31, p. 230.

146 VALS (2017), *Submission to the Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria*, Recommendation 8, p. 5.

147 s. 80, *Health Complaints Act 2016 (Vic)*.

148 *Municipal Code of Chicago*, Chapter 2-78-160.

RECOMMENDATIONS

Recommendation 34. Legislation establishing a new independent body for police complaints should include robust protections for complainants, including:

(a). Making it an offence to threaten or intimidate, persuade or attempt to persuade another person not to make a complaint, or subject them to any detriment;
(b). Monitoring charges laid against a complainant once they have submitted a complaint.

Recommendation 35. The new independent body for police complaints should recognise in its policies and procedures that investigations may need to be deferred to avoid interfering with the defence in a criminal prosecution. These procedures should include:

- Advising complainants that they may wish to seek legal advice;
- Highlighting the importance of legal advice where there may be related matters before a court;
- With consent, putting a complainant in touch with an appropriate legal service (VALS in the case of Aboriginal complainants).

Complaint Outcomes

A robust investigative process and findings of misconduct are important in their own right, but will only meaningfully contribute to reducing the harmful effects of over-policing on Aboriginal people if the system is designed to ensure effective outcomes. The design of the complaints process must ensure it facilitates and supports just outcomes through the police disciplinary system, criminal proceedings and civil litigation. It must also provide appropriate appeal rights and a mechanism for addressing systemic problems, where these are identified by investigations.

Police Disciplinary System

To ensure just outcomes from police complaint investigations, the police disciplinary system needs to be linked to the outcomes of the independent complaints investigation process. Where there has been an independent investigation with findings made against a police officer, it is not sufficient for these findings to be treated as recommendations by the Chief Commissioner or the disciplinary system. When a complaint is investigated independently, it can only destroy confidence in both Victoria Police and the complaints body, for the matter to be subsequently re-investigated by an internal disciplinary process.

The police disciplinary system is discussed further below, in the standalone discussion of legal and disciplinary sanctions as a key pillar of an effective police oversight system.

Criminal Prosecution

Prosecution of police officers is a crucial form of accountability for misconduct, and one of the key pillars of an effective police oversight system. Criminal prosecution is a distinct process from the police complaints system, and it is discussed in its own right below.

However, it is vital that the complaints process is able to support criminal prosecutions far more effectively than it does at present. In 2020/21, prosecutions were finalised against only five police officers. The prosecutions were all successful and related to extremely serious misconduct – the assault of an elderly man with a disability, and leaking of information from police databases to undermine ongoing investigations.[149] The very low number of prosecutions, their success rate and the seriousness of the misconduct involved suggest that IBAC is extremely conservative in bringing prosecutions of police officers for misconduct. This is a key reason for under-reporting by Aboriginal complainants and lack of confidence in the existing police complaints system.

Criminal prosecution is and should remain a separate process from the complaints system. However, complaints investigation is clearly related to the potential for prosecution of police, and the system should be designed so that complaints investigations can facilitate prosecutions where appropriate. The independent complaints body should have the power to refer matters for prosecution when it makes its findings. This referral may be made alongside any recommendations for police disciplinary outcomes. There is a risk that the Office of Public Prosecutions (**OPP**), which works closely with police on a regular basis, will not be perceived as a reliable prosecutor of police misconduct matters. To address this concern, the OPP should be required to provide a written explanation to the complaints body and the complainant if it declines to prosecute after a recommendation.

RECOMMENDATION

Recommendation 36. The independent complaints body should have the power to refer matters for prosecution. The Office of Public Prosecutions should be required to provide a written explanation to the complaints body and the complainant if it declines to prosecute after a referral.

149 IBAC (2021), *Annual Report 2020/21*, p35.

Civil Litigation

Civil litigation will always be a separate process from the police complaints system, and is a key element of a broad and robust police oversight system. Civil litigation is discussed further below. However, the outcomes of independent complaints investigations should support the fair and prompt resolution of civil litigation. This can be achieved if the complaints system is appropriately designed.

At present, it is very difficult to access information from IBAC investigations as a result of a legislative framework designed to protect its anti-corruption functions. The new complaints body should be significantly more transparent, and complainants and their legal representatives should have access to the complaint investigation file once the matter has been finalised, and earlier, to the greatest extent possible. Evidence from the investigation file should be admissible in civil proceedings. Victoria Police's model litigant obligations should be extended to explicitly require that the findings of an independent investigation are considered when deciding whether to settle a civil suit.

RECOMMENDATIONS

Recommendation 37. Complainants and their legal representatives should have a legal right to access the complaint investigation file once a matter has been finalised, and evidence from the file should be admissible in civil litigation.

Recommendation 38. Victoria Police should be required to consider the findings of an independent investigation when deciding whether to settle a civil suit.

Review Rights

IBAC's findings about police complaints are not reviewable. If a member of the public is unsatisfied with IBAC's frequently inadequate investigation of a complaint, their only option is to make a complaint about IBAC to the Victorian Inspectorate, which does not directly engage a review of the substance of the complaint.[150]

It is crucial that a reformed police complaints system in Victoria provides an avenue for review, accessible to both complainants and police officers, to increase transparency and trust in the system. This is common practice in international jurisdictions. For example, in Manitoba, Canada, police complaints are investigated by the Law Enforcement Review Agency (**LERA**) and complainants can appeal to a provincial court judge if LERA closes the complaint without

150 IBAC, 'If you disagree with IBAC's decision', web page accessed 22 April 2022.

taking action.[151] At the other end of the spectrum, New Zealand's Independent Police Conduct Authority (**IPCA**) conducts an internal review if a complainant provides new information or raises issues that were not properly addressed by the initial investigation, and provides a written decision at the end of that review.[152] Victoria's lack of any avenue for review of findings from a complaint investigation further undermines public confidence in the oversight system.

In the Victorian context, a new complaints body needs to be designed to maximise transparency and accountability. This is necessary if the new body is to gain public confidence and overcome the longstanding failures of investigation that have plagued IBAC. With this in mind, the appropriate model for review rights is a public review hearing by an external body.[153] Given the difficulties of accessing courts for marginalised people, who are most frequently affected by misconduct, the review should be by an external tribunal – either as an expansion of VCAT's function or a newly constituted tribunal. The principle of accessible, timely and thorough external review is crucial to building an effective police complaints system. The court system must also continue to be available for judicial review of complaints investigations. VALS and other community legal services should be funded to represent complainants throughout both the complaints process and any subsequent review stages.

RECOMMENDATION

Recommendation 39. Findings of the independent police complaints body should be reviewable by an external, public tribunal. Review rights should be available to both the complainant and the police officer(s) subject to the complaint.

Systemic Reforms

VALS recommends, as discussed above, that the reformed oversight system includes a definition of systemic police misconduct and robust powers (including own motion powers and a super-complaints process) for the complaints body to investigate systemic issues. This would mean that a key form of complaint outcome would be recommendations for systemic reform, not only findings about individual incidents.

151 Office of the Commissioner, Law Enforcement Review Agency, *Annual Report 2018*, p11.

152 Independent Police Conduct Authority, *Complaints*, web page accessed 20 April 2022.

153 VALS continues to support the recommendation of the Police Accountability Project that investigation decisions must be administratively and judicially reviewable. See Police Accountability Project (2017), *Independent Investigation of Complaints against the Police: Policy Briefing Paper*, p6. Available at https://www.policeaccountability.org.au/wp-content/uploads/2017/09/Policy-Briefing-Paper-2017_online.pdf.

As there is no mechanism for the independent complaints body to enforce systemic changes in Victoria Police, it is crucial to create accountability and transparency with respect to Victoria Police's response to these recommendations. Accountability for implementation of reform is discussed in a dedicated section below.

RECOMMENDATIONS

Recommendation 40. The independent complaints body must have the power to make recommendations for reform of systems, policies and procedures within Victoria Police.

Recommendation 41. Victoria Police should be required to submit an annual report to the independent complaints body, providing details on its implementation of recommendations from the complaints body, including plans for ongoing implementation and any barriers to successful implementation.

Complaints Data

Complaints data is essential to building an effective oversight system and rebuilding community trust in police oversight. Existing data published by both Victoria Police and IBAC is limited, fragmented, and published in inconsistent ways, which makes comparison over time very difficult.

We note in particular that IBAC's use of special reports and individual audits tends to produce very delayed and non-comparable data, which inhibits the ability of the community and civil society organisations to monitor and evaluate the complaints system. IBAC was due to publish an audit of how Victoria Police handles complaints made by Aboriginal people in 2020. The audit was repeatedly delayed, and by the time of its publication, it provided out-of-date information that did not reflect significant changes in the police's relationship with the community, notably over the course of repeated COVID-19 lockdowns. This delay underscores the need for regular, transparent publication of data on police complaints.

Transparent data release is also essential for identifying and dealing with systemic problems with policing. As noted in the UN Office on Drugs and Crime's *Handbook on Police Accountability, Oversight and Integrity*, this data can "be used to identify the operational areas where the abuse of police powers is most likely to occur and also which officers are subject to an unusually high number of allegations."[154]

154 UN Office on Drugs and Crime (2011), *Handbook on police accountability, oversight and integrity*, p43.

The independent complaints body should routinely publish data on police complaints and should initiate an early intervention and complaint profiling system, as noted above.

We also note that collection and publication of data relating to police complaints in Victoria must be informed by the fundamental principles of Indigenous Data Sovereignty (**IDS**) and Indigenous Data Governance (**IDG**). In 2018, the Indigenous Data Sovereignty Summit in Australia developed the following definitions for key concepts relating to IDS and IDG:

- Indigenous data is "information or knowledge, in any format or medium, which is about and may affect Indigenous peoples both collectively and individually."[155]
- IDS refers to "the right of Indigenous peoples to exercise ownership over Indigenous Data. Ownership of data can be expressed through the creation, collection, access, analysis, interpretation, management, dissemination and reuse of Indigenous Data."[156]
- IDG refers to "the right of Indigenous Peoples to autonomously decide what, how and why Indigenous Data are collected, accessed and used. It ensures that data on or about Indigenous peoples reflects our priorities, values, cultures, worldviews and diversity."[157]

The importance of Indigenous Data Sovereignty is recognised under the Victorian Aboriginal Affairs Agreement (**VAAF**),[158] the Closing the Gap National Agreement[159] and the Closing the Gap Victorian Implementation Plan.[160] *Burra Lotjpa Dunguludja*, the Aboriginal Justice Agreement Phase 4, also includes a commitment to increase Aboriginal community ownership of and access to justice data, including through improved collection and availability of Aboriginal justice data.[161]

155 Indigenous Data Sovereignty, Communique. Indigenous Data Sovereignty Summit, 20 June 2018, p. 1.

156 Ibid.

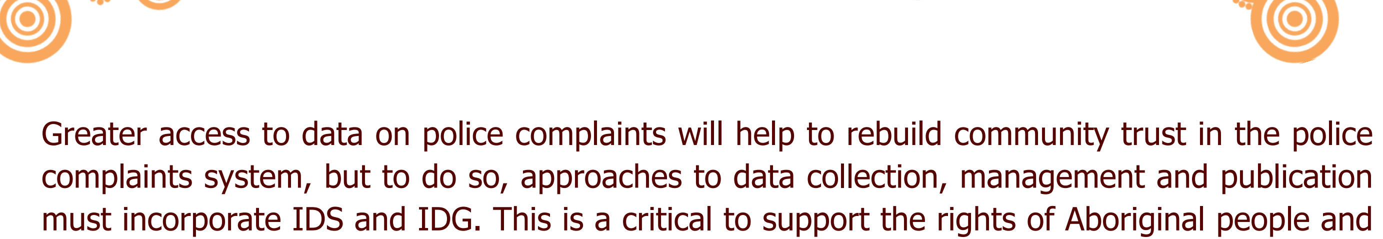
157 Ibid.

158 Department of Premier and Cabinet (DPC), *Victorian Aboriginal Affairs Framework 2018-2023* (VAAF) (October 2018), pp. 27 and 59.

159 *National Agreement on Closing the Gap* (an Agreement between the Coalition of Aboriginal and Torres Strait Islander Peak Organisations and all Australian Governments) (July 2020), paras 69-77.

160 DPC, *Victorian Closing the Gap Implementation Plan 2021-2023* (June 2021), p. 27.

161 *Burra Lotjpa Dunguludja: Aboriginal Justice Agreement Phase 4, A partnership between the Victorian Government and Aboriginal Community*, (*"Burra Lotjpa Dunguludja"*) (2018), p. 50. To date, this has included work by the Crime Statistics Agency to improve "the availability of high-quality data," investment by Victoria Police in IT enhancements "to improve the recording and reporting of Standard Indigenous Question (SIQ) data," and measures to improve police practice in relation to asking individuals whether they identify as Aboriginal. See *Aboriginal Justice Agreement In Action* (website).



Greater access to data on police complaints will help to rebuild community trust in the police complaints system, but to do so, approaches to data collection, management and publication must incorporate IDS and IDG. This is a critical to support the rights of Aboriginal people and communities, individually and collectively, to:

1. Exercise control over the manner in which data concerning Aboriginal individuals and communities is gathered, managed, interpreted and utilised; and
2. Access and collect data obtained about Aboriginal individuals and communities.

RECOMMENDATION

Recommendation 42. Data relating to police complaints from Aboriginal complainants must be gathered, managed and used in accordance with the principles of Indigenous Data Sovereignty and Indigenous Data Governance.

Powers of Police Complaints Bodies

The independent police complaints body must be granted adequate powers to enable it to conduct investigations without being reliant on cooperation from Victoria Police. Generally, powers which are coercive or intrusive should have safeguards in the form of external oversight or warrant requirements, but the complaints body should not need to request support from Victoria Police to exercise any power necessary to fulfil its investigative function. Safeguards are important to ensure that the powers required for independent investigation of complaints do not themselves lead to misconduct, as alleged in Victoria's former Office of Police Integrity.[162]

Jurisdictional Powers

Some powers provided under legislation serve mainly to determine the scope of IBAC's investigations, rather than being powers exercised during an investigation. We refer to these here as 'jurisdictional' powers.

The complaints body should have explicitly legislated review powers, including the power to review Victoria Police's characterisation of a matter as a customer service issue and a requirement on Victoria Police to report the outcome of customer service matters to the complaints body.

162 Nick McKenzie & Richard Baker, The Age, 9 February 2012, 'OPI staff misconduct claims'. Available at https://www.theage.com.au/national/victoria/opi-staff-misconduct-claims-20120208-1rf2e.html.

The complaints body should be able to conduct these reviews on the request of a complainant or on its own motion. In addition to reviewing these decisions, the independent complaints body should be able to play an active role in oversight where it determines this is necessary. As noted above, this should include a power to impose requirements on how police investigate a customer service complaint and a power of veto over the choice of police investigator/complaint handler.

'Cease and desist' powers are critical to avoiding duplication and ensuring fully independent investigation. Victoria Police should not be permitted to investigate any matter that is being investigated by the complaints body, and the complaints body should have the power to order police to cease any investigation that could interfere with an ongoing complaints investigation.

As discussed above, the independent complaints body must have strong own motion powers and be empowered to receive and investigate 'super-complaints' from representative bodies.

RECOMMENDATIONS

Recommendation 43. Victoria Police should be legislatively prohibited from investigating any matter that is being investigated by the new independent complaints body. The complaints body should have a power to order police to cease any related investigation if it could interfere with an ongoing complaint investigation.

Recommendation 44. Where Victoria Police is investigating a complaint (i.e. the complaint is assessed as a customer service matter), the independent body must have the power to take over the investigation of any complaint at any time – both complaints received directly by police and those referred by the independent body – and to require police to suspend their investigation.

Investigative Powers

The small number of independent investigations undertaken by IBAC are hampered by reliance on Victoria Police to exercise certain powers. IBAC's powers with respect to conducting searches, seizing substances, obtaining names and addresses, taking physical evidence and making arrests are restricted by comparison to Victoria Police's powers.[163] For example, IBAC has powers to search police premises, but searches are sometimes ineffective because evidence can easily be concealed on someone's person, because IBAC investigators do not have any power to search

163 Victorian Parliament (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, p251.

people.[164] IBAC officers cannot direct a person to provide a password, meaning evidence on a computer or mobile phone can be concealed. IBAC also has no power to take fingerprints or DNA samples.[165]

These deficiencies risk impeding independent investigation, and creating actual and perceived conflicts of interest when Victoria Police become involved in an investigation. This is a serious problem with the existing complaints investigation system. A new system, putting far greater value on independent investigation, must grant significantly expanded powers to the complaints body.

In Northern Ireland, investigators employed by the Police Ombudsman are granted all the powers of a police officer while they are investigating a complaint.[166] As a rule, PONI uses only those powers relevant to an investigative function, and does not use other powers such as those concerning arrest or use of force.[167] It is appropriate that the independent complaints body should not have powers to use force or make arrests, and in the Victorian context this limitation could be established in legislation rather than as a matter of practice. Beyond this, VALS sees no significant drawbacks in the Northern Ireland approach to the powers of complaints investigators, provided that there are also appropriate oversight mechanisms and avenues for complaints about the conduct of staff of the complaints body.

Expanded powers, in particular powers to take physical evidence, would require the oversight agency to be notified of the incident as soon as possible. Any delay while the complaint body determines whether to refer the complaint to Victoria Police could compromise an investigation. This underlines the need for a simple system in which the complaints body is responsible for independently investigating all police complaints and critical incidents, reducing the risk of delays of this kind.

RECOMMENDATION

Recommendation 45. Investigators employed by the independent complaints body should be granted all the investigative powers of a police officer while they are investigating a complaint.

164 Ibid, pp256-7.

165 Ibid, p259.

166 Police (Northern Ireland) Act 1998, s56(3).

167 Police Ombudsman of Northern Ireland, 'Power of Constable' web page accessed 10 April 2022.

Police-Contact Deaths and Serious Injuries

Police-contact deaths and serious injuries (also referred to as "critical incidents"[168]) are currently investigated by Victoria Police,[169] who also perform an oversight function for these investigations.[170] The purpose of the investigation is to determine if there have been criminal or disciplinary offences.[171] The purpose of the oversight is to determine whether policies, procedures and guidelines were adhered to, and to determine whether any action is necessary to prevent similar incidents in the future.[172]

The role of IBAC in relation to police-contact deaths and serious injuries is primarily to provide oversight of Victoria Police investigations and oversight.[173] IBAC can also start an 'own motion' investigation in relation to a police-contact death or serious injury,[174] but this is rare. Victoria Police are not required by legislation to notify IBAC when an investigation is opened into a police-contact death or serious injury; these notifications are instead provided through an administrative arrangement.

168 Section 82, *Victoria Police Act 2013* (Vic).

169 An investigation of a death or serious injury/illness may be undertaken by Victoria Police's Homicide Squad, the Major Collision Investigation Group or another squad or unit nominated by a deputy commissioner. See IBAC (2018), *Audit of Complaints Investigated by Professional Standards Command, Victoria Police*.

170 Professional Standards Command (PSC) provides oversight for all investigations into a police-contact death and serious injury/illness before or following police-contact. If appropriate, Regional investigators may perform the oversight function for investigations into serious illness/injury. Guidelines relating to oversight of investigations is provided under Victoria Police's Integrity Management Guide (IMG) and the Victoria Police Manual (VPM); it is not provided for under the Victoria Police Act 2013. See IBAC (2018), *Audit of Complaints Investigated by Professional Standards Command, Victoria Police*; Victoria Police Manual, "Death or Serious Injury/Illness incidents involving police."

171 Office of Police Integrity (2011), *Review of the investigative process following a death associated with police contact*, p14. See also Victoria Police Manual, "Death or Serious Injury/Illness Incidents involving Police."

172 IBAC (2018), *Audit of Complaints Investigated by Professional Standards Command, Victoria Police*.

173 IBAC's functions include: assessing police personnel conduct; ensuring that the highest ethical and professional standards are maintained by police officers; and ensuring police officers have regard to the human rights set out in the *Charter of Human Rights and Responsibilities Act 2006*. See Section 15, *IBAC Act 2011* (Vic) These functions provide grounds for IBAC's oversight of police-contact deaths and serious injuries involving Victoria Police.

174 IBAC, 'Our Investigative Powers', web page accessed 15 April 2022.

Some police-contact deaths will also be the subject of a coronial investigation, and possibly an inquest. All deaths in police custody[175] are subject to a mandatory coronial inquest, and other police-contact deaths may also trigger a coronial investigation and inquest, depending on the circumstances.[176] Coronial investigation of police-contact deaths is carried out by a police officer ("the Coronial Investigator"), on behalf of the Coroner, and is usually carried out by the Homicide Squad[177] with support and oversight from the Police Coronial Support Unit (**PCSU**).[178] The role of the police in preparing the coronial brief, and the relationship between the Coroner and the police officer is not clearly regulated under legislation.[179]

As outlined above, police investigating police fundamentally contravines international law and principles. This is particularly the case for police-related injuries and police-contact deaths, where the right to life and the right to an effective remedy under international human rights law[180] and the Victorian Charter[181] require an independent investigation. The United Nations Human Rights Committee (**UNHRC**) has found internal investigations by Victoria Police into alleged human rights abuses by police are in breach of the *International Covenant on Civil and Political Rights*.[182] In response to a complaint brought by Corinna Horvath, whose nose was broken by a police office during an arrest in 1996. The UN Human Rights Committee found that

175 Under the *Coroners Act 2008* (Vic), when a person dies in police custody, the death must be reported to the Coroner and a coronial investigation and inquest into the death is mandatory (ss. 4 and 11). The purpose of the coronial investigation and inquest is to establish the identity, cause and circumstances of the death and contribute to a reduction in the number of preventable deaths (s 1(c)). A coronial inquest is not required if a person has been charged with an indicatable offence in respect of the death (s. 52(3)(b)). The coronial inquest may result in the matter being referred to the Director of Public Prosecution for a criminal investigation (s. 72).

176 Under the *Coroners Act 2008* (Vic), when a person dies in connection with a police operation (but not in police custody), the death must be reported to the coroner (s. 4) and the coroner may carry out an investigation and possibly an inquest, depending on the circumstances.

177 See Victorian Police Manual (VPM), "Death or Serious Injury/Illness incidents involving police."

178 The *Police Coronial Support Unit* (PCSU) is staffed by members of Victoria Police who assist coroners with their investigations into deaths and fires. The PCSU can attend scenes at the request of the coroner, provides coronial briefs of evidence for the coroner and supports Victoria Police members who are investigating matters on behalf of a coroner.

179 Under Section 59 of the *Victoria Police Act 2013*, a police officer may assist a coroner in the investigation of a death. The role of police in preparing the coronial brief is set out under the State Coroner's *Practice Direction 3 of 2021*, above note 28.

180 Article 6, *International Covenant on Civil and Political Rights* (ICCPR); Article 14, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).

181 Section 9, *Charter of Human Rights and Responsibilities Act 2006* (Vic).

182 UN Human Rights Committee, *Views: Communication No. 1885/2009* (5 June 2014), 110th sess (Horvath v Australia).

Victoria Police's internal investigative process did not provide an adequate remedy for police misconduct because of its failure to hear from civilian witnesses, hold a public hearing, or reopen its investigation after the County Court awarded civil damages against the police officers involved.[183]

Criminal and Disciplinary Investigation

As discussed above, police investigation of police-contact deaths and serious injuries is deeply problematic for Aboriginal people and communities. Aboriginal people do not trust police to investigate police complaints and they do not trust police to investigate the death of a loved one who has died in police custody or as a result of a police operation.

This lack of trust is firmly justified by the evidence. A 2018 audit by IBAC indicated serious problems with Victoria Police's oversight of critical police incidents. In particular, "over half of the oversights conducted by Victoria Police failed to consider evidence that should have been included."[184] This included a failure to include statements from independent witnesses and an over-reliance on police statements. Additionally, 61% of oversights did not address human rights; "even where human rights were discussed, some oversights failed to identify relevant human rights issues, did not address rights in sufficient detail, or demonstrated a poor understanding by mischaracterising other issues as 'rights'."[185]

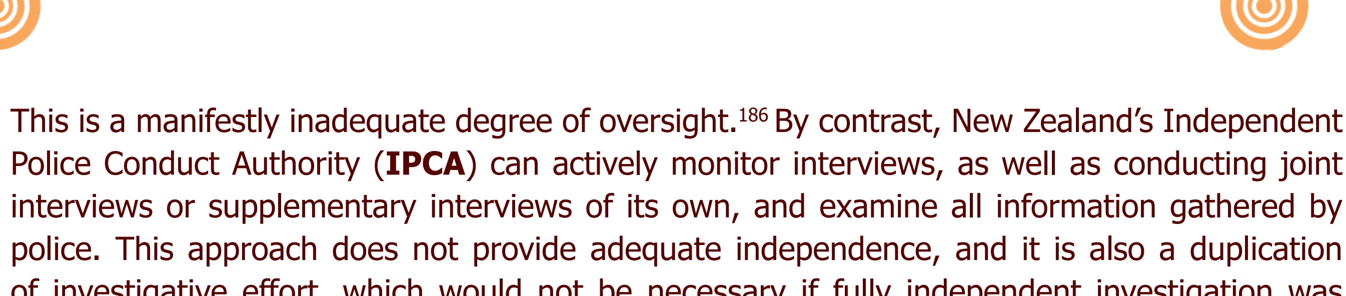
At present, Victoria Police investigate internal incidents and the investigation is overseen by (but typically not conducted by) Professional Standards Command. IBAC then performs an after-the-fact review of PSC's oversight of the investigation. This approach evidently does not provide for independent investigation, and it is clear that in practice it also has not ensured thorough or reliable investigation of critical incidents.

One possible alternative to the current oversight approach is a model of 'real-time' oversight, which would involve an independent body essentially shadowing the Victoria Police investigation as it occurs. In practice, real-time oversight could only be effective if the powers involved are so extensive that the oversight body essentially runs the investigation. For example, the supervisory powers granted to the Law Enforcement Conduct Commission (**LECC**) in New South Wales do not allow it to manage or even influence the conduct of an investigation, and many of its powers are restricted to use with the consent of the police officers involved in the incident.

183 Ibid, p15.

184 IBAC (2018), *Audit of Complaints Investigated by Professional Standards Command, Victoria Police*, p. 27.

185 Ibid, p. 44.



This is a manifestly inadequate degree of oversight.[186] By contrast, New Zealand's Independent Police Conduct Authority (**IPCA**) can actively monitor interviews, as well as conducting joint interviews or supplementary interviews of its own, and examine all information gathered by police. This approach does not provide adequate independence, and it is also a duplication of investigative effort, which would not be necessary if fully independent investigation was adopted as a simpler, more streamlined approach to such incidents.

Enabling this kind of independent investigation would require a fully resourced independent body, with the staffing and resources to rapidly respond to calls and attend the scene of an incident. Jurisdiction of the body to investigate police-contact deaths and serious injuries should be mandated by legislation, and the body must have adequate powers to carry out these investigations effectively. There should also be a mechanism in place for oversight of the investigations undertaken by the independent body.

Victoria Police may be involved in securing a scene, but should be required to immediately call the independent body to attend and commence the substantive investigation. For example, in Northern Ireland, PONI investigators are called to the scene of serious incidents, where they are distinguished from police by a different uniform.[187]

A new independent body should learn from the experiences in other jurisdictions. In Northern Ireland, all critical incidents are investigated by the Police Ombudsman of Northern Ireland, which also receives and investigates police complaints.[188]

In British Columbia, Canada, the Independent Investigations Office (**IIO**) conducts investigations into police-related incidents resulting in death or serious harm, following mandatory notification by police when an incident has taken place.[189] The IIO has jurisdiction over all the policing agencies operating in British Columbia, including on- and off-duty officers. It conducts investigations to a criminal standard and may refer the matter to the British Columbia Prosecution Service to consider laying charges. If a matter is not referred to prosecutors, the IIO can release a detailed public report or a press release to provide information about its investigation.[190]

Police-contact deaths and serious incidents are likely to have a higher media profile and be more

186 Law Enforcement Conduct Commission Act 2016 (NSW) ss 114, 115(4), 116.

187 Tamar Hopkins (2009), 'An Effective System of Complaints Against the Police', 44, 52.

188 Police Ombudsman for Northern Ireland (PONI), '*Information for Police Officers: When you must contact the Police Ombudsman's Office*', web page accessed 7 April 2022.

189 Independent Investigations Office (IIO), 'What we Do', web page accessed 20 April 2022.

190 Ibid.

traumatic for the victims of police conduct. It is crucial that they have full confidence in the investigation, and any reform which falls short of fully independent investigation of these cases cannot achieve that. The IBAC Committee Inquiry recommended that the Victorian Government review the basis and extent of IBAC's jurisdiction with respect to the investigation and oversight of critical incidents in which death or serious injury has occurred in connection with police activity.[191] The Inquiry also recommended that Victoria Police be required by legislation to notify IBAC when they commence an investigation into a critical police-contact incident.[192] VALS does not support these recommendations, as we fundamentally oppose police investigation of these incidents.

RECOMMENDATION

Recommendation 46. Police-contact deaths and incidents involving serious injuries must not be investigated by police; they must be investigated by a new independent police complaints body.

Coronial Investigations

Coronial processes are a critical component of a comprehensive and effective police accountability system. The current system – whereby police investigate police-contact deaths – is deeply problematic for Aboriginal families whose loved ones have died in police custody or as a result of police contact.

While previous inquiries have noted concerns with the current coronial process and recommended that the investigating coroner be given authority under the *Coroners Act 2008* to direct the police investigation,[193] this is not enough to meet international requirements for an independent investigation.

191 Victorian Parliament (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, Recommendation 67, p. 315.

192 Ibid., Recommendation 66, p. 315.

193 *RCIADIC National Report*, Volume 5, Recommendation 29; Parliament of Victoria, *Inquiry into the Review of the Coroners Act 1985* (2006), Recommendation 42; *Tanya Day Inquest*, Recommendation 2, p. 107. In 2011, the OPI carried out a review of the investigative process following a death associated with police contact, and recommended that: "That the Victorian Government consults with key stakeholders regarding an optimal legislative framework for the investigation and oversight of deaths associated with police contact in Victoria." See Office of Police Integrity (2011), *Review of the investigative process following a death associated with police contact*, Recommendation 3, p. 16.

In addition to the lack of independence, there are often serious deficiencies in the coronial investigations carried out by police. This includes failures to preserve critical evidence, poor exercise of discretion regarding the investigation and "an alarming lack of rigour."[194]

Practice Direction 6 of 2020 ("Indigenous Deaths in Custody") of the Coroners Court addresses some of these concerns by requiring, where practicable, that the State Coroner and/or delegate (such as the duty coroner) immediately attend the scene of the death, when an Aboriginal person dies in custody.[195] Moreover, the investigating coroner should contact the coroner's investigator at the earliest opportunity to determine appropriate arrangements for the collection of time-critical evidence (such as CCTV footage).[196] Although the Direction applies specifically to Aboriginal deaths in custody, coroners are encouraged to apply the Direction in relation to all Aboriginal deaths that are subject to a coronial investigation and possibly an inquest.[197] This direction is an important development and has contributed to enhancing the quality of recent investigations.

Additionally, *Practice Direction 3 of 2021* ("Police Contact Deaths") provides that "the investigating coroner as soon as reasonably practicable will refer the matter to the In-House Legal Service (**IHLS**) to take carriage of and assist the investigating coroner at all stages of the investigation (from inception to closure)." It also provides that "under no circumstances are the Police Coronial Support Unit (**PCSU**) to take carriage of or have any substantive involvement in the investigation of a police contact death."[198] The IHLS was established to assist the coroner with investigations, principally police-contact deaths, where it would be inappropriate for the Coroner to be assisted by Victoria Police.[199] However, even when the IHLS has carriage of a matter, they still rely on police officers (usually from the Homicide Squad) to do the investigatory work.

Additionally, Aboriginal families have raised concerns with VALS regarding police practice and approaches when taking statements from family member. Often, family members are required to give statements in the days immediately following the passing of their loved one, even when there are no clear reasons for the statement to be provided so quickly (e.g. for reasons related to freshness of evidence). In some cases, family members have been required to wait in police

194 See for example, *Finding into the Death of Raymond Noel Lindsey Thomas*, p. 28. The coroner criticised the independent police investigation for an "alarming lack of internal rigour," para. 148.

195 State Coroner, *Practice Direction 6 of 2020* ("Indigenous Deaths in Custody"), para 3.1.

196 Ibid., para 3.4.

197 Ibid., para 1.5.

198 *Practice Direction 3 of 2021*, paras 3.1 and 3.2. Emphasis omitted.

199 Coroners Court of Victoria, *Annual Report 2014-15*, p27.

stations for hours to give their statements and have received inappropriate direction from police officers on what they should include in their statement.

In response to some of these concerns, *Practice Direction 6 of 2020* provides that the investigating coroner will ensure that the coroner's investigator is contacted at the earliest possible opportunity to determine appropriate arrangements for "obtaining statements (such as to facilitate witness interviews being held in a location other than a police station, or for the presence of support persons at interviews of family members where requested)."[200] To ensure the evidence gathering process does not unnecessarily retraumatise a client, and is done at a time that works best for them, VALS has also started taking client statements for the Coroner in recent inquest matters.

Practice Direction 6 of 2020 is a welcome development that can help to alleviate some of the trauma experienced by Aboriginal family members in the days immediately following the death of their loved one. However, it does not address the fundamental issue of police carrying out investigations, including the well-founded distrust that Aboriginal communities have of police and their ongoing experiences of systemic racism.

To address the concerns raised above, coronial investigations into the death of an Aboriginal person in police custody or as a result of a police operation must not be carried out by police. They must be carried out by a specialist civilian investigation team that is independent from police,[201] is culturally appropriate and includes Aboriginal staff and leadership.

There are a number of options for independent coronial investigations, including the models identified below. In determining the best model, the voices of Aboriginal families whose loved ones have died in police custody, or as a result of a police operation, must be prioritised.

- *A specialised investigation team at the Coroners Court* and an independent investigations office for all police-contact deaths and serious injuries. This is the case in British Colombia, Canada where:
    - The Independent Investigations Office (**IIO**) conducts investigations into all police-related incidents resulting in death or serious harm to determine whether

200 *Practice Direction 6 of 2020*, para 3.4.

201 Federation of Community Legal Centres (FCLC) (2011), *Effective, Transparent, Accountable: An independent system to investigate police-related deaths in Victoria*. Police Accountability Paper, *Independent Investigations*,; T. Hopkins (2009), *An Effective System for Investigating Complaints Against Police: A Study on Human Rights Compliance in Police Complaint Models in the US, Canada, UK, Northern Ireland and Australia*, p. 7.

any offences have been committed;[202]

- The Special Investigations Unit (**SIU**) at the BC Coroners Service, which includes a Special Investigations Coroner who provides specialised knowledge and expertise for police-involved deaths.[203]

- *A specialised team at the independent police complaints body*:
  - This is the case in Northern Ireland, where the Police Ombudsman of Northern Ireland (**PONI**) investigates all deaths where police appear to be involved or implicated, for the purposes of determining whether any criminal or disciplinary offences have occurred, as well as to prepare a brief for the coronial proceeding and make recommendations to this inquiry.[204]
  - Similarly, the independent police complaints body for England and Wales, the Independent Office for Police Conduct (**IOPC**), investigates all deaths where the person had direct or indirect contact with police at the time of, or shortly before their death, and the investigation report is shared with the coroner.[205]

- *An independent Aboriginal-led body to investigate Aboriginal deaths in custody*: this was recommended by the Jumbunna Institute it its submission to the NSW Parliamentary Inquiry into the high level of First Nations People in Custody and Oversight and Review of Deaths in Custody.[206]

The coronial investigation is in addition to the immediate independent investigation of all police-contact deaths and serious injuries for criminal and disciplinary purposes, discussed above. Any model for independent coronial investigations should attempt to minimise duplication, and in particular avoid repeated re-questioning of family members. This can be achieved either by having a coronial brief prepared by the team that conducts the criminal investigation (the second model above) or by facilitating information-sharing.

In addition to independent coronial investigations, there must also be a robust oversight mechanism for implementation of coronial recommendations relating to police-contact deaths. The Government should establish an Aboriginal Social Justice Commissioner to perform

202 IIO, 'What We Do', web page accessed 30 March 2022.

203 BC Coroners Service, 'Special Investigations Unit', web page accessed 30 March 2022.

204 FCLC (2011), *Effective, Transparent, Accountable: An independent system to investigate police-related deaths in Victoria*, p. 8.

205 Independent Office for Police Conduct (IOPC) 'What We Investigate and Next Steps', web page accessed 30 March 2022.

206 Jumbunna Institute of Education and Research, Research Unit (2020), *Submission to the Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody*, para 144.

this function, and the Commissioner should also provide oversight for implementation of recommendations from the RCIADIC and other Aboriginal justice outcomes in Victoria.

RECOMMENDATIONS

Recommendation 47. Coronial investigations into police-contact deaths must not be carried out by police. They must be carried out by a specialist civilian investigation team that is independent from police, is culturally appropriate and includes Aboriginal staff and leadership.

Recommendation 48. The Government should consult with the families of Aboriginal people who have died in custody regarding the mechanism for independent coronial investigation of police-contact deaths.

Recommendation 49. Family members of an Aboriginal person who has died in police custody should be given the option of providing a statement through the Koori Engagement Unit at the Coroners Court or VALS lawyers.

Recommendation 50. The Government should establish an Aboriginal Social Justice Commissioner to provide independent oversight for Aboriginal justice outcomes in Victoria. One of the key functions of the Commissioner should be to provide independent oversight for implementation of all coronial recommendations arising from the police-contact death of an Aboriginal person.

Legal and Disciplinary Sanctions

Robust legal sanctions are key to deterring misconduct and creating accountability for the abuse of police power. These sanctions can be delivered through criminal prosecution or civil litigation.

These legal processes operate independently, though there are important interconnections between them. The relationship of these legal processes to the police complaints system is discussed above, in the 'Complaint Outcomes' subsection.

Criminal Prosecutions

There are significant challenges to prosecutions of police officers in jurisdictions all over the world. Addressing these is critical to ensuring effective accountability and oversight of police. Criminal accountability is one of the most high-profile and serious forms of sanction that an officer can face, and it is crucial to ensure that this form of accountability is not rendered ineffective.

IBAC very rarely brings prosecutions against police officers. Prosecutions were finalised against only five police officers in 2020/21, as noted above.[207] A very low number of prosecutions, all of which were successful and all of which related to extremely serious misconduct, suggests a conservative approach, in which prosecution for police misconduct is only brought when it is almost certain to succeed. While prosecutors are required to proceed only if there is a reasonable prospect of conviction,[208] it appears clear that a much higher bar is being applied in decisions about whether to prosecute police officers.

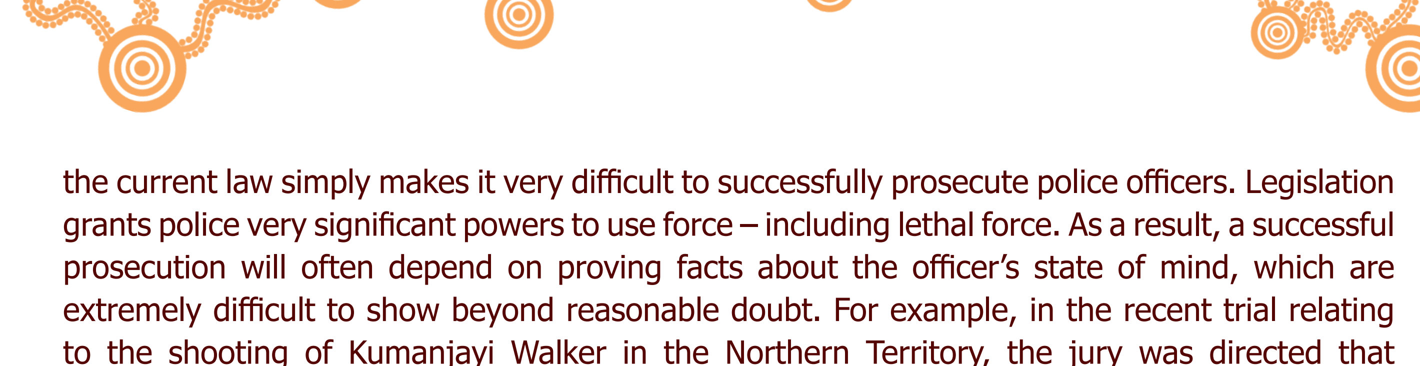
As noted above, the prosecution process should be linked to the independent police complaints system, so that when misconduct has been established by the independent oversight body, the Director of Public Prosecutions must justify any decision not to prosecute. In other jurisdictions internationally, the willingness to prosecute police officers and expertise in doing so have been supported by establishing a dedicated unit within the public prosecutor's office.[209] The lack of independent investigations of police, and the reluctance of IBAC and Victoria Police's Professional Standards Command to bring prosecutions, have been major impediments to criminal prosecution being an effective pillar of the oversight system.

However, even with greater willingness to prosecute, significant obstacles will remain because

207 IBAC (2021), *Annual Report 2020/21*, p35.

208 Office of Public Prosecutions (2021), *Policy of the Director of Public Prosecutions for Victoria*, p2.

209 UN Office on Drugs and Crime (2011), *Handbook on police accountability, oversight and integrity*, p40.



the current law simply makes it very difficult to successfully prosecute police officers. Legislation grants police very significant powers to use force – including lethal force. As a result, a successful prosecution will often depend on proving facts about the officer's state of mind, which are extremely difficult to show beyond reasonable doubt. For example, in the recent trial relating to the shooting of Kumanjayi Walker in the Northern Territory, the jury was directed that police officer Zachary Rolfe could not be found guilty if he had honestly believed the shooting was reasonably necessary to perform his police duties – even if that belief was based on an inaccurate perception of events.[210]

The prospects for success in prosecutions of police officers are also reduced because it is difficult to introduce evidence about a police officer's previous conduct. Excluding evidence about past incidents is an important protection for all types of defendants, and it is important to retain the principle that such evidence can only be introduced in special circumstances. However, there are some cases in which this kind of evidence may be appropriate to permit in trials of police officers, particularly where the officer is relying on character evidence as part of their defence. Clearer legislated rules about when evidence of past conduct is admissible, with safeguards to prevent its inappropriate use, would improve consistency in how this evidence is treated and lead to fairer trials.

For Aboriginal victims of police misconduct, these challenges come on top of the broader biases of the court system. Opportunities to give evidence in a culturally safe way are extremely rare. Judges and jury members may have biases that lead them to give less weight to the testimony of Aboriginal people. The existence of a past criminal record – which is disproportionately likely for Aboriginal people, as a result of over-policing and the ongoing impacts of colonisation – may be used to justify a police officer's behaviour or discredit a victim's evidence.

Without reform, prosecutions will remain challenging and proper police accountability will be restricted. Recent prosecutions of police officers who have shot and killed Aboriginal people have not been successful. Officer Zachary Rolfe was found not guilty. In Western Australia, an unnamed police officer was prosecuted for murder after he shot and killed JC, a 29-year old Aboriginal woman, when other police officers were attempting to de-escalate the situation; the officer was found not guilty.[211] The importance of successful prosecutions of police officers is demonstrated by experiences in the United States, where the conviction of the police officer

210 The Guardian, 10 March 2022, 'Judge urges jurors to 'guard against' emotion when considering verdict in Zachary Rolfe murder trial'. Available at https://www.theguardian.com/australia-news/2022/mar/10/judge-urges-jurors-to-guard-against-emotion-when-considering-verdict-in-zachary-rolfe-trial.

211 ABC News, 22 October 2021, 'Police officer not guilty of murdering woman during confrontation on Geraldton street'.

who killed George Floyd helped energise the Black Lives Matter movement,[212] but failure to prosecute or secure convictions in other cases – such as the police shooting of Michael Brown in Ferguson – has severely undermined confidence in police and the bodies that oversee them.[213]

VALS intends to conduct further research on the changes that are needed to improve criminal prosecutions of police officers, and ensure that they are a functioning part of the police oversight system.

Civil Litigation

Civil litigation is a key mechanism for justice in relation to police misconduct, particularly given the current complaints system does not provide for independent investigation or meaningful remedies. While a reformed complaints system would mitigate the need for civil litigation in some cases, it will remain an important way for complainants and victims of police misconduct to achieve satisfaction and compensation.

Litigation against police is very challenging. Courts and juries are often deferential to police evidence and police documentation, and courts have historically been reluctant to find against police out of concern that liability could make police officers excessively risk-averse while on duty.[214]

As discussed above, civil litigation needs to be connected to the police complaints process so that the evidence uncovered by complaints investigators is available to the victims of police misconduct. There are a number of other changes which also need to be made, to make civil litigation a more effective tool for police oversight. VALS has been advocating consistently to improve access to Body-Worn Cameras in civil litigation, as discussed below. We will be doing further work in future on reforms that are needed to improve the effectiveness of civil litigation as a fair tool for holding police accountable.

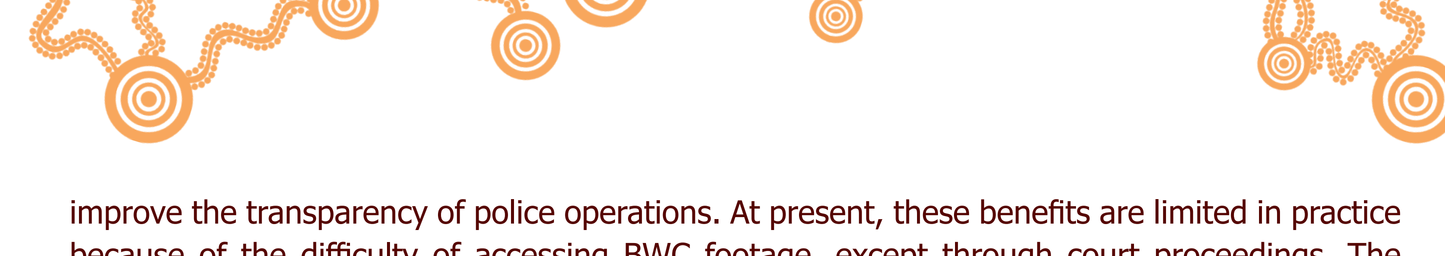
Body-Worn Cameras

The limited ability to access Body-Worn Camera (**BWC**) footage also creates barriers to civil claims. Victoria Police have been using BWCs for around five years. In principle, the widespread deployment of BWCs creates vital objective evidence that can help hold police accountable and

212 BBC News, 25 June 2021, 'George Floyd murder: Derek Chauvin sentenced to over 22 years'.

213 CNN, 25 November 2014, 'Fires, chaos erupt in Ferguson after grand jury doesn't indict in Michael Brown case'.

214 Ransley, Janet, Jessica Anderson and Tim Prenzler (2007), 'Civil Litigation Against Police in Australia: Exploring Its Extent, Nature and Implications for Accountability', The Australian & New Zealand journal of criminology 40(2), pp 143, 174.



improve the transparency of police operations. At present, these benefits are limited in practice because of the difficulty of accessing BWC footage, except through court proceedings. The *Surveillance Devices Act 1999* and *Surveillance Devices Regulations 2016* place strict limits on how BWC footage can be accessed and used.

Until late 2021, BWC footage was only disclosed during criminal proceedings – it could not be accessed for civil litigation, meaning that VALS clients found themselves in the position of having BWC footage used to prosecute them, while being unable to rely upon the same footage in their efforts to obtain justice for wrongs done to them by public officials.

Recent changes to regulation have enabled BWC footage to be accessed at the discovery stage of civil litigation.[215] However, there are still significant barriers to this footage being an effective oversight tool. Commencing civil litigation and sustaining it through to the stage at which BWC footage would be disclosed is costly and time-consuming. Understanding what is shown on BWC footage is often a crucial part of assessing whether a client has a viable legal claim, and whether it is worth pursuing a matter. A broader reshaping of the legislation and regulations is needed so that BWC footage can be accessed through the Freedom of Information (**FOI**) system. VALS welcomes the recent changes as a starting point and looks forward to further engagement with the Victorian Government in relation to additional reforms in this area.

RECOMMENDATION

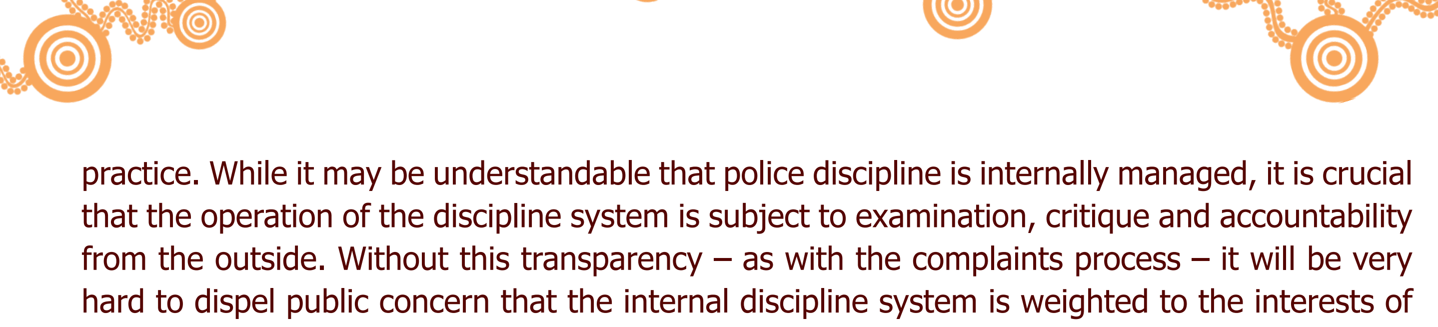
Recommendation 51. Complainants should be able to access footage from body-worn cameras (BWCs) worn by police and Protective Service Officers (PSOs). To enable access to this footage, Sections 30D and 30F of the *Surveillance Devices Act 1999* should be amended, to remove BWCs from the ambit of this legislation.

Police Disciplinary System

For many instances of police misconduct, the Victoria Police disciplinary system will be the first line of sanction, particularly in cases where misconduct has occurred, but a full criminal prosecution or lengthy civil litigation would be difficult to sustain. It is therefore crucial for police accountability that the police's internal disciplinary system provides a robust process, and takes seriously the effects of misconduct on victims and the Victorian community more broadly.

The operation of the disciplinary system is, at present, extremely opaque. Disciplinary matters are wholly internal and it is difficult for outside stakeholders to understand how they operate in

215 The Age, 21 December 2021, 'Police body camera footage allowed in Victorian civil lawsuits'.



practice. While it may be understandable that police discipline is internally managed, it is crucial that the operation of the discipline system is subject to examination, critique and accountability from the outside. Without this transparency – as with the complaints process – it will be very hard to dispel public concern that the internal discipline system is weighted to the interests of police, rather than to the community members affected by police misconduct. Aboriginal people are overpoliced, and just as they are disproportionately affected by police misconduct, they are profoundly affected by failings of the police disciplinary system.

The detailed procedures of the Victoria Police disciplinary system – including what factors are considered in determining a sanction, how hearings are conducted, and avenues for appeal or review – should be the subject of a specific and public review. A full review of the police disciplinary system has been repeatedly recommended by the IBAC Committee,[216] the Victorian Equal Opportunity and Human Rights Commission,[217] the State Services Authority[218] and the Office of Police Integrity.[219] The latest Victoria Police annual report indicates that an internal review of the disciplinary system, the Discipline Transformation Project, has been essentially completed.[220] This project has evidently involved minimal consultation with external stakeholders or people affected by police misconduct, including VALS, despite the fact that the police disciplinary system routinely fails Aboriginal people. A full, public review is required to identify the changes that the police disciplinary system needs.

216 Victorian Parliament (2019), *Inquiry into the external oversight of police corruption and misconduct in Victoria*, Recommendation 65.

217 VEOHRC (2015), *Independent Review into sex discrimination and sexual harassment, including predatory behaviour, in Victoria Police: Phase 1 Report*, Recommendation 20.

218 State Services Authority (2011), *Inquiry into the command, management and functions of the senior structure of Victoria Police*.

219 Office of Police Integrity (2011), *Improving Victoria Police discipline and complaint handling systems*. Office of Police Integrity (2007), *A fair and effective Victoria Police discipline system*.

220 Victoria Police, *Annual Report 2020-2021*, p25.

RECOMMENDATIONS

Recommendation 52. As recommended by the IBAC Committee Inquiry, the Victorian Government should "review the disciplinary system for Victoria Police, including the nature and operation of the *Victoria Police Act 2013* (Vic) with respect to that system." The review should be open to submissions from the public and stakeholder organisations and should publish its final report.

Recommendation 53. The review of the police disciplinary system should make recommendations for linking the disciplinary system with the police complaints system, to avoid re-investigation of matters that have been independently investigated through the complaints process.

Recommendation 54. The review of the police disciplinary system should make recommendations to provide for greater transparency and accountability in the operation of the disciplinary process.

Monitoring, Auditing & Record-keeping

Monitoring of police decision-making is a crucial piece of an effective oversight system. It enables problematic practices to be identified and addressed even where there is not an individual willing or able to make or complaint. Ensuring that monitoring approaches are effective in holding Victoria Police to account is vital to tackling the problems with policing in Victoria.

At present, monitoring requirements for Victoria Police are mainly focused on 'coercive and intrusive' powers used in major crime investigations. It is crucial to appreciate that monitoring of police should not only mean resource-intensive, substantive review of individual police decisions to use major investigatory powers. Effective monitoring must also involve increased data transparency and routine analysis of the use of more 'everyday' police powers, whose misuse disproportionately affects Aboriginal people in Victoria and other over-policed communities.

All police powers are coercive and intrusive, particularly in their cumulative effect on over-policed communities, and greater monitoring of all types of police powers is clearly warranted.

Principles for Effective Monitoring

Monitoring of police in Victoria can be broadly divided into two categories, procedural and substantive. Current monitoring schemes in Victoria are almost exclusively procedural – that is, oversight bodies monitor compliance with reporting and other procedural requirements, rather than assessing the substance of police decision-making and resultant outcomes. There are multiple ways of improving this model of police monitoring, all of which should be adopted in different parts of a reformed police oversight system. All kinds of monitoring should be conducted by an independent body, with oversight of a range of police powers, rather than being fragmented between different oversight bodies and internal Victoria Police functions.[221]

The monitoring agency should be separate to the police complaints body, to ensure an appropriate level of independence in the operation of these very different oversight functions. If this is not the case, and the complaints and monitoring functions are located in a single agency, there should be a strict information firewall. Monitoring bodies require extensive data-sharing and cooperation from police, which are unlikely to be forthcoming if the same agency is involved in receiving and investigating complaints against police. Similarly, complainants may be reluctant to engage with an agency which is in regular dialogue with police about the details of their operational processes and how they should be improved. The effectiveness of both monitoring

221 Royal Commission into the Management of Police Informants, *Final Report: Volume III*, pp230-5.

and complaints processes therefore depends on a firm separation of the two functions.

All types of monitoring must be highly transparent, with regular publication of reports, which do not only summarise information reported by police but analyse what it shows about the exercise of police powers. While it may not be possible to publish all details in relation to the exercise of some police powers, the general principle should be that monitoring is a public exercise. Its purpose is to improve police conduct and accountability, and improve the public's confidence in policing. This can only be achieved with transparency about what is being monitored and what police need to change. Transparent monitoring also supports the effective operation of the police complaints body, by providing information which could be the basis of an own-motion investigation into systemic issues.

It is also critical that the monitoring body's culture and practice support and engage with parallel accountability through civil society. Non-government actors regularly analyse official statistics and the experiences of their clients to identify problems with police conduct, and this practice is vital to ensuring police accountability and establishing community trust. It should be facilitated, including by providing regular and timely publication of data and analysis, which community organisations can work with. The work of community organisations may also highlight areas of police conduct which the monitoring agency is not focused on. The body needs to have both the structural flexibility and the right internal culture to recognise and respond to this kind of outside information.

Key forms of monitoring that should take place in line with these principles are:

- *Procedural/reporting-based*: as outlined below, there is significant scope for making this form of monitoring far more effective than it currently is by using reporting requirements as the basis for data analysis.
- *Substantive/outcome-focused*: monitoring should include the substantive review of the exercise of police powers, particularly where detailed reporting requirements provide the materials for a full assessment of decision-making.

Different forms of monitoring are appropriate to different police powers, but all need to be conducted in line with the principles of independence and transparency.

Shortcomings of Existing Monitoring Schemes

While monitoring is one of the critical elements of an adequate police oversight system, the monitoring schemes currently in place in Victoria are ineffective at preventing police misconduct.

There are a range of reasons for the inadequacy of current monitoring arrangements. The Royal Commission into the Management of Police Informants identified the purely procedural focus of most monitoring (on compliance with reporting requirements) and the fragmentation of monitoring between different bodies as major issues.[222]

In addition to these problems, monitoring schemes are currently ineffective because they are limited to a small set of police powers, and because they do not have the transparency needed to create proper accountability. As a result, monitoring and oversight extends to only a tiny proportion of police activity, with limited mechanisms for effecting change when problems are identified. This means that the current monitoring arrangements allow serious systemic problems in police conduct to develop outside their purview, with serious consequences for communities being over-policed and for the culture of the police force.

An illustrative example of a police power that is not currently subject to independent monitoring is the power to stop and search. Police searches are not generally regarded as a major or 'intrusive' power that needs specific monitoring. Searches are, however, highly intrusive for individuals from over-policed and marginalised communities, like Aboriginal people, for whom the cumulative effect of routine searching can be very harmful. 'Minor' powers like police stops are also significant because everyday police activity is where deep cultural problems can develop and perpetuate themselves. There is strong evidence, for example, of a problem with racial profiling in police searches in Victoria.[223] This is both a symptom of systemic racism, and contributes to it by exposing new police officers to an everyday culture of racially-biased searching.

The issue of police searches demonstrates both the need for expanded monitoring and the need for greater transparency in monitoring schemes. The existing evidence of racial profiling in Victoria comes largely from an analysis conducted during a court case, because there is no ongoing monitoring mechanism in place.[224] Data on police searches is not routinely collated or analysed, and the current practice of searches – with limited record-keeping requirements –

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222 Royal Commission into the Management of Police Informants, *Final Report: Volume III*, pp234-5.

223 Court documents from *Haile-Michael v. Konstantinidis*, 'Summary of Professor Gordon's and Dr Henstridge's First Reports'.

224 Police Stop Data Working Group (2017), *Monitoring Racial Profiling: Introducing a scheme to prevent unlawful stops and searches by Victoria Police*, p6.

would not facilitate such analysis. To the extent that any data is collated within Victoria Police, it is not published or shared with civil society groups and the broader community, a step which is crucial in providing oversight and accountability.

This lack of monitoring stands in contrast to the practice in the United Kingdom. National data on police stop and search are published annually, with breakdowns by ethnicity and geography.[225] This overall data is complemented by Stop and Search Community Monitoring Groups, which are empowered to examine individual incidents (including viewing body-worn camera footage), as well as data on stops.[226] VALS is one of many civil society groups which have previously called for the establishment a police stops monitoring scheme in Victoria.[227]

The Victorian Parliament's recent Inquiry into the Criminal Justice System recommended the establishment of "a three-year trial of a racial profiling monitoring scheme".[228] The importance of active monitoring of police searches is well established by international evidence, and by the evidence which exists about Victoria Police's use of searches. However, this is not a reform which needs to be subject to trials or reviews – it is a key and urgent form of accountability. VALS does welcome the recommendation as a sign of growing recognition of the need for improved monitoring of police searches.

Monitoring should be an important element of Victoria's reformed police oversight system. As the example of police searches shows, this will require both an improvement in the effectiveness of monitoring schemes and an expansion of their scope. These two elements are addressed in turn below.

Effective Monitoring Using Reporting Requirements

Procedural monitoring has an important part to play in the system, alongside greater substantive monitoring. This can be achieved by ensuring that the monitoring scheme is not a mere reporting arrangement, which requires specific documentation of decisions, but does not use this reporting to any wider effect. Such an arrangement may have a minimal effect on police conduct simply by increasing the burden of using particular powers, but it cannot create real accountability.

225 UK Government, Stop and Search, web page accessed 20 November 2021.

226 Mayor of London, Stop and Search, web page accessed 20 November 2021.

227 Police Stop Data Working Group (2017), *Monitoring Racial Profiling - Introducing a scheme to prevent unlawful stops and searches by Victoria Police*.

228 Victorian Parliament (2022), *Inquiry into Victoria's Criminal Justice System*, Recommendation 20.

Reporting requirements can be leveraged into effective monitoring through the use of trend analysis of the exercise of police powers. This may not be possible in relation to major crime powers which are not frequently exercised, but for police powers that are exercised more regularly, a robust reporting requirement can create the basis for a rich dataset, which can give significant insight into whether police are conducting themselves appropriately. Detailed data on, for example, police stops or drug testing in police custody can reveal important patterns, even without a substantive judgement about particular incidents. If data revealed a low percentage of searches or tests resulting in any contraband being found, that would suggest that the powers are being used inappropriately. If the data reveals a disproportionate use of these powers against Aboriginal people – which we anticipate it would – that would reveal a problem with systemic racism, and help identify particular stations or commands where that problem is particularly serious.

Trend analysis based on reporting requirements can be an effective form of monitoring only if certain standards are met. The key is a high degree of transparency. Data must be published on a regular basis, not as a subject of occasional or one-off reports. It should be published in a format which enables comparison of trends over time and comparison with other data sources. The importance of these standards is illustrated by the following two examples.

- *COVID-19 fines*: Data on COVID-19 fines is published by the Crime Statistics Agency. It includes a breakdown by Aboriginal status and a breakdown by Local Government Area (**LGA**), but not both, making it impossible to identify areas of particularly biased enforcement.
- *Police stop data*: Police do record information about stops and searches in the Law Enforcement Assistance Program (**LEAP**), Victoria Police's database for tracking police operational activity, as part of their standard practice. This information is not developed into a dataset enabling monitoring of police searches. As a result, the best information on racial profiling comes from an analysis conducted on a limited subset of LEAP data for two suburbs more than a decade ago, because this data was released in the course of a lawsuit.[229] Even that data was limited by the fact that police are highly inconsistent in whether they record key variables like ethnicity and country of birth, and how they do so.

With the appropriate standards and legislative provisions in place, reporting requirements can be the basis of a highly effective and transparent form of monitoring, rather than merely imposing a compliance burden to minimal effect, as in the current system.

229 Court documents from *Haile-Michael v. Konstantinidis*, 'Summary of Professor Gordon's and Dr Henstridge's First Reports'.

Effective monitoring requires, as a foundation, complete data. This must be guaranteed by strong reporting requirements, as discussed further below (see sub-section 'Police Record-keeping).

RECOMMENDATIONS

Recommendation 55. Monitoring of Victoria Police should be conducted by a single dedicated monitoring body, not fragmented between agencies. The monitoring function should be carried out by a body that is separate to the independent police complaints body. If the complaints and monitoring functions are located in a single agency, there should be a strict information firewall.

Recommendation 56. Monitoring must not be limited to procedural monitoring, but should also include substantive, outcome-focused monitoring of the exercise of police powers. The monitoring body should significantly expand the use of substantive monitoring, through a merits review of documented police decision-making.

Recommendation 57. The monitoring body should use reporting obligations of Victoria Police as the basis for regular and timely publishing of statistical analysis of the exercise of police powers.

Recommendation 58. Data published by the monitoring body should be disaggregated to the greatest extent possible, and published in consistent formats, which facilitate analysis and comparison over time.

Expanding the Scope of Monitoring Schemes

There are a large number of 'everyday' police powers which, as discussed above, are intrusive and have serious consequences for people subjected to them, including Aboriginal people. These powers should be within the scope of police monitoring schemes.

VALS has identified a number of police powers and areas of police conduct where monitoring should be instituted. This is not an exhaustive list, and the types of police activity which are subject to monitoring should not be fixed once, never to be revisited. The police oversight system needs the flexibility to identify new areas where potentially problematic conduct needs to be monitored, and to establish new monitoring arrangements as appropriate. This will only be possible with a more unified approach to monitoring of police, since, as identified by the Royal Commission into the Management of Police Informants, current monitoring arrangements are highly fragmented – established under their own pieces of legislation and implemented

by different oversight bodies.[230] A single monitoring body with a broader remit would have the flexibility needed to establish monitoring arrangements as necessary, without needing the creation of a new statutory scheme in every instance.

The areas in which monitoring schemes should be established include:

- *Police stops and searches* – as discussed above.
- *Move-on orders*[231]– these powers give police a significant amount of discretion, making space for biased enforcement. Requiring recording of (at least) Aboriginality, race, gender, and the reason for the order would enable monitoring of whether powers are being used discriminatorily.
- *Any new police powers relating to public intoxication* – when the decriminalisation of public intoxication takes effect, police callouts relating to intoxication should be subject to strict recording requirements, to enable monitoring of whether police are contravening the purpose of public intoxication reforms, by laying other types of charges or misusing any powers (eg. to transport) granted under the reforms.[232]
- *Powers under the Mental Health Act* – similarly to public intoxication, police involvement in mental health crisis incidents should be strictly limited, and the exercise of any powers under the *Mental Health Act*[233] (including new powers under the new Act) should be monitored.
- *Charges against children in out-of-home care* – Victoria Police has made commitments under the *Framework to reduce criminalisation of young people in residential care.*[234] Requiring detailed reporting before and after any arrests or charges would potentially help prevent unnecessary police contact, and allow monitoring of whether police commitments are being met.
- *Arrest of children and young people* – the *Children, Youth and Families Act 2005* creates a presumption in favour proceeding by way of summons, rather than arresting a child or young person.[235] However, police regularly fail to apply this presumption in

230 Royal Commission into the Management of Police Informants, *Final Report: Volume III*, pp234-5.

231 *Summary Offences Act* (s. 6).

232 Expert Reference Group on Decriminalising Public Drunkenness (2020), *Seeing the Clear Light of Day: Report to the Victorian Attorney-General*, pp48-50 and Recommendation 25.

233 *Mental Health Act 2014*, s. 351.

234 Department for Families, Fairness and Housing (2020), *Framework to reduce criminalisation of young people in residential care*.

235 Section 345, *Children, Youth and Families Act 2005* (Vic).

practice[236] and Aboriginal children are substantially over-represented in arrests.[237]

- *Cautioning* – cautions for young people play an important role in reducing unnecessary contact with the criminal legal system and avoiding the risk of further offending. Regularly published statistics would enable monitoring of whether police commitments to expand the use of cautions are being met.
- *Diversion* – diversion offers an important alternative to criminal prosecution for many offences and can help reduce reoffending and incarceration rates. At present, police consent is required for a person charged with an offence to enter a court-based diversion program.[238] Police should be required to prepare reports whenever this consent is not given, enabling monitoring of aggregate consent rates and substantive review of a sample of individual decisions.
- *Use of weapons at rallies/protests (rubber bullets, oleoresin capsicum spray, armoured vehicles etc.)* – police should be required to prepare written reports explaining why the use of this equipment was required and demonstrating that all alternatives were properly considered. These reports should be audited for accuracy and consistency with the public record, and in some cases subjected to substantive review.
- *Treatment in police custody, including use of force, drug testing, strip searching* – people in police custody are particularly vulnerable to physical harm and traumatisation by police decisions. Documenting of actions such as the use of force, drug testing and strip searching would enable the monitoring body to assess whether these measures are being overused.
- *Medical care in police custody* – people in custody are entirely dependent on police decision-making for their medical needs to be met and their health to be protected. There should be thorough documentation of police decisions about contacting a doctor, calling an ambulance, or decisions not to seek medical assistance when a person in custody has requested it.
- *Police bail* – documentation of decisions about whether to grant police bail should facilitate regular publication of statistics about how often bail is being denied, whether bail denials are disproportionately affecting Aboriginal people, and how often people in custody are subsequently granted bail by a magistrate or bail justice. The decrease in bail being granted by police or a bail justice has been a major factor in Victoria's increasing incarceration rate, and more effective monitoring of bail is crucial to

236 Data from the Crimes Statistics Agency shows that between January 2018 and December 2019, police were substantially more likely to arrest Aboriginal children and young people aged 10 to 17 years than proceed in any other way. See CCYP, Our Youth Our Way, 2020, p. 430.

237 CCYP (2020), *Our Youth Our Way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system*, p. 430.

238 Victorian Parliament (2022), *Inquiry into Victoria's Criminal Justice System*, p218.

understand and address the causes of this problem.[239]

- *Custody Notification Service (**CNS**), bail justice, Aboriginal Community Justice Panels (**ACJP**), Independent Third Person services, and Youth Referral and Independent Third Person services* – people in custody have a right to various supports including notification to VALS' CNS and ACJPs for Aboriginal people, access to a bail justice, support from an Independent Third Person for those with cognitive disabilities, and the Youth Referral and Independent Person Program. Regular statistics should be published on the number of requests for these supports and the time taken to provide them, broken down by Aboriginal status and by police station.

Many of these powers would benefit even from the introduction of procedural monitoring schemes, provided that those arrangements included the elements described above to avoid being 'mere' reporting schemes.

Outcome-focused monitoring, through a substantive review of a sample of files, would provide further benefits in many of these areas. This is particularly the case in relation to police custody, where the circumstances and decisions should be comprehensively recorded so that they can be reviewed in detail. In some areas, particularly those involving the exercise of powers by police on the street, a substantive review of individual incidents may not be possible (unless a specific complaint has been brought and can be investigated by the complaints body.) Outcome-focused monitoring of these powers should primarily take the form of trend analysis, as discussed above.

RECOMMENDATIONS

Recommendation 59. The scope of procedural and substantive monitoring should be expanded to a wider range of police powers than the currently monitored major investigative powers, including powers that are frequently exercised in the community or disproportionately impact on Aboriginal people and other marginalised communities. These should include:

- Police stops and searches
- Move-on orders
- Any new police powers relating to public intoxication
- Powers under the Mental Health Act and future relevant Acts
- Charges against children in out-of-home care
- Arrest of child or young person rather than proceeding by way of summons
- Cautioning
- Diversion
- Use of weapons at rallies/protests (rubber bullets, OC spray, armoured vehicles etc.)

239 VALS (2021), *Submission to the Inquiry into Victoria's Criminal Justice System*, pp54-5.

- Use of force during arrest
- Treatment in police custody, including use of force, drug testing, strip searching and provision of medical care
- Police bail decisions
- Police use of Custody Notification Service (**CNS**), bail justices, Aboriginal Community Justice Panels (**ACJP**) and Independent Third Person services.

Recommendation 60. The monitoring body should be granted the flexibility to establish monitoring arrangements in new areas of police conduct as appropriate, not restricted to an established list of monitoring areas.

Police Record-keeping

A fully effective police oversight system will require an improvement in Victoria Police's record-keeping, to expand both the range of matters recorded and the level of detail that records involve. While there are some areas in which police do currently keep records, and the necessary action is to use these records for improved monitoring, as discussed above, there are also many areas of police operations where record-keeping is inadequate.

In addition, the Government needs to incorporate new record-keeping requirements into any and all changes it makes to police powers and duties in the future. For example, the planned decriminalisation of public intoxication may involve new police powers to detain (without arresting) people who are intoxicated in public, under certain circumstances. To ensure these powers are not used inappropriately, the Expert Reference Group on public intoxication reform recommended that:

> **Victoria Police keeps detailed records of the enquiries they make in relation to locating a safe place for the person, including any reasons for concluding that the location is not a safe place, such as risk of family violence.**[240]

It remains essential that this recommendation is implemented. Similar consideration must be given to record-keeping as a safeguard whenever the powers or duties of police are being amended.

Record-keeping obligations must be enacted through legislation rather than regulations or Victoria Police policy. This is critical to ensure that record-keeping standards are not weakened,

240 Expert Reference Group on Decriminalising Public Drunkenness (2020), *Seeing the Clear Light of Day: Report to the Victorian Attorney-General*, Recommendation 25.

or routinely altered in a way that makes it difficult to compare records over time.

Legislation should also establish penalties for police officers and PSOs who fail to comply with record-keeping requirements. These could include disciplinary action as well as civil or criminal sanctions in more serious cases. Without clear penalties, there is a risk that police will see their record-keeping obligations as an unimportant paperwork requirement. Legislation and policy must make clear that record-keeping is a crucial accountability measure and a key part of building confidence in Victoria Police.

RECOMMENDATION

Recommendation 61. Victoria Police should be required by legislation to keep detailed records in relation to the exercise of specific police powers, and provide disaggregated data to an independent body for the purposes of monitoring. Data collection and collation should adhere to the principles of Indigenous Data Sovereignty.

Detention Inspections in Compliance with OPCAT

Under the *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (**OPCAT**), the Australian Government is required to establish and maintain a National Preventive Mechanism (**NPM**) with jurisdiction to visit "any place under its jurisdiction and control where persons are or may be deprived of their liberty."[241] In Australia, OPCAT will be implemented through a national network of bodies fulfilling the functions of an NPM.[242] The Victorian Government has responsibility for designating and maintaining a body or group of bodies to fulfil the functions of the NPM in Victoria,[243] with the support of the Commonwealth Government.

The powers exercised by NPMs established under OPCAT are an example of preventative inspections or monitoring, as opposed to reactive complaints handling and investigations. While the NPM's jurisdiction will be much broader than police custody, its oversight of police cells and other places of police detention (such as vehicles) will be a critical part of the police oversight system in Victoria.

To ensure this part of the oversight system is effective, it is crucial that the jurisdiction of the NPM in Victoria is not inappropriately limited. As noted by the Australian Human Rights Commission, OPCAT does not permit any temporal limit – such as a minimum time in custody – to be imposed on when oversight obligations are engaged.[244] OPCAT implementation in Victoria must include all police places of detention. This will provide for routine, unannounced visits to police cells and vehicles to ensure that conditions are adequate and that people's rights and welfare are being protected.

The importance of robust detention oversight of police custody has been demonstrated:

> **Carver and Handley, in their study on whether prevention of torture works, found that despite the fact that the greatest risk of torture (noting this study did not extend to ill-treatment) is in police custody, monitoring bodies focused more on prisons.**

241 *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Article 3(1). According to Article 3(2), "deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority."

242 Commonwealth Ombudsman, *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)*, September 2019, p. 7.

243 Ibid.

244 Australian Human Rights Commission, *Implementing OPCAT in Australia* (2020), p. 8.

They recommended that monitoring bodies more frequently visit police stations. Similarly, the UN *Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (SPT) recognises that 'while all detainees are in a position of vulnerability, those in police cells awaiting questioning and those in pretrial custody… are particularly vulnerable.[245]

Australia ratified OPCAT in December 2017, and the deadline for implementation of its legal obligations was January 2022. The Australian Government then sought a further one year extension, until January 2023. Progress has stalled, seemingly as a result of Victorian and Commonwealth Governments disputing who is responsible for funding OPCAT implementation. In fact, this is a joint responsibility, and they are both shirking that responsibility.[246] The Commonwealth Government has ratified OPCAT and voluntarily signed up to meeting obligations under OPCAT, and it is the Victorian Government's criminal legislation the leads to people being arrested, it is the Victorian Government's legislation that regulates the conduct of its police force, and it is the Victorian Government that is responsible for other key legislation, such as the bail laws.

The urgent need to implement OPCAT in Victoria has been identified by the Victorian Ombudsman, who carried out two OPCAT style investigations in custodial facilities in 2017 and 2019.[247] The Victorian Government had not responded to the Ombudsman's recommendation to establish, and properly resource, a NPM in Victoria.[248] According to the Ombudsman, "DJCS has advised that a considerable amount of work has been done on the government's implementation of its responsibilities under OPCAT, and that a lack of public statements about OPCAT is not an indicator that progress is not being made."[249]

Since June 2020, the Government has remained silent on its "considerable" progress. The only information in the public record is the allocation of $500,000 for OPCAT implementation

245 VALS, *Building Back Better: COVID-19 Recovery Plan*, p. 110.

246 Lachsz, *Dragging its feet on torture prevention: Australia's international shame* (December 2021), available at https://theconversation.com/dragging-its-feet-on-torture-prevention-australias-international-shame-171729

247 Victorian Ombudsman, *Implementing OPCAT in Victoria: Report and inspection of Dame Phyllis Frost Centre*, 2017; Victorian Ombudsman, *OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people* (2019), p. 61.

248 Victorian Ombudsman (2020). *Ombudsman's Recommendations – Third Report*, p. 14.

249 Ibid., p. 14.

between 2021-2025.[250] This is woefully inadequate, and VALS is concerned that this once in a generation opportunity is being squandered.

In August 2021, the Commonwealth Government released the Commonwealth Closing the Gap Implementation Plan, which dedicates funding over two years (2021-2022) to support states and territories to implement OPCAT.[251] Although the document indicates the amount of funding for other actions under the Plan, it is silent on the amount of funding that will be provided to States and Territories for OPCAT implementation.[252] The funding is also, seemingly, just a one-off, rather than ongoing funding.

VALS takes this opportunity to reiterate the recommendations that it has made previously. The Victorian Government must be transparent and provide a public update on its progress in implementing OPCAT. VALS and the Aboriginal Justice Caucus expect the Victorian Government to engage in robust consultations in developing an appropriate model and legislation for Victoria.

You can find out more about OPCAT from VALS' OPCAT factsheet and *Unlocking Victorian Justice webinar*, *OPCAT: An opportunity to prevent the ill-treatment, torture and death of Aboriginal and Torres Strait Islander people in custody*. VALS' Head of Policy, Communications and Strategy also completed a Churchill Fellowship on culturally appropriate OPCAT implementation for Aboriginal and Torres Strait Islander people.

RECOMMENDATIONS

Recommendation 62. The operations, policies, frameworks and governance of the designated detention oversight bodies under OPCAT (NPMs) must be culturally appropriate and safe for Aboriginal people.

Recommendation 63. The Victorian Government must urgently undertake robust, transparent and inclusive consultations with the Victorian Aboriginal community, its representative bodies and ACCOs on the implementation of OPCAT in a culturally appropriate way.

250 VALS (2021), 'This International Day in Support of Victims of Torture, the Andrews Government must do better on OPCAT'.

251 Commonwealth of Australia (2021). *Commonwealth Closing the Gap Implementation Plan*, p. 48. The funding is linked to Targets 10 (By 2031, reduce the rate of Aboriginal and Torres Strait Islander adults held in incarceration by at least 15%) and Target 11 (By 2031, reduce the rate of Aboriginal and Torres Strait Islander young people (10-17 years) in detention by at least 30%).

252 Ibid., pp. 152 and 157.

Recommendation 64. In accordance with Article 3(1) of OPCAT, the NPM in Victoria must have jurisdiction over all places where individuals are or may be detained by Victoria Police or Protective Service Officers, regardless of the length of time of detention.

Recommendation 65. The Victorian Government must legislate for the NPM's mandate, structure, staffing, powers, privileges and immunities.

Recommendation 66. The Victorian and Commonwealth Governments must ensure that the NPM is sufficiently funded to carry out its mandate effectively. OPCAT implementation is a joint responsibility of the Commonwealth and State Governments.

Victorian Aboriginal Legal Service

Accountability for Implementation

Victoria Police should be required to report annually to the independent complaints body providing information on implementation of recommendations. This report may not be made public in its entirity and should therefore provide highly detailed information on the progress of implementation, any barriers to implementation, and Victoria Police's plans for ongoing implementation of recommendations. The independent complaints body should prepare an annual report to be tabled in Parliament, based on Victoria Police's report and its own investigation and analysis, discussing Victoria Police's progress in implementing its recommendations.

In addition, VALS and the Aboriginal Justice Caucus have for many years called for the establishment of an Aboriginal Social Justice Commissioner to monitor Aboriginal justice outcomes in Victoria.[253] This would include monitoring implementation of recommendations from the Royal Commission into Aboriginal Deaths in Custody, and recommendations from coronial inquests. The functions of the proposed Aboriginal Social Justice Commissioner should also include monitoring implementation of recommendations from the independent police complaints body.

RECOMMENDATIONS

Recommendation 67. The Victorian Government should establish an independent, statutory office of the Aboriginal Social Justice Commissioner. This office should be properly funded and report directly to the Parliament. The mandate of the Commissioner should include monitoring the implementation of RCIADIC recommendations, as well as recommendations from coronial inquests into Aboriginal deaths in custody.

253 VALS & Djirra, 26 March 2021, 'It is time for a Victorian Aboriginal and Torres Strait Islander Social Justice Commissioner'.

Artwork

The artwork used in this document was originally designed by Gary Saunders for the Victorian Aboriginal Legal Service.

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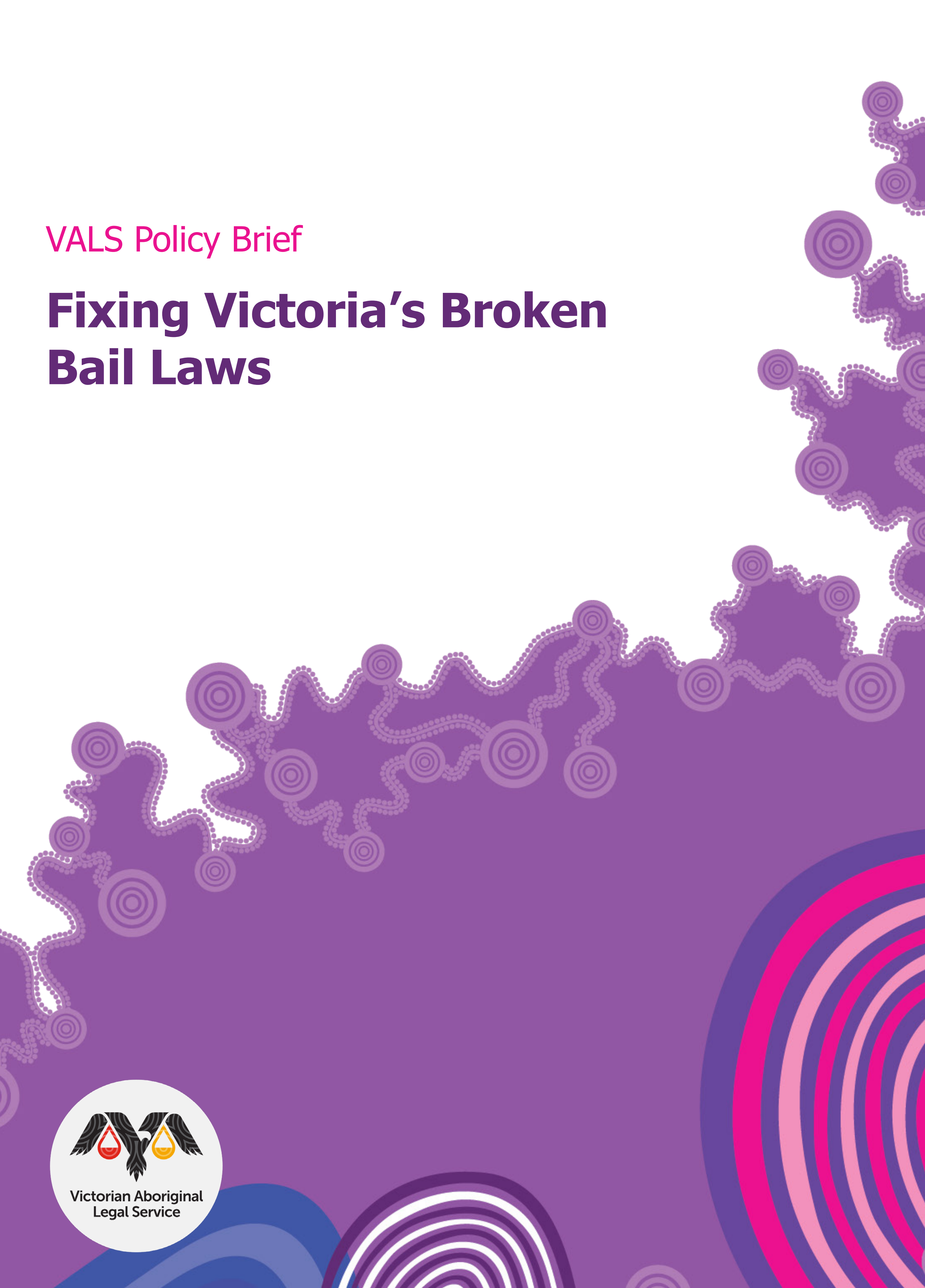


VALS Policy Brief

Fixing Victoria's Broken Bail Laws

Victorian Aboriginal Legal Service

In 2017-18, in response to the Bourke Street incident, the Victorian Government changed the bail laws to make it easier to lock people up before criminal charges are finalised. The changes aimed to restrict access to bail for individuals accused of serious violent offences; however, they have had wider and more devastating impacts.

The punitive bail system has disproportionately impacted Aboriginal and/or Torres Strait Islander people, and has resulted in a dramatic increase in the number of Aboriginal people in prison who have not been sentenced. This is the opposite of what the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**) recommended, over thirty years ago.

Bail and Remand Data

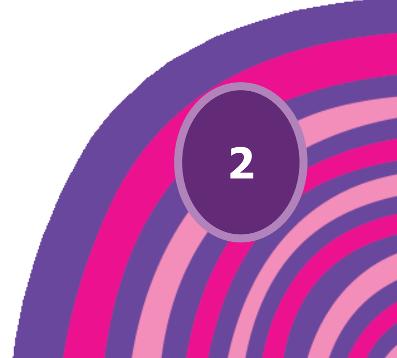
- In June 2021, 51% of Aboriginal people in prison in Victoria were on remand, compared to 32% in June 2017 and 20% in June 2010.
- In June 2019, 57.5% of Aboriginal women in prison in Victoria were on remand, compared to 48% in June 2017 and 29.6% in June 2010.
- Between 2009-2010 and 2019-2020, the number of Aboriginal women entering prison on remand increased by 440%, compared to a 210% increase for the total prison.
- In June 2019, 46.7% of Aboriginal men in prisons in Victoria were on remand, compared to 30% in June 2017 and 19% in June 2010.
- In 2020-2021, 68.7% of Aboriginal children in youth custody in Victoria were on remand on an average day.

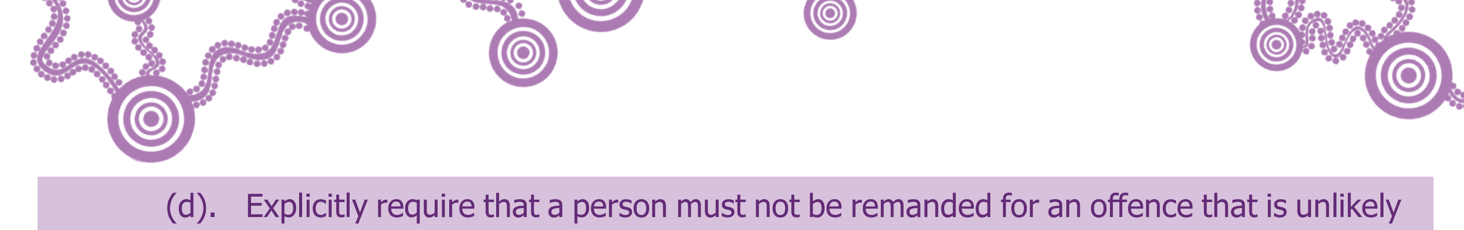
Note: VALS notes that this data is dated, and recommends that the Victorian Government publish, on a monthly basis, disaggregated, up-to-date data in relation to remand rates for Aboriginal people (and specifically women and children). Such an approach would align with its commitment under the Closing The Gap Agreement and Implementation Plan.

Recommendations

1. The bail laws must be urgently amended to:

   (a). Remove the presumption against bail;
   (b). Create a presumption in favour of bail for all offences, with the onus on the prosecution to demonstrate that bail should not be granted due to there being a specific and immediate risk to the physical safety of another person; a serious risk of interfering with a witness; or the person posing a demonstrable flight risk;
   (c). Clarify that "flight risk" is a risk that the person will flee the jurisdiction. Bail must not be refused due to a risk that the person will not attend court for other reasons;





(d). Explicitly require that a person must not be remanded for an offence that is unlikely to result in a sentence of imprisonment; and
(e). Remove the offences of committing an indictable offence while on bail, breaching bail conditions and failure to answer bail.

2. Bail hearings must take place in person, unless absolutely necessary, as the decision to grant or refuse bail is one of the most significant decisions in a criminal matter, and provides a critical opportunity to assess the person's health and welfare.

3. The Department of Justice and Community Safety (**DJCS**) should increase the number and diversity of bail justices, particularly in regional and rural areas. There should be targeted efforts at recruiting Aboriginal and/or Torres Strait Islander people as bail justices.

4. Bail justice hearings should not take place via Audio-Visual Link (**AVL**) unless absolutely necessary. There should be a prescriptive and legally enforceable protocol to ensure that remote bail justice hearings are strictly limited.

5. Aboriginal Community Justice Panels (**ACJP**) should be adequately funded to provide culturally safe support to Aboriginal people in police custody, including during police bail or bail justice hearings.

6. Access to an Independent Third Person (**ITP**) must be a legislated right for any person who has a disability or mental illness. ITPs should receive extensive training on cultural awareness and systemic racism, that is developed and implemented by Aboriginal communities.

7. To ensure that bail decision makers genuinely comply with their obligation to consider someone's Aboriginality, the bail laws should be amended so that:

   (a). If someone is unrepresented in a bail hearing, the bail decision maker must be required to make inquiries as to whether the person is Aboriginal;
   (b). All bail decision makers must be required to explain how they have discharged their obligation to consider Aboriginality in bail decisions. This would require bail decision makers to explain what information they have taken into account to understand why and how someone's Aboriginality is relevant to the bail hearing. It is not acceptable that an individual identifies as Aboriginal, yet their Aboriginality is not considered or referred to during the bail hearing.

8. When considering someone's Aboriginality in relation to a bail decision, courts and other bail decision makers should consider relevant matters identified in case law and coronial

findings, including:

(a). "over-policing of Aboriginal communities and their overrepresentation amongst the prison population;"
(b). Aboriginality is relevant to bail decisions even if the individual's connection to their Aboriginality and culture has been intermittent throughout their life;
(c). "Cultural connection can play a significant role in the rehabilitation of offenders who are of Aboriginal heritage;"
(d). The importance of supporting and encouraging Aboriginal people to learn more about their Aboriginality and strengthen their family bonds;
(e). Custody is likely to be disruptive to the person's "personal and cultural development";
(f). The availability of support "based on therapeutic community principles and Aboriginal cultural practices";
(g). If the decision whether or not to grant bail is a close one, the person's Aboriginality should weigh in favour of them being granted bail; and
(h). Breach of bail conditions by non-attendance at court should not be grounds for bail refusal and should be avoided due to the adverse impact on Aboriginal people (*see Coronial Inquest into the Death of Mr. Ward in Western Australia in 2008*).

9. VALS should be funded to work with Aboriginal communities to develop a formal guide and training for bail decision makers (police, bail justices, magistrates and judges), so that they understand the relevance of Aboriginality for bail decisions. These resources should include information on the unique systemic and background factors affecting Aboriginal people in the justice system, including the way that colonisation has impacted on their lives, families and communities. They should also identify the strengths of Aboriginal communities, including connection to culture, language and Country, and non-custodial, culturally-appropriate alternatives to remand. These resources should also be used by practitioners representing/who may represent Aboriginal and/or Torres Strait Islander people, and prosecutors.

10. All bail decision makers (police, bail justices, magistrates and judges), and practitioners representing/who may represent Aboriginal and/or Torres Strait Islander people, and prosecutors must be required to undertake mandatory training on cultural awareness and the requirement to consider Aboriginality in bail decisions, including, but not limited to, leading court decisions on this issue. Training must be delivered on a regular basis, not just as a "one off."

11. To improve access to culturally safe bail proceedings across Victoria, it is critical to:

    (a). Provide funding to VALS to provide a culturally safe duty lawyer service at the Bail and Remand Court (BaRC);
    (b). Ensure that all Aboriginal people appearing at BaRC are visited by an Aboriginal person employed by the court, when they first arrive at the Melbourne Custody Centre;
    (c). Give priority to Aboriginal applicants appearing at BaRC;
    (d). Increase access to after-hours bail courts across all of metro and regional Victoria, and for children.

12. The Government should work with Koori Courts and Aboriginal communities to consider how Koori Courts can be expanded to hear bail applications.

13. The Government and the Magistrates Court of Victoria must increase the number of Koori workers in the Court Integrated Support Service (**CISP**).

14. To increase access to bail, the Government must invest in:

    (a). Culturally safe residential bail accommodation and support;
    (b). Culturally safe drug and alcohol rehabilitation and support services;
    (c). Culturally safe mental health services.

How do the bail laws operate?

When someone is arrested for an offence, they are either granted bail and required to attend court on a certain date; or they are detained in prison or youth prison (held on remand) until they appear in court. Bail is only granted if the tests set out in the bail laws are met.

For some offences, the law provides that someone accused of an offence should be granted bail, unless they present an "unacceptable risk." It is up to the police or prosecutor to prove that the person presents this risk.

For other offences, there are two tests that must be met:

- As a first step, the law states that bail should not be granted, unless the person accused of the offence can demonstrate that there are "exceptional circumstances" or "compelling reasons" for granting bail. This means that there is a presumption against that person getting bail. In deciding whether there are "exceptional circumstances" or "compelling reasons" for granting bail, all "surrounding circumstances" must be considered, including

if the person is Aboriginal. If this step is not satisfied, bail is refused.

- If step one is satisfied, the bail decision maker must also consider whether the person poses an "unacceptable risk." It is up to the police or prosecutor to prove that there is a risk.

Creating a double hurdle for these other offences, and putting the burden on the person to prove that they deserve bail, can make it incredibly difficult to get bail. It also means that someone who is charged with multiple low-level offences (e.g. possession of drugs for personal use, shoplifting, bail offences) must meet the same test to access bail, as someone who is charged with murder or terrorism offences.

Who decides whether or not to grant bail?

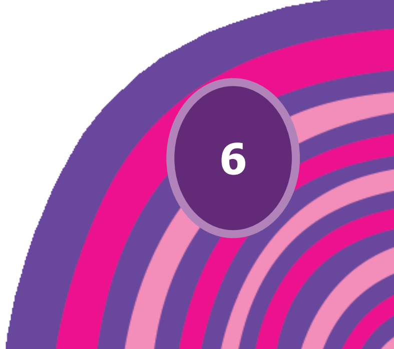
The decision to grant bail or detain someone can be made by police, a bail justice, or the court (a judge or magistrate). Bail justices are members of the community, who attend a police station when someone is arrested, and decide whether or not the person should be granted bail. If someone is accused of more serious offences, only a court can grant bail.

Regardless of who makes the decision to grant or refuse bail, the bail hearing should take place in person, unless absolutely necessary. This decision is one of the most important decisions during a criminal matter, with serious ramifications for the person's health and wellbeing, and the eventual outcome of their matter. If a bail hearing takes place in person, it is easier for the bail decision maker to assess the person's welfare and treatment in police custody, and the person is more likely to engage with the bail decision maker.

Do the bail laws apply to children?

The bail laws apply to both adults and children, including children as young as 10 years old, who can be held criminally responsible for an offence in Victoria.

For children, the bail decision maker must consider several issues when making a decision about bail. This includes: all other options before detaining the child; the need to strengthen the child's relationships with family and carers; the importance of not interrupting the child's living arrangements, education, training or employment; the likely sentence if the child is found guilty of the offence; and the need to minimise the stigma resulting from detention. Bail cannot be refused because the child does not have adequate accommodation.



What are bail offences?

Since 2013, there have been three criminal offences relating to bail:

- failure to answer bail;
- breaching bail conditions; and
- committing an indictable offence whilst on bail.

Breaching bail conditions and committing an indictable offence whilst on bail are both punishable by up to 3 months imprisonment; whereas the penalty for failing to answer bail is punishable by up to 2 years imprisonment.

These offences are harmful and serve no purpose other than to further criminalise people who are already criminalised. The law should be amended to remove all three bail offences.

If someone does not attend court when they are meant to, they may be charged with the offence of breaching bail conditions by non-attendance at court, even when they have a reasonable explanation. This contradicts the recommendations of RCIADIC, which recognised the need for supports, transport and infrastructure to facilitate Aboriginal people attending courts. Instead of further criminalising people, courts should adjourn proceedings for Aboriginal people who have extenuating circumstances, and where there is a reasonable explanation.

Although the offence of breaching bail conditions does not apply to children under 18 years, police sometimes seek to "punish" children by applying for bail to be revoked if the child has breached bail conditions. This leads to the child being locked up and undermines the legal requirement that children should only be detained as a last resort. This practice highlights the need for stronger police accountability.

What were the key changes to the bail laws in 2017 - 2018?

One of the biggest changes in 2018 was to expand the presumption against bail. Prior to 2018, the presumption against bail only existed for a small number of offences. Since 2018, it applies to over 100 offences, which is more than anywhere else in Australia.

The presumption against bail means that the burden is on the accused person to demonstrate why they should be granted bail. This is contrary to international human rights law and the *Victorian Charter of Human Rights and Responsibilities*, which provides that an accused person

must be presumed innocent until proven guilty. Additionally, international law provides that pre-trial detention must be a last resort.

The presumption against bail now applies to cumulative low-level offences (e.g. possession of drugs for personal use, shoplifting, bail offences) which has had a disproportionate impact on Aboriginal people, because they are often targeted by police.

How have the 2017 - 2018 changes to the bail laws impacted Aboriginal people?

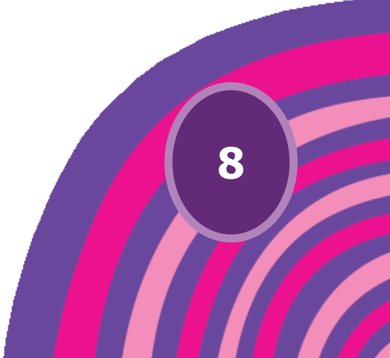
Aboriginal people have suffered disproportionality as a result of the punitive bail system. Aboriginal women have been particularly affected and are now the fastest growing demographic in Victoria's prisons. In June 2019, 57.5% of Aboriginal women in prisons in Victoria had not been sentenced. Many of these women are victim-survivors of family violence and mothers. They need support, not a prison cell.

Aboriginal children in Victoria are also subjected to the same punitive bail system, and are disproportionality impacted. In 2020-2021, 68.7% of Aboriginal children youth custody were on remand. Although bail decision makers are required to consider certain issues in relation to children (as set out above), the high percentage of Aboriginal children on remand shows that the law is wholly inadequate and fundamentally fails to keep our children out of custody.

Over thirty years ago, the RCIADIC recommended that governments should "revise any criteria which inappropriately restricts the granting of bail to Aboriginal people" and that prison must only be used "as a sanction of last resort." **The Victorian Government's punitive bail system has done exactly the opposite.**

The immediate harm caused by detaining an Aboriginal person is significant and far-reaching. Detention separates an individual from their family, community, Country and culture, and jeopardises their health, wellbeing and safety, including through increasing rates of people self-harming in custody. Detention also disrupts education and may result in loss of housing, employment or custody of dependent children.

Additionally, being detained on remand can affect sentencing outcomes and future contact with the justice system. If someone is remanded, they are more likely to receive a custodial sentence, because they have effectively already been "punished" for their offending. Once someone has received a prison sentence, they are more likely to be refused bail if they are arrested again, and are more likely to receive a more severe sentence if they are sentenced again in the future.



What is VALS’ position on the bail laws?

VALS has been advocating for changes to bail laws for years. In July 2021, VALS sent an open letter (signed by 55 organisations) and an expert petition (signed by over 250 experts) to relevant Ministers calling for urgent bail reform. We have still not received an official response. In March 2022, VALS launched a community bail petition calling on the government to take urgent action.

In relation to the 2017-18 changes, VALS position is that the bail laws must be urgently amended to:

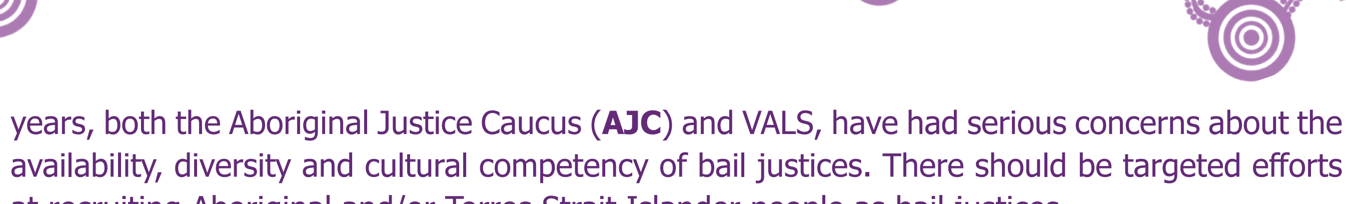
- Remove the presumption against bail;
- Create a presumption in favour of bail for all offences, with the onus on the prosecution to demonstrate that bail should not be granted due to there being a specific and immediate risk to the physical safety of another person; a serious risk of interfering with a witness; or the person posing a demonstrable flight risk;
- Clarify that “flight risk” is a risk that the person will flee the jurisdiction. Bail must not be refused due to a risk that the person will not attend court for other reasons;
- Explicitly require that a person must not be remanded for an offence that is unlikely to result in a sentence of imprisonment; and
- Remove the offences of committing an indictable offence while on bail, breaching bail conditions and failure to answer bail.

Our proposed changes would make Victoria’s bail laws more closely reflect the RCIADIC recommendations and international laws. It would save the Victorian Government many millions of dollars that could then be invested in communities.

What is a bail justice hearing?

When someone is arrested outside of ordinary court hours, the decision to grant bail or detain someone can sometimes be made by a bail justice (the law includes some restrictions on when a bail justice can hear a bail application). Bail justices are particularly important in regional and rural areas, where court sitting times are less frequent and there is a higher risk of individuals being remanded in police custody while they wait to access a court.

While bail justice hearings aim to increase access to bail, there are not enough bail justices to meet demand, meaning that it is not always possible for a bail justice to attend the police station when required. Current data on bail justices is not publicly available. However, in 2017, there were 220 bail justices. 77% were male and 81% were over the age of 50 years. For many



years, both the Aboriginal Justice Caucus (**AJC**) and VALS, have had serious concerns about the availability, diversity and cultural competency of bail justices. There should be targeted efforts at recruiting Aboriginal and/or Torres Strait Islander people as bail justices.

To increase access to bail justices, Victoria Police and the Department of Justice and Community Safety (**DJCS**) are currently trialling remote bail justice hearings via audio visual link (**AVL**). VALS does not support this approach because it is critical for a bail hearing to take place in person. Bail justice hearings should not take place via AVL unless absolutely necessary. There should be a prescriptive and legally enforceable protocol to ensure that remote bail justice hearings are strictly limited.

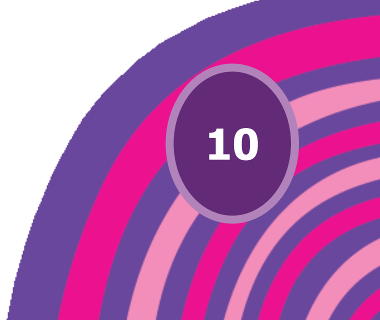
While it is essential to increase access to bail justices, remote hearings via AVL are not the answer. DJCS must increase the number and diversity of bail justices urgently.

Additionally, bail justices must be required to complete regular training on cultural awareness, unconscious bias and anti-racism, that is developed and implemented by Aboriginal communities.

What support is available for Aboriginal people if bail is decided by a bail justice or police?

If the decision to bail or remand is made by the police or a bail justice, it will happen at the police station. Usually, the person accused of the offence does not have a lawyer at this stage. There is limited support available to Aboriginal people during a bail justice hearing, or for police bail.

- Whenever an Aboriginal person goes into police custody, police must contact the Custody Notification System (**CNS**) run by VALS. CNS Officers call the relevant police station to check on the health and welfare of the person, and can connect them to a VALS lawyer if they would like legal advice. VALS lawyers do not attend the police station or provide support during a bail justice hearing, however, they can provide advice leading up to the hearing.
- Non-legal support may also be provided by a volunteer from the Aboriginal Community Justice Panel (**ACJP**), including helping the person to understand the process and/or to help connect them to relevant services or identify accommodation. However, ACJP is a volunteer service with limited capacity. ACJP should be adequately funded to provide culturally safe support to Aboriginal people in police custody, including in relation to bail.
- If someone has a disability or a mental illness, they can also get non-legal support from an Independent Third Person (**ITP**). ITPs are independent from police and the bail justice and provide safe and effective support to people in police custody, including during a bail



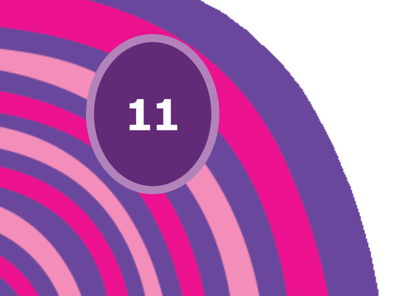
justice hearing. Currently, the Victorian Police Manual (**VPM**) requires the police to call an ITP if the person has a disability or mental illness. However, there are many instances where this does not happen. To create more accountability, the law should be changed so that police must notify everyone in their custody about the ITP service, and organise an ITP if the person may be eligible and would like to have one present. As this is not a specialised service for Aboriginal people, ITPs should do extensive cultural awareness training that is developed and implemented by Aboriginal communities.

- Children and young people can receive advice and support from the Central After Hours Assessment and Bail Placement Service (**CAHABPS**), which is run by DJCS, and must be contacted by Victoria Police prior to a bail hearing for a child. CAHABPS can provide advice about bail and the bail hearing, and can also help the young person to find accommodation and/or refer them to support services. CAHABPS may also advocate on behalf of the child during the hearing or organise for a lawyer to be present. However, this is not a specialised service for Aboriginal people.
- Finally, if a parent or guardian is not available, children and young people can also access support through the Youth Referral and Independent Person Program (**YRIPP**). This includes independent support in relation to bail decisions that are made at the police station, either by police or a bail justice. Although this is not a specialised service for Aboriginal children and young people, Independent Persons receive training to help them best support an Aboriginal child or young person.

Do bail decision makers consider Aboriginality in bail decisions?

In 2010, the bail laws were amended to reduce the number of Aboriginal people on remand. Since then, all bail decision makers are required to into account "any issues that arise due to the person's Aboriginality, including: (a) the person's cultural background, including the person's ties to extended family or place; and (b) any other relevant cultural issue or obligation." This obligation applies to all bail decisions, including whether or not to grant bail, whether certain bail conditions should be imposed and whether an individual committed a bail offence.

In addition, the law was amended in 2018 to explicitly require bail decision makers to consider someone's Aboriginality as a "surrounding circumstance," when they consider whether there are "exceptional circumstances" or "compelling reasons" for granting bail. Although the intention behind these changes is positive, and has resulted in some positive court decisions, it has not resulted in less Aboriginal people on remand. This is because the requirement to consider Aboriginality in bail decisions is not properly understood or applied. Many bail decision makers have a fundamental lack of understanding about what it means to be Aboriginal in Victoria, and



a lack of appreciation for the diversity amongst Aboriginal communities.

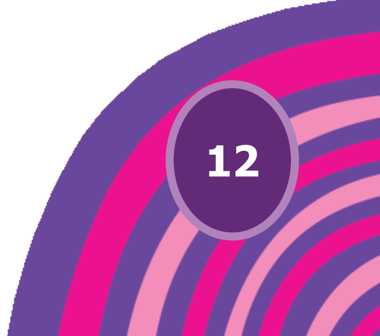
The requirement to consider Aboriginality in bail decisions is also undermined because bail decision makers generally adopt a deficit approach that focuses on "risk," rather than a strengths-based approach. It is the same in sentencing decisions, where Aboriginal peoples' background and circumstances are seen as a problem rather than a strength.

Aboriginal people have the oldest continuous culture on earth. Connection to community and Country is the foundation of that culture and a great strength. Refusing bail disconnects Aboriginal people from this strength. It is harder for them to receive guidance from Elders and can cause tremendous distress.

More work must be done to ensure that there is space in both bail and sentencing processes to better understand an Aboriginal person's life and circumstances, including the "aspirations, interests, strengths, connections, culture, and supports of the individual, as well as the adverse impact of colonial and carceral systems on their life."

To ensure that bail decision makers genuinely understand and comply with their obligation to consider someone's Aboriginality:

- The bail laws should be amended so that:
    - If someone is unrepresented in a bail hearing, the bail decision maker must be required to make inquiries as to whether the person is Aboriginal;
    - All bail decision makers must be required to explain how they have discharged their obligation to consider Aboriginality in bail decisions. This would require bail decision makers to explain what information they have taken into account to understand why and how someone's Aboriginality is relevant to the bail hearing.
- Courts and other bail decision makers should consider relevant matters identified in case law and coronial findings, including:
    - "over-policing of Aboriginal communities and their overrepresentation amongst the prison population;"
    - Aboriginality is relevant to bail decisions even if the individual's connection to their Aboriginality and culture has been intermittent throughout their life;
    - "Cultural connection can play a significant role in the rehabilitation of offenders who are of Aboriginal heritage";
    - The importance of supporting and encouraging Aboriginal people to learn more about their Aboriginality and strengthen their family bonds;
    - Custody is likely to be disruptive to the person's "personal and cultural development";



- The availability of support "based on therapeutic community principles and Aboriginal cultural practices;"
- If the decision whether or not to grant bail is close, the person's Aboriginality should weigh in favour of them being granted bail; and
- Breach of bail conditions by non-attendance at court should not be grounds for bail refusal and should be avoided due to the adverse impact on Aboriginal people *(see Coronial Inquest into the passing of Mr. Ward in Western Australia in 2008)*.

- VALS should be funded to work with Aboriginal communities to develop a formal guide and training for bail decision makers (police, bail justices, magistrates and judges), so that they understand the relevance of Aboriginality for bail decisions. These resources should include information on the unique systemic and background factors affecting Aboriginal people in the justice system, including the way that colonisation has impacted on their lives, families and communities. They should also identify the strengths of Aboriginal communities, including connection to culture, language and Country, and non-custodial, culturally-appropriate alternatives to remand. These resources should also be used by practitioners representing/who may represent Aboriginal and/or Torres Strait Islander people, and prosecutors.

Do bail decision makers undertake cultural awareness training?

Although information regarding the training requirements for bail decision makers is not publicly available, it appears that cultural awareness training is not mandatory for all bail decision makers. This may be one reason why bail decision makers do not properly understand or apply their obligations to consider someone's Aboriginality in relation to all bail decisions.

To address this gap:

- All bail decision makers (police, bail justices, magistrates and judges) must be required to undertake mandatory training on cultural awareness, unconscious bias, anti-racism and the requirement to consider Aboriginality in bail decisions (including leading court decisions on this issue);
- Defence lawyers and prosecution should also be required to complete mandatory cultural awareness training;
- Training must be completed regularly, not as a "one-off"
- Aboriginal organisations should be funded to work with Aboriginal communities to develop and deliver this training.

What is the Bail and Remand Court?

Since 2018, after hours bail applications can be heard at the Bail and Remand Court (**BaRC**), which operates 7 days a week from 9:30am to 9pm. However, BaRC is only located at the Melbourne Magistrates Court, meaning that it is not accessible for people in regional areas. There is no equivalent of BaRC for children.

BaRC is a generalist court which is not culturally appropriate for Aboriginal people. To improve access to culturally appropriate bail proceedings across Victoria, it is critical to:

- Provide funding to VALS to provide a culturally safe duty lawyer service at BaRC (currently only VLA is funded to provide duty lawyers at BaRC);
- Ensure that all Aboriginal people appearing at BaRC are visited by an Aboriginal person employed by the court when they first arrive at the Melbourne Custody Centre;
- Give priority to Aboriginal applicants appearing at BaRC;
- Increase access to after-hours bail courts across Victoria and for children;
- Increase access to culturally appropriate bail proceedings, by expanding the jurisdiction of Koori Courts to hear bail applications (see below).

Do Koori Courts grant bail?

Koori Courts were established in Victoria in 2002 in response to the RCIADIC. Currently, an Aboriginal person who has a matter at the Magistrates Court, County Court or Children's Court, can choose to go to Koori Court rather than the generalist court. However, Koori Courts are sentencing courts; they do not hear contested matters and do not deal with bail applications.

In some parts of Canada, there are specialised bail courts for Aboriginal people. Similar to Koori Courts in Victoria, these specialised bail courts have judges/magistrates who are more familiar with the issues experienced by Aboriginal people, resulting in more culturally appropriate hearings and bail decisions than in generalist courts.

To reduce the number of Aboriginal people on remand and ensure that bail decision makers properly consider someone's Aboriginality, it is essential to provide access to culturally appropriate bail proceedings. The Government should work with Koori Courts and Aboriginal communities to look at how Koori Courts can be expanded to hear bail applications.

Are bail conditions culturally appropriate for Aboriginal people?

When someone is granted bail, the bail decision maker sets bail conditions, including that the individual must attend court when required. During the period of bail, the person must comply with these conditions. Breaching bail conditions "without reasonable excuse" is a criminal offence, punishable by up to 3 months imprisonment.

When setting bail conditions, bail decision makers are required to take into account "any issues that arise due to the person's Aboriginality, including: (a) the person's cultural background, including the person's ties to extended family or place; and (b) any other relevant cultural issue or obligation." Yet bail decision makers regularly impose onerous and culturally inappropriate bail conditions, like non-association with a relative. This is particularly problematic when bail is granted by police.

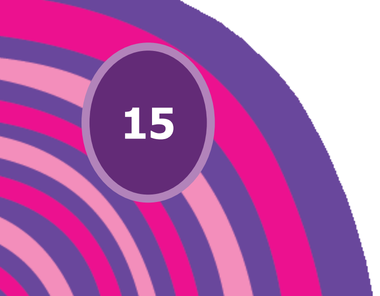
Bail decision makers are also required to take into account "any issues that arise due to a person's Aboriginality" when they assess compliance with bail conditions; yet the approach taken is often punitive.

What support is available for Aboriginal people on bail?

Bail support in Victoria is provided through the Court Integrated Support Service (**CISP**), which seeks to reduce re-offending rates by assisting people to access support services. Individuals are eligible for CISP if they have physical or mental disabilities or illnesses; drug and alcohol dependency and misuse issues; inadequate social, family and economic support; or are homeless.

CISP is available at 20 out of the 50 locations of the Magistrates Court of Victoria; and across the state, there are approximately 70 CISP case managers. The Government has committed to increase the number of a Koori CISP case managers, however, information is not publicly available on how many Koori CISP case managers there are in Victoria.

Koori CISP workers are essential as they have expertise and knowledge in relation to culturally safe support services and are able to engage more effectively with Aboriginal people. They are also better placed to take a culturally appropriate approach if a client does not comply with CISP conditions.



One of the key reasons that Aboriginal people cannot access bail is because of a lack of stable accommodation, as well as a significant shortage in culturally safe drug and alcohol rehabilitation and support services, and culturally safe mental health services.

To address this, the Government must invest in:

- Culturally safe residential bail accommodation and support;
- Culturally safe drug and alcohol rehabilitation and support services;
- Culturally safe mental health services.

Additionally, DJCS must work with Aboriginal Community Controlled Organisations, to design community programs suitable to address the needs of Aboriginal people who are appearing before bail courts.

Where can I learn more about the bail laws and bail reform?

- VALS submission to the Parliamentary Inquiry into Victoria's Criminal Justice System
- VALS Open Letter to Victorian Government Ministers
- VALS Bail Reform petition

Acknowledgement of Traditional Owners

The Victorian Aboriginal Legal Services acknowledges all of the traditional owners in Australia and pay our respects to their Elders, past and present. Soveriegnty was never ceded. Always was, always will be, Aboriginal land.

Artwork

The artwork used in this document was originally designed by Gary Saunders, a Bangerang, Wiradjuri, Yorta Yorta and Dja Dja Wurrung man, for the Victorian Aboriginal Legal Service.

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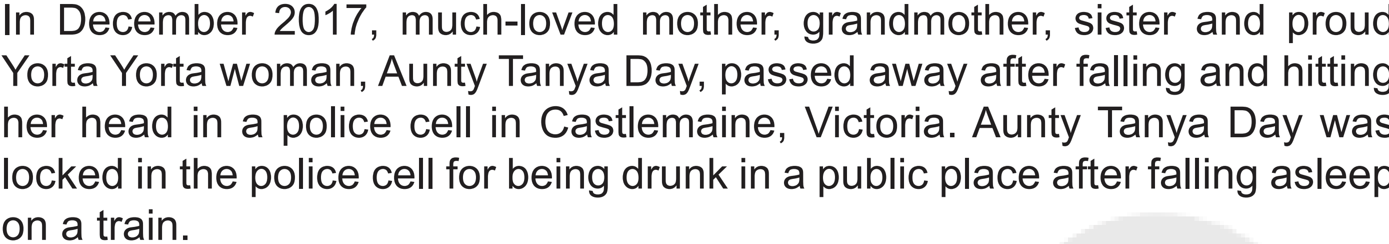
decriminalising public intoxication



In December 2017, much-loved mother, grandmother, sister and proud Yorta Yorta woman, Aunty Tanya Day, passed away after falling and hitting her head in a police cell in Castlemaine, Victoria. Aunty Tanya Day was locked in the police cell for being drunk in a public place after falling asleep on a train.

After almost two years of courageous advocacy by Aunty Tanya Day's family, and over 28 years since the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**), the Government finally committed to decriminalise public drunkenness and to replace it with a public health response in August 2019.

What did the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) say about the criminal offence of public drunkenness?

Between 1987 and 1991, the RCIADIC investigated the deaths of 99 Aboriginal and Torres Strait Islander People across Australia - including three in Victoria - and systemic problems that had contributed to their deaths.

Of the 99 deaths in custody that were investigated by the Commission, 35% involved individuals who were detained by police in relation to public intoxication. In 27 cases, Aboriginal people were detained for the criminal offence of public intoxication. This included the three Victorian cases investigated by the Commission, including Aunty Tanya Day's uncle,

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Harrison Day. A further eight cases involved Aboriginal people in NSW, SA and NT who were detained in relation to public intoxication, under protective custody laws rather than criminal laws.

The RCIADIC made 339 recommendations to end Aboriginal deaths in custody, including that the criminal offence of public drunkenness be abolished and that Governments establish non-custodial facilities for the care and treatment of intoxicated persons, such as sobering up centres. The Commission also recommended that police be required by law to consider and use alternatives to detaining intoxicated people in police cells.

How does the criminal offence of public intoxication affect Aboriginal people?

Criminal charges of public intoxication are disproportionately used by police against Aboriginal people. Whilst Aboriginal people make up 0.8% of the Victorian population, 6.5% of all public intoxication offences between 2014 and 2019 were recorded against Aboriginal people. The arrest and detention of Aunty Tanya Day demonstrates how Aboriginal people are brought to police stations when they pose no danger to anyone and is a clear example of how systemic racism affects Aboriginal people.

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What is protective custody and how does it affect Aboriginal people?

In all States and Territories, aside from Victoria and Queensland, public intoxication is not a criminal offence. However, Aboriginal people continue to be locked up in police cells when they are intoxicated in public. This is because police have the power to detain an intoxicated individual for "their own protection" or the "protection of others". This is called "protective custody" and Aboriginal people continue to be detained under these laws at disproportionate rates to the detriment of their safety and often their lives.

In South Australia, 41% of people who are detained for public intoxication under protective custody laws are Aboriginal. In the Northern Territory, almost everyone who is detained for public intoxication (92%) is Aboriginal.

VALS strongly opposes protective custody laws.

What has happened in Victoria since the RCIADIC?

Since 1991, there have been several inquiries in Victoria that have reaffirmed the need to decriminalise public intoxication, including a Parliamentary Inquiry into Public Drunkenness in 2001 and a 2005 Review of the Government's progress in implementing the RCIADIC recommendations.

Finally, in 2019, on the eve of the Coronial Inquest into the death of Aunty Tanya Day, the Government announced that it would decriminalise public intoxication and replace it with a public health response. The Government

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established an Expert Reference Group (**ERG**), to provide advice on what needed to be done to implement this reform. The ERG included two Aboriginal experts – Nerita Waight, CEO of VALS; and Helen Kennedy, then Chief Operation Officer at VACCHO – and two non-Aboriginal experts, including a former Assistant Commissioner of Police.

What did the Coronial Inquest recommend?

In 2020, the Coronial Inquest into the death of Aunty Tanya Day found that:

- Police should have taken Aunty Tanya to hospital or sought urgent medical attention, instead of arresting and detaining her.
- Aunty Tanya's death was clearly preventable had she not been taken into police custody.
- The checks the police officers conducted on Aunty Tanya whilst she was in the police cell were inadequate, and that the police officers failed to take proper care for Aunty Tanya's safety, security, health and welfare.
- Had the checks been conducted by the police in accordance with the relevant requirements, Aunty Tanya's deterioration may well have been identified and treated appropriately earlier.

The Coroner found that the totality of the evidence supported a belief that an indictable offence may have been committed, and referred two police officers for criminal investigation. The Director of Public Prosecutions did not, however, prosecute.

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The Coroner also recommended that the offence of public intoxication be decriminalised, which the Victorian Government committed to do in August 2019.

What did the Expert Reference Group recommend?

Over 12 months, the ERG carried out extensive research and consultation with key stakeholders, including Aboriginal organisations, Victoria Police, Ambulance Victoria, and other health authorities.

The ERG reported back to the Government in August 2020 yet the Victorian Government still has not yet responded in detail to the ERG recommendations. **Their lack of response will invariably cause difficulties as the sector grapples with forming an appropriate health response without understanding the Victorian Government's position and expectations.**

The ERG made 86 recommendations on decriminalising public intoxication and establishing a public health response. VALS supports some, but not all of these recommendations.

Key ERG recommendations supported by VALS include:

- The criminal offence of public intoxication should be decriminalised.
- No one should be detained in a police cell solely for being intoxicated in public (this means that Victoria should not give police protective custody powers).

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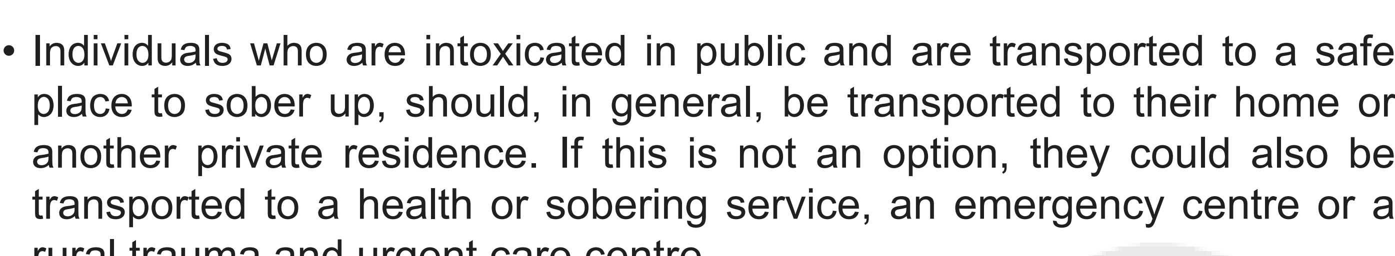

decriminalising public intoxication

- Individuals who are intoxicated in public and are transported to a safe place to sober up, should, in general, be transported to their home or another private residence. If this is not an option, they could also be transported to a health or sobering service, an emergency centre or a rural trauma and urgent care centre.

What is VALS' position on decriminalising public intoxication?

VALS' position on decriminalising public intoxication differs to some of the ERG recommendations. In particular, we support the position of the Day family that **police should not be involved in a public health response to public intoxication.**

Transitioning from a criminal justice to a health response requires cultural, institutional and system reform. It requires significant investment in health-based services, including outreach services, sobering centres and adequate transport capacity. Inadequate funding of the health response must not be used as an excuse to justify involvement of police and/or more extensive police powers.

Aboriginal self-determination must be at the forefront of the new health response, and must be central during the reform process. Aboriginal and/or Torres Strait Islander communities must be empowered to develop and implement Aboriginal-led responses that are culturally safe and tailored to the needs of local communities.

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What is VALS' position on any new powers for First Responders?

If Victoria Police are involved in the public health response, they should only be involved as a **last resort and their role should be strictly limited:**

- The threshold for police involvement (including a referral to police), must be high, where there is a "serious and imminent risk of significant harm to the intoxicated individual or other individuals."
- They should not have the power to detain someone in a public place whilst they identify a safe place where the person can sober-up.
- They should only be able to provide transport to an intoxicated individual in strictly limited circumstances. If police provide transport, they must be required to notify the VALS Custody Notification Service.

The ERG also recommended that as a last resort, there may be instances where health personnel (not including staff at Sobering Services) will need to detain an individual who is intoxicated in public.

VALS strongly opposes detention of intoxicated individuals by health personnel.

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What is VALS' position on safeguards and accountability for First Responders?

If Victoria Police are given new powers to respond to public intoxication, there must be robust safeguards and accountability mechanisms, to ensure that this power is not abused:

- If police are given a power to detain individuals while they identify a safe place for the person to sober up, it should only be exercised if there is "a serious and imminent risk of significant harm to the intoxicated individual or other individuals." Any new detention powers must be limited to a maximum duration of 60 minutes.
- Police must be bound by comprehensive legislation, regulations, guidelines, policies and procedures, to ensure that police discretion is applied appropriately and reasonably to all members of the community.
- Police must be provided with training (including ongoing refresher training) on: cultural awareness; systemic racism; unconscious bias; culturally appropriate service delivery; mental health and disability; de-escalation and conflict resolution.
- Any charges that arise from a public intoxication incident, including any charges relating to assault police, must be authorised by an Inspector.
- Police must be required to keep detailed and publicly available disaggregated data on:
  - All public intoxication incidents involving police.
  - Any enquiries made by police to locate a safe place for the intoxicated person.

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- Use of "move on" powers to direct an intoxicated person to leave a public place.
- Any arrest that is made in relation to a person who is intoxicated in public, including for assault police or other minor offences.

In addition, VALS supports the ERG recommendation that the Victorian Government should empower an oversight body to adjudicate complaints and conduct investigations in relation to the implementation of the public intoxication reforms.

Where is the reform up to now?

In February 2021, the Government passed a law to decriminalise public intoxication. The law was due to come into effect in November 2022; however, the Government wants to delay decriminalisation until November 2023 so that there is more time to establish the health response.

In December 2021, the Government announced that it will trial the new public health response in Shepparton, Dandenong, Castlemaine and the City of Yarra (Melbourne). The trials are currently being established and will include an Aboriginal-led response in each of the trial sites. The trials are expected to inform the state-wide roll out of the health response and any future legislation.

VALS is disappointed that the decriminalisation of public intoxication will not occur as planned in November 2022, as every extra day it takes to implement this reform is another day that Aboriginal people are being

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targeted and locked up under the existing laws. The Government must use this extension to ensure that the health response is culturally safe and that Aboriginal voices are central to the design of the model.

Where can I learn more about the process to decriminalise public intoxication and replace it with a public health response?

- Expert Reference Group on Decriminalising Public Drunkenness, Seeing the Clear Light of Day: Report to the Victorian Attorney-General
- VALS Submission to the Parliamentary Inquiry on Victoria's Criminal Justice System
- Statement from the Day Family (December 2021)

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Victorian Aboriginal Legal Service Submission to the Inquiry into Children of Imprisoned Parents

May 2022

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BACKGROUND TO THE VICTORIAN ABORIGINAL LEGAL SERVICE

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

Legal Services

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

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

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

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

Our Specialist Legal and Litigation Practice, Wirraway, provides legal advice and representation in civil litigation matters against government authorities. This includes for claims involving excessive force or

[1] The term "Aboriginal" is used throughout this submission to refer to Aboriginal and/or Torres Strait Islander peoples.

unlawful detention; police complaints; prisoners' rights issues; and coronial inquests (including deaths in custody).

Community Justice Programs

VALS operates a Custody Notification System (**CNS**). The Crimes Act 1958[2] requires that Victoria Police notify VALS within 1 hour of an Aboriginal person being taken into police custody in Victoria.[3] Once a notification is received, VALS contacts the relevant police station to conduct a welfare check and facilitate access to legal advice if required.

The Community Justice Programs Team also operates the following programs:

- Family Violence Client Support Program[4]
- Community Legal Education
- Victoria Police Electronic Referral System (**V-PeR**)[5]
- Regional Client Service Officers
- Baggarrook Women's Transitional Housing program[6]

Policy, Research and Advocacy

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

ACKNOWLEDGEMENT

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

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

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

- Andreea Lachsz (Head of Policy, Communications & Strategy)
- Negar Panahi (Senior Solicitor, Balit Ngulu)
- Sarah Schwartz (Senior Lawyer, Wirraway Specialist Legal & Litigation Practice)

INTRODUCTION

The Legal and Social Issues Committee (Legislative Council) at the Parliament of Victoria is conducting an inquiry into the children of imprisoned parents.

The Committee is investigating the adequacy of policies and services to assist the children of imprisoned parents in Victoria, with particular reference to:

(a) the social, emotional and health impacts on affected children;

(b) what policies exist and what services are available, including consideration of those in other jurisdictions;

(c) how effective these services are, including —

(i) consideration of evaluation of work already done in this area; and

(ii) identifying areas for improvement.

VALS welcomes the opportunity to make a submission to the Inquiry.

SUMMARY OF RECOMMENDATIONS

Recommendation 1. Existing legislation and policies should be reformed to ensure that Aboriginal people and Aboriginal Community Controlled Organisations (**ACCO**s) are provided access to data collected which concerns Aboriginal individuals and communities. This should also extend to participation in decisions regarding the evaluation and dissemination of such data, in a manner consistent with Indigenous Data Sovereignty (**IDS**) and Indigenous Data Governance (**IDG**). Both IDS and IDG require the meaningful and effective participation of Aboriginal people before decisions are made in relation to policies and legislation concerning Indigenous data.

Recommendation 2. The Victorian Government must commence publicly reporting, on a regular basis, data and information relating to the impact of incarcerating parents (and other primary carers), on children. Particularly, this information should identify when children come into contact with the Child Protection system and/or are removed from their families subsequent to their carers' incarceration. The way this data is reported should be consistent, and presented in a manner which will enable comparisons across different regions of Victoria, and include information on whether parents/carers and children are Aboriginal and/or Torres Strait Islander. It should enable identification of gaps in programs and services, and systemic racism.

Recommendation 3. VALS supports the Council of Europe's recommendations that "before a judicial order or a sentence is imposed on a parent, account shall be taken of the rights and needs of their children and the potential impact on them. The judiciary should examine the possibility of a reasonable suspension of pre-trial detention or the execution of a prison sentence and their possible replacement with community sanctions or measures… Where a custodial sentence is being contemplated, the rights and best interests of any affected children should be taken into consideration and alternatives to detention be used as far as possible and appropriate, especially in the case of a parent who is a primary caregiver."

Recommendation 4. The bail laws must be urgently amended to:

(a) Remove the presumption against bail;

(b) Create a presumption in favour of bail for all offences, with the onus on the prosecution to demonstrate that bail should not be granted due to there being a specific and immediate risk to the physical safety of another person; a serious risk of interfering with a witness; or the person posing a demonstrable flight risk;

(c) Clarify that "flight risk" is a risk that the person will flee the jurisdiction. Bail must not be refused due to a risk that the person will not attend court for other reasons;

(d) Explicitly require that a person must not be remanded for an offence that is unlikely to result in a sentence of imprisonment; and

(e) Remove the offences of committing an indictable offence while on bail, breaching bail conditions and failure to answer bail.

Recommendation 5. Bail hearings must take place in person, unless absolutely necessary, as the decision to grant or refuse bail is one of the most significant decisions in a criminal matter, and provides a critical opportunity to assess the person's health and welfare.

Recommendation 6. The Department of Justice and Community Safety (**DJCS**) should increase the number and diversity of bail justices, particularly in regional and rural areas. There should be targeted efforts at recruiting Aboriginal and/or Torres Strait Islander people as bail justices.

Recommendation 7. Bail justice hearings should not take place via Audio-Visual Link (**AVL**) unless absolutely necessary. There should be a prescriptive and legally enforceable protocol to ensure that remote bail justice hearings are strictly limited.

Recommendation 8. Aboriginal Community Justice Panels (**ACJP**) should be adequately funded to provide culturally safe support to Aboriginal people in police custody, including during police bail or bail justice hearings.

Recommendation 9. Access to an Independent Third Person (**ITP**) must be a legislated right for any person who has a disability or mental illness. ITPs should receive extensive training on cultural awareness and systemic racism, that is developed and implemented by Aboriginal communities.

Recommendation 10. To ensure that bail decision makers genuinely comply with their obligation to consider someone's Aboriginality, the bail laws should be amended so that:

(a) If someone is unrepresented in a bail hearing, the bail decision maker must be required to make inquiries as to whether the person is Aboriginal;

(b) All bail decision makers must be required to explain how they have discharged their obligation to consider Aboriginality in bail decisions. This would require bail decision makers to explain what information they have taken into account to understand why and how someone's Aboriginality is relevant to the bail hearing. It is not acceptable that an individual identifies as Aboriginal, yet their Aboriginality is not considered or referred to during the bail hearing.

Recommendation 11. When considering someone's Aboriginality in relation to a bail decision, courts and other bail decision makers should consider relevant matters identified in case law and coronial findings, including:

(a) "over-policing of Aboriginal communities and their overrepresentation amongst the prison population;"

(b) Aboriginality is relevant to bail decisions even if the individual's connection to their Aboriginality and culture has been intermittent throughout their life;

(c) "Cultural connection can play a significant role in the rehabilitation of offenders who are of Aboriginal heritage;"

(d) The importance of supporting and encouraging Aboriginal people to learn more about their Aboriginality and strengthen their family bonds;

(e) Custody is likely to be disruptive to the person's "personal and cultural development";
(f) The availability of support "based on therapeutic community principles and Aboriginal cultural practices";
(g) If the decision whether or not to grant bail is a close one, the person's Aboriginality should weigh in favour of them being granted bail; and
(h) Breach of bail conditions by non-attendance at court should not be grounds for bail refusal and should be avoided due to the adverse impact on Aboriginal people.

Recommendation 12. VALS should be funded to work with Aboriginal communities to develop a formal guide and training for bail decision makers (police, bail justices, magistrates and judges), so that they understand the relevance of Aboriginality for bail decisions. These resources should include information on the unique systemic and background factors affecting Aboriginal people in the justice system, including the way that colonisation has impacted on their lives, families and communities. They should also identify the strengths of Aboriginal communities, including connection to culture, language and Country, and non-custodial, culturally-appropriate alternatives to remand. These resources should also be used by practitioners representing/who may represent Aboriginal and/or Torres Strait Islander people, and prosecutors.

Recommendation 13. All bail decision makers (police, bail justices, magistrates and judges), and practitioners representing/who may represent Aboriginal and/or Torres Strait Islander people, and prosecutors must be required to undertake mandatory training on cultural awareness and the requirement to consider Aboriginality in bail decisions, including, but not limited to, leading court decisions on this issue. Training must be delivered on a regular basis, not just as a "one off."

Recommendation 14. To improve access to culturally safe bail proceedings across Victoria, it is critical to:

(a) Provide funding to VALS to provide a culturally safe duty lawyer service at the Bail and Remand Court (**BaRC**);
(b) Ensure that all Aboriginal people appearing at BaRC are visited by an Aboriginal person employed by the court, when they first arrive at the Melbourne Custody Centre;
(c) Give priority to Aboriginal applicants appearing at BaRC;
(d) Increase access to after-hours bail courts across all of metro and regional Victoria, and for children.

Recommendation 15. The Government should work with Koori Courts and Aboriginal communities to consider how Koori Courts can be expanded to hear bail applications.

Recommendation 16. The Government and the Magistrates Court of Victoria must increase the number of Koori workers in the Court Integrated Support Service (**CISP**).

Recommendation 17. To increase access to bail, the Government must invest in:

(a) Culturally safe residential bail accommodation and support;

(b) Culturally safe drug and alcohol rehabilitation and support services;

(c) Culturally safe mental health services.

Recommendation 18. The Victorian Government should establish sentencing guidelines that require magistrates and judges to consider the best interests of any affected child when making sentencing decisions.

Recommendation 19. The Victorian Government must support self-determined initiatives to improve sentencing outcomes for Aboriginal people. This includes by directing dedicated funding from *Burra Lotjpa Dunguludja* to the Aboriginal Community Justice Reports[7] project currently carried out by VALS and partners, as well as providing ongoing funding beyond the pilot Project.

Recommendation 20. The Victorian Government should increase community-based sentencing options. This includes creating additional sentencing options between an adjourned undertaking and a Community Corrections Order (**CCO**).

Recommendation 21. The Victorian Government should repeal mandatory sentencing schemes under the Sentencing Act 1991 (Vic), including for the following offences:

(a) Category 1 and Category 2 offences;

(b) Offences against "emergency workers";

(c) Category A and Category B "serious youth offences."

Recommendation 22. Bangkok Rule 63 should be implemented in Victoria, and enshrined in legislation: "Decisions regarding early conditional release (parole) shall favourably take into account women prisoners' caretaking responsibilities, as well as their specific social reintegration needs." VALS recommends expanding this to carers, rather than just limiting the approach to women.

Recommendation 23. The Victorian Government should amend the *Corrections Act 1986* (Vic) to provide for automatic court-ordered parole for sentences under five years.

Recommendation 24. The Victorian Government should repeal Section 77C of the *Corrections Act 1986* (Vic) and adopt a new provision which provides that time spent on parole, before a parole order is cancelled, counts as time served.

Recommendation 25. The Victorian Government should amend the *Corrections Act 1986* (Vic) to include a legislative requirement to have Aboriginal people on the Adult Parole Board. Membership

[7] VALS, Aboriginal Community Justice Reports, https://www.vals.org.au/aboriginal-community-justice-reports/

of the Parole Board must include people with professional backgrounds and with relevant lived experience.

Recommendation 26. The Victorian Government should amend the *Corrections Act 1986* (Vic) and the Adult Parole Board Manual, to provide that parole cannot be denied on the basis that a required program has not been completed, where this program is unavailable or unsuitable for Aboriginal people.

Recommendation 27. The Victorian Government should work with Aboriginal organisations to ensure that Aboriginal people who are incarcerated, particularly Aboriginal women, have access to culturally safe rehabilitation programs. Funding must be given to Aboriginal organisations to design and deliver these programs.

Recommendation 28. The Victorian Government must work with Aboriginal organisations to develop and provide culturally appropriate transitional housing and support for Aboriginal people exiting prison.

Recommendation 29. The Victorian Government must repeal regulation 5 of the *Charter of Human Rights and Responsibility (Public Authorities) Regulation 2013* (Vic), which exempts the Adult Parole Board from the operation of the Charter.

Recommendation 30. The Victorian Government must repeal section 69(2) of the *Corrections Act 1986* (Vic), which provides that the Adult Parole Board is not bound by the rules of natural justice.

Recommendation 31. The Victorian Government must amend the *Corrections Act 1986* to include the purpose of parole and the criteria on which parole decisions are made. The legislated purpose of parole should highlight that the release of the individual on parole will contribute to the protection of society by facilitating their rehabilitation and reintegration into society.

Recommendation 32. The Victorian Government must amend the *Corrections Act 1986* to provide for the following rights of incarcerated people in relation to any decisions made by the Adult Parole Board regarding parole:

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

Recommendation 33. The Victorian Government should provide funding to VALS to provide legal assistance, support and representation to Aboriginal people who are applying for parole.

Recommendation 34. The Victorian Government should amend the *Corrections Act 1986* (Vic) so that the Adult Parole Board is required to take into account cultural considerations when making decisions on parole applications, suspension and cancellation of parole for Aboriginal people. The Adult Parole Board Manual should be amended to provide guidance to the Adult Parole Board on complying with this requirement. All parole officers should be required to undertake mandatory and ongoing cultural awareness training.

Recommendation 35. The Government should invest in culturally appropriate prevention and early intervention services, rather than continuing to rely on imprisonment, with the view to reduce incarceration of Aboriginal and/or Torres Strait Islander parents and other carers.

Recommendation 36. VALS supports the Council of Europe's recommendations that

(a) [d]ue consideration should be given by the police to the impact that arrest of a parent may have on any children present. In such cases, where possible, arrest should be carried out in the absence of the child or, at a minimum, in a child-sensitive manner.
(b) Prior to, or on admission, individuals with caregiving responsibilities for children shall be enabled to make arrangements for those children, taking into account the best interests of the child.
(c) The prison administration shall endeavour to collect and collate relevant information at entry regarding the children of those detained.
(d) At admission, the prison administration should record the number of children a prisoner has, their ages, and their current primary caregiver, and shall endeavour to keep this information up-to-date.
(e) On admission and on a prisoner's transfer, prison authorities shall assist prisoners who wish to do so in informing their children (and their caregivers) of their imprisonment and whereabouts or shall ensure that such information is sent to them.
(f) Enforcing restrictions on contact of an arrested or a remanded parent shall be done in such a way as to respect the children's right to maintain contact with them.

Recommendation 37. VALS supports Her Majesty's Inspectorate Of Prisons' (**HMIP**) requirements that "[w]omen can make immediate contact with their children, families and other people who are significant to them to put in place appropriate care arrangements… Women who have been recently separated from a child or have dependent children in the community are provided with information to allow them to access support services and resources." This obligation should extend to both Victoria Police and prison staff.

Recommendation 38. All carers with dependent children, who are incarcerated (either remanded or sentenced), should be afforded culturally appropriate legal advice and representation, particularly in the event that Child Protection becomes involved. Access to legal advice should be provided as a matter of priority. VALS should receive notifications of child protection involvement where the incarcerated carer is Aboriginal and/or Torres Strait Islander, and should be properly funded to provide

assistance (other legal service providers should also be appropriately funded, for circumstances where VALS is unable to act due to a conflict of interest).

Recommendation 39. Incarcerated parents should be allocated to a facility close to their children, to "facilitate maintaining child-parent contact, relations and visits without undue burden either financially or geographically." Where there is not a prison located close to the child's place of residence, this should be taken into account in bail decision-making and/or sentencing, centring the best of the interests of the child.

Recommendation 40. Children have a right to maintain contact, and their relationship, with their incarcerated parent.

(a) Any "[r]estrictions imposed on contact between [incarcerated parents] and their children shall be implemented only exceptionally, for the shortest period possible."
(b) "A child's right to direct contact shall be respected, even in cases where disciplinary sanctions or measures are taken against the imprisoned parent."

The above should be enshrined in legislation.

Recommendation 41. "Support and information shall be provided by the prison, as far as possible, about contact and visiting modalities, procedures and internal rules in a child-friendly manner."

Recommendation 42. With regard to security considerations related to children visiting their parents:

(a) Legislation should explicitly prohibit any intrusive searches of children, including body cavity searches, strip searches and pat down searches.
(b) "Any searches of [incarcerated people] prior to visits shall be conducted in a manner which respects their human dignity in order to enable them to interact positively with their children during visits."

Recommendation 43. With regard to supporting children to exercise their right to visit, and maintain their relationship with their incarcerated parent:

(a) Visits by children should be facilitated within a week of their parent's detention. Afterwards, "[c]hild-friendly visits should be authorised in principle once a week, with shorter, more frequent visits allowed for very young children, as appropriate".
(b) "[A]uthorities shall endeavour to provide sufficient resources to State agencies and civil society organisations to support children with imprisoned parents and their families… including offering logistic and financial support, where necessary, in order to maintain contact."
(c) "Visits shall be organised so as not to interfere with other elements of the child's life, such as school attendance. If weekly visits are not feasible, proportionately longer, less frequent visits allowing for greater child-parent interaction should be facilitated."

(d) "In cases where the current caregiver is not available to accompany a child's visit, alternative solutions should be sought, such as accompanying by a qualified professional or representative of an organisation working in this field or another person as appropriate."
(e) "When a child's parent is imprisoned far away from home, visits shall be arranged in a flexible manner, which may include allowing prisoners to combine their visit entitlements."

Recommendation 44. With regard to conducting the visit itself:
(a) Children shall be permitted to visit their parent together, regardless of general restrictions that may be in place, such as those used in Corrections Victoria's response to the pandemic.
(b) Children shall be permitted physical contact with their parent.
(c) "Measures should be taken to ensure that the visit context is respectful to the child's dignity and right to privacy, including facilitating access and visits for children with special needs."
(d) **"**Prison visits shall provide an environment conducive to play and interaction with the parent."

Recommendation 45. Visits should be permitted "to take place in the vicinity of the detention facility, with a view to promoting, maintaining and developing child-parent relationships in as normal a setting as possible."

Recommendation 46. Free Zoom meetings should continue to be provided, at least once a week, to facilitate contact between children and their incarcerated parents.

Recommendation 47. With regards to phone calls:
(a) Phone calls from prison facilities should be free.
(b) "When feasible, children should be authorised to initiate telephone communications with their imprisoned parents."

Recommendation 47. There should be a direct mailing system between children and their parents, whereby the incarcerated parent is permitted to keep the original letter or artwork, rather than being provided copies. Parents should be permitted to keep drawings and other artworks that their children have completed in their cells.

Recommendation 48. Parents should be afforded the opportunity to attend significant events in their child's life (including, but not limited to, birthdays, first days of school, events that are of cultural significance, supporting children during difficult events such as funerals, or hospitalisation), free of charge.

Recommendation 49. "Arrangements should be made to facilitate an imprisoned parent, who wishes to do so, to participate effectively in the parenting of their children, including communicating with school, health and welfare services and taking decisions in this respect, except in cases where it is not in the child's best interests."

Recommendation 50. Women should be provided adequate opportunity to bond with their baby after birth. They should have a chance to breastfeed, and also have photos taken at the birth, and in the days afterwards.

Recommendation 51. The opportunity to take photos should also be extended to visits by children.

Recommendation 52. The following Bangkok Rules should be implemented in Victoria:
(a) Rule 42(2) The regime of the prison shall be flexible enough to respond to the needs of pregnant women, nursing mothers and women with children. Childcare facilities or arrangements shall be provided in prisons in order to enable women prisoners to participate in prison activities.
(b) Rule 42(3) Particular efforts shall be made to provide appropriate programmes for pregnant women, nursing mothers and women with children in prison.

Recommendation 53. The following Bangkok Rule should be legislated:
(a) Rule 24 Instruments of restraint shall never be used on women during labour, during birth and immediately after birth

Recommendation 54. The following Bangkok Rules, relating to breastfeeding parents/parents who have recently given birth, should be implemented in Victoria:
(a) Rule 48 (1) Pregnant or breastfeeding women prisoners shall receive advice on their health and diet under a programme to be drawn up and monitored by a qualified health practitioner. Adequate and timely food, a healthy environment and regular exercise opportunities shall be provided free of charge for pregnant women, babies, children and breastfeeding mothers.
(b) Rule 48 (2) Women prisoners shall not be discouraged from breastfeeding their children, unless there are specific health reasons to do so.

Recommendation 55. Given that children are permitted to remain with their mother in prison, the following Bangkok Rules should be implemented in Victoria:
(a) Rule 49 Decisions to allow children to stay with their mothers in prison shall be based on the best interests of the children. Children in prison with their mothers shall never be treated as prisoners.
(b) Rule 50 Women prisoners whose children are in prison with them shall be provided with the maximum possible opportunities to spend time with their children.
(c) Rule 51(1) Children living with their mothers in prison shall be provided with ongoing health-care services and their development shall be monitored by specialists, in collaboration with community health services.
(d) Rule 51(2) The environment provided for such children's upbringing shall be as close as possible to that of a child outside prison.

(e) Rule 33(3) Where children are allowed to stay with their mothers in prison, awareness-raising on child development and basic training on the health care of children shall also be provided to prison staff, in order for them to respond appropriately in times of need and emergencies.
(f) Rule 52(1) Decisions as to when a child is to be separated from its mother shall be based on individual assessments and the best interests of the child…
(g) Rule 52(2) The removal of the child from prison shall be undertaken with sensitivity, only when alternative care arrangements for the child have been identified.

Recommendation 56. The following Bankok Rules should be implemented in Victoria:
(a) Rule 9 If the [incarcerated] woman… is accompanied by a child, that child shall also undergo health screening, preferably by a child health specialist, to determine any treatment and medical needs. Suitable health care, at least equivalent to that in the community, shall be provided.
(b) Rule 15 Prison health services shall provide or facilitate specialised treatment programmes designed for women substance [users], taking into account prior victimisation, the special needs of pregnant women and women with children, as well as their diverse cultural backgrounds.

Recommendation 57. People in detention must be provided medical care that is the equivalent of that provided in the community. Medical care must be provided without discrimination.

Recommendation 58. Health care should be delivered through DHHS rather than DJCS, and not through for-profit organisations.

Recommendation 59. The Federal Government must ensure that incarcerated people have access to the Pharmaceutical Benefits Scheme (**PBS**) and the Medicare Benefits Schedule (**MBS**). The Victorian Government should advocate with the Commonwealth to enable this access in order to provide equivalence of care to Aboriginal people and other vulnerable people held in prison.

Recommendation 60. The Federal and State Governments should ensure that incarcerated people have access to the National Disability Insurance Scheme (**NDIS**) and are assessed for eligibility for NDIS upon entry to a prison or youth justice centre.

Recommendation 61. Incarcerated people must not be required to pay out-of-pocket medical expenses. Incarcerated people have been deprived of their liberty by the State, and are entirely dependent on the State for both their (drastically reduced) income and healthcare provision.

Recommendation 62. Incarcerated people must be entitled to a free, second medical opinion.

Recommendation 63. The Government must properly address the issue of individual and systemic racism, in regards to healthcare in prison. The medical care provided to children and their incarcerated

mother must be provided in a manner that is competent, culturally safe and free from racism or discrimination.

Recommendation 64. A model of delivery of primary health services by Aboriginal Community Controlled Health Organisations in places of detention in Victoria should be considered, in consultation with VACCHO and member organisations.

Recommendation 65. Culturally safe rehabilitation services should be available to people held in prison on remand.

Recommendation 66. Funding for rehabilitation in prisons, including culturally safe rehabilitation support provided by Aboriginal organisations, should be significantly increased.

Recommendation 67. Rehabilitation programs, both in prisons and for people transitioning out of prison or diverted from prison, should be run on a voluntary basis, not penalising or threatening people for breaching behavioural requirements.

Recommendation 68. The Government should provide long-term and stable funding to ACCOs to deliver pre- and post-release programs, including transitional housing programs run by ACCOs, such as VALS' Baggarrook program, to support men and women leaving prison. Assistance provided should be in the form of housing, employment, parenting programs, financial literacy programs and follow-up with drug rehabilitation and counselling.

DETAILED SUBMISSIONS

Introduction: Relevant Rights

Rights Under the *Charter of Human Rights and Responsibilities Act 2006*

VALS highlights the following relevant rights under the Charter:

17 Protection of families and children

> (1) Families are the fundamental group unit of society and are entitled to be protected by society and the State.
> (2) Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.

19 Cultural rights

> (2) Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community—
> > (a) to enjoy their identity and culture; and
> > (b) to maintain and use their language; and
> > (c) to maintain their kinship ties; and
> > (d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

Rights Under the *Convention on The Rights of The Child* (**CRC**)

There are a number of relevant Articles in the CRC, including:

Article 8(1)

> States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and *family relations* as recognized by law without unlawful interference. (emphasis added)

Article 9

> (1) States Parties shall ensure that a child *shall not be separated* from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that *such separation is necessary for the best interests of the child*…

(b) States Parties shall respect the right of the child who is separated from one or both parents to *maintain personal relations and direct contact with both parents on a regular basis*, except if it is contrary to the child's best interests. (emphasis added)

Article 16

(1) *No child shall be subjected to arbitrary or unlawful interference with his or her* privacy, *family*, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
(2) The child has the right to the protection of the law against such interference or attacks.

Article 20 (1)

A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State. (emphasis added)

Introduction: The Impact on Children of Imprisoning their Parents

85% of women in prison in Australia have been pregnant at some point in their lives, and more than half have a dependent child at the time of their imprisonment.[8] Research indicates that approximately 5% of all children in Australia will have an imprisoned parent, while approximately 20% of Aboriginal children will experience the incarceration of a parent.[9]

Themes Arising from VALS' Practice Experience

- For children who have witnessed their parents go in and out of prison throughout their childhood, visiting a parent/parents in prison, going to court regularly, witnessing police contact and arrest, prison and contact with the criminal legal system is normalised. Children then expect the same for their future.
- Some children have committed crimes with their parents/family and their idea of morality is different (or underdeveloped, as is with kids who are assessed and found doli incapax) to that of other children in our community, who are not exposed to the same family dynamics.
- We hear comments such as "mum/dad/aunty made me do it, that's just what we do, I have to". Whether this expectation is verbalised or children intuit this to be the case, it puts them in a difficult position. Even if they really want to break away from that cycle and not have contact with the criminal legal system, it is not easy for them.
- Children with parents in custody/or previously in custody will gravitate towards other children with similar upbringings and often engage in risk-taking behaviour together. It is

[8] Australian Institute of Health and Welfare, *The Health of Australian Prisoners,* 2018, pp. 14 and 72.
[9] Quilty, S. (2011). The Magnitude of Experience of Parental Incarceration in Australia. 12(1) Psychiatry, Psychology and Law 256-257.

evident that those relationships give them a sense of belonging/family that they have not experienced (at least not consistently or in a stable way). Often, as they fall behind in state schools and they are enrolled in alternative schools (like OPTIONS), they connect to peers of similar background in those settings.

- As has been extensively documented, children with Child Protection involvement have a greater risk of youth justice and/or criminal justice involvement. These children have been described as 'crossover kids'.

Increased Contact of Children with the Child Protection System, and Youth and Adult Criminal Legal Systems

Having a parent in prison has a dramatic effect on children's wellbeing and development. If a child continues to live with the other parent or another family member, the disappearance of their imprisoned parent can leave the household in poverty, increasing the likelihood of unstable housing, disengagement from education and a range of other harms. In other cases, particularly when single mothers are imprisoned, children may come into the care of the child protection system. Any of these scenarios greatly increase the risk of children becoming involved in the youth justice system and with the criminal legal system later in life.[10] Rod Barton MP noted that around 77,000 young people have imprisoned parents, and these children are up to six times more likely to end up in prison themselves.[11]

Children of imprisoned parents are at considerably greater risk of being in contact with child protection services. Although there is no routine reporting of the prevalence or outcomes of parental incarceration, children with a history of out-of-home placement are at greater risk of mental ill-health, behavioural issues and poor school performance,[12] as well as increased rates of juvenile detention and adult incarceration.[13] These children are commonly referred to as 'crossover children.' 1 in 3 Aboriginal children who had received diversion or sentences under the existing Victorian youth justice framework had been the subject of child protection reports, while 1 in 6 had been placed in out-of-home care at some point.[14] Furthermore, research conducted by the Australian Law Reform Commission indicates

[10] J Sherwood et al, *Reframing Space by Building Relationships: Community Collaborative Participatory Action Research with Aboriginal Mothers in Prison*, 2013, p.83, 85

[11] Rod Barton, MP. The Invisible Victims of Crime in Victoria. Available at https://rodbarton.com.au/the-invisible-victims-of-crime-in-victoria/.

[12] Dowell, C. Et al. (2018). Maternal Incarceration, child protection, and infant mortality: a descriptive study of women prisoners in Western Australia. 6(2) Health and Justice 1-12, p. 2. Available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5768585/pdf/40352_2018_Article_60.pdf.

[13] Australian Law Reform Commission (2018). Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, at 15.5. Available at https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/; NSW Child, Family and Community Peak Aboriginal Corporation. (2021) The growing link between child protection and incarceration. Available at https://www.absec.org.au/growing-link-between-child-protection-and-incarceration.html.

[14] Commission for Children and Young People. (2021). Our youth, our way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system, p. 81.

90% of Aboriginal young people who appeared in a children's court appeared in adult court within 8 years, with 36% receiving a prison sentence later in life.[15]

The Need for Improved Data Collection and Publication

The issues discussed above are particularly significant for Aboriginal families, given the extensive history of family separation and consequent intergenerational trauma that has been experienced by Aboriginal communities in Australia. Data on the number of children who come into the child protection system as a result of their parents being incarcerated is not being made publicly available by the government, making it impossible to assess the scope of this issue and undermining transparency about the extent to which children are being adversely affected by the criminal legal system's treatment of their parents. In particular, the lack of data makes it difficult to identify what VALS believes is a major factor in worsening this problem – the changes to bail laws, which have led to increased incarceration and extended remand periods, especially for Aboriginal women.

Addressing Systemic Racism

VALS highlights recent developments in Canada, with the introduction of the *Anti-Racism Data Act,* "one of the first pieces of new legislation to be co-developed with Indigenous leadership under the Declaration on the Rights of Indigenous Peoples Act":

> The B.C. government has introduced first of its kind legislation in an attempt to "dismantle systemic racism and discrimination" faced by Indigenous, Black and people of colour in the province. The Anti-Racism Data Act will provide a tool to ensure all the data collected will help identify gaps in programs and services, the province said… for too long, systemic racism and the long-lasting effects of colonialism have unfairly held people back when it comes to education, job opportunities, housing and more… These injustices are compounded when Indigenous Peoples and racialized communities ask for action, only to be told by government to provide evidence using data that is not being collected.[16]

It is clear that the issue of inadequate data being collected, "for the purposes of identifying systemic racism and advancing racial equity,"[17] is not unique to the Victorian context. And yet, robust data is essential to the development of evidence-based, effective policy development, that reflects the lived experiences of people impacted by Government policies (and policy failures). Publishing this data in a regular and accessible manner is fundamental for transparent and accountable government. It is also crucial to addressing systemic racism across government institutions, particularly noting that the Victorian Government has established an "Anti-Racism Taskforce [which] will provide strategic advice

[15] Australian Law Reform Commission (2018). Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, at 15.6. Available at https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/.

[16] B.C. becomes first in North America to introduce Anti-Racism Data Act, Available at https://globalnews.ca/news/8802898/bc-government-systemic-racism-announcement/

[17] B.C.'s new anti-racism legislation allows us to turn intersectional data into systemic change, Available at https://www-theglobeandmail-com.cdn.ampproject.org/c/s/www.theglobeandmail.com/amp/opinion/article-bcs-new-anti-racism-legislation-allows-us-to-intersectional-data-into/

to the Victorian Government on effective approaches to tackling racism in Victoria".[18] VALS draws the Committee's attention to our submission to this Taskforce.[19]

Indigenous Data Sovereignty

The concepts of Indigenous Data Sovereignty and Indigenous Data Governance are a specific exercise of the right to self-determination as enshrined in Article 3 (as well as numerous other Articles) of the *United Nations Declaration on the Rights of Indigenous Peoples*. The following key concepts relating to Indigenous Data Sovereignty were defined by consensus by delegates of the Indigenous Data Sovereignty Summit:[20]

- *Indigenous Data*: 'In Australia… refers to information or knowledge, in any format or medium, which is about and may affect Indigenous peoples both collectively and individually.'
- *Indigenous Data Sovereignty (IDS)*: 'refers to the right of Indigenous peoples to exercise ownership over Indigenous Data. Ownership of data can be expressed through the creation, collection, access, analysis, interpretation, management, dissemination and reuse of Indigenous Data.'
- *Indigenous Data Governance (IDG)*: 'refers to the right of Indigenous Peoples to autonomously decide what, how and why Indigenous Data are collected, accessed and used. It ensures that data on or about Indigenous peoples reflects our priorities, values, cultures, worldviews and diversity.'[21]

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

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

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

[18] See https://www.vic.gov.au/anti-racism-taskforce
[19] VALS, Victorian Aboriginal Legal Service Submission on Victoria's Anti-Racism Strategy, December 2021, available at https://www.vals.org.au/wp-content/uploads/2022/01/VALS-submission-Anti-Racism-Strategy.pdf.
[20] The Indigenous Data Sovereignty Summit was held in Canberra, ACT, on 20 June 2018.
[21] *Indigenous Data Sovereignty, Communique*. Indigenous Data Sovereignty Summit. 20 June 2018, p. 1.

RECOMMENDATIONS

Recommendation 1. Existing legislation and policies should be reformed to ensure that Aboriginal people and Aboriginal Community Controlled Organisations (**ACCO**s) are provided access to data collected which concerns Aboriginal individuals and communities. This should also extend to participation in decisions regarding the evaluation and dissemination of such data, in a manner consistent with Indigenous Data Sovereignty **(IDS)** and Indigenous Data Governance (**IDG**). Both IDS and IDG require the meaningful and effective participation of Aboriginal people before decisions are made in relation to policies and legislation concerning Indigenous data.

Recommendation 2. The Victorian Government must commence publicly reporting, on a regular basis, data and information relating to the impact of incarcerating parents (and other primary carers), on children. Particularly, this information should identify when children come into contact with the Child Protection system and/or are removed from their families subsequent to their carers' incarceration. The way this data is reported should be consistent, and presented in a manner which will enable comparisons across different regions of Victoria, and include information on whether parents/carers and children are Aboriginal and/or Torres Strait Islander. It should enable identification of gaps in programs and services, and systemic racism.

Moving away from Incarcerating Parents: Bail, Sentencing and Parole Reform

VALS is of the view that the impacts of custodial sentences on the children of imprisoned people are not adequately considered during decisions about criminal charges, bail, sentencing and parole of parents/carers. Separating a dependent child from their parent is effectively imposing a punishment on them, and this fact should be recognised when considering the appropriateness of laying charges, making decisions regarding bail/remand, sentencing and parole. The CRC provides that the best interests of a child must be "a primary consideration" in all state actions concerning children,[22] including in judicial proceedings that affect the interests of the child indirectly.[23] However, in practice in Victoria, courts are hesitant to consider children's rights or the hardships that would be experienced by children as a result of the custodial sentences to parents as children are not the 'core business' of the adult criminal legal system.[24]

[22] Article 3(1) of the UNCRC. See also Mole & Sloan (2020), 'Children with imprisoned parents and the European Court of Human Rights', *European Journal of Parental Imprisonment*. Accessed at https://childrenofprisoners.eu/wp-content/uploads/2021/05/EJPI_2020-ENGLISH_COPE.pdf.
[23] Article 12 of the UNCRC.
[24] Flynn, C. et al. (2016). Responding to the needs of the children of parents arrested in Victoria, Australia. The role of the adult criminal justice system. 49(3) Australian & New Zealand Journal of Criminology 351-369, pp. 355-360.

VALS brings to the attention of the Committee the following recommendations of the Council of Europe (**CoE**):[25]

> Without prejudice to the independence of the judiciary, before a judicial order or a sentence is imposed on a parent, account shall be taken of the rights and needs of their children and the potential impact on them. The judiciary should examine the possibility of a reasonable suspension of pre-trial detention or the execution of a prison sentence and their possible replacement with community sanctions or measures.

The Need for Urgent Bail Reform

VALS has recently published a Policy Brief on Victoria's bail laws (Fixing Victoria's Broken Bail Laws[26]), which we encourage the Legal and Social Issues Committee to read. A summary of the recommendations are included below.

In 2017-18, in response to the Bourke Street incident, the Victorian Government changed the bail laws to make it easier to lock people up before criminal charges are finalised. The changes aimed to restrict access to bail for individuals accused of serious violent offences; however, they have had wider and more devastating impacts.

The punitive bail system has disproportionately impacted Aboriginal and/or Torres Strait Islander people, and has resulted in a dramatic increase in the number of Aboriginal people in prison who have not been sentenced. This is the opposite of what the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**) recommended, over thirty years ago.

- In June 2021, 51% of Aboriginal people in prison in Victoria were on remand, compared to 32% in June 2017 and 20% in June 2010.
- In June 2019, 57.5% of Aboriginal women in prison in Victoria were on remand, compared to 48% in June 2017 and 29.6% in June 2010.
- Between 2009-2010 and 2019-2020, the number of Aboriginal women entering prison on remand increased by 440%, compared to a 210% increase for the total prison population.
- In June 2019, 46.7% of Aboriginal men in prisons in Victoria were on remand, compared to 30% in June 2017 and 19% in June 2010.
- In 2020-2021, 68.7% of Aboriginal children in youth custody in Victoria were on remand on an average day.

[25] Council of Europe, Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents

[26] Available at https://www.vals.org.au/wp-content/uploads/2022/05/Fixing-Victorias-Broken-Bail-Laws.pdf

In July 2021, VALS sent an open letter[27] (signed by 55 organisations) and an expert petition[28] (signed by over 250 experts) to Ministers Symes, Hutchins and Williams calling for urgent bail reform. We have still not received an official response. Recently, we have also launched a community petition, calling on urgent bail reform,[29] which has already been signed by 1,473 people.

RECOMMENDATIONS

Recommendation 3. VALS supports the Council of Europe's recommendations that "before a judicial order or a sentence is imposed on a parent, account shall be taken of the rights and needs of their children and the potential impact on them. The judiciary should examine the possibility of a reasonable suspension of pre-trial detention or the execution of a prison sentence and their possible replacement with community sanctions or measures… Where a custodial sentence is being contemplated, the rights and best interests of any affected children should be taken into consideration and alternatives to detention be used as far as possible and appropriate, especially in the case of a parent who is a primary caregiver."

Recommendation 4. The bail laws must be urgently amended to:

(a) Remove the presumption against bail;

(b) Create a presumption in favour of bail for all offences, with the onus on the prosecution to demonstrate that bail should not be granted due to there being a specific and immediate risk to the physical safety of another person; a serious risk of interfering with a witness; or the person posing a demonstrable flight risk;

(c) Clarify that "flight risk" is a risk that the person will flee the jurisdiction. Bail must not be refused due to a risk that the person will not attend court for other reasons;

(d) Explicitly require that a person must not be remanded for an offence that is unlikely to result in a sentence of imprisonment; and

(e) Remove the offences of committing an indictable offence while on bail, breaching bail conditions and failure to answer bail.

Recommendation 5. Bail hearings must take place in person, unless absolutely necessary, as the decision to grant or refuse bail is one of the most significant decisions in a criminal matter, and provides a critical opportunity to assess the person's health and welfare.

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[27] VALS, Bail Reform is Urgently Needed, May 2021, available at Bail-Reform-Letter-May-2021-5.pdf (vals.org.au)
[28] VALS, Expert Petition calling for Urgent Reform of Victoria's Bail Laws, VALS-Bail-Reform-Petition.pdf
[29] Available at https://www.vals.org.au/bail-petition/

Recommendation 6. The Department of Justice and Community Safety (**DJCS**) should increase the number and diversity of bail justices, particularly in regional and rural areas. There should be targeted efforts at recruiting Aboriginal and/or Torres Strait Islander people as bail justices.

Recommendation 7. Bail justice hearings should not take place via Audio-Visual Link (**AVL**) unless absolutely necessary. There should be a prescriptive and legally enforceable protocol to ensure that remote bail justice hearings are strictly limited.

Recommendation 8. Aboriginal Community Justice Panels (**ACJP**) should be adequately funded to provide culturally safe support to Aboriginal people in police custody, including during police bail or bail justice hearings.

Recommendation 9. Access to an Independent Third Person (**ITP**) must be a legislated right for any person who has a disability or mental illness. ITPs should receive extensive training on cultural awareness and systemic racism, that is developed and implemented by Aboriginal communities.

Recommendation 10. To ensure that bail decision makers genuinely comply with their obligation to consider someone's Aboriginality, the bail laws should be amended so that:

(a) If someone is unrepresented in a bail hearing, the bail decision maker must be required to make inquiries as to whether the person is Aboriginal;

(b) All bail decision makers must be required to explain how they have discharged their obligation to consider Aboriginality in bail decisions. This would require bail decision makers to explain what information they have taken into account to understand why and how someone's Aboriginality is relevant to the bail hearing. It is not acceptable that an individual identifies as Aboriginal, yet their Aboriginality is not considered or referred to during the bail hearing.

Recommendation 11. When considering someone's Aboriginality in relation to a bail decision, courts and other bail decision makers should consider relevant matters identified in case law and coronial findings, including:

(a) "over-policing of Aboriginal communities and their overrepresentation amongst the prison population;"

(b) Aboriginality is relevant to bail decisions even if the individual's connection to their Aboriginality and culture has been intermittent throughout their life;

(c) "Cultural connection can play a significant role in the rehabilitation of offenders who are of Aboriginal heritage;"

(d) The importance of supporting and encouraging Aboriginal people to learn more about their Aboriginality and strengthen their family bonds;

(e) Custody is likely to be disruptive to the person's "personal and cultural development";

(f) The availability of support "based on therapeutic community principles and Aboriginal cultural practices";

(g) If the decision whether or not to grant bail is a close one, the person's Aboriginality should weigh in favour of them being granted bail; and

(h) Breach of bail conditions by non-attendance at court should not be grounds for bail refusal and should be avoided due to the adverse impact on Aboriginal people.

Recommendation 12. VALS should be funded to work with Aboriginal communities to develop a formal guide and training for bail decision makers (police, bail justices, magistrates and judges), so that they understand the relevance of Aboriginality for bail decisions. These resources should include information on the unique systemic and background factors affecting Aboriginal people in the justice system, including the way that colonisation has impacted on their lives, families and communities. They should also identify the strengths of Aboriginal communities, including connection to culture, language and Country, and non-custodial, culturally-appropriate alternatives to remand. These resources should also be used by practitioners representing/who may represent Aboriginal and/or Torres Strait Islander people, and prosecutors.

Recommendation 13. All bail decision makers (police, bail justices, magistrates and judges), and practitioners representing/who may represent Aboriginal and/or Torres Strait Islander people, and prosecutors must be required to undertake mandatory training on cultural awareness and the requirement to consider Aboriginality in bail decisions, including, but not limited to, leading court decisions on this issue. Training must be delivered on a regular basis, not just as a "one off."

Recommendation 14. To improve access to culturally safe bail proceedings across Victoria, it is critical to:

(a) Provide funding to VALS to provide a culturally safe duty lawyer service at the Bail and Remand Court (**BaRC**);

(b) Ensure that all Aboriginal people appearing at BaRC are visited by an Aboriginal person employed by the court, when they first arrive at the Melbourne Custody Centre;

(c) Give priority to Aboriginal applicants appearing at BaRC;

(d) Increase access to after-hours bail courts across all of metro and regional Victoria, and for children.

Recommendation 15. The Government should work with Koori Courts and Aboriginal communities to consider how Koori Courts can be expanded to hear bail applications.

Recommendation 16. The Government and the Magistrates Court of Victoria must increase the number of Koori workers in the Court Integrated Support Service (**CISP**).

Recommendation 17. To increase access to bail, the Government must invest in:

(a) Culturally safe residential bail accommodation and support;

(b) Culturally safe drug and alcohol rehabilitation and support services;

(c) Culturally safe mental health services.

Sentencing

VALS brings to the attention of the Committee the following recommendations of the COE:[30]

> Where a custodial sentence is being contemplated, the rights and best interests of any affected children should be taken into consideration and alternatives to detention be used as far as possible and appropriate, especially in the case of a parent who is a primary caregiver.

VALS also draws attention to Rule 64 of the United Nations *Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* (**Bangkok Rules**):

> Non-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent or the woman represents a continuing danger, and after taking into account the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children.

RECOMMENDATIONS

Recommendation 18. The Victorian Government should establish sentencing guidelines that require magistrates and judges to consider the best interests of any affected child when making sentencing decisions.

Recommendation 19. The Victorian Government must support self-determined initiatives to improve sentencing outcomes for Aboriginal people. This includes by directing dedicated funding from *Burra Lotjpa Dunguludja* to the Aboriginal Community Justice Reports[31] project currently carried out by VALS and partners, as well as providing ongoing funding beyond the pilot Project.

Recommendation 20. The Victorian Government should increase community-based sentencing options. This includes creating additional sentencing options between an adjourned undertaking and a Community Corrections Order (**CCO**).

Recommendation 21. The Victorian Government should repeal mandatory sentencing schemes under the Sentencing Act 1991 (Vic), including for the following offences:

(a) Category 1 and Category 2 offences;
(b) Offences against “emergency workers”;
(c) Category A and Category B “serious youth offences.”

[30] Council of Europe, Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents

[31] VALS, Aboriginal Community Justice Reports, https://www.vals.org.au/aboriginal-community-justice-reports/

Parole

As with the above, there needs to be broader reform to Victoria's parole process, as well as specific considerations for incarcerated carers. Many people, especially Aboriginal people, serve out the entirety of their sentence, rather than being released on parole. To reduce the amount of time that children are separated from their parents, there needs to be a fundamental overhaul of the parole system.

RECOMMENDATIONS

Recommendation 22. Bangkok Rule 63 should be implemented in Victoria, and enshrined in legislation: "Decisions regarding early conditional release (parole) shall favourably take into account women prisoners' caretaking responsibilities, as well as their specific social reintegration needs." VALS recommends expanding this to carers, rather than just limiting the approach to women.

Recommendation 23. The Victorian Government should amend the *Corrections Act 1986* (Vic) to provide for automatic court-ordered parole for sentences under five years.

Recommendation 24. The Victorian Government should repeal Section 77C of the *Corrections Act 198*6 (Vic) and adopt a new provision which provides that time spent on parole, before a parole order is cancelled, counts as time served.

Recommendation 25. The Victorian Government should amend the *Corrections Act 1986* (Vic) to include a legislative requirement to have Aboriginal people on the Adult Parole Board. Membership of the Parole Board must include people with professional backgrounds and with relevant lived experience.

Recommendation 26. The Victorian Government should amend the *Corrections Act 1986* (Vic) and the Adult Parole Board Manual, to provide that parole cannot be denied on the basis that a required program has not been completed, where this program is unavailable or unsuitable for Aboriginal people.

Recommendation 27. The Victorian Government should work with Aboriginal organisations to ensure that Aboriginal people who are incarcerated, particularly Aboriginal women, have access to culturally safe rehabilitation programs. Funding must be given to Aboriginal organisations to design and deliver these programs.

Recommendation 28. The Victorian Government must work with Aboriginal organisations to develop and provide culturally appropriate transitional housing and support for Aboriginal people exiting prison.

Recommendation 29. The Victorian Government must repeal regulation 5 of the *Charter of Human Rights and Responsibility (Public Authorities) Regulation 2013* (Vic), which exempts the Adult Parole Board from the operation of the Charter.

Recommendation 30. The Victorian Government must repeal section 69(2) of the *Corrections Act 1986* (Vic), which provides that the Adult Parole Board is not bound by the rules of natural justice.

Recommendation 31. The Victorian Government must amend the *Corrections Act 1986* to include the purpose of parole and the criteria on which parole decisions are made. The legislated purpose of parole should highlight that the release of the individual on parole will contribute to the protection of society by facilitating their rehabilitation and reintegration into society.

Recommendation 32. The Victorian Government must amend the *Corrections Act 1986* to provide for the following rights of incarcerated people in relation to any decisions made by the Adult Parole Board regarding parole:

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

Recommendation 33. The Victorian Government should provide funding to VALS to provide legal assistance, support and representation to Aboriginal people who are applying for parole.

Recommendation 34. The Victorian Government should amend the *Corrections Act 1986* (Vic) so that the Adult Parole Board is required to take into account cultural considerations when making decisions on parole applications, suspension and cancellation of parole for Aboriginal people. The Adult Parole Board Manual should be amended to provide guidance to the Adult Parole Board on complying with this requirement. All parole officers should be required to undertake mandatory and ongoing cultural awareness training.

A Pivot to Community-Based Supports and Services

In VALS' extensive submission to the Criminal Justice Inquiry,[32] we made a number of recommendations relating to improved sentencing practices, and focusing on community-based supports and services, rather than continuing with the current reliance on incarceration. These recommendations are relevant to this Inquiry as well, as the focus should be on avoiding having circumstances where children are deprived of their parents, as a result of their parents' incarceration.

We note the following, from the Bangkok Rules:

> Rule 60 Appropriate resources shall be made available to devise suitable alternatives for women offenders in order to combine non-custodial measures with interventions to address the most common problems leading to women's contact with the criminal justice system. These may include therapeutic courses and counselling for victims of domestic violence and sexual abuse; suitable treatment for those with mental disability; and educational and training programmes to improve employment prospects. Such programmes shall take account of the need to provide care for children and women-only services.
> Rule 62 The provision of gender-sensitive, trauma-informed, women-only substance abuse treatment programmes in the community and women's access to such treatment shall be improved, for crime prevention as well as for diversion and alternative sentencing purposes.

RECOMMENDATIONS

Recommendation 35. The Government should invest in culturally appropriate prevention and early intervention services, rather than continuing to rely on imprisonment, with the view to reduce incarceration of Aboriginal and/or Torres Strait Islander parents and other carers.

Prioritising the Health and Wellbeing of Children During Arrest and Remand

The Bangkok Rules state the following:

> Rule 2(2) Prior to or on admission, women with caretaking responsibilities for children shall be permitted to make arrangements for those children, including the possibility of a reasonable suspension of detention, taking into account the best interests of the children.
> Rule 3(1) The number and personal details of the children of a woman being admitted to prison shall be recorded at the time of admission. The records shall include, without prejudicing the rights of the mother, at least the names of the children, their ages and, if not accompanying the mother, their location and custody or guardianship status.

[32] VALS, Victorian Aboriginal Legal Service Submission on Victoria's Anti-Racism Strategy, December 2021, available at https://www.vals.org.au/wp-content/uploads/2022/01/VALS-submission-Anti-Racism-Strategy.pdf.

VALS brings to the attention of the Committee the following CoE recommendations:[33]

> Due consideration should be given by the police to the impact that arrest of a parent may have on any children present. In such cases, where possible, arrest should be carried out in the absence of the child or, at a minimum, in a child-sensitive manner…
>
> Enforcing restrictions on contact of an arrested or a remanded parent shall be done in such a way as to respect the children's right to maintain contact with them…
>
> The prison administration shall endeavour to collect and collate relevant information at entry regarding the children of those detained…
>
> At admission, the prison administration should record the number of children a prisoner has, their ages, and their current primary caregiver, and shall endeavour to keep this information up-to-date.
>
> Prior to, or on admission, individuals with caregiving responsibilities for children shall be enabled to make arrangements for those children, taking into account the best interests of the child.
>
> On admission and on a prisoner's transfer, prison authorities shall assist prisoners who wish to do so in informing their children (and their caregivers) of their imprisonment and whereabouts or shall ensure that such information is sent to them.

VALS emphasises the importance of detention staff (both police and prison staff) supporting carers to make arrangements for their dependent children, as a matter of urgency, upon their detention. For example, Her Majesty's Inspectorate Of Prisons' (**HMIP**) Expectations require the following:[34]

> Women can make immediate contact with their children, families and other people who are significant to them to put in place appropriate care arrangements. More than one telephone call is allowed if needed…
>
> Women who have been recently separated from a child or have dependant children in the community are provided with information to allow them to access support services and resources…
>
> All potential child safeguarding concerns are relayed to the prison safeguarding lead. Contact is made with children's services as necessary, action is followed up and information is promptly shared with women.

Particularly noting Australia's history of removing children and tearing Aboriginal and Torres Strait Islander families apart, all carers with dependent children, who are incarcerated (either remanded or sentenced), should be afforded culturally appropriate legal advice and representation, particularly in the event that Child Protection becomes involved. Access to legal advice should be provided as a matter of priority. VALS should receive notifications of child protection involvement where the incarcerated carer is Aboriginal and/or Torres Strait Islander, and should be properly funded to provide assistance (other legal service providers should also be appropriately funded, for circumstances where VALS is unable to act due to a conflict of interest).

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[33] Council of Europe, Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents

[34] Her Majesty's Inspectorate Of Prisons, Expectations Criteria for assessing the treatment of and conditions for women in prison, Version 2, 2021, available at https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2021/08/Womens-Expectations-FINAL-July-2021-1.pdf

RECOMMENDATIONS

Recommendation 36. VALS supports the Council of Europe's recommendations that

(g) [d]ue consideration should be given by the police to the impact that arrest of a parent may have on any children present. In such cases, where possible, arrest should be carried out in the absence of the child or, at a minimum, in a child-sensitive manner.

(h) Prior to, or on admission, individuals with caregiving responsibilities for children shall be enabled to make arrangements for those children, taking into account the best interests of the child.

(i) The prison administration shall endeavour to collect and collate relevant information at entry regarding the children of those detained.

(j) At admission, the prison administration should record the number of children a prisoner has, their ages, and their current primary caregiver, and shall endeavour to keep this information up-to-date.

(k) On admission and on a prisoner's transfer, prison authorities shall assist prisoners who wish to do so in informing their children (and their caregivers) of their imprisonment and whereabouts or shall ensure that such information is sent to them.

(l) Enforcing restrictions on contact of an arrested or a remanded parent shall be done in such a way as to respect the children's right to maintain contact with them.

Recommendation 37. VALS supports Her Majesty's Inspectorate Of Prisons' (**HMIP**) requirements that "[w]omen can make immediate contact with their children, families and other people who are significant to them to put in place appropriate care arrangements… Women who have been recently separated from a child or have dependent children in the community are provided with information to allow them to access support services and resources." This obligation should extend to both Victoria Police and prison staff.

Recommendation 38. All carers with dependent children, who are incarcerated (either remanded or sentenced), should be afforded culturally appropriate legal advice and representation, particularly in the event that Child Protection becomes involved. Access to legal advice should be provided as a matter of priority. VALS should receive notifications of child protection involvement where the incarcerated carer is Aboriginal and/or Torres Strait Islander, and should be properly funded to provide assistance (other legal service providers should also be appropriately funded, for circumstances where VALS is unable to act due to a conflict of interest).

The Right of Children to Visit and Stay in Contact with their Parents in Custody

Children have the right to maintain contact with parents while in custody.[35] While the Bangkok Rules specifically address the need for the government to encourage and facilitate visitation of imprisoned mothers, including measures to counterbalance disadvantages,[36] VALS is of the opinion that the rights of the child place an obligation on the Victorian Government to implement such policies and practices in relation to the visitation of parents and other carers generally.[37]

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

- The oppressive and secure nature of the visiting areas in prisons with little attention to the needs of children;
- Surveillance and the lack of privacy during visits; and
- Intimidating and disrespectful attitudes of custodial staff.[38]

While the barriers to visitation of a parent in custody infringe upon the rights of the child, the situation is exacerbated for mothers in custody, who receive fewer visits than fathers while in custody and are at greater risk of losing contact with their children.[39]

Placement of Parents

VALS brings to the attention of the Committee the following CoE recommendations.[40]

> Whenever a parent is detained, particular consideration shall be given to allocating them to a facility close to their children… Apart from considerations regarding requirements of administration of justice, safety and security, the allocation of an imprisoned parent to a particular prison, shall, where appropriate, and in the best interests of their child, be done such as to facilitate maintaining child-parent contact, relations and visits without undue burden either financially or geographically.

[35] Article 9(3) of the UNCRC.
[36] Rule 26 of the Bangkok Rules.
[37] Article 3 and 9 on the UNCRC.
[38] Flynn, C. (2014). Getting there and being there: Visits to prisons in Victoria - the experiences of women prisoners and their children., pp. 179-180.
[39] Ibid., p. 177.
[40] Council of Europe, Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents

RECOMMENDATION

Recommendation 39. Incarcerated parents should be allocated to a facility close to their children, to "facilitate maintaining child-parent contact, relations and visits without undue burden either financially or geographically." Where there is not a prison located close to the child's place of residence, this should be taken into account in bail decision-making and/or sentencing, centring the best of the interests of the child.

Visits by Children to the Prison

Case Study – Frances' children (a pseudonym)

During the pandemic, not all of Frances' children were able to visit her at the same time, due to restrictions. This was really detrimental, as the focus should have been on keeping the children together, as each others' safety net, particularly when visiting their mother in such a foreign environment. This was also particularly important to enable the older children, who had a stronger connection with their mother, to be there at the same time as the younger children, who were not as bonded.

The visiting room was pretty barren, without toys. Frances' children's carer was unable to bring food into the family room (other than baby formula), including bottles of water for the older children, and there was no nutritious food that could be bought there. There was only junk food in the vending machine available.

After visits, Frances' children demonstrated their grief in different ways - regressing, throwing tantrums, swearing, lashing out, screaming, waking up at 3am and swearing/playing. The children could not articulate that they are missing their mum, but the "trauma is unbelievable".

There have been some positives to zoom calls, as this allowed Frances to see where her children are living, including their bedroom and toys. It also meant that Frances could observe the interactions between her children and carers, which was reassuring. However, zoom calls should be additional to child-friendly, in-person visits, not substitutes.

VALS highlights the following from the Corrections Commissioner's Requirements: [41]

> Visits, including video visit contact with children and family, cannot be withdrawn as a punishment for disciplinary offences, *except where it is demonstrably justifiable*… (emphasis added)
>
> The number of visitors (including children under 16 years of age and infants) who will be permitted to visit a prisoner at a time is based on a density quotient of 1 person per 2 square metres in the visit centre…
>
> Visitors and prisoners are permitted to elbow bump or fist bump at the start and end of their visit. At all other times, physical distancing must be maintained, however, staff should be mindful that not having physical contact will be difficult for some visitors, particularly children. Staff should therefore provide a gentle reminder or warning to visitors regarding the requirement for physical distancing. Where a visitor refuses to comply after being reminded/warned to maintain physical distancing, staff may consider terminating the visit.
>
> Only items that can be suitably cleaned/disinfected should be present in the visit centre. The availability of toys, books and play equipment for children, as well as the operation of visit centre canteens and vending machines will depend on health advice at the time of the visit.

In contrast, VALS notes the following Bangkok Rules:

> Rule 23 Disciplinary sanctions for women prisoners shall not include a prohibition of family contact, especially with children.
>
> Rule 26 Women prisoners' contact with their families, including their children, and their children's guardians and legal representatives shall be encouraged and facilitated by all reasonable means. Where possible, measures shall be taken to counterbalance disadvantages faced by women detained in institutions located far from their homes.
>
> Rule 28 Visits involving children shall take place in an environment that is conducive to a positive visiting experience, including with regard to staff attitudes, and shall allow open contact between mother and child. Visits involving extended contact with children should be encouraged, where possible.
>
> Rule 21 Prison staff shall demonstrate competence, professionalism and sensitivity and shall preserve respect and dignity when searching both children in prison with their mother and children visiting prisoners.

Additionally, VALS brings to the attention of the Committee the following CoE recommendations.[42]

> Special measures shall be taken to encourage and enable imprisoned parents to maintain regular and meaningful contact and relations with their children, thus safeguarding their development. Restrictions imposed on contact between prisoners and their children shall be implemented only exceptionally, for the shortest period possible, in order to alleviate the negative impact the restriction might have on children and to protect their right to an emotional and continuing bond with their imprisoned parent…
>
> A child's right to direct contact shall be respected, even in cases where disciplinary sanctions or measures are taken against the imprisoned parent. In cases where security requirements are so extreme as to necessitate non-contact visits, additional measures shall be taken to ensure that the child-parent bond is supported…

[41] Corrections Victoria Commissioner, Commissioner's Requirements, Programs and Industry, 3.2.1 Management of Visits to Prisoners (October 2021)

[42] Council of Europe, Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents

Support and information shall be provided by the prison, as far as possible, about contact and visiting modalities, procedures and internal rules in a child-friendly manner and in different languages and formats as necessary…

Any security checks on children shall be carried out in a child-friendly manner that respects children's dignity and right to privacy, as well as their right to physical and psychological integrity and safety. Any intrusive searches on children, including body cavity searches, shall be prohibited…

Any searches of prisoners prior to visits shall be conducted in a manner which respects their human dignity in order to enable them to interact positively with their children during visits. As far as possible, children shall be authorised to leave the visiting area prior to the imprisoned parent, as this can be traumatic for some children. Where prisoners are provided with clothes by prison authorities, this clothing shall not offend their dignity, particularly during visits with their children…

Children shall be offered the opportunity, when feasible and in the child's best interests, and with the support of an appropriate adult, to visit or receive information (including images) about areas in which their imprisoned parent spends time, including the parent's prison cell.

Children should normally be allowed to visit an imprisoned parent within a week following the parent's detention and, on a regular and frequent basis, from then on. Child-friendly visits should be authorised in principle once a week, with shorter, more frequent visits allowed for very young children, as appropriate…

[A]uthorities shall endeavour to provide sufficient resources to State agencies and civil society organisations to support children with imprisoned parents and their families to enable them to deal effectively with their particular situation and specific needs, including offering logistic and financial support, where necessary, in order to maintain contact…

Visits shall be organised so as not to interfere with other elements of the child's life, such as school attendance. If weekly visits are not feasible, proportionately longer, less frequent visits allowing for greater child-parent interaction should be facilitated…

In cases where the current caregiver is not available to accompany a child's visit, alternative solutions should be sought, such as accompanying by a qualified professional or representative of an organisation working in this field or another person as appropriate…

When a child's parent is imprisoned far away from home, visits shall be arranged in a flexible manner, which may include allowing prisoners to combine their visit entitlements…

Measures should be taken to ensure that the visit context is respectful to the child's dignity and right to privacy, including facilitating access and visits for children with special needs…

A designated children's space shall be provided in prison waiting and visiting rooms (with a bottle warmer, a changing table, toys, books, drawing materials, games, etc.) where children can feel safe, welcome and respected. Prison visits shall provide an environment conducive to play and interaction with the parent…

Consideration should also be given to permitting visits to take place in the vicinity of the detention facility, with a view to promoting, maintaining and developing child-parent relationships in as normal a setting as possible…

Child-parent activities should include extended prison visits for special occasions (Mother's Day, Father's Day, end of year holidays, etc.) and other visits to further the child-parent relationship, in addition to regular visits. Consideration on such occasions should be given to prison and other staff in visiting areas being dressed less formally, in an effort to normalise the atmosphere.

RECOMMENDATIONS

Recommendation 40. Children have a right to maintain contact, and their relationship, with their incarcerated parent.

(c) Any "[r]estrictions imposed on contact between [incarcerated parents] and their children shall be implemented only exceptionally, for the shortest period possible."

(d) "A child's right to direct contact shall be respected, even in cases where disciplinary sanctions or measures are taken against the imprisoned parent."

The above should be enshrined in legislation.

Recommendation 41. "Support and information shall be provided by the prison, as far as possible, about contact and visiting modalities, procedures and internal rules in a child-friendly manner."

Recommendation 42. With regard to security considerations related to children visiting their parents:

(c) Legislation should explicitly prohibit any intrusive searches of children, including body cavity searches, strip searches and pat down searches.

(d) "Any searches of [incarcerated people] prior to visits shall be conducted in a manner which respects their human dignity in order to enable them to interact positively with their children during visits."

Recommendation 43. With regard to supporting children to exercise their right to visit, and maintain their relationship with their incarcerated parent:

(f) Visits by children should be facilitated within a week of their parent's detention. Afterwards, "[c]hild-friendly visits should be authorised in principle once a week, with shorter, more frequent visits allowed for very young children, as appropriate".

(g) "[A]uthorities shall endeavour to provide sufficient resources to State agencies and civil society organisations to support children with imprisoned parents and their families… including offering logistic and financial support, where necessary, in order to maintain contact."

(h) "Visits shall be organised so as not to interfere with other elements of the child's life, such as school attendance. If weekly visits are not feasible, proportionately longer, less frequent visits allowing for greater child-parent interaction should be facilitated."

(i) "In cases where the current caregiver is not available to accompany a child's visit, alternative solutions should be sought, such as accompanying by a qualified professional or representative of an organisation working in this field or another person as appropriate."

(j) "When a child's parent is imprisoned far away from home, visits shall be arranged in a flexible manner, which may include allowing prisoners to combine their visit entitlements."

Recommendation 44. With regard to conducting the visit itself:

(e) Children shall be permitted to visit their parent together, regardless of general restrictions that may be in place, such as those used in Corrections Victoria's response to the pandemic.

(f) Children shall be permitted physical contact with their parent.

(g) "Measures should be taken to ensure that the visit context is respectful to the child's dignity and right to privacy, including facilitating access and visits for children with special needs."

(h) **"**Prison visits shall provide an environment conducive to play and interaction with the parent."

Recommendation 45. Visits should be permitted "to take place in the vicinity of the detention facility, with a view to promoting, maintaining and developing child-parent relationships in as normal a setting as possible."

Other Means by which Children Can Maintain Contact with their Incarcerated Parent

Case Study – Belinda (a pseudonym)

We have been told that it would have been useful to have a direct mailing system between children and their parents. There are significant delays (months) between letters being sent and them being received. Even when Belinda's children's correspondence was shared with Belinda, it was a photocopy, not the original.

Belinda should have been able to keep drawings that her children had done and photos of them in her cell, but this was not facilitated.

VALS brings to the attention of the Committee the following CoE recommendations.[43]

> In accordance with national law and practice, the use of information and communication technology (video-conferencing, mobile and other telephone systems, internet, including webcam and chat functions, etc.) shall be facilitated between face-to-face visits and should not involve excessive costs. Imprisoned parents shall be assisted with the costs of communicating with their children if their means do not allow it. These means of communication should never be seen as an alternative which replaces face-to-face contact between children and their imprisoned parents.
>
> Rules for making and receiving telephone calls and other forms of communication with children shall be applied flexibly to maximise communication between imprisoned parents and their children. When feasible, children should be authorised to initiate telephone communications with their imprisoned parents.

[43] Council of Europe, Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents

RECOMMENDATIONS

Recommendation 46. Free Zoom meetings should continue to be provided, at least once a week, to facilitate contact between children and their incarcerated parents.

Recommendation 47. With regards to phone calls:

(c) Phone calls from prison facilities should be free.

(d) "When feasible, children should be authorised to initiate telephone communications with their imprisoned parents."

Recommendation 47. There should be a direct mailing system between children and their parents, whereby the incarcerated parent is permitted to keep the original letter or artwork, rather than being provided copies. Parents should be permitted to keep drawings and other artworks that their children have completed in their cells.

Leave for Parents

VALS brings to the attention of the Committee the following CoE recommendation:[44]

> Significant events in a child's life – such as birthdays, first day of school or hospitalisation – should be considered when granting prison leave to imprisoned parents.

RECOMMENDATION

Recommendation 48. Parents should be afforded the opportunity to attend significant events in their child's life (including, but not limited to, birthdays, first days of school, events that are of cultural significance, supporting children during difficult events such as funerals, or hospitalisation), free of charge.

[44] Council of Europe, Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents

Opportunities for Parents to Continue to be Involved in Decisions Regarding their Child

VALS brings to the attention of the Committee the following CoE recommendation:[45]

> Arrangements should be made to facilitate an imprisoned parent, who wishes to do so, to participate effectively in the parenting of their children, including communicating with school, health and welfare services and taking decisions in this respect, except in cases where it is not in the child's best interests.

RECOMMENDATION

Recommendation 49. "Arrangements should be made to facilitate an imprisoned parent, who wishes to do so, to participate effectively in the parenting of their children, including communicating with school, health and welfare services and taking decisions in this respect, except in cases where it is not in the child's best interests."

Pregnant and Breastfeeding People, and Children Staying with their Parents in Custody

General

Case Study – Melanie (a pseudonym)

Melanie had a C-section. Usually, women stay in hospital for 5 days after their c-section, but this did not happen for Melanie. There was also no bonding time for Melanie with her baby, who was taken to their carer within a day of Melanie giving birth. Melanie was not able to breastfeed her baby, and so her baby did not get colostrum.

When children are born to mothers who are in custody, photos at the birth are not taken. Families, including Melanie, should not be deprived of the opportunity to capture/document this special moment.

The opportunity to take photos should be extended to visits by children. Irrespective of Melanie's actions that led to her incarceration, she loves her children, and both she and her children deserve to have family photos as the children are growing up, particularly when mothers are serving lengthier prison sentences and the children are young. This is crucial for everyone, and the prison's failure to make such a small accommodation reflected a lack of compassion.

[45] Council of Europe, Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents

RECOMMENDATIONS

Recommendation 50. Women should be provided adequate opportunity to bond with their baby after birth. They should have a chance to breastfeed, and also have photos taken at the birth, and in the days afterwards.

Recommendation 51. The opportunity to take photos should also be extended to visits by children.

VALS has made recommendations below, which reflect the Bangkok Rules, as they relate to pregnant people, breastfeeding parents, and children who remain with their parents in prison. VALS highlights that both legislation and the Commissioner's Requirements should properly address issues relating to pregnancy and birth.

RECOMMENDATIONS

Recommendation 52. The following Bangkok Rules should be implemented in Victoria:

(c) Rule 42(2) The regime of the prison shall be flexible enough to respond to the needs of pregnant women, nursing mothers and women with children. Childcare facilities or arrangements shall be provided in prisons in order to enable women prisoners to participate in prison activities.

(d) Rule 42(3) Particular efforts shall be made to provide appropriate programmes for pregnant women, nursing mothers and women with children in prison.

Recommendation 53. The following Bangkok Rule should be legislated:

(b) Rule 24 Instruments of restraint shall never be used on women during labour, during birth and immediately after birth

Recommendation 54. The following Bangkok Rules, relating to breastfeeding parents/parents who have recently given birth, should be implemented in Victoria:

(c) Rule 48 (1) Pregnant or breastfeeding women prisoners shall receive advice on their health and diet under a programme to be drawn up and monitored by a qualified health practitioner. Adequate and timely food, a healthy environment and regular exercise opportunities shall be provided free of charge for pregnant women, babies, children and breastfeeding mothers.

(d) Rule 48 (2) Women prisoners shall not be discouraged from breastfeeding their children, unless there are specific health reasons to do so.

Recommendation 55. Given that children are permitted to remain with their mother in prison, the following Bangkok Rules should be implemented in Victoria:

(h) Rule 49 Decisions to allow children to stay with their mothers in prison shall be based on the best interests of the children. Children in prison with their mothers shall never be treated as prisoners.
(i) Rule 50 Women prisoners whose children are in prison with them shall be provided with the maximum possible opportunities to spend time with their children.
(j) Rule 51(1) Children living with their mothers in prison shall be provided with ongoing health-care services and their development shall be monitored by specialists, in collaboration with community health services.
(k) Rule 51(2) The environment provided for such children's upbringing shall be as close as possible to that of a child outside prison.
(l) Rule 33(3) Where children are allowed to stay with their mothers in prison, awareness-raising on child development and basic training on the health care of children shall also be provided to prison staff, in order for them to respond appropriately in times of need and emergencies.
(m) Rule 52(1) Decisions as to when a child is to be separated from its mother shall be based on individual assessments and the best interests of the child…
(n) Rule 52(2) The removal of the child from prison shall be undertaken with sensitivity, only when alternative care arrangements for the child have been identified.

The Need for Equivalency of Healthcare in Custody

The provision of high-quality healthcare in prison is essential to maintaining adequate conditions and treatment in custody, and avoiding re-traumatisation. It is also necessary for upholding the human rights and wellbeing of people in prison. This is the basis of the 'equivalence of care' principle, according to which the Government has an obligation to provide equivalent access to medical care for people in detention as those in the community. People held in prisons are completely dependent on the state to provide adequate healthcare.

The *United Nations Standard Minimum Rules for the Treatment of Prisoners* (**the Mandela Rules**) make clear that "prisoners should enjoy the same standards of health care that are available in the community, and should have access to necessary healthcare services free of charge, without discrimination on the grounds of their legal status."[46] The obligation to provide equivalence of medical care to people deprived of their liberty is echoed in *the International Covenant on Economic, Social and Cultural Rights*, which emphasises "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[47]
The Victorian Charter of Human Rights and Responsibilities requires that "[a]ll persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human

[46] United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), UN Doc A/RES/70/175 (17 December 2015).
[47] International Covenant on Economic, Social and Cultural Rights, Article 12.

person".[48] The Victorian Coroners Court has found, in its inquest into the death of Yorta Yorta woman Aunty Tanya Day, that in custodial settings this requires police and prison staff to ensure access to medical care, given that people detained are completely dependent on the state to provide for their health.[49]

Last year, a Guardian analysis of 474 Aboriginal and/or Torres Strait Islander Deaths in Custody since 1991, on the 30th anniversary of the report of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), found that:

> For both Aboriginal and Torres Strait Islander people and non-Indigenous people, the most common cause of death was medical problems, followed by self-harm. However, Indigenous people who died in custody were *three times more likely not to receive all necessary medical care*, compared to non-Indigenous people. For Indigenous women, the result was even worse – *less than half received all required medical care* prior to death.[50] (emphasis added)

A recent tragic example of the apparent lack of equivalence in healthcare in Victorian prisons involved the death of a 12-day-old baby in the mothers and children unit at Dame Phyllis Frost Centre on 18 August 2018. Despite efforts made by the mother and a fellow incarcerated person to elicit assistance to attempt to resuscitate the baby, the prison officers and nurse that arrived in the cell allegedly failed to engage in any efforts to perform CPR.[51] The failure of officers and healthcare staff to attempt to perform lifesaving measures on a newborn baby would be extremely unlikely if the situation had occurred within the greater Victorian community.

VALS bring to the attention of the Committee the following Bangkok Rules:

> Rule 9 If the woman prisoner is accompanied by a child, that child shall also undergo health screening, preferably by a child health specialist, to determine any treatment and medical needs. Suitable health care, at least equivalent to that in the community, shall be provided.
>
> Rule 15 Prison health services shall provide or facilitate specialized treatment programmes designed for women substance abusers, taking into account prior victimization, the special needs of pregnant women and women with children, as well as their diverse cultural backgrounds.

Victoria is unusual among Australian states and territories in not providing healthcare in places of detention through its health department, but through private providers sub-contracted by the Department of Justice and Community Safety.[52] This arrangement falls short of international human

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[48] Charter of Human Rights and Responsibilities Act 2006, s22(1).
[49] Coronial Inquest into the Death of Tanya Day, [533].
[50] Allam, L. et al. (2021). The facts about Australia's rising toll of Indigenous deaths in custody. Available at https://www.theguardian.com/australia-news/2021/apr/09/the-facts-about-australias-rising-toll-of-indigenous-deaths-in-custody.
[51] Schelle, C. (2021) Coroner to probe newborn baby's tragic death in Melbourne prison. News.com.au. Available at https://www.news.com.au/national/victoria/courts-law/coroner-to-probe-newborn-babys-tragic-death-in-melbourne-prison/news-story/0679b4ba482860ecf392dc6d3ce5ac3a.
[52] For further information concerning contracted providers of healthcare in Victorian prisons, see https://www.corrections.vic.gov.au/justice-health.

rights standards which are themselves inadequate in many respects, and the lack of transparency around places of detention makes scrutiny of healthcare provision extremely difficult.

Equivalence of care, particularly for Aboriginal people with serious health issues, and a need for culturally safe healthcare services, can only be delivered with substantial resourcing. This requires greater investment from the state Government, but there is also a need for people in prison to have access to funding from Medicare and the Pharmaceutical Benefits Scheme, to ensure that resources are available to provide all the care needed to the same standard enjoyed in the community. This is particularly important for Aboriginal people, as there are a number of specific items in the Medicare Benefits Schedule which support enhanced screenings, assessments and health promotion activities for Aboriginal people. These streams of Medicare funding are critical to the operation of Aboriginal health services.[53] Access to Medicare funding for people in prison would enable the expansion of in-reach care in prisons by Aboriginal health services. It would also bring funding arrangements in line with those for people in the community. ACCHOs receive direct state and federal funding, as well as being eligible for Medicare funding streams. Similar funding arrangements should be available in relation to custodial settings to ensure the same quality of care can be provided.[54]

RECOMMENDATIONS

Recommendation 56. The following Bankok Rules should be implemented in Victoria:

(a) Rule 9 If the [incarcerated] woman… is accompanied by a child, that child shall also undergo health screening, preferably by a child health specialist, to determine any treatment and medical needs. Suitable health care, at least equivalent to that in the community, shall be provided.

(b) Rule 15 Prison health services shall provide or facilitate specialised treatment programmes designed for women substance [users], taking into account prior victimisation, the special needs of pregnant women and women with children, as well as their diverse cultural backgrounds.

Recommendation 57. People in detention must be provided medical care that is the equivalent of that provided in the community. Medical care must be provided without discrimination.

Recommendation 58. Health care should be delivered through DHHS rather than DJCS, and not through for-profit organisations.

Recommendation 59. The Federal Government must ensure that incarcerated people have access to the Pharmaceutical Benefits Scheme (**PBS**) and the Medicare Benefits Schedule (**MBS**). The

[53] Ibid, p. 83.

[54] ABC News, 19 October 2020, 'Greg Hunt rejects Danila Dilba's request for Medicare-funded health services in Don Dale'. Available at https://www.abc.net.au/news/2020-10-19/don-dale-medicare-health-services-rejected-by-greg-hunt/12776808.

Victorian Government should advocate with the Commonwealth to enable this access in order to provide equivalence of care to Aboriginal people and other vulnerable people held in prison.

Recommendation 60. The Federal and State Governments should ensure that incarcerated people have access to the National Disability Insurance Scheme (**NDIS**) and are assessed for eligibility for NDIS upon entry to a prison or youth justice centre.

Recommendation 61. Incarcerated people must not be required to pay out-of-pocket medical expenses. Incarcerated people have been deprived of their liberty by the State, and are entirely dependent on the State for both their (drastically reduced) income and healthcare provision.

Recommendation 62. Incarcerated people must be entitled to a free, second medical opinion.

Culturally Safe Healthcare

Culturally safe healthcare for Aboriginal and/or Torres Strait Islander children and their incarcerated mothers is critical to protecting their health and wellbeing, and must be provided where children reside in prison with their parent.

The Australian Health Practitioner Regulation Authority has defined cultural safety as follows:

> Cultural safety is determined by Aboriginal and Torres Strait Islander individuals, families and communities. Culturally safe practise is the ongoing critical reflection of health practitioner knowledge, skills, attitudes, practising behaviours and power differentials in delivering safe, accessible and responsive healthcare *free of racism*.[55] (emphasis added)

Cultural safety is understood as follows:

> Cultural safety is an environment that is spiritually, socially and emotionally safe, as well as physically safe for people; where there is no assault, challenge or denial of their identity, of who they are and what they need. It is about shared respect, shared meaning, shared knowledge and experience, of learning together with dignity, and truly listening.[56]

RECOMMENDATIONS

Recommendation 63. The Government must properly address the issue of individual and systemic racism, in regards to healthcare in prison. The medical care provided to children and their

[55] Australian Health Practitioner Regulation Authority, National Scheme's Aboriginal and Torres Strait Islander Health and Cultural Safety Strategy, available at https://www.ahpra.gov.au/About-Ahpra/Aboriginal-and-Torres-Strait-Islander-Health-Strategy/health-and-cultural-safety-strategy.aspx

[56] Robyn Williams, 'Cultural Safety – What does it mean for our work practice?' (1999) 23 Australian and New Zealand Journal of Public Health 2.

incarcerated mother must be provided in a manner that is competent, culturally safe and free from racism or discrimination.

Recommendation 64. A model of delivery of primary health services by Aboriginal Community Controlled Health Organisations in places of detention in Victoria should be considered, in consultation with VACCHO and member organisations.

Supporting Parents when they Leave Prison

Case Study – Jessica (pseudonym)

Jessica cares for children of incarcerated parents. She has told us that their parents, in their hearts, want to look after their children, and might be able to look after their children long-term with the right support. However, parents need to be given better support upon their release from prison, both general support, as well as support to get their children back. There needs to be assistance in the form of housing, employment, parenting programs, financial literacy programs and follow-up with drug rehabilitation and counselling.

RECOMMENDATIONS

Recommendation 65. Culturally safe rehabilitation services should be available to people held in prison on remand.

Recommendation 66. Funding for rehabilitation in prisons, including culturally safe rehabilitation support provided by Aboriginal organisations, should be significantly increased.

Recommendation 67. Rehabilitation programs, both in prisons and for people transitioning out of prison or diverted from prison, should be run on a voluntary basis, not penalising or threatening people for breaching behavioural requirements.

Recommendation 68. The Government should provide long-term and stable funding to ACCOs to deliver pre- and post-release programs, including transitional housing programs run by ACCOs, such as VALS' Baggarrook program, to support men and women leaving prison. Assistance provided should be in the form of housing, employment, parenting programs, financial literacy programs and follow-up with drug rehabilitation and counselling.

Royal Commission into Victoria's Mental Health System Supplementary Submission

AUGUST 2020

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BACKGROUND TO THE VICTORIAN ABORIGINAL LEGAL SERVICE

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

Legal Services

Our legal practice operates in the areas of criminal, family and civil law. We represent women, men and children who come to us for assistance, and are only hindered in doing this where there is a legal conflict of interest. If this is the case, we provide warm referrals to other suitable legal representatives. Our 24-hour criminal law service is backed up by the strong community-based role of our Client Service Officers play, who are the first point of contact when an Aboriginal person is taken into custody, through to the finalisation of legal proceedings.

Our Criminal Law Practice provides legal assistance and represent Aboriginal people in immediate court dealing such as bail applications, defending or pleading to charges and sentencing. This includes matters in both the mainstream and Koori Court.[2] Many of our clients come from backgrounds where they may have been exposed to family violence, poor mental health, homelessness and poverty. We try to understand the underlying reasons that have led to the offending behaviour and ensure that prosecutors, magistrates and legal officers are aware of this. We support our clients to access support that can help to address underlying reasons for offending and reduce the risk of recidivism.

Our Civil and Human Rights Practice provides advice and casework to Aboriginal people in relation to a range of civil law issues, including: infringements, tenancy, victims of crime, police complaints, discrimination and human rights, Personal Safety Intervention Orders (PSIVO) matters, Coronial Inquests including in relation to deaths in custody, prisoners' rights, consumer law issues and Working With children Check suspension or cancellation.

Our Aboriginal Families Practice provides legal advice and represents families in family law and child protection matters, where we advocate for support to ensure that families can remain together, and for compliance with the Aboriginal Child Placement Principle wherever children are removed from their parents' care.

Community Justice Programs

VALS run a Custody Notification System (CNS) which requires Victoria Police to notify VALS within 1 hour every time an Aboriginal person in Victoria is taken into police custody.[3] Since October 2019, this requirement

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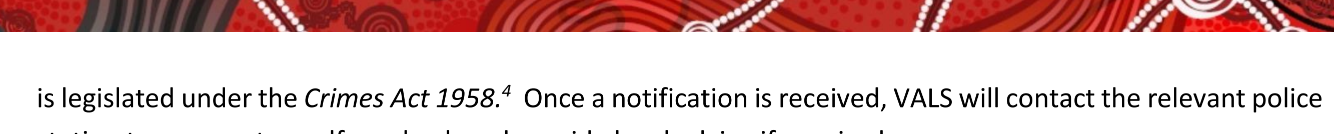
[1] The term "Aboriginal" is used throughout this submission to refer to Aboriginal and/or Torres Strait Islander peoples.

[2] In 2017-2018, VALS provided legal services in relation to 1367 criminal law matters, and in 2018-2019, VALS provided legal services in relation to 1,253 criminal law matters.

[3] In 2017-2018, VALS received and responded to 11,104 notifications through the CNS and in 2018-2019, we received 12,293.



is legislated under the *Crimes Act 1958.*[4] Once a notification is received, VALS will contact the relevant police station to carry out a welfare check and provide legal advice if required.

The Community Justice Team also run the following programs:

- Family Violence Client Support Program[5]
- Community Legal Education
- Victoria Police Electronic Referral System (V-PeR)[6]
- Regional Client Service Officers
- Baggarrook Women's Transitional Housing program.[7]

Policy, Research and Advocacy

VALS operates in various strategic forums which help inform and drive initiatives to support Aboriginal people in their engagement with the legal system in Victoria. VALS works closely with the Aboriginal Justice Caucus ad ACCOs in Victoria, as well as other key statehooders within the legal sector.

VALS is also engaged in research projects, including a three-year project to pilot Aboriginal Community Justice Reports in Victoria. The project is being carried out in partnership with the University of Technology, Griffith University, the Australasian Institute of Judicial Administration (AIJA) and Five Bridges Aboriginal and Torres Strait Islander organisation (Queensland).

ACKNOWLEDGEMENTS

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

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

- Andreea Lachsz, Senior Policy, Research and Advocacy Officer
- Ren Flannery, Policy, Research and Advocacy Officer

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[4] Ss. 464AAB and 464FA, *Crimes Act 1958* (Vic).

[5] VALS has three Family Violence Client Support Officers (FVCSOs) who support clients throughout their family law or civil law matter, providing holistic support to limit re-traumatisation to the client and provide appropriate referrals to access local community support programs and emergency relief monies.

[6] The Victoria Police Electronic Referral (V-PeR) program involves a partnership between VALS and Victoria Police to support Aboriginal people across Victoria to access culturally appropriate services. Individuals are referred to VALS once they are in contact with police, and VALS provides support to that person to access appropriate services, including in relation to drug and alcohol, housing and homelessness, disability support, mental health support.

[7] The Baggarrook Women's Transitional Housing program provides post-release support and culturally safe housing for six Aboriginal women to support their transition back to the community. The program is a partnership between VALS, Aboriginal Housing Victoria and Corrections Victoria.

SUMMARY OF RECOMMENDATIONS

Recommendation 1: Given the over-representation of people with cognitive disabilities in the justice system and within Aboriginal and Torres Strait Islander communities, further investment should be made in VALS to enable it to deliver culturally safe support to clients with disabilities. This should include an ongoing funding commitment that would expand VALS' service:

- As per the proposal in VALS' funding bid, funding a sustainable place-based service delivery presence to enhance community access to high quality legal services across Victoria (including in areas and to communities outside metro Melbourne, that experience entrenched disadvantage).
- Funding support workers to assist VALS clients with intellectual, cognitive and psychosocial disabilities and complex communication needs to participate in criminal, civil and family law proceedings, with the view to achieving equality before the law. The support workers would assist clients to attend meetings, liaise with community support services, provide communication support to clients before the courts, and assist lawyers and legal services to operate in a more accessible way.

Recommendation 2:
Once designated/established:

- The Victorian NPM's/NPMs' mandate should (in compliance with Article 4 of OPCAT and Recommendation 10 of the AHRC's report), include any place under the Government's jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence.
- This includes both public and private custodial settings which that person is not permitted to leave at will by order of any judicial, administrative or other authority.
- The NPMs' mandate should not be restricted by any temporal limitations.
- The NPM's mandate should encompass instances where people who are detained are temporarily absent from the place they are normally detained (eg when they are taken to a hospital for medical treatment).
- The NPM's mandate should include forensic mental health hospitals, closed forensic disability facilities or units, correctional facilities, youth detention facilities, police custody, court custody, and residential secure facilities for children.

Recommendation 3: The Victorian Government should engage in transparent, inclusive and robust consultations, as NPMs are designated/established and operationalised, with Aboriginal and/or Torres Strait Islander communities and organisations, such as VALS, to ensure that NPM operations, policies, frameworks and governance are culturally appropriate and safe for Aboriginal people.

Recommendation 4: The Victorian NPM should be culturally competent for Aboriginal and/or Torres Strait Islander people. The NPM should appreciate the legacy and ongoing impacts of colonisation; that Aboriginal perspectives of what constitutes torture, or cruel, inhuman or degrading treatment or punishment may diverge from that of non-Aboriginal people; and that the long-term impact of torture and ill-treatment can be shaped by the survivors' culture and the historic-political context of the ill-treatment (including the history of colonisation). It should also take into account systemic racism in its work.

Recommendation 5: The Victorian NPM must be urgently be established, given the heightened risk of torture and ill-treatment of those who are detained during the pandemic.

Recommendation 6: People with lived experience of detention (or experts by experience), including Aboriginal people, should be involved in the design and operation of the NPM.

Recommendation 7: Experts by experience should be provided with appropriate support, recognising the risk of re-traumatisation, and the value of their contribution and expertise should be acknowledged with appropriate remuneration.

DETAILED SUBMISSIONS

On 5 July 2019, VALS made a submission to the Royal Commission into Victoria's Mental Health System. This is a supplementary submission to assist the Commission, specifically focusing on the following of the Royal Commission's Terms of Reference:

> 4. How to improve mental health outcomes, taking into account best practice and person-centred treatment and care models, for those in the Victorian community, especially those at greater risk of experiencing poor mental health, including but not limited to people:
>
> > 4.1. from Aboriginal and Torres Strait Islander backgrounds;
> >
> > 4.4. in contact, or at greater risk of contact, with the forensic mental health system and the justice system.

Unfitness to plead project

1. Project overview

'While unfitness to plead laws are aimed at avoiding unfair trials for persons with cognitive disabilities, declarations of unfitness can lead to detention and/or supervision for periods which exceed the length of a sentence had such persons been convicted.'[8]

The University of Melbourne's 2017 *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities* project sought to evaluate two major research gaps in relation to unfitness to plead laws. The first relates to the United Nations Convention on the Rights of Persons with Disabilities (**CRPD**), which entered into force in 2008 and which Australia has ratified. The second major research gap concerned effective support for accused persons with cognitive disabilities to participate in criminal proceedings.

The aim of the research project was to address the legal barriers facing people with cognitive disabilities engaged in the justice system and to create appropriate alternative supports in the community. The research team conducted their assessment through a human rights analysis of the current unfitness to plead laws and implementing a 6-month Disability Justice Support Program across three community organisations, including VALS. The project provided VALS with a Disability Justice Support Person three days a week for six months. 'The aim of the formal support was to optimise the participation of accused persons with cognitive disabilities

[8] McSherry et al, *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities* (2017) University of Melbourne, 58.

in proceedings against them by focusing on the supports they may require to exercise legal capacity and access to justice on an equal basis with others.'[9]

2. Value of project

The project identified that 'there is a need to maximise rights protections for persons with cognitive disabilities in existing criminal justice processes, such as the unfitness to plead law.'[10]

Clients, their families, lawyers and support workers shared the view that there were significantly better outcomes for the individuals involved in the project, with many gaining access to support programs rather than a custodial sentence. Identified benefits of the program included support workers being able to bridge the communication gap between their client, lawyers, magistrates, police and court personnel. Additional benefits noted by participants included the support workers' knowledge and understanding of the client's disability, their ability to provide referrals to appropriate support services and assistance in managing tasks that might otherwise compound the client's stress, such as paying bills and grocery shopping.

A comprehensive costs analysis conducted by the research team confirmed significant short-term savings, with it being estimated that the long-term savings would be even greater. The research team published a detailed account of these findings with a full explanation of the costing's methodology.[11]

The evaluation process identified a number of issues that would need to be addressed should the program continue, including:

- The unique cultural requirements of Aboriginal and/or Torres Strait Islander clients;
- The assessment process, which echoed concerns around the unfitness to plead test;
- The Disability Justice Support Workers' lack of legal knowledge and training;
- The fact that, as non-legal representatives, support workers can be called to give evidence that may go against their client.

3. Further investment

Research indicates that persons with cognitive disabilities are significantly over-represented in the justice system in Australia. In 2011 the Victorian Department of Justice and Community Safety (DJCS) reported 42% of male prisoners and 33% of female prisoners had an acquired brain injury, compared to 2.2% of the general population.[12] A 2013 Victorian parliamentary inquiry reported that individuals with an intellectual disability were 'anywhere between 40 and 300 per cent more likely' to be jailed than those without an intellectual disability. [13]

[9] McSherry et al, *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities* (2017) University of Melbourne, 30.
[10] McSherry et al, *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities* (2017) University of Melbourne, 58.
[11] McCausland et al, *Cost Benefit Analysis of Support Workers in Legal Services For People with Cognitive Disability* (2017) University of Melbourne
[12] Martin Jackson et al, 'Acquired Brain Injury in the Victorian Prison System', Corrections Research Paper No 4, Department of Justice (2011) 22.
[13] Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (2013).

The University of Melbourne's Unfitness to Plead project report states:

> Indigenous people with disabilities face particular disadvantage in the criminal justice system, including under unfitness to plead laws.[14] Mindy Sotiri and colleagues reported in 2012 that all nine individuals on indefinite supervision orders as a result of findings of unfitness to plead in Western Australia were Indigenous, as were 11 of 33 individuals found unfit to plead or 'unsound of mind' under the jurisdiction of the Western Australian Mentally Impaired Accused Review Board.[15]

Through the evaluation process of the project, researchers found that Aboriginal and/or Torres Strait Islander participants presented with significantly unique needs with regards to cultural protocols, lore, societal structures, gender, language, remoteness and the complex impacts of colonialism on disability and disadvantage. Aboriginal participants and lawyers from the two participating Aboriginal legal services identified that the success of the Disability Justice Support Program required the following:

- It must be delivered by an Aboriginal Community Controlled Organisation;
- It must be gender specific in its design;
- The support worker must be Aboriginal, or receive cultural training and work in partnership with an Aboriginal client service officer;
- Engagement must take into consideration historical distrust of social welfare services.

The report found that Victorian participants who were able to access Koori Court and the Assessment and Referral Court List were significantly better off. The supportive environment with the Elders and support worker present and the Magistrate sitting at the table with the client, assisted the client to feel less vulnerable throughout the hearing. The process was a conversation, without the confusing legal jargon, facilitating the client's ability to comprehend and actively participate in the process.

From 2018-2019 VALS serviced 925 clients identifying as having a disability. Of those only 12% clearly stated having just a physical disability, the rest had cognitive disabilities or a number of disabilities.[16] Whilst the DJCS publish weekly statistics showing age, gender, offence, sentence, Aboriginality, country of birth, marital status, employment status and level of education, Corrections Victoria does not provide a breakdown of prisoners identifying as having a disability.[17]

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[14] Eileen Baldry et al, *A Predictable and Preventable Path: Aboriginal People with Mental and Cognitive Disabilities in the Criminal Justice System* (University of New South Wales, 2015) 164, 167; Harry Blagg, Tamara Tulich and Zoe Bush, 'Diversionary Pathways for Indigenous Youth with FASD in Western Australia: Decolonising Alternatives' (2015) 40 *Alternative Law Journal* 257; First Peoples Disability Justice Consortium, Submission No 39 to Senate Community Affairs References Committee, *Indefinite Detention of People with Cognitive Disabilities in Australia*, April 2016, 40–51.

[15] Mindy Sotiri, Patrick McGee and Eileen Baldry, 'No End in Sight: The Imprisonment, and Indefinite Detention of Indigenous Australians with a Cognitive Impairment' (Report, Aboriginal Disability Justice Campaign, September 2012) 24. The Mentally Impaired Accused Review Board is responsible for periodic reviews of ongoing detention under the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 33. It is the Board that ultimately recommends the release of a person from a custodial order following a finding of unfitness to plead.

[16] VALS Service Data 2018-2019.

[17] Department of Justice and Community Safety - Corrections Victoria, Monthly prisoner and offender statistics 2019-20, available at https://www.corrections.vic.gov.au/monthly-prisoner-and-offender-statistics-2019-20

Recommendation 1: Given the over-representation of people with cognitive disabilities in the justice system and within Aboriginal and Torres Strait Islander communities, further investment should be made in VALS to enable it to deliver culturally safe support to clients with disabilities. This should include an ongoing funding commitment that would expand VALS' service:

- As per the proposal in VALS' funding bid, funding a sustainable place-based service delivery presence to enhance community access to high quality legal services across Victoria (including in areas and to communities outside metro Melbourne that experience entrenched disadvantage).
- Funding support workers to assist VALS clients with intellectual, cognitive and psychosocial disabilities and complex communication needs to participate in criminal, civil and family law proceedings, with the view to achieving equality before the law. The support workers would assist clients to attend meetings, liaise with community support services, provide communication support to clients before the courts, and assist lawyers and legal services to operate in a more accessible way.

Culturally appropriate, OPCAT-compliant independent detention oversight of secure forensic mental hospitals, prisons and other places of detention

The objective of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (**OPCAT**) is 'to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.'[18] OPCAT, ratified by Australia,[19] requires States to 'set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment.'[20] These bodies are called National Preventive Mechanisms (NPMs).

1. Scope of OPCAT includes forensic mental health hospitals

The Australian Human Rights Commission's (**AHRC**) recently released report, 'Implementing OPCAT in Australia', asserted that 'OPCAT has broad application to any place where an individual cannot leave of their own free will, and where that place of detention is linked, either directly or indirectly, to a public authority.'[21] The AHRC also affirmed that 'there is no temporal limitation on the concept of detention in OPCAT. Therefore, places where people are routinely detained for periods of less than 24 hours, should be included in the places open to inspection by NPMs.'[22] It thus departed from the Commonwealth's suggestion that NPMs should focus on 'closed facilities or units where people may be involuntarily detained by law for mental health assessment or treatment (*where people are held for equal to, or greater than, 24 hours*, such as a locked ward or residential institution)… [and] closed forensic disability facilities or units where people may

[18] *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006) Art 1.
[19] *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006) Declarations and Reservations: Australia.
[20] *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006) Art 3.
[21] Australian Human Rights Commission, *Implementing OPCAT in Australia* (29 June 2020) 43.
[22] Australian Human Rights Commission, *Implementing OPCAT in Australia* (29 June 2020) 46.

be involuntarily detained by law for care (*where people are held for equal to, or greater than, 24 hours*), such as a Disability Forensic Assessment and Treatment Service.'[23]

The AHRC's expansive understanding of 'place of detention', including that temporal limits should not be erroneously imposed,[24] constitutes an accurate interpretation of OPCAT that should be adopted by the Victorian Government.

According to Forensicare's website, at the end of May 2018 there were 85 people on custodial supervision orders at Thomas Embling Hospital, and 11 men waiting in prison to be transferred to the Hospital (and some had been waiting for more than 10 months).[25] Places of detention such as the Thomas Embling Hospital, where '[p]atients are generally admitted to the hospital from the criminal justice system under the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997, Mental Health Act 2014 or the Sentencing Act 1991'[26] should fall within the NPM's inspection mandate (once the Victorian NPM is established).

Of note, although the focus of this submission is forensic mental health hospitals, the Commission should consider both the Government's obligations in relation to, and the need for, OPCAT-compliant detention oversight in all places of detention, including (but not limited to) correctional facilities, youth detention facilities, police custody, court custody, and residential secure facilities for children. Prevention of torture and ill-treatment through OPCAT-compliant detention oversight of all of these places of detention will be of interest to the Commission, as ill-treatment has a detrimental effect on the mental health of people deprived of their liberty (many of whom already have existing mental health conditions). Particularly of note, torture is understood to include severe mental pain or suffering[27] and '"cruel, inhuman or degrading treatment or punishment" should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental.'[28]

People with mental health conditions are held in all of the above mentioned places of detention. The AHRC report highlighted that its 'research has found that prisoners with disability have been subjected to a range of harmful practices, including being physically shackled, medically restrained, segregated for long periods of time, and denied family visits or support persons as punishment. The impact of such treatment is compounded for people with disability who have been declared unfit to stand trial, when detention can be indefinite.'[29]

[23] Australian Human Rights Commission, *Implementing OPCAT in Australia* (29 June 2020) 45.
[24] Australian Human Rights Commission, *Implementing OPCAT in Australia* (29 June 2020) 46.
[25] Victorian Institute of Forensic Mental Health, Mental illness and the criminal law, https://www.forensicare.vic.gov.au/about-us/mental-illness-and-the- -law/
[26] Victorian Institute of Forensic Mental Health, Thomas Embling Hospital, https://www.forensicare.vic.gov.au/our-services/thomas-embling/
[27] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) Art 1(1).
[28] *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, GA Res 43/173, UN GAOR, 49th sess, 76th plen mtg, Supp.No.49, UN Doc A/43/49 (9 December 1988) General Clause.
[29] Australian Human Rights Commission, *Implementing OPCAT in Australia* (29 June 2020) 26.

Recommendation 2:

Once designated/established:

- The Victorian NPM's/NPMs' mandate should (in compliance with Article 4 of OPCAT and Recommendation 10 of the AHRC's report), include any place under the Government's jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence.
- This includes both public and private custodial settings which that person is not permitted to leave at will by order of any judicial, administrative or other authority.
- The NPMs' mandate should not be restricted by any temporal limitations.
- The NPM's mandate should encompass instances where people who are detained are temporarily absent from the place they are normally detained (eg when they are taken to a hospital for medical treatment).
- The NPM's mandate should include forensic mental health hospitals, closed forensic disability facilities or units, correctional facilities, youth detention facilities, police custody, court custody, and residential secure facilities for children.

2. Consultation with and participation of Aboriginal and/or Torres Strait Islander communities and organisations

The AHRC Report recommended that the Australian Government 'adopt an OPCAT implementation strategy, which includes a measurable timeframe for implementation, identifying key dates and milestones [and] the process for ensuring that each body designated with an NPM function is OPCAT compliant.' [30] In Victoria, NPMs have yet to be designated/established.

The National Aboriginal and Torres Strait Islander Legal Services' (**NATSILS**) position is that

> '[a]ll governments need to urgently designate and/or establish National Preventive Mechanisms (NPM) to oversee the conditions of detention and treatment of people in places of detention, which must, at a minimum, comply with international human rights standards. Governments need to engage with civil society, including our organisations, in transparent, inclusive and robust consultations as they are established and operationalised. NPMs need to ensure that their operations, policies, frameworks and governance are always culturally appropriate and safe for our people. NPMs need to also ensure their findings are publicly available and published in different formats and languages, including our languages.'[31]

Recommendation 3: The Victorian Government should engage in transparent, inclusive and robust consultations, as NPMs are designated/established and operationalised, with Aboriginal and/or Torres Strait Islander communities and organisations, such as VALS, to ensure that NPM operations, policies, frameworks and governance are culturally appropriate and safe for Aboriginal people.

[30] Australian Human Rights Commission, *Implementing OPCAT in Australia* (29 June 2020) 60.

[31] National Aboriginal and Torres Strait Islander Services, *Black Lives Matter: always have, always will*, available at http://www.natsils.org.au/portals/natsils/Policy%20statement%20on%20Black%20Lives%20Matter.pdf?ver=2020-07-09-171028-630

3. NPMs should be culturally competent for detained Aboriginal and/or Torres Strait Islander people

The AHRC's report recognised that

> 'Aboriginal and Torres Strait Islander peoples, who have long been over-represented in many forms of detention and are affected by conditions of detention in distinct ways due to numerous factors including ongoing social and historical marginalisation and disadvantage, over-policing and experience of police bias, and intergenerational trauma. Aboriginal and Torres Strait Islander peoples in places of detention also have specific cultural requirements that differ from other people deprived of their liberty, such as the need to maintain strong cultural identity and connection to culture, country and community.'[32]

It also recommended that the Australian Government 'adopt national principles regarding minimum conditions of detention to protect the human rights of detainees (National Conditions Principles). These principles should deal with issues including: the protection of particularly vulnerable detainees, such as… people with disability, Aboriginal and Torres Strait Islander peoples…'[33]

Culturally appropriate OPCAT implementation should consider the following:

- 'The ongoing impact of colonisation on the criminal justice system (particularly in relation to places of detention and detaining authorities) and the legacy of the systemic human rights abuses that occurred in Australia should inform the work of [the NPM]. This includes an understanding of the consequent intergenerational trauma.'[34]
- 'In order to properly assess the risk of torture or ill-treatment of Aboriginal detainees, the [NPM] should incorporate into its expectations/standards an expectation that there is an absence of systemic racism.'[35]
- 'Aboriginal perspective[s] of what constitutes torture, or cruel, inhuman or degrading treatment or punishment, may diverge from that of non-Aboriginal people. The suffering experienced by an individual, the significance that they attribute to particular conduct or a situation in detention, and their emotional response, will be determined in part by how their culture shapes their worldview… [NPMs] should appreciate that Aboriginal people may experience imprisonment differently.'[36]
- 'The [NPM] should appreciate, in its preventative work, that the long-term impact of torture and ill-treatment can be shaped by survivors' culture and the historic-political context of the ill-treatment (including the history of colonisation).'[37]

These recommendations were echoed in the 'Joint Submission for the Report of the Special Rapporteur on the Rights of Indigenous Peoples to the General Assembly – Impact of COVID-19 on Indigenous Peoples.'[38]

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[32] Australian Human Rights Commission, *Implementing OPCAT in Australia* (29 June 2020) 26.
[33] Australian Human Rights Commission, *Implementing OPCAT in Australia* (29 June 2020) 51-52.
[34] Andreea Lachsz, *Culturally appropriate oversight of conditions of detention and treatment of detained Aboriginal and Torres Strait Islander people in the Northern Territory's criminal justice system – in compliance with the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (2019) 21, available at https://www.churchilltrust.com.au/project/?id=PR0014391
[35] Ibid.
[36] Ibid.
[37] Ibid.
[38] NATSILS, Aboriginal Peak Organisations Northern Territory, Danila Dilba Health Service, Andreea Lachsz, *Joint Submission for the Report of the Special Rapporteur on the Rights of Indigenous Peoples to the General Assembly – Impact of COVID-19 on Indigenous Peoples* (2020), available at https://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/Callforinput_COVID19.aspx

Recommendation 4: The Victorian NPM should be culturally competent for Aboriginal and/or Torres Strait Islander people. The NPM should appreciate the legacy and ongoing impacts of colonisation; that Aboriginal perspectives of what constitutes torture, or cruel, inhuman or degrading treatment or punishment may diverge from that of non-Aboriginal people; and that the long-term impact of torture and ill-treatment can be shaped by the survivors' culture and the historic-political context of the ill-treatment (including the history of colonisation). It should also take into account systemic racism in its work.

4. A note on the importance of culturally appropriate detention oversight during the COVID-19 pandemic

The UN Anti-Torture mechanisms recently unanimously warned that 'the COVID-19 pandemic is leading to an escalation of torture and ill-treatment worldwide.'[39] The 'Joint Submission for the Report of the Special Rapporteur on the Rights of Indigenous Peoples to the General Assembly – Impact of COVID-19 on Indigenous Peoples' stated that

> 'Those who are marginalised are more vulnerable to torture and ill-treatment and detained Indigenous people are at a higher risk of torture and ill-treatment… these risks are heightened during COVID-19. Across Australia, detention oversight mechanisms are currently inadequate, limiting the opportunities to prevent torture and ill-treatment and to ensure detaining authorities do not act with impunity.'[40]

A joint submission to the *Select Committee on COVID-19 to inquire into the Australian Government's response to the COVID-19 pandemic*, 'OPCAT, places of detention and COVID-19' by an alliance of civil society organisations and academics recommended that:

> 'Federal, State and Territory Governments must urgently designate and/or establish National Preventive Mechanisms as part of their response to the COVID-19 pandemic, to oversee the conditions of detention and treatment of people in places of detention, which must, at a minimum, comply with international human rights standards. Governments must engage with civil society, including Aboriginal and Torres Strait Islander organisations, in transparent, inclusive and robust consultations during this process.'[41]
>
> 'Federal, State and Territory Governments must guarantee all oversight bodies, including National Preventive Mechanisms, unimpeded access to all places of detention and persons detained throughout (and beyond) the duration of the COVID-19 pandemic. Governments and places of detention must co-operate with oversight bodies, accommodate inspections and respond to requests for information.' [42]

Recommendation 5: The Victorian NPM must be urgently be established, given the heightened risk of torture and ill-treatment of those who are detained during the pandemic.

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[39] UN Committee against Torture, the UN Subcommittee on Prevention of Torture, the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, and the Board of Trustees of the UN Voluntary Fund for Victims of Torture, *COVID-19 exacerbates the risk of ill-treatment and torture worldwide – UN experts* (2020), available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25995&LangID=E

[40] NATSILS, Aboriginal Peak Organisations Northern Territory, Danila Dilba Health Service, Andreea Lachsz, *Joint Submission for the Report of the Special Rapporteur on the Rights of Indigenous Peoples to the General Assembly – Impact of COVID-19 on Indigenous Peoples* (2020), available at https://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/Callforinput_COVID19.aspx

[41] *OPCAT, places of detention and COVID-19: Joint Submission to the Select Committee on COVID-19*, Submission 79 (2020) 7, available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/COVID-19/COVID19/Submissions

[42] *OPCAT, places of detention and COVID-19: Joint Submission to the Select Committee on COVID-19*, Submission 79 (2020) 8, available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/COVID-19/COVID19/Submissions

5. Consultations with and participation of people with lived experience of secure forensic mental health hospitals and other places of detention

The AHRC's report identified the importance of including people with lived experience in the OPCAT process.[43]

The Victorian NPM should consider the following:

- 'People with lived experience can, and should, be involved in a myriad of ways, including the design of the NPM, in drafting expectations/standards and the inspection framework, in preparing for inspections, partaking in the inspection itself, providing feedback during the inspection regarding what evidence might need to be properly triangulated (should they not be entering the place of detention themselves), in drafting recommendations, in analysing the detaining authority's response and providing training to staff.'[44]
- 'Including staff with lived experience improves an NPM's ability to effectively carry out its mandate, by increasing its ability to genuinely appreciate the culture of an institution and through challenging assumptions… which could in turn assist an NPM to build a better understanding of what should be classified as torture and cruel, inhuman or degrading treatment or punishment.'[45]

For example, the New Zealand Ombudsman (a designated NPM) secured funding to train people with lived experience of caring or using mental health services, so that they could assist in inspections.[46]

Recommendation 6: People with lived experience of detention (or experts by experience), including Aboriginal people, should be involved in the design and operation of the NPM.

Recommendation 7: Experts by experience should be provided with appropriate support, recognising the risk of re-traumatisation, and the value of their contribution and expertise should be acknowledged with appropriate remuneration. [47]

[43] Australian Human Rights Commission, *Implementing OPCAT in Australia* (29 June 2020) 14.

[44] Andreea Lachsz, *Culturally appropriate oversight of conditions of detention and treatment of detained Aboriginal and Torres Strait Islander people in the Northern Territory's criminal justice system – in compliance with the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (2019) 101, available at https://www.churchilltrust.com.au/project/?id=PR0014391

[45] Ibid 102.

[46] Ibid 103.

[47] Ibid 108.

Community fact sheet: Systemic Racism

What is systemic racism?

Systemic racism is when laws, policies and practices across agencies work together to produce a discriminatory outcome for racial or cultural groups. While the laws, policies and practices may appear to be neutral, they result in uneven or unfair outcomes.

Systemic racism is different to individual or interpersonal racism, which takes place when individuals hold racist views and treat people differently based on those views, for example, hate speech or racial abuse. Laws, policies and practices can contribute to systemic racism, even if this is not acknowledged or recognised by the authorities that develop and implement them.

How does systemic racism affect Aboriginal communities?

Systemic racism impacts the lives of Aboriginal people and communities in Victoria on a daily basis. It affects VALS clients across all of the areas where we provide legal and community justice services, including criminal justice, youth justice, child protection, family law, tenancy, employment, access to health services, coronial inquests and police complaints.

For example, systemic racism results in over-representation of Aboriginal people at all stages of the criminal justice and youth justice systems, as well as disproportionate rates of child removal and placement of Aboriginal children in out-of-home-care.

The impact of systemic racism on Aboriginal communities is a direct product of this country's violent and racist history. The legal system is built on a foundation of violence and dispossession, denial of sovereignty and humanity, with the colonial project continuing through policies of protection and assimilation.

How can systemic racism in the justice system be addressed?

Addressing systemic racism requires systemic reform across laws, polices, practices and institutions which reinforce and perpetuate this form of racism. It also requires robust mechanisms to hold public authorities to account when they engage in any form of racism. Aboriginal communities know what the solutions are and have been calling for change for decades.

1. Reform laws and policies that have a discriminatory impact for Aboriginal people

One of the key ways to address systemic racism is to reform laws, policies and practices that disproportionality impact Aboriginal people in a discriminatory manner.

For example, the punitive bail system in Victoria has a disproportionate impact on Aboriginal people because of the high threshold for accessing bail. In June 2020, 44% of Aboriginal people in prison in Victoria were on remand and had not been convicted of an offence. Amongst the non-Aboriginal prison population, only 35% of people were on remand. Accessing stable accommodation is a key factor in being granted bail, yet Aboriginal people experience higher rates of housing instability than non-Aboriginal people, and there is a significant shortage of culturally safe residential bail support and accommodation. This often means that an Aboriginal people are not able to access bail and is more likely to be remanded in custody whilst they wait for their criminal charges to be heard.

Similarly, the low age of criminal responsibility in Victoria and across Australia disproportionality affects Aboriginal children and young people, who have contact with the youth justice system at a much younger age than non-Aboriginal children. They are also less likely to receive a caution and more likely to be charged with an offence. Raising the age of criminal responsibility from 10 to at least 14 years is a critical way of addressing systemic racism and reducing over-representation of Aboriginal children within the youth justice system.

2. Mandate accountability and monitoring mechanisms to investigate systemic racism

Systems, mechanisms and bodies of accountability and oversight should be explicitly

mandated to examine and investigate systemic racism. This includes all complaints mechanisms, as well as detention monitoring bodies and coronial processes.

For example, in accordance with international law, the Australian Government and all State and Territory Governments are required to establish a mechanism to carry out independent monitoring of all places where people are or may be detained. This includes police custody, prisons, forensic mental health hospitals, involuntary mental health facilities, secure welfare and residential care facilities. The aim of the monitoring is to prevent ill-treatment and torture including for example, solitary confinement. Independent monitoring of places of detention is also a critical way to prevent Aboriginal deaths in custody. To achieve this goal, all bodies that monitor places of detention must be explicitly mandated to examine and make recommendations on how to address systemic racism within detention settings.

When relevant, systemic racism should also be considered during coronial inquests, which seek to establish the cause and circumstances of certain deaths, including when someone dies in custody or in connection with a police operation. In the coronial inquest into the passing of Tanya Day, the Coroner investigated whether systemic racism played a role in the death of Ms Day. The Coroner found that the decision of the train conductor to call the police, rather than pursue other options, was affected by unconscious bias and Ms Day's Aboriginality.

3. Establish an Aboriginal Social Justice Commissioner

Despite numerous inquiries and recommendations to address systemic racism and its impacts for Aboriginal people, there is a lack of accountability and the vast majority of recommendations have not been implemented. For example, it is over thirty years since the RCIADIC, yet many of these recommendations have not been implemented.

VALS and the Aboriginal Justice Caucus have repeatedly called for the establishment of an Aboriginal and Torres Strait Islander Social Justice Commissioner, to oversee Aboriginal justice outcomes in Victoria. In particular, the Commissioner would have oversight of the implementation of RCIADIC recommendations in Victoria, as well as recommendations arising from coronial inquests into the deaths of Aboriginal people.

4. *Develop a robust Anti-Racism Strategy that leads to concrete change for Aboriginal people*

The Victorian Government is currently developing an Anti-Racism Strategy. It is essential that this strategy takes a comprehensive approach to Anti-Racism, which includes measures to better understand and respond to systemic racism.

The strategy must lead to concrete outcomes for Aboriginal people, and the Government must be accountable to Aboriginal communities in implementing this Strategy.

5. *Cultural awareness, anti-racism and unconscious bias training*

Although training is not a cure-all, mandatory cultural awareness, anti-racism and unconscious bias training for all public authorities in Victoria is an important mechanism for increasing awareness of systemic racism and its impacts for Aboriginal communities. Ideally, training should be mandatory for all individuals engaged in developing and implementing public policies and legislation. As a priority, anti-racism training must be prioritised for public agencies/organisations where racism is known to be widespread, including for example, Victoria Police and staff in all custodial facilities.

Where can I learn more about systemic racism?

You can learn more about systemic racism and its impacts for Aboriginal communities in the following VALS documents:

- Submission to the Parliamentary Inquiry on Victoria's Criminal Justice System
- Submission on the Anti-Racism Strategy
- Policy Briefing on Police Oversight and Accountability
- Community Factsheet: the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)
- Community Factsheet: the Age Pension test case
- Resource: Investigating systemic racism, a Tanya Day inquest resource for advocates and lawyers (produced together with the Victorian Equal Opportunity and Human Rights Commission)

Community fact sheet: Aboriginal Self-Determination

What is the right to self-determination?

While the right to self-determination remains undefined under international law. It can best be described as the right of a 'people' to collectively exercise control over, and make decisions regarding, matters that affect them. It is the right of a people to determine their destiny.

The right to self-determination is different to other traditional human rights. Most human rights are concerned with rights of individuals or 'persons' within a society. Self-determination is a collective right of 'peoples' under international law.

What is a 'people'?

No universal definition of 'people' exists under international law. The common features of 'peoples' include distinct communities composed of individuals with:

- common tradition and culture
- ethnicity
- historical ties and heritage
- language
- religion
- sense of identity or kinship
- the will to constitute a people
- common suffering

Indigenous peoples were recognised as 'peoples' under international law by the United Nations General Assembly and bearers of the right to self-determination in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) in 2007.

Why is the right to self-determination important to Aboriginal communities in Victoria?

The right to self-determination can serve as a means by which Aboriginal communities can restore Aboriginal authority over Aboriginal affairs through Aboriginal-determined institutions.

Contemporary Victorian government practices treat Aboriginal people as minorities

– a group or category of individuals making up a small portion of Victorian society and in a non-dominant position – that have suffered violations of human rights and dignity as a result of their status. Minority rights traditionally require the government to determine the means by which to protect the rights of minorities. While representatives of minority groups are allowed to participate in discussions concerning how issues affecting the group are addressed, there is no requirement for a government to reflect the opinions and decisions voiced by a minority group in legislation, policy or practice.

As 'peoples', Victorian Aboriginal communities are legally entitled to more than a seat at the table. The right to self-determination of Aboriginal peoples in Victoria mandates that Aboriginal communities and their self-determined institutions:

- Actively participate in decision-making processes that affect them; and
- Possess the right to free, prior and informed consent over administrative and legislative measures that affect them.

What are the current issues relating to the Aboriginal right to self-determination in the Victorian legal system?

The following themes have consistently emerged in the advocacy undertaken by VALS.

Systemic discrimination against Aboriginal peoples

Victorian Government practices that fail to recognise, respect and reflect the collective rights of Aboriginal communities as 'peoples' in Victorian Government practices and processes that denies Aboriginal peoples the enjoyment and exercise of their rights in political, economic, social cultural and other fields of public life, constitutes 'racial discrimination' under Article 1(1) of the *International Convention on the Elimination of All Forms of Racial Discrimination*.

Legal distinctiveness of Aboriginal communities

Aboriginal communities are distinct communities within Victoria and their status should

be reflected in legislative practice. Specific and dedicated legislative guidelines and frameworks should be created for matters that affect the individual and collective rights and interests of Aboriginal communities.

Legislative recognition of the right to self-determination of Aboriginal peoples in Victoria

To date, Victorian legislation has not recognised the right to self-determination of Aboriginal communities in Victoria. Victorian legislation, particularly the *Charter of Human Rights and Responsibilities 2006,* should be amended to explicitly recognise Aboriginal self-determination as a right of Aboriginal communities in Victoria.

Free, prior and informed consent

The Victorian Government current consultation processes often leave Aboriginal Community Controlled Organisations (**ACCO**s) with little time to provide feedback and regualrly do not incorporate feedback from ACCOs in final outcomes.

The right to free, prior and informed consent mandates that governments consult with the Aboriginal community and ACCOs prior to designing legislative and administrative measures and reach consensus with Aboriginal communities and ACCOs on the scope and content of measures affecting Aboriginal communities prior to being implemented.

Cultural rights

The Victorian Government generally determines that legislation does not contradict Aboriginal cultural rights despite submissions from Aboriginal communities and ACCOs stating that conflicts with Aboriginal culture and tradition exist. By virtue of self-determination, Aboriginal communities should make such determinations rather than the Victorian Government.

Aboriginal deaths in custody

In 1991, Recommendation 188 of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) stated that governments should negotiate with Aboriginal communities to determine guidelines, procedures and processes to be followed in the

modification, design and implementation of policies and programs affecting Aboriginal communities. The Recommendation was premised upon self-determination and has yet to be consistently and meaningfully reflected in practice.

Aboriginal data sovereignty

The concept of Aboriginal data sovereignty mandates that Aboriginal communities and ACCO have have a right to access and interpret information concerning Aboriginal individuals and communities, as well as the right to determine how the data is used and disseminated within mainstream society. The authority and control over such data not only ensures that the information is understood in its appropriate context, but is also beneficial to ACCOs to ensure that the services and programs provided meet the demand and needs of Aboriginal communities.

Funding for ACCOs

Article 39 of the UNDRIP and Recommendation 190 of RCIADIC emphasise the importance of funding ACCOs to ensure that such organisations are able to effectively perform their respective functions. However, ACCOs frequently lack sufficient funding and resources to implement and maintain needed programs and services for the benefit of Aboriginal communities.

Where can I learn more about Aboriginal self-determination in Victoria?

You can learn more about self-determination and its impacts for Victorian Aboriginal communities in the following VALS documents:

- Submission to the Parliamentary Inquiry on Victoria's Criminal Justice System
- Submission on the Anti-Racism Strategy