



SUBMISSION TO THE ROYAL COMMISSION INTO VICTORIA'S MENTAL HEALTH SYSTEM

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1. EXECUTIVE SUMMARY

The Victorian Aboriginal Legal Service (VALS) welcomes the opportunity to make a written submission to the Royal Commission into Victoria's Mental Health System. The Commission represents an important opportunity to make long-lasting changes to the mental health system, and to strengthen the interaction between the mental health system and other services and systems, including the legal system.

We make this submission from the perspective of an Aboriginal Community-Controlled Organisation (ACCO) providing a legal service for Victorian Aboriginal and Torres Strait Islander¹ communities across criminal, family and civil law. Through our work, we are acutely aware of the challenges faced by clients with poor mental health, both in terms of accessing the mental health system, as well as their interaction with other systems and services. Across our three areas of legal practice in 2017-2018, 37.5% of all new matters involved clients who reported having a mental health issue² and 6.2% of the matters involved a client with an intellectual or cognitive disability.³

The high rate of mental health conditions amongst our clients is reflective of broader trends across Victoria and Australia. In 2014-2015, 29.3% of Aboriginal adults had a mental health condition and 30% experienced high or very high levels of psychological distress.⁴ Moreover, 29% of young Aboriginal people aged 15-24 had a long-term mental health condition and 39% of Victorian Aboriginal people aged 15-24 experienced high or very high psychological distress.⁵ Aboriginal people are more likely to experience poor mental health than non-Aboriginal people and the suicide rate for Aboriginal people is double the national average.⁶

Poor mental health - including moderate and acute mental health conditions - is often one of the key factors leading to our clients' interaction with the legal system. This arises from the criminalisation of mental health conditions, discrimination on the basis of mental health, and inability of social systems to respond adequately to individuals with mental health concerns. Aboriginal people with mental health conditions are some of the 'most marginalised people in Australian society' and who experience 'multiple, interlocking and compounding disadvantageous circumstances'.⁷

¹ The term Aboriginal is used throughout the document to refer to Aboriginal and/or Torres Strait Islander Peoples.

² 915 out of 2441 new matters in 2017-2018 involved clients with mental health concerns. This included: 364 out of 663 civil law matters (54%); 126 out of 477 family law matters (26%); and 424 out of 1301 of criminal law matters (32%).

³ 152 out of 2441 new matters in 2017-2018 (6.2%) involved clients with an intellectual or cognitive disability.

⁴ Australian Bureau of Statistics (ABS), 4714.0 - *National Aboriginal and Torres Strait Islander Social Survey, 2014-15* (2016).

⁵ Australian Institute of Health and Welfare (AIHW), *Aboriginal and Torres Strait Islander adolescent and youth health and wellbeing 2018* (2018), 95 and 129.

⁶ ABS, *Causes of Death, Australia, 2017*, (2017).

⁷ First Peoples Disability Justice Consortium, *Aboriginal and Torres Strait Islander Perspectives on the Recurrent and Indefinite Detention of People with Cognitive and Psychiatric Impairment: A submission to the Senate Inquiry on the Indefinite Detention of People with Cognitive and Psychiatric Impairment* (2016), 11.



Once in contact with the legal system, we regularly see how legal processes impact on the social and emotional wellbeing of Aboriginal individuals, families, and communities. The impact of the legal system on mental health is particularly acute for Aboriginal peoples, given the lack of cultural safety and ongoing discrimination and racism within the system. This is even more aggravated for Aboriginal people in contact with the criminal justice system, where the impacts for social and emotional wellbeing are devastating, particularly for Aboriginal people in custody.

Drawing on the experience of our clients and staff, our submission highlights issues arising from the intersection between the mental health and legal system. In considering these issues, and the recommendations contained in our submission, we ask that the Commission acknowledge and give further consideration to the following:

- There is a critical need to enhance access to culturally safe and trauma-informed mental health and social and emotional wellbeing services in the community;
- Early intervention and integrated holistic wrap-around services are essential to address underlying mental health issues and prevent escalation of legal issues;
- ACCOs are best placed to provide culturally safe services. There is a critical need to invest in ACCOS as the primary providers of culturally safe and trauma informed services for Aboriginal people with mental health conditions;
- There is a critical need to reform existing systems, so that they support social and emotional wellbeing rather than penalising poor mental health;
- Prisons and youth justice centres are harmful for the social and emotional wellbeing of Aboriginal people, particularly for Aboriginal children and young people. The expansion of the prisons and youth justice centres as places to manage and control people with poor mental health must stop.
- The forensic mental health system is in crisis. The Royal Commission should prioritise the mental health of people in the criminal justice and youth justice systems, including the social and emotional wellbeing of Aboriginal young people.
- Significant reform is needed to ensure that the legal system is culturally safe for Aboriginal individuals, families and communities, and can support them to maintain their best possible social and emotional wellbeing.

Rather than respond to the specific questions share by the Royal Commission, we have chosen to structure our submission in seven thematic sections. VALS welcomes the opportunity to share our experiences and expertise and looks forward to engaging further with the Commission.



2. SUMMARY OF RECOMMENDATIONS

1. Ensure government accountability for implementation of commitments under the *Balit Murrup Aboriginal Social and Emotional Wellbeing Framework* as well as *Dhelk Dja, Korin Korin Balit-Djak, Wungurilwil Gapgaduir, Burra Lotjpa Dunguludja* and the *Victorian Aboriginal Affairs Framework*. Ensure that any further recommendations are consistent with and build on the existing commitments outlined in these frameworks.
2. In line with the Self Determination Principles set out in the *Victorian Aboriginal Affairs Framework*, the Royal Commission should consult with Aboriginal Community Controlled Organisations on its draft recommendations before they are finalised.

Ensure that clinical care is culturally-safe and trauma informed clinical care

3. The Royal Commission should adopt a holistic understanding of Aboriginal mental health, informed by the concept of Aboriginal Social and Emotional wellbeing.
4. Psychiatric hospitals should employ adequate Aboriginal mental health workers and involve external Aboriginal Social and Emotional Wellbeing Workers so that Aboriginal involuntary inpatients have consistent access to support, and to ensure that mental health services are delivered in a culturally safe manner.
5. Aboriginal mental health staff should be consistently consulted by clinical and nursing staff to ensure that they are able to meaningfully support Aboriginal inpatients to engage in treatment.
6. Clinicians and other members of treating teams should work more extensively with the families of patients and involve them in the decision-making process regarding treatment options.

Increase funding to Aboriginal Organisations to provide culturally-safe, integrated and holistic services

7. Establish integrated mental health and Social and Emotional Wellbeing teams in all Aboriginal Community Controlled Health Organisations, linked to Aboriginal specialist mental health services, as recommended by the National Mental Health Commission Review.
8. Provide long-term and secure funding to VALS and other ACCOs to employ a counsellor, a social worker and mental health support workers. These roles would provide counselling services to clients, support clients to engage with their legal matters, and also support referrals and integrated pathways between the mental health system and related areas, including justice education, drug and alcohol programs, family violence.



9. Provide Flexible Mental Health Support Packages, modelled off the Flexible Family Violence Support Packages, to support social and emotional wellbeing of individuals with mental health conditions. Packages could be used by individuals to establish financial stability (e.g. pay off fines, utility debts and/or address basic needs), secure safe and stable housing (e.g. pay off arrears) and access health and wellbeing services.
10. Provide funding to VALS to re-establish Balit Ngulu to provide holistic and culturally safe legal assistance and representation for Victoria's Aboriginal children and young people.

Redress harm suffered by Victoria's Stolen Generations

11. The Royal Commission should prioritise the mental health and social and emotional wellbeing of Victoria's Stolen Generations and their families, including by convening a Round Table with the Stolen Generations', ACCOs and other relevant stakeholders.
12. Develop and implement a culturally safe and comprehensive scheme, to redress Aboriginal Victorians who were removed from their families and institutionalised as a result of Government policies. The scheme should redress Aboriginal Victorians for the loss of culture, as well as the physical, sexual and psychological abuse and intergenerational trauma.

Reform systems and services that impact on mental health

13. Maintain and grow public housing stock in order to reduce public housing wait lists.
14. Provide brokerage funding to ACCOs, including VALS, to support Aboriginal people facing eviction due to mental health conditions. This brokerage funding should be modelled off similar funding provided to ACCOs for clients experiencing family violence.
15. Community housing should have the same policies and standards as public housing, with a focus on early support and eviction as a last resort.
16. Culturally-safe, trauma-informed services should be available to Aboriginal people with mental health conditions to assist them to maintain tenancies.
17. Increase funding to cover the cost of psychologist and psychiatrist reports for people applying for enforcement reviews at Fines Victoria, who have not yet accumulated \$5,000 in fines.
18. Accept and legislate all 69 recommendations from the Final Report of the Independent Broad-based Anti-Corruption Commission's (IBAC) Committee on the *Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria*, including providing adequate funding to IBAC to create a new Police Corruption and Misconduct Division.



Stop criminalising mental health and support social and emotional wellbeing of Aboriginal people in the criminal justice system

19. The Royal Commission should prioritise the mental health and social and emotional wellbeing of people in the criminal justice system, including Aboriginal people.
 - a. The Commission should work with the Mental Health Legal Centre to visit each of Victoria's prisons and engage with people who have lived experience of mental illness and the forensic mental health system, including Aboriginal people (both sentenced and on remand).
 - b. The Commission should convene a Round Table discussion to examine the forensic mental health system and the relationship between the mental health and criminal justice systems.
20. Decriminalise offences in the *Summary Offences Act 1966* (Vic) (SOA) that disproportionately target persons with poor mental health and/or who are experiencing homelessness including:
 - a. Begging (s 49A of the SOA)
 - b. Obstruction of foot paths (s 5 of the SOA)
 - c. Move on directions (s 6 of the SOA)
 - d. Obscene language (s 17 of the SOA)
 - e. Drunk and disorderly offences (ss 13 and 14, 16 and 17A of the SOA)
21. Improve access to multi-disciplinary and culturally safe crisis response teams including Aboriginal health workers/clinicians and culturally aware Police with better integrated health diversion processes as front-line response.
22. Commit to implement the Victorian Ombudsman's recommendation for the expansion of current therapeutic court-based interventions, together with parallel investments in associated support services.
23. Prioritise the planning, development and delivery of a culturally appropriate model for a multi-jurisdictional therapeutic and specialised healing court for Aboriginal accused with multiple and complex needs, as identified in *Burra Lotjpa Dunguludja*.
24. Repeal the punitive Bail reforms introduced in 2018, so that people are not compelled to 'show exceptional circumstances' for low-level offences linked to poverty and homelessness.
25. Increase funding to the Court Integrated Support Program (CISP) so that it is accessible in all locations across Victoria, including by ensuring that there are adequate Koori CISP workers to support Aboriginal people on bail across Victoria.



26. Prioritise resources for the development of a culturally safe residential bail program by ACCOs.
27. Develop training and guidelines to assist bail decision makers, including bail justices, to better understand the needs of people with mental health conditions and consider therapeutic bail conditions.
28. Develop guidelines on the application of section 3A of the Bail Act, as recommended by the Australian Law Reform Commission Inquiry into Incarceration Rates of Aboriginal and Torres Strait Islander Peoples.
29. Repeal legislation imposing mandatory or presumptive terms of imprisonment upon conviction of an offender, as recommended by the Australian Law Reform Commission, particularly as it relates to police and emergency service response to mental health incidents.
30. Amend the *Sentencing Act 1991* to support the use of Aboriginal Community Justice Reports and consideration of an offenders' Aboriginal background.
31. Provide long-term and sustainable funding to VALS and other organisations, to resource the employment of a Disability Justice Support Worker. This role will support legal counsel to work with persons with a cognitive disability who are accused of a crime.
32. Where a person is found not guilty by mental impairment under the *Crimes (Mental Impairment and Unfitness to Stand Trial) Act 1997*, should immediately be spent conviction.
33. Ensure that all prison officers receive regular, gender and culturally sensitive, training on how to interact with people with cognitive disabilities.
34. Commit significant and sustained investment in the Aboriginal and Torres Strait Islander mental health workforce within the correctional health sector, in order to build recruit, train, accredit and build the capacity of more qualified Aboriginal and Torres Strait Islander psychologists, psychiatrists, counsellors, social workers and other mental health workers.
35. 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 justice system.
36. Prioritise the development and finalisation of standards for culturally safe trauma informed health services in criminal justice and youth justice.
37. Introduce a specialised Koori Unit within *Mental Health Advice and Response Service*.



38. The Royal Commission should enquire into the availability and utilisation of culturally appropriate screening tools to be used for the assessment of Aboriginal prisoners such as the *Here and Now Aboriginal Assessment* (HANAA) developed in Western Australia⁸, the Indigenous Risk Impact Screen (IRIS)⁹ or the Patient Health Questionnaire (aPHQ-9).¹⁰
39. The Royal Commission enquire into best practice throughcare models including integrated models operating in Victoria and other Australian and international jurisdictions.
40. Provide long-term and stable funding to ACCOs to deliver pre and post release programs, including transitional housing programs, for Aboriginal people in custody.
41. The Royal Commission enquire into the success of the Continuity of Aboriginal Health Care Pilot (CAHP) and consider recommendations to expand similar pilots to other prisons across Victoria.

Improve social and emotional wellbeing by diverting our young people away from the youth justice system

42. Raise the minimum age of criminal responsibility to 14 years old to prevent early criminalisation, which can be a precursor, causal and aggravating factor for mental health conditions in children.
43. Commit long-term funding to ensure that the Victorian Police Koori Youth Cautioning program is implemented in all areas across Victoria.
44. Invest in culturally safe diversion programs run by Aboriginal Community Controlled organisations, to ensure that Aboriginal young people can access diversion.
45. Develop and implement an inter-agency Protocol to reduce the contact of children in residential care with the youth justice system.
46. Ensure that the Koori Children's Court is accessible in additional locations across Victoria to ensure that Aboriginal children across Victoria have access to a legal process that is culturally-safe and supports social and emotional wellbeing.
47. Increase the capacity of forensic mental health services for young people in the youth justice system.
48. Implement the recommendations from the 2017 *Inquiry into the Use of Isolation, Separation and Lockdowns in the Victorian Youth Justice System*.

⁸ <https://www.ncbi.nlm.nih.gov/pubmed/25944764>

⁹ <https://www.ncbi.nlm.nih.gov/pubmed/17364845>

¹⁰ <https://www.mja.com.au/journal/2019/211/1/getting-it-right-validating-culturally-specific-screening-tool-depression-aphq-9>



49. Implement the recommendations from the 2018 Report by VEOHRC and the CCYP on *Aboriginal Cultural Rights in Youth Justice Centres*.
50. Increase funding to ACCOs to provide culturally effective support to Koori young people on community-based orders, including through funding to VALS to re-establish a legal service for Aboriginal young people across Victoria.
51. Provide financial support to Aboriginal families and community members to visit their young people in youth justice centres.

Support the social and emotional wellbeing of Aboriginal people engaged in the family law and child protection systems

52. Increase funding to ACCOs to provide culturally safe and trauma-informed support services to Aboriginal families at risk of or engaged in the child protection system
53. Provide long term and secure funding for ACCOs to develop a tailored, flexible plan specific to the needs of each Aboriginal child in out-of-home-care. This includes individual mental health plans to be embedded in case planning for children and young people with mental health concerns, that incorporate cultural support and trauma informed care
54. Amend the Family Law Act to ensure that “in determining what arrangements best promote the best interests of an Aboriginal or Torres Strait Islander child, a court must consider the child’s opportunities to connect with, and maintain the child’s connection to, the child’s family, community, culture and country,” as recommended by the ALRC Inquiry into the Family Law System.
55. Introduce cultural reports into the family law system, to provide a stronger voice for Aboriginal families in Court and ensure that connections to family, community, culture and country are adequately considered.
56. Expand the Koori Family Hearing Day (Family Division of the Children’s Court) and the Indigenous List (FCCA) to other locations across Victoria, to ensure that Aboriginal families, particularly those in rural and regional areas have access to a culturally safe court process.
57. Reinstate Aboriginal Liaison Officers at the Family Court and the Federal Court of Australia. Aboriginal Liaison Officers make a significant contribution to cultural safety of court proceedings by monitoring the cultural safety of court proceedings, advising judges and court officials, and guiding Aboriginal people through court process and ensure they have access to appropriate service.



3. INTRODUCTION

VALS welcomes the opportunity to make a written submission to the Royal Commission into Victoria's Mental Health System. The Commission represents an important opportunity to make long-lasting changes to the mental health system, and to strengthen the interaction between the mental health system and other services and systems, including the legal system.

We make this submission from the perspective of an ACCO providing a legal service for Victorian Aboriginal communities across criminal, family and civil law. Through our work, we are acutely aware of the challenges faced by clients with poor mental health, both in terms of accessing the mental health system, as well as other systems and services. Across our three areas of legal practice in 2017-2018, 37.5% of all new matters involved clients who reported having a mental health issue¹¹ and 6.2% of the matters involved a client with an intellectual or cognitive disability.¹²

The high rate of mental health condition amongst our clients is reflective of broader trends across Victoria and Australia. In 2014-2015, 29.3% of Aboriginal adults had a mental health condition and 30% experienced high or very high levels of psychological distress.¹³ Moreover, in 2017-2018 in Victoria, 33% of young Aboriginal people aged 15-24 had a long-term mental health condition and 39% Aboriginal people aged 15-24 experienced high or very high psychological distress.¹⁴ Aboriginal people are more likely to experience poor mental health than non-Aboriginal people and the suicide rate for Aboriginal people is double the national average.¹⁵

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Once in contact with the legal system, we regularly see how legal processes can have a significant determinantal impact on the social and emotional wellbeing of individuals, families, and communities. The impact of the legal system on mental health is particularly acute for Aboriginal and/or Torres Strait Islander peoples, given the lack of culturally safety and ongoing discrimination and racism within the system. This is even more aggravated for Aboriginal people in contact with the

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criminal justice and youth justice systems, where the impacts for social and emotional wellbeing are devastating, particularly for Aboriginal people in custody.

Drawing on the experience of our clients and staff, our submission highlights issues arising from the intersection between the mental health and legal systems. Rather than respond to the specific questions share by the Royal Commission, we have chosen to structure our submission in seven thematic sections. VALS welcomes the opportunity to share our experiences and expertise and looks forward to engaging further with the Commission.

3.1 BACKGROUND TO THE VICTORIAN ABORIGINAL LEGAL SERVICE

VALS is an ACCO established in 1972 by committee and incorporated in 1975. VALS is committed to caring for the safety and psychological well-being of clients, their families and communities and respecting the cultural diversity, values and beliefs of our clients. VALS vision is to ensure that Aboriginal Victorians are treated with true justice before the law, our human rights are respected, and we have the choice to live a life of the quality we wish.

We operate in a number of strategic forums which help inform and drive initiatives to support Aboriginal people in their engagement with the justice, and broader legal system, in Victoria. We have strong working relationships with the other five peak ACCOs in Victoria and we regularly support our clients to engage in services delivered by our sister organisations. Our legal practice spans across Victoria and operates in the areas of criminal, civil and family law (including child protection and family violence).

Our 24-hour support service is backed up by the strong community-based role our Client Service Officers play in being the first point of contact when an Aboriginal person is taken into custody, through to the finalisation of legal proceedings. Our community legal education program supports the building of knowledge and capacity within the community so our people can identify and seek help on personal issues before they become legal challenges.

We seek to represent women, men and children who come to us for assistance in their legal matters, and are only hindered in doing this where there is a legal conflict of interest and we cannot act. If this is the case, we provide warm referrals to other suitable legal representatives, which include Victoria Legal Aid, Djirra, community legal centres and private practitioners as appropriate.

Criminal Law Practice

We represent male and female clients of all ages in immediate criminal court dealings such as bail applications, defending or pleading to charges and sentencing. In looking at bail conditions and sentencing options, we are involved in finding accommodation and supports that will not only support a client in their immediate circumstances, but also address the underlying causes of why



they are committing criminal acts. This includes drug and alcohol services; behavioural change programs and counselling; linkages to mental health services, and connections to community. In 2017-2018, 32% of our criminal law matters (including adults and children) involved clients who reported having a mental health condition.

Children, Youth and Family Law Practice

Our Children, Youth and Family Law Division represents both adults and children in the areas of youth justice, child protection and family law.

We represent children who are engaged with the youth justice system, often arising from multiple traumas including family violence, separation from parents and other family members who are in custody, drug and alcohol misuse, removal from parents, dislocation from family and communities. Poor mental health of parents, family members and children is a reoccurring issue with many of our young clients.

We are increasingly seeing a significant number of children who are being removed by the Department of Health and Human Services (DHHS) due to family violence, mental health and/or substance misuse. We often observe children to be suffering from the anxiety of separation and being away from family, plus coming into contact with older children who have been in the child protection system for extensive periods of time, which may cause anxiety, distress and place them at risk of harm in other ways. In 2017-2018, 26% of our family law matters involved clients who reported having a mental health condition.

Civil Law and Human Rights Practice

Our Civil Law and Human Rights Practice encompasses a range of legal areas which often arise as a result of poor mental health, family violence, engagement with the criminal justice system and drug/alcohol misuse. This includes tenancy and eviction, fines and infringements, police complaints, health complaints, discrimination in the workplace, debt, social security, health and wellbeing of prisoners, and personal safety intervention orders. In 2017-2018, 54% of our civil law matters involved clients who reported having mental health issues.

Balit Ngulu

Balit Ngulu (meaning 'strong voice') operated between 2017-2018 as the only Aboriginal legal service for Aboriginal children and young people in Australia. Balit Ngulu provided legal advice and assistance in the areas of youth justice, child protection, family law, and civil law issues. It also provided integrated and culturally appropriate services aimed at breaking the cycle of disadvantage and addressing over-representation of Aboriginal young people in youth justice and child protection. In doing so, the service was successful in diverting Aboriginal youth from the criminal justice system



and prioritising and facilitating placement of children within a kinship network Balit Ngulu unfortunately closed in 2018 due to lack of funding.

Community Justice Programs

VALS model of holistic support is provided by way of the Community Justice Program, which includes: pre-and post-release support programs; Local Justice Worker Programs; Aboriginal Community Justice Panels Programs; and the 24-hour Custodial Notification System. Our community-based Client Service Officers play a critical role as the first point of contact when an Aboriginal person is taken into custody, through to the finalisation of legal proceedings.

3.2 POLICY LANDSCAPE

VALS would like to draw the attention of the Commission to the vast policy framework that already exists in relation to the mental health and social and emotional wellbeing for Aboriginal people, both at a national and state level. Time and time again, Aboriginal communities across Australia have been consulted with and asked to share their stories, their time and their expertise in the hope that they will be heard, and things will change.

Significant changes are still required to enhance the capacity of our mental health system to respond to the needs of Aboriginal communities in Victoria. However, it is critical to take stock of the policy work that has already been done and understand whether previous strategies, reports, policies and recommendations have resulted in real change for Aboriginal people.

Commonwealth Government policy framework

- *Fifth National Mental Health and Suicide Prevention Plan, 2017*
- *Fifth National Mental Health Implementation Plan, 2017*
- *National Aboriginal and Torres Strait Islander Strategic Framework for Aboriginal and Torres Strait Islander People's Mental Health and Social and Emotional Wellbeing 2017-2023, 2017*
- *National Aboriginal and Torres Strait Islander Health Plan 2013-2023, 2013*
- *National Aboriginal and Torres Strait Islander Health Plan Implementation Plan, 2015*
- *National Cultural Respect Framework for Aboriginal and Torres Strait Islander Health 2016-2026, 2016*
- *National Aboriginal and Torres Strait Islander Health Workforce Strategic Framework 2016-2023, 2017*
- *A National framework on recovery-oriented mental health services: Policy and Theory, 2013*
- *A National framework on recovery-oriented mental health services: Guide for Practitioners and Providers, 2013*
- *Closing the Gap Framework, 2008*
- *Closing the Gap Refresh Framework (currently being developed)*



Victorian Government Policy Framework

- *Victoria's 10 Year Mental Health Plan*, 2015
- *Victorian suicide prevention framework 2016–2025*, 2016
- *Victoria's Mental Health Workforce Strategy*, 2016
- *Balit Marrup: Aboriginal social and emotional wellbeing framework 2017-2027*, 2017
- *Absolutely everyone: State Disability Plan 2017–2020*, 2016
- *Victorian Public Health and Wellbeing Plan 2015–2019*, 2015
- *Korin Korin Balit-Djak: Aboriginal Health, Wellbeing and Safety Strategic Plan 2017-2027*, 2017
- *Victorian Aboriginal Affairs Framework 2018-2023*, 2018
- *Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement Phase 4*, 2018
- *Wungurilwil Gapgapduir Aboriginal Children and Families Agreement*, 2018
- *Dhelk Dja: Safe Our Way (Strong Culture, Strong Peoples, Strong Families)*, 2018
- *Victorian Aboriginal Economic Development Strategy 2013-2020*, 2013
- *Marrung: Aboriginal Education Plan 2016-2026*, 2016
- *Aboriginal Health and Human Services Workforce Strategic Action Plan 2018-2019*, 2018
- *Roadmap for Reform: Strong families, safe children*, 2016

Commonwealth Royal Commissions, Inquiries and Reviews

- Royal Commission into Aboriginal Deaths in Custody (1987 – 1991)
- *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, 1997
- National Mental Health Commission, *Contributing Lives, Thriving Communities: Report of the National Review of Mental Health Programmes and Services*, 2014
- Department of Health, *Australian Government Response to Contributing Lives, Thriving Communities – Review of Mental Health Programmes and Services*, 2015
- Royal Commission into Institutional Responses to Child Sexual Abuse (2013-2017)
- Productivity Commission, *Inquiry on improving mental health to support economic participation and enhancing productivity and economic growth* (ongoing)

Victorian Royal Commissions, Inquiries and Reviews

- Parliament of Victoria, Drugs and Crime Prevention Committee, *Inquiry into Public Drunkenness* 2011
- Victorian Auditor-General, *Residential Care Services for Children*, 2014
- Royal Commission into Family Violence (2015-2016)
- Office of the Public Advocate, *Rebuilding the Village: Supporting families where a parent has a disability, report 2: Child Protection*, 2015
- Parliament of Victoria, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations*, 2013



- *Government Response to the Report of the Family and Community Development Committee Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations 'Betrayal of trust', 2014*
- *CCYP, Always Was, Always will be Koori children: Systemic inquiry into services provided to Aboriginal children and young people in out-of-home care in Victoria, 2016*
- *CCYP, In the child's Best Interests: Inquiry into compliance with the intent of the Aboriginal Child Placement Principle in Victoria, 2016*
- *Commission for Children and Young People (CCYP), The Same Four Walls: Inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system, 2017*
- *Victorian Ombudsman, Report on youth justice facilities at the Grevillea Unit of Barwon Prison, Malmsbury and Parkville, 2017*
- *Armytage and Ogloff, Youth Justice Review and Strategy: Meeting needs and reducing offending (Part I and II), 2017*
- *Parliament of Victoria, Inquiry into Youth Justice Centres in Victoria, 2018*
- *Government Response to the Parliamentary Inquiry into Youth Justice Centres in Victoria, 2018*
- *Victorian Ombudsman, Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre, 2017*
- *Victorian Ombudsman, Investigation into the use of solitary confinement and young people (ongoing investigation)*
- *Victorian Auditor-General, Accessibility of Mainstream Services for Aboriginal Victorians, 2014*
- *Victorian Auditor-General, Mental Health Strategies for the Justice System, 2014*
- *Victorian Equal Opportunity and Human Rights Commission, Aboriginal Cultural Rights in Youth Justice Centres, 2018*

VALS is supportive of the renewed attention being given to the mental health system as a result of the Royal Commission. In doing so, we encourage the Commission to take account of the existing policy framework and previous recommendations relating to the mental health and social and emotional wellbeing of Aboriginal people. It is critical to ensure accountability for recommendations and initiatives that have been promised and not implemented.

RECOMMENDATIONS:

1. Ensure government accountability for implementation of commitments under the *Balit Murrup Aboriginal Social and Emotional Wellbeing Framework* as well as *Dhelk Dja, Korin Korin Balit-Djak, Wungurilwil Gapgaduir, Burra Lotjpa Dunguludja* and the *Victorian Aboriginal Affairs Framework*. Ensure that any further recommendations are consistent with and build on the existing commitments outlined in these frameworks.
2. In line with the Self Determination Principles set out in the *Victorian Aboriginal Affairs Framework*, the Royal Commission should consult with Aboriginal Community Controlled Organisations on its draft recommendations before they are finalised.



3.3 DEFINITIONS AND KEY CONCEPTS

Aboriginal social and emotional wellbeing

Aboriginal approaches to mental health are grounded on a holistic understanding of health, which encompasses mental, physical, cultural and spiritual health. VALS endorses the framework set out in *Balit Marrup* (meaning ‘Strong Spirit’) which is grounded on the concept of social and emotional wellbeing of Aboriginal individuals, families and communities.

Social and emotional wellbeing is an inclusive concept which means “being resilient, being and feeling culturally safe and connected, having and realising aspirations, and being satisfied with life.”¹⁷ It is a strengths-based model which emphasises the importance of building strengths, resilience and connectedness in Aboriginal people and communities as pathways to positive mental health and wellbeing.¹⁸ Social and emotional wellbeing is composed of the following internal dimensions:

- connection to spirit, spirituality and ancestors
- connection to land
- connection to culture
- connection to community
- connection to family and kinship
- connection to mind and emotions
- connection to body

Social and emotional wellbeing is also influenced by external factors, including social, political, historical and cultural determinants.

In highlighting this approach, we encourage the Commission to adopt a more holistic understanding of mental health and mental health conditions, which acknowledges the Aboriginal concept of social and emotional wellbeing. Adopting a narrow focus on mental health and mental illness fails to take into account the impact of trauma on an individuals wellbeing, their social co-dependency and interaction with social, political, historical and cultural determinants of health.

¹⁷ Department of Health and Human Services, *Balit Marrup: Aboriginal social and emotional wellbeing framework 2017-2027* (hereafter referred to as *Balit Marrup*), 50.

¹⁸ Gee et al, ‘Aboriginal and Torres Strait Islander social and emotional wellbeing,’ in P. Dudgeon, H. Milroy and R. Walker (eds) *Working Together: Aboriginal and Torres Strait Islander mental health and wellbeing principles and practice*, (2014: Canberra).



Cultural Safety

Cultural safety refers “an environment that is 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, living and working together with dignity and truly listening.”¹⁹

In Australia, cultural safety has been diminished “through a lack of respect and recognition of the positive aspects of Aboriginal culture and its centrality in creating a sense of meaning and purpose for Aboriginal peoples.”²⁰ Hence, many Aboriginal people are often wary of non-Aboriginal services and systems and are reluctant to receive services from non-Aboriginal organisations.²¹

To address this issue, there has been increasing acknowledgement of the importance of providing culturally safe services for Aboriginal people. Access to culturally safe services and organisations is an essential way of promoting Aboriginal social and emotional wellbeing as they acknowledge and understand the importance of culture, land, community, family, kinship, spirits and ancestors for Aboriginal people. They also understand the influence of social, political, historical and cultural determinants for Aboriginal people’s social and emotional wellbeing, including systemic racism, intergenerational trauma and child removal policies.

In VALS perspective, Aboriginal community-controlled organisations are best placed to provide culturally safe services because of their close connection to communities and high numbers of Aboriginal staff. However, some Aboriginal people prefer to access services from non-Aboriginal organisations and it is therefore critical to ensure that mainstream services are also culturally safe.

Cultural safety also applies to the legal system, where it is necessary to address systemic racism and to reduce the negative impact of legal processes and proceedings on Aboriginal social and emotional wellbeing. In the legal system, cultural safety includes making sure that Aboriginal people:

- feel heard, believed and understood, including in your own language;
- feel confident to share their story;
- are able to seek service without fear of mistreatment, repercussions or misunderstanding of cultural needs;

¹⁹ R. Williams ‘Cultural safety - what does it mean for our work practice?’ (1999) 23(2) *Australia and New Zealand Journal of Public Health*, 212.

²⁰ R. Frankland, M. Bamblett and P. Lewis, “Forever Business: A Framework for Maintaining and Restoring Cultural Safety in Aboriginal Victoria,” (2011) 7 (24) *Indigenous Law Bulletin* 27.

²¹ Victorian Auditor General Office (VAGO), *Accessibility of Mainstream services for Aboriginal Victorians*, (2014). See also DHHS, *Balit Marrup*, p. 17: “Racism continues to have a significant impact on Aboriginal people’s decisions about when and why they seek health services.”



- do not have to defend their experience of systemic or cultural barriers or discrimination, knowing that their legal representative will do their best to overcome those barriers to get you a fair hearing and outcome.²²

In Victoria, strategies to strengthen cultural safety are embedded in the policy framework,²³ including: (1) increasing access to culturally safe services provided by Aboriginal organisations; and (2) increasing the cultural safety of mainstream services. According to the Mental Health Workforce Strategy, “culturally safe service provision in Australia needs to recognise first and foremost the unique position of Aboriginal and Torres Strait Islanders as the Indigenous people of Australia, their right to self-determination, and the impacts of historical trauma resulting from colonisation.”²⁴ Aboriginal community-controlled organisations play a key role in strengthening cultural safety both as service providers and in their provision of secondary consultation services to mainstream organisations.

Trauma and trauma-informed service delivery

Trauma refers to experiences and reactions to particularly intensive life events, including threats (real or perceived) that can overwhelm a person’s ability to cope and have long-term impacts on their mental health.²⁵ If people do not have an opportunity to heal, they may deal with their pain in negative ways, including physical or emotional violence, abuse or addiction.²⁶

As a result, trauma can be an underling factor for criminal behaviour, family violence and other issues which will bring a person in contact with the legal system. It can also inform the way that an individual engages with the mental health, legal and child protection systems.

Aboriginal people, families and communities have experienced significant trauma, resulting from invasion, colonisation, loss of culture and land and past government policies, including child removal policies. High rates of family violence, poor mental health, suicide, incarceration and homelessness are directly linked to experiences of historical trauma. These experiences can also cause new instances of trauma, leading to cycles of multiple and compounding trauma.

Aboriginal families and communities are also affected by intergenerational trauma, primarily as a result of the Stolen Generations. Originally studied in Holocaust survivors, historical trauma is

²² National Aboriginal and Torres Strait Islander Legal Services (NATSILS), [Submission to the Australian Law Reform Commission’s Review of the Family Law System, Discussion Paper No 86](#), (November 2018), 24.

²³ Victorian Government, *Victorian Aboriginal Affairs Agreement 2013-2018 (VAAF)*, DHHS, *Balit Marrup* (2017); DHHS, *Korin Korin Balit-Djak: Aboriginal health, wellbeing and safety strategic plan 2017-2029* (2017), Victorian Government, *Victoria’s 10 Year Mental Health Plan* (2015); *Wungurilwil Gapgapduir: Aboriginal Children and Families Agreement*, (2018);

²⁴ Victorian Government, *Mental Health Workforce Strategy* (2016).

²⁵ Victorian Government, *Balit Marrup* (2017), 50; The Healing Foundation, [“Glossary of healing terms,”](#)

²⁶ Victorian Government, *Balit Marrup* (2017), 50.



thought to be a pervasive, cumulative, intentional, massive trauma, affecting a specific group and transcending generations through family transmission.

Trauma-informed care is a strengths-based service delivery approach that is grounded in an understanding of, and responsiveness to, the impact of trauma, that emphasises physical, psychological and emotional safety for both providers and survivors to rebuild a sense of control and empowerment.²⁷

Trauma-informed approaches are critical for Aboriginal people given significantly higher rates of trauma, including intergenerational trauma. The importance of trauma-informed services and systems is recognised in government policies and strategies as a key way of supporting resilience, healing and trauma recovery.²⁸

4. ENSURE THAT CLINICAL CARE IS CULTURALLY-SAFE AND TRAUMA INFORMED²⁹

While VALS does not represent clients at the *Mental Health Tribunal* and has limited engagement with clinical mental healthcare facilities, issues regarding clinical care have arisen from work representing clients at the Coroners Court.

VALS' casework in this area highlights the need the need to grow and support Aboriginal mental health and social and emotional wellbeing workers and services, a need which is acknowledged in *Balit Marrup*, Victoria's 10 year Mental Health Plan³⁰ and its associated Mental Health Workforce Strategy.³¹

4.1 STRENGTHEN CULTURAL SUPPORT IN CLINICAL CARE SETTINGS

Cultural support is particularly important for Aboriginal people detained in psychiatric units under the *Mental Health Act* who have severely limited access to family and community cultural support. Aboriginal mental health workers could be playing a much greater role within mental health settings than they currently do. We want to see these workers involved by clinical and other staff in key treatment and other decisions, to better harness their unique ability to connect with inpatients and their families, and provide the best care and support.

Culturally safe care means nursing and clinical staff working alongside Aboriginal Mental Health Workers (AMHWs) to ensure that patients understand and engage in treatment, and so that cultural

²⁷ Substance Abuse and Mental Health Services Administration (SAMHSA), [*SAMHSA's Concept of trauma and guidance for a trauma-informed approach*](#) (2014), cited in Victorian Government, *Balit Marrup* (2017), 50.

²⁸ Victorian Government, *Balit Marrup* (2017). DHHS is currently developing a framework for trauma-informed practices.

²⁹ This section responds to ToR 2 and 3, as well as guiding questions 2, 6 and 7.

³⁰ Victorian Government, *Victoria's 10 Year Mental Health Plan* (2015), 19.

³¹ Victorian Government, *Mental Health Workforce Strategy* (2016), 9.



considerations are factored into care decisions. Aboriginal community-controlled organisations such as Wadamba Wilam and the Victorian Aboriginal Health Service (VAHS) employ Aboriginal Social and Emotional Wellbeing Officers and other support staff, often with lived experience, whose role includes engaging and assisting with psychiatric inpatients. They play a key role in advocating for and supporting patients, alongside hospital-employed AMHWs.

Coronial Inquest Into The Death Of Harley Larking

Harley, a Nunga and Palawa man, passed away on 13 May 2016 at the age of 23 years. On that day, Harley absconded from the Northern Hospital's psychiatric unit where he was an involuntary inpatient, and then lost his life through suspected self-immolation in a nearby park some hours later. He suffered from schizophrenia and substance abuse, and had been an inpatient on multiple occasions in the four years preceding his death.

Harley's death is the subject of an ongoing Coronal Inquest into the cause and circumstances of his death. VALS is representing his mother Annemarie on behalf of Harley's family.

The evidence indicates that Harley engaged better with his treating team with the support of Aboriginal Mental Health Workers and Aboriginal Social and Emotional Wellbeing Workers from ACCOs such as Wadamba Wilam. However, it appears that cultural support was not consistently provided to him due to high demands on the limited Aboriginal mental health workers at the Northern Hospital, and Aboriginal mental health workers were not sufficiently included in the clinical care decision making process, nor were they provided enough opportunity to support Harley in a meaningful way.

In the view of Harley's mother, Annemarie, there is a need for more activities for in-patients which are age-appropriate. Harley's conditions were considered treatment resistant and as a result he spent many months as an inpatient, including his 21st birthday. He was bored and restricted from doing the things he loved, such as spending time with his family, working out, working on his car and playing with his dog. As a young adult, he became frustrated with activities such as colouring in and watching television. These frustrations in part led Harley to abscond from the hospital on multiple occasions to be with his family and his beloved dog Tyson.

VALS and Harley's family are seeking recommendations from the Coroner to improve the care of Aboriginal mental health patients in Victoria. Aboriginal mental health workers play a vital role in fostering social and emotional well-being. They can help ensure patients understand and consent to the treatment they are receiving and support them in their communities during their journey of recovery.



4.2 SUPPORT ABORIGINAL FAMILIES AND CARERS

For Aboriginal and Torres Strait Islander people suffering from poor mental health, connection to their family and community is a key protective factor and vital to their recovery.

Annemarie Skratek

Annemarie Skratek is a Palawa woman who lost her son Harley Larking in tragic circumstances while he was an involuntary inpatient at the Northern Hospital.

Annemarie knows first-hand the devastating impacts of mental illness on her family. She herself has suffered from schizophrenia since her late teens. Her own poor experiences with the mental health system meant that she was reluctant to leave Harley in the hands of 'the system' as an involuntary inpatient, and following his death, she believes the system failed Harley and her family.

Annemarie was keen to have her views considered in this Royal Commission, as someone who has suffered the worst possible outcomes of engaging with the mental health system, as she is aware that the ongoing coronial inquest is not going to deliver all the answers or changes she would like to see.

Annemarie feels that she should have been included in more of the discussions with Harley's treating team about his care, and given more opportunity to work with the Aboriginal mental health workers. She was very close with Harley and in a position to encourage him to engage with clinicians and nurses, but she feels that her relationship with her son was not given the priority or respect it deserved.

"Harley just wanted to be with his family, that's why he kept escaping from the hospital," Annemarie says. "There wasn't a proper space for him to spend time with us when we visited. I visited him every single day that he was there, but his brothers found it really hard to visit Harley at the hospital. The psychiatric ward environment was really overwhelming. Harley wanted to see his nieces and nephews, but it wasn't really a place to bring young kids."

Harley died hours after absconding from the Hospital in May 2016. Annemarie thinks his death was an accident. Annemarie says "It's hard, because when you hand them over to the hospital you think they are going to be safe. He wanted to be with us, his family. He had too much to live for."

RECOMMENDATIONS:

3. The Royal Commission should adopt a holistic understanding of Aboriginal mental health, informed by the concept of Aboriginal Social and Emotional wellbeing.



4. Psychiatric hospitals should employ adequate Aboriginal mental health workers and involve external Aboriginal Social and Emotional Wellbeing Workers so that Aboriginal involuntary inpatients have consistent access to support, and to ensure that mental health services are delivered in a culturally safe manner.
5. Aboriginal mental health staff should be consistently consulted by clinical and nursing staff to ensure that they are able to meaningfully support Aboriginal inpatients to engage in treatment.
6. Clinicians and other members of treating teams should work more extensively with the families of patients and involve them in the decision-making process regarding treatment options.

5. INCREASE FUNDING TO ABORIGINAL ORGANISATIONS TO PROVIDE CULTURALLY SAFE, INTEGRATED AND HOLISTIC SERVICES³²

Integrated and holistic legal services

Like many aboriginal Community-controlled organisations, VALS model of service delivery is based on a holistic wrap-around approach, whereby client support officers and local justice workers provide support to clients to navigate the legal system and connect with other relevant services. Most recently, this approach has been reinforced through the creation of Family Violence Client Service Officers, through funding flowing from the Royal Commission into Family Violence. The holistic model of service delivery is critical for clients with mental health conditions, as poor mental health is often an underlying reason for their contact with the legal system.

In addition to our legal practice, in 2017-2018 VALS also established Balit Ngulu (meaning 'strong voice'), Australia's first Aboriginal legal service for children and young people. The service provided critical legal assistance and representation as well as integrated support to Aboriginal and Torres Strait Islander youth across Victoria, including maintaining and strengthening connection to cultural and family, whilst also assisting clients to access education, employment and leadership opportunities. In doing so, the service was successful in diverting Aboriginal youth from the criminal justice system and prioritising and facilitating placement of children within a kinship network.

Despite the holistic approach taken by VALS and other ACCOs, we are often limited in what we can achieve due to insufficient and insecure funding, including short-term funding cycles. ACCOs are often also over-stretched in providing services as well as supporting government services to improve cultural safety. Important to invest in ACCOs to meet needs of growing Aboriginal population.

Under *Balit Marrup*, the government has recognised the need for interagency, multi-disciplinary Aboriginal social and emotional wellbeing teams across ACCOs and mainstream services agencies to

³² This section responds to ToR 4 and guiding question 2.



provide culturally appropriate support and treatment to Aboriginal mental health consumers.³³ While this is currently expressed as a 10 year aspiration, the Royal commission into the Mental Health System presents an opportunity to translate this aspiration into reality.

RECOMMENDATIONS:

7. Establish integrated mental health and Social and Emotional Wellbeing teams in all Aboriginal Community Controlled Health Organisations, linked to Aboriginal specialist mental health services, as recommended by the National Mental Health Commission Review.
8. Provide long-term and secure funding to VALS and other ACCOs to employ a counsellor, a social worker and mental health support workers. These roles would provide counselling services to clients, support clients to engage with their legal matters, and also support referrals and integrated pathways between the mental health system and related areas, including justice education, drug and alcohol programs, family violence.
9. Provide Flexible Mental Health Support Packages, modelled off the Flexible Family Violence Support Packages, to support social and emotional wellbeing of individuals with mental health conditions. Packages could be used by individuals to establish financial stability (e.g. pay off fines, utility debts and/or address basic needs), secure safe and stable housing (e.g. pay off arrears) and access health and wellbeing services.
10. Provide funding to VALS to re-establish Balit Ngulu to provide holistic and culturally safe legal assistance and representation for Victoria's Aboriginal children and young people.

6. REDRESSING HARM SUFFERED BY VICTORIA'S STOLEN GENERATIONS

The impact of child removal policies on the mental health of Aboriginal people and the social and emotional wellbeing of individuals, families and communities has been well documented in a number of previous inquiries, including the *Bringing Them Home* Report (1997), the *Betrayal of Trust* report of the Victorian Parliament (2013), the final report of the Royal Commission into Institutional Responses to Child Sexual Abuse (2017).

These inquiries detail the lifelong emotional and psychological harm experienced by Aboriginal people who were removed from the families. As at 2018, 40% of Stolen Generation Aboriginal people aged > 50 have poor mental health due to the trauma of removal and are 1.3 times more likely to have poor mental health than non-Aboriginal people aged > 50.³⁴ Additionally, child removal

³³ DHHS, *Balit Marrup* (2017), 44. The teams will include psychologists, psychiatrists, counsellors, mental health nurses, allied health, and Aboriginal mental health and community mental health support workers.

³⁴ *Healing Foundation* (2018). Submission to developing an Action Plan for Aboriginal and Torres Strait Islanders under the Aged Care Diversity Framework. Unpublished.



policies have had and continue to have a significant impact for families and communities, as a result of intergenerational trauma.

Most devastatingly, such policies also destroyed the cultural connection between child, family, community, land and language. Cultural abuse – referring to the denial of practices unique to Aboriginal Victorians – continues to impact Victorian members of the Stolen Generation, and undermine their right to culture.³⁵

As part of its strategic advocacy work in relation to the Royal Commission into Institutional Abuse, VALS has been working with members of the Stolen Generations since 2013. In 2017-2018, VALS undertook a series of consultations with Aboriginal communities, leading to the publication of a Discussion Paper in 2017 setting out recommendations for a future redress scheme in Victoria.

The following key recommendations from our research should be taken into account when developing a redress scheme:

- In the case of deceased persons who were removed, the redress scheme should include secondary victims (family members) to address impacts of intergenerational trauma.
- Aboriginal children removed under Victorian legislation but placed in interstate institutions should be eligible for redress, as well as children were removed under another state's law and placed in a Victorian institution.
- The scheme should redress Aboriginal Victorians for the loss of culture, as well as the physical, sexual and psychological abuse and intergenerational trauma.
- Prisoners should have access to any redress scheme offered
- The redress scheme should include multiple forms of redress, including: counselling; story-telling and history projects; healing centres; headstones for Aboriginal people who were removed and buried in unmarked graves; education scholarships for children; home ownership assistance; care packages; prisoner post-release programs; women's prisoner assistance; apology.
- Any financial payment made should not affect Centrelink or Medicare benefits.
- Any financial amount should be of a considerable sum, and applicants should have agency over how that money is used and distributed.
- While financial and legal counselling should be offered as part of the redress scheme, people should in no way have the payment administered by a government or other agency unless they opt for that to occur.

³⁵ Cultural rights are protected under the [*International Covenant on Economic, Social and Cultural Rights*](#) (art. 15) and the *Victorian Charter of Human Rights and Responsibilities* 2006, s. 19.



A well informed, culturally appropriate redress scheme is an opportunity for the Victorian State Government to acknowledge the trauma that removal has caused for Aboriginal Victorians and the loss of culture sustained due to past practice.

Twenty-two years after the release of the *Bringing Them Home* Report and 12 years after the National Apology to the Stolen Generations, redress for the Stolen Generations in Victoria continues to be unfinished business and must be prioritised as a matter of urgency.

RECOMMENDATIONS:

11. Prioritise the mental health and social and emotional wellbeing of Victoria's Stolen Generations and their families, including by convening a Round Table with the Stolen Generations', ACCOs and other relevant stakeholders.
12. Develop and implement a culturally safe and comprehensive scheme, to redress Aboriginal Victorians who were removed from their families and institutionalised as a result of Government policies. The scheme should redress Aboriginal Victorians for the loss of culture, as well as the physical, sexual and psychological abuse and intergenerational trauma.

7. REFORM SERVICES AND SYSTEMS THAT IMPACT ON PEOPLE'S MENTAL HEALTH³⁶

Government services and systems often fail to respond to the needs of people with mental health conditions. In doing so, they can exacerbate poor mental health, which can in turn lead to legal issues such as eviction, fines/infringements. Systemic racism and discrimination across these services and systems impacts on the mental health of Aboriginal and Torres Strait Islander.

7.1 INCREASE ACCESS TO PUBLIC HOUSING

Aboriginal people are more likely to experience housing stress and are ten times more likely to experience homelessness than non-Aboriginal Australians.³⁷ This is certainly the case in Victoria, which has the highest rate of Aboriginal specialist homelessness service clients in Australia, taking into account the relative size of the Aboriginal population.³⁸ As such, it is no surprise that in 2014, tenancy disputes were one of the most common areas of legal need for Aboriginal people in Victoria.³⁹

³⁶ This section responds to ToR 4 and questions 1, 4 and 8.

³⁷ AIHW, *Aboriginal and Torres Strait Islander people: a focus report on housing and homelessness* (2019), 46.

³⁸ AIHW, *Aboriginal and Torres Strait Islander people: a focus report on housing and homelessness* (2019), 60.

³⁹ M. Schwartz, F. Allison, C. Cunneen, *The Civil and Family Law Needs of Indigenous People in Victoria: A Report of the Australian Indigenous Legal Needs Project*, (2013), James Cook University, Cairns.



Tenancy law is one of the key areas of focus for VALS Civil Law and Human Rights Division, where we support clients to resolve legal issues in order to avoid eviction, and often, homelessness. VALS routinely assists tenants in private and social housing in the following areas:

- Preventing evictions through negotiation and advocacy at VCAT;
- Representing tenants accused of misconduct, including breach of duty notices and applications for compliance orders;
- Advocating for urgent and non-urgent repairs;
- Defending compensation claims and claims against tenants' bonds;
- Applying for compensation on behalf of tenants against landlords in breach; and
- Assisting tenants in relation to goods left behind at rented premises.

Many of our clients have mental health conditions and we see first-hand the way that housing stress and homelessness can exacerbate these conditions. Aboriginal people with poor mental health are particularly vulnerable to becoming homeless, with national data showing that 23% of Aboriginal people accessing specialist homelessness services have mental health conditions.⁴⁰ In the other areas of our legal practice, we also see the significant flow-on effects of homelessness, including removal of children, engagement with the criminal justice and youth justice systems and inability to access bail.

In our experience, both public and community housing providers regularly fail to respond to the needs of Aboriginal people with mental health issues, and do not provide culturally safe and trauma informed services. The fragmentation of housing and homelessness services in Victoria provides additional barriers for Aboriginal people with mental health conditions, who may struggle to find and link into the right service.

A key issue for our clients is the lack of affordable public housing and the long waiting periods for public housing, which affects the ability of many Aboriginal Victorians to access stable housing. A Parliamentary Inquiry last year found that approximately 82,000 Victorians were on the waiting lists for public housing, and that Victoria has the lowest proportion of social housing units per capita of all States in Australia.⁴¹

For clients who cannot access public housing and are therefore in private rentals, the main issue is unaffordable rent, which frequently leads to evictions and insecure housing. There is also much less scope to negotiate with private landlords regarding repayment of short-term arrears and less incentive to resolve and assist tenants dealing with complex crises which may relate to mental health or family violence.

⁴⁰ AIHW, *Aboriginal and Torres Strait Islander people: a focus report on housing and homelessness* (2019), 59.

⁴¹ Parliament of Victoria, Legal and Social Issues Committee, *Inquiry into the Public Housing Renewal Program* (June 2018), 23.



Case Study: Eviction From Private Rental Into Homelessness

VALS assisted a client with a mental health condition in private rental who had their WorkCover repayments temporarily suspended due to a dispute around attending appointments. While VALS was eventually able to advocate to have these payments back paid, it was not in time for the VCAT possession order hearing for rent arrears. The other party refused to negotiate to resolve the arrears through a payment plan, due in part to the client's poor mental health. VCAT granted a possession order and the client was evicted soon afterwards into homelessness, which further exacerbated his mental health condition and access to support services.

If the client in the case study above had been able to access public housing, an issue such as this could have been resolved through negotiation and a situation of homelessness would have likely been avoided. We welcome recent amendments to the *Residential Tenancies Act 1997* (Vic) that will bring in a reasonable and proportionate test for VCAT to apply when considering whether to grant a possession order, along with a new five-stage process for evictions for rent arrears. We hope that these reforms will reduce the amount of evictions where there are short term arrears that are able to be addressed.

Tenants in public housing with mental health conditions have the benefit of well-developed policies that acknowledge and have processes to deal with, some of the complex issues they are likely to face. For example, the Department of Health and Human Services' Tenancy Management Manual, allows tenants who are temporarily absent from their property for up to 6 months to demonstrate special circumstances and receive a subsidy to reduce their rent to \$15 per week.⁴² This can cover, for example, tenants who are in psychiatric treatment or incarcerated. This policy is crucial for people with mental health conditions to assist them to maintain stable housing and avoid homelessness.

DHHS' Maintenance Manual also clearly sets out the circumstances in which a tenant would not be held responsible for third party damage to a property due, for example, to family violence, or the criminal actions of a third party or taking into account the tenant's disability.⁴³ These policies provide clarity and support for tenants and provide a basis for lawyers to advocate directly with DHHS to try to resolve issues in line with their policies instead of going to VCAT.

While DHHS policies are positive and evidence a willingness of the Department to consider the mental health of public housing tenants, there are still gaps in the system and a need to strengthen the cultural safety and trauma-informed approach of public housing.

⁴² DHHS, *Tenancy Management Manual: Temporary Absence Operational Guidelines* (September 2018).

⁴³ DHHS, *Maintenance Manual: Tenant Property Damage Operational Guidelines* (July 2017), 9.



Hoarding Behaviours and Inter-Generational Trauma

In some of the matters that VALS has dealt with, the mental health condition of the client is long-term and severe and could include behavioural issues such as hoarding. This leads to the client stockpiling belongings in their property which can cause the property to become unsafe.

Hoarding issues are sometimes associated with past trauma due to having children removed by DHHS. This is a common issue with VALS tenancy clients, who often have deep levels of mistrust and fear of government and non-Aboriginal organisations, including largescale housing providers, due to trauma relating to the stolen generations and consistently high levels of removal of Aboriginal children from their family by child protection.

These clients are generally issued with breach of duty notices for failure to clean up their property, which lead to compliance orders from VCAT and then notice to vacate being issued and possession granted. While DHHS does provide limited support to these clients, in VALS' experience they do not provide culturally safe mental health support provided to assist to manage the underlying issues, which means that these clients often end up being evicted and becoming homeless as a result.

Public housing tenants with long-term mental health conditions that directly impact on their ability to maintain their housing, need culturally safe and trauma informed services to provide intensive, long term support. While DHHS often provides some level of support, it is generally not culturally safe and sufficiently intensive to help resolve issues that may be affecting their tenancy.

Given the long history of adverse interventions, dispossession, abuse and mistreatment by government and non-Aboriginal institutions, and the resulting fear and mistrust, it may be necessary for the service to be provided by an organisation that is independent from government. The importance of culturally safe, Aboriginal-led services and support, across housing, homelessness and mental health sectors was acknowledged by the Victorian Government in its report *Balit Murrup: Aboriginal social and emotional wellbeing framework 2017-2027*.⁴⁴

In contrast to public housing, Community Housing providers often do not have publicly available tenancy management policies, or if they do, they are much less detailed and comprehensive than the DHHS policies. This leads to discretionary decision-making which can impact on tenants whose mental health may be contributing to behavioural issues affecting their tenancy and relationship with their housing provider. It places them at a greater risk of eviction into homelessness, with the associated negative impacts on their mental health.

For example, we have had several community housing clients who have had arrears built up while serving periods of custody. If they had been in DHHS properties, their rent would have been reduced

⁴⁴ DHHS, *Balit Murrup* (2017), 21.



to \$15 a week, recognising that clients who receive Centrelink income have their incomes stopped while they are in custody. However, clients in community housing are generally not able to do this and can therefore build up high arrears and are vulnerable to eviction on that basis.

VALS does not currently receive any financial brokerage money to assist clients facing eviction who have small amounts of arrears and other discrete needs (e.g. funding for a skip bin to address rubbish issues). This is despite VALS being the only ACCO to provide tenancy law advice and legal representation to Aboriginal people in Victoria. VALS does try to reach out to other housing services who may have brokerage money that would assist a client, but often there are very tight timeframes and seeking out services and applying for funding can be very time consuming. It is also a very confusing system to navigate, with multiple services having different requirements for assistance. If VALS was able to access brokerage money this would greatly assist our advocacy on behalf of our clients to try to avoid evictions.

The system could be based on brokerage funding for clients experiencing family violence, which followed on from Royal Commission into Family Violence, which recommended that the Victorian government give priority to providing adequate funding to ACCOs to provide culturally appropriate family violence services for Aboriginal women and children.⁴⁵

RECOMMENDATIONS:

13. Maintain and grow public housing stock in order to reduce public housing wait lists.
14. Provide brokerage funding to ACCOs, including VALS, to support Aboriginal people facing eviction due to mental health conditions. This brokerage funding should be modelled off similar funding provided to ACCOs for clients experiencing family violence.
15. Ensure that community housing providers have the same policies and standards as public housing, with a focus on early support and eviction as a last resort.
16. Provide culturally-safe, trauma-informed services for Aboriginal people with mental health conditions to assist them to maintain tenancies.

7.2 FINES AND INFRINGEMENTS

Aboriginal people are over-represented as fine recipients.⁴⁶ They are also less likely than non-Aboriginal people to pay for their fines at the time of issue and are therefore more 'susceptible to

⁴⁵ *Royal Commission into Family Violence: Summary and Recommendations* (March 2016), Recommendation 146, p. 85.

⁴⁶ ALRC, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (2018) 12.23.



escalating fine debt and fine enforcement measures'.⁴⁷ The infringements system in Victoria has been found to have a significant adverse impact on people with mental health conditions.⁴⁸

Through VALS' Infringements Clinic, we see that the complex personal circumstances of many Aboriginal people with mental health conditions makes it difficult to avoid infringements and to deal with the complex processes required to address the fines. The focus of VALS' Infringements Clinic is on lodging enforcement review applications based on the special circumstances of our clients with the aim of having their fines waived or reduced. For many of our infringement's clients, poor mental health contributes directly to the reason for receiving the fine and we apply for enforcement review on this basis.

In 2017-2018 significant reforms were introduced into the fines system in Victoria, including a new Family Violence Scheme to deal with fines incurred as a result of family violence. While this reform is positive, the implementation of the new system by Fines Victoria has been poor, with extensive delays for resolving enforcement review matters, due primarily to ongoing troubles with a new IT system. As the Ombudsman noted in her recent report, long delays and communication issues with Fines Victoria have exacerbated mental health issues and caused anxiety, frustration and trauma.⁴⁹

For example, VALS have had clients applying under the family violence scheme who have had to wait long periods of time for their matters to be resolved by Fines Victoria. This has caused further stress and trauma. A further barrier has been the requirement for the applicant to complete a statutory declaration outlining the family violence they have experienced and how that substantially contributed to their offending. This requirement has further resulted in clients feeling further traumatised and often disengaging from the process.

Applicants applying for enforcement review with Fines Victoria on the basis of a mental health condition are required to provide a report from their general practitioner, or psychologist/psychiatrist setting out their condition and how that condition caused them to commit the offence. In our experience, it is important that such reports are provided by specialists, and that they are quite detailed and well-reasoned, meaning that they are generally not provided by practitioners without a substantial fee.

Victoria Legal Aid provides funding for psychologist/psychiatrist reports, but only where the fines exceed \$5,000.00 and the applicant fits the VLA income criteria. This means that VALS clients with mental health conditions who have fines less than \$5,000.00 may be unable to access specialist reports to assist them to have their fines waived. This can place clients in a difficult position and further exacerbate their stress and anxiety surrounding the infringements.

⁴⁷ Ibid.

⁴⁸ Meredith Brown et al, [*"I'm sorry but you're just not that special..." Reflecting on the 'Special Circumstances' Provisions of the Infringements Act 2006 \(Vic\) \(2013\) 24\(3\) Current issues in Criminal Justice 375, 377.*](#)

⁴⁹ Victorian Ombudsman, [*Fines Victoria Complaints*](#) (April 2019), 2.



RECOMMENDATIONS:

17. Increase funding to cover the cost of psychologist and psychiatrist reports for people applying for enforcement reviews at Fines Victoria, who have not yet accumulated \$5,000 in fines.

7.3 IMPLEMENT AN INDEPENDENT POLICE COMPLAINTS SYSTEM

VALS has long called for a more independent police complaints system in Victoria.⁵⁰ Such a reform is particularly important for Aboriginal people who have a mental health condition who are at a higher risk of police misconduct and face particular challenges in bringing complaints.

Research has shown that Aboriginal people with mental health conditions ‘often have difficult interactions with police that escalate in frequency and intensity’.⁵¹ The negative effects of police interactions have been found to be particularly acute for Aboriginal people with a mental illness. As the recent report from the Independent Broad-based Anti-Corruption Commission (IBAC) Committee on the *Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria* notes, Aboriginal people and people with mental health issues are more likely to be vulnerable to police misconduct and are also more likely to face difficulties in reporting that misconduct.⁵²

In 2018, the IBAC Committee found that there is a general lack of confidence in the police complaint system, due to lack of independence and transparency; an overwhelmingly inadequate response to complaints of police misconduct; and the fact that the majority of complaints are investigated by Victoria Police, resulting in bias a lack of cultural change.⁵³ The lack of confidence in the current police complaints system has led to significant under-reporting of police misconduct, in particular by marginalised groups such as Aboriginal people and people with a mental health condition.⁵⁴ This in turn, means that there is no opportunity to drive cultural change within Victoria Police and address these systemic issues of over- and under-policing.

The difficulties faced by Aboriginal people with a mental illness in engaging with police and reporting police misconduct is highlighted by the case of VALS’ client, whose story has been made public to highlight the deficiencies with the current system.⁵⁵

⁵⁰ See for example: Victorian Aboriginal Legal Service, *Submission to the Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria* (September 2017) 7.

⁵¹ Dr Ruth McCausland et al, *Indigenous People, Mental Health, Cognitive Disability and the Criminal Justice System* (Brief 22, August 2017), 3.

⁵² Parliament of Victoria, Independent Broad-based Anti-Corruption Committee (IBAC), *Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria* (September 2018), 155.

⁵³ Parliament of Victoria, IBAC, *Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria* (September 2018), Finding 9, 146.

⁵⁴ Parliament of Victoria, IBAC, *Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria* (September 2018), 150.

⁵⁵ Nick McKenzie, ‘*Drunk disorderly – and slammed head-first into a cell door*’ *The Age* (4 April 2018).



JH: Failure Of Police To Respond To Violent Assault

JH is a 44-year-old Aboriginal woman with a mental health condition.

In 2013, JH called police to report being violently assaulted by her drunken former partner turned housemate. When police attended the scene, they issued an intervention order against JH rather than her abuser and ordered her to leave her own home. The police who attended dismissed her concerns and she saw them 'laughing and joking' with her abuser. After JH left the house her abuser sprayed 'coon' on the wall, and damaged and stole her belongings. Police did not follow up on any of these actions. VALS lodged a police complaint in 2015, but IBAC referred the complaint to Victoria Police, who did not substantiate any of the complaints made. Police also failed to inform VALS when they interviewed JH for the complaint.

JH successfully lodged a victims of crime compensation application for the act of violence by her ex-partner. The Koori List Magistrate stated that it was 'quite clear' that police actions had 'exacerbated' JH's trauma and that JH was 'owed some apology for the manner in which [she was] treated' by police.

It is VALS' position that an important step towards improving the way in which police interact with Aboriginal people, and particularly Aboriginal people with poor mental health, is to ensure accountability for police when they do engage in misconduct. Thus, VALS welcomes the IBAC Committee's final report and urges the Commission to recommend that the Victorian Parliament accept and legislate all 69 of its recommendations, including providing adequate funding to the IBAC to create a new Police Corruption and Misconduct Division.

We also note that, as highlighted in VALS's submission to the IBAC Committee's inquiry, police complaints is an area of high demand and VALS faces difficulties in providing assistance to all Aboriginal people seeking our help. VALS has had to prioritise assisting more serious complaints, while providing self-help kits to those people it cannot assist. It is clear that this is an area of high demand where there is insufficient assistance available. We therefore reiterate our recommendation that increased funding be provided to VALS and other legal services to assist Aboriginal people to make police complaints.

RECOMMENDATIONS:

18. Accept and legislate all 69 recommendations from the Final Report of the Independent Broad-based Anti-Corruption Commission's (IBAC) Committee on the *Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria*, including providing adequate funding to IBAC to create a new Police Corruption and Misconduct Division.



8. STOP CRIMINALISING MENTAL HEALTH CONDITIONS AND SUPPORT THE SOCIAL AND EMOTIONAL WELLBEING OF ABORIGINAL PEOPLE IN THE CRIMINAL JUSTICE SYSTEM⁵⁶

Almost three decades after the Royal Commission into Aboriginal Deaths in Custody (RCIADIC),⁵⁷ and despite a collective commitment by governments across Australia to implement the recommendations from this Royal Commission,⁵⁸ overrepresentation and incarceration of Aboriginal people in the criminal justice system remains unchecked and unabated.⁵⁹

The Victorian imprisonment rate for Aboriginal prisoners is currently higher than in any other Australian jurisdiction. Corrections Victoria's Monthly Prisoner and Offender Statistics at 31 May 2019 indicate that more than 10% of the total prison population (812 people) identified as Aboriginal.⁶⁰ By contrast, Aboriginal people make up less than 1% of the total Victorian population.⁶¹ The imprisonment rate of Aboriginal people in Victoria has been consistently higher than the rate for the total population⁶² and by 2020, the proportion of Aboriginal people in custody is expected to reach 50% of the national prison population.⁶³

Through its Criminal Law Practice, VALS is aware of the many challenges faced by Aboriginal people in the criminal justice system, which escalate even further when our clients are also managing a mental health condition. Many Aboriginal people in the criminal justice system are suffering from poor mental, which may be a reason for their offending and/or a cause of their experiences in the system. In 2017-2018, 32% of criminal law matters opened by VALS (including adults, children and young people) involved clients who reported mental health concerns. This trend is reflected in 2013 data relating to the health of Victoria's Koori population, which found that 72% of Koori men and 92% of Koori women had received a lifetime diagnosis of mental illness, compared with a lifetime prevalence of 45% in the general population.⁶⁴

⁵⁶ This section responds to ToR 4 and guiding questions 1, 4, 7 and 11.

⁵⁷ [Royal Commission into Aboriginal Deaths in Custody](#), Final Report (April 1991).

⁵⁸ "Outcomes Statement for the Ministerial Summit on Indigenous Deaths in Custody" [1997] IndigLawB 79; (1997) 4(5) Indigenous Law Bulletin 15

⁵⁹ Amnesty International, [Review of the Implementation of RCIADIC](#) (May 2015).

⁶⁰ Corrections Victoria, [Prisoner and offender statistics](#) (May 2019)

⁶¹ ABS 2016 Census QuickStats available online:

https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/2?opendocument

⁶² In 2017, the rate for Aboriginal people in prison in Victoria was 1,833.9 per 100,000 adults compared with 145.4 for all Victorians. From 2009 to 2017, the imprisonment rate of Aboriginal people increased from 956.7 to 1,833.9 per 100,000 adults. See [ABS, 4517.0 - Prisoners in Australia, 2017: Aboriginal and Torres Strait Islander Prisoner Characteristics](#) (2017).

⁶³ Human Rights Watch, "I needed help instead I was punished", February 2018

⁶⁴ Professor James R. P. Ogloff, Dr. Jenny Patterson, Dr. Margaret Cutajar, Dr. Karen Adams, Professor Stuart Thomas, & Mr. Chris Halacas, *Koori Prisoner Mental Health and Cognitive Function Study – Final Report*, Centre for Forensic Behavioural Science, Monash University & Victorian Institute of Forensic Mental Health and the Victorian Aboriginal Community Controlled Health Organisation, February 2013, p. 13 - which found that major depressive episodes and post-traumatic stress disorder were the most prevalent conditions found for both male and female Aboriginal prisoners, with close to half Koori women having a PTSD diagnosis. The vast majority of prisoners with diagnosed mental illness had a dual diagnosis.



This section addresses VALS concerns regarding the intersection between the mental health and criminal justice systems, including the following:

- The criminal justice system invites re-entry like a revolving door for Aboriginal people with mental illness: unaddressed symptoms including behavioural issues translate to increased and escalated contacts with police.
- The absence of appropriate and accessible multi-disciplinary community-based services, including qualified well-resourced crisis assessment teams, means police are left to manage with few viable options – and the risk of criminalisation increases.⁶⁵
- Delays in accessing expert medical or neuropsychological reports limit the capacity of lawyers and courts to identify appropriate diversion strategies or unduly restrict access to bail.
- On remand, Aboriginal people experiencing a mental health condition have limited access to culturally informed assessments, treatment or other support programs.
- Once in custody, there is a lack of sustainably resourced culturally appropriate health services and programs, to meet the social and emotional wellbeing needs of Aboriginal prisoners.
- Transition planning often occurs too late, is inadequate and culturally unsafe. Post-release supports are not sufficiently integrated, are not culturally informed and are under-resourced.

We are concerned that many Aboriginal people with poor mental health are falling through the cracks and becoming increasingly entrenched in a cycle of criminalisation. We strongly encourage the Royal Commission to give priority to the forensic mental health system in its future inquiries, with a specific focus on the way that this system, and the criminal justice system more broadly, is failing Aboriginal people.

RECOMMENDATIONS:

19. The Royal Commission should prioritise the mental health and social and emotional wellbeing of people in the criminal justice system, including Aboriginal people.
 - a. The Commission should work with the Mental Health Legal Centre to visit each of Victoria's prisons and engage with people who have lived experience of mental illness and the forensic mental health system, including Aboriginal people (both sentenced and on remand).

⁶⁵ McCausland et al, *Indigenous People, Mental Health, Cognitive Disability and the Criminal Justice System* (Brief 22, August 2017), available online: <https://www.indigenousjustice.gov.au/wp-content/uploads/mp/files/publications/files/research-brief-24-final-31-8-17.pdf> 6-7.



- b. The Commission should convene a Round Table discussion to examine the forensic mental health system and the relationship between the mental health and criminal justice systems.

8.1 CRIMINALISATION OF MENTAL HEALTH CONDITIONS

People with mental health conditions and Aboriginal people face an increased risk of being criminalised, due to the discriminatory impact of certain laws and lack of culturally safe cautioning and diversion programs. Not only are Aboriginal people overrepresented in the criminal justice system, they are also more likely than non-Aboriginal people to experience mental health issues.⁶⁶

According to research carried out in 2017 on the incidence of mental health disorders and cognitive disabilities among Aboriginal people in Australia, there is a lack of appropriate (culturally safe and responsive) diversionary programs at all stages of the criminal justice process – from initial contact with police, in the courts through the custodial process and post-release.⁶⁷ The research cites extensive Aboriginal-led research from New South Wales and the Northern Territory which found that institutionalised racism, dispossession, child removal policies, poor educational outcomes, over-crowded housing, a lack of appropriate health care, earlier mortality, over-policing and high rates of incarceration all continue to act negatively on the mental health of Aboriginal people.⁶⁸ The research concludes that “community based and determined responses and support embracing person-centred, holistic and culturally responsive practice, should be resourced to prevent criminalisation and the cycle of criminal justice management.”⁶⁹

VALS strongly believes that in order to close the gap in Aboriginal mental health outcomes to reduce mental ill health-related offending and reduce the numbers of Aboriginal people coming into contact with the criminal justice system, significant additional investment in frontline social and community services, rather than criminalisation, is required.

Decriminalisation of low-level offences that have a disproportionate impact on Aboriginal people

VALS supports the decriminalisation of low-level offences that have a disproportionate impact on Aboriginal people experiencing mental health and cognitive disabilities, including offences such as drunk and disorderly offences, begging, homelessness or other poverty related public order offences.⁷⁰ To this end, the Victorian Government should work with relevant peak bodies (including with Aboriginal Community Controlled Organisations, including VALS) to address unmet legal needs that leads to low level offending, and meet gaps in service provision to support people on bail or

⁶⁶ Ibid, 1.

⁶⁷ Ibid, 1.

⁶⁸ Ibid, 1.

⁶⁹ Ibid, 7.

⁷⁰ Law Council of Australia, The Justice Project, Final Report – Part 1, Aboriginal and Torres Strait Islander People, August 2018 p 66.



divert people to suitable services and programs. This includes resourcing of more frontline social and community services and culturally informed health services and safe, affordable and appropriate housing.

The discriminatory impact of the offence of public drunkenness has received particular attention for a number of years, with has led to multiple calls for de-criminalisation of this offence. This includes the Final Report of the RCIADIC (which called for the offence of public drunkenness to be abolished and replaced with a public-health based response) as well as two inquiries by the Parliament of Victoria's Drugs and Crime Prevention Committee (DCPC) in 2001 and 2006.⁷¹ In 2006, the Parliamentary Inquiry set out a pathway for decriminalisation, including: legislative amendment; the establishment of sobering up shelters and support services; training for police officers and shelter staff. The DCPC also recommended that the RCIADIC recommendations relating to diversion from police custody be implemented.⁷² Despite this, and many other expert reports and research, the Victorian Government's response to the 2006 Inquiry was that it did not support decriminalisation and that "further investigations" were required to "assess the complexities of the issue and determine the suitability of a suite of public health responses."⁷³

The tragic death of Yorta Yorta woman Tanya Day on 5 December 2017, indicates that the discriminatory impact of drunk and disorderly offences is still very much an issue for Aboriginal people. After being arrested for public drunkenness while asleep on a train, Tanya Day was taken into police custody where she sustained head injuries and later died. In December 2018, at the commencement of the Inquest into her death, the Victorian Coroners Court foreshadowed yet another recommendation decriminalising public drunkenness.⁷⁴

RECOMMENDATIONS:

20. Decriminalise offences in the *Summary Offences Act 1966* (Vic) (SOA) that disproportionately target persons with poor mental health and/or who are experiencing homelessness including:

- a. Begging (s 49A of the SOA)
- b. Obstruction of foot paths (s 5 of the SOA)

⁷¹ Drugs and Crime Prevention Committee, [Inquiry Into Public Drunkenness: Final Report](https://www.parliament.vic.gov.au/80-dcpc/inquiry-into-public-drunkenness) (2001) available online here: <https://www.parliament.vic.gov.au/80-dcpc/inquiry-into-public-drunkenness>; and Drugs and Crime Prevention Committee, [Inquiry into Strategies to Reduce Harmful Alcohol Consumption: Final Report](https://www.parliament.vic.gov.au/76-dcpc/inquiry-into-strategies-to-reduce-harmful-alcohol-consumption/295-report-and-response-), Volume 1, (2006) available online: <https://www.parliament.vic.gov.au/76-dcpc/inquiry-into-strategies-to-reduce-harmful-alcohol-consumption/295-report-and-response->

⁷² Drugs and Crime Prevention Committee, [Inquiry Into Public Drunkenness: Final Report](https://www.parliament.vic.gov.au/80-dcpc/inquiry-into-public-drunkenness) (2001) available online: <https://www.parliament.vic.gov.au/80-dcpc/inquiry-into-public-drunkenness>, page xi.

⁷³ Victorian Government, [Victorian Government's Response to the Drugs and Crime Prevention Committee 'Inquiry into Strategies to Reduce Harmful Alcohol Consumption'](https://www.vic.gov.au/victorian-government-response-to-the-drugs-and-crime-prevention-committee-inquiry-into-strategies-to-reduce-harmful-alcohol-consumption), (September 2006), p. 18.

⁷⁴ Perkins, "Mum was alone": Did systemic racism play a role in Tanya Day's death?, *The Age*, 19 March 2019, available online: <https://www.theage.com.au/national/victoria/mum-was-alone-did-systemic-racism-play-a-role-in-tanya-day-s-death-20190319-p515ic.html>



- c. Move on directions (s 6 of the SOA)
- d. Obscene language (s 17 of the SOA)
- e. Drunk and disorderly offences (ss 13 and 14, 16 and 17A of the SOA)

21. Improve access to multi-disciplinary and culturally safe crisis response teams including Aboriginal health workers/clinicians and culturally aware Police with better integrated health diversion processes as front-line response.

8.2 INCREASE ACCESS TO THERAPEUTIC JUSTICE MODELS

In 2015, the Victorian Ombudsman undertook an investigation into the rehabilitation and reintegration of prisoners in Victoria⁷⁵. The Ombudsman called for the expansion of the current court-based interventions to operate as required for offenders, regardless of their location. This should build on the successful models of the Drug Court of Victoria, the Court Integrated Services Program, the Neighbourhood Justice Centre, the Assessment and Referral Court List, the Criminal Justice Diversion Program and the CREDIT/Bail Support Program and the Koori Court. This increased capacity should be coupled with a commensurate increase in the capacity and availability of support services connected with the programs.

The Koori Court division of the Magistrates Court commenced operation in 2002 in Victoria and provides a culturally safe forum for sentencing Aboriginal offenders. Currently the Koori Court is only available at Bairnsdale, Broadmeadows, Geelong, Latrobe Valley, Melbourne, Mildura, Shepparton, Swan Hill, Warrnambool, Portland and Hamilton. In consultation with relevant Aboriginal organisations, VALS supports the expansion of the Koori Court to additional metropolitan and regional courts across Victoria.

Assessment and Referral Court (ARC)

The Assessment and Referral Court (ARC) aims to help people address underlying factors that contribute to their offending behaviours and is available to people on bail who have been diagnosed with a mental illness, an intellectual disability, an acquired brain injury, an autism spectrum disorder or a neurological impairment including dementia. The person's diagnosis must cause a substantially reduced capacity in at least one of the areas of either self-care, self-management, social interaction or communication, and there must be a perceived benefit from the person receiving coordinated services in accordance with an individual support plan. These services may include psychological services, welfare services, health services, mental health services, disability services, drug or alcohol treatment services, housing support and other services that aim to reduce the risk of offending or reoffending. The accused person must appear before the ARC magistrate on a regular basis to discuss their progress. If compliance with the individual support plan isn't met, the magistrate can

⁷⁵ Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria*, September 2015; available online at: <https://www.ombudsman.vic.gov.au/Publications/Parliamentary-Reports/Investigation-into-the-rehabilitation-and-reintegr>



transfer the matter to the mainstream court for sentencing. Once a guilty plea is entered, sentencing occurs within the ARC when the individual's support plan is complete⁷⁶.

Currently the ARC is only available at Magistrates Courts in Frankston, Latrobe Valley, Korumburra, Melbourne and Moorabbin. VALS supports the expansion of the ARC to all regional courts across Victoria. VALS also supports strategies to increase the employment of Aboriginal case managers.

RECOMMENDATIONS:

22. Commit to implement the Victorian Ombudsman's recommendation for the expansion of current therapeutic court-based interventions, together with parallel investments in associated support services.
23. Prioritise the planning, development and delivery of a culturally appropriate model for a multi-jurisdictional therapeutic and specialised healing court for Aboriginal accused with multiple and complex needs, as identified in *Burra Lotjpa Dunguludja*.

8.3 REPEAL PUNITIVE BAIL LAWS AND INCREASE ACCESS TO COURT INTEGRATED SERVICES PROGRAM (CISP)

Victorian bail laws and policies have a disproportionate and discriminatory effect on Aboriginal people and communities. According to the 2017 Inquiry of the Australian Law Reform Commission on the *Incarceration Rate of Aboriginal and Torres Strait Islander People*, Aboriginal people are more likely to be held on remand for low-level offences and are less likely to be granted bail compared to non-Aboriginal people.⁷⁷

In Victoria, the number of people on remand has significantly increased since reform of the *Bail Act* 1977 (Vic) in 2017 which raised the threshold for accessing bail and implemented presumptions against bail.⁷⁸ Between 30 June 2017 and 30 June 2018, the number people on remand in Victoria increased by 22%, compared to the national average of 7%.⁷⁹

Section 3A of the Bail Act

In VALS experience, bail conditions imposed by decision makers frequently fail to properly take into account cultural and practical considerations leading to a situation where some offenders are essentially 'set up to fail'. This is despite the fact that the Victorian *Bail Act* requires consideration of

⁷⁶ Magistrates Court of Victoria Assessment and Referral Court see: <https://www.mcv.vic.gov.au/about-us/assessment-and-referral-court-arc>

⁷⁷ ALRC, *Pathways to Justice: Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples: Final Report*, (December 2017), 27.

⁷⁸ <https://engage.vic.gov.au/bailreview>

⁷⁹ Australian Bureau of Statistics, *4517.0 - Prisoners in Australia, 2018*, Key Findings, 2018, available online at: <https://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>



any issues that arise due to a 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.⁸⁰ According to the 2017 Inquiry of the Australian Law Reform Commission, section 3A of the Bail Act (Vic) is not well understood and is underutilised.⁸¹ In this regard, VALS supports the commitment of the Victorian Government to mandate cultural awareness training for bail justices.⁸²

Lack of accommodation as a hurdle to accessing bail

Aboriginal people often face challenges in accessing bail, due to a lack of access to appropriate accommodation. Investments are required to address the lack of access to bail accommodation, bail support programs and post-release accommodation for Aboriginal people on remand. Specific training should also be provided on around homelessness and substance dependence.⁸³ In addition, training and guidelines should be developed to assist bail decision makers, including bail justices, to consider therapeutic bail conditions which may address the needs of accused people who come before them.⁸⁴

Court Integrated Services Program (CISP)

VALS's clients have had positive experiences with the *Court Integrated Services Program (CISP)*, which is a bail support program available for people with specific vulnerabilities, including if they have physical or mental disabilities or illnesses, as well as drug and alcohol dependency and misuse issues. CISP aims to reduce the likelihood of reoffending by improving the health and wellbeing of the accused individual, including by providing support to access priority housing, drug and alcohol services, disability services, mental health treatment and other services, some of which are Koori specific. By coordinating referral and regular case management support prior to trial the defendant's risk of undertaking activities, such as drug or alcohol use, that may otherwise have resulted in remand is mitigated.

Unfortunately, CISP is only available in 20 of the 50 Magistrates Courts across Victoria, with 8 in the greater metropolitan area. This limited availability is problematic, particularly for Aboriginal people who live in regional areas. VALS welcomes the Victorian Government's commitment to increase resourcing and cultural safety within the CISP program by employing 5 additional Koori CISP workers over the next 5 years⁸⁵ however we remain concerned that this represents significant underinvestment. VALS encourages the Royal Commission to look into increased funding and

⁸⁰ *Bail Act 1977 (Vic)*, section 3A

⁸¹ The Law Council of Australia, *The Justice Project: Courts and Tribunals, Final Report Part 2*, August 2018, p69; and ALRC *Pathways to Justice*, p 173

⁸² Aboriginal Justice Agreement Phase 4, page 47

⁸³ The Honourable Paul Coghlan QC, *Bail review: Second advice to the Victorian government*, State Government of Victoria, Melbourne, 1 May 2017, page 9: available online: <https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/4414/9419/8013/Coghlan-report-2.pdf>

⁸⁴ Colvin, Emma, "Bail Justices in Victoria: Perceptions and Experiences" [2017] CJCrimJust 18; (2017) 29(2) Current Issues in Criminal Justice 123

⁸⁵ Victorian Government, *Burra Lotjpa Dunguludja*, p 43



resources for the CISP to be expanded to other sites across Victoria, including through increased capacity of the Koori specific CISP.

RECOMMENDATIONS:

24. Repeal the punitive Bail reforms introduced in 2018, so that people are not compelled to 'show exceptional circumstances' for low-level offences linked to poverty and homelessness.
25. Increase funding to the Court Integrated Support Program (CISP) so that it is accessible in all locations across Victoria, including by ensuring that there are adequate Koori CISP workers to support Aboriginal people on bail across Victoria.
26. Prioritise resources for the development of a culturally safe residential bail program by ACCOs.
27. Develop training and guidelines to assist bail decision makers, including bail justices, to better understand the needs of people with mental health conditions and consider therapeutic bail conditions.
28. Develop guidelines on the application of section 3A of the Bail Act, as recommended by the Australian Law Reform Commission Inquiry into Incarceration Rates of Aboriginal and Torres Strait Islander Peoples.

8.4 SENTENCING CONSIDERATIONS FOR ABORIGINAL PEOPLE

Mandatory sentencing

Mandatory sentencing undermines a Court's ability to consider the most appropriate sentence for an individual offender by excluding otherwise relevant considerations including the extent to which a person's mental ill health or cognitive issues contributed to the offending. Mandatory sentencing will not necessarily act as a deterrent to a person who is experiencing acute symptoms of mental ill health, such as psychosis, nor a person with a cognitive disability. Mandatory sentencing also provides a disincentive for Aboriginal people to opt in to attend Koori Court.

In this regard, VALS remains extremely concerned by the impact of mandatory sentencing laws for offences against emergency workers, as provided in the *Justice Legislation Miscellaneous Amendment Bill 2018*. We are concerned that this is acting as a disincentive for Aboriginal Victorians to contact emergency and protective services in a time of crisis, including to seek assistance relating to a mental health crisis. VALS supports the recommendation of the Australian Law Reform Commission that the Victorian government should repeal legislation imposing mandatory or



presumptive terms of imprisonment upon conviction of an offender that has a disproportionate impact on Aboriginal and Torres Strait Islander peoples.⁸⁶

Aboriginal Community Justice Reports

Unlike the *Bail Act* (Vic), Aboriginality is not a consideration for sentencing under the *Sentencing Act* 1991 (Vic). VALS is concerned that as a result, Aboriginality is not consistently taken into account in a way that can help to identify and address underlying factors for offending and reduce incarceration.

In this regard, VALS has previously proposed the introduction of Aboriginal Community Justice Reports (ACJR), modelled off *Gladue Reports* used in Canada.⁸⁷ ACJRs are a pre-sentence, community written report, which aims to gather information about underlying impacts on any Aboriginal offender. The purpose such reports is to identify possible underlying drivers of the individual's offending, in particular, those that may relate to the impacts of trauma and colonisation uniquely experienced as an Aboriginal person. The reports also provide the opportunity for the offender and the community, to spend time to consider and speak about such impacts in a therapeutic and restorative justice manner. VALS sees the Aboriginal Community Justice Reports as an extension of, and addition to, the function of the Koori Courts with the aim to implement such reports across a range of courts and justice scenarios, assisting both Koori Courts and the broader court system.

We believe that ACJR will go a long way in enhancing the cultural safety of the current criminal justice system. We note that the Victorian Government has committed under *Burra Lotjpa Dungaludja* to trial ACJRs in Victorian Courts over the next five years. We strongly encourage the Commission to reinforce this commitment by recommending that the *Sentencing Act* be amended to include Aboriginality as a factor to be considered in sentencing.

RECOMMENDATIONS:

29. Repeal legislation imposing mandatory or presumptive terms of imprisonment upon conviction of an offender, as recommended by the Australian Law Reform Commission, particularly as it relates to police and emergency service response to mental health incidents.
30. Amend the *Sentencing Act* 1991 to support the use of Aboriginal Community Justice Reports and consideration of an offenders' Aboriginal background.

8.5 ABORIGINAL PEOPLE WITH COGNITIVE DISABILITIES

⁸⁶ Australia Law Reform Commission, *Pathways to Justice - An Enquiry into the Incarceration Rate of Aboriginal And Torres Strait Islander People*, (ALRC 133 Summary), recommendation 8-1, page 25, available online: <https://www.alrc.gov.au/publications/pathways-justice-summary>

⁸⁷ Supreme Court of Canada, *R v Gladue*, [1999] 1 S.C.R. 688, available online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1695/index.do>



Aboriginal people with cognitive disabilities⁸⁸ are overrepresented in their contact with all criminal justice agencies; they are more likely to come to attention of police, more likely to be charged, imprisoned, spend longer in custody, have fewer in-custody opportunities for program pathways, are less likely to be granted parole and have less access to appropriate treatment.⁸⁹ Rates of acquired and traumatic brain injury have also been found to be higher amongst Aboriginal people coming into contact with the criminal justice system.⁹⁰

Research carried out by the University of Melbourne in 2017 raised serious concerns about unequal access to justice and indefinite detention of people with cognitive disabilities. The research found that many areas of disadvantage for people with cognitive disabilities who are facing criminal charges, including: inaccessible court proceedings that rely on complex language; inconsistent support through proceedings; legal services that are under-resourced and may not be able to respond to the needs of the person with disabilities; long delays and the criminalisation of disabilities.⁹¹

VALS participated in this research, which trialled the use of Disability Justice Support Workers to work assist accused persons with disabilities by working alongside legal counsel and helping clients to participate in legal proceedings. The Disability Justice Support Workers provided critical support. Given that VALS has many clients with intellectual or cognitive disabilities (152 new matters in 2017-2018 involved a client with an intellectual or cognitive disability), we support increased access to Disability Justice Support Workers.

RECOMMENDATIONS:

31. Provide long-term and sustainable funding to VALS and other organisations, to resource the employment of a Disability Justice Support Worker. This role will support legal counsel to work with persons with a cognitive disability who are accused of a crime.
32. Where a person is found not guilty by mental impairment under the *Crimes (Mental Impairment and Unfitness to Stand Trial) Act 1997*, should immediately be spent conviction.

⁸⁸ The term “cognitive disabilities” is used to refer to all impairments that may affect cognition, including: the ability to learn, process, remember or communicate information; awareness; and/or decision making. Cognitive disabilities include: intellectual disabilities, learning disabilities, autism, acquired brain injuries, and Fetal Alcohol Spectrum Disorder (FASD). See B. McSherry et al., *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities: Addressing the Legal Barriers and Creating Appropriate Alternative Supports in the Community*, (2017).

⁸⁹ McCausland et al, *Indigenous People, Mental Health, Cognitive Disability and the Criminal Justice System* (Brief 22, August 2017), 2.

⁹⁰ Ibid, at 2.

⁹¹ McSherry B, Baldry E, Arstein-Kerslake A, Gooding P, McCausland R and Arabena K, (2017). *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities*, Melbourne: Melbourne Social Equity Institute, University of Melbourne.



33. Ensure that all prison officers receive regular, gender and culturally sensitive, training on how to interact with people with cognitive disabilities.

8.6 PROVIDE CULTURALLY SAFE AND TRAUMA-INFORMED FORENSIC MENTAL HEALTH CARE

Aboriginal mental health in Aboriginal hands

VALS supports initiatives to develop and increase access to culturally safe trauma informed forensic mental health services throughout the criminal justice system including those outlined in the current Victorian Government policy and strategic frameworks referred to throughout this submission. Self-determination must be at the forefront of these initiatives and funding prioritised for services that are identified, developed and determined by Aboriginal people for Aboriginal people.

VALS notes that *Burra Lotjpa Dunguludja* commits the Victorian Government to develop cultural safety standards for health services in the adult and youth justice systems over the next 5 years.⁹² In addition, *Balit Marrup* commits to strengthening access to culturally responsive social and emotional wellbeing and mental health services, promotion of trauma-informed services and expansion of Aboriginal social and emotional wellbeing, mental health and alcohol and drug workforce.⁹³ These are important steps in the right direction, but there be effective accountability mechanisms to ensure that policy commitments translate into real change.

VALS supports additional resourcing and funding for the Victorian Aboriginal Community Controlled Health Organisation (VACCHO), the peak body for Aboriginal people's health and wellbeing in Victoria, to guide the development of culturally safe, social and emotional wellbeing programs across the criminal justice spectrum, including diversion programs, programs for persons on remand, sentenced prisoners and prisoners following release. VACCHO has long called for changes in correctional health service delivery, including recommendations around improving cultural safety across the clinical, programs and policy spheres, to decrease service barriers and increase health service utilisation by Aboriginal prisoners.⁹⁴

Support for prisoners to maintain and observe cultural practices whilst in custody is a fundamental to social and emotional wellbeing, and in turn is a necessary element of successful rehabilitation. Prison based programs need to be informed by cultural practices, including content that reflects the experience of and resonates with Aboriginal people. VACCHO's focus on strengthening protective factors which enhance Aboriginal prisoners social and emotional wellbeing and build resilience - including maintaining connection to family, community, culture and country – is critical.

⁹² Victorian Government, *Burra Lotjpa Dunguludja*, page 47

⁹³ DHHS, *Balit Marrup*, page 9

⁹⁴ Halacas, C & Adams, K (2015), *Keeping our mob healthy in and out of prison: Exploring Prison Health in Victoria to Improve Quality, Culturally Appropriate Health Care for Aboriginal People*, Victorian Aboriginal Community Controlled Health Organisation, Collingwood



VALS strongly believes that Aboriginal community control over service design, delivery, implementation and evaluation is vital to the success and sustainability of these programs and services. This must be underpinned by long-term sustainable funding.

VALS is also supportive of initiatives to improve the cultural safety, competence and responsiveness of other public, private and mainstream mental health services, including through better partnership between and integration of ACCHOs with government departments and other community justice and health service providers.

Aboriginal people on remand

The Australian Law Reform Commission has commented that more than a third of Aboriginal and Torres Strait Islander prisoners are on remand awaiting trial or sentence⁹⁵. In Victoria at the end of May 2019 37% of Victoria's prisoners were unsentenced⁹⁶. VALS welcomes the acknowledgement of the Victorian Government in the Aboriginal Justice Agreement Phase 4 of the particular unmet therapeutic, rehabilitation and reintegration needs of prisoners on remand.

A wide range of negative outcomes have been shown to impact Aboriginal people who are remanded in custody, including separation from family and community, disruption to education and employment, association with sentenced offenders, and not being able to access therapeutic programs. For young people, particularly those on care and protection orders, there are additional concerns around being inappropriately held in police cells or facilities that are not designed to meet their needs.⁹⁷

VALS calls on the Royal Commission to inquire into the progress of the Victorian Government's *Balit Marrup Social and Emotional Wellbeing Plan 2017-2027* four-year commitment to the following actions:

- Support the implementation of the Forensic mental health improvement plan to address the over-representation of people with a mental illness in the criminal justice system with a focus on preventing reoffending in the first place.
- Create an Aboriginal Coordinator's position to ensure culturally safe partnerships with Aboriginal community-controlled organisations and culturally responsive mental health interventions for Aboriginal offenders on a Mental Health Treatment and Rehabilitation Condition

Mental Health Advice and Response Service

The Mental Health Advice and Response Service (MHARS)⁹⁸ provides clinical mental health advice to eight metropolitan Magistrates Courts including advice relating to the appropriateness of mental

⁹⁵ Australian Law Reform Commission, *Pathways to Justice - An Enquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander People*, ALRC Report 133, December 2017, p 27

⁹⁶ Corrections Victoria, *Monthly Prisoner and Offender Statistics 2014-15 to 2018-19*, available online:

<https://www.corrections.vic.gov.au/prison/prisoner-and-offender-statistics>

⁹⁷ Victorian Government, *Burra Lotjpa Dunguludja*, p 42.

⁹⁸ For an overview of the Mental Health Advice and Response Service see: <https://www.forensicare.vic.gov.au/our-services/community-forensic-mental-health-services/court-mental-health-response-service/>



health interventions and referrals for people coming before the Court. MHARS also provide clinical advice to Community Corrections on the appropriateness of mental health treatment and rehabilitation conditions for people on community corrections orders. MHARS also has a consultation and education function for Magistrates, Community Corrections and other court users on mental health services and issues.

VALS note that the Aboriginal Justice Agreement Phase 4 commits 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 community corrections order (CCO) with a mental health treatment and rehabilitation condition, or are on parole with a mandated mental health order.

VALS recommend the introduction of a specialist Koori Unit within MHARS to lead service delivery for Aboriginal and Torres Strait people coming into contact with the criminal justice system.

RECOMMENDATIONS:

34. Commit significant and sustained investment in the Aboriginal and Torres Strait Islander mental health workforce within the correctional health sector, in order to build recruit, train, accredit and build the capacity of more qualified Aboriginal and Torres Strait Islander psychologists, psychiatrists, counsellors, social workers and other mental health workers.
35. Employ more Aboriginal Health Workers and Aboriginal Wellbeing Officers at all levels of the justice health system (Victoria Police, Courts, Forensic/MHARS, Community Corrections, Correctional Health Services) to work with Aboriginal people at all stages of their engagement with the criminal justice system.
36. Prioritise the development and finalisation of standards for culturally safe trauma informed health services in criminal justice and youth justice.
37. Introduce a specialised Koori Unit within *Mental Health Advice and Response Service*.
38. The Royal Commission should enquire into the availability and utilisation of culturally appropriate screening tools to be used for the assessment of Aboriginal prisoners such as the *Here and Now Aboriginal Assessment* (HANAA) developed in Western Australia⁹⁹, the Indigenous Risk Impact Screen (IRIS)¹⁰⁰ or the Patient Health Questionnaire (aPHQ-9).¹⁰¹

8.7 PRE AND POST-RELEASE SUPPORT

VALS is extremely concerned about the significant unmet need that exists for holistic and targeted culturally safe and responsive pre and post release programs for Aboriginal prisoners, many of whom

⁹⁹ <https://www.ncbi.nlm.nih.gov/pubmed/25944764>

¹⁰⁰ <https://www.ncbi.nlm.nih.gov/pubmed/17364845>

¹⁰¹ <https://www.mja.com.au/journal/2019/211/1/getting-it-right-validating-culturally-specific-screening-tool-depression-aphq-9>



are clients of VALS. Of the Victorian prisoners 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*.¹⁰²

Pre and post release programs must be sufficiently flexible, recognising the complexity of individual needs and the barriers that exist in access to vital community services such as stable, safe and appropriate housing. They must also ensure continuity of culturally safe mental health care and take an early intervention approach to addressing barriers to opportunities for meaningful employment. Pre and post release programs must be designed, developed and implemented in consultation with the Aboriginal community and in partnership with ACCOs. They need to be accessible at all prisons and at all stages of the custodial process.

ReConnect programs

ReConnect is Corrections Victoria's current post-release transition program. It provides targeted (up to four weeks) and intensive (up to 12 months) post-release reintegration outreach services for Victorian prisoners exiting custody.

From 2015 and 2017, VALS operated a Reconnect program with funding from Corrections Victoria's. The program provided culturally safe case management services for Aboriginal prisoners exiting custody. The VALS service delivery model assisted prisoners to make preparations for release including facilitating access to services delivered by ACCOs. VALS Reconnect workers were positioned to provide intensive culturally safe trauma informed case management, benefited by quickly established trust relationships. This enabled the early identification of what we found were often highly complex underlying needs (often described as risk factors for re-offending).

Unfortunately, in 2017 VALS made a decision to stop delivering the ReConnect program due to the comparatively limited program resources which meant the program as designed was not sustainable. The ReConnect program is now only delivered by mainstream service providers, lessening its accessibility and cultural safety for Aboriginal prisoners. VALS would welcome future opportunities to re-engage with the Department of Justice and Community Safety to improve the service delivery model for this program in the future.

VALS note that Corrections Victoria provides some ongoing pre-release, transitional and post release programs which target seven key areas described as being the key drivers of effective and successful reintegration (including housing, employment, education and training, independent living skills, mental health, alcohol and drugs, family/community connectedness).¹⁰³

Included are programs delivered under the Kaka Wangity Wangin-Mirrie Aboriginal Cultural Programs Grants Scheme which provided a series of 3 year funding grants to Aboriginal programs within prisons and in community corrections focusing on cultural strengthening, family violence

¹⁰² Victorian Government, *Burra Lotjpa Dunguludja* (2018) p. 44.

¹⁰³ For an overview see: <https://www.corrections.vic.gov.au/release/after-prison-support>



(aimed at perpetrators), healing and parenting. While the aim of these programs is to reduce the prisoner risk of reoffending and improve effective reintegration into the community, VALS is concerned at the grants-based funding model and urges the Victorian Government to maintain long-term and stable funding for these critical programs.

Yawul Magadjina

Yawal Mugadjina is an Aboriginal cultural mentoring program being run by Corrections Victoria's *Naalamba Ganbu Nerrlinggu Yilam* (Cultural Integrity and Resilience Unit) within its Rehabilitation and Reintegration Branch. The *Naalamba Ganbu Nerrlinggu Yilam* (previously the Aboriginal Programs Unit) leads the design, development, implementation and monitoring of Corrections Victoria (CV) policies, programs and services aimed at reducing the overrepresentation of Aboriginal people within the Victorian correctional system.¹⁰⁴

Yawal Mugadjina is a Cultural Mentoring Program that provides Aboriginal men and women in Victorian prisons access to mentoring from Aboriginal Elders and Respected Persons. The program also allows participants to commence a Cultural Journey that will link into services post release including Community Corrections and the Local Justice Worker program. VALS applauds the introduction of *Yawal Mugadjina* and looks forward to assisting its clients to engage with the program wherever possible.

Transitional housing

Access to safe, stable, appropriate and affordable housing is one of the most significant barriers to the successful reintegration of prisoners into the community. Homelessness can lead to mental ill health and exacerbate existing mental ill health. Homelessness is a key driver of reoffending and reincarceration. Lack of access to housing also contributes to more people remaining in prison on remand, an issue compounded by recent bail reforms. Housing is foundational for the healthy functioning of family and community relationships – a key component of Aboriginal social and emotional wellbeing.

VALS acknowledges there is currently significant unmet need for transitional accommodation and other residential centres for prisoners to prepare for release. This is especially the case for Aboriginal women, in light of the unacceptably high rates of homelessness and rapidly increasing incarceration rates.¹⁰⁵ Transition centres allow for the gradual reestablishment of community and familial relationships that may not have been possible or appropriate in the custodial environment.

¹⁰⁴ Victorian Government, *Yawal Mugadjina Program Guidelines Naalamba Ganbu Nerrlinggu Yilam*, December 2018, unpublished.

¹⁰⁵ The Victorian Equal Opportunity and Human Rights Commission's 2013 report *Unfinished Business: Koori Women and the Justice System* found that Koori women comprise the fastest growing segment of the Victorian prison population. The full report is available online here:

https://www.humanrightscommission.vic.gov.au/media/k2/attachments/Unfinished_business_-_Koori_women_and_the_justice_system.pdf



VALS is currently working towards delivery of a new limited transitional housing program for Koori women and is looking forward to its implementation in the near future.

RECOMMENDATIONS:

39. The Royal Commission enquire into best practice throughcare models including integrated models operating in Victoria and other Australian and international jurisdictions.
40. Provide long-term and stable funding to ACCOs to deliver pre and post release programs, including transitional housing programs, for Aboriginal people in custody.

8.8 CONTINUITY OF HEALTH CARE POST-RELEASE

The first six months following release are a critical time for many prisoners returning to the community. Continuity of care through transition and post release is crucial to ensure Aboriginal prisoners exiting the prison system access and maintain appropriate mental health and social and emotional wellbeing supports to maximise their rehabilitation and reintegration potential.

Over the past few years, investment has been directed towards the Continuity of Aboriginal Health Care Pilot (CAHCP)¹⁰⁶ by Justice Health and Corrections Victoria. VALS acknowledges the integral role played by VACCHO in highlighting some of the failures of existing support mechanisms and in driving the development of the CAHCP.¹⁰⁷

The pilot aimed to ensure that Aboriginal women and men exiting the Dame Phyllis Frost Centre (DPFC), Dhurringile Prison and Fulham Correctional Centre were supported to access health care services in the community. The CAHCP service delivery partners were each Aboriginal Community Controlled Health Services, including Ngwala Willumbong (at DPFC), Rumbalara Aboriginal Cooperative (Dhurringile) and Gippsland and East Gippsland Aboriginal Co-Operative (Fulham).

VALS understands that implementation of the CAHCP has been monitored via reporting to the Corrections and Justice Health Koori Reference Group and to the Aboriginal Justice Forum and that the pilot was due to be completed in June 2018 to coincide with the conclusion and evaluation of Phase 3 of the Aboriginal Justice Agreement.

RECOMMENDATION:

41. The Royal Commission enquire into the success of the Continuity of Aboriginal Health Care Pilot (CAHP) and consider recommendations to expand similar pilots to other prisons across Victoria.

¹⁰⁶ This Victorian Government media release on 16 March 2017 outlined the program:

<https://www.premier.vic.gov.au/more-support-for-aboriginal-prisoners/>

¹⁰⁷ VACCHO, *Keeping Our Mob Healthy in and out of Prison*, 2015, in particular see page 27-28



9. IMPROVING SOCIAL AND EMOTIONAL WELLBEING BY DIVERTING OUR YOUNG PEOPLE AWAY FROM THE YOUTH JUSTICE SYSTEM¹⁰⁸

The youth justice system in Victoria has been under strain for some time, with multiple inquiries and investigations highlighting the harmful effects of the system on the mental health and social and emotional wellbeing of children and young people.¹⁰⁹ This is particularly significant for young people in detention, as observed by the Royal Commission into the Protection and Detention of Children in the Northern Territory¹¹⁰ and the Australian Medical Association.¹¹¹

Whilst the youth justice system can be harmful for mental health, poor mental health also increases the risk of coming in contact with the system, including as a result of criminalisation of young people with mental health issues.¹¹² In 2017, 53% of young people in detention in Victoria presented with mental health issues, 30% had a history of self-harm or suicidal ideation and 41% had cognitive difficulties that affected their daily functioning.¹¹³ Essentially, the youth justice system ‘has become normalised as a place of disability management and control’.¹¹⁴

Aboriginal young people are substantially over-represented in the youth justice system in Victoria,¹¹⁵ and are therefore disproportionality impacted by the detrimental impacts of this system. Through our work, VALS is acutely aware of the harm caused to our young people, including as a result of over-policing of Aboriginal children and young people; frequent use of isolation and lock downs; over- medication of young people in detention; and dislocation from family, community and culture.

Following the 2017 Review of the Youth Justice System,¹¹⁶ the Department of Justice is currently developing a new Youth Justice Strategy and Act, as well as a Koori Youth Justice Strategy. Multiple recommendations in the 2017 Review point towards the need for a more rehabilitative approach, yet

¹⁰⁸ This section responds to ToR 4 and guiding questions 4,7,9 and 11.

¹⁰⁹ Commission for Children and Young People (CCYP), *The Same Four Walls: Inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system*, (2017); P. Armytage and J. Ogloff, *Youth Justice Review and Strategy: Executive Summary* (2017); Victorian Ombudsman, *Report on youth justice facilities at the Grevillea unit of Barwon Prison, Malmesbury and Parkville* (2017); Victorian Equal Opportunity and Human Rights Commission (VEOHRC) and CCYP, *Aboriginal Cultural Rights in Youth Justice Centres* (2018); Parliament of Victoria Legal and Social Issues Committee, *Inquiry into Youth Justice Centres in Victoria: Final Report* (2018).

¹¹⁰ Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final Report* (2017) vol 2B, 407 – 480.

¹¹¹ Australian Medical Association, *The Justice System and Public Health* (9 August 2012). See also, C. Cunneen, *Arguments for Raising the Minimum Age of Criminal Responsibility: Research Report*, Comparative Youth Penalty Project, University of New South Wales, Sydney, 2017.

¹¹² Law Council of Australia, *The Justice Project: Final Report – Part 2 (Broader Justice System Players)*, (2018) p. 522.

¹¹³ Victorian Government, *Youth Parole Board Annual Report 2017-18* (2018) p. 15.

¹¹⁴ McCausland, R. and Baldry, E. (2017) ‘“I feel like I failed him by ringing the police’: Criminalising disability in Australia’, *Punishment & Society*, 19(3): 290-309.

¹¹⁵ In 2017, 15% of the total number of young people in youth justice centres identified as Aboriginal. See Victorian Government, *Youth Parole Board Annual Report 2017-2018* (2018). Aboriginal young people were 12 times more likely than non-Aboriginal counterparts to be detained and 13 times more likely to be subject to a community justice order. AIHW, *Youth Justice in Australia 2017-18* (2018), p. 9

¹¹⁶ P. Armytage and J. Ogloff, *Youth Justice Review and Strategy: Meeting the needs and reducing offending (Executive Summary – July 2017)* (2017).



at the same time, the government has transferred youth justice from DHHS to Corrections Victoria and continues to invest in a new high security detention centre at Cherry Creek.

VALS is extremely concerned about escalating punitive measures targeting children and young people in detention. Any policy that promotes the re-traumatization of Aboriginal children and young people and impacts negatively on social and emotional wellbeing should be thoroughly examined and reconsidered, to be replaced with therapeutic options that pursues the twin aims of reducing re-offending and rehabilitation.

VALS strongly encourages the Royal Commission to prioritise the mental health of young people in the youth justice system, including the social and emotional wellbeing of Aboriginal young people.

9.1 RAISE THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY

The age of criminal responsibility in Victoria is 10 years.¹¹⁷ This is the age at which a child can be investigated for an offence, arrested by police, charged and locked up in a youth prison. When a child is over the age of 10 but under 14, there is an old, common law rebuttable presumption that the child lacks the capacity to be criminally responsible for his or her acts, known as “doli incapax” (incapable of crime). In order to rebut the presumption, it must be proved that at the time of an offence the child knew that his or her actions were seriously wrong in the moral sense.¹¹⁸

This archaic presumption routinely fails to safeguard children. It is applied inconsistently and it can be very difficult for children to access expert evidence, particularly children in regional and remote areas.¹¹⁹ Importantly, the presumption does not reflect contemporary medical knowledge of childhood brain development, social science, long term health effects or human rights law.

The current legal minimum age of criminal responsibility is against medical evidence that children aged 10 to 14 years lack emotional, mental and intellectual maturity. Research shows that children’s brains are still developing throughout these formative years where they have limited capacity for reflection before action.¹²⁰ Children in grades four, five and six are not at a cognitive level of

¹¹⁷ *Children, Youth and Families Act 2005* (Vic), s 344.

¹¹⁸ *RP v The Queen* [2016] HCA 53.

¹¹⁹ See O’Brien, W. and Fitz-Gibbon, K., ‘The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders’ Views and the Need for Principled Reform’ (2017) 17(2) *Youth Justice*.

¹²⁰ Andrew Becroft, ‘From Little Things, Big Things Grow: Emerging Youth Justice Themes in the South Pacific’ (Paper presented at the Australasian Youth Justice Conference on Changing Trajectories of Offending and Reoffending, New Zealand, 21-22 May 2013) 5 referring to Science Advisory Committee *Improving the Transition: Reducing Social and Psychological Morbidity During Adolescence* (May 2011) at 24. See also Kelly Richards, ‘What makes juvenile offenders different from adult offenders?’ (2011) 409 *Trends & issues in crime and criminal justice*, 4; Laurence Steinberg ‘Risk Taking in Adolescence: New Perspectives from Brain and Behavioural Science’ (2007) 16 *Current Directions in Psychological Science* 55, 56.



development where they are able to fully appreciate the criminal nature of their actions or the life-long consequences of criminalisation.¹²¹

Criminalising the behaviour of young and vulnerable children creates a vicious cycle of disadvantage that can entrench children in the criminal justice system.¹²² Studies show that the younger a child has their first contact with the criminal justice system, the higher the chance of future offending.¹²³ The Sentencing Advisory Council recently found that with each one year increase in a child's age at first sentence, there is an 18% reduction in the likelihood of reoffending.¹²⁴ Children who are forced into contact with the criminal justice system at a young age are less likely to complete their education and find employment and are more likely to die an early death. The current system traps children who would otherwise grow out of the behaviours and benefit from social interventions and support.

The Royal Commission into the Protection and Detention of Children in the Northern Territory noted the harm caused to children by time in custody.¹²⁵ The Australian Medical Association has noted in particular the negative impacts imprisonment has on the health of Aboriginal and Torres Strait Islander peoples.¹²⁶ There is a clear link between wellbeing, mental health and youth detention, given one third of imprisoned children diagnosed with depression only experienced its onset once they were behind bars.¹²⁷ Youth imprisonment is associated with higher risks of suicide and depression.¹²⁸ Imprisoning children impacts on their immediate and future health and should be avoided.

The current minimum age of criminal responsibility in Victoria is in breach of international human rights law and is inconsistent with international standards. The median age of criminal responsibility

¹²¹ Ibid.

¹²² Australian Institute of Health and Welfare 2016. Young people returning to sentenced youth justice supervision 2014–15. Juvenile justice series no. 20. Cat. no. JUV 84. Canberra: AIHW: The younger a person was at the start of their first supervised sentence, the more likely they were to return to sentenced supervision. For those whose first supervised sentence was community-based, 90% of those aged 10-12 at the start of this sentence returned to sentenced supervision, compared with 23% of those aged 16 and just 3% of those aged 17. More staggering were those sentenced to detention as their first supervised sentence, all (100%) those aged 10-12 at the start of his sentence returned to some type of sentenced supervision before they turned 18. This rate of return decreased with age, to around 80% of those 14 and 15, 56% of those 16 and 17% of those 17.

¹²³ Ibid. See also Australian Institute of Health and Welfare 2013. Young People Aged 10 – 14 in the youth justice system, 2011-12. Juvenile justice series No.12 JUV 19. Canberra: AIHW.

¹²⁴ Sentencing Advisory Council, *Reoffending by Children and Young People in Victoria* (December 2016) 26.

¹²⁵ Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final Report* (2017) vol 2B, 407 – 480.

¹²⁶ Australian Medical Association, *The Justice System and Public Health* (9 August 2012) Australian Medical Association <<https://ama.com.au/position-statement/health-and-criminal-justice-system-2012>>.

¹²⁷ Barry Holman and Jason Ziedenberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities* (28 November 2006) Justice Policy Institute <<http://www.justicepolicy.org/research/1978>>.

¹²⁸ Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final Report* (2017).



worldwide is 14 years old. The United Nations Committee on the Rights of the Child has consistently said that countries should be working towards a minimum age of 14 years or older.¹²⁹

The Smart Justice for Young People (SJ4YP) Coalition in Victoria – a coalition of leading Aboriginal and Torres Strait Islander, social services, health, legal and youth advocacy organisations who advocate for evidence-based and effective responses to justice involved children and young people – is calling on the Government to raise the age of criminal responsibility to at least 14 years old. This call is supported by the Australian Medical Association, the Royal Australian College of Physician, the Australian Indigenous Doctors' Association, the National Aboriginal and Torres Strait Islander Legal Services, the Lowitja Institute, the Law Council of Australia and the Public Guardians and Children's Commissioners across the country.¹³⁰

RECOMMENDATION:

42. Raise the minimum age of criminal responsibility to 14 years old to prevent early criminalisation, which can be a precursor, causal and aggravating factor for mental health conditions in children.

9.2 DIVERT YOUNG PEOPLE AWAY FROM THE YOUTH JUSTICE SYSTEM

It is critical to address the underlying causes for offending for young people,¹³¹ rather than criminalising behaviour and trapping children into lifetime of offending. For young people with mental health conditions (i.e. 30% of the population in young justice centres) this means addressing mental health through a holistic integrated model. Rather than taking a punitive approach and locking up Aboriginal children and young people, time and resources should be invested in early intervention and diversion, including culturally safe pre-charge cautioning and court mandated diversion programs.

Pre-Charge Cautioning

Over the past decade, there have been several pilot programs to increase pre-charge cautioning:

- In 2007, a 12-month Koori Youth Cautioning Pilot was introduced in Mildura;

¹²⁹ Committee on the Rights of the Child, *General Comment No. 10 Children's rights in juvenile justice*, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007), [32-33].

¹³⁰ Australian Medical Association, *AMA Calls for the Age of Criminal Responsibility to be Raised to 14 Years of Age*, (25 March 2019) <<https://ama.com.au/media/ama-calls-age-criminal-responsibility-be-raised-14-years-age>>. See also Law Council of Australia, <https://www.lawcouncil.asn.au/media/media-releases/commonwealth-states-and-territories-must-lift-minimum-age-of-criminal-responsibility-to-14-years-remove-doli-incapax>

¹³¹ P. Armytage and J. Ogloff, *Youth Justice Review and Strategy: Meeting the needs and reducing offending (Executive Summary – July 2017)* (2017) p. 11.



- In 2010, a Youth Cautioning Pilot was introduced in Western Region Division 4, the Northern Grampians and Horsham Police Service Areas, the Eastern Region Division 2 Knox PSA and the Southern Metro Region Division 3 Casey PSA.

Currently, Victoria Police are working with VALS and Aboriginal communities to develop and implement a new Aboriginal Youth Cautioning program (AYCP). The AYCP will operate as a pre-charge cautioning model, whereby police make referrals to other programs rather than charging a young person. Under *Burra Lotjpa Dunguludja*, resources have been committed over 5 years to implement this program in four sites across Victoria.¹³²

VALS supports the ACYP as a step in the right direction and is pleased to see that the program is being designed together with Aboriginal communities. However, we remain concerned that we are still a long way off implementation of a state-wide program. In the meantime, we continue to see inconsistent application of and access to diversion programs, particularly for Aboriginal young people in rural and regional areas.

Court Diversion

Since 2017, Victoria has a Court-based legislative youth diversion scheme¹³³ whereby children and young people charged with low-level offences can be placed on a diversions order, which may contain a range of conditions aimed at promoting reparation of harm caused by the offence. The scheme was developed in response to the Royal Commission into Family Violence¹³⁴ and is managed across Victoria by the Children's Court Youth Diversion Service (CCYD).

Despite the implementation of this scheme, VALS is concerned by the lack of culturally safe diversion programs, which mean that Aboriginal young people are often unable to access diversion. This is particularly true in rural and regional areas. Programs such as Baroona,¹³⁵ Bunjilawarra¹³⁶ and youth justice programs run by Ngwala Willumbong¹³⁷ provide positive examples of culturally safe rehabilitative programs for young people with drug and alcohol issues. Another successful program is Bareng Maroop, for children aged 10-14 years who are involved in the justice system.¹³⁸ While these programs can be accessed by young people on a court diversion order, there is no Koori specific youth diversion program.

RECOMMENDATIONS:

¹³² AJF, *Burra Lotjpa Dunguludja* (2018), p. 41.

¹³³ *Children Youth and Families Act 2005* (Vic), s. 356C.

¹³⁴ *Royal Commission into Family Violence: Final Report* (Summary and Recommendations) Recommendation 127, p. 79.

¹³⁵ <http://www.njernda.com.au/baroona-healing-centre/>

¹³⁶ http://bunjilwarra.org.au/#service_model

¹³⁷ <https://www.ngwala.org.au/youth-justice.html>

¹³⁸ <https://www.vacca.org/page/services/justice-support/barreng-moorop-youth-justice-program>



43. Commit long-term funding to ensure that the Victorian Police Koori Youth Cautioning program is implemented in all areas across Victoria.
44. Invest in culturally safe diversion programs run by Aboriginal Community Controlled organisations, to ensure that Aboriginal young people can access diversion.

9.3 STOPPING CRIMINALISATION OF YOUNG PEOPLE WITH MENTAL HEALTH CONDITIONS IN RESIDENTIAL CARE

Children and young people in residential care are particularly vulnerable to early engagement with the youth justice system due to over-reliance on police to respond to behaviour issues in residential homes.¹³⁹ While this is problematic in and of itself, one of the key reasons for behavioural issues in residential homes is poor mental health, often linked to severe trauma. Although data on the mental health of children in residential care is limited, the limited data available indicates that “children in residential care experience poorer health outcomes, particularly in relation to mental health.”¹⁴⁰ In relation to OOHC more generally, the Taskforce 1000 Inquiry in 2016 found that 22% of Aboriginal children in OOHC in Victoria had a mental health condition.¹⁴¹

Victoria Aboriginal children and young people are 12.9 times more likely to be in OOHC than non-Aboriginal youth and are therefore particularly at risk of criminalisation in residential facilities.¹⁴² Indeed Aboriginal children and young people in OOHC are 16 times more likely than the equivalent general population to be under youth justice supervision within the same year.¹⁴³

VALS represents a number of clients who are involved in both the children protection system and the youth justice system and is extremely concerned by the criminalisation of mental health within residential homes. The links between placement into out of home care and the youth justice and adult criminal justice systems speak loudly and clearly of a broken system.¹⁴⁴

Amelia: Criminalisation in Residential Care

Amelia is 16 years of age and living in residential care. She was removed from her parents at the age of 7 and was first placed in foster and kinship placements, before entering residential care at

¹³⁹ Victorian Legal Aid, *Care not Custody* (2016).

¹⁴⁰ Auditor General of Victoria, *Residential Care Services for Children* (2014), p. xii

¹⁴¹ CCYP, *‘Always was, always will be Koori children’: Systemic inquiry into services provided to Aboriginal children and young people in out of home care in Victoria* (2016).

¹⁴² Ibid.

¹⁴³ AIHW, *Young people in child protection and under youth justice supervision 2015–16* (2017). See also: Sentencing Advisory Council, *Crossover Kids’: Vulnerable Children in the Youth Justice System* (2019).

¹⁴⁴ According to the Australian Law Reform Commission “the links between these systems is so strong that child removal into out-of-home care and juvenile detention could be considered as key drivers of adult incarceration. See ALRC, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (2017), p. 485.



the age of 11. She has been extremely unhappy in this facility for some time, and has experienced significant periods of time without a child protection worker.

In 2018, she was granted youth parole after serving six months in custody. This was her first time in custody but she has been in contact with the youth justice system since the age of 11. Whilst on parole, police made multiple attempts to serve VALS with charges for alleged offending that occurred prior to Amelia's remand. The offending was minor, for example, one matter related to allegedly throwing a coffee cup in her residential unit. This created significant issues as she was required to attend court long after she had stopped offending.

As recommended by Victorian Legal Aid in its 2016 report, *Care not Custody*, VALS strongly recommends the development and implementation of an inter-agency Protocol to reduce the contact of children in residential care with the youth justice system. A similar Protocol has been developed in NSW and could be used as a model.¹⁴⁵

RECOMMENDATIONS:

45. Develop and implement an inter-agency Protocol to reduce the contact of children in residential care with the youth justice system.

9.4 INCREASE ACCESS TO THE CHILDREN'S KOORI COURT

The Children's Koori Court has been operating in Victoria since 2005 and is available for Aboriginal children and young people who have been found guilty of committing an offence. The Children's Koori Court is currently available in Melbourne; Heidelberg; Dandenong; Mildura; Latrobe Valley (Morwell); Bairnsdale; Warrnambool; Portland; Hamilton; Geelong Swan Hill; and Shepparton.

Where it is accessible, the majority of VALS clients opt for the Children's Koori Court and VALS experience is that we get better outcomes for clients and their families in these courts. Unlike the mainstream court process, the Children's Koori Court is more informal and culturally safe. It is less alienating for our clients and more likely to promote a safe and protective environment for social and emotional wellbeing.

VALS is concerned the Children's Koori Court is not accessible for all Koori children and young people across Victoria, including in Horsham, Ballarat, Stawell and Ararat. Whilst some families may be able to travel to access the Koori Court in a different location, many clients do not have the financial means to do so. In this regard, VALS strongly supports the commitment under *Burra Lotjpa*

¹⁴⁵ NSW Government, [*Joint Protocol to reduce the contact of young people in residential out-of-home-care with the criminal justice system*](#) (2016).



Dunguludja to expand the Children's Koori Courts to additional locations over the next 5 years.¹⁴⁶ VALS calls for additional resources to be provided to legal services to ensure that vulnerable Aboriginal children and youth have access to culturally appropriate legal services.

RECOMMENDATIONS:

46. Ensure that the Koori Children's Court is accessible in additional locations across Victoria to ensure that Aboriginal children across Victoria have access to a legal process that is culturally-safe and supports social and emotional wellbeing.

9.5 ENSURE THAT FORENSIC MENTAL HEALTH SERVICES FOR YOUNG PEOPLE IN THE YOUTH JUSTICE SYSTEM ARE CULTURALLY SAFE

The best way to promote better mental health outcomes for Aboriginal young people is to divert them away from the youth justice system. However, for those young people who are detained or on community-based orders, it is essential to ensure access to culturally safe and trauma-informed mental health services.

Since 2010, forensic mental health services for young people in the youth justice system have been provided by the Youth Justice Mental Health Initiative. This includes 6 clinical positions working exclusively with custodial and community youth justice services.¹⁴⁷ In 2017, the Youth Justice Review found that forensic mental health services for young people in the youth justice system were inadequate.¹⁴⁸ This finding reflects the experience of our clients, who have experienced over-medication and insufficient access to mental health services.

In relation to over-medication, quetiapine (a sedating antipsychotic) is often used to sedate young people so that they are settled enough to engage and benefit from programs. This medication is regularly given when young people are locked down, not at bedtime, so that young people fall asleep early in the evening and then wake before morning. VALS is concerned about the use of sedating antipsychotics as a way of managing environments where appropriate psychological interventions or opportunities to modify the environment are not available.

¹⁴⁶ AJF, *Burra Lotjpa Dunguludja* (2018), p. 47.

¹⁴⁷ <https://www.forensicare.vic.gov.au/youth-justice-mental-health-program/>

¹⁴⁸ P. Armytage and J. Ogloff, *Youth Justice Review and Strategy: Meeting the needs and reducing offending (Executive Summary – July 2017)* (2017) p. 13.



Jonathan¹⁴⁹: Sedating Antipsychotics

Jonathan is a 16-year-old boy who is in contact with the youth justice. Jonathan has experienced multiple traumas, including removal from his mother at birth and rejection from his father. He was cared for by his grandparents until the age of 13 when he was placed in residential care. Jonathan has been diagnosed with a moderate intellectual disability and Attention Deficit and Hyperactivity Disorder (ADHD). He also has a history of self-harm and suicidal ideation, including two suicide attempts whilst in youth justice centres.

In 2017, whilst serving a sentence at a Malmsbury Youth Justice Centre, Jonathan was prescribed 400mg of quetiapine (a sedating antipsychotic) per day to help him sleep. He had been advised by the prescribing psychiatrist that he needed the medication because “he wasn’t a normal person” and because “he couldn’t sit still.” The medication is not recommended as a hypnotic and an independent psychiatric assessment deemed that there was no evidence of a disorder which might merit its prescription.

Additionally, the report of the independent psychiatrist found that it was crucial for Jonathan to access expanded psychiatric services, and that it was not good enough to simply state that a young person “does not wish to engage” with therapy, whilst noting increasing self-harming and suicidal behaviours. At this stage, the clinical care available at Malmsbury included a psychiatrist for 1 day a week for to address the needs of over 100 young people.

Since this time, a number of reforms have been initiated:

- Community Forensic Mental Health Service (early intervention problem behaviour program for young people with mental illness and problematic behaviours)
- Dedicated secure two-bed forensic mental health unit at the Footscray Hospital for young people detained in Youth Justice centres who require compulsory inpatient treatment
- Custodial Forensic Youth Mental Health Service in Youth Justice centres (services for young people with mental health issues requiring specialist treatment)¹⁵⁰
- Development of cultural safety standards for health services in the adult and youth justice systems.¹⁵¹

In addition, the government has recently established The Children’s Court Mental Health Advice and Response Service (MHARS) at Melbourne Children’s Court, a specialist mental health service delivered by Orygen Youth Health (OYH) that will help to identify if a mental health issue is present and inform when it is necessary to go beyond a justice response to also or instead use a therapeutic response.

¹⁴⁹ Not his real name.

¹⁵⁰ Victorian Government, [Youth Parole Board Annual Report 2017-18](#) (2018), p. 17; Victorian Government, [Victoria’s Mental Health Services Annual Report 2017-2018](#), (2018) p. 31.

¹⁵¹ AJF, [Burra Lotjpa Dunguludja](#) (2018) p. 47.



While VALS is pleased to see increased investment in forensic mental health services for young people in the youth justice system, we are concerned that there is still a lack of culturally safe mental health services, particularly in rural and regional areas. As highlighted by the Victorian Equal Opportunity and Human Rights Commission, “given the potential mental health impacts of custodial environments, priority should be given to ensuring mental health services are culturally safe.”¹⁵²

RECOMMENDATIONS:

47. Increase the capacity of forensic mental health services for young people in the youth justice system.

9.6 ADDRESS HARMFUL PRACTICES IN YOUTH JUSTICE CENTRES

The 2017 Inquiry of the Commission for Children and Young People found that there was over-reliance in Victoria’s Youth Justice system on isolation,¹⁵³ separation and lock-downs, resulting in detrimental impacts for young people and staff.¹⁵⁴ In addition, Koori youth were overrepresented among those placed in isolation, particularly at Malmsbury Youth Justice Centre.¹⁵⁵

This is despite international research and best practice, which indicates that the effects of isolation on children’s health and wellbeing can be severe, long-term and irreversible, particularly for children who have been victims of abuse or trauma¹⁵⁶ or who have mental health conditions. It also goes against the recommendation of the Royal Commission into Aboriginal Deaths in Custody that Aboriginal people should not be held alone in rooms or cells.¹⁵⁷

According to the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, solitary confinement (defined as the physical and social

¹⁵² VEOHRC and CCYP, *Aboriginal Cultural Rights in Youth Justice Centres* (2018), p. 9.

¹⁵³ Isolation is regulated under the Children, Youth and Families Act and involves placing a child or a young person in a locked room, separate from others and from the normal routine of the centre.

¹⁵⁴ CCYP, *The Same Four Walls: Inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system*, (2017). The concerns raised by the CCYP inquiry were also shared by the 2017 Armytage and Ogloff review of the Youth Justice System and the Parliamentary Inquiry into Youth Justice Centres. See P. Armytage and J. Ogloff, *Youth Justice Review and Strategy: Meeting the needs and reducing offending (Executive Summary – July 2017)* (2017); Parliament of Victoria Legal and Social Issues Committee, *Inquiry into Youth Justice Centres in Victoria: Final Report* (2018).

¹⁵⁵ CCYP, *The Same Four Walls: Inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system*, (2017).

¹⁵⁶ <http://www.nationalpreventivemechanism.org.uk/app/uploads/2017/02/NPM-Isolation-Guidance- FINAL.pdf> See also, Chris Cunneen article - <https://newsroom.unsw.edu.au/news/social-affairs/locking-kids-damages-their-mental-health-and-leads-more-disadvantage-what-we>

¹⁵⁷ *Royal Commission into Aboriginal Deaths in Custody* (1991), Recommendation 144: unless there are substantial grounds for believing that the wellbeing of the detainee or other persons detained would be prejudiced, an Aboriginal detainee should not be placed alone in a police cell. Wherever possible an Aboriginal detainee should be accommodated with another Aboriginal person. The views of the Aboriginal detainee and such other detainee as may be affected should be sought. Where placement in a cell alone is the only alternative the detainee should thereafter be treated as a person who requires careful surveillance.”



isolation of individuals who are confined to their cells for 22 to 24 hours a day) of juveniles of any duration constitutes cruel, inhumane and degrading treatment.¹⁵⁸

Although the 2017 Inquiry of the CCYP and the 2017 Review of the Youth Justice System both included recommendations to address systematic use of isolation, separation and lock-downs,¹⁵⁹ VALS experience is that Aboriginal young people with poor mental health are still being subjected to harmful practices that undermine their social and emotional wellbeing and compound trauma. For example, in 2019, one of our clients aged 16 was placed in a room by herself for the entirety of her period on remand due to concerns for her safety. This included 21 days, followed by 52 days, followed by 21 days.

RECOMMENDATIONS:

48. Implement the recommendations from the 2017 Inquiry into the use of Isolation, Separation and Lockdowns in the Victorian Youth Justice System.

9.7 SUPPORT ABORIGINAL YOUNG PEOPLE TO BE STRONG IN THEIR CULTURE

Connection to culture, country and community is a protective factor for the social and emotional wellbeing of Koori young people.¹⁶⁰ Despite this, a 2018 Report by the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) and the CCYP found that detaining Aboriginal youth in Victoria's youth justice centres undermines their connection to culture.¹⁶¹ Similar concerns were identified by the 2017 Review of the Youth Justice System which found that "despite the extensive literature, strong leaders/elders and the wealth of Victorian knowledge regarding culturally effective approaches, there is still a lack of appropriate programs and support for young Koori people in the youth justice system."¹⁶²

Currently, connection to culture, community and country for Aboriginal youth in detention is supported by four Aboriginal Liaison Officers and the following cultural programs: Koori Cultural Education program (at Parkville College),¹⁶³ a weekly cultural program run by Youth Justice Service and Parkville College at Melbourne Youth Justice Centre, a weekly program by Uncle Ron Murray at

¹⁵⁸ J.E Méndez, United Nations General Assembly, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, (A/HRC/28/68, 5 March 2015), para 44.

¹⁵⁹ P. Armytage and J. Ogloff, *Youth Justice Review and Strategy: Meeting the needs and reducing offending (Executive Summary – July 2017)* (2017).

¹⁶⁰ P. Armytage and J. Ogloff, *Youth Justice Review and Strategy: Meeting the needs and reducing offending (Executive Summary – July 2017)* (2017); VEOHRC and CCYP, *Aboriginal Cultural Rights in Youth Justice Centres* (2018), p. 4.

¹⁶¹ VEOHRC and CCYP, *Aboriginal Cultural Rights in Youth Justice Centres* (2018), p. 5.

¹⁶² P. Armytage and J. Ogloff, *Youth Justice Review and Strategy: Meeting the needs and reducing offending (Executive Summary – July 2017)* (2017).

¹⁶³ Victorian Government, *Youth Parole Board Annual Report 2017-18* (2018), p. 21.



Malmsbury Youth Justice Centre and culturally mentoring program being piloted by Richmond Football Club's Korin Gamadji Institute.¹⁶⁴

VALS also acknowledges the commitment under *Burra Lotjpa Dunguludja* to establish a Connecting to Country project at Malsmbury Youth Justice Centre and implement mentoring programs and in-reach Elder support for Aboriginal children and young people in youth justice centres.¹⁶⁵ Despite these initiatives, VALS remains concerned by the impact of detention on relationships with family and community members, particularly for young Aboriginal people from rural and regional areas whose families may not have the financial means to travel and visit their children in detention.

For Aboriginal young people on community-based youth justice orders, the Koori Youth Justice program (including Koori Youth Justice workers) provides support to comply with orders and engage in their local and cultural communities.¹⁶⁶ However, the 2017 Review of the Youth Justice System found that there was a significant lack of investment in culturally effective supervision for Koori young people on statutory orders.¹⁶⁷

VALS supports the recommendations included in the 2017 VEOHRC and CCYP Report, including the following:

- Increase number of Aboriginal staff in youth justice centres
- Increase consistency, duration and variety of cultural programs
- Develop culturally safe transitional support for young people being released
- Cultural awareness training for all staff in youth justice centres
- Develop a social and emotional wellbeing strategy for Koori youth in custody that recognises the fundamental role of culture, community and spirituality in Aboriginal wellbeing
- Prioritise the promotion of Aboriginal cultural rights in the Koori Youth Justice Strategy¹⁶⁸

We encourage the Commission to ensure that these recommendations are implemented by the Department of Justice and Regulation and that Aboriginal cultural rights and connection to culture, community, family and country are prioritised in the development of the new Youth Justice and Koori Youth Justice Strategies.

RECOMMENDATIONS:

49. Implement the recommendations from the Report by VEOHRC and the CCYP on *Aboriginal Cultural Rights in Youth Justice Centres*.

¹⁶⁴ VEOHRC and CCYP, *Aboriginal Cultural Rights in Youth Justice Centres* (2018), p. 7.

¹⁶⁵ AJF, *Burra Lotjpa Dunguludja* (2018), p. 45.

¹⁶⁶ Victorian Government, *Youth Parole Board Annual Report 2017-18* (2018).

¹⁶⁷ P. Armytage and J. Ogloff, *Youth Justice Review and Strategy: Meeting the needs and reducing offending (Executive Summary – July 2017)* (2017) p. 45.

¹⁶⁸ VEOHRC and CCYP, *Aboriginal Cultural Rights in Youth Justice Centres* (2018).



50. Increase funding to ACCOs to provide culturally effective support to Koori young people on community-based orders, including through funding to VALS to re-establish a legal service for Aboriginal young people across Victoria.
51. Provide financial support to Aboriginal families and community members to visit their young people in youth justice centres.

10. SUPPORTING THE SOCIAL AND EMOTIONAL WELLBEING OF ABORIGINAL PEOPLE ENGAGED IN THE FAMILY LAW AND CHILD PROTECTION SYSTEMS

As with criminal justice and youth justice, many Aboriginal people are drawn into the family law and child protection systems as a result of poor mental health.¹⁶⁹ Family law and child protection proceedings can also have a profound negative impact on the mental health and social and emotional wellbeing of individuals, families and communities. This is particularly the case for Aboriginal Victorians, due to lack of cultural safety within the family law and child protection systems and the dire shortage of culturally safe support services.

The impact of child protection proceedings on the social and emotional wellbeing of Aboriginal families and communities is accentuated by the fact that Aboriginal people in Victoria are overrepresented in the child protection system. In 2017-2018, Aboriginal young people in Victoria were 16 times more likely to be on care and protection orders¹⁷⁰ and 20 times more likely to be in OOHC than non-Aboriginal children.¹⁷¹

Through its work, VALS is aware of the correlation between poor mental health and family law issues. In 2017-2018, 26% of our family law matters involved a client who reported having mental health concerns. The following section outlines issues arising from the way that the family law and child protection systems interact with Aboriginal people with mental health conditions, and the impact of the family law and child protection systems on the social and emotional wellbeing of Aboriginal people, families and communities.

10.1 MENTAL HEALTH AND CAPACITY TO PARENT

According to a report by the Victorian Office of the Public Advocate in 2015, children are removed from their family at a higher rate when a parent has a disability, particularly a cognitive disability or

¹⁶⁹ In 2016, mental health of parents was a driving factor leading to the removal of more than 60% of all Aboriginal children in out of home care. See CCYP, *'Always was, always will be Koori children': Systemic inquiry into services provided to Aboriginal children and young people in out of home care in Victoria* (2016), p. 50.

¹⁷⁰ AIHW, *Child Protection Australia 2017-2018*, p. 44.

¹⁷¹ AIHW, *Child Protection Australia 2017-2018*, p. 48.



mental illness.¹⁷² This finding is reinforced by the Taskforce 1000 Inquiry, which found that 60% of Aboriginal children in OOHC in Victoria came to the attention of child protection as a result of parental mental health issues in combination with other risk factors.¹⁷³

In VALS experience, poor mental health is often identified as a protective concern and may lead to pre-judgment regarding parenting capacity. Given the high rates of intergenerational trauma amongst Aboriginal families, including as a result of child removal over multiple generations, it is critical to ensure that Department of Health and Human Services adopts a strengths-based approach that is grounded in an understanding of and responsiveness to, the impact of trauma.¹⁷⁴

Lisa¹⁷⁵: Intergenerational Trauma and mental health

Lisa is 37 and has three children, including Karen who has an intellectual disability. Karen also has a child, who has been in the care of Lisa, who is the child's maternal grandmother.

In 2017, DHHS removed the child Lisa's care due to family violence, and the child now resides in out of home care. DHHS seek a Care by Secretary Order on the basis that poor parenting and ongoing, normalised family violence pose an unacceptable risk of harm to the child.

Lisa is one of 12 children and was born in Bendigo. She grew up in poverty and came to the attention of child protection services numerous times in her childhood primarily due to parental neglect. She again came to the attention of child protection at 11 years old when she attempted to commit suicide. At 14 she fell pregnant with Karen.

At 15, Lisa met her current partner Rob. Lisa and Rob's relationship is characterised by family violence. Despite a long history of police callouts for physical family violence against her, Lisa does not acknowledge that there is any risk to the child of family violence in the grandparents' home.

¹⁷² Office of the Public Advocate, *Rebuilding the village: Supporting families where a parent has a disability. Report 2, Child Protection* (2015), p. 4.

¹⁷³ CCYP, *'Always was, always will be Koori children': Systemic inquiry into services provided to Aboriginal children and young people in out of home care in Victoria* (2016), p. 50.

¹⁷⁴ Substance Abuse and Mental Health Services Administration, *SAMHSA's Concept of trauma and guidance for a trauma-informed approach* (2014), cited in Victorian Government, *Balit Marrup*.

¹⁷⁵ Not her real name.



10.2 REFORM THE CHILD PROTECTION SYSTEM SO THAT IT IS CULTURALLY SAFE AND TRAUMA-INFORMED

Culturally-safe guardianship of Aboriginal children

Significant progress has been made within the child protection system in recent years, by transferring guardianship of Aboriginal Children on Children's Court protection orders to the CEO of VACCA. Under section 18 of the *Children, Youth and Families Act 2005*, DHHS may authorise VACCA to exercise the legal powers conferred upon DHHS under the Act in relation to a protection order in respect of an Aboriginal child. The increasing role of VACCA reflects important steps towards self-determination for Aboriginal communities in Victoria.

In VALS experience, we achieve much better outcomes for our clients when VACCA is appointed guardian and we strongly support an increasing role of VACCA under s. 18 of the *Children Youth and Families Act*. In contrast to the culturally safe case management provided by VACCA, we remain concerned by the challenges experienced by our clients in their engagement with DHHS. Our experience is that many of the issues raised during the Taskforce 1000 Inquiry continue to persist.

Bradley:¹⁷⁶ Removal of Children Into Three Separate Out-Of-Home-Care Placements

Bradley is the father of four children aged between six months and seven years. Bradley and his partner Maddie were subject to child protection proceedings in 2015. After a final protection order was made placing the children in parental care with DHHS taking a supervisory role, Bradley and Maddie's case was transferred to VACCA's Nugel program.

While Nugel was involved, the family remained together and was supported by other VACCA programs. In their reporting and decision making about the family, VACCA recognised the trauma that the children continued to suffer from their time in out of home care. In this matter, a decision was made to intensively support the family to remain together despite evidence of infrequent drug use by the parents. In their reports, VACCA maintained that a human rights-based approach demanded that the risk of the parents' limited drug use be balanced against the trauma caused to the children by removing them. On their assessment, it was more culturally appropriate and trauma-informed to keep the family together than to remove the children due to a risk of infrequent exposure to drug use. Things were progressing well enough for VACCA to close their case in early 2019.

In late May 2019, following strain on the parents' relationship and an attendant increase in ice use around the children, DHHS became involved again. The children were removed from parental care and placed in 3 separate out of home care placements. DHHS have taken a noticeably more punitive approach with the parents, granting them twice weekly contact with the children which they are unwilling to increase, despite the children's requests and prior trauma history.

¹⁷⁶ Not his real name.



While the *Lakidjeka* ACSASS and Mallee District Aboriginal Services provides advice to DHHS on the best interests of Aboriginal children, Taskforce 1000 found that many Aboriginal children did not receive services provided by ACSASS.¹⁷⁷ We believe that more efforts are needed to ensure that DHHS is engaging with Aboriginal families and parents, including those with mental health conditions, in a way that is culturally safe and trauma informed.

Cultural Support Plans for children in OOHC

Under the *Children, Youth and Families Act*, a Cultural Support Plan is required for every Aboriginal child in OOHC and should be made within 16 weeks of entering care.¹⁷⁸ The aim of these plans is to ensure that Aboriginal children in OOHC remain connected to their community and culture.

Between 2009 and 2016, a series of inquiries found extremely poor compliance with the cultural planning requirements under the CYFA.¹⁷⁹ For example, in 2016, only 6.7% of Aboriginal children in OOHC had a cultural support plan.¹⁸⁰ In the experience of VALS, even where a plan exists, they have often been grossly inadequate.

Since 2017, DHHS has increased funding to Aboriginal organisations, including VACCA, to contribute to the development of cultural support plans and programs for every Aboriginal child in OOHC.¹⁸¹ VALS strongly supports the increasing role of ACCOs as a way of ensuring that Cultural Support Plans exist and are more than just a check-box exercise.

It is essential that any Cultural Support Plan developed for an Aboriginal child in OOHC be a living document, which takes account not only of the child's need to be connected to their specific culture but also looks at culture more broadly to encompass consideration of contact with extended family and more importantly consistent contact with their parents and siblings.

Culturally safe services run by Aboriginal community-controlled organisations

The Royal Commission into Family Violence found a dearth of culturally safe early intervention and support services to strengthen families and reduce the number of Aboriginal children entering the

¹⁷⁷ CCYP, *'Always was, always will be Koori children': Systemic inquiry into services provided to Aboriginal children and young people in out of home care in Victoria* (2016), p. 63.

¹⁷⁸ S. 176 *Children, Youth and Families Act 2005* (Vic). Note that prior to March 2016, the legislative requirement was that every child subject to a Guardianship or Long-term Guardianship order be provided by the Secretary of DHHS with a cultural plan. This was amended in 2016 to make it mandatory for all Aboriginal children in OOHC.

¹⁷⁹ Victorian Ombudsman, *Own motion investigation into the Department of Human Services child protection program* (2009); Victorian Auditor General (VAGO), *Residential care services for children* (2014); CCYP, *'Always was, always will be Koori children': Systemic inquiry into services provided to Aboriginal children and young people in out of home care in Victoria* (2016), p. 72.

¹⁸⁰ CCYP, *'Always was, always will be Koori children': Systemic inquiry into services provided to Aboriginal children and young people in out of home care in Victoria* (2016), p. 23.

¹⁸¹ Victorian Government, *Korin Korin Balit-Djak* (2017), p. 61.



child protection system.¹⁸² Funding flowing from the Royal Commission into Family Violence has led to an increase in culturally safe services to support children, parents and families who are engaged with the child protection system. Some examples include *Wilka Kwe*, run by VACCA, which provides short-term intensive support to Aboriginal families involved in child protection, in order to strengthen families' capacity to protect and care for their children and prevent them being removed,¹⁸³ and *Dily Bag*, run by Djiira which draws on Aboriginal culture and heritage to promotes healing.¹⁸⁴ Additionally, the government has committed to resource culturally responsive initiatives that deliver emotional, social, cultural and financial support for Aboriginal young people leaving OOHC.¹⁸⁵

These programs have achieved important results in supporting the social and emotional wellbeing of Aboriginal families, parents and children. However, in VALS experience, there is still a lack of culturally safe services in rural and regional areas for families, resulting in an inability to access services or delays in accessing support services. VALS encourages the Commission to investigate further into how ACCOS can be funded to increase access to services, particularly in regional areas.

RECOMMENDATIONS:

52. Increase funding to ACCOs to provide culturally safe and trauma-informed support services to Aboriginal families at risk of or engaged in the child protection system.
53. Provide long term and secure funding for ACCOs to develop a tailored, flexible plan specific to the needs of each Aboriginal child in out-of-home-care. This includes individual mental health plans to be embedded in case planning for children and young people with mental health concerns, that incorporate cultural support and trauma informed care.

10.3 REFORM THE FAMILY LAW SYSTEM TO ENSURE THAT IT IS CULTURALLY-SAFE AND TRAUMA INFORMED

Connection to family, community and culture under the Family Law Act

Under the *Family Law Act* 1975, a court must consider the bests of the child as a paramount consideration.¹⁸⁶ VALS is concerned that the application of this section is insufficient regarding Aboriginal children, as the legislation limits consideration to the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture.

¹⁸² *Royal Commission into Family Violence: Final Report (Summary and Recommendations)*.

¹⁸³ <https://www.vacca.org/page/services/children-and-families/children-in-care/wilka-kwe>

¹⁸⁴ <https://djiira.org.au/what-we-do/#workshops>

¹⁸⁵ Victorian Government, *Korin Korin Blat-Djak*, p. 63.

¹⁸⁶ *Family Law Act* (Cth), s. 122.



In its Inquiry into the family law system released in March 2019, the Australian Law Reform Commission recommended amendment of the *Family Law Act* to provide that “in determining what arrangements best promote the best interests of an Aboriginal or Torres Strait Islander child, a court must consider the child’s opportunities to connect with, and maintain the child’s connection to, the child’s family, community, culture and country.”

VALS strongly endorses this recommendation and encourages the Commission to ensure that Victoria plays a key role in advocating for this legislative reform, in line with its commitment under the *Charter on Human Rights and Responsibilities* to respect the cultural rights of Aboriginal people.

Cultural reports for interim orders and family hearings

To ensure that the Court is adequately equipped to take into account a child’s opportunities to connect with and maintain connection to family, community, culture and country, VALS believes that the Family Law system should be amended to include cultural reports that would be given equal weighting by the courts as interim and family reports. In this regard, VALS strongly endorses the recommendation from the recent Inquiry into the Family Law System to include cultural reports.¹⁸⁷

Cultural reports can play a significant role in overcoming the cultural barriers presented by the family court system and greatly assist judges in gaining a more comprehensive understanding of the circumstances and needs of Aboriginal families. They should outline the cultural supports required by the child or parents, as well as extended family when they are fulfilling a parental role in the matter. They should also address issues such as the traumatic impacts of colonisation and the complexities of Aboriginal family support networks and cultural requirements.

The reports should be written by an ACCO that is connected to the child, parent or extended family. The report writer should consult with the family and extended family when appropriate, and with relevant community members. This information should be included alongside academic information that assists in explaining the experiences of the family, such as, the impacts of inter-generational trauma and child removal on the family and their community.

RECOMMENDATIONS:

58. Amend the Family Law Act to ensure that “in determining what arrangements best promote the best interests of an Aboriginal or Torres Strait Islander child, a court must consider the child’s opportunities to connect with, and maintain the child’s connection to, the child’s family, community, culture and country,” as recommended by the ALRC Inquiry into the Family Law System.

¹⁸⁷ ALRC, *Review of the Family Law System: Final Report*, (2019), p. 172.



59. Introduce cultural reports into the family law system, to provide a stronger voice for Aboriginal families in Court and ensure that connections to family, community, culture and country are adequately considered.

10.4 ENHANCE THE CULTURAL SAFETY OF THE CHILDREN'S COURT, FAMILY COURT AND FEDERAL CIRCUIT COURT OF AUSTRALIA

Specialised Aboriginal Lists

Koori specific lists currently exist in the Family Division of the Children's Court (Melbourne and Shepparton Court locations) and are due to commence in the Federal Circuit Court of Australia (FCCA) (Melbourne and Dandenong).

In the Family Division of the Children's Court, *Marram-Ngala Ganbu* (meaning 'We are One') was implemented in 2016 as the first Koori specific Family Division list in any Children's Court in Australia. It takes place once a week and has significantly improved court attendance. VALS experience is that *Marram-Ngala Ganbu* provides much more respectful and culturally safe environment for our staff and clients.

VALS strongly advocates for expanding the Koori Family Hearing Day to other locations, to ensure that Aboriginal families across Victoria can participate in a court process that is more accessible. Such a change in court settings will significantly improve Aboriginal people accessing the Children's Court and the participation of elders who can provide advice regarding the cultural needs of any children involved. We also support the forthcoming introduction of an Aboriginal List in the FCCA (Melbourne and Dandenong) and recommend that this List is expanded to other Court locations in Victoria.

Aboriginal Liaison Officers

VALS recommends that Aboriginal Liaison Officers be employed in the FCCA, just as they are in the Magistrates Court and Children's Court. Aboriginal Liaison Officers play a critical role in assisting parties to overcome language and cultural barriers, and in navigating the complexities of the family law system. Six Indigenous Liaison Officers used to exist at the Family Court, however these positions were defunded in 2006 (except in Cairns).

The current lack of Aboriginal Liaison Officers and Aboriginal Family Consultants working at the Family Court and FCCA has been identified as a concern by the Australian Law Reform Commission's Inquiry into the Family Law System, which recommended that these roles be reinstated.¹⁸⁸ Providing

¹⁸⁸ ALRC, *Inquiry into Family Law System: Final Report*, p. 378 (Recommendation 45).



Aboriginal Family Liaison Officers would help facilitate early risk assessment, evidence gathering and access to culturally appropriate support services for both children and parents.

We note that the FCCA (Melbourne) has recently advertised for a new “Indigenous Liaison Officer.” We support this as a step in the right direction and strongly additional appointments to ensure that access to and support of an Aboriginal Liaison Officer is possible across all locations of the FCCA.

RECOMMENDATIONS:

56. Expand the Koori Family Hearing Day (Family Division of the Children’s Court) and the Indigenous List (FCCA) to other locations across Victoria, to ensure that Aboriginal families, particularly those in rural and regional areas have access to a culturally safe court process.
57. Reinstate Aboriginal Liaison Officers at the Family Court and the Federal Court of Australia. Aboriginal Liaison Officers make a significant contribution to cultural safety of court proceedings by monitoring the cultural safety of court proceedings, advising judges and court officials, and guiding Aboriginal people through court process and ensure they have access to appropriate service.