



Victorian Aboriginal Legal Service

Department of Premier and Cabinet Consultation on Victorian
Youth Strategy

JANUARY 2021



Contents

ACKNOWLEDGEMENTS	4
EXECUTIVE SUMMARY	5
SUMMARY OF RECOMMENDATIONS	5
FUNDING FOR VALS	6
Balit Ngulu – VALS’ culturally appropriate legal service for Aboriginal Children and Young People..	6
Community Legal Education	7
RAISING THE AGE OF CRIMINAL RESPONSIBILITY	8
BAIL REFORM	8
YOUTH DETENTION	9
CHILD PROTECTION	10
COVID-19 FINES	11

Contact Andreea Lachsz - Senior Policy, Research and Advocacy Officer
alachsz@vals.org.au



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 Victoria.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.

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.



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 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 Program⁵
- Community Legal Education
- Victoria Police Electronic Referral System (V-PeR)⁶
- Regional Client Service Officers
- Baggarook 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 and ACCOs in Victoria, as well as other key statehooders within the legal sector.

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
- Alex Walters, Principal Managing Lawyer, Civil Law and Human Rights Practice
- Juergen Kaehne, Principal Managing Lawyer, Family Law

³ In 2017-2018, VALS received and responded to 11,104 notifications through the CNS and in 2018-2019, we received 12,293.

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 Baggarook 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.



EXECUTIVE SUMMARY

VALS welcomes the opportunity to make a submission to the Department of Premier and Cabinet's consultation on the Victorian Youth Strategy. This submission focuses on a few key areas of concern regarding the rights of Aboriginal and/or Torres Strait Islander children and young people involved in the criminal, civil and family law systems.

VALS also brings to the Premier's attention the Aboriginal Justice Caucus' (**AJC**) two submissions on the Youth Justice Act reforms (in 2019 and 2020), and VALS' COVID-19 Recovery Plan, *Building Back Better*, which will be released this week.

VALS understands that DPC will be conducting further consultations on the Youth Strategy, and VALS looks forward to the Government working in partnership with the Victorian Aboriginal community to ensure the rights of Aboriginal children and young people are strengthened.

SUMMARY OF RECOMMENDATIONS

Recommendation 1: The Victorian Government should provide ongoing funding to re-establish Balit Ngulu at VALS, to provide legal assistance, advice and representation to Aboriginal youth across Victoria who are involved in the child protection system or have matters in the youth justice system.

Recommendation 2: 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 all children in the Aboriginal community).

Recommendation 3: The Government should raise the age of criminal responsibility to at least 14, and the age at which children can be detained to at least 16. All youth justice legislative, strategy and policy reforms should incorporate and align with raising the age reform.

Recommendation 4: The following changes to the Bail Act should be urgently implemented:

- The reverse-onus provisions in the Bail Act should be repealed, particularly the 'show compelling reason' and 'exceptional circumstances' provisions (sections 4AA, 4A, 4C, 4D and schedules 1 and 2 of the Bail Act).
- There should be a presumption in favour of bail for all offences, except in circumstances where there is a specific and immediate risk to the physical safety of another person. This should be accompanied by 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.
- The offences of committing an indictable offence while on bail (s. 30B), breaching bail conditions (s. 30A) and failure to answer bail (s. 30) should be repealed.

Recommendation 5: There should be increased and mandatory guidance and oversight for police officers, to ensure that they understand and comply with the requirements of the Bail Act. It is essential that police officers are able to appropriately determine when bail should be granted by a police decision maker, and when the individual should be brought to court.



Recommendation 6: The Victorian Government should prioritise investment in a residential bail support and therapeutic program for Aboriginal children and young people in the 2021-2022 State budget.

Recommendation 7: VALS strongly encourages DPC to consider the Aboriginal Justice Caucus' submissions on the youth justice act currently being drafted, to ensure that Victoria's Youth Strategy considers the rights and needs of some of Victoria's most vulnerable children: Aboriginal children in detention.

Recommendation 8: Measures taken and practices adopted in places of detention must never amount to torture or cruel, inhuman or degrading treatment or punishment. Children must never be subjected to solitary confinement.

Recommendation 9: The Government must urgently undertake robust, transparent and inclusive consultations with the Victorian Aboriginal community, its representative bodies and Aboriginal Community Controlled Organisations, such as VALS, on the implementation of Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) in a culturally appropriate way.

Recommendation 10: The Government must develop and implement a strategy, in partnership with Aboriginal Community Controlled Organisations, to meet the Closing the Gap target – to reduce, by 2031, the rate of over-representation of Aboriginal and Torres Strait Islander children in out-of-home care by 45 per cent.


Recommendation 11: Currently the assessment of placement of a child is an administrative matter for DHHS alone. VALS recommends that instead, the Court be the sole arbitrator of placement suitability.

Recommendation 12: To prevent the significant impact of COVID-19 specific fines on children and young people, the Victorian Government should withdraw all fines issued through the COVID-19 Directions to children and young people aged 18 and under, and instead prioritise a service, education and health-based response.

FUNDING FOR VALS

Balit Ngulu – VALS' culturally appropriate legal service for Aboriginal Children and Young People

Balit Ngulu was established by VALS in 2017, to ensure that all Aboriginal and/or Torres Strait Islander youth in Victoria have access to a holistic and culturally safe legal service. With the Victorian Aboriginal youth population over-represented in both the youth justice and the child protection systems, Balit Ngulu provided a critical service aimed at breaking the cycle of disadvantage and giving our youth the chance to thrive. Through a service model combining both lawyers and Client Service Officers, Balit Ngulu focused on maintaining and strengthening connection to culture and family, whilst also assisting clients to access education, employment and leadership opportunities. In doing so, the service was



successful in diverting Aboriginal young people from the criminal legal system and prioritising and facilitating placement of children within a kinship network.

We strongly encourage the Victorian and Commonwealth Governments to invest in this crucial legal service, which was widely recognised and endorsed, including by the Law Council of Australia,⁸ the Law Institute of Victoria,⁹ Koorie Youth Council, the Victorian Council of Social Services¹⁰ and the Commissioner for Aboriginal Children and Young People.¹¹

Recommendation 1: The Victorian Government should provide ongoing funding to re-establish Balit Ngulu at VALS, to provide legal assistance, advice and representation to Aboriginal youth across Victoria who are involved in the child protection system or have matters in the youth justice system.

Community Legal Education

Much of VALS' work is reactive, assisting children who have been caught up in the criminal, family or civil law systems. Community Legal Education (CLE) can support this important work, but it can also play a crucial role in the prevention space – preventing children from becoming involved in the legal system to begin with, which is, of course, the ideal outcome.

CLE can prompt children to recognise that they have existing legal issues, with which VALS can assist. This empowers children 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 children 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 has an important role to play in the prevention space, such as avoiding COVID-19 fines to begin with.

Recommendation 2: 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 all children in the Aboriginal community).

⁸ The Law Council of Australia, Alternative Report to the United Nations Committee on the Rights of the Child (1 November 2018) 10, available at <https://www.lawcouncil.asn.au/publicassets/6dacf616-0fe6-e811-93fc-005056be13b5/S%20-%202018%2011%2001%20Law%20Council%20Report%20to%20CRC.pdf>

⁹ Law Institute of Victoria, LIV calls on government to fund Balit Ngulu (5 October 2018), available at <https://www.liv.asn.au/Staying-Informed/Submissions/submissions/October-2018/LIV-calls-on-government-to-fund-Balit-Ngulu>

¹⁰ Victorian Council of Social Services, Delivering Fairness: Victorian Budget Submission 2019-2020 (2019) 38, available at https://vcoss.org.au/wp-content/uploads/2019/03/DF_Online.pdf

¹¹ Victorian Aboriginal Legal Service shuts down youth service (28 September 2018), available at <https://www.abc.net.au/news/2018-09-28/victorian-aboriginal-legal-service-shuts-down-youth-service/10315948>

RAISING THE AGE OF CRIMINAL RESPONSIBILITY

In July 2020, the Council of Attorneys-General decided not to raise the age of criminal responsibility. This decision was made despite research from the Australia Institute and Change the Record that shows that most Australians agree children as young as 10 years old do not belong in prison,¹² and the UN Committee on the Rights of the Child recommending that Governments acknowledge scientific findings and increase the minimum age to at least 14 years, as well as fixing an age limit below which children may not be detained, such as 16 years (noting also that over 50 States parties have raised the minimum age following ratification of the Convention on the Rights of the Child, and that the most common minimum age of criminal responsibility internationally is 14).¹³ Although raising the age could have reduced the incarceration of Aboriginal children by 15% nationally,¹⁴ the decision to defer recommending raising the age of criminal responsibility took place in the same week that the Closing the Gap Agreement was released.

VALS has called on the Victorian Government to go it alone and show leadership by raising the age, and incorporating these reforms in the new youth justice act currently being developed.¹⁵ The ACT has already begun the process, by including raising the minimum age of criminal responsibility in its ‘ambitious legislative and administrative reform agenda over the coming term.’¹⁶

Recommendation 3: The Government should raise the age of criminal responsibility to at least 14, and the age at which children can be detained to at least 16. All youth justice legislative, strategy and policy reforms should incorporate and align with raising the age reform.

BAIL REFORM

VALS has repeatedly called for the below bail reforms, as the current, punitive bail system in Victoria disproportionately impacts on Aboriginal communities. Particularly of note, even before the harmful bail changes, Aboriginal children were overrepresented in remand populations. The Sentencing Advisory Council’s (SAC) report, released in 2020, found that Aboriginal and Torres Strait Islander children were over-represented in the remand population (15%), especially in rural and regional areas,


¹² The Australia Institute and Change the Record, Raising the Age of Criminal Responsibility (July 2020), available at <https://apo.org.au/node/307114>

¹³ UN Committee on the Rights of the Child, General Comment No. 24 (2019) on children’s rights in the child justice system (18 September 2019) [20-24], [89], available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f24&Lang=en

¹⁴ Productivity Commission for the Steering Committee for the Review of Government Service Provision, Overcoming Indigenous Disadvantage Key Indicators 2020 Report (2020) 4.143

¹⁵ VALS, VALS calls for the Victorian Government to proceed with raising the age of criminal responsibility to at least 14 (27 July 2020), available at <https://www.vals.org.au/vals-calls-victorian-government-to-raise-the-age-of-criminal-responsibility-to-14/>; VALS, VALS calls on the Victorian Government to commit to ambitious justice targets and significant funding to address the overincarceration of Aboriginal people (31 July 2020)

¹⁶ 10th Legislative Assembly of the Australian Capital Territory, Parliamentary & Governing Agreement (2020) available at https://www.cmtedd.act.gov.au/_data/assets/pdf_file/0003/1654077/Parliamentary-Agreement-for-the-10th-Legislative-Assembly.pdf?fbclid=IwAR24UwRy8uqLMWGbPyEo8XU8-qGu9qlUoGNzZKJZCVCikUJhcrBt6o2OmuE



prior to the bail changes.¹⁷ The SAC's report also showed that of the 442 children remanded in 2017–18, *two-thirds* did not receive a custodial sentence, with those children spending 10,755 days on remand, at a cost of \$15 million.¹⁸

Recommendation 4: The following changes to the Bail Act should be urgently implemented:

- The reverse-onus provisions in the Bail Act should be repealed, particularly the 'show compelling reason' and 'exceptional circumstances' provisions (sections 4AA, 4A, 4C, 4D and schedules 1 and 2 of the Bail Act).
- There should be a presumption in favour of bail for all offences, except in circumstances where there is a specific and immediate risk to the physical safety of another person. This should be accompanied by 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.
- The offences of committing an indictable offence while on bail (s. 30B), breaching bail conditions (s. 30A) and failure to answer bail (s. 30) should be repealed.

Recommendation 5: There should be increased and mandatory guidance and oversight for police officers, to ensure that they understand and comply with the requirements of the Bail Act. It is essential that police officers are able to appropriately determine when bail should be granted by a police decision maker, and when the individual should be brought to court.

Recommendation 6: The Victorian Government should prioritise investment in a residential bail support and therapeutic program for Aboriginal children and young people in the 2021-2022 State budget.

YOUTH DETENTION


The Aboriginal Justice Caucus (of which VALS is a member) made detailed submissions in 2019 and 2020 on the youth justice act which is currently being drafted. VALS recommends that the DPC review those submissions, which consider in great detail the conditions and treatment of children and young people in detention.

VALS has been particularly concerned for the health and welfare of Aboriginal children in detention during the pandemic, especially the children who have been subjected to isolation and lockdowns. VALS refers DPC to VALS' *Submission to the Public Accounts and Estimates Committee's Inquiry into the Victorian Government's response to COVID-19*¹⁹ and the VALS COVID-19 Recovery Plan, *Building*

¹⁷ Sentencing Advisory Council, *Children Held on Remand in Victoria: A Report on Sentencing Outcomes* (September 2020) ix

¹⁸ *Ibid* xi

¹⁹ VALS, *Submission to the Public Accounts and Estimates Committee's Inquiry into the Victorian Government's response to COVID-19* (September 2020), available at https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Submissions/87_Victorian_Aboriginal_Legal_Service.pdf



Back Better (being released this week), for a detailed description of the identified issues and our recommendations to protect the rights of detained Aboriginal children.

VALS also highlights the Government's obligation under the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)* 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' (National Preventive Mechanisms, or **NPMs**) by January 2022.

Recommendation 7: VALS strongly encourages DPC to consider the Aboriginal Justice Caucus' submissions on the youth justice act currently being drafted, to ensure that Victoria's Youth Strategy considers the rights and needs of some of Victoria's most vulnerable children: Aboriginal children in detention.

Recommendation 8: Measures taken and practices adopted in places of detention must never amount to torture or cruel, inhuman or degrading treatment or punishment. Children must never be subjected to solitary confinement.


Recommendation 9: The Government must urgently undertake robust, transparent and inclusive consultations with the Victorian Aboriginal community, its representative bodies and Aboriginal Community Controlled Organisations, such as VALS, on the implementation of Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) in a culturally appropriate way.

CHILD PROTECTION

The Closing the Gap Agreement's targets include to reduce, by 2031, 'the rate of over-representation of Aboriginal and Torres Strait Islander children in out-of-home care by 45 per cent.'²⁰

The single biggest issue in child protection is the limit on the jurisdiction of the Children's Court. Under the Act, the assessment of placement is an administrative matter for the applicant (DHHS) alone and, as such, is beyond the Court's jurisdiction. The principles in the State child protection legislation and the Family Law Act both spring from the UN Convention on the Rights of the Child. Yet the threshold for who is considered suitable to care for a child is applied differently, with the State generally having a much higher (and sometimes seemingly arbitrary) threshold. Given the gravity of placement, it is imperative that the Court be the arbiter of suitability.

²⁰ Coalition of Aboriginal and Torres Strait Islander Peak Organisations and Australian Governments, National Agreement on Closing the Gap (July 2020) 30



Recommendation 10: The Government must develop and implement a strategy, in partnership with Aboriginal Community Controlled Organisations, to meet the Closing the Gap target – to reduce, by 2031, the rate of over-representation of Aboriginal and Torres Strait Islander children in out-of-home care by 45 per cent.

Recommendation 11: Currently the assessment of placement of a child is an administrative matter for DHHS alone. VALS recommends that instead, the Court be the sole arbitrator of placement suitability.

COVID-19 FINES

In the PAEC submission, VALS noted the following:

Children may have a range of reasons for being outside past curfew, including not having a safe home. Additionally, magistrates are only able to fine children under 15 years old \$165.20, and children between 15 and 17 years \$826.²¹ Children do not have the financial capacity to pay fines, and their culpability is less than that of adults, given their age and maturity.²²

With at least 2000 children aged 14 to 17 years old being fined \$200, \$1652 or \$5000,²³ there is significant financial pressure on families to whom the responsibility falls to pay these fines.²⁴ On 9 December 2020, the Smart Justice for Young People coalition ‘of forty Victorian youth advocates, legal centres, Aboriginal and Torres Strait Islander services and other organisations... called on the State Government to withdraw an estimated \$3 million in COVID-19 fines handed out to around 2000 children and young people during the pandemic.’²⁵

Recommendation 12: To prevent the significant impact of COVID-19 specific fines on children and young people, the Victorian Government should withdraw all fines issued through the COVID-19 Directions to children and young people aged 18 and under, and instead prioritise a service, education and health-based response.

²¹ *Children Youth and Families Act (Vic)*, s373

²² VALS, Submission to the Public Accounts and Estimates Committee’s Inquiry into the Victorian Government’s response to COVID-19 (September 2020) 56-57, available at https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Submissions/87_Victorian_Aboriginal_Legal_Service.pdf

²³ Youth Law, Submission on behalf of COVID-19 Fines Community Lawyers Working Group to the Inquiry into the Victorian Government’s Response to the COVID-19 Pandemic (30 November 2020) 2, available at https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Submissions/209_Youthlaw_Redacted.pdf

²⁴ Ibid.

²⁵ Smart Justice For Young People, State Government must waive COVID-19 fines handed out to 2000 Victorian children (9 December 2020), available at <https://ysas.org.au/media-releases/9th-december-2020-media-statement>