SUBMISSION TO SENTENCING ACT REFORM PROJECT

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BACKGROUND TO THE VICTORIAN ABORIGINAL LEGAL SERVICE

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

Legal Services

Our legal practice operates in the areas of criminal, family and civil law. We represent women, men and children who come to us for assistance, and are only hindered in doing this where there is a legal conflict of interest. If this is the case, we provide warm referrals to other suitable legal representatives. Our 24-hour criminal law service is backed up by the strong community-based role of our Client Service Officers play, who are the first point of contact when an Aboriginal person is taken into custody, through to the finalisation of legal proceedings.

Our Criminal Law Practice provides legal assistance and represent Aboriginal people in immediate court dealing such as bail applications, defending or pleading to charges and sentencing. This includes matters in both the mainstream and Koori Court.[2] Many of our clients come from backgrounds where they may have been exposed to family violence, poor mental health, homelessness and poverty. We try to understand the underlying reasons that have led to the offending behaviour and ensure that prosecutors, magistrates and legal officers are aware of this. We support our clients to access support that can help to address underlying reasons for offending and reduce the risk of recidivism.

Our Civil and Human Rights Practice provides advice and casework to Aboriginal people in relation to a range of civil law issues, including: infringements, tenancy, victims of crime, police complaints, discrimination and human rights, Personal Safety Intervention Orders (PSIVO) matters, Coronial Inquests including in relation to deaths in custody, prisoners' rights, consumer law issues and Working With children Check suspension or cancellation.

Our Aboriginal Families Practice provides legal advice and represents families in family law and child protection matters, where we advocate for support to ensure that families can remain together, and for compliance with the Aboriginal Child Placement Principle wherever children are removed from their parents' care.

Community Justice Programs

VALS run a Custody Notification System (CNS) which requires Victoria Police to notify VALS within 1 hour every time an Aboriginal person in Victoria is taken into police custody.[3] Since October 2019, this requirement is legislated under the *Crimes Act 1958*.[4] Once a notification is received, VALS will contact the relevant police station to carry out a welfare check and provide legal advice if required.

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[1] The term "Aboriginal" is used throughout this submission to refer to Aboriginal and/or Torres Strait Islander peoples.
[2] In 2017-2018, VALS provided legal services in relation to 1367 criminal law matters, and in 2018-2019, VALS provided legal services in relation to 1,253 criminal law matters.
[3] In 2017-2018, VALS received and responded to 11,104 notifications through the CNS and in 2018-2019, we received 12,293.
[4] Ss. 464AAB and 464FA, *Crimes Act 1958* (Vic).

The Community Justice Team also run the following programs:

- Family Violence Client Support Program[5]
- Community Legal Education
- Victoria Police Electronic Referral System (V-PeR)[6]
- Regional Client Service Officers
- Baggarrook Women's Transitional Housing program.[7]

Policy, Research and Advocacy

VALS operates in various strategic forums which help inform and drive initiatives to support Aboriginal people in their engagement with the legal system in Victoria. VALS works closely with the Aboriginal Justice Caucus ad ACCOs in Victoria, as well as other key statehooders within the legal sector.

VALS is also engaged in research projects, including a three-year project to pilot Aboriginal Community Justice Reports in Victoria. The project is being carried out in partnership with the University of Technology, Griffith University, the Australasian Institute of Judicial Administration (AIJA) and Five Bridges Aboriginal and Torres Strait Islander organisation (Queensland).

ACKNOWLEDGMENTS

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

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

- Isabel Robinson, Senior Policy, Research and Advocacy Officer
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- Jacqueline Morris, Quality Improvement Coordinator
- Kathryn Morris, Team Leader – Metropolitan Community Services
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[5] VALS has three Family Violence Client Support Officers (FVCSOs) who support clients throughout their family law or civil law matter, providing holistic support to limit re-traumatisation to the client and provide appropriate referrals to access local community support programs and emergency relief monies.

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

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

SUMMARY OF RECOMMENDATIONS

Repeal mandatory sentencing schemes

1. Mandatory sentencing schemes - including in relation to Category 1 and Category 2 offences, emergency worker offences and Category A and Category B serious youth offences - should be removed, in order to safeguard judicial discretion and prevent such schemes from disproportionately impacting Aboriginal people in Victoria.

Increase deferrals in mainstream courts

2. Examine the use of deferrals pursuant to section 83A of the *Sentencing Act* in both mainstream and Koori Courts, and develop mechanisms for increasing the use of deferrals in mainstream courts.

Improve the sentencing process for Aboriginal people through Aboriginal Community Justice Reports

3. Amend section 5(2) of the *Sentencing Act* so that for the purposes of sentencing, courts are required to take into account the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples.

4. Require all Judges and Magistrates to complete regular face-to-face cultural competence training, to enhance their ability to comply with amended section 5(2) of the *Sentencing Act* (as proposed above).

5. Support self-determined initiatives to improve sentencing outcomes for Aboriginal people, including by directing dedicated funding from *Burra Lotjpa Dunguludja* to the project currently being carried out by VALS and its partners on Aboriginal Community Justice Reports.

Embed Aboriginal self-determination in the Sentencing Act

6. Amend section 1 of the *Sentencing Act* so that furthering Aboriginal self-determination in sentencing is included as a key purpose of the Act.

Reduce the number of Aboriginal people on remand

7. Repeal the reverse-onus provisions in the *Bail Act*, particularly the 'show compelling reason' and 'exceptional circumstances' provisions (sections 4AA, 4A, 4C, 4D and schedules 1 and 2 of the *Bail Act*).

8. Create a presumption in favour of bail for all offences, except in circumstances where there is a specific and immediate risk to the physical safety of another person. This should be accompanied by an explicit requirement in the Act that a person may not be remanded for an offence that is unlikely to result in a sentence of imprisonment.

9. Repeal the offences of committing an indictable offence while on bail (s. 30B), breaching bail conditions (s. 30A) and failure to answer bail (s. 30).

10. Provide increased and mandatory guidance and oversight for police officers, to ensure that they understand and comply with the requirements of the *Bail Act*. It is essential that police officers are able

to appropriately determine when bail should be granted by a police decision maker, and when the individual should be brought to court.

Expand Koori Courts to allow for culturally appropriate bail proceedings and outcomes

11. Ensure that Aboriginal people in Victoria can access culturally appropriate bail proceedings by expanding the jurisdiction of Koori Courts to hear bail applications.

Increase access to culturally appropriate diversion

12. Explore and progress options for increasing access to culturally appropriate diversion programs in Victoria, including:

    (a) Expand Koori Courts so that they operate as a plea and resolution court, with jurisdiction to divert offenders to culturally appropriate diversion programs;

    (b) Create independent self-determined Aboriginal bodies that have responsibility for developing and agreeing to a diversion plan with the offender;

    (c) Expand the role of Elders and Respected Persons (ERPs) in Koori Courts to include development and adoption of diversion plans with the offender.

13. Remove police discretion as to which offences are suitable for diversion, as well as the requirement for prosecutors to consent to diversion.

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

Increase and strengthen community-based sentencing options

15. Increase community-based sentencing options, including to create an additional sentencing option between an adjourned undertaking and a Community Corrections Order (CCO).

16. Implement measures to ensure that conditions attached to CCOs are culturally appropriate, including:

    (a) Amend section 48A of the *Sentencing Act* so that for the purpose of attaching conditions to a CCO, courts are required to take into account the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples.

    (b) Require all Judges and Magistrates to complete regular face-to-face cultural competence training, to ensure that the conditions set on CCOs for Aboriginal people are culturally appropriate and achievable.

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

18. Amend the *Sentencing Act* to ensure that individuals with an acquired brain injury, as well as those who have an intellectual disability that was not diagnosed before the age of 18 years, are eligible for a Justice Plan.

19. Amend Part 3A of the *Sentencing Act* to include a provision akin to section 18 of the *Children, Youth and Families Act 2005* (Vic), which would allow for the progressive divestment of responsibilities from Corrections Victoria to Aboriginal communities, in relation to supervision of community-based orders.

Increase sentencing options for young adult offenders

20. Expand the scope of the dual track system to young adult offenders aged 21 to 25 years.

21. Expand the dual track system, so that young adult offenders can access non-custodial options available under the *Children, Youth and Families Act* (Vic) 2005 and the new *Youth Justice Act*.

22. Amend the dual track system so that young adult offenders who are eligible for a Youth Justice Centre Order and who are remanded in custody, are able to be remanded in a Youth Justice Centre (not an adult prison).

23. Introduce sentencing principles in the *Sentencing Act 1991* (Vic) that specifically address young adult offenders aged 18-25 years, including psychobiological development.

24. Introduce a specialist young adult court or a specialist list to address the needs of young adult offenders at sentencing.

DETAILED SUBMISSIONS

VALS welcomes the opportunity to provide input to the Department of Justice and Community Safety (DJCS) as part of its review of the *Sentencing Act* 1991 (Vic).

This review comes at a critical time for Aboriginal people and communities in Victoria, as it provides important opportunities for the government to further its commitment to self-determination of Aboriginal people and communities.[8] Given the over-representation of Aboriginal people in the criminal justice system, including disproportionate rates of Aboriginal people in prisons and on community based sentences, concrete measures to further self-determination in the sentencing process are essential.

Our submission is structured around selected questions from the background document, with a specific focus on the following issues:

- Mandatory sentencing schemes
- Deferral of sentences
- Aboriginal Community Justice Reports
- Aboriginal self-determination in sentencing
- Culturally appropriate bail proceedings and outcomes
- Culturally appropriate diversion
- Community-based sentencing options
- Sentencing options for young adult offenders

All case studies are de-identified and are provided with the consent of our clients, who are eager to see reforms that could lead to significant positive outcomes for their wellbeing, livelihoods, families and communities.

How could the operation of sentencing requirements be improved?

1. Repeal mandatory sentencing schemes

VALS continues to be concerned about the removal of judicial discretion, particularly in relation to mandatory sentencing schemes. Whilst we acknowledge that mandatory sentencing schemes are not open to review as part of the current reform project,[9] we take this opportunity to raise ongoing concerns regarding the impact of these schemes on Aboriginal people in Victoria.

VALS continues to oppose mandatory sentencing schemes for the following reasons:

- They erode the fundamental principle of an independent judiciary and discretion in sentencing;
- They increase incarceration rates, and are therefore more costly;[10]
- Mandatory sentencing is not an effective deterrent;
- They contradict the principle of proportionality and imprisonment as a last resort;

[8] Victoria State Government, *Victorian Aboriginal Affairs Framework* (VAAF) 2018-2023, 22-27.
[9] Victorian Aboriginal Legal Service, *Aboriginal Community Justice Reports: Addressing Over-incarceration* (October 2017).
[10] Australian Law Reform Commission (ALRC), Report 133, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander peoples,* December 2018, 273.

- Mandatory sentencing schemes have proven to be an ongoing driver of the over-incarceration of Aboriginal and Torres Strait Islander peoples. In this regard, mandatory sentencing contradicts the Victorian governments' commitment to addressing over-incarceration of Aboriginal people;[11]
- Mandatory sentencing for offences against emergency workers act as a deterrent and disincentive for Aboriginal people to call on emergency and protective services to assistance in a time of crisis.

Recommendation:	Mandatory sentencing schemes - including in relation to Category 1 and Category 2 offences, emergency worker offences and Category A and Category B serious youth offences - should be removed, in order to safeguard judicial discretion and prevent ongoing disproportionate impacts of these schemes on Aboriginal people in Victoria.

2. Increase deferrals within mainstream courts

In contrast to the approach taken in Koori Courts, VALS is concerned that there is not a strong practice in mainstream courts of deferring sentencing pursuant to section 83A of the *Sentencing Act*. Under this provision the court can defer sentencing for a period not exceeding 12 months, including for the purposes of allowing the offender to address the underlying causes of the offending or demonstrate steps towards rehabilitation.[12]

VALS provides legal representation in relation to approximately 188 matters in Koori Courts each year[13] and it is common practice for VALS lawyers to request that sentencing is deferred to allow time for the offender to engage in culturally appropriate programs to support. In VALS experience, deferral of sentencing is an important tool as it regularly leads to a reduced sentence and avoids unnecessary escalation of the offender up the sentencing hierarchy.

Case Study: Lisa

Lisa is a 36-year single mother of two young children. Whilst Lisa was on a CCO, she was charged with new dishonesty offence which contravened the order.

VALS conducted a consolidated plea in Koori Court. At the time of the plea she had been referred to drug and alcohol support but had been cancelling/rescheduling a lot of appointments. The magistrate and Elders had a conversation with her about this and emphasized that she needed to engage with services.

The magistrate deferred sentence to enable the client to engage in community supports. Ordinarily, given the offending on a CCO and given that she had already been linked into supports, she would be likely to receive a further CCO.

[11] Department of Justice and Community Safety (DJCS), *Burra Lotjpa Dunguludja, Aboriginal Justice Agreement: Phase 4 (AJA4)* 2018, 32. See goal 2.1 Aboriginal people are not disproportionately worse off under policies and legislation; goal 2.2 Fewer Aboriginal people enter the criminal justice system; goal 2.3 Fewer Aboriginal people progress through the criminal justice system; and goal 2.4 Fewer Aboriginal people return to the criminal justice system.

[12] Section 83A, *Sentencing Act 1991* (Vic).

[13] In 2017-2018, VALS criminal lawyers made 330 appearances in relation to 195 matters in Koori Courts; and in 2018-2019, VALS criminal law lawyers made 300 appearances in relation to 182 matters.

The client came back to court a number of times over a period of 6 months. She was ultimately placed on an adjourned undertaking, given her engagement with services and with the Eders. The difference in the Koori Court was the emphasis on her rehabilitation and encouragement to work with supports, rather than just seeing further offending on a CCO and resentencing her immediately.

The trend in Koori Courts to defer sentencing appears to derive from the strong therapeutic foundations of these courts and the deeper understanding of Koori Court judges and magistrates regarding the harmful effects of escalating an Aboriginal offender up the sentencing hierarchy. Judicial officers in Koori Courts are generally more flexible to the needs of Koori offenders and are firmly commited to the need for healing over punishment.

From our experience, we have observed the following reasons why deferral of sentences may not be as prevalent in mainstream courts:

- Time pressure: magistrates regularly have long lists, so there may be a tendency to want to clear the list rather than deferring sentencing and requiring an offender to come back before the court;
- Funding cuts: legal aid grants do not cover adjournments, so private lawyers may be reluctant to ask that sentencing is deferred;
- Complex clients: in some cases, there may be concerns that clients with complex needs will not return to court if the matter is deferred.

Recommendation:	Examine the use of deferrals pursuant to section 83A of the *Sentencing Act* in both mainstream and Koori Courts, and develop mechanisms for increasing the use of deferrals in mainstream courts.

How can the Act be reformed to provide better assistance to the sentencing exercise?

3. Introduce a legislative obligation to consider Aboriginality for the purposes of sentencing

The unique and systemic historical and background factors affecting Aboriginal people are not well understood or considered by courts across Australia, including in Victoria. VALS is strongly of the view that sentencing legislation in Victoria should require courts to take into account unique systemic and background factors affecting Aboriginal people in the justice system. We believe that this is essential for ensuring respect for the principle of individualised justice and equality before the law.[14]

Research indicates that pre-sentence reports (PSRs) prepared by Corrections do not adequately consider cultural identity or community circumstances of Aboriginal people.[15] For example, research by Anthony, Behrendt and Marchetti found that: Aboriginal and Torres Strait Islander background information was often referenced using vague or general terms; PSRs do not address systemic issues linked to Aboriginality,

[14] *Veen v The Queen [No 2]* (1988) 164 CLR 465, 476.
[15] S.M. Shepherd & T. Anthony (2018) Popping the cultural bubble of violence risk assessment tools, *The Journal of Forensic Psychiatry & Psychology*, 29:2, 211-220.

including intergenerational trauma, impacts of child removal and land dispossession; and Aboriginal and Torres Strait Islander-specific sentence options were rarely identified.[16]

To address this gap, VALS has been advocating for changes to the *Sentencing Act* since 2017, and continues to see legislative amendment as a key change required to address over-incarceration rates in Victoria.[17] We believe that the *Sentencing Act* should require judicial decision-makers to consider the circumstances related to the offender's Aboriginal background and to demonstrate the steps taken to ascertain relevant information.

This is similar to the situation in Canada, where the federal *Criminal Code* requires decision makers to consider (a) the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection.[18]

Amending sentencing legislation in this way was also a key recommendation from the ALRC Inquiry into Incarceration of Aboriginal and/or Torres Strait Islander Peoples in 2018,[19] and was supported by a majority of stakeholders who made submissions to that Inquiry.[20]

Recommendation:	Amend Section 5(2) of the *Sentencing Act* so that for the purposes of sentencing, courts are required to take into account the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples. Require all Judges and Magistrates to complete regular face-to-face cultural competence training, to enhance their ability to comply with amended section 5(2) of the *Sentencing Act* (as proposed above).

4. Support and fund the development of Aboriginal Community Justice Reports across Victoria

In order to give effect to a legislative obligation as proposed above, it is necessary to develop mechanisms for ensuring that courts have access to information about an Aboriginal person's culture and mob, as well as the way that colonisation has impacted on their life, family and community. We believe that Aboriginal Community Justice reports, modelled off Gladue reports in Canada, provide a mechanism to ensure that this critical information is conveyed to courts.

Case Study: Aboriginal Community Justice Report Project

[16] Anthony, T., Marchetti, E. Behrendt, L. & Longman, C, 'Individualised Justice through Indigenous Community Reports in Sentencing,' (2017) 26(3) *Journal of Judicial Administration* 121, 135.
[17] VALS, above note 9.
[18] Section 718.2(e) *Criminal Code*: "A court that imposes a sentence shall also take into consideration the following principles: (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders."
[19] ALRC, above note **Error! Bookmark not defined.**, Recommendation 6-1.
[20] ALRC, above note **Error! Bookmark not defined.**, pp. 186 and 205.

From 2020-2023, VALS and four other partners are leading a research project which aims to improve sentencing processes and outcomes for Aboriginal defendants by providing courts with information about the personal and community circumstances of Aboriginal individuals before the courts, and which provide relevant sentencing options that are accompanied with appropriate supports.

In Victoria, the project involves piloting Aboriginal Community Justice Reports in the Koori Court in Melbourne, Broadmeadows and Mildura. In parallel, the project also involves work with Five Bridges Aboriginal and Torres Strait Islander organisation, which has been writing Narrative Reports for clients in Murri Courts for the last five years.

Aboriginal Community Justice reports are modelled off Gladue Reports, which evolved in Canada in 2001. They are designed as a mechanism to provide courts with the following information:

- Cultural identity and the individual's connection to community, cultural, country and kinship;
- Underlying drivers of an individual's offending, such as inter-generational trauma and historical and contemporary community circumstances adversely affected the individual;
- The individual's strengths as well as the strengths of his/her community;
- Perceptions of the individual by relevant community members;
- Community based options and programs relevant for the sentencing decision.

Through the pilot project, Aboriginal Community Justice Reports will be developed for 20 female clients through a Report Writing Service located at VALS. The service will employ two Aboriginal women to develop the reports over an 18 month-period (2020-2021). The service will be located in VALS' Community Justice Programs and will operate independently from our Legal Services, with technical supervision and guidance from UTS. The service will receive referrals both from VALS Legal Services, including Victoria Legal Aid and the Women's Law and Advocacy Centre

In 2022, UTS and Griffith University will evaluate the pilot projects and develop recommendations for further use of the reports in Victoria and other jurisdictions across Australia.

VALS has been advocating for Aboriginal Community Justice Reports since 2017[21] and has witnessed growing support for similar mechanisms since this time:

- In 2017, the ACT Government committed to trial the use of 'Aboriginal and Torres Strait Islander Experience Court Reports' in sentencing courts in the ACT.[22] Although there has not been significant progress in implementing this commitment, it remains on the agenda.

- In Queensland, Five Bridges have been developing Narrative reports for use in Murri Courts in Maroochydore, Brisbane and Ipswich since 2015, and other justice groups in Queensland also do similar reports.

[21] VALS, above note 9.
[22] Michael Inman (Canberra Times) "ACT set to trial sentencing reports for indigenous offenders, like Canada's Gladue reports," 6 August 2017.

- In 2018, the ALRC Inquiry recommended that "State and territory governments, in partnership with relevant Aboriginal and Torres Strait Islander organisations and communities, should develop options for the presentation of information about unique systemic and background factors that have an impact on Aboriginal and Torres Strait Islander peoples in the courts of summary jurisdiction, including through Elders, community justice groups, community profiles and other means."[23]

- In 2018, the Victorian government and the Aboriginal Justice Caucus committed to pilot Aboriginal Community Justice Reports over the five-year period of *Burra Lotjpa Dunguludja*: *Victorian Aboriginal Justice Agreement Phase 4.*[24]

- In the Northern Territory, the draft Aboriginal Justice Agreement (currently being developed) includes a commitment to implement Aboriginal Experience Reports.[25]

Whilst there are various models for developing court reports, research by Anthony et al. examining the experience in Canada indicates that the report writing service needs to be placed in a trusted Aboriginal organisation which Aboriginal people feel safe accessing.[26] These requirements generally preclude government agencies or non-Aboriginal organisations from providing the report writing service. In Canadian provinces where *Gladue* reports were produced by non-Aboriginal legal services, private consultants or government departments "the study identified that the organisations lacked the level of 'cultural awareness and understanding' that make the reports useful to courts."[27]

Moreover, Anthony et a. found that Aboriginal Legal Services were well-placed to conduct the report-writing function because "of their experience in giving a voice to or advocating for Indigenous people, their capacity to draw on Indigenous people with expertise in community matters and their established relationships within local Indigenous communities with community members."[28] However, the study also noted the importance of ensuring that reports are independent, both their for credibility and to avoid conflict of interest.

Recommendation:	Support self-determined initiatives to improve sentencing outcomes for Aboriginal people, including by directing dedicated funding from *Burra Lotjpa Dunguludja* to the project currently being carried out by VALS and its partners on Aboriginal Community Justice Reports.

What measures can improve sentencing outcomes for Aboriginal people?

[23] ALRC, above note **Error! Bookmark not defined.**. See also, Recommendation 6-2: "State and territory governments, in partnership w ith relevant Aboriginal and Torres Strait Islander organisations, should develop and implement schemes that would facilitate the preparation of 'Indigenous Experience Reports' for Aboriginal and Torres Strait Islander offenders appearing for sentence in superior courts."
[24] DJCS, above note 11, 39.
[25] Northern Territory Department of Attorney General and Justice, *Northern Territory Aboriginal Justice Agreement 2019-2025: draft agreement for consultation*, p.23.
[26] Anthony et al., above note 16, 135.
[27] Ibid.
[28] Ibid., 136.

5. Embed Aboriginal self-determination in the *Sentencing Act*

In view of the Victorian Government's commitment to Aboriginal self-determination[29] and the ongoing work of Victorian Aboriginal communities to build a self-determined Aboriginal justice system,[30] it is critical that Aboriginal self-determination and the obligations and responsibilities stemming from this are embedded into relevant Victorian laws.

VALS submission includes specific concrete recommendations to further self-determination in relation to sentencing, including in relation to community-based orders, diversion and mechanisms for considering Aboriginality as a factor in sentencing. In addition, we believe that the *Sentencing Act* should include an overarching commitment to further Aboriginal self-determination through sentencing processes and approaches. This is consistent with the Government's commitments under *Burra Lotjpa Dunguludja,*[31] and its obligations under international law to respect and promote the right of Aboriginal peoples to self-determined solutions.[32]

The government's commitment to self-determination should be included under Section 1 of the *Sentencing Act,* which sets out the key purposes of the Act. For example: "The purposes of this Act are – (m) to provide for Aboriginal self-determination in sentencing processes."

Recommendation:	Amend Section 1 of the *Sentencing Act* so that furthering Aboriginal self-determination in sentencing is included as a key purpose of the Act.

6. Reduce the number of Aboriginal people on remand by amending the *Bail Act*

It is now well known and accepted that changes to the *Bail Act* in 2018 have resulted in an unprecedented number of people on remand, including a disproportionate number of Aboriginal people. In February 2020, there were 3,203 adult prisoners on remand in Victoria comprising 39% of all prisoners.[33] This is an increase from 24% in February 2015.[34] Between 2014 and 2019, unsentenced prisoners in Victoria accounted for 92% of the overall increase in the prison population.[35]

Since the changes to the *Bail Act* in 2018, VALS has seen a significant increase in the number of our clients who are remanded in custody rather than being released on bail. In many cases, this is due to limited access to stable housing. For example, in 2017-2018, 11% of the notifications that VALS received through

[29] Victoria Government, above note 8, 27.
[30] Larissa Behrendt et al, 'Aboriginal Self-determination in the Victorian Justice Context…towards an Aboriginal Community Controlled Justice System' (Jumbunna Institute for Indigenous Education and Research, 2017). See also, Aboriginal Justice Caucus *Perspectives and Priorities for Self-Determination in Youth Justice – Summary of Priority Issues Resulting from Workshops on 10/12/18, 30/4/19 and 21/5/19*; Aboriginal Justice Caucus, *Equality and Justice for our Kids: Aboriginal Justice Caucus submission on the development of a new Youth Justice Act for Victoria,* (December 2019) *pp.4-6.*
[31] DJCS, above note 11, 11-12.
[32] *United Nations Declaration on the Rights of Indigenous Peoples,* GA Res 3, UN GAOR, 107th mtg, 61/295, UN doc A/61/L.67 and Add.1 (13 September 2007), annex I, article 3.
[33] Corrections Victoria, *Monthly Prisoner and Offender Statistics 2019-2020*.
[34] Corrections Victoria, *Monthly Prisoner and Offender Statistics 2014-2015*.
[35] Sentencing Advisory Council, State of Victoria, *Time Served Prison Sentences in Victoria* (2020) p. 5.

the Custody Notification System involved clients on remand and in 2018-2019, this figure increased to 15.3%.[36]

Due to high remand rates, a significant proportion of VALS clients receive time served prison sentences.[37] Although VALS does not currently collect data on the average time that our clients spend on remand, it is usually between 6 and 16 weeks for clients with matters in the magistrates' court. In 2017-2018, 17.9% of VALS criminal law matters that resulted in custodial sentences involved time served prison sentences;[38] and in 2018-2019, this figure increased to 24%.[39]

This experience is reflected in recent research by the Sentencing Advisory Council, which found that in 2017-2018, time served prison sentences accounted for 29% of all cases in which an offender received a prison sentence after spending time on remand.[40] Between 2013-2014 and 2017-2018, 95% of time served prison sentences were imposed by the magistrates court,[41] 96% were less than six months and the average duration of time served prison sentences imposed by the magistrates court was 58 days.[42]

The impacts of time spent on remand for Aboriginal people are widespread and well documented. They include: disconnection from family, community, country; negative effects for social and emotional wellbeing; increased stigma and discrimination associated with having spent time in custody; and further entrenchment into the criminal justice system. The increased remand rates also come at a considerable economic cost for the government.[43]

In VALS experience, time spent on remand also has significant detrimental impacts for sentencing outcomes. Unlike our clients who are on bail in the community, remandees are unable to access programs that can help them to address the underlying causes for the offending behaviour, and are unable to demonstrate steps towards healing and rehabilitation, which can have an important impact on the final sentencing decision.

Although data is not readily available, our experience is that client's who are remanded are more likely to receive a custodial sentence, which undermines the principle of parsimony. This experience is supported by recent research by the Sentencing Advisory Council, which found that "offenders who *may* have otherwise received a non-custodial sentence might instead receive a time served prison sentence (with or without a CCO) because they have, in effect, already been punished for their offending."[44] Having a sentence of

[36] In 2017-2018, VALS received 11,104 notifications through the Custody Notification System, including 1,239 notifications relating to people who were on remand. In 2018-2019, VALS received 12,293 notifications, including 1,889 relating to people who were on remand.
[37] A time served prison sentence is a sentence of imprisonment imposed on an offender where the length of imprisonment is equal to the amount of time that the offender has spent on remand in custody. See Sentencing Advisory Council, above note 35, 1.
[38] In 2017-2018, 106 out of 1,367 of VALS criminal law matters resulted in custodial sentences, including 19 time served prison sentences.
[39] In 2018-2019, 85 out of 1253 of VALS criminal law matters resulted in custodial sentences, including 21 time served prison sentences.
[40] Sentencing Advisory Council, above note 35, 6-7. In 2017-2018, 66% of all cases where an offender received a prison sentence after being on remand involved sentences that were greater than the time spent on remand; and 5% involved sentences that were less than the total period of time spent on remand.
[41] Ibid., 7.
[42] Ibid., 10.
[43] In 2018-2019, the Productivity Commission estimated that the real net operating expenditure per prisoner per day was $317.90. See Productivity Commission, *Report on Government Services 2020*. Part C, Corrective Services Data Tables, Table 8A.19.
[44] Sentencing Advisory Council, above note 35, 10.

imprisonment on a person's criminal record reduces the likelihood of receiving a less severe sentence is they are sentenced again in the future.[45]

In addition to the increased likelihood of a custodial sentence after spending time on remand, time served prison sentences are also extremely detrimental as there is effectively no opportunity for our clients to connect with or receive holistic support. Not only does this undermine the key sentencing purpose of "rehabilitation,"[46] it also means that clients have fewer opportunities to organise their transition out of prison, which can increase the risk of recidivism.[47]

Legislative amendments to the *Bail Act* are urgently needed to address the remand crisis in Victoria and ensure that sentencing outcomes for Aboriginal people are not negatively impacted by the punitive bail system. If the Victorian government is serious about its commitments under *Burra Lotjpa Dunguludja*[48] - including its commitment to ensure that there are fewer Aboriginal people in the criminal justice system and fewer Aboriginal people on remand - it is essential to amend the *Bail Act*.

Case Study: Julia

Julia (not her real name) is a 31-year-old Yorta Yorta/Wiradjuri woman. She is a survivor of family violence and has significant mental health and drug issues.

In mid-2018, Julia was remanded for trafficking methylamphetamine. Our client maintained that she was not trafficking, it was purely for personal use. At the time, she was on bail for shop theft and on summons for breaching her Community Corrections Order, awarded in relation to a series of offences (shop theft, failure to answer bail, committing an indictable offence whilst on bail, theft and dishonestly assisting in the retention of stolen goods).

Her legal representative at the time assessed the merit in a bail application as low without support services, which were not available on the day. The VALS solicitor sought a global sentence indication on behalf of the client and the magistrate indicated a term of imprisonment that was shorter than the time she would be on remand whilst waiting on support services and a bail application. The indication was accepted by the client, who entered a plea of guilty.

The client came back before the Koori Court on low-level dishonesty offences (primarily shop theft). She pleaded guilty in relation to several of these offences on the basis of complicity.

As a result of having a term of imprisonment on her criminal record, the magistrate noted that the client was at high risk of a second immediate term of imprisonment for the subsequent low-level offending. However, the magistrate granted a deferral, during which time the client engaged in rehabilitative

[45] Ibid., 11.
[46] Ibid., 16.
[47] Research has consistently shown that the immediate weeks and months following release from custody are when the person is most at risk of reoffending. See Craig Jones et al., *Risk of Re-offending Among Parolees*, Crime and Justice Bulletin no. 91 (2006); Stuart Kinner, *The Post-Release Experience of Prisoners in Queensland*, Trends & Issues in Criminal Justice no. 325 (2006); Wai-Yin Wan et al., *Parole Supervision and Reoffending*, Trends & Issues in Criminal Justice no. 485 (2014), cited in Sentencing Advisory Council, above note 35, 15.
[48] Under *Burra Lotjpa Dunguludja,* the Victorian government has committed to take action to ensure that there are fewer Aboriginal people in the criminal justice system (Goal 2), including fewer Aboriginal people on remand (Outcome 2.3.2). See Department of Justice and Community Safety, above note 11, 32

programs and didn't reoffend. The client was eventually sentenced to a bond with a condition to engage in drug and alcohol counselling.

Recommendations:	Repeal the reverse-onus provisions, particularly the 'show compelling reason' and 'exceptional circumstances' provisions (sections 4AA, 4A, 4C, 4D and schedules 1 and 2 of the *Bail Act*). Create a presumption in favour of bail for all offences, except in circumstances where there is a specific and immediate risk to the physical safety of another person. This should be accompanied by an explicit requirement in the Act that a person may not be remanded for an offence that is unlikely to result in a sentence of imprisonment. Repeal the offences of committing an indictable offence while on bail (s. 30B), breaching bail conditions (s. 30A) and failure to answer bail (s. 30). Provide increased and mandatory guidance and oversight for police officers, to ensure that they understand and comply with the requirements of the *Bail Act*. It is essential that police officers are able to appropriately determine when bail should be granted by a police decision maker, and when the individual should be brought to court.

7. Expand Koori Courts to allow for culturally appropriate bail proceedings and outcomes

Although Koori Courts have had significant success in providing culturally appropriate sentencing processes for Aboriginal people in Victoria, there are further opportunities to strengthen sentencing outcomes for Aboriginal people by expanding the jurisdiction of Koori Courts. Building on the experiences of First Nations courts in Canada, VALS strongly believes that Koori Courts in Victoria should have jurisdiction to deal with aspects of the criminal process prior to sentence, particularly bail proceedings.

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

In recent years, there have been various calls from Aboriginal organisations to further develop and strengthen Koori Courts in Victoria. In particular, the Koori Youth Council (KYC) have called for expansion of Children's Koori Court structure "to enable children to plead not guilty, thereby increasing their access to

the existing justice system."[49] In addition, the Aboriginal Justice Caucus have called for shared decision-making between judges and Elders and Respected Persons.[50]

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

In Victoria, section 3A of the *Bail Act* requires bail decision makers to take into account any issues that arise due to the person's Aboriginality, including: (a) the person's cultural background, including the person's ties to extended family or place; and (b) any other relevant cultural issue or obligation.

Whilst the intention behind section 3A is a step in the right direction, VALS experience is that it is often not taken into account unless raised specifically by the defence. We are of the view that culturally appropriate bail proceedings/courts would achieve significant improvements in sentencing outcomes for Aboriginal people in Victoria. This will go a long way in achieving the Victorian government's commitment to reducing over-representation of Aboriginal people on remand and more broadly in the criminal justice system.[51]

Recommendation:	Ensure that Aboriginal people in Victoria can access culturally appropriate bail proceedings by expanding the jurisdiction of Koori Courts to hear bail applications.

8. Increase access to culturally appropriate diversion

Similar to the recommendations above relating to bail, VALS believes that sentencing outcomes for Aboriginal people in Victoria can be significantly improved through increased access to culturally appropriate diversion programs. Currently, diversion is only available in limited circumstances, and even when it is available, the Criminal Justice Diversion Program does not adequately cater for the needs and experiences of Aboriginal people. Significant changes are required in order to ensure that diversion is available and effective in diverting Aboriginal people away from the criminal justice system.

Diversion is currently available in Victoria if the following criteria[52] are met:

- The offence is not precluded from diversion;[53]

[49] Koori Youth Council, *Ngaga-dji* (2018), 53.
[50] Larissa Behrendt et al, above note 30.
[51] Under *Burra Lotjpa Dunguludja,* the Victorian government has committed to take action to ensure that there are fewer Aboriginal people in the criminal justice system, including fewer Aboriginal people on remand (Outcome 2.3.2). See Department of Justice and Community Safety, above note 11, 32.
[52] Section 59, *Criminal Procedure Act* (CPA) (Vic) 2009.
[53] Under section 59(1) of the CPA, the following offences are excluded: (a) an offence punishable by a minimum or fixed sentence or penalty, including cancellation or suspension of a licence or permit to drive a motor vehicle and disqualification under the Road Safety Act 1986 or the Sentencing Act 1991 from obtaining such a licence or permit or from driving a motor vehicle on a road in Victoria but not including the incurring of demerit points under the Road Safety Act 1986 or regulations made under that Act; or (b) an offence against section 49(1) of the Road Safety Act 1986 not referred to in paragraph (a).

- The accused acknowledges responsibility for the offence;
- It appears appropriate to the Magistrates Court that the accused should participate in the diversion program;
- Both the prosecution and the accused consent to the Magistrates Court adjourning the proceedings for the purposes of diversion;
- Whilst not a strict requirement, generally, diversion is only available to first-time offenders.

Pursuant to section 59 of the *Criminal Procedure Act*, the magistrate can adjourn proceedings for up to 12 months, and require the accused to complete certain conditions as set out under the diversion plan. If the program is completed successfully, no plea is taken and the court must discharge the accused without any finding of guilt.

Data from the Victorian Sentencing Advisory Council indicates that in 2017-2018, 5.9% of cases before the magistrates court were adjourned for diversion.[54] Unfortunately, data is not available publicly on the number of Aboriginal people who received diversion in Victoria, however, research from across Australia indicates that Aboriginal people are less likely than non-Aboriginal people to receive a police caution and less likely to have their matters adjourned for diversion.[55] In 2017-2018 and 2018-2019, only 4% of VALS criminal law matters were adjourned for diversion.[56]

In our view, there are a number of key challenges with the current diversion framework which meant that it is not as effective as it could be in diverting Aboriginal people away from the criminal justice system:

- Inconsistent decisions by police informants as to when diversion is available;
- Even when diversion is approved by the informant and considered suitable by the diversion coordinator, the prosecution at court can refuse to consent;
- Generally diversion is only available to first time offenders - as Aboriginal people are engaged in the system earlier than non-Aboriginal people, they often use of up diversion options and escalate more quickly up the sentencing hierarchy;
- Financial contributions can be problematic for many of our clients;
- Lack of culturally appropriate diversion programs, particularly in rural and regional areas.

In contrast to Victoria, the approach taken in some provinces in Canada indicates the diversion processes which are developed and implemented by Aboriginal communities and grounded in self-determination can have far greater success in diverting Aboriginal people away from the criminal justice system.

Case study: Old City Hall Gladue Court, Toronto, Canada[57]

[54] Sentencing Advisory Council, Sentencing outcomes in the Magistrates Court 2005-2018.
[55] Crime Statistics Agency Victoria, *Indigenous Alleged Offender Incidents—Year Ending June 2018* (2018) table 6; Lucy Snowball and Australian Institute of Criminology, 'Diversion of Indigenous Juvenile Offenders' (Trends & Issues in Crime and Criminal Justice No 355, Australian Institute of Criminology, 2008).
[56] In 2017-2018, VALS provided legal representation in relation to 1,367 criminal law matters and 57 of these resulted in diversion. In 2018-2019, VALS provided legal representation in relation to 1,253 criminal law matters and 55 of these matters resulted in diversion.
[57] Aboriginal Legal Services, *Evaluation of the Gladue Court Old City Hall, Toronto* (2016), 43-44.

As indicated above, Gladue Courts in Ontario have much broader jurisdiction than Koori Courts in Victoria. They operate as a plea and resolution court with diversion being a possible resolution.

Whilst the process for accessing diversion still includes approval by the Crown Attorney, the decision is based on the recommendation of the Aboriginal court worker and legal counsel. Diversion is available to Aboriginal people even if they are not first-time offenders.

Individuals are diverted to the "Community Council" which is a restorative circle of Aboriginal volunteers, including Elders, based at the Aboriginal Legal Service (ALS). The role of the Council is to work with the individual to develop a 'decision' (which is a list of tasks to which the client agrees) and to approve the successful completion of the diversion. The Council talks with the client about why the offence occurred, and works with the client to develop a rehabilitative program. They also link the individual to culturally relevant services suited to their circumstances and needs. A critical element of the way that the Council works is that it is the individual who decides on the program direction to follow. According to a 2016 evaluation of the program, this creates agency for the individual in their own development and leads to a program direction that is more likely to elicit commitment and to result in success.

During the period of diversion, the individual is supported by an ALS case worker who supports each client through their diversionary activities. The role of the case worker is not to enforce or police compliance with the diversion plan. If the individual is re-arrested, they are not allowed to return to the Community Council until they have completed the previous diversion.

In contrast to many diversion programs in Victoria, diversion to the Community Council appears to have the effect of engaging individuals with their culture and decreasing re-offending. The diversion programs aim to address the underlying reasons for offending and are more likely to divert the offender away from the further reoffending.

VALS believes that there is a lot to learn from experiences in other jurisdictions, where diversion programs operate as a culturally appropriate way of reducing recidivism and preventing Aboriginal people from escalating up the sentencing hierarchy. In Victoria, Koori Court has demonstrated that culturally appropriate court processes and responses can be far more effective and relevant for Aboriginal people. Similarly, diversion should be a culturally relevant for Aboriginal offenders and Aboriginal communities should have a much greater role in developing and implementing diversion.

Recommendations: Explore and progress options for increasing access to culturally appropriate diversion in Victoria, including:

(a) Expand Koori Courts so that they operate as a plea and resolution court, with jurisdiction to divert offenders to culturally appropriate diversion programs;

(b) Expand the role of Elders and Respected Persons (ERPs) in Koori Courts to include development and adoption of diversion plans with the offender;

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

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

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

What new sentencing orders or conditions should be considered?

9. Increase and strengthen community-based sentencing options

Aboriginal people are less likely to receive a community-based sentence than non-Aboriginal offenders, and are more likely to breach a community based sentence.[58] In VALS experience, this is because community based orders in Victoria – particularly the Community Corrections Order (CCO) – is not appropriately tailored to Aboriginal offenders, and the mechanisms for supporting Aboriginal people to successfully complete their community-based orders continue to be grounded in punitive and paternalistic approaches.

There is a critical need to increase and strengthen community-based sentencing options, in order to reduce incarceration rates of Aboriginal people, including by:

- Introducing sentencing options between a CCO and adjourned undertaking;
- Creating a stronger role for Aboriginal communities in adjudicating community-based sentences;
- Investing in and increasing access to culturally appropriate services/programs to support Aboriginal people on community-based orders.

Since the introduction of Community Corrections Orders in 2012 and abolishment of a range of other community-based orders (intensive correction order, home detention, community-based order, suspended sentences), there are now only two community-based orders in Victoria: Drug Treatment Order and CCO. In 2018-2019 in Victoria, Aboriginal people made up 6.87% of the average daily community corrections offender population[59] versus 9.5% of the average daily prisoner population.[60] In the same year, 5.82% of VALS criminal law matters resulted in a CCO versus 6.7% which resulted in a custodial sentence.[61]

[58] ALRC, above note **Error! Bookmark not defined.**, 234 and 254.
[59] Productivity Commission, above note 43, Table 8A.8.
[60] Ibid., Table 8A.6.
[61] In 2018-2019, 73 out of 1253 VALS criminal law matters resulted in a CCO. In the same year, 85 matters resulted in a custodial sentence. In 2017-2018, 212 out of 1367 VALS criminal law matters resulted in CCO. In the same year, 106 matters resulted in a custodial sentence.

CCOs were introduced as a flexible option, allowing a judge or magistrate to tailor the order. Conditions attached to a CCO include standard core terms (e.g. not reoffending, not leaving Victoria without permission, reporting to a community corrections centre, complying with written directions from the Secretary to the DJCS) as well as at least one additional condition (e.g. medical treatment, unpaid community work, supervision by corrections worker, non-association with certain people, complying with curfew, staying away from a specific place or area).

Despite the intention of creating a more flexible sentencing option, in VALS experience, there are a number of challenges with CCOs which mean that our clients are often in breach of conditions and may end up with a prison sentence as a result.[62] This is supported by data from the Productivity Commission indicating that Aboriginal people in Victoria are less likely to complete a CCO than non-Aboriginal people.[63]

In particular, we see the following issues:

- CCO conditions are often not culturally appropriate;
- The narrow definition of an intellectual disability under the *Disability Act 2006*, means that clients who have an acquired brain injury (ABI) or an intellectual disability that was not diagnosed before the age of 18 years, are not eligible for a Justice Plan;
- Corrections Victoria take a punitive, inflexible approach to enforcing CCO conditions;
- There is a shortage in Aboriginal-led culturally appropriate programs and services to support clients on CCOs, particularly in rural and regional areas.

Culturally inappropriate CCO conditions

Research suggests that compliance with community-based orders would increase if programs and conditions were relevant to Aboriginal and Torres Strait Islander offenders and if offenders were given greater support.[64] In VALS experience, inappropriate conditions include:

- reporting conditions that do not take into account challenges associated with lack of transport options, challenges with remoteness and clashes with cultural and family obligations;
- non-association conditions that do not take into account an individuals' family or community obligations (which may mean that it is not possible to stay away from someone);
- place or area exclusions which can be challenging in rural and remote areas where there are limited public places for individuals to gather;
- conditions requiring participation in programs can be challenging in rural and regional areas where it is often harder to access culturally appropriate programs and services.

Lack of support for clients with an acquired brain injury (ABI)

[62] An offender who breaches a condition of a community correction order may be resentenced for the original offence and may face up to 3 months additional imprisonment for the breach. See section 83AD, *Sentencing Act (Vic)* 1991.
[63] In 2019-2019, 56.4% of non-Aboriginal people on CCOs in Victoria successfully completed their orders compared to only 43.4% of Aboriginal people. See Productivity Commission, above note 43, Table 8A.20.
[64] Fiona Allison and Chris Cunneen, 'The Role of Indigenous Justice Agreements in Improving Legal and Social Outcomes for Indigenous People' (2010) 32 *Sydney Law Review* 645.

Under section 80 of the *Sentencing Act*, individuals who are on a CCO and have an intellectual disability (as defined under the *Disability Act 2006*) are eligible for a Justice Plan. This means that they are able to receive specialised support to help them comply with the conditions of the Order.

Due to the narrow definition of intellectual disability under the Disability Act, many of VALS clients who are in need of additional support are not eligible for a Justice Plan. This includes clients with an ABI, as well as clients who have an intellectual disability that was not diagnosed before the age of 18 years.

Although the term "ABI" encompasses a broad range of injuries, common symptoms can include problems with concentration and memory, difficulties in planning and organising, confusion, mood swings, and changes in personality and behaviour that may be viewed as irritable and inappropriate. These symptoms can often make it harder to comply with the conditions on a CCO and increases the likelihood that the client will breach the order.

Case study: Aaron

Aaron (not his real name) is a 32-year-old Aboriginal man from rural Victoria. He has a significant history of drug addiction and mental health issues. He also has a mild intellectual disability which has manifested in literacy issues and limits his capacity to navigate public transport and keep track of appointments.

Our client faced charges before the County Court for attempted armed robbery. For the purposes of sentencing, the Judge ordered that our client be assessed for a Justice Plan. As our client's intellectual disability was not diagnosed before he turned 18, he did not satisfy the definition of intellectual disability under the *Disability Act (Vic)* 2006 and did not qualify for a Justice Plan.

Aaron has recently been sentenced to a period of imprisonment and a two-year CCO. Although he does not qualify for a Justice Plan, DHHS have advised that he may be able to access the same services if he consents to do so. If he is not able to access additional support, Aaron faces a significant risk of missing relevant appointments, which, if seen by Corrections Victoria as a reluctance to engage, will lead to a breach of his CCO. The consequences of breaching his CCO will include resentence on the original offending and a possible 3-month prison sentence for failure to comply with the order. Additionally, a breach of his CCO means that he is unlikely to be eligible for a further CCO should be reoffend in the future.

Punitive approach taken by Corrections

In addition to culturally inappropriate conditions, the experience of our clients is that the approach to supervising compliance with CCOs is also inappropriate. We regularly see instances of inflexibility with reporting conditions, and a lack of understanding as to how cultural, family and/or community obligations can impact on an individual's ability to comply with their order. For example, we have clients who have missed an appointment and then reengaged soon afterwards. Rather than extending or carrying the order, the worker has recommended cancellation and resentence. In our view, the rigid approach to supervision of CCOs is one of the key reasons why Aboriginal people are less likely than non-Aboriginal people to complete their orders.

In contrast, approaches such as the Wulgunggo Ngalu Learning Place demonstrate the strength of programs that are designed jointly with Aboriginal communities, run by Aboriginal people and grounded on Aboriginal culture.[65] Currently, Wulgunggo Ngalu Learning Place has capacity to support 17 Koori men at once, with support ranging from 3-6 months. As recommended by the ALRC Inquiry into Incarceration of Aboriginal peoples,[66] VALS strongly supports increased investment in Aboriginal-led support programs for Aboriginal people on community-based sentences, including the establishment of an equivalent program for women.

Similarly, the Local Justice Worker Program, whereby Aboriginal people on CCOs can receive support from a Local Justice Worker, has been extremely successful in providing more culturally appropriate support and addressing the barriers that prevent community members from complying with the conditions of their order.[67]

Case Study: Wulgunggo Ngalu Learning Place

Adam* is a 43-year-old Aboriginal male who has a long history with substance abuse whom VALS assisted through our ReConnect program. Adam advised his caseworker that his family was disconnected and whilst he was in jail he realised that he did not want this to be the case for him and his children. Adam stated that he thought that he needed to change, not just for him, but for his children so that he could see them and develop a relationship with them to prevent them from being further disconnected from family and culture like he was. Adam had found that one of the best diversions for him from further offending was art and he wanted to use this diversion to change so that he could assist his youngest son whom was having some difficulties in foster care and behaving badly.

Adam advised [his VALS] caseworker that he had long standing issues with drugs and alcohol and wanted to attend Wulgunggo Ngalu Learning Place. The caseworker assisted Adam to submit an application and supported him through the assessment process. Adam was able to secure a place at Wulgunggo Ngalu where he received assistance with drugs & alcohol, mental health, life skills and cultural strengthening.

Adam was also assisted with his art and was supported and guided by the caseworker in how to advertise and sell his artwork to earn income. Adam was also supported to undertake cultural strengthening activities which he reported as never having done before but being needed in order to address the disconnect from family and culture he felt. After being discharged from Wulgunggo Adam reported, over the proceeding months, as being committed to staying out of jail and indicated an intention to support his family and undertake a TAFE course on art.

Aboriginal self-determination in community-based sentences

[65] Clear Horizon Consulting, Department of Justice, *Wulgunggo Nglu Learning Place: Final Evaluation Report* (2013), 3-4.
[66] Australian Law Reform Commission, above note **Error! Bookmark not defined.**, Recommendation 7–3: "State and territory governments and agencies should work with relevant Aboriginal and Torres Strait Islander organisations to provide the necessary programs and support to facilitate the successful completion of community-based sentences by Aboriginal and Torres Strait Islander offenders."
[67] Clear Horizon Consulting, above note 65, 25-26.

In the context of Treaty and the government's commitment to self-determination of Aboriginal people in Victoria, there is a critical need to explore options for greater self-determination in the adjudication of community-based sentences. The AJC has already made important progress in this regard.[68] Building of the success of initiatives such as Wulgunggo Ngalu and parallel experiences in community-controlled diversion programs, VALS advocates for Aboriginal supervision of community-based sentences, in particular for low-level offences. According to NATSILS, "it is essential that community-based sentences are designed and driven by community and supported if necessary by community correction officers and other appropriate support structures."[69]

Recommendations:

Increase community-based sentencing options, including to create an additional sentencing option between an adjourned undertaking and a Community Corrections Order (CCO).

Implement measures to ensure that conditions attached to CCOs are culturally appropriate, including:

(a) Amend section 48A of the *Sentencing Act* so that for the purpose of attaching conditions to a CCO, courts are required to take into account the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples.

(b) Require all Judges and Magistrates to complete regular cultural competence training, to ensure that the conditions set on CCOs for Aboriginal people are culturally appropriate and achievable.

Amend the *Sentencing Act* to ensure that individuals with an acquired brain injury, as well as those who have an intellectual disability that was not diagnosed before the age of 18 years, are eligible for a Justice Plan.

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

Amend Part 3A of the *Sentencing Act* to include a provision akin to section 18 of the *Children, Youth and Families Act 2005* (Vic), which would allow for the progressive divestment of responsibilities from Corrections Victoria to Aboriginal communities, in relation to supervision of community-based orders.

10. Increase sentencing options for young adult offenders

[68] Larissa Behrendt et al, above note 30.
[69] Victorian Aboriginal Legal Service, *Submission to Australian Law Reform Commission, Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (2017).

Although the dual track system currently allows for specific consideration of young adult offenders aged 18-20 years, there is no specific approach for young people aged 20-25 years. Given the body of neurological, psychiatric and psychological evidence indicating that young adults are not fully developed until at least the age of 25 years,[70] tailored approaches are also required for sentencing young offenders aged 21-25 years.

Under the dual track system, young adult offenders aged 18-20 years are sentenced in adult courts, but can receive a young justice centre order, meaning that they are sentenced to spend time in a specialised youth justice centre versus an adult prison. In VALS perspective, the dual track system should also apply to young adult offenders aged 21-25 years.

Additionally, we believe that there are significant opportunities to strengthen sentencing options for young adult offenders aged 18 to 25 years. Drawing on the recent research by the Sentencing Advisory Council,[71] VALS supports the following options:

- Introduce sentencing principles in the *Sentencing Act* that specifically address young adult offenders, including making psychobiological development of an offender a specific sentencing consideration;

- Expand the dual track system, so that young adult offenders can access non-custodial options available under the *Children, Youth and Families Act* (Vic) 2005 and the new *Youth Justice Act*;

- Introduce a specialist young adult court or a specialist list to address the needs of young adult offenders at sentencing.

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

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

Case Study: Jonathan

Jonathan is 19 years of age and has primarily grown up in residential care, with periods in youth justice detention.

Our client was on a Community Corrections Order and was charged with robbery. His application for bail was refused so he was remanded in an adult prison while his charges were resolved. As the waiting period for a plea in Koori Court is longer than in mainstream court, our client waited on remand for 4 months.

[70] Sentencing Advisory Council, State of Victoria, *Rethinking Sentencing for Young Adult Offenders* (2019), 5-7.
[71] Ibid.

The VALS solicitor sought a Youth Justice Centre assessment, but he was assessed as a mature offender who was unsuitable for a Youth Justice Centre Order. This is despite the fact that his trauma and offending history pointed more to institutionalization than maturity. He was eventually sentenced to time served.

Recommendations:

Expand the scope of dual track to offenders aged 21 to 25.

Expand the dual track system, so that young adult offenders can access non-custodial options available under the *Children, Youth and Families Act* (Vic) 2005 and the new *Youth Justice Act*;

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

Introduce sentencing principles in the *Sentencing Act 1991* (Vic) that specifically address young adult offenders aged 18-25, including psychobiological development.

Introduce a specialist young adult court or a specialist list to address the needs of young adult offenders at sentencing.