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

December 2021

Victorian Aboriginal Legal Service

Table of Contents

Contact Andreea Lachsz – Head of Policy, Communications and Strategy
alachsz@vals.org.au

BACKGROUND TO THE VICTORIAN ABORIGINAL LEGAL SERVICE

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

Legal Services

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

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

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

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

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

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

Community Justice Programs

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

The Community Justice Programs Team also operates the following programs:

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

Policy, Research and Advocacy

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

[5] In 2019-2020, VALS Wirraway provided legal services in relation to 2 legal matters. In 2020-2021, VALS Wirraway has provided legal services in relation to 53 legal matters (as of 19 March 2021).
[6] Ss. 464AAB and 464FA, Crimes Act 1958 (Vic).
[7] In 2019-2020, VALS CNS handled 13,426 custodial notifications. In 2020-2021, VALS CNS has handled 8,366 custodial notifications (as of 19 March 2021).
[8] VALS has three Family Violence Client Support Officers (FVCSOs) who support clients throughout their family law or civil law matter, providing holistic support to limit re-traumatisation to the client and provide appropriate referrals to access local community support programs and emergency relief monies.
[9] The Victoria Police Electronic Referral (V-PeR) program involves a partnership between VALS and Victoria Police to support Aboriginal people across Victoria to access culturally appropriate services. Individuals are referred to VALS once they are in contact with police, and VALS provides support to that person to access appropriate services, including in relation to drug and alcohol, housing and homelessness, disability support, mental health support.
[10] The Baggarrook Women's Transitional Housing program provides post-release support and culturally safe housing for six Aboriginal women to support their transition back to the community. The program is a partnership between VALS, Aboriginal Housing Victoria and Corrections Victoria.
[11] Read more about the Reports at https://www.vals.org.au/aboriginal-community-justice-reports/

ACKNOWLEDGEMENTS

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

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

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

SCOPE OF THE INQUIRY

Stream 1 – Staff

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

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

Stream 2 – People in custody

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

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

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

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

EXECUTIVE SUMMARY

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

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

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

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

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

SUMMARY OF RECOMMENDATIONS

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

Aboriginal Self-Determination

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

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

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

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

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

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

Systemic Racism

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

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

Ending Aboriginal Deaths in Custody

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

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

Addressing the Growth in Prison and Remand Populations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Parole

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

Recommendation 33. The Victorian Government should repeal Section 77C of the *Corrections Act 1986* (Vic) and adopt a new provision which provides that time spent on parole, before a parole order is cancelled, counts as time served.

Recommendation 34. The Victorian Government should amend the *Corrections Act 1986* (Vic) to include a legislative requirement to have Aboriginal people on the Adult Parole Board… Membership of the Parole Boards must include people with professional backgrounds and with relevant lived experience.

Recommendation 35. The Victorian Government should amend the *Corrections Act 1986* (Vic) and the Adult Parole Board Manual, to provide that parole cannot be denied on the basis that a required program has not been completed, where this program is unavailable or unsuitable for Aboriginal people.

Recommendation 36. The Victorian Government should work with Aboriginal organisations to ensure that Aboriginal people who are incarcerated, particularly Aboriginal women and girls, have access to culturally safe rehabilitation programs. Funding must be given to Aboriginal organisations to design and deliver these programs.

Recommendation 37. The Victorian Government must work with Aboriginal organisations to develop and provide culturally appropriate transitional housing and support for Aboriginal people exiting prison.

Recommendation 38. The Victorian Government must repeal regulation 5 of the *Charter of Human Rights and Responsibility (Public Authorities) Regulation 2013* (Vic), which exempts the Adult Parole Board from the operation of the Charter.

Recommendation 39. The Victorian Government must repeal section 69(2) of the *Corrections Act 1986* (Vic), which provides that the Adult Parole Board is not bound by the rules of natural justice.

Recommendation 40. The Victorian Government should amend the *Corrections Act 1986* to include the purpose of parole and the criteria on which parole decisions are made. The legislated purpose of parole should highlight that the release of the individual on parole will contribute to the protection of society by facilitating their rehabilitation and reintegration into society.

Recommendation 41. The Victorian Government must amend the *Corrections Act 1986* to provide for the following rights of incarcerated people in relation to any decisions made by the Adult Parole Board regarding parole:

- The right to have access to all information and documents being considered by the parole authority, subject to limited exceptions;
- The right to appear before the Board;
- The right to culturally appropriate legal assistance and representation;
- The right to detailed reasons relating to a decision;
- The right to appeal a decision of the Board.

Recommendation 42. The Victorian Government should provide funding to VALS to provide legal assistance, support and representation to Aboriginal people who are applying for parole.

Recommendation 43. The Victorian Government should amend the *Corrections Act 1986* (Vic) so that the Adult Parole Board is required to take into account cultural considerations when making decisions on parole applications, suspension and cancellation of parole for Aboriginal people. The Adult Parole Board Manual should be amended to provide guidance to the Adult Parole Board on complying with this requirement. All parole officers should be required to undertake mandatory and ongoing cultural awareness training.

Rehabilitation Programs

Recommendation 44. Rehabilitation programs, both in prisons and for people transitioning out of prison or diverted from prison, should be run on a voluntary basis, not penalising or threatening people for breaching behavioural requirements.

Recommendation 45. Funding for rehabilitation in prisons, including culturally safe rehabilitation support provided by Aboriginal organisations, should be significantly increased.
Recommendation 46. Rehabilitation services should be available to people held in prison on remand.

Conditions and Treatment in Custody

Recommendation 47. Prison complaints, including complaints against private prisons and contractors, should be handled by an appropriately resourced independent oversight body with sufficient powers to refer matters for criminal investigation.
Recommendation 48. All prison staff should receive extensive training, that is developed and delivered in collaboration with ACCOs, on trauma-informed care, anti-racism, and the specific needs of vulnerable groups including Aboriginal people and women.

COVID-19, Isolation and Prison Lockdowns

Recommendation 49. The Government should make publicly available the health advice, risk-assessment and human rights assessment upon which it relies in making decisions about the use of isolation and protective and transfer quarantine.
Recommendation 50. The use of protective and transfer quarantining, and the nature of the quarantine itself, should be

- reviewed on a regular basis,
- guided by medical advice, in consultation with civil society stakeholders,
- adopting the least restrictive measure, in accordance with the *Victorian Charter of Human Rights and Responsibilities.*

Recommendation 51. Legislation should be amended to require that incarcerated people in protective quarantine/transfer quarantine and isolation are regularly observed and verbally communicated with.
Recommendation 52. Legislation should explicitly provide for the rights of people in protective/transfer quarantine… including guaranteeing meaningful contact with other people and time out of cell, in fresh air, every day.
Recommendation 53. People in protective/transfer quarantine… should be provided supports and services (including mental health services and cultural supports and services provided by ACCOs), and means by which to contact family, lawyers, independent oversight bodies, and ACCOs.
Recommendation 54. The Victorian Government should maintain a register of all people placed in protective/transfer quarantine…:

- The register should include information such as age, gender, disabilities, medical conditions, mental health conditions and Aboriginality of people in protective quarantine.
- Information should also be provided in relation to the length and the nature of meaningful contact provided on a daily basis, how much time people spend out of cell, and the services made available to them and used by them.

- Any incidents, such as attempted self-harm, should also be included.

Recommendation 55. Facilities should not, by default, go into complete lockdown during a COVID-19 outbreak.

Recommendation 56. Staffing and other operational issues should be urgently addressed, to ensure lockdowns do not occur as a result of inadequate staff to safely manage the facility.

Recommendation 57. No one should be in effective solitary confinement as a result of lockdown, particularly… people with mental or physical disabilities, or histories of trauma.

Recommendation 58. If lockdowns occur, people should be provided supports and services (including mental health services and cultural supports and services provided by ACCOs), and means by which to contact family, lawyers, independent oversight bodies, and ACCOs, including VALS.

Recommendation 59. Information on how lockdowns are operationalised should be publicly available and regular updates should be shared.

Recommendation 60. The Victorian Government should add prisons… to the Surveillance Testing Industry List, with both employees and contractors subject to regular surveillance testing.

Recommendation 61. The Victorian Government should improve the COVID-19 vaccine rollout, and put in place preparations for a significantly more effective vaccine rollout for any future pandemic, including by:

- Ensuring that no person in prison is offered a vaccine later than they would be if living freely in the community, in line with the principle of equivalence;
- Involving ACCOs in the delivery of health information and vaccines;
- Giving regular public updates on the status of the vaccine rollout, including demographic information such as Aboriginality.

Emergency Management Days

Recommendation 62. Corrections, in making decisions in relation to Emergency Management Days, should acknowledge that the pandemic has negatively impacted on all people in detention, albeit to different degrees. Emergency Management Days should be granted not only to people who have been subject to isolation or mandatory quarantine, but to others as well, in recognition of the additional hardships faced by everyone in detention.

Recommendation 63. Corrections policy should be amended so that people can be granted 4 Emergency Management Days for each day that the 'emergency exists', and the 14 days they could be entitled to due to 'circumstances of an unforeseen and special nature.'

Recommendation 64. Corrections policy should be clarified to provide that people in detention cannot 'lose' EMDs once they have been granted, including if they are bailed and subsequently re-remanded.

Recommendation 65. There should be greater transparency in relation to the process by which Emergency Management Days are granted. Information should also be made available in relation to the number of people released on Emergency Management Days, how many days they were granted (broken down per month and per facility), and how many Aboriginal and non-Aboriginal people were granted Emergency Management Days.

Recommendation 66. Decisions in relation to EMDs should be governed by natural justice. Applicants should be given clear particulars of any reasons as to why an application has been refused and be allowed to seek review.

Recommendation 67. Emergency Management Day assessments should occur on a regular basis, to allow adequate time to prepare for release.

Recommendation 68. No one should be denied Emergency Management Days due to a lack of housing.

Use of Force and Restraints

Recommendation 69. The regulation of use of force/restraints should be provided for in legislation, not regulations, policies/procedures, written notices, or in Gazette.

Recommendation 70. The default position must be that the use of restraints/force is prohibited, with exceptions where authorised.

Recommendation 71. Prohibitions on use of force/restraints that should be enshrined in legislation:

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

Recommendation 72. When use of force/restraints may be permitted:

- Use of force/restraints must only be permissible when necessary to prevent an imminent and serious threat of injury to the incarcerated person or others, and only as explicitly authorised and specified by law and regulation.
- Use of force/restraints should be exceptional, as a last resort, when all other control methods (including de-escalation techniques) have been exhausted and failed.
- The decision to use physical restraints must be made by more than one person, and must be authorised by senior management.
- Use of force/restraints must be used restrictively, for no longer than is strictly necessary.
- A minimum level of restraint/degree of force must be used.
- Restraint instruments must be used appropriately/restraint techniques properly executed.
- The safety of the incarcerated person must be a prime consideration.

Recommendation 73. Additional safeguards:

- The use of force/restraint should be under close, direct and continuous control of a medical and/or psychological professional.
- The person who is restrained must be regularly observed, while subjected to restraint instruments, at least every 15 minutes.
- Use force/restraint should be reported to senior management as soon as practicable.
- The privacy of restrained people should be respected/protected when the person in restraints is in public.
- Staff who use restraint or force in violation of the rules and standards should be disciplined and/or have their employment ceased. Staff should be prosecuted where appropriate.

Solitary Confinement

Recommendation 74. Solitary confinement should be prohibited in all places of detention… by legislation.

- No person should ever be placed in solitary confinement, noting people who are particularly vulnerable to the harms… people with mental or physical disabilities, people histories of trauma.
- Prolonged solitary confinement can amount to torture, and no one should be subjected to this.

Recommendation 75. Staffing and other operational issues in places of detention should be urgently addressed, to ensure no one is subjected to solitary confinement.

Strip Searching and Urine Testing

Recommendation 76. The threshold for authorising a strip search in adult prisons should be raised by legislation. 'Good order' and 'security of the facility' should be removed as grounds for a strip search and legislation should provide that strip searching must be a last resort and must be based on intelligence. Prior to strip searching, other means of searching such as pat searches, metal detectors and increased surveillance must be used. Strip searching must never be routinely conducted as part of the general routine of the centre or on entry to a centre.

Recommendation 77. Prisons should adopt policies which require them to consider the effect of strip searches on re-traumatisation.

Recommendation 78. Urine testing should only be required upon reasonable grounds and in a manner consistent with the inherent dignity and right to privacy of the detainee involved to the greatest extent possible.

Recommendation 79. Body cavity searches should never be performed on imprisoned people.

Recommendation 80. The Government should invest in technology which enables non-intrusive searching, to provide further alternatives and minimise the use of strip searching.

Equivalence of Healthcare

Recommendation 81. People in detention must be provided medical care that is the equivalent of that provided in the community. Medical care must be provided without discrimination.

Recommendation 82. Health care should be delivered through DHHS rather than DJCS, and not through for-profit organisations.

Recommendation 83. A model of delivery of primary health services by Aboriginal Community Controlled Health Organisations in places of detention in Victoria should be considered, in consultation with VACCHO and member organisations.

Recommendation 84. The Federal Government must ensure that incarcerated people have access to the Pharmaceutical Benefits Scheme (PBS) and the Medicare Benefits Schedule (MBS). The Victorian Government should advocate with the Commonwealth to enable this access in order to provide equivalence of care to Aboriginal people and other vulnerable people held in prison.

Recommendation 85. The Federal and State Governments should ensure that incarcerated people have access to the National Disability Insurance Scheme (NDIS) and are assessed for eligibility for NDIS upon entry to a prison or youth justice centre.

Recommendation 86. The Government should employ more Aboriginal Health Workers and Aboriginal Wellbeing Officers at all levels of the justice health system (Victoria Police, Courts, Forensicare/MHARS, Community Corrections, Correctional Health Services) to work with Aboriginal people at all stages of their engagement with the criminal legal system.

Recommendation 87. The Government should prioritise the development and finalisation of standards for culturally safe, trauma informed health services in the criminal legal system…

Mental Health & Mental Healthcare

Recommendation 88. The Government should ensure that all prison officers receive regular gender and culturally sensitive training on how to interact with people with cognitive disabilities.

Recommendation 89. The Government should commit significant resources to improving mental healthcare for Aboriginal people in custody in Victoria, including by:

- Recruiting, training and accrediting more qualified Aboriginal and Torres Strait Islander psychologists, psychiatrists, counsellors, social workers and other mental health workers;
- Introducing a specialised Koori Unit within Mental Health Advice and Response Service;
- Introducing standardised and culturally appropriate screening tools across all custody settings.

OPCAT

Recommendation 90. The Victorian Government must urgently undertake robust, transparent and inclusive consultations with the Victorian Aboriginal community, its representative bodies and ACCOs on the implementation of OPCAT in a culturally appropriate way.

Recommendation 91. The operations, policies, frameworks and governance of the designated detention oversight bodies under OPCAT (National Preventive Mechanisms - NPMs) must be culturally appropriate and safe for Aboriginal people.

Recommendation 92. The Victorian Government must legislate for the NPM's mandate, structure, staffing, powers, privileges and immunities.

Recommendation 93. The Victorian and Commonwealth Governments must ensure that the NPM is sufficiently funded to carry out its mandate effectively.

Recommendation 94. In accordance with Article 3(1) of OPCAT, the NPM in Victoria must have jurisdiction over all places where individuals are or may be detained, including… forensic mental health hospitals and other places where people with cognitive disabilities are deprived of their liberty.

Recommendation 95. The Victorian Government must amend COVID-19 Emergency legislation to ensure that visits to correctional facilities and youth detention facilities by independent detention oversight bodies cannot be prohibited.

Disciplinary Proceedings

Recommendation 96. The Victorian Government should implement the recommendations of the Victorian Ombudsman in her July 2021 report on prison disciplinary hearings.

Recommendation 97. Protections relating to procedural fairness in disciplinary proceedings should reflect those outlined in the Mandela Rules and should be enshrined in legislation.

Recommendation 98. The rights of incarcerated people with disability must continue to be upheld during the pandemic and recovery period, including the right to be supported through the Office of the Public Advocate during disciplinary hearings.

Privatisation of Prisons

Recommendation 99. The Government should end privatisation of prisons in Victoria. This should include wholly privately-run prisons, as well as particular services, such as healthcare. The Government should move towards public control of all prison facilities as a matter of urgency.

Women in Prison

Recommendation 100. The Government should expand the availability of rehabilitation and reintegration supports for women in prison.

Recommendation 101. The Government should improve transitional supports for women, including through:

- The establishment of a pre-release transitional centre for women, equivalent to the Judy Lazarus Transition Centre for men;
- Eliminating exits into homelessness by expanding housing availability for women leaving prison;
- Providing continuity of healthcare, alcohol and drug treatment and other key support services in the community.

Recommendation 102. The Government should fund a dedicated residential diversion program for Aboriginal women, similar to Wulgunggo Ngalu Learning Place.

Recommendation 103. Victorian legislation should require that Corrections Victoria select a location for a woman to serve a custodial sentence that is as close as possible to the place or residence of the imprisoned woman's family and children.

Recommendation 104. Corrections Victoria should be required to maintain records and make statistical data publicly available about all aspects of the Living with Mum program, including applications and outcomes.

Recommendation 105. The time required for the processing of applications for the Living with Mums program by Corrections Victoria should be reduced to ensure that mothers desiring to maintain custody of their dependent children while in prison are not precluded from doing so on the basis of a short custodial sentence.

Older People in Prison

Recommendation 106. Corrections Victoria should recognise the unique needs of older incarcerated people and implement necessary policy, program and practice changes in relation to matters including:

- Age-appropriate health services and programs;
- Age-appropriate approaches to rehabilitation and reintegration programs; and
- Increased access to, and frequency of, parole hearings.

Transition Support

Recommendation 107. The Government should provide long-term and stable funding to ACCOs to deliver pre- and post-release programs, including transitional housing programs run by ACCOs, such as VALS' Baggarrook program, to support men and women leaving prison.

Language, Stigma & Dehumanisation

Recommendation 108. The Victorian Government should undertake, in close consultation with civil society and people with lived experience of imprisonment, an evaluation and examination of the terminology employed in policies, programs, legislation and statements concerning people serving custodial sentences and who are justice system involved with the objective of mitigating the stigmatising effect of such terminology within the Victorian community.

Recommendation 109. The Victorian Government should ensure that specialised services are provided to imprisoned people and their families following the completion of their custodial sentence to address issues arising from stigma experienced within the community.

Voting Rights

Recommendation 110. Victoria should remove all restrictions in state law on the right of people in prison to vote in state and local elections.

Recommendation 111. Victoria should lead advocacy nationally, including at the Meeting of Attorneys-General, for a consistent, nationwide approach which grants full voting rights to people in prison, including in federal elections.

Independent Visitors Scheme

Recommendation 112. Visitors under the Independent Visitors Scheme (IPVS) should be appointed independently of the Justice Assurance and Review Office, the Minister for Corrections and prison management. The IPVS should be its own, independent statutory body, or sit within an independent statutory body (such as the Victorian Ombudsman or the NPM, once designated).

Post-Sentence Detention

Recommendation 113. The post-sentence detention order regime under the *Serious Offenders Act 2018* should be abolished.

DETAILED SUBMISSIONS

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

Recently, VALS made a submission to the Criminal Justice Inquiry, which provided a detailed account of issues within the prison system, and made extensive recommendations. For ease of reference, some of the key relevant sections have been included below.

Aboriginal Self-Determination

Issues concerning the self-determination of Aboriginal peoples are of particular importance in relation to the criminal legal system in Victoria. The increased frequency of the use of the term 'self-determination' in relation to Aboriginal peoples[18] in Victoria, however, is only partially reflected in existing policies and legislative practices.

The bearers of the right to self-determination under international law are 'peoples'. In practice, Victorian practice appears to continue to be premised upon the traditional concept of 'peoples' as the population of a state.[19] The international legal concept of 'Indigenous peoples' recognises Aboriginal communities as being distinct 'peoples' that exist alongside the rest of the population of a state.

The Commonwealth of Australia has drawn criticism from United Nations human rights bodies for its continuing failure to Constitutionally acknowledge the legal distinctiveness and status of Aboriginal peoples.[20] While constitutional recognition is a matter to be addressed at the Commonwealth level,

[18] The present section utilises the legal definition of the term 'peoples', which, in essence, refers to a distinct community of persons.

[19] This is the traditional approach taken towards self-determination by States. For further information, see Kelsen, Hans. The Law of the United Nations. (1951) pp-50-53; Rigo Sureda, Andres. The Evolution of the Right to Self-determination: A Study of United Nations Practice. (1973) p. 215; and Knop, Karen. Diversity and Self-Determination in International Law. (2002) p. 99.

[20] United Nations Committee on the Elimination of Racial Discrimination. 'Concluding observations on the eighteenth to twentieth periodic reports of Australia' (2017). UN Doc. CERD/C/AUS/CO/18-20, at 19-20; United Nations Committee on the Elimination of Racial Discrimination. 'Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia' (2010). UN Doc. CERD/C/AUS/CO/15-17 at 15; United Nations Committee on Economic, Social and Cultural Rights. 'Concluding Observations on the fifth periodic report of Australia' (2017). UN Doc. E/C.12/AUS/CO/5 at 16(a); United Nations Human Rights Committee. 'Concluding observations on t
he sixth periodic report of Australia' (2017). UN Doc. CCPR/C/AUS/CO/6 at 50(b).

Victorian Parliament can provide *de facto* recognition of the distinctiveness and status of Aboriginal peoples within Victorian society through legislative practice. The legal distinctiveness of Aboriginal peoples in Victoria can be reflected in future legislation that affects members of Aboriginal communities, individually and collectively, by creating specific and dedicated legislative guidelines and frameworks.

While self-determination can be achieved by individuals, groups[21] and minorities[22] as a component of the population of a state in the traditional sense by ensuring participation in 'representative' governmental processes, the interests of minorities are often cast aside due to majority rule.[23] For example, a group or minority can overwhelmingly vote for an individual to be elected to office, but this does not guarantee an outcome in an election.

Self-determination in the context of Indigenous peoples differs as participatory rights are enhanced when juxtaposed against the general population of a given state. Aboriginal peoples are guaranteed more than just the opportunity to provide feedback and voice opinions on matters that affect their rights individually and collectively: they have the right to meaningful and effective consultation and a role in decision-making in relation to matters that affect their rights and interests.[24] In essence, they have more than a mere right to a seat at the table, but a say in the outcomes.

Aboriginal Community Controlled Organisations (**ACCO**s) play a significant role in the efforts towards the realisation of the right to self-determination of Aboriginal peoples. The first Aboriginal Legal Service, the Aboriginal Legal Service in Redfern, New South Wales was founded in 1970 as a response the injustices and oppression endured by Aboriginal peoples.[25] One year later, the first Aboriginal community controlled health organisation (**ACCHO**) was founded in Redfern as a response to Aboriginal experiences of racism in generalist health services and the need for culturally safe and accessible primary health care services.[26] ACCOs continue to play a vital role in addressing the need for the provision of culturally appropriate and safe services to Aboriginal peoples and as an invaluable tool to respond to continuing injustices and oppressive practices against Aboriginal peoples, individually and collectively, in contemporary Australian society.

Recommendation 188 of the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**) emphasised the need for governments to negotiate with Aboriginal organisations and communities to determine the guidelines pertaining to procedures and processes to be followed to ensure that self-determination played a role in the design and implementation, or modification, of policies and

[21] 'Groups' refers to individuals that fall within a given category based upon specific traits, characteristics or interests.
[22] 'Minorities' refers to groups of individuals that constitute either a numerical minority or a minority based upon power disparity (i.e., inability to influence governmental policies, practices and outcomes typically due to existing bias and discrimination within entrenched institutions).
[23] Raic, David. Statehood and the Law of Self-Determination (2002). pp. 277-281.
[24] Article 18 of the United Nations Declaration on the Rights of Indigenous Peoples.
[25] For more information, see https://www.alsnswact.org.au/about.
[26] For more information, see https://www.naccho.org.au/acchos.

programs that particularly affected Aboriginal peoples. Despite the recommendations made in 1991, Australia continues to receive criticism from UN human rights bodies for its failure to engage with Aboriginal peoples and ACCOs in relation to Closing the Gap (**CTG**),[27] despite the principal objectives of the Agreement including shared decision-making[28] and improved government engagement with Aboriginal communities when undertaking changes to policies and programs.[29] Similarly, the continued practices of the Victorian Government in relation to the participatory rights in the context of the self-determination of Aboriginal peoples in Victoria is contrary not only to their status as 'peoples', but to the objectives of the CTG Agreement.

In the context of governmental processes in Victoria, the continued treatment of Aboriginal peoples as 'minorities' rather than 'peoples' is reflected in legislative and administrative practices, particularly in relation to consultations with ACCOs regarding pending legislation. VALS is routinely contacted by departments and agencies of the Victorian Government for consultations concerning legislative and administrative proposals. The consultation timeframes are frequently very short, making it challenging for VALS, being chronically underfunded, to provide comprehensive feedback. Moreover, feedback provided by VALS is not typically reflected in the measures implemented by the Victorian Government.

Such issues are particularly apparent in relation to Aboriginal cultural rights, where departments and agencies of the Victorian Government generally respond by stating that no conflicts with Aboriginal cultural rights under s.15(2) of the *Charter of Human Rights and Responsibilities 2006* were detected by *their* legal teams. It is important to point out that, in accordance with the right to self-determination, it should not be the Victorian Government that determines whether legislative or administrative measures conflict with Aboriginal cultural rights and interests, but the Aboriginal peoples themselves - whether that be directly or through their representatives and institutions.

Additionally, the inherent failure on the part of the Victorian Government in regards to the right to participation of Aboriginal peoples in Victoria enshrined in Article 18 of the *United Nations Declaration on the Rights of Indigenous Peoples* to be reflected in practice (much less engage in shared decision-making, resulting from meaningful and effective consultation directly with Aboriginal peoples at the community level and indirectly through ACCOs) undermines the ability to effectively and efficiently reduce inequities and improve outcomes within the Aboriginal communities of Victoria. This is particularly the case in relation to CTG targets concerning Aboriginal adults and youths entangled in the Victorian criminal legal system, and Aboriginal Justice Agreement (**AJA**) milestones.[30]

[27] United Nations Committee on Economic, Social and Cultural Rights. 'Concluding Observations on the fifth periodic report of Australia' (2017). UN Doc. E/C.12/AUS/CO/5 at 15-16; United Nations Committee on the Elimination of Racial Discrimination. 'Concluding observations on the eighteenth to twentieth periodic reports of Australia' (2017). UN Doc. CERD/C/AUS/CO/18-20, at 17-18.
[28] See, for example, Clause 17 and Priority Reform One of the National Agreement on Closing the Gap.
[29] Clause 59(f), ibid.
[30] Clause 38(a), ibid.

The Victorian Government is party to several commitments to ensure the recognition of and respect for the self-determination of Aboriginal peoples of Victoria, including the following measures:

- The CTG Agreement recognises self-determination as the basis for shared decision making,[31] while further recognising ACCOs as self-determined institutions of Aboriginal peoples.[32]
- *Burra Lotjpa Dunguludja* is the 4th phase of the AJA in Victoria and the Victorian Government has committed to work towards self-determination and Treaty to serve as the basis for a new relationship between the Victorian Government and Aboriginal peoples.[33]
- The Victorian Aboriginal Affairs Framework (**VAAF**) recognises self-determination as not only the basis for the framework, but the basis of all future actions affecting Aboriginal peoples across Victoria.[34]
- The *Children, Youth and Families Act 2005* recognises the 'principle' of self-determination of Aboriginal peoples in Victoria.[35]

Furthermore, the pledge to support the effort for the right to self-determination to be realised by the Aboriginal peoples of Victoria is also part of the Victorian Labor Party Platform.[36]

Despite the emphasis placed on the self-determination of Aboriginal people in Victoria by the Victorian Government, the *Charter of Human Rights and Responsibilities 2006* (**the Charter**) – Victoria's core human rights document – is silent on the matter. The only references to Aboriginal peoples in the Charter appear in relation to the human rights of Aboriginal people in relation to the diverse relationships with their traditional lands and waters;[37] the definition of 'Aboriginal';[38] and the distinct cultural rights of Aboriginal peoples in Victoria.[39]

While the Charter required a review after four years to determine whether Aboriginal self-determination should be included in the Act,[40] the Scrutiny of Acts and Regulations Committee (**SARC**) recommended that the Victorian Government continue to consult with Victorian Aboriginal communities to continue to develop programs that foster improved outcomes for Aboriginal Victorians and not to include self-determination in the Charter because of the obscurity of the content of the right.[41] This was, again, in contradiction to submissions prepared concerning the matter by

[31] Clause 32(c)(5), ibid.
[32] Clause 44, ibid.
[33] Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement Phase 4 – A partnership between the Victorian Government and Aboriginal community, p. 11. Available at https://files.aboriginaljustice.vic.gov.au/2021-02/Victorian%20Aboriginal%20Justice%20Agreement%20Phase%204.pdf.
[34] Victoria State Government (2019). Victoria Aboriginal Affairs Framework: 2018-2023, pp. 20-27. Available at https://content.vic.gov.au/sites/default/files/2019-09/Victorian-Aboriginal-Affairs-Framework_1.pdf.
[35] s. 12 of the *Children, Youth and Families Act 2005*.
[36] Victorian Australian Labor Party (2018). Victorian Branch Australian Labor Party Platform 2018, p. 86.
[37] Preamble of the *Charter of Human Rights and Responsibilities 2006.*
[38] s. 3(1), ibid.
[39] s. 15(2), ibid.
[40] s. 44(2), ibid.
[41] Scrutiny of Acts and Regulations Committee (2011). Review of the Charter of Human Rights and Responsibilities Act 2006, pp. 52-58. Available at https://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/report_response/20110914_sarc.charterreviewreport.pdf.

numerous ACCOs (including VALS[42]). The subsequent review of the Charter in 2015 concluded that the 'principle' of self-determination should be included in the Preamble of the Charter, but stopped short of recommending that the right to self-determination of Aboriginal peoples in Victoria be recognised in the Charter.[43] To date, the 'right' to self-determination of the Aboriginal peoples of Victoria has yet to be recognised in the Charter - or any other Victorian legislation.

Another principal area of concern relating to the self-determination of Aboriginal peoples in Victoria in the context of the criminal legal system relates to the continued lack of funding for ACCOs whose mandates includes advocating for the individual and collective interests of Aboriginal peoples. While issues concerning the funding and resourcing of Aboriginal organisations and institutions have been highlighted by United Nations human rights bodies in criticisms of the Commonwealth Government,[44] the issue has also been repeatedly identified by VALS in numerous submissions to the Victorian Government.[45] The ability of ACCOs to effectively advocate for the interests of Aboriginal communities in Victoria is considerably impeded by the lack of appropriate funding and resources to fulfil their respective mandates.

Aboriginal self-determined institutions also play a critical role in addressing issues relating to Aboriginal youths and adults entangled in the Victorian criminal legal system. The Koori Courts that currently operate in Victoria provide an example of what can be achieved by Aboriginal community involvement, and have been deemed successful in addressing offences committed by Aboriginal persons in Victoria, in regards to the cultural-appropriateness of both the proceedings and sentences imposed, as well as the prevention of future offences. However, these Courts have limited jurisdiction in respect of both types of offences and plea requirements, coupled with the fact that Koori Court sits at only 12 Magistrates' Court locations and five County Court locations at present. The role of Aboriginal Elders and Respected Persons is also limited in a way that prevents Koori Courts from being truly self-determined institutions. The expansion of the Koori Courts system is a logical and necessary next step to progress towards realising Aboriginal self-determination within the Victorian criminal legal system.

---

[42] VALS (2011). Review of the Victorian Charter of Human Rights and Responsibilities, pp. 14-26. Available at https://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/submissions/258_VALS_1.7.2011.pdf

[43] Young, M. B. (2015). From commitment to culture: The 2015 Review of the Victorian Charter of Human Rights and Responsibilities Act 2006, p. 216-218. Available at https://files.justice.vic.gov.au/2021-06/report_final_charter_review_2015.pdf.

[44] United Nations Committee on the Elimination of Racial Discrimination. 'Concluding observations on the eighteenth to twentieth periodic reports of Australia' (2017). UN Doc. CERD/C/AUS/CO/18-20, at 17-18; United Nations Committee on the Elimination of Racial Discrimination. 'Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia' (2010). UN Doc. CERD/C/AUS/CO/15-17 at 15; United Nations Committee on Economic, Social and Cultural Rights. 'Concluding Observations on the fifth periodic report of Australia' (2017). UN Doc. E/C.12/AUS/CO/5, at 15-16; United Nations Human Rights Committee. 'Concluding observations on the sixth periodic report of Australia.' (2017) UN Doc. CCPR/C/AUS/CO/6, at 39-40 and 49-50, United Nations Human Rights Committee. 'Concluding observations of the Human Rights Committee: Australia. (2009) UN Doc. CCPR/C/AUS/CO/5, at 13 and 25.

[45] See, for example Recommendations 7- 10 of VALS. 'Submission to the Royal Commission into Victoria's Mental Health System (July2019); Recommendations 1 and 3 of VALS. 'Submission to the Victorian Law Reform Commission Project: Improving the Response of the Justice System to Sexual Offences.' (March 2021); Recommendations 1 and 5-11 of VALS. 'Building Back Better: Victorian Aboriginal Legal Service COVID-19 Recovery Plan.' (February 2021);

The Treaty process currently being undertaken in Victoria will undoubtedly have profound implications on the nature of relations between the Victorian Government and Aboriginal peoples in Victoria, particularly in relation to how the right to self-determination of Aboriginal peoples in Victoria will be exercised. Despite the fact that the Treaty process has not yet been concluded, the Victorian Government should work in anticipation of ensuring that its practices are consistent with the right to free, prior and informed consent (**FPIC**)[46] of Aboriginal peoples in relation to legislative and administrative measures that may affect them.[47]

While the right to FPIC generally refers to a requirement to consult with representative institutions (i.e., elected bodies), examples of FPIC practice include other Indigenous governance structures and organisations such as ACCOs, as well as engagement with Aboriginal persons and groups at the community level.[48] With regards to legislative and administrative measures relating to the Victorian criminal legal system, the implementation of policies and practices consistent with the right to FPIC would involve consultation with Aboriginal communities and ACCOs during the conceptualisation, development and drafting stages of such measures, rather than requesting feedback when such processes have been completed.

In practice, the concepts of Indigenous Data Sovereignty and Indigenous Data Governance are a specific exercise of the right to self-determination as enshrined in Article 3 (as well as numerous other Articles) of the *United Nations Declaration on the Rights of Indigenous Peoples*. The following key concepts relating to Indigenous Data Sovereignty were defined by consensus by delegates of the Indigenous Data Sovereignty Summit:[49]

- *Indigenous Data*: 'In Australia… refers to information or knowledge, in any format or medium, which is about and may affect Indigenous peoples both collectively and individually.'
- *Indigenous Data Sovereignty (IDS)*: 'refers to the right of Indigenous peoples to exercise ownership over Indigenous Data. Ownership of data can be expressed through the creation, collection, access, analysis, interpretation, management, dissemination and reuse of Indigenous Data.'
- *Indigenous Data Governance (IDG)*: 'refers to the right of Indigenous Peoples to autonomously decide what, how and why Indigenous Data are collected, accessed and used. It ensures that

[46] 'Free' indicating an absence of coercion; 'Prior' meaning that consultations occur before work begins on matters that may affect Aboriginal peoples; 'Informed' meaning that all potential benefits and consequences of a measures deliberated are presented to the Aboriginal people(s) affected; and 'Consent' indicating that the scope and content of the measures is agreed upon by the State and Aboriginal parties concerned.
[47] Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples.
[48] Although focusing on land use and projects, the FAO provides a clear overview of both the right to FPIC and the processes involved in implementing FPIC. See Food and Agriculture Organization of the United Nations. Free Prior and Informed Consent: An indigenous peoples' right and a good practice for local communities. (2016). Available at http://www.fao.org/3/I6190E/i6190e.pdf.
[49] The Indigenous Data Sovereignty Summit was held in Canberra, ACT, on 20 June 2018.

data on or about Indigenous peoples reflects our priorities, values, cultures, worldviews and diversity.'[50]

The nature of the relationship between data collected concerning Aboriginal peoples and IDS can be described as follows:

- The right of Aboriginal peoples, individually and collectively, to access and collect data obtained about Aboriginal individuals and communities.
- The right of Aboriginal peoples, individually and collectively, to exercise control over the manner in which data concerning Aboriginal individuals and communities is gathered, managed and utilised.

The relationship between IDG and data collected concerning Aboriginal individuals and communities, on the other hand, involves determining the specific circumstances under which data concerning Aboriginal peoples can be collected in the first place. It is important to note that both IDS and IDG require the meaningful and effective participation of Aboriginal people before decisions are made in relation to policies and legislation concerning Indigenous data.

RECOMMENDATIONS

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

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

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

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

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

[50] *Indigenous Data Sovereignty, Communique*. Indigenous Data Sovereignty Summit. 20 June 2018, p. 1.

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

Systemic Racism

As VALS outlined in our COVID-19 Recovery Plan, Building Back Better:

> The Black Lives Matter movement has brought national attention to the long-standing injustice that is systemic racism, with the voices of Aboriginal and Torres Strait Islander people being amplified through the solidarity of non-Aboriginal Australians. Acknowledging how this country's colonial history has created and shaped structures and institutions characterised by racism, which so often fail to deliver true justice for Aboriginal people, is crucial. The legal system is built on a foundation of violence and dispossession, denial of sovereignty (and of course, humanity), with the colonial project continuing through policies of protection and assimilation. Today's injustices are inextricably linked to the injustices of the past, and achieving a collective understanding of Victoria's colonial legacy can help guide the reforms necessary for realising a truly equitable legal system.[51]

[…]

Systemic racism can be understood as how laws, policies and practices across agencies work together to produce a discriminatory outcome for racial or cultural groups. Cultural awareness training will not address the issue of racism and systemic racism, although this is frequently the proposed solution. Anti-racist or unconscious bias training cannot address systemic racism, although it may achieve results at an individual level. Cultural awareness and anti-racist training are crucial, but the issue of systemic racism is deep-rooted, complex and is ultimately not about individuals within a system that otherwise operates well. What is required is a strategy that addresses racism at both the individual and the systemic level.[52]

The nature of systemic racism is that it needs to be understood and tackled across different, interacting institutions **[…]** While changes to practice in the Coroners Court for inquests into the deaths of Aboriginal people in custody (made recently, almost 30 years after they were recommended

[51] VALS (2021), *Building Back Better: Victorian Aboriginal Legal Service COVID-19 Recovery Plan*, p99. Available at https://www.vals.org.au/wp-content/uploads/2021/02/Building-Back-Better-Victorian-Aboriginal-Legal-Service-COVID-19-Recovery-Plan-February-2021-FOR-DISTRIBUTION.pdf

[52] VALS (2021), *Building Back Better: Victorian Aboriginal Legal Service COVID-19 Recovery Plan*, p100. Available at https://www.vals.org.au/wp-content/uploads/2021/02/Building-Back-Better-Victorian-Aboriginal-Legal-Service-COVID-19-Recovery-Plan-February-2021-FOR-DISTRIBUTION.pdf.

by the RCIADIC) will improve the thoroughness and cultural appropriateness of those inquiries, they did not extend to requiring inquests to fully consider the role that systemic racism plays in those deaths.[53] There is, however, an increasing appreciation of the importance of proper consideration of systemic racism, as demonstrated with the recent launch of VEOHRC/VALS' resource, 'Investigating Systemic Racism: A Tanya Day Inquest Resource for Advocates and Lawyers'. VALS emphasises that considerations in relation to systemic racism should be a key part of the function of all oversight bodies, including the Coroner and the monitoring bodies to be established under the *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (**OPCAT**), discussed further below.

RECOMMENDATIONS

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

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

Ending Aboriginal Deaths in Custody

This year we marked the 30 year anniversary of the Royal Commission into Aboriginal Deaths in Custody. On the anniversary, a paper was released, "outlin[ing] concerns with the 2018 Deloitte Access Economics review of the implementation of the 339 recommendations of [RCIADIC]… argu[ing] that there is a risk that misinformation may influence policy and practice responses to First Nations deaths in custody, and opportunities to address the widespread problems in Indigenous public policy in Australia may be missed."[54]

VALS and Djirra echoed the calls of the Aboriginal Justice Caucus for the establishment of an Aboriginal Social Justice Commissioner, a call which was first made 17 years ago:

> We need an Aboriginal and Torres Strait Islander Social Justice Commissioner to ensure the unfinished work of the Royal Commission into Aboriginal Deaths in Custody is finally completed. The lack of

[53] The Guardian, 22 September 2020, 'Victorian coroner changes how Indigenous deaths in custody are investigated'. Accessed at https://www.theguardian.com/australia-news/2020/sep/22/victorian-coroner-changes-how-indigenous-deaths-in-custody-are-investigated.

[54] Thalia Anthony et al, 30 years on: Royal Commission into Aboriginal Deaths in Custody recommendations remain unimplemented, accessed at https://caepr.cass.anu.edu.au/research/publications/30-years-royal-commission-aboriginal-deaths-custody-recommendations-remain

transparency and accountability by State and Federal Governments over the last 30 years is why there has been at least 470 Aboriginal deaths in custody since the Royal Commission.[55]

RECOMMENDATIONS

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

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

To mark this anniversary, VALS also produced a video podcast series of interviews with Aboriginal people, including family members whose loved ones have died in custody, Senator Patrick Dodson and our Community Justice Programs Statewide leader (who discussed the CNS). You can view the podcasts here.

[…]

Addressing the Growth in Prison and Remand Populations

In June 2015, there were 6,219 people held in Victorian prisons.[56] By June 2021, the prison population had swelled to 7,249.[57] These numbers, however, understate the increasing rate of imprisonment in Victoria because they reflect temporary reductions due to COVID-19 which will inevitably be reversed without a concerted policy shift towards decarceration. Prior to the pandemic, the prison population reached a high of 8,216 in 2019, an increase of 28.3% in just three years.[58]

These numbers have been driven in large part by the soaring remanded population – people held in prison who have not been sentenced by a court to jail time. From June 2015 to June 2021, the number of people serving sentences in prison actually fell slightly – from 4,786 to 4,064. Even the period from June 2015 to January 2020 (before the prison population began to fall due to COVID-19) saw an increase of 4.8%. In contrast, the number of people held without sentence skyrocketed from 1,433 to

[55] VALS and Djirra, It is time for a Victorian Aboriginal and Torres Strait Islander Social Justice Commissioner (26 March 2021), available at https://www.vals.org.au/joint-media-release-from-djirra-and-victorian-aboriginal-legal-service/
[56] Corrections Victoria, *Annual Prisoner Statistical Profile 2019-20*, Table 1.3.
[57] Corrections Victoria, *Monthly Prisoner and Offender Statistics 2020-21*, Table 1.12
[58] Corrections Victoria, *Monthly Time Series Prisoner and Offender Data*, Table 1.

3,185, an increase of 122%. The proportion of people in prison who had received a sentence fell from 77% to just 56%.[59]

It is unsurprising, given the history of Victoria's criminal legal system and the overpolicing of Aboriginal communities, that these changes have particularly impacted Aboriginal people. The number of Aboriginal people held in Victorian prisons was 771 in June 2021.[60] Immediately prior to the pandemic, in February 2020, the Aboriginal prison population was as high as 890, up more than 85% from the 480 held in June 2015.[61] The number of unsentenced Aboriginal people held in Victorian prisons quadrupled from June 2015 to June 2019.[62] Aboriginal people now make up more than 10% of the people held in prison in Victoria, compared to less than 1% of the Victorian population.[63]

Aboriginal women have been particularly affected by Victoria's increasingly carceral approach to dealing with social problems. In June 2015, there were 42 Aboriginal women in Victorian prisons, 10% of the prison total.[64] By June 2019, before the onset of the pandemic, that number had nearly doubled to 80, making up a hugely disproportionate 13.9% of the female prison population.[65]

These trends run completely counter to the Victorian Government's commitments and responsibilities towards Aboriginal people. It has been clear for decades that reducing the incarceration rates of Aboriginal people is urgent. A key finding of the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**), whose report was handed down more than 30 years ago, was that the number of deaths in custody is due primarily to the extreme and disproportionate rate at which Aboriginal people are imprisoned. A recent analysis found that, of the over 470 Aboriginal people who have died in custody since the Royal Commission's report, more than half had not been sentenced.[66] Both the scale of the increase in Victoria's imprisonment of Aboriginal people, and the concentration of that growth in the remanded population, are putting more and more Aboriginal lives at risk.

The Government is committed under the Closing the Gap (**CTG**) Agreement to reducing the incarceration rate of Aboriginal adults by 15%, and of Aboriginal children by 30%, by 2031.[67] Given the increase in imprisonment of Aboriginal people in recent years, Victoria could meet the Closing the Gap

[59] Ibid.
[60] Corrections Victoria, *Monthly Prisoner and Offender Statistics 2020-21*, Table 1.12
[61] Corrections Victoria, *Monthly Prisoner and Offender Statistics 2020-21*, Table 1.08.
Corrections Victoria, *Annual Prisoner Statistical Profile 2019-20*, Table 1.4.
[62] Corrections Victoria, *Annual Prisoner Statistical Profile 2019-20*, Table 1.4.
[63] Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians, June 2016*.
[64] Corrections Victoria, *Annual Prisoner Statistical Profile 2019-20*, Table 1.4.
[65] Ibid. The data released by Corrections Victoria does not allow the number of Aboriginal women in custody to be known for any date except June 30, making it impossible to see the continuing growth of numbers until immediately before the pandemic.
[66] The Guardian, 9 April 2021, 'The 474 deaths inside: tragic toll of Indigenous deaths in custody revealed'. Accessed at https://www.theguardian.com/australia-news/2021/apr/09/the-474-deaths-inside-rising-number-of-indigenous-deaths-in-custody-revealed.
[67] Coalition of Aboriginal and Torres Strait Islander Peak Organisations and Australian Governments, National Agreement on Closing the Gap (July 2020), pp31-32.

target merely by returning to the incarceration rate of 2017.[68] The CTG targets are clearly inadequate, and reverting back to numbers from a few short years ago is much too unambitious a goal. But even such a conservative improvement will not be achieved without major policy change by the Victorian Government. *Burra Lotjpa Dunguludja*, the Aboriginal Justice Agreement Phase 4, set a more ambitious target to fully close the gap by 2031.[69] No progress has been made towards that target since 2017.[70]

VALS is calling on the Victorian Government to take the steps necessary to achieve parity in this generation's lifetimes, and to commit to the important work that needs to be done to address systemic racism. There are immediate actions the Victorian Government could take to exceed the minimum Closing the Gap targets and demonstrate its commitments to meet the goals agreed under Burra Lotjpa Dunguludja. This first section of the submission details how government policy in many domains is contributing to overincarceration, and how these shameful trends could be reversed.

Bail

The punitive bail system in Victoria is the single largest factor contributing to the growth in prison and remand populations. By now, the "bail crisis" is well known and well documented. Across the adult prison population, 44% of people in prison are currently unsentenced,[71] versus only 28.9% in June 2016.[72] In the women's system, the situation is even more dire, with more women currently on remand than serving sentences.[73] In the youth justice system, the number of children on remand has more than doubled between 2010 and 2019.[74] Changing the punitive bail system and reducing remand rates is among the most critical reforms needed in the criminal legal system.

The evidence is clear that the current bail system disproportionality impacts Aboriginal people.[75] In June 2020, 44% of Aboriginal people in prison in Victoria were on remand, whereas only 35% of the

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

[69] Aboriginal Justice Agreement, *Burra Lotjpa Dunguludja*, pp30-31. Accessed at https://files.aboriginaljustice.vic.gov.au/2021-02/Victorian%20Aboriginal%20Justice%20Agreement%20Phase%204.pdf.

[70] The AJA reported a baseline of 1,495 Aboriginal people under adult justice supervision in 2017. At 30 June 2021, there were 1,468 Aboriginal people under supervision (771 in prison and 697 under community supervision.) Corrections Victoria, *Monthly Prisoner and Offender Statistics 2020-21*, Tables 1.12 and 2.12.

[71] Corrections Victoria, Monthly Time Series Prisoner and Offender Data: Monthly time series prisoner and offender data | Corrections, Prisons and Parole

[72] Corrections Victoria, Annual Prisoner Statistical Profile 2009-10 to 2019-20 | Corrections, Prisons and Parole, Table 1.3. Include data on average time on remand if it can be found.

[73] Corrections Victoria, Monthly Time Series Prisoner and Offender Data. In July 2021, 53% of women in Victoria's prisons are unsentenced.

[74] Sentencing Advisory Council (2020), *Children Held on Remand in Victoria*, p. ix. Accessed at https://www.sentencingcouncil.vic.gov.au/publications/children-held-on-remand-in-victoria.

[75] In 2017-2018, 15% of children on remand identified as Aboriginal, whereas 1% of Victoria's population identifies as Aboriginal. SAC, Children on Remand, p. xii. In June 2020, 44% of Aboriginal people in prison in Victoria were on remand, whereas only the 35% of the total prison population was on remand. See Corrections Victoria, Profile of Aboriginal People in Prison, Annual Prisoner Statistical Profile 2009-10 to 2019-20 | Corrections, Prisons and Parole; Corrections Victoria, Profile of People in Prison, Annual Prisoner Statistical Profile 2009-10 to 2019-20 | Corrections, Prisons and Parole

total prison population was on remand.[76] In 2017-2018, 15% of children on remand identified as Aboriginal[77] and in 2018-2019, 48% of all Aboriginal children in youth justice custody on an average day were on remand (versus 33% in 2014-2015).[78]

VALS has the following critical concerns regarding the bail system:

(a) Harmful changes to the bail laws in 2013, 2017 and 2018, including criminalisation of additional bail offences and expansion of the reverse-onus test;
(b) Lack of bail justices and remote bail justice hearings;
(c) Challenges with police bail, including culturally inappropriate bail conditions;
(d) Cultural appropriateness of bail proceedings.

Since 2017, VALS has repeatedly raised concerns about the immediate and longer-term impacts of the bail laws for Aboriginal people in Victoria.[79] In July 2021, VALS sent an open letter[80] (signed by 55 organisations) and an expert petition[81] (signed by over 250 experts) to Ministers Symes, Hutchins and Williams calling for urgent bail reform. We have still not received a response.

The current bail laws are the product of major reforms in 2017 and 2018,[82] which followed the Bourke Street incident in 2017 and the Coghlan Review,[83] commissioned by the Government. Additionally, the bail laws were amended in 2013 to introduce two new criminal offences related to breaching bail.[84]

The reforms to the *Bail Act* in 2017 and 2018 included:

- Expansion of the "reverse-onus test": if an individual is arrested for an offence listed under Schedule 1 or 2 of the *Bail Act*, they must demonstrate that there are "exceptional circumstances" (for Schedule 1 offences) or "compelling reasons" (for Schedule 2 offences) to

[76] See Corrections Victoria, Profile of Aboriginal People in Prison, Annual Prisoner Statistical Profile 2009-10 to 2019-20 | Corrections, Prisons and Parole; Corrections Victoria, Profile of People in Prison, Annual Prisoner Statistical Profile 2009-10 to 2019-20 | Corrections, Prisons and Parole

[77] Sentencing Advisory Council (2020), *Children Held on Remand in Victoria*, p. xii. Available at https://www.sentencingcouncil.vic.gov.au/publications/children-held-on-remand-in-victoria.

[78] Commission for Children & Young People, *Our youth, our way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system*, p. 34. Between 2014–15 and 2018–19, the number of Aboriginal children and young people held on remand in Victoria on an average day almost doubled.

[79] Building Back Better: VALS COVID-19 Recovery Plan, February 2021.
VALS Submission to the Parliamentary Inquiry into the Government's Response to COVID-19, September 2020.
VALS Submission to the Sentencing Act Reform Project, April 2020.
VALS Submission to CCYP Inquiry, Our Youth Our Way, October 2019.
VALS submission to the Royal Commission into Victoria's Mental Health System, August 2019.

[80] VALS, Bail Reform is Urgently Needed, May 2021, available at Bail-Reform-Letter-May-2021-5.pdf (vals.org.au)

[81] VALS, Expert Petition calling for Urgent Reform of Victoria's Bail Laws, VALS-Bail-Reform-Petition.pdf

[82] *Bail Amendment (Stage One) Act 2017* (Vic) and *Bail Amendment (Stage Two) Act* 2018 (Vic)

[83] The Hon. Paul Coghlan QC, *Bail Review: First Advice to the Victorian Government*, 3 April 2017; The Hon. Paul Coghlan QC, *Bail Review: Second Advice to the Victorian Government*, 1 May 2017.

[84] In December 2013, the *Bail Act 1977* (Vic) was amended to include the following bail offences: breaching bail conditions (s. 30A); and committing an indictable offence while on bail (s. 30B). There are now three bail offences under the Act, including failure to answer bail (s. 30). The offence of breaching bail conditions (S. 30A) does not apply to children.

grant bail. Although this test existed prior to the 2017/2018 reforms, it only existed for a small number of offences. Since 2017/2018, the reverse-onus test applies to a broad range of offences, including if the individual commits an indictable offence whilst on bail, is subject to a summons for an indictable offence, is on parole, or is serving a Community Corrections Order for an indictable offence.[85]

- The "show cause" standard that existed previously, was replaced with a requirement to "show compelling reasons" (for Schedule 2 offences)
- In applying the "exceptional circumstances" test, the "compelling reasons" test, the "unacceptable risk" test and when considering bail conditions, the court must consider "surrounding circumstances," as defined in the Act.[86]
- Only a court can grant bail for a Schedule 1 offence[87] or where an accused is on two or more undertakings of bail.[88]

Following the 2017/2018 bail reforms, bail applications for Schedule 1 and 2 offences involve the following two step process:

1. The accused person must demonstrate that there are "exceptional circumstances"[89] (for Schedule 1 offences) or "compelling reasons"[90] (for Schedule 2 offences) for granting bail. If this step is not satisfied, bail is refused.
2. If step one is satisfied, the court must also consider whether the person poses an "unacceptable risk" of endangering the safety or welfare of any person, committing an offence while on bail, interfering with a witness, obstructing the course of justice or not attending court.[91] The burden of proof lies with the prosecutor and the court can only grant bail if satisfied that the person does not pose an "unacceptable risk."

For offences not listed in Schedule 1 and 2, the court can only grant bail if satisfied that the person does not pose an "unacceptable risk" of endangering the safety or welfare of any person, committing an offence while on bail, interfering with a witness, obstructing the course of justice or not attending court. [92] The burden of proof lies with the prosecutor.

[85] Offences in Schedule 1 include: aggravated carjacking and aggravated home invasion. Schedule 2 is much broader and includes: as armed robbery, aggravated burglary, intentionally causing serious injury and trafficking in a drug of dependence. It also includes any indictable offence alleged to have been committed while the person was on bail or subject to a summons for an indictable offence.

[86] *Bail Act 1977* (Vic), Sections 3AAA (definition of "surrounding circumstances"), 4A(3) (consideration of "surrounding circumstances" when applying "exceptional circumstances" test), 4C(3) (consideration of "surrounding circumstances" when applying "compelling reasons" test), 4E(3)(a) (consideration of "surrounding circumstances" when applying "unacceptable risk" test), and s 18AD (consideration of "surrounding circumstances" when considering bail conditions).

[87] *Bail Act 1977* (Vic), Section 13(3).

[88] *Bail Act 1977* (Vic), Section 13A.

[89] *Bail Act 1977* (Vic), Section 4A.

[90] *Bail Act 1977* (Vic), Section 4C.

[91] *Bail Act 1977* (Vic), Sections 4D and 4E.

[92] *Bail Act 1977* (Vic), Sections 4D and 4E.

Case Study – Veronica Marie Nelson

In January 2020, Ms. Veronica Marie Nelson, a proud Gunditjmara, Dja Dja Wurrung, Wiradjuri and Yorta Yorta woman, was refused bail after being arrested for shoplifting-related offences and remanded at Dame Phyllis Frost Centre.

Three days after being remanded, Ms Nelson tragically died alone in her cell. On the night of her death, she was distressed and cried out for medical assistance a number of times. Her death is a piercing reminder "of the human cost of the current bail laws."[93]

VALS' Wirraway team is representing Percy Lovett, Veronica Nelson's partner of 22 years, in the Coronial Inquest into her death. The following quotes are attributable to Percy Lovett:

> *"Veronica was a strong woman – stronger than me. She'd always help someone on the street. She taught me everything about our ways. It's got me beat how she knew what she knew. She knew everything."*
>
> *"I don't want it to happen again. I want to make it easier for the next women who gets locked up. I want them to be looked after more. I want them to get more support and treatment in the community."*[94]

The evidence is clear that the current bail system disproportionality impacts Aboriginal people.[95] Aboriginal people experience higher rates of housing instability,[96] and therefore face challenges in meeting the reverse onus provisions in the *Bail Act*. There is a significant shortage of culturally safe residential bail support and accommodation to address this issue.[97] Aboriginal people are also

[93] VALS Media Release, Coronial Inquest into death of Veronica Marie Nelson to examine healthcare in Victorian prisons and bail laws – Victorian Aboriginal Legal Service (vals.org.au)

[94] VALS Media Release, "Coronial Inquest into death of Veronica Marie Nelson to examine healthcare in Victorian prisons and bail laws," 29 March 2021.

[95] In 2017-2018, 15% of children on remand identified as Aboriginal, whereas 1% of Victoria's population identifies as Aboriginal. SAC, Children on Remand, p. xii. In June 2020, 44% of Aboriginal people in prison in Victoria were on remand, whereas only the 35% of the total prison population was on remand. See Corrections Victoria, Profile of Aboriginal People in Prison, Annual Prisoner Statistical Profile 2009-10 to 2019-20 | Corrections, Prisons and Parole; Corrections Victoria, Profile of People in Prison, Annual Prisoner Statistical Profile 2009-10 to 2019-20 | Corrections, Prisons and Parole

[96] Parliament of Victoria, *Inquiry into homelessness in Victoria: Final report*, p58. Accessed at https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Homelessness_in_Victoria/Report/LCLSIC_59-06_Homelessness_in_Vic_Final_report.pdf.

[97] Under *Burra Lotjpa Dunguludja* (AJA4), the Victorian government and the Aboriginal Justice Caucus have committed to develop a residential bail support and a therapeutic program for Aboriginal young people that builds upon the Baroona Healing Place model. See AJA4 In Action. The government has also committed to develop and implement cultural and gender specific supports for Aboriginal women involved in the correctional system to obtain bail and avoid remand. In December 2021, the Koori Justice Unit is due to release a report identifying which cultural and gender specific supports need to be implemented for Aboriginal women involved in the correctional system to obtain bail and avoid remand. See Aboriginal Justice Forum #59 (July 2021), "Progress against AJA4 actions."

disproportionately impacted by the requirement to show "exceptional circumstances" for repeat low-level poverty/survival crimes, such as shoplifting.

Additionally, Aboriginal people are disproportionately impacted by the criminalisation of bail offences, introduced in 2013,[98] which serve no purpose other than to further criminalise people who are already criminalised.

[…]

The immediate harm caused by detaining an Aboriginal person on remand is significant and far-reaching. Detention separates an individual from their family, community, country and culture, and jeopardises their health, wellbeing and safety. This is particularly the case at the moment given the protective quarantine regime in place in prisons, requiring individuals to isolate for the first 14 days. Being detained on remand also disrupts education and employment, risks people losing their housing, and other crucial protective factors. Unlike individuals who are on bail in the community, remandees are unable to access rehabilitation and support programs.

Aboriginal women make up 13% of the female prison population and are particularly at risk of harm caused by the draconian bail laws. Many Aboriginal women who are on remand are victim-survivors of family violence, and are further traumatised as a result of their incarceration. In accordance with the *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* (**Bangkok Rules**),[99] courts should be responding appropriately to the situation of women who have offended, which includes developing and implementing gender-specific pretrial alternatives that take into account their history of victimisation,[100] as well as the use of diversionary and alternative pretrial measures in lieu of custodial measures.[101]

Remanding women also has a significant impact on dependent children, who may be forced into alternative forms of care when their mother is in custody. There is no publicly available data on the number of women on remand in Victoria with dependent children, and the number of times that child protection becomes involved as a result of a mother going into custody. However, women are more likely to be primary caregivers to dependent children in Victoria,[102] and this trend particularly impacts Aboriginal children, families and communities.[103] Across Australia, at least 54% of women in prisons

[98] As noted above, the Bail Act was amended in 2013 to include two additional criminal offences: breaching bail conditions (s. 30A); and committing an indictable offence while on bail (s. 30B). There are now three bail offences under the Act, including failure to answer bail (s. 30).
[99] United Nations (2011). Resolution adopted by the General Assembly on 21 December 2010. (2011) UN Doc. A/RES/65/229 ("Bangkok Rules").
[100] Ibid., Rule 57.
[101] Ibid., Rule 58 (read in conjunction with para. 17).
[102] Flynn, C. (2014). Getting there and being there: Visits to prisons in Victoria – the experiences of women prisoners and their children. 61(2) Probation Journal 176-191, p. 177.
[103] Walker, J. et al. (2021). Residential programmes for mothers and children in prison: Key themes and concepts. 21(1) Criminology & Criminal Justice 21-39, p.22.

have at least one dependent child.[104] While kinship care is a common outcome for the children of women in custody, it is reported that mothers are only able to regain custody of their children following their incarceration in as few as 28% of instances in Victoria.[105]

Detaining mothers on remand without considering the implications for their dependent children is contrary to international law standards. The Bangkok Rules provide that non-custodial pretrial alternatives for women "shall be implemented wherever appropriate and possible,"[106] and non-custodial sentences are explicitly preferred for pregnant women or women with dependent children in most cases.[107] Further, the Bangkok Rules require governments to develop and implement gender-specific pretrial alternatives that take into account the caretaking responsibilities of incarcerated women.[108]

In addition, the United Nations Convention on the Rights of the Child (**UNCRC**) obliges Australia to ensure that children not be separated from their parents against their will, unless necessary for the best interests of the child.[109] International legal norms indicate a clear preference towards continued family integrity, rather than fragmentation, as a result of bail hearings.

In addition to the immediate harmful effects for Aboriginal people on remand and their families, the bail system has significant flow-on effects for sentencing outcomes,[110] and future involvement in the criminal legal system. This includes an increased likelihood of receiving a custodial sentence.[111] According to the Sentencing Advisory Council, "offenders who *may* have otherwise received a non-custodial sentence might instead receive a time served prison sentence (with or without a CCO) because they have, in effect, already been punished for their offending."[112]

Time-served sentences are harmful for a number of reasons. They effectively mean that there is no opportunity for the individual to connect with or receive holistic support. Moreover, receiving a time-

[104] Australian Institute of Health and Welfare, *The Health of Australian Prisoners,* 2018, pp. 14 and 72.
[105] Stone, U. et al. (2017). Incarcerated Mothers: Issues and Barriers for Regaining Custody of Children. 97(3) The Prison Journal 296-317, pp. 297-298.
[106] United Nations (2011). Resolution adopted by the General Assembly on 21 December 2010. (2011) UN Doc. A/RES/65/229 ("Bangkok Rules"), Rule 58 (read in conjunction with para. 17).
[107] Ibid., Rule 64. The rule establishes that in the absence of a serious or violent offence or instances where a woman 'represents a continuing danger', such decisions should be made on the basis of the best interests of, and care for, dependent children.
[108] Ibid., Bangkok Rules, Rule 57.
[109] Article 9 of the UNCRC.
[110] According to the SAC, "a child's remand experience will often affect how the sentencing discretion is exercised and how the child's sentence is served."
[111] Research by the Sentencing Advisory Council indicates that there is an increased likelihood of a custodial sentence after spending time on remand: "Sentencing Advisory Council, State of Victoria, *Time Served Prison Sentences in Victoria* (2020), 10.
[112] Sentencing Advisory Council (2020), *Time Served Prison Sentences in Victoria*. Available at https://www.sentencingcouncil.vic.gov.au/sites/default/files/2020-02/Time_Served_Prison_Sentences_in_Victoria.pdf.
The SAC made similar conclusions in its recent report on Children in Remand: "Courts may consider imposing a custodial sentence, where they may not otherwise, if the child has already been exposed to the custodial environment and/or it would be 'unduly punitive' to impose a non-custodial order with conditions if the child has already been in custody for a period of time." p5.

served sentence means that there is a higher chance of the individual being remanded if they are arrested again.[113] It also increases the likelihood that they will receive a more severe sentence if they are sentenced again in the future.[114]

VALS is incredibly concerned about the increase in time-served sentences amongst our clients. In 2017-2018, 17.9% of VALS criminal law matters that resulted in custodial sentences involved time served prison sentences; and in 2018-2019, this figure increased to 24%.

During the COVID-19 pandemic, we have also seen an increase in individuals receiving and serving time-served prison sentences in police cells. In 2020-2021, 76 notifications from the Custody Notification System (**CNS**) involved a client serving a time-served prison sentence in police custody, compared to 21 notifications in 2019-2020. In one matter, an individual was detained in a police cell for 11 days and the VALS CNS team carried out 76 welfare checks on the individual during this time. This is incredibly concerning, given that police cells are not designed for individuals to be serving a sentence.

In addition to the human cost, the financial cost of the bail laws is enormous. In 2017-2018, 442 children were held on remand in Victoria for a combined period of 29,000 days, with a total cost was approximately $41 million.[115] Of this, approximately $15 million was spent remanding children who did not receive a custodial sentence.[116] According to information published in The Age in May 2021, the annual cost of managing prisons in Victoria (including people on remand and those serving sentences) is due to double to $3.5 billion by 2023-24.[117]

Over the past 12 months, the risks arising from the COVID-19 pandemic have been considered by courts when deciding whether or not to grant bail. This has led to more individuals being released on bail than would normally be the case. While this may have created a short-term reduction in the number of people on remand, it does not negate the need for significant reform of the bail system.

Although the calls for change have been loud and clear, the Victorian Government has continued to politicise bail laws and refuse to address the bail crisis. This is despite its commitment under *Burra Lotjpa Dunguludja* to reduce the number of Aboriginal people on remand,[118] and its commitment under the National Closing the Gap Agreement to reduce Aboriginal incarceration rates.[119] We note

---

[113] Sentencing Advisory Council (2020), *Children Held on Remand in Victoria*, p5. Accessed at https://www.sentencingcouncil.vic.gov.au/publications/children-held-on-remand-in-victoria.
[114] Ibid., 11.
[115] Sentencing Advisory Council (2020), *Children Held on Remand in Victoria*, p. xi.
[116] Ibid.
[117] R. Millar, C. Vedelago, T. Mills, "New Prisons or looser bail laws? Labor's unpalatable choice," 15 May 2021.
[118] Under *Burra Lotjpa Dunguludja,* the Victorian government has committed to take action to ensure that there are fewer Aboriginal people in the criminal justice system (Goal 2), including fewer Aboriginal people on remand (Outcome 2.3.2). National Closing the Gap Agreement, targets 10 and 11.
[119] By 2031, Australia governments have committed to reduce the rate of Aboriginal adults held in incarceration by 15% (target 10) and reduce the rate of young people (10-17 years) held in incarceration by at least 30 (target 11).

that under *Burra Lotjpa Dunguludja,* the Government has committed to carrying out research on the impact of the bail reforms on Aboriginal people.[120] This research is currently being carried out by the Bail Data Working Group, chaired by the Crime Statistics Agency. We look forward to seeing the results of this research.

Over thirty years ago, the RCIADIC recommended that all governments should "revise any criteria which inappropriately restrict the granting of bail to Aboriginal people,"[121] and "legislate to enforce the principle that imprisonment should be utilised only as a sanction of last resort."[122] It is time for the government to stop paying lip service to its commitments and take action.

RECOMMENDATIONS

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

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

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

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

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

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

[120] AJA4 In Action: Impact of bail reforms | Aboriginal Justice
[121] Royal Commission into Aboriginal Deaths in Custody National Report' (1991), Recommendation 91(b), available at http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol5/5.html#Heading19
[122] Royal Commission into Aboriginal Deaths in Custody National Report' (1991), Recommendation 92, available at http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol5/5.html#Heading19

[…]

Public Health Issues

Criminalisation of public health issues - including mental illness, public intoxication and other drug dependencies - is a key cause of Victoria's growing prison population. VALS strongly believes that public health issues should be met with a public health response, and that a law enforcement approach is harmful, inherently discriminatory, costly and inefficient. Decriminalising public health issues would ensure that individuals receive the health support that they need and would not be further entrenched in a cycle of criminalisation and incarceration.

[…]

Drug Decriminalisation

VALS believes that, to the extent that the use of drugs is a problem in Victoria, it should be understood as a public health issue and not a criminal one. Our longstanding position, as with public intoxication and mental health issues, is that public health issues must be met with public health responses, not with criminalisation.

VALS has previously recommended the decriminalisation of cannabis in Victoria, as an important measure to reduce the disproportionate impacts of the criminal legal system on Aboriginal people and avoid unnecessary incarceration.[123] The Victorian Parliament made a number of important findings in the recent Inquiry into the use of cannabis in Victoria, which are highly relevant to this Inquiry's focus on the criminal legal system.[124] These include:

- That "[t]he harms that arise from the criminalisation of cannabis affect a larger number of people and have a greater negative impact than the mental health and other health harms associated with cannabis use."[125]
- That Victoria Police's cannabis cautioning program is inconsistently applied and is overly restrictive.[126]

[123] VALS (2020), *Submission to the Inquiry into the Use of Cannabis in Victoria*. Available at https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_the_use_of_Cannabis_in_Victoria/Submissions/S1398_-_Victorian_Aboriginal_Legal_Service.pdf.

[124] Parliament of Victoria, Legislative Council Legal and Social Issues Committee (2021), *Inquiry into the use of cannabis in Victoria*. Available at https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_the_use_of_Cannabis_in_Victoria/Report/LCLSIC_59-07_Use_of_cannabis_in_Vic.pdf.

[125] Ibid, p102.

[126] Ibid, p131.

- That Aboriginal people are "significantly overrepresented in sentencing statistics for minor cannabis offences compared to other Victorians"[127] and that Aboriginal people face particular trauma from interactions with the criminal legal system.[128]
- That criminal records for cannabis offences act as an obstacle to accessing housing, employment and other services, which raises the risk of further contact with the criminal legal system.[129]

These findings clearly support VALS' position that criminalisation of cannabis use in Victoria is harmful, particularly for Aboriginal people, and serves no reasonable public policy goal. We are deeply disappointed by the Andrews Government's moves to water down the strong recommendations these findings would have justified, and its response to the Inquiry's recommendations.[130] There is no need for further inquiries to investigate cannabis decriminalisation, which should be adopted as policy by the Victorian Government without delay.

Use of cannabis by Aboriginal people is slightly higher than by non-Aboriginal Australians. However, this gap has narrowed in recent years as the rate of use among Aboriginal Australians declines.[131]

Despite this, crime statistics show that there has been a growing police emphasis on this issue.[132]

- The number of incidents for drug use and possession involving Aboriginal people has risen by 86% since 2016 and 215% since 2012.
- This is substantially faster than the overall increase in recorded incidents (36% in the last five years; 76% since 2012) suggesting that drug issues in particular have seen an increasingly police-led response.
- The increase in drug use and possession incidents is much lower for non-Aboriginal people than Aboriginal people – 94% rather than 215% since 2012, and 42% rather than 86% since 2016.

This data makes it clear that the policing-led response to drug use in Victoria has a disproportionate effect on Aboriginal people. These contacts with police and the criminal legal system, which are unnecessary and deliver no significant public benefit, contribute to the unacceptable incarceration rate of Aboriginal people in Victoria.

---

[127] Ibid, p141.
[128] Ibid, p163.
[129] Ibid, p158.
[130] The Age, 5 August 2021, 'Andrews government quashes push to legalise cannabis in Victoria'. Available at https://www.theage.com.au/politics/victoria/andrews-government-quashes-push-to-legalise-cannabis-in-victoria-20210804-p58fq1.html.
7 News, 5 August 2021, 'Vic premier dismisses call to legalise pot'. Available at https://7news.com.au/politics/report-into-cannabis-use-in-victoria-due-c-3598003.
[131] Australian Institute of Health and Welfare, National Drug Strategy Household Survey 2019, Supplementary data table 8.1.
[132] Crime Statistics Agency, *Alleged offender incidents by Aboriginal and Torres Strait Islander Status – Tabular* Visualisation, Victoria – Principal offence. Accessed at https://www.crimestatistics.vic.gov.au/crime-statistics/latest-aboriginal-crime-data/alleged-offender-incidents-by-aboriginal-and-torres.

This is particularly so because of the way the police-led response to drug use interacts with Victoria's onerous bail regime. People arrested on drug charges – who, as noted above, are disproportionately likely to be Aboriginal – are often held in prison while awaiting trial for a charge which will not ultimately lead them to a custodial sentence.

- From 1 July 2016 to 30 June 2019, just 10.6% of proven cannabis possession charges resulted in custodial sentences.
- This is far fewer than the 29.4% which resulted in discharge, dismissal or adjournment.[133]

This phenomenon is not limited to cannabis charges. At June 2020:[134]

- *Sentenced* people in prison with drug offences as their most serious conviction were 13% of the prison population (21.7% of women, 12.5% of men)
- Among *unsentenced* people held in prisons, drug offences were the most serious charge for 17.8% of individuals (31.6% of women, 16.8% of men)

This is a clear indication that people charged with drug offences are denied bail out of proportion to the likelihood that they will ultimately receive a custodial sentence. A breakdown of these figures for incarcerated Aboriginal people is not available, but given the overall disproportion in the remanded population it can be presumed that the disproportionate denial of bail for drug charges is even more acute for Aboriginal people. These issues are particularly of concern in rural and regional Victoria, where it is more common that a Bail Justice will not be able to attend the police station, as discussed above.

Victorian courts sentence people to prison terms for drug charges too often. But it is crucial for this Committee to recognise that large numbers of people are held in prison over drug charges which, even under the existing harsh laws and approach to sentencing, do not warrant imprisonment. This makes drug criminalisation a significant contributor to unnecessary imprisonment, the disproportionate incarceration of Aboriginal people, and the skyrocketing remanded population in Victoria's prisons.

There is strong expert consensus around an alternative approach to drug use, which treats it as a public health issue and deals with substance use issues where necessary, without resorting to criminal punishment. In relation to cannabis, research has found that a number of therapeutic behavioural treatments, such as cognitive-behavioural therapy, contingency management and Motivational Enhancement Therapy, are the most effective way to manage, recover and rehabilitate from cannabis misuse.

At present, access to these treatments is very inconsistent and the use of public health approaches is highly discretionary. This is a particular concern because discretion from police and prosecutors typically leads to worse outcomes for Aboriginal people. In NSW, more than 80% of Aboriginal people

[133] Sentencing Advisory Council, *SACStat Magistrate's Court – Possess cannabis*. Accessed at https://www.sentencingcouncil.vic.gov.au/sacstat/magistrates_court/9719_73_1.7.html.
[134] Corrections Victoria, *Annual Prisoner Statistical Profile 2019-20*, Tables 1.10 & 1.11.

police dealt with for small-scale cannabis use were pursued through the courts, rather than given access to cautions and diversion programs, compared to 52% of the non-Aboriginal population.[135] The court system in Victoria does not enable equivalent data analysis, but case studies that VALS has presented show a similar pattern.

[…]

A more consistent public health approach would allow these opportunities for rehabilitation and therapeutic treatments to be taken, without creating further obstacles and pressures for Aboriginal people through criminalisation.

This approach to drug use could be facilitated by expanding the role of the Victorian Drug Court. The Drug Court provides access to a range of relevant services and takes a therapeutic approach to dealing with people whose offending was influenced by substance use. However, at present, Drug Court is available only to people who would be likely to receive a term of imprisonment. Drug Treatment Orders are imposed as an alternative to imprisonment, with a suspended custodial sentence alongside a treatment plan. Broadening the scope of Drug Court, including amending Drug Treatment Orders so that they do not need to be associated with a suspended prison sentence, would allow people charged with minor drug offences to access a rehabilitation-focused approach to dealing with their substance use issues. For Aboriginal people, access to this kind of therapeutic approach would also be improved by allowing Drug Treatment Orders to be a sentencing option in Koori Court, which they currently are not.

VALS also supports health responses such as supervised injecting services, as we believe that these services can save and transform lives. VALS stands with many other organisations in Victoria in supporting the establishment of a supervised injective service in the Melbourne CBD, embedded within a broader range of community health services such as mental health, housing, sexual health, oral health and allied health. Studies of injecting services around the world have shown that they are one of the most effective tools in combating the serious harm caused by drug dependence in our community.[136]

A report on decriminalisation by the University of NSW, National Drug and Alcohol Research Centre and Drug Policy Modelling Program found that decriminalisation of drug use, not limited to cannabis:

- "Reduces the costs to society, especially the criminal justice system costs;
- Reduces social costs to individuals, including improving employment prospects;
- Does not increase drug use;

[135] The Guardian, 10 June 2020, 'NSW police pursue 80% of Indigenous people caught with cannabis through courts'. Accessed at https://www.theguardian.com/australia-news/2020/jun/10/nsw-police-pursue-80-of-indigenous-people-caught-with-cannabis-through-courts.

[136] Commonwealth Department of Health (2005), *Needle and Syringe Programs: A review of the evidence.* Available at https://www1.health.gov.au/internet/publications/publishing.nsf/Content/illicit-pubs-needle-kit-evid-toc~illicit-pubs-needle-kit-evid-rev#10.

- Does not increase other crime."[137]

The Australian Lawyers Alliance (**ALA**) has also recently published a report endorsing a public health-led, harm minimisation response to drug use.[138] The ALA found that current drug policies in Australia are ineffective because criminalisation increases the dangers of drug use and limits opportunities for safe use and rehabilitation.

Victoria Police's new drug strategy issued in December 2020 takes some steps towards the need for a public health approach, recognising that "drug problems are first and foremost health issues."[139] However, the strategy still involves a too heavy focus on the role of policing and envisages a large role for Victoria Police in treatment, rehabilitation and community education functions, which would be better performed by other organisations with more relevant expertise. VALS is also concerned that the Drug Strategy appears to have been developed without consultation with Aboriginal community organisations, and contains no discussion of the particular impact that drug policing has on Aboriginal people in Victoria.

VALS is conducting further research into drug decriminalisation in 23 international jurisdictions, including a comparative analysis of what makes for an effective public health approach to drug use.

VALS will be publishing a paper on what Victoria can learn from these jurisdictions, and how to respond to the use of drugs in the community without relying on a criminal justice approach which is disproportionately affecting Aboriginal people.

RECOMMENDATIONS

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

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

[137] UNSW, National Drug & Alcohol Research Centre and Drug Policy Modelling Program (2017), *Decriminalisation of drug use and possession in Australia – a briefing note*. Accessed at https://www.parliament.vic.gov.au/images/stories/committees/lrrcsc/Drugs_/Submissions/164_2017.03.17_-_NDARC_-_submission_-_appendix_a.pdf.

[138] Australian Lawyers Alliance (2021), *Doing More Harm Than Good: The Need for a Health-Focused Legal Response to Drug Use.*

[139] Victoria Police (2020), *Drug Strategy 2020-25*. Accessed at https://www.police.vic.gov.au/drug-strategy.

Mental Health Responses

People with mental illness are routinely subjected to inappropriate policing responses in moments of crisis. This is a major contributor to the overrepresentation of people with mental illness in the Victorian prison population. Given that Aboriginal people suffer from mental health issues at far higher rates than the non-Aboriginal population, this is also a significant factor in the disproportionate incarceration of Aboriginal people.[140]

RECOMMENDATION

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

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

[…]

Sentencing

"Sentencing courts are key gatekeepers for prisons and are therefore, in part, accountable for the high rates of Aboriginal incarceration."[141] In Victoria, Aboriginal people are more likely to receive a prison sentence than non-Aboriginal people, and less likely to receive a community-based sentence.[142]

Sentencing laws and decisions have contributed to the growing number of Aboriginal people in prisons in Victoria in the following ways:

1. Sentencing courts fail to take into account the unique systemic and background factors affecting Aboriginal peoples when making sentencing decisions. This means that sentences are often not

[140] McCausland et al (2017), 'Indigenous People, Mental Health, Cognitive Disability and the Criminal Justice System', *Indigenous Justice Clearinghouse*. Accessed at https://www.indigenousjustice.gov.au/wp-content/uploads/mp/files/publications/files/research-brief-24-final-31-8-17.pdf.

[141] T. Anthony, A. Lachsz and N. Waight, 'The role of 're-storying in addressing over-incarceration of Aboriginal and Torres Strait Islander Peoples,' 17 August 2021, The role of 're-storying' in addressing over-incarceration of Aboriginal and Torres Strait Islander peoples (theconversation.com)

[142] In 2019-2020, Aboriginal people made up 7.39% of the average daily community corrections offender population, although they only represent 0.8% of the total population (2016 census). See Productivity Commission, *Report on Government Services 2021*. Part C, Section 8: Corrective Services Data Tables, Table 8A.8 (data on CCOs). In contrast, Aboriginal people represent 8.6% of the sentenced prisoner population as at June 2020. See Corrections Victoria, Annual Prisoner Statistical Profile 2019-2020, Table 1.3. See also, Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, (2017), p. 91.

appropriate and fail to take into account Aboriginal community-based options which can support rehabilitation and reintegration of the individual.

2. Sentencing courts fail to take into account the rights of dependent children when sentencing Aboriginal women. Being separated from a primary carer often means that school and housing is disrupted, leading to an increased likelihood of contact with the youth justice system.
3. Community Corrections Orders (**CCO**s) often involve onerous and culturally inappropriate conditions, and there is a significant lack of culturally appropriate support for Aboriginal people on CCOs, particularly those who have disabilities. Aboriginal people are less likely to complete a CCO than non-Aboriginal people,[143] and more likely to receive a prison sentence as a result of breaching an order.[144]
4. Mandatory sentencing removes judicial discretion and requires judicial decision-makers to impose prison sentences for particular offences, without taking into account the circumstances of the individual and the offence.

Aboriginal Community Justice Reports

Since 2017, VALS has been calling for key changes to the sentencing process for Aboriginal people, in order to improve sentencing outcomes and reduce over-incarceration of Aboriginal people in Victoria.[145] Currently, sentencing processes regularly fail to consider the unique systemic and background factors affecting Aboriginal people in the justice system. We firmly believe that two critical changes are required to address this issue:

1. Sentencing laws should be amended to require judicial decision-makers to consider the circumstances related to the person's Aboriginal background and to demonstrate the steps taken to ascertain relevant information;
2. Aboriginal Community Justice Reports should be funded on a long-term basis as a mechanism to ensure that judges have access to relevant information regarding a person's Aboriginal background and Aboriginal-specific sentencing options.

In 2017, VALS released its discussion paper, *Aboriginal Community Justice Reports: Addressing Over-Incarceration*. In this paper, VALS proposed trialling "Aboriginal Community Justice Reports… a pre-sentence, community written report, which aims to gather information about underlying impacts on any Aboriginal offender… The purpose of preparing such reports is to identify possible underlying drivers of the individual's offending, in particular, those that may relate to the impacts of trauma and

[143] In 2019-2020 in Victoria, 45.2% of Aboriginal people on CCOs completed their orders, versus 58.5% of non-Aboriginal people on CCOs. See Productivity Commission, *Report on Government Services 2021*, Part C, Section 8, Table 8A.21. See also, Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, (2017), pp. 254 and 113.

[144] Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, (2017) p. 113.

[145] VALS, *Aboriginal Community Justice Reports Addressing Over-Incarceration* (October 2017); VALS, *Aboriginal Considerations in Sentencing: Proposed Sentencing Act Amendment, Discussion Paper*, October 2017; VALS, *Submission to ALRC Inquiry on Incarceration of Aboriginal and Torres Strait Islander Peoples*, 2017; VALS, *Submission to the Sentencing Act Reform Project* (2020); VALS, *Submission to CCYP Inquiry, Our Youth Our Way*, October 2019.

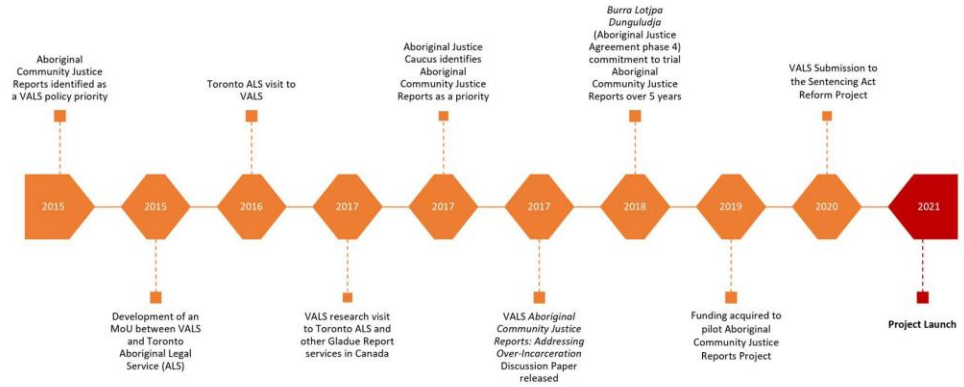
colonisation uniquely experienced as an Aboriginal person… [it] also provides a further voice to the offender, their family and community, and thus greater involvement in, and engagement with the justice system."[146]

In 2018, the Victorian Government and the Aboriginal Justice Caucus committed to piloting Aboriginal Community Justice Reports over the five-year period of *Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement Phase 4*; to "[t]rial Aboriginal Community Justice Reports modelled on Canada's Gladue reports to provide information to judicial officers about an Aboriginal person's life experience and history that impacts their offending; and to identify more suitable sentencing arrangements to address these underlying factors."[147]

VALS' 2020 *Submission to the Sentencing Act Reform Project* recommended that the Government "[s]upport self-determined initiatives to improve sentencing outcomes for Aboriginal people, including by directing dedicated funding from Burra Lotjpa Dunguludja to the project currently being carried out by VALS and its partners on Aboriginal Community Justice Reports."[148]

Additionally, in 2017, the Australian Law Reform Commission's report, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* recommended that "State and territory governments, in partnership with relevant Aboriginal and Torres Strait Islander organisations, should develop and implement schemes that would facilitate the preparation of 'Indigenous Experience Reports' for Aboriginal and Torres Strait Islander offenders appearing for sentence in superior courts."[149]

The below timeline outlines the development of the Aboriginal Community Justice Reports Project in Victoria:



[146] VALS, *Aboriginal Community Justice Reports Addressing Over-Incarceration* (October 2017) 3-4.
[147] *Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement Phase 4*, 39.
[148] VALS, *Submission to the Sentencing Act Reform Project* (2020) 12.
[149] ALRC, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (2017) 214.

In addition to Victoria, progress is being made in other jurisdictions towards improving sentencing processes for Aboriginal people:

- In 2017, the ACT Government committed to trial the use of 'Aboriginal and Torres Strait Islander Experience Court Reports' in sentencing courts in the ACT.[150]
- In Queensland, Five Bridges have been developing Narrative reports for use in Murri Courts in Maroochydore, Brisbane and Ipswich since 2015, and other justice groups in Queensland also do similar reports.
- In NSW, Deadly Connections is running the Bugmy Justice Project, which seeks to improve the sentencing processes and outcomes for Aboriginal people identified as defendants, by providing courts with additional information that addresses the personal and community circumstances of the individual Aboriginal person and relevant sentencing options.[151]

Sentencing decisions are regularly informed by pre-sentence reports (**PSR**s), which do not adequately consider cultural identity or community circumstances of Aboriginal people.[152] PSRs are prepared by Corrections and do not address systemic issues linked to Aboriginality, including intergenerational trauma, impacts of child removal and land dispossession, and Aboriginal-specific sentence options are rarely identified.[153] Furthermore, they are informed by the language and measurements of "risk" and "use a deficit metric to influence decisions on sentencing. Rather than identifying strengths, community corrections treat First Nations peoples' backgrounds and circumstances as a problem."[154]

To address this gap, VALS has been advocating for a statutory obligation requiring judicial decision-makers to take into account the unique systemic or background factors for Aboriginal people in sentencing. This requires much more than simply taking into account a "disadvantaged upbringing," as was the case in *Bergman (a pseudonym) v The Queen.*[155] It requires courts to provide space within the sentencing process to better understand an Aboriginal person's life and circumstances, including their "aspirations, interests, strengths, connections, culture, and supports of the individual, as well as the adverse impact of colonial and carceral systems on their life."[156]

This proposal draws on the Canadian federal *Criminal Code* which requires that sentencing courts take into account: "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be

[150] Michael Inman (Canberra Times) "ACT set to trial sentencing reports for indigenous offenders, like Canada's Gladue reports," 6 August 2017.
[151] Deadly Connections Australia, Bugmy Justice Project.
[152] S.M. Shepherd & T. Anthony (2018) Popping the cultural bubble of violence risk assessment tools, *The Journal of Forensic Psychiatry & Psychology*, 29:2, 211-220.
[153] Anthony, T., Marchetti, E. Behrendt, L. & Longman, C, 'Individualised Justice through Indigenous Community Reports in Sentencing,' (2017) 26(3) *Journal of Judicial Administration* 121, 135.
[154] T. Anthony, A. Lachsz and N. Waight, "The role of 're-storying' in addressing over-incarceration of Aboriginal and Torres Strait Islander Peoples," 17 August 2021.
[155] *Bergman (a pseudonym) v The Queen* [2021] VSCA 148.
[156] T. Anthony, A. Lachsz and N. Waight, "The role of 're-storying' in addressing over-incarceration of Aboriginal and Torres Strait Islander Peoples," 17 August 2021.

considered for all offenders, with particular attention to the circumstances of Aboriginal offenders."[157] In practice, this means that courts consider: (a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal person before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the person because of his or her particular Aboriginal heritage or connection.

Statutory reform has also been considered by the ALRC, which recommended in 2018 that sentencing legislation provide that, when sentencing Aboriginal and Torres Strait Islander people, courts take into account unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples.[158] VALS notes that the Department of Community Justice and Safety (**DJCS**) has been considering amendments to the *Sentencing Act 1991* (Vic) and strongly encourages DJCS to consider ALRC's proposal. We also note that the development of the new Youth Justice Act provides an important opportunity to require judicial decision-makers to consider the circumstances related to the child's Aboriginal background and to demonstrate the steps taken to ascertain relevant information.

Creating a statutory obligation is critical, but Section 3A of the *Bail Act 1977* (Vic)[159] has shown that statutory reform alone will not lead to systemic change; it must also be accompanied by practical reforms to ensure that judicial decision-makers have access to the necessary information to discharge their obligations.

Good Practice Model: Aboriginal Community Justice Reports

On 10th March 2020, VALS launched its Aboriginal Community Justice Reports (**ACJR**) Project.[160] The Project aims to reduce the overincarceration of Aboriginal people and improve sentencing processes and outcomes for Aboriginal defendants. Information in the Reports will include a more holistic account of individual circumstances, including as they relate to a person's community, culture and strengths and community-based options.

VALS is undertaking this Project, funded with an Australian Research Council grant, in partnership with the Australasian Institute of Judicial Administration, University of Technology Sydney and Griffith University. The Reports are modelled on Canada's Gladue Reports, and adapted for the Victorian context. In Victoria, 20 Aboriginal Community Justice Reports will be produced as part of

[157] Criminal Code RSC 1985, c C-46 s 718.2(e).
[158] ALRC, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, December 2017, Recommendation 6-1.
[159] Section 3A of the *Bail Act 1977* (Vic) provides that: "In making a determination…in relation to an Aboriginal person, a bail decision maker must take into account (in addition to any other requirements of this Act) any issues that arise due to the person's Aboriginality, including: (a) the person's cultural background, including the person's ties to extended family or place; and (b) any other relevant cultural issue or obligation.
[160] *Aboriginal Community Justice Reports Project: Improving sentencing outcomes and reducing overincarceration of Aboriginal people*, available at https://www.vals.org.au/unlocking-victorian-justice/

this pilot. Case works upport will be made available to each person who participates in order to provide support and care.

To be considered for an Aboriginal Community Justice Report, the following eligibility criteria must be met:

- The person must be Aboriginal and/or Torres Strait Islander;
- The matter must be listed:
  - For a plea hearing (matters that are listed for sentence appeal will not automatically be excluded from eligibility for the Project, but given the pilot will be producing only 20 reports, suitability for a report for a sentence appeal will be assessed on a case-by-case basis);
  - In the County Koori Court division or in the general list before a Judge who is eligible to sit in the Koori Court division;
  - At Melbourne or La Trobe Valley.
- The person must voluntarily consent to participating. The person whose matter is before the court should also be willing to participate in an interview after sentencing, for the purpose of researching the outcomes of the Report.

Suitability is assessed by Aboriginal Community Justice Report Project staff, situated in VALS' Community Justice Programs section. To enable assessment of suitability for an Aboriginal Community Justice Report:

- The lawyer must have an initial meeting with Aboriginal Community Justice Report Project staff;
- The person whose matter is before the court must have an initial meeting with Aboriginal Community Justice Report Project staff;
- There must be sufficient notice provided, to enable Aboriginal Community Justice Report Project staff to draft the report (at least 8 weeks). It is recommended that lawyers make a referral at the committal mention stage.

RECOMMENDATIONS

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

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

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

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

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

Women with Dependent Children

The number of women in prisons in Victoria has increased dramatically over the past decade.[161] Between 2017 and 2019, the number of women in prison almost doubled, and incarceration of Aboriginal women almost tripled.[162] As discussed elsewhere in this submission, key drivers in the rising incarceration rate of women include changes to the *Bail Act*,[163] over-policing and punitive approaches to parole and CCO supervision.

Criminalisation and over-incarceration of Aboriginal women – both on remand and serving sentences – directly affects the rights of children and has significant and inter-generational impacts for Aboriginal families and communities. The majority of women in Australian prisons are parents, with 85 per cent having been pregnant at some point in their lives, and 54 per cent having at least one dependent child.[164]

As noted above, the Bangkok Rules emphasis the need to develop and implement gender-specific diversionary and sentencing alternatives for women who have offended,[165] particularly in regards to non-custodial measures being implemented in order to avoid the separation of women from their families and communities.[166] Furthermore, the Bangkok Rules emphasise the need to avoid custodial sentences for women with dependent children except for serious or violent offences that continue to pose a danger; and only after taking into account the best interests of the child.[167] In the practice of

[161] Corrections Victoria, *Annual Prisoner Statistical Profile*, June 2019. Include specific reference.
[162] Corrections Victoria, *Annual Prisoner Statistical Profile*, June 2019. Include specific reference.
[163] In June 2019, 46% of women in Victorian prisons were on remand (unsentenced) as compared with 25% in 2007. Corrections Victoria, *Annual Prisoner Statistical Profile*, June 2019
[164] Australian Institute of Health and Welfare, *The Health of Australian Prisoners,* 2018, pp. 14 and 72.
[165] Rule 57 of the Bangkok Rules.
[166] Rule 58 of the Bangkok Rules.
[167] Rule 64 of the Bangkok Rules.

Victorian courts, however, magistrates currently only modify sentences on the basis of childcare responsibilities in exceptional circumstances.[168]

While custodial measures are generally sought to be avoided under the Bangkok Rules, the need to ensure appropriate measures of care for children is emphasised where a custodial sentence is imposed by the court.[169] In Victoria, studies indicate that information concerning dependent children and their needs are rarely presented in court by defence counsel and, where such information is presented, magistrates lack any guidelines concerning sentencing decisions that affect children. Issues pertaining to ensuring appropriate measures of care for children can often fall by the wayside as a result since children are not the 'core business' of the adult criminal legal system, despite evidence of inconsistent practice among magistrates adjourning sentences for a day so that arrangements can be made for the child(ren) affected.[170]

Imposing custodial sentences on mothers directly impacts dependent children, including by separating children from their mothers or exposing a child to an unsafe prison environment. Children of women who are in prison are more likely to have disrupted education, unstable housing and poor health, and all of these factors increase the risk of contact with the youth justice system and intervention by child protection.[171] Children of incarcerated parents are five to six times more likely to be involved in criminal behaviour than the average child.[172] Meanwhile, anecdotal evidence indicates that magistrates do not feel any responsibility for the consequences of sentencing decisions on children.[173]

Australia's international human rights obligations require the Victorian Government to consider the rights and the best interests of children whose mothers have been imprisoned. This includes the *Convention on the Rights of the Child*, which enshrines the right to family life and requires that the best interests of the child shall be a primary consideration in all actions concerning children.[174] According to the Committee on the Rights of the Child: "[a]lternatives to detention should be made available and applied on a case-by-case basis, with full consideration of the likely impacts of different sentences on the best interests of the affected child(ren)."[175] Under the Victorian *Charter on Human*

[168] Flynn, C. et al. (2016). Responding to the needs of the children of parents arrested in Victoria, Australia. The role of the adult criminal justice system. 49(3) Australian & New Zealand Journal of Criminology 351-369, pp. 361.
[169] Rules 2(2) and 64 of the Bangkok Rules.
[170] Flynn, C. et al. (2016). Responding to the needs of the children of parents arrested in Victoria, Australia. The role of the adult criminal justice system. 49(3) Australian & New Zealand Journal of Criminology 351-369, pp. 361-362.
[171] J Sherwood et al, *Reframing Space by Building Relationships: Community Collaborative Participatory Action Research with Aboriginal Mothers in Prison*, 2013, p.83, 85
[172] Rowland. M & Watts, A (2007) Washing State's: Effort to Reduce the Generational Impact on Crime. Corrections Today 69(4) 34-42, cited in A. Shlonsky et al, *Literature Review of Prison-based Mothers and Children Programs: Final Report* (2016). See Prison-based mothers and children programs | Corrections, Prisons and Parole
[173] Flynn, C. et al. (2016). Responding to the needs of the children of parents arrested in Victoria, Australia. The role of the adult criminal justice system. 49(3) Australian & New Zealand Journal of Criminology 351-369, pp. 362.
[174] Convention on the Rights of the Child, Articles 3(1) and 9.
[175] Committee on the Rights of the Child, Report and Recommendations of the Day of General Discussion on "Children of Incarcerated Parents" (2011), p. 6. See OHCHR | Children of incarcerated parents. Replace with reference to General Comment if there is one.

Rights and Responsibilities, the Victorian Government is also required to protect families and children.[176]

In the UK, the Parliament is considering sentencing reform to protect the right to family life of children whose mothers are in prison.[177] The reform will require that:

- judicial decision-makers consider the best interests of the defendant's dependent children, when making sentencing decisions;
- judicial decision makers demonstrate how the best interests of the child were considered when sentencing a primary carer of a dependent child; and
- judicial decision makers consider the impact of not granting bail on the defendant's children.

When making decisions concerning the best interest of the child(ren) that may be adversely affected by sentencing decisions, a further step should be taken to ensure that the institutional 'invisibility' of affected children is minimised to the greatest extent possible, by providing them the opportunity to express their views, interests and concerns during sentencing proceedings. Not only do the decisions made by Victorian courts in relation to adult sentencing predominantly overlook the best interests of children when making decisions concerning sentences, current practices by magistrates indicate a tendency to physically remove children from the proceedings altogether by removing them from the courtroom in an effort to 'protect' them. Conversely, the UNCRC requires that children be given the opportunity to speak and be heard, either directly or through a representative, during administrative and judicial decisions that affect them.[178]

To give effect to Australia's human rights obligations, the Victorian Government should amend the *Sentencing Act* to require judicial decision-makers to take into account the best interests of any dependent children and to demonstrate how they have discharged this obligation.

RECOMMENDATIONS

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

- Take into account the best interests of the defendant's children, particularly dependent children;
- Ensure the provision of adequate time to women with dependent children prior to beginning a custodial sentence to make necessary arrangements for dependent children;
- Permit children to be present during sentencing proceedings;

[176] Victorian Human Rights Charter 2006, Section 17.
[177] Judges must consider interests of child when sentencing mother, urges Committee - Committees - UK Parliament
[178] Articles 9(2) and 12 of the UNCRC.

- Permit children to express their interests, views and concerns, either directly or through a representative, during sentencing proceedings involving a parent.

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

[…]

Mandatory Sentencing

Under the *Sentencing Act 1991* (Vic), the Court must impose a custodial order for "Emergency worker harm offences," which include the following offences[179] committed against an "emergency worker" on duty:[180]

- intentionally causing serious injury in circumstances of gross violence against an emergency worker on duty;
- recklessly causing serious injury in circumstances of gross violence against an emergency worker on duty;
- causing serious injury intentionally against an emergency worker on duty;
- causing serious injury recklessly against an emergency worker on duty;
- causing injury intentionally or recklessly against an emergency worker etc on duty intentionally exposing an emergency worker to risk by driving if the emergency worker is injured, and
- aggravated intentionally exposing an emergency worker to risk by driving if the emergency worker is injured.

Additionally, amendments were made to the *Sentencing Act* in 2017, requiring courts to issue a custodial order (imprisonment, drug treatment order of a youth justice detention order) for Category 1 offences.[181] Custodial orders must also be made for Category 2 offences, unless certain circumstances exist.[182]

[179] Section 10AA *Sentencing Act 1991* (Vic) requires the court to impose a term of imprisonment for the following offences under the *Crimes Act 1958* (Vic): Causing serious injury intentionally in circumstances of gross violence (s. 15A), Causing serious injury recklessly in circumstances of gross violence (s. 15B), Causing serious injury intentionally (s. 16) and Causing serious injury recklessly (s. 17).
[180] The definition of "Emergency worker" includes custodial officers (including prisoner officers and police custody officers), emergency workers and youth justice custodial workers. Section 10AA, *Sentencing Act 1991* (Vic).
[181] See Sections 3 and 5(2G) *Sentencing Act 1991* (Vic).
[182] See Sections 3 and 5(2H) *Sentencing Act 1991* (Vic).

Similarly, the *Sentencing Act* provides for mandatory uplifting of certain offences[183] committed by a young person (under the age of 21), meaning that the young person cannot receive a youth justice detention order under the dual track youth justice system; they must be sentenced to adult prison.

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

- They erode the fundamental principle of an independent judiciary and discretion in sentencing;
- They increase incarceration rates, and are therefore more costly;[184]
- Mandatory sentencing is not an effective deterrent;
- They contradict the principle of proportionality and imprisonment as a last resort;
- Mandatory sentencing schemes have proven to be an ongoing driver of the over-incarceration of Aboriginal and Torres Strait Islander people. In this regard, mandatory sentencing contradicts the Victorian Government's commitment to addressing over-incarceration of Aboriginal people;[185]
- Mandatory sentencing for offences against emergency workers acts as a deterrent and disincentive for Aboriginal people to call on emergency and protective services to assistance in a time of crisis.

RECOMMENDATION

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

- Category 1 and Category 2 offences;
- Offences against "emergency workers";
- Category A and Category B "serious youth offences."

[…]

[183] A young person being sentenced for a "Category A serious youth offences" cannot access youth detention, unless exceptional circumstances exist. See Sections 3 and 32(2C), *Sentencing Act 1991* (Vic). A court must not impose a youth justice centre order or a youth residential centre order on a young person being sentenced for a "Category B serious youth offence" if they have previously been convicted of a Category A or Category B serious youth offence, unless exceptional circumstances exist. See Sections 3 and 32(2D) *Sentencing Act 1991*.

[184] Australian Law Reform Commission (ALRC), Report 133, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander peoples,* December 2018, 273.

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

Community Legal Education

Community Legal Education (**CLE**) is an essential tool in reducing contact with the criminal legal system for marginalised people in Victoria. A key driver of continuing contact with police and the legal system, and consequently of overincarceration, is people's uncertainty about their rights in the face of a complex and regularly changing legal landscape. The preventative role of CLE in helping people understand their legal situation and avoid involvement in the legal system complements our client work.

This has been a particularly important issue during the pandemic, with regular changes to legal restrictions and police powers that are not communicated consistently or clearly by the Government to Aboriginal communities. The provision of culturally competent community legal education is therefore crucial to improving Aboriginal people's experience with the justice system, as has been emphasised by the UN's Special Rapporteur on the Rights of Indigenous Peoples.[186]

CLE can prompt individuals to recognise that they have existing legal issues, with which VALS can assist. This empowers individuals with the knowledge that they have rights, and that they can access culturally competent legal assistance in realising and protecting those rights. CLE can assist individuals already caught up in these legal systems to navigate their way with more confidence, taking proactive steps to mitigate risks and achieve better outcomes. CLE also has an important role to play in the prevention space, such as avoiding COVID-19 fines to begin with. Finally, CLE can play an important role in improving VALS' practice, as well as informing policy and law reform. CLE provides an opportunity for the Victorian Aboriginal community to highlight the legal issues which are particularly impacting on them, and their views on current laws or practices.

As part of our Community Justice programming, VALS provides this community legal education to Aboriginal communities across Victoria. For example, VALS welcomed the Victorian Government's provision of funding for *Stronger me, Stronger us*, a CLE program relating to family violence and healthy relationships.[187] Our CLE work consists of information sessions around the state as well as a library of resources available to Aboriginal people and organisations.

However, our CLE work has been strained in the past year due to a series of *Omnibus Bills* and other legislative reforms, and changes to regulations, which have introduced rapid change across VALS' practice areas, along with logistical difficulties in running CLE across the state under pandemic restrictions.

---

[186] VALS (2021), *Building Back Better: Victorian Aboriginal Legal Service COVID-19 Recovery Plan*, p55. Available at https://www.vals.org.au/wp-content/uploads/2021/02/Building-Back-Better-Victorian-Aboriginal-Legal-Service-COVID-19-Recovery-Plan-February-2021-FOR-DISTRIBUTION.pdf.

[187] Victorian Government, 22 June 2021, 'Supporting Aboriginal Young People to Connect'. Accessed at https://www.premier.vic.gov.au/supporting-aboriginal-young-people-connect.

Maintaining and advancing Aboriginal people's knowledge of their legal rights and responsibilities is essential to minimising unnecessary contact with the justice system and reducing overincarceration. Sustainable, ongoing funding is crucial for us to continue operating effective, culturally safe CLE in a variety of formats to Aboriginal people around the state. Community Legal Education should also be made available in prisons, to help provide legal information to people who are particularly at risk of repeat contact with the criminal legal system, and funding should be made available to support this.

RECOMMENDATION

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

People with Cognitive Disabilities

Research indicates that persons with cognitive disabilities are significantly over-represented in the justice system in Australia. In 2011 the Victorian DJCS reported 42% of incarcerated men and 33% of incarcerated women had an acquired brain injury, compared to 2.2% of the general population.[188] A 2013 Victorian parliamentary inquiry reported that individuals with an intellectual disability were "anywhere between 40 and 300 per cent more likely" to be jailed than those without an intellectual disability.[189]

Aboriginal people are overrepresented in the justice system and among people with cognitive disabilities, meaning that the way criminal legal processes treat people with disability is of huge significance to Aboriginal people's individual and collective wellbeing.[190] In 2019-2020, 16.9% of criminal matters opened by VALS' Criminal Team involved clients with a disability, although this figure relies on individuals to have received a diagnosis and identify their disability. In reality, a higher number of our clients have disabilities, including undiagnosed and untreated disabilities.

In addition to the support they may need while in police custody, detailed above, people with cognitive disabilities need substantial assistance to navigate the criminal legal system. It can be very difficult for people with cognitive disabilities to understand proceedings in a criminal trial and get access to justice

[188] Martin Jackson et al, 'Acquired Brain Injury in the Victorian Prison System', Corrections Research Paper No 4, Department of Justice (2011) 22.
[189] Law Reform Committee, Parliament of Victoria, Inquiry into Access to and interaction with the Justice System by People with an Intellectual Disability and their Families and Carers (2013).
[190] McCausland et al (2017), 'Indigenous People, Mental Health, Cognitive Disability and the Criminal Justice System', *Indigenous Justice Clearinghouse*. Accessed at https://www.indigenousjustice.gov.au/wp-content/uploads/mp/files/publications/files/research-brief-24-final-31-8-17.pdf.

on the same terms as other people charged with offences. Additionally, individuals with cognitive disabilities face significant challenges in complying with their sentences, including both prison and community-based sentences.

Lack of Support for Clients with Acquired Brain Injury

Under section 80 of the *Sentencing Act*, individuals who are on a CCO and have an intellectual disability (as defined under the *Disability Act 2006*) are eligible for a Justice Plan. Justice Plans are prepared by the Department of Families, Fairness and Housing, and identify treatment services and specialised support to help them comply with the conditions of the Order.[191]

However, due to the narrow definition of intellectual disability under the *Disability Act*, many of VALS' clients who are in need of additional support are not eligible for a Justice Plan. This includes clients with an Acquired Brain Injury (**ABI**), as well as clients who have an intellectual disability that was not diagnosed before the age of 18 years. This issue was also identified by the Centre for Innovative Justice in its recent report on Enabling Justice for People with an Acquired Brain Injury.[192]

Although the term 'ABI' encompasses a broad range of injuries, common symptoms can include problems with concentration and memory, difficulties in planning and organising, confusion, mood swings, and changes in personality and behaviour that may be viewed as irritable and inappropriate. These symptoms can often make it harder to comply with the conditions on a CCO and increases the likelihood that the client will breach the order and end up with a prison sentence.[193]

Unfitness to Stand Trial

Avenues available to people with severe cognitive disabilities, include the statutory scheme for people found unfit to plead or stand trial. In Victoria, people deemed unfit to stand trial are still subject to a 'special hearing' to determine whether they did the act that comprises the offence – with no guarantee that they will understand the proceedings against them, which are meant to be conducted "as nearly as possible as if they were criminal trials".[194] In some cases, people found unfit to stand trial end up facing indefinite detention, including for periods longer than if they had been convicted in an ordinary trial.[195]

---

[191] Sentencing Advisory Council, 'Community Correction Order', https://www.sentencingcouncil.vic.gov.au/about-sentencing/community-correction-order

[192] Centre for Innovative Justice and Jesuit Social Services, *Recognition, Respect and Support: Enabling Justice for People with an Acquired Brain Injury*, September 2017, Recommendation 18.

[193] An offender who breaches a condition of a community correction order may be resentenced for the original offence and may face up to 3 months additional imprisonment for the breach. See section 83AD, *Sentencing Act (Vic)* 1991.

[194] Judicial College of Victoria, 'Special Hearings' paragraph 14. Accessed at https://www.judicialcollege.vic.edu.au/eManuals/CCB/29030.htm.

[195] NATSILS (2020), *Submission to the Disability Royal Commission's Criminal Justice Issues Paper*, p36. Available at https://disability.royalcommission.gov.au/system/files/submission/ISS.001.00157.PDF.

The number of people deemed unfit to plead or stand trial is generally low, particularly in comparison to the number of people with cognitive or intellectual disabilities in the prison system.[196] Clearly, unfitness to stand trial is not relevant to many people with disabilities going through criminal legal processes. For those who do come within the remit of the special hearings system, it provides no guarantee of procedural fairness or access to justice.

In 2017, VALS was a participant in the University of Melbourne's *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities* project. The project was built on the recognition that 'unfit to stand trial' provisions alone are not adequate to ensure people with cognitive disabilities have access to justice, and the principle that people should be supported to understand the process they are being subjected to wherever possible.

The research element of the project found a number of barriers to justice for people with cognitive disabilities, which mean they are not treated with procedural fairness, increasing the likelihood they will receive unjustified court outcomes and avoidable prison sentences. These include:

- inaccessible court proceedings that rely on complex language;
- the inconsistent availability of support through proceedings;
- legal services that are under-resourced and not necessarily prepared to respond to the access needs of persons with disabilities;
- long delays in proceedings involving accused persons with cognitive disabilities; and
- the 'criminalisation of disabilities', in which the environmental causes of difficult behaviour are ignored or played down, and/or disability is misinterpreted as deliberately difficult or defiant behaviour.[197]

VALS' role in the Unfitness to Plead project was to implement a 6-month Disability Justice Support Program, aiming to "optimise the participation of accused persons with cognitive disabilities in proceedings against them by focusing on the supports they may require to exercise legal capacity and access to justice on an equal basis with others."[198]

There was consensus among clients, their families, lawyers and support workers that the project delivered significantly better outcomes. Many clients served by the program were able to access support services rather than being given a custodial sentence. The program successfully bridged communications gaps between clients, lawyers, magistrates, police and court personnel. The support worker was also able to provide support beyond the legal process, thanks to their relationship with the clients and understanding of their disabilities, including referrals to other services or assistance in

[196] McSherry et al (2017), *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities*, p17. Accessed at https://socialequity.unimelb.edu.au/__data/assets/pdf_file/0006/2477031/Unfitness-to-Plead-Main-Project-Report.pdf.
[197] Ibid, p10
[198] Ibid, p30.

managing tasks that might otherwise compound the client's stress, such as paying bills and grocery shopping.[199]

A comprehensive costs analysis conducted by the research team confirmed significant short-term savings, with it being estimated that the long-term savings would be even greater. The research team published a detailed account of these findings with a full explanation of the costing's methodology.[200] In addition to the benefits of the support services, the report found that Victorian participants who were able to access Koori Court and the Assessment and Referral Court List were significantly better off. The supportive environment with the Elders and support worker present and the Magistrate sitting at the table with the client, assisted the client to feel less vulnerable throughout the hearing. The process was a conversation, without the confusing legal jargon, facilitating the client's ability to comprehend and actively participate in the process.[201]

The findings of the project strongly support our view that accused persons with cognitive disabilities should be provided with comprehensive support to understand and engage in the legal processes they are subject to. Legal support alone is inadequate, and a finding that someone is unfit to stand trial does not eliminate their right to have access to a fair process and the support they need to properly engage with it.

Aboriginal participants and lawyers from the two participating Aboriginal legal services identified that the success of the Disability Justice Support Program required the following:

- It must be delivered by an Aboriginal Community Controlled Organisation;
- It must be gender specific in its design;
- The support worker must be Aboriginal, or receive cultural training and work in partnership with an Aboriginal client service officer;
- Engagement must take into consideration historical distrust of social welfare services.[202]

This should be the basis of a renewed effort to improve access to justice for people with cognitive disabilities, building on the Disability Justice Support Program model. VALS and other organisations should receive funding to deliver these support services on an ongoing basis. Improving people with disabilities' experience of the criminal legal system protects their rights and will help to avoid continued growth in Victoria's prison population, by ensuring that people are connected with appropriate support services as an alternative to custodial sentences wherever possible.

[199] VALS (2020), *Royal Commission into Victoria's Mental Health System Supplementary Submission*, p6. Accessed at https://www.vals.org.au/wp-content/uploads/2020/08/Royal-Commission-into-Victorias-Mental-Health-System-Supplementary-Submission.pdf.
[200] McCausland et al (2017), *Cost Benefit Analysis of Support Workers in Legal Services for People with Cognitive Disability*. Available at https://socialequity.unimelb.edu.au/__data/assets/pdf_file/0003/2477046/Unfitness-to-Plead-Project-Cost-Benefit-Analysis.pdf.
[201] VALS (2020), *Royal Commission into Victoria's Mental Health System Supplementary Submission*, p7.
[202] Ibid.

RECOMMENDATIONS

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

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

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

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

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

[…]

Parole

Parole allows individuals serving a custodial sentence to serve part of the sentence in the community. When done effectively, parole plays a critical role in the rehabilitation and reintegration of incarcerated people, as it provides for supported transition from prison to the community,[203] which can in turn reduce recidivism.

[203] Research by the AIC indicates that incarcerated people who receive parole have significantly lower rates of recidivism or commit less serious offences than those released unsupervised. See Wan, W-Y, et al. (2014). Parole Supervision and Reoffending. Australian Institute of Criminology.. Available at https://www.aic.gov.au/sites/default/files/2020-05/tandi485.pdf

Since the reform of the Victorian parole system in 2015, parole has become harder to access, which is another factor contributing to the growing prison population.[204] The "tougher" parole system has had a disproportionate impact on Aboriginal people in prison, who are less likely to apply for parole than non-Aboriginal people, and also less likely to be released on parole.[205]

Significant reform is required to reverse the changes made in 2015 and establish a fair, transparent and equitable parole system that is genuinely committed to the rehabilitation and reintegration of incarcerated people. These reforms include:

- Replacing the discretionary adult parole system with automatic parole for certain sentences;
- Permitting time spent on parole to contribute to the head sentence, even if parole is cancelled;
- Amending the parole process to incorporate procedural fairness and natural justice;
- Investing in, and ensuring access to, culturally appropriate rehabilitation programs that are designed, developed and delivered by Aboriginal organisations;
- Ensuring that parole conditions are achievable and culturally appropriate;
- Investing in, and ensuring access to, culturally appropriate support for Aboriginal people on parole, including transitional housing and holistic support.

In 2015, the Victorian parole system was amended significantly to implement the recommendations of the Callinan Review.[206] Key changes included:

- Implementation of a discretionary parole system, whereby the onus is on incarcerated people to apply for parole. Prior to this, the presumption was that parole should be granted at the eligibility date, unless there was some compelling reason not to do so.
- A requirement that incarcerated people complete programs while in prison, in order to be eligible for parole, even if they have to wait for the programs to become available.[207]
- Tougher rules for people in prison who reapply for parole after having their parole cancelled for reoffending (including being convicted of the offence of breaching parole);[208]
- A two-layered review process for parole applications from "Serious Violent and Sexual Offenders."[209]

---

[204] VALS has previously indicated its concerns with the adult parole system. See VALS (2017). Submission to ALRC Inquiry, 2017; VALS (2011). Submission to SAC review of parole in Victoria, 2011.

[205] Evaluation of AJA2 found that 67% of Aboriginal offenders released from prison were not released on parole. See Nous Group, *Evaluation of the Aboriginal Justice Agreement—Phase 2: Final Report* (2012) [10.2.5]; Australian Law Reform Commission (2019), *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, pp.268-269.

[206] The Callinan review was an independent review commissioned by DJCS, following a number of high profile violent crimes committed by individuals who were on parole. The review resulted in 23 recommendations, all of which were accepted by the government.

[207] Adult Parole Board (2020). Parole Manual: Adult Parole Board of Victoria, Sections 5.3.5 and 4.7. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20%20Board%20-%20Parole%20Manual%202020.pdf.

[208] Corrections Amendment (Parole Reform) Act 2013, s11. Include legislative provision. Law passed in May 2014. See AG report.

[209] Corrections Amendment (Parole Reform) Act 2013, s10(2). Law passed in May 2014, See AG report.

The Callinan Review also recommended that the Adult Parole Board (**APB**) should continue to be excluded from the application of the Human Rights Charter,[210] and that the rules of natural justice should not apply to parole decisions, as was the case prior to the Review.[211]

Discretionary Versus Statutory Parole

The discretionary parole system – whereby people in prison are required to apply for parole rather than being automatically considered at their earliest possible date – creates an unnecessary barrier to parole, resulting in some people not applying for parole even though they are eligible. In 2019-2020, 152 people were eligible for parole in Victoria but did not apply.[212] This is another factor contributing to the growing prison population. Additionally, it means that some people in prison are released at the end of their sentence without ongoing support in the community.

In contrast to Victoria, the adult parole systems in NSW,[213] QLD[214] and SA[215] combine both statutory parole and discretionary parole. Statutory parole is also used in the UK, NZ and Canada.[216] Accordingly, people on short sentences are automatically released on parole on the date set by the court, without having to apply. Those on longer sentences must apply for parole under a discretionary system. In South Australia, statutory parole applies to people serving sentences of less than five years.[217] Individuals must accept parole conditions before they are released on parole, and in NSW and QLD there is a mechanism for over-riding court-ordered parole.[218]

[210] See Section 5(a) and (*c), Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2013*.
[211] Callinan Review, Recommendation 8. See Section 69(2) of the *Corrections Act 1986*.
[212] This represented 8% of the total number of incarcerated people who were eligible to apply for parole. In 2018-2019, 156 (8%) of incarcerated people who were eligible did not apply for parole, and in 2017-2018, there were 114. Adult Parole Board Victoria (2019). Annual Report: 2018-19, p. 24. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20Board%20Annual%20Report%202018-19.pdf.
[213] In NSW, people sentenced to 3 years or less are automatically released when the non-parole period expires, unless the State Parole Authority decides to revoke the automatic release. See *Crimes (Administration of Sentences) Act* 1999 (NSW), Section 158 and *Children (Detention Centres) Act* 1987 (NSW), Section 44.
[214] In QLD, incarcerated people sentenced to less than 3 years (and not a serious violent or sexual offence) are automatically released at the end of the non-parole period. See *Penalties and Sentences Act 1992* (Qld) s 160B(3).
[215] In South Australia, incarcerated people serving sentences of less than 5 years are generally released automatically at the end of the non-parole period. See C*orrectional Services Act 1982* (SA) s 66.
[216] In the UK, most incarcerated people serving a determinate sentence are now released automatically after expiry of one-half of their sentenced terms. See *Criminal Justice Act 2003* (UK) c 44, s 244. In NZ, incarcerated people with sentences of 2 years or shorter are automatically released after serving half of their sentence. Incarcerated people serving sentences of over 2 years become eligible for parole after serving one-third of their sentence (unless the court has imposed a longer minimum non-parole period). Naylor, B. and Schmidt, J. (2010), Do Prisoners have a Right to Fairness before the Parole Board? 32 Sydney Law Review 437-469, p. 440..
[217] C*orrectional Services Act 1982* (SA) s 66.
[218] For example, in NSW, an incarcerated person can request revocation, or the State Parole Authority can revoke court-ordered parole if the SPA decides that the offender is unable to adapt to normal lawful community life, or that satisfactory post-released accommodation or plans have not been made. See s. 222(1)(a)-(c) *Crimes (Administration of Sentences) Regulation 2014* (NSW), cited in ALRC Inquiry p. 307.

VALS strongly supports automatic parole for people serving sentences of less than five years imprisonment.[219] Automatic parole will increase access to parole for Aboriginal people,[220] who are more likely to be convicted of low-level offences and sentenced to shorter sentences.[221] However, an automatic parole must be accompanied by abolition of the parole revocation scheme and ensuring parole supervision is less punitive and more focused on rehabilitation.

RECOMMENDATION

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

Parole Revocation Schemes

In addition to the barriers created by the discretionary parole system, some people may be dissuaded from applying for parole because of the parole revocation system, whereby time on parole does not automatically count towards the head sentence if the parole order is cancelled, unless the APB[222] or the Youth Parole Board[223] directs otherwise. In 2019-2020, 54% of adults who had their parole cancelled did not have their time on parole counted towards their sentence.

According to an investigation by the Victorian Ombudsman in 2016, some incarcerated people were choosing not to apply for parole and instead serve the full sentence in prison because "they found the parole conditions to be too onerous and would rather spend extra time in prison than be released on parole and risk the chance of breaching parole and being reimprisoned."[224] As a result, people are being straight released back to the community without any supports and a much higher risk of recidivism.

[219] VALS (2019*), Submission to Australian Law Reform Commission Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, p42. Available at https://www.alrc.gov.au/wp-content/uploads/2019/08/39._victorian_aboriginal_legal_service_vals.pdf.

[220] See Australian Law Reform Commission (2019), *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, p. 303. Available at https://www.alrc.gov.au/wp-content/uploads/2019/08/final_report_133_amended1.pdf

[221] Australian Law Reform Commission (2019), *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, pp.268-269.

[222] Adult Parole Board (2020). Parole Manual: Adult Parole Board of Victoria, Section 7.6. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20%20Board%20-%20Parole%20Manual%202020.pdf..

[223] The Youth Parole Board has the power, if cancelling parole, to deduct the time or part of the time spent on parole (having regard to the extent and manner in which the young person complied with the parole order) in determining the unexpired portion of detention, see s. 460(7) of the *Children, Youth and Families Act 2005*.

[224] Victorian Ombudsman (2015)*, Investigation into the rehabilitation and reintegration of prisoners in Victoria,* p30. Available at https://assets.ombudsman.vic.gov.au/assets/Reports/Parliamentary-Reports/1-PDF-Report-Files/Investigation-into-the-rehabilitation-and-reintegration-of-prisoners-in-Victoria.pdf?mtime=20191217123824

In contrast to the situation in Victoria, the parole system in Queensland provides that time served on parole counts towards the head sentence.[225] This approach was also recommended by the ALRC Inquiry into Incarceration of Aboriginal and Torres Strait Islander People.[226]

VALS strongly recommends that the parole revocation scheme in Victoria be abolished.[227] We believe that this reform would lead to more Aboriginal people being released on parole, rather than being "straight released" back to the community without support. Provided there is effective and culturally appropriate support in place for Aboriginal parolees, parole offers a much better chance at successfully reintegrating back to the community rather than "straight release".

RECOMMENDATION

Recommendation 33. The Victorian Government should repeal Section 77C of the *Corrections Act 1986* (Vic) and adopt a new provision which provides that time spent on parole, before a parole order is cancelled, counts as time served.

Membership of the Parole Board

The Adult Parole Board is established under Section 61 of the *Corrections Act 1986* (Vic)[228] and consists of members appointed by the Government, including current and retired judicial officers, lawyers with at least 10 years' experience and community members. There are currently 32 members of the Adult Parole Board, including 15 community members.[229] The Board includes an Aboriginal Elder, although this is not required under the Act. Board panels normally comprise a presiding divisional chairperson, a community member and a full-time member.[230]

[…]

According to the 2019-2020 Annual Report of the Adult Parole Board, "the experience and background of the community members include:

[225] Sofronoff (2016), *Queensland Parole System Review: Final Report*, p300. Accessed at https://parolereview.premiers.qld.gov.au/assets/queensland-parole-system-review-final-report.pdf.
[226] Australian Law Reform Commission (2019), *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples,* Recommendation 9(2).
[227] VALS (2019*), Submission to Australian Law Reform Commission Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, p44. Available at https://www.alrc.gov.au/wp-content/uploads/2019/08/39._victorian_aboriginal_legal_service_vals.pdf.
Australian Law Reform Commission (2019), *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples,* Recommendation 9(2)
[228] s. 61 of the *Corrections Act 1986* (Vic).
[229] Adult Parole Board Victoria (2020). Annual Report: 2019-20, p. 13. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20Board%20Annual%20Report%202019-20.pdf.
[230] Ibid.

- People who have been or have supported victims of crimes
- Retired police officers
- An Aboriginal Elder
- Mental health service provision
- Public administration
- Members of other decision-making Boards at tribunals, hospital administration, education and child protection."[231]

Whilst VALS acknowledges that.. the APB… includes one Aboriginal Elder, we believe that this position should be provided for in legislation. We also support additional representation from the Aboriginal community…

RECOMMENDATION

Recommendation 34. The Victorian Government should amend the *Corrections Act 1986* (Vic) to include a legislative requirement to have Aboriginal people on the Adult Parole Board… Membership of the Parole Boards must include people with professional backgrounds and with relevant lived experience.

Culturally Appropriate Rehabilitation Programs in Prisons

As noted above, incarcerated people are required to complete certain offending behaviour programs whilst in prison, in order to be eligible for parole. However, there is a shortage of programs, which means that there are long waiting lists for program participation, and in some cases, inability to access programs has prevented people in prison from applying for parole.[232] Similarly, there are long waiting lists for screening and assessment to determine program suitability and treatment needs.[233]

The Adult Parole Board Manual provides some discretion in granting parole where an individual has not completed the required programs. However this does not include situations where the program has not been completed because it is not available.[234]

[231] Adult Parole Board Victoria (2020). Annual Report: 2019-20, p. 13. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20Board%20Annual%20Report%202019-20.pdf.

.

[232] Victorian Ombudsman (2015), *Investigation into the rehabilitation and reintegration of prisoners in Victoria,* p30. Available at https://assets.ombudsman.vic.gov.au/assets/Reports/Parliamentary-Reports/1-PDF-Report-Files/Investigation-into-the-rehabilitation-and-reintegration-of-prisoners-in-Victoria.pdf?mtime=20191217123824

[233] Ibid, p52.

[234] Adult Parole Board Manual Section 4.7 - The Board would only consider paroling an incarcerated person that had been assessed as requiring treatment but has not done that treatment if there were significant factors to mitigate the risk to the community.

Aboriginal people are disproportionality affected by the requirement to complete offending behaviour programs for the following reasons:

- There are not enough culturally appropriate programs for incarcerated Aboriginal people.[235] This is an ongoing issue, but it is becoming even more accentuated due to restrictions on programs arising from the COVID-19 pandemic.[236]
- Incarcerated Aboriginal people are also more likely to serve shorter sentences,[237] which makes it harder to access pre-release programs because of long waiting times. Similarly, they are more likely to receive time-served sentences,[238] which means that they are not able to access programs as the entire sentence is served on remand.[239]

VALS has previously called for investment in culturally appropriate rehabilitation programs for incarcerated Aboriginal people.[240] This gap has also been identified by the Australian Law Reform Commission,[241] and by the Commonwealth Government in its *Prison to Work* Report in 2016.[242] Programs must be designed, developed and delivered by Aboriginal people, and supported by prison staff who are trained in cultural awareness.[243] Additionally, they must be trauma-informed, especially programs being delivered to Aboriginal women.[244]

RECOMMENDATIONS

Recommendation 35. The Victorian Government should amend the *Corrections Act 1986* (Vic) and the Adult Parole Board Manual, to provide that parole cannot be denied on the basis that a required program has not been completed, where this program is unavailable or unsuitable for Aboriginal people.

[235] There are positive examples such as Dilly Bag, but overall the system is under strain. See also VO report, indicating 5 programs as at 2015. See p. 82. The Prison to Work Report also sets out

[236] Department of Justice and Community Safety, *Changes to coronavirus (COVID-19) restrictions: Factsheet for stakeholders*, 23 November 2020; Department of Justice and Community Safety, *Youth Justice coronavirus (COVID-19) update: Factsheet for stakeholders.*

[237] Australian Law Reform Commission (2018). Pathways to Justice – Inquiry into the Incarceration of Rate of Aboriginal and Torres Strait Islander Peoples (ALRC Report 133) at 9.16-9.2. Available at https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/.

[238] Sentencing Advisory Council (2020), *Time Served Prison Sentences in Victoria*. Available at https://www.sentencingcouncil.vic.gov.au/sites/default/files/2020-02/Time_Served_Prison_Sentences_in_Victoria.pdf.

[239] While there are some programs available for remandees, they are much more limited and delivery is inconsistent. See Victorian Ombudsman (2015), p50.

[240] VALS (2014), *Response from the Victorian Aboriginal Legal Service: Victorian Ombudsman Investigation into the rehabilitation and reintegration of prisoners in Victoria – Discussion Paper.* (

[241] Australian Law Reform Commission (2019), *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander People*, pp. 285-301.

[242] The Prison to Work report highlighted the importance of cultural competence in programs; coordination in the delivery of throughcare and post-release services; and the need for an increased focus on the delivery of programs to women in prison—with particular emphasis on Aboriginal and Torres Strait Islander women in prison.

[243] VALS (2019*), Submission to Australian Law Reform Commission Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, p37. Available at https://www.alrc.gov.au/wp-content/uploads/2019/08/39._victorian_aboriginal_legal_service_vals.pdf..

[244] Australian Law Reform Commission (2019), *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander People*, p. 297.

Recommendation 36. The Victorian Government should work with Aboriginal organisations to ensure that Aboriginal people who are incarcerated, particularly Aboriginal women and girls, have access to culturally safe rehabilitation programs. Funding must be given to Aboriginal organisations to design and deliver these programs.

Lack of Stable Accommodation for Parolees

Similar to bail, access to housing is a major factor preventing people from accessing parole. In 2019-2020, absence of suitable accommodation was one of the factors considered by the Board in 63% of cases in which parole was denied.[245] Aboriginal people are disproportionality impacted by housing issues, particularly homelessness, inadequate housing and overcrowding.[246]

Dedicated transitional housing for individuals exiting prison in Victoria – either on parole or at the end of their sentences – is woefully inadequate. According to an investigation by the Victorian Ombudsman in 2015, the transitional housing available through Corrections Victoria "would at best provide supported transitional housing for 1.7% of released prisoners."[247] In June 2019, over half of the prison population in Australia expected to be homeless when discharged from prison.[248] In 2019-2020, 51% of people exiting prison who accessed specialist homelessness services, accessed those services in Victoria.[249]

Transitional housing for Aboriginal people exiting prison in Victoria is even more limited. Through the Baggarrook program, VALS and Aboriginal Housing Victoria provide transitional housing and support for 6 Aboriginal women and their families.[250] A new facility is also being developed by Warrigunya Aboriginal and Torres Strait Islander Corporation in Gippsland, which will provide safe, affordable post-release housing for 12 Aboriginal men.[251] There are also several residential rehabilitation centres

[245] Adult Parole Board Victoria (2020). Annual Report: 2019-20, p. 25. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20Board%20Annual%20Report%202019-20.pdf.. The Youth Parole Board has also indicated that housing remains an issue. See YPB Annual Report.

[246] Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2016—Report* (2016). Victorian Parliamentary Inquiry into Homelessness, p. 58.

[247] Victorian Ombudsman (2015), *Investigation into the rehabilitation and reintegration of prisoners in Victoria,* p107. Available at https://assets.ombudsman.vic.gov.au/assets/Reports/Parliamentary-Reports/1-PDF-Report-Files/Investigation-into-the-rehabilitation-and-reintegration-of-prisoners-in-Victoria.pdf?mtime=20191217123824p. 107.

[248] AIHW (2019), The Health of Australia's Prisoners 2018, p. 24.

[249] AIWH, Specialist Homelessness Services Annual Report.

[250] The Baggarrook program combines transitional housing and holistic support for Aboriginal women as they transition from prison. Housing is provided by Aboriginal Housing Victoria and holistic support is provided by VALS and allied organisations, as well as DHHS and Corrections Victoria. The program is funded by Corrections Victoria. See Baggarrook – Victorian Aboriginal Legal Service (vals.org.au)

[251] Warrigunya News, June 2021.

for Aboriginal people managing alcohol and/or drug dependencies,[252] however these are usually short-term and not specifically for people leaving prison.

As recommended by the Parliamentary Inquiry into Homelessness in March 2021, the Victorian Government must provide additional transitional housing for people leaving custodial settings.[253] VALS recommends further investment in Aboriginal controlled transitional housing and support, building on Baggarrook and the Wulgunggo Ngalu Learning Place, which provides residential support for Aboriginal men on Community Corrections Orders.

RECOMMENDATION

Recommendation 37. The Victorian Government must work with Aboriginal organisations to develop and provide culturally appropriate transitional housing and support for Aboriginal people exiting prison.

Natural Justice and Procedural Fairness

In both the adult and youth justice parole systems in Victoria, principles of procedural fairness and natural justice, as well as the *Charter of Human Rights and Responsibilities 2006*, do not apply to decisions of the parole boards.[254] This is not the case in jurisdictions such as NSW, QLD, ACT, UK, NZ, and Europe, where reforms have led to a more transparent and fair system in which individual rights derived from natural justice are provided for in legislation and/or regulations, and upheld in court.[255]

VALS strongly believes that there is a need for greater transparency, accountability and fairness in the parole process.[256] As VALS noted in its 2011 submission to the SAC review of the adult parole framework, people should be "afforded the same procedural fairness granted in criminal proceedings.

[252] Ngwala Willumbong Aboriginal Corporation runs the following Recovery Centres: Yitjawudik Men's Recovery Centre, Galiamble Men's Recovery Centre and Winja Ulupna Women's Recovery Centre. For young Aboriginal people, there is also Bunjilwarra (Koori Youth Alcohol and Drug Healing Service) and Baroona Youth Healing Centre. If an Aboriginal person is serving a Community Corrections Order after finishing their prison sentence, they may also be able to access Wulgunggo Ngalu Learning Place.

[253] Parliamentary Inquiry into Homelessness, Recommendation 22. Available at https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Homelessness_in_Victoria/Report/LCLSIC_59-06_Homelessness_in_Vic_Final_report.pdf.

[254] S. 69(2) of the Corrections Act 1986, s. 69(2); ; s. 449(2) of the *Children, Youth and Families Act 2005*; and Adult Parole Board (2020). Parole Manual: Adult Parole Board of Victoria, Section 3.3. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20%20Board%20-%20Parole%20Manual%202020.pdf.

[255] In 1988, "the European Court of Human Rights held that a refusal to grant parole is a deprivation of liberty and that, in England, natural justice is required for parole decisions." See Naylor, B. and Schmidt, J. (2010), Do Prisoners have a Right to Fairness before the Parole Board? 32 Sydney Law Review 437-469, p. 455.

[256] See VALS Submission to Review of the Adult Parole Board, VALS submission to ALRC Inquiry?

In both proceedings, decisions impacting on an individual's rights to liberty are at stake and therefore compel the employment of procedural fairness."[257]

Incorporating procedural fairness into the *Corrections Act* 1986 (Vic) and the new Youth Justice Act will increase community and incarcerated people's confidence in the parole process, increase incarcerated people's acceptance of parole board decisions, encourage positive behaviour by them and lead to better outcomes for incarcerated Aboriginal people.

Without procedural fairness and natural justice, there is also an increased risk of discriminatory practices that could impact on Aboriginal people, people with disabilities, and people with other characteristics that increase their vulnerability to discriminatory practices. Safeguards are critical to protect against systemic and institutional racism, including racialised understandings of risk.

Procedural Fairness

Procedural fairness is a core component of administrative law and includes:

- the right to be informed of and understand the case against you;
- the right to be heard and respond to the case against you;
- the right to have a decision affecting you made without bias;
- the right to be informed of and understand a decision in a case against you; and
- the right to appeal a decision in a case against you.

These principles ensure that decisions affecting the rights, interests or legitimate expectations of individuals are fair, transparent and equitable. The Victorian Human Rights Charter enshrines these principles as they relate to criminal proceedings.[258]

The Parole Decision-Making Process

The parole process is set out in the Manuals for the Adult Parole Board and the Youth Parole Board, but it is not enshrined in legislation. In both jurisdictions, the overarching purpose of parole is to promote public safety by supervising and supporting the transition of people from custody back into the community in a way that seeks to minimise their risk of reoffending, in terms of both frequency and seriousness, while on parole and after they complete their sentence.[259] In the youth justice system, the purpose of parole also includes support for the young person's continued rehabilitation.[260]

---

[257] VALS (2011). Review of Victoria's Adult Parole Framework – Submission to the Sentencing Advisory Council.
[258] ss. 24-25 of the *Charter of Human Rights and Responsibilities 2006*.
[259] Adult Parole Board (2020). Parole Manual: Adult Parole Board of Victoria, p. 7. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20%20Board%20-%20Parole%20Manual%202020.pdf. Youth Parole Board (2020). Annual Report 2019-2020, p. 15. Available at https://files.justice.vic.gov.au/2021-06/YPB_Annual_Report_2020_0.pdf.
[260] Youth Parole Board (2020). Annual Report 2019-2020, p. 15. Available at https://files.justice.vic.gov.au/2021-06/YPB_Annual_Report_2020_0.pdf.

In the adult parole system, the parole decision making process includes both an application phase and a decision-making phase:

- Parole application: incarcerated people must apply for parole 12 months prior to their earliest eligibility date. Following the application, Corrections Victoria prepares a report which is considered by the APB, along with the incarcerated person's application. The APB can either deny or defer the application, or request a Parole Suitability Assessment.
- Parole decision: the APB considers the Parole Suitability Assessment Report and the incarcerated person's parole application. They may also interview them, although this is the exception rather than the rule,[261] and will take into account any victims' statements. The paramount consideration in deciding whether or not to grant parole is safety and protection of the community.[262] The APB Manual and Annual Report sets out a non-exhaustive list of factors that are also considered.[263] A two-tiered decision-making process exists for 'Serious Violent Offenders or Sexual Offenders'.[264]

In the youth justice system, the YPB is established under the CYFA, but the process for granting parole and any guidance on how the YPB exercises its discretion is not provided for in the public domain, other than a brief overview in the YPB Annual Reports. VALS is of the view it is critical that the new Youth Justice Act include more detailed provisions relating to youth parole.

Currently, parole for young people is automatically considered by the Youth Parole Board, which has discretion to grant parole at any time (subject to limited exceptions).[265] In practice, the YPB will set a review date part way through the young person's sentence. At the review, the YPB receives a report from the manager of the youth justice centre setting out how the young person has been going during their sentence and a recommendation on whether they should be granted parole.[266]

---

[261] Adult Parole Board (2020). Parole Manual: Adult Parole Board of Victoria, Section 5.3. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20%20Board%20-%20Parole%20Manual%202020.pdf.

[262] s. 73A of the *Corrections Act 1986*.

[263] The factors include: the sentence imposed by the court including any comments by the court about parole and rehabilitation; psychiatric or psychological reports available to the court when it imposed the sentence; victim impact statements provided to the sentencing court; the nature and circumstances of the offence for which the incarcerated person is serving a sentence; the incarcerated person's criminal history, including performance on past parole orders or community-based orders' a submission received from a victim of the prisoner; the outcome of formal risk assessments conducted for the incarcerated person; whether the incarcerated person has undertaken treatment or programs and, if so, formal reports of their performance; psychiatric or psychological reports requested by the Board; whether proposed accommodation is suitable and stable; the incarcerated person's behaviour in prison, including outcomes of random drug tests.

[264] Adult Parole Board Victoria (2020). Annual Report: 2019-20. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20Board%20Annual%20Report%202019-20.pdf..

[265] CYFA. Exceptions are: where a young person has been sentenced to a term of imprisonment of over 12 months or with a non-parole period by a higher court and has subsequently been transferred to a youth justice centre, or; where a young person is subject to a mandatory minimum youth justice centre order imposed by a higher court for an assault against an emergency or custodial worker. In both cases, the Board must not release the young person on parole before the expiry of the relevant period or term. There are also some other very limited circumstances in which the Board's discretion to grant or cancel parole is curtailed in the context of terrorism-related offending.

[266] See Parole in the youth justice system | Department of Justice and Community Safety Victoria.

Furthermore, the YPB Annual Report indicates that in carrying out its functions, the Board:

- interviews young people in detention either at the request of centre management, a young person, or on the Board's own initiative;
- receives and considers case histories, summaries of offences, outcomes of risk assessments using validated tools and reports on young people's progress in custody and on parole to assist in their decision-making;
- requests and considers special reports and court documents, for example, court transcripts, victim impact statements, school reports, police summaries, psychiatric and psychological reports;
- hears from victims and/or their families;
- may warn a young person who is demonstrating non-compliance or problematic behaviour in a Youth Justice Centre that their behaviour is delaying or even jeopardising their prospects of being granted parole.[267]

The YPB Annual Report sets out a range of factors that are considered by the Board when making decisions concerning parole.[268]

The Right to be Informed of and Understand the Case Against You

In both the adult and youth justice parole systems, individuals do not have the right to view or receive copies of reports submitted about them to the APB/YPB. This includes reports from Corrections and Youth Justice officers, as well as other reports that may be considered by the APB when deciding whether to request a Parole Suitability Assessment and whether to grant parole. Additionally, information provided to the APB through interviews with prison staff is not shared with the incarcerated person.

[267] Youth Parole Board (2020). Annual Report 2019-2020, p. 16. Available at https://files.justice.vic.gov.au/2021-06/YPB_Annual_Report_2020_0.pdf

[268] The factors considered by the Board in making its decisions include: the young person's age and interests; the nature and circumstances of the offence; the young person's criminal history, outstanding charges, and compliance with any previous community-based orders; comments by the sentencing court; interests of or risk to the community; capacity for parole to assist rehabilitation; family and community support networks; reports, assessments and recommendations made by medical practitioners, psychologists and psychiatrists, custodial staff, parole officers and support agencies; submissions from the young person, their family and friends; and from victims and police informants.

In contrast, the parole systems in NSW, ACT,[269] QLD,[270] NZ,[271] UK[272] and Canada[273] provide for an incarcerated person to access all information that is being considered by the relevant parole authorities, subject to safety and security considerations. For example, in the ACT, the parole decision-making process includes an initial inquiry, following by a hearing if the parole authority decides not to grant parole at the inquiry stage.[274] The incarcerated person is given written notice of the hearing and is provided with copies of any report or other document that will be considered by the Board in deciding whether or not to grant parole.[275] The incarcerated person is invited to make a submission or appear at the hearing.[276]

VALS strongly recommends that Victoria follows the approach taken in these jurisdictions and creates a statutory right to access all information used by the Board to make a decision regarding parole, subject to limited exceptions. Relevant documents must be provided in a timely manner, so that incarcerated people have adequate time to consider the material and respond. Transparency in the parole decision-making process will increase incarcerated people's confidence in the parole process and acceptance of decisions by the Parole Boards.

The Right to be Heard and Respond to the Case Against You

The APB regularly interviews incarcerated people as part of the parole decision making process, but there is no right to appear in person before the APB. Even if the Board does interview the incarcerated person, the individual is not in a position to respond fully to the case against them if they have not previously been provided with all relevant documents and given appropriate time and support to prepare for the interview. Moreover, legal representatives do not have standing before the Parole board, and VALS is not funded to provide advice and support to people in prison regarding their parole applications.

---

[269] *Crimes (Sentence Administration) Act 2005* (ACT) s 127.
[270] The Parole Board first forms a preliminary view. If the Board forms the view that parole should not be granted, the Board informs the incarcerated person in writing and discloses all relevant information and materials to the incarcerated person. The incarcerated person then has 14 days to submit additional information or make further submissions, before the Board reconsiders the application. See *Parole Board Queensland: Parole Board Manual* (2019), p. 16.
[271] *Parole Act 2002* (NZ) s 13. The Board must take all reasonable steps to ensure that the information received by the Board on which it will make any decision relating to an offender is made available to the offender—(a) at least 5 working days before the relevant hearing; or (b) if that is not possible, as soon as practicable before the hearing.
[272] Incarcerated people in the UK receive a dossier containing the documents going to the parole board. There is provision for withholding information if disclosure would adversely affect: (i) national security; (ii) the prevention of disorder or crime; or (iii) the health or welfare of the incarcerated person or any other person. Withholding of the information must be necessary and proportionate in the circumstances. See Parole Board Rules 2019, Rules 16-17
[273] *Corrections and Conditional Release Act*, SC 1992, c 20, s 141. At least fifteen days before the day set for the review of the case of an offender, the Board shall provide or cause to be provided to the offender, in writing, in whichever of the two official languages of Canada is requested by the offender, the information that is to be considered in the review of the case or a summary of that information.
[274] Crimes (Sentence Administration) Act 2005, (ACT) ss. 125-127.
[275] Crimes (Sentence Administration) Act 2005, (ACT) s. 127(3)(b).
[276] Crimes (Sentence Administration) Act 2005, (ACT), s. 127(2)(c).

In the Youth Justice parole system, the young person attends an interview on the day they are being released on parole, but they do not appear in person before the Board as part of the decision-making process.[277] They do not have a right to legal assistance or representation as part of the parole process.

The right to appear before the parole authority has been incorporated into other jurisdictions, both in Australia and abroad.[278] This means that incarcerated people are able to address any inaccuracies in the documents being considered by the parole authority. For this right to be effective however, it is critical that incarcerated people are able to access relevant support in preparing their submissions and have the right to be represented by a lawyer. This is the case in the ACT,[279] South Australia[280] and Canada,[281] which provide for a statutory right to legal representation at parole hearings. In NZ, incarcerated people are entitled to be represented by a lawyer, with leave of the board,[282] and in NSW, incarcerated people can access legal representation through Legal Aid and NSW ALS, although they do not have a statutory right.

As stated previously, VALS believes that "the right to appear before the board is central to the notion of positive engagement whereby the prisoner is involved in the decision-making process and is therefore more likely to help arrive at an informed and well-tailored plan for conditional release, or alternatively be more accepting of the decision of the Board if they decide not to grant parole."[283]

Given recent reports by IBAC and the Victorian Ombudsman – relating to serious misconduct by prison staff and challenges with the disciplinary process – we also believe that it is critical that incarcerated people in Victoria have the opportunity to test the accuracy of information before the Board. High illiteracy rates amongst incarcerated people[284] mean that access to legal assistance and representation is essential to ensure that incarcerated people are able to participate fully in this process.

The Right to be Informed of and Understand a Decision in a Case Against You

The right to be informed of and understand the parole decision requires both transparency in the criteria on which a decision is made, as well as the right to receive detailed reasons for the decision by the parole authority.

---

[277] Youth Parole Board (2020). Annual Report 2019-2020, p. 18. Available at https://files.justice.vic.gov.au/2021-06/YPB_Annual_Report_2020_0.pdf

[278] s. 209 of the *Crimes (Sentence Administration) Act 2005* (ACT); s. 140 of the *Crimes (Administration of Sentences) Act 1999* (NSW), although limited to review hearings (s. 137C(2)); s. 77(2)(c) of the *Correctional Services Act 1982* (SA); s. 189 of the *Corrective Services Act 2006* (Qld)(if leave is granted);s.72(2) of the *Corrections Act 1997* (Tas) (if leave is granted).

[279] s. 209(a) of the *Crimes (Sentence Administration) Act 2005* (ACT).

[280] *Correctional Services Act 1982* (SA) s 77(3).

[281] *Corrections and Conditional Release Act*, SC 1992, c 20, s 140(7)–(9).

[282] *Parole Act 2002* (NZ) s 49(3).

[283] VALS (2011), *Review of Victoria's Adult Parole Framework: Submission to the Sentencing Advisory Council,* p10. Available at https://balitngulu.org.au/assets/2015/06/Review-of-Victoria's-Adult-Parole-System.pdf.

[284] Kendall & Hopkins (2019), 'Inside out literacies: literacy learning with a peer-led prison reading scheme', *International Journal of Bias, Identity and Diversities in Education*.

As noted above, the purpose of parole and the criteria that guide the decision-making process of the APB and the YPB in Victoria are now publicly available.[285] In the adult system, the paramount consideration in deciding whether or not to grant parole is the safety and protection of the community.[286] Other factors take into consideration by the Board include: formal risk assessments; criminal history; performance on other supervised sentencing orders served in the community; behaviour in prison; ability to address factors underlying offending behaviour; victims' submissions; and accommodation and release planning.[287]

In deciding whether to grant a youth parole order, the YPB considers the following factors in making a decision: the interests of, or risk to the community; the interests of the young person; comments by the sentencing court; the age of the young person; the capacity for parole to assist the young person's rehabilitation; the nature and circumstances of the offences; outstanding charges or pending court appearances; the young person's criminal history; previous community-based dispositions and compliance; risk assessments using validated tools; family and community support networks; access to appropriate and stable accommodation; reports from psychologists, psychiatrists, teachers, medical practitioners and other professionals; submissions made by victims and police informants; and submissions made by the young person, the young person's family, friends and potential employers. [288]

Although there is now further clarity in what guides the exercise of discretion by the Boards, such criteria should be legislated, as is the case in NSW[289] and ACT.[290] As in Canada, the legislated criteria in Victoria should include a requirement to consider how the release of the person will contribute to the protection of society by facilitating the reintegration of the person who has offended into society.[291] Legislating the criteria to be considered by the parole boards in their decision-making, and having flexible and individualised responses are not mutually exclusive.

---

[285] Adult Parole Board (2020). Parole Manual: Adult Parole Board of Victoria, Sections 3.1 and 5.3. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20%20Board%20-%20Parole%20Manual%202020.pdf; Adult Parole Board Victoria (2020). Annual Report: 2019-20, pp. 20-21. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20Board%20Annual%20Report%202019-20.pdf.. The purpose of parole is to promote public safety by supervising and supporting the transition of offenders from prison back into the community in a way that seeks to minimise their risk of reoffending, in terms of both frequency and seriousness, while on parole and after they complete their sentence. The Board must treat the safety and protection of the community as its paramount consideration.

[286] s. 73A of the *Corrections Act 1986*.

[287] Adult Parole Board (2020). Parole Manual: Adult Parole Board of Victoria, Section 5.3. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20%20Board%20-%20Parole%20Manual%202020.pdf.

[288] Youth Parole Board (2020). Annual Report 2019-2020, pp. 15 and 18. Available at https://files.justice.vic.gov.au/2021-06/YPB_Annual_Report_2020_0.pdf

[289] s. 135 of the *Crimes (Administration of Sentences) Act 1999* (NSW).

[290] s. 120 of the *Crimes (Sentence Administration) Act 2005* (ACT).

[291] Canadian legislation provides the following criteria for granting parole: (a) "the offender will not, by reoffending, present an undue risk to society before the expiration according to law of the sentence the offender is serving; and (b) the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen." See c. 20, s. 102 of the *Corrections and Conditional Release Act*, SC 1992.

If parole is refused, individuals do not receive detailed reasons for the decision reached by the respective parole boards and decisions cannot be accessed through Freedom of Information requests.[292] As noted above, in the youth justice parole system, the young person does not appear at their parole review. The YPB makes a decision based on a report from the manager of the Youth Justice Centre, which includes a recommendation on whether the young person should be released on parole. If parole is not granted, the young person is not informed of the reasons for the decision.

In line with other jurisdictions,[293] Victoria should provide a statutory right for individuals to receive written reasons for the decision when parole is refused, including any matters that may assist the incarcerated person in further parole applications. We believe that providing detailed reasons setting out why parole was refused will increase confidence in the parole system, as well as understanding and acceptance of parole decisions.

The Right to Appeal a Decision in a Case Against You

The right to appeal a parole decision is fundamental for procedural fairness and must include review by a body that is independent to the body that made the original decision. In Victoria, the adult parole system currently provides for internal review by the APB, as well as judicial review by the Supreme Court in limited circumstances.[294] The APB Manual provides that incarcerated people can request an internal review of a board decision, and "if the Board determines that there is a proper basis for the review, it may review the original decision."[295] No further information is provided regarding the grounds for review or what will guide the decision of the Board in granting or refusing the request. Decisions of the APB are explicitly excluded from the jurisdiction of the Victorian Ombudsman.[296]

The right to appeal a parole decision in certain circumstances is provided for in the UK,[297] NZ[298] and Canada.[299] In NSW and WA, the person in prison can request the parole authority to review its decision.[300] This is similar to Victoria, but the right to review in NSW and WA is provided for in

---

[292] The *Freedom of Information Act 1982* does not apply to the Adult Parole Board as it is not a 'prescribed authority' as defined in section 5 of the *Freedom of Information Act 1982.*

[293] *Crimes (Sentence Administration) Act 2005* (ACT) s.126(2B); *Corrective Services Act 2006* (Qld) s 193(5)(a); *Correctional Services Act 1982* (SA) s 67(9)(b); *Corrections Act 1997* (Tas) s 72(8); *Corrections and Conditional Release Act*, SC 1992, c 20, ss 143–144; *Parole Act 2002* (NZ) s 67; Parole Board Rules, rules 19(8), 21(12), 25(6) and 28(10); cited in Naylor,

[294] Currently, judicial review of a decision of the Adult Parole Board by the Supreme Court of Victoria is available on the grounds of jurisdictional error.

[295] Adult Parole Board (2020). Parole Manual: Adult Parole Board of Victoria, Section 3.3.2. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20%20Board%20-%20Parole%20Manual%202020.pdf.

[296] *Corrections Act 1986* (Vic).

[297] Individuals can request review of parole board decisions made since 2019, if parole was not review correctly, or the decision was unreasonable. The Parole Board will decide if the decision needs to be reconsidered, and if there needs to be a new hearing. If the Parole Board refuses to reconsider the decision, the individual can apply for judicial review.

[298] *Parole Act 2002* (NZ) ss 67–68.

[299] *Corrections and Conditional Release Act*, SC 1992, c 20, s 157.

[300] *Crimes (Administration of Sentences) Act 1999* (NSW) s 139; *Sentence Administration Act 2003* (WA) s 115A. In WA, the grounds for review are that the person who made the decision: (a) did not comply with the Act or regulations; or (b) made an error of law; or (c) used incorrect or irrelevant information or was not provided with relevant information.

legislation. Similar to other aspects of procedural fairness, VALS strongly recommends that the right to appeal to an independent body should be enshrined in legislation.

RECOMMENDATIONS

Recommendation 38. The Victorian Government must repeal regulation 5 of the *Charter of Human Rights and Responsibility (Public Authorities) Regulation 2013* (Vic), which exempts the Adult Parole Board from the operation of the Charter.

Recommendation 39. The Victorian Government must repeal section 69(2) of the *Corrections Act 1986* (Vic), which provides that the Adult Parole Board is not bound by the rules of natural justice.

Recommendation 40. The Victorian Government should amend the *Corrections Act 1986* to include the purpose of parole and the criteria on which parole decisions are made. The legislated purpose of parole should highlight that the release of the individual on parole will contribute to the protection of society by facilitating their rehabilitation and reintegration into society.

Recommendation 41. The Victorian Government must amend the *Corrections Act 1986* to provide for the following rights of incarcerated people in relation to any decisions made by the Adult Parole Board regarding parole:

- The right to have access to all information and documents being considered by the parole authority, subject to limited exceptions;
- The right to appear before the Board;
- The right to culturally appropriate legal assistance and representation;
- The right to detailed reasons relating to a decision;
- The right to appeal a decision of the Board.

Recommendation 42. The Victorian Government should provide funding to VALS to provide legal assistance, support and representation to Aboriginal people who are applying for parole.

Parole Conditions and Supervision: Setting People up to Fail

In addition to challenges in accessing parole, Aboriginal people face challenges in meeting parole conditions, which are often culturally inappropriate, excessive and inflexible. Furthermore, Corrections Victoria takes a rigid and punitive approach, which has a disproportionate impact on Aboriginal people.

Both youth and adult parole orders contain mandatory conditions,[301] including a requirement not to break the law and reporting conditions.[302] Additionally, the APB/YPB may also impose special conditions such as a requirement not to consume alcohol, to not contact specified persons or attend a specified place.[303] Similar to bail conditions, and conditions attached to a Community Corrections Order, parole conditions can often be culturally inappropriate, for example, requiring someone not to contact a specific person when they may have cultural obligations in relation that person.

Supervision of parole by Corrections Victoria is often punitive and rigid, and carried out by parole officers who have not undertaken cultural awareness training. Whilst there are some Aboriginal parole officers, there is no program whereby Aboriginal people on parole can access an Aboriginal parole officer. In VALS' experience, the rigid and inflexible approach taken by parole officers does not work for Aboriginal people and there is a high risk of breaching parole, resulting in cancellation of their parole, as well as an additional prison sentence (up to 3 months) on top of their original sentence and/or 30 penalty units.[304]

In 2019-2020, 19% of adults on parole had their parole cancelled.[305] Non-compliance with parole conditions - including breaches of conditions, loss of contact with CCS or unacceptable absences for scheduled appointments - was a factor in 73% of cancellations.[306] In the same time period, the Youth Parole Board issued 160 parole orders, 40 warnings and 83 parole cancellations.[307]

In other jurisdictions, including Queensland, the Parole Board is specifically directed to take into account cultural considerations when considering both parole applications and parole cancellations.[308] A similar approach should be taken in Victoria, including through guidance in the Parole Board Manuals, as well as a legislative requirement under the *Corrections Act 1986* and the new Youth Justice Act.

Changes must also be made to parole supervision, to ensure that Aboriginal people are not set up to fail, and to support rehabilitation and reintegration of parolees. The section below on transition support sets out additional recommendations for Aboriginal people leaving prison, including on parole and at the end of their sentence.

---

[301] s. 458(4) of the *Children, Youth and Families Act 2005*.

[302] Adult Parole Board (2020). Parole Manual: Adult Parole Board of Victoria, Section 5.6.1. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20%20Board%20-%20Parole%20Manual%202020.pdf

[303] Adult Parole Board (2020). Parole Manual: Adult Parole Board of Victoria, Section 5.6.2. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20%20Board%20-%20Parole%20Manual%202020.pdf

[304] S. 78A of the *Corrections Act 1986*.

[305] Adult Parole Board Victoria (2020). Annual Report: 2019-20, p. 26. Available at https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20Board%20Annual%20Report%202019-20.pdf..

[306] Ibid., , p. 26.

[307] Youth Parole Board (2020). Annual Report 2019-2020, pp. 23, 25 and 26. Available at https://files.justice.vic.gov.au/2021-06/YPB_Annual_Report_2020_0.pdf

[308] See Queensland Parole Manual.

RECOMMENDATION

Recommendation 43. The Victorian Government should amend the *Corrections Act 1986* (Vic) so that the Adult Parole Board is required to take into account cultural considerations when making decisions on parole applications, suspension and cancellation of parole for Aboriginal people. The Adult Parole Board Manual should be amended to provide guidance to the Adult Parole Board on complying with this requirement. All parole officers should be required to undertake mandatory and ongoing cultural awareness training.

Rehabilitation Programs

An important part of reducing the risk of reoffending for people in prison is ensuring that adequate rehabilitation and reintegration programs are available. This includes, for Aboriginal people, access to culturally safe programs which support connection to culture, a protective factor against reoffending.[309]

VALS has observed a concerning lack of programs available for Aboriginal people in prison, contributing to disconnection from community and culture, in the past eighteen months. This is partly attributable to the effects of COVID-19 restrictions, which have limited in-person visits to prisons and consequently impacted face-to-face programs. Restrictions in the wider community have also had flow-on impacts for rehabilitation services – supplies for art programs, for example, have been disrupted, as have programs delivered in partnership with outside organisations that are heavily affected by the pandemic. The introduction of some restrictions is an important safety measure, but, as detailed further below, VALS is of the view that restrictions in prisons have gone beyond what is necessary to protect the health of people in prison, as demonstrated by their frequent lack of alignment with restrictions in place in the community. Prisons should be very hesitant about disrupting access to rehabilitative programming, especially for Aboriginal people. Furthermore, decisions to suspend any programs should not be taken unless truly necessary and suspended programs should be restored at the first opportunity.[310] In the interim, it is critical that detained people are not penalised – for example, in parole applications or treatment by prison authorities – for failing to participate in or complete programs when they are not being run.

Further shortcomings in the programs offered by Victorian prisons continue to exist that predate the current COVID-19 pandemic. Services for Aboriginal people (particularly Aboriginal women) are rarely able to meet demand because of insufficient funding to the ACCOs that provide these services. People

[309] Edwige & Gray (2021), *Significance of Culture to Wellbeing, Healing and Rehabilitation*. Available at https://www.publicdefenders.nsw.gov.au/Documents/significance-of-culture-2021.pdf.
[310] VALS (2021), *Building Back Better: Victorian Aboriginal Legal Service COVID-19 Recovery Plan*, p83. Available at https://www.vals.org.au/wp-content/uploads/2021/02/Building-Back-Better-Victorian-Aboriginal-Legal-Service-COVID-19-Recovery-Plan-February-2021-FOR-DISTRIBUTION.pdf.

on remand typically have no access to rehabilitation programs, an issue which has become even more serious as the remand population has grown and the amount of time people spend on remand has steadily increased.

The Victorian Government has formally recognised the inadequacy of rehabilitation offerings for Aboriginal people in prison before the Supreme Court. Perversely, however, this admission was used to argue for harsher sentences on the basis that, since the Government is not properly resourcing rehabilitation, community safety could only be protected by a longer prison term. VALS was satisfied to see this argument, which was tendered in a case involving one of our clients who had been convicted of serious charges, rejected by the court.[311] Nonetheless, it reflects a concerning attitude on the part of the Government. Rehabilitation programs should not be an afterthought for the Government, and the absence of such programs cannot be compensated for by longer sentences, which are unlikely, in and of themselves, to have any beneficial impact in reducing reoffending.[312]

VALS firmly believes that rehabilitation programs should operate on voluntary principles. Attempts to rehabilitate people are unlikely to be successful when they are premised upon a carceral logic that threatens people with punishment – such as being returned to court in formal breach of a community corrections order – for not meeting the requirements of a program. There needs to be recognition of the complex needs of people who have committed offences and of the fact that rehabilitation cannot be forced. This is particularly true for Aboriginal people, and rehabilitative programs which are focused on encouraging reconnection to culture; meaningful engagement with culture and community can only come voluntarily, not from activities undertaken under the threat of a formal breach of a community corrections order. It must also be recognised that disengagement from a program should be met with greater support to facilitate reengagement – a punitive approach simply will not enable rehabilitative objectives to be met.

An important model is Wulgunggo Ngalu Learning Place, a residential program for Aboriginal men on Community Corrections Orders.[313] Participation in Wulgunggo Ngalu is voluntary and participants are able to voluntarily 'discharge' themselves at any time. Rather than trying to compel participation, the program aims to facilitate it by removing barriers which, in other contexts, prevent Aboriginal people completing programs. This is reflected in the attitudes of participants, who feel they have a better chance of completing the terms of their CCOs at Wulgunggo Ngalu than other programs, according to a formal evaluation of the initiative.[314] Involuntary rehabilitation has very limited prospects of successfully integrating people into society or establishing meaningful connections with culture, and

[311] DPP v Herrman, https://www.supremecourt.vic.gov.au/case-summaries/judgment-summaries/director-of-public-prosecutions-v-codey-herrmann

[312] Centre for Innovative Justice (2021), *Leaving custody behind: Foundations for safer communities & gender-informed criminal justice systems*, p86. Available at https://cij.org.au/cms/wp-content/uploads/2021/09/leaving-custody-behind-issues-paper-july-2021-.pdf.

[313] Corrections Victoria (2015), Wulgunggo Ngalu Learning Place leaflet. Available at https://files.corrections.vic.gov.au/2021-06/wulgunggodl2015_acc.pdf.

[314] Clear Horizon (2013), *Wulgunggo Ngalu Learning Place: Final Evaluation Report*, p25. Available at https://files.corrections.vic.gov.au/2021-06/wnlp_evaluationfinal.pdf.

so its value is very low. The focus of the Victorian Government needs to be on programming which attracts willing participants and creates environments where they are empowered to complete their rehabilitation voluntarily. This principle extends to drug and alcohol rehabilitation, which is a medical treatment that should always be provided on the basis of informed consent, not made mandatory.[315]

Positive models for rehabilitation and reintegration are too often kept at a very small scale and not made accessible to enough people in prison, particularly Aboriginal people. Despite supportive feedback and research evaluations, Wulgunggo Ngalu remains a small-scale project. Corrections Victoria should establish similar programs that are accessible for the many Aboriginal people who cannot access Wulgunggo Ngalu, including women, people not assessed as suitable for CCOs, and people who cannot take a residential placement in Gippsland away from their family and community. Similarly, the Judy Lazarus Transition Centre – a pre-release centre for people in the last months of a custodial sentence appears to have a strong track record in reducing reoffending rates.[316] However, its small capacity limits the benefits it delivers, and tight restrictions on who can be admitted – including a security assessment – exclude too many Aboriginal people from being able to access this specialised support. There is also no equivalent centre for women, neglecting a population who are highly capable of reintegration if given adequate support, as discussed further below.

RECOMMENDATIONS

Recommendation 44. Rehabilitation programs, both in prisons and for people transitioning out of prison or diverted from prison, should be run on a voluntary basis, not penalising or threatening people for breaching behavioural requirements.

Recommendation 45. Funding for rehabilitation in prisons, including culturally safe rehabilitation support provided by Aboriginal organisations, should be significantly increased.

Recommendation 46. Rehabilitation services should be available to people held in prison on remand.

[315] Harm Reduction International (2010), *Human Rights and Drug Policy: Compulsory Drug Treatment*. Available at https://www.hri.global/files/2010/11/01/IHRA_BriefingNew_4.pdf.

[316] Victorian Ombudsman (2015), *Investigation into the rehabilitation and reintegration of prisoners in Victoria,* p102. Available at https://assets.ombudsman.vic.gov.au/assets/Reports/Parliamentary-Reports/1-PDF-Report-Files/Investigation-into-the-rehabilitation-and-reintegration-of-prisoners-in-Victoria.pdf?mtime=20191217123824.

Conditions in Custody

Conditions in prisons and other places of custody are critical to reducing reoffending rates. Contrary to a simplistic deterrence-based view of the causes of offending, harsh conditions in custody can increase the risk of reoffending for many people held in prisons.

Prison can be a deeply traumatising experience, and these harms are particularly acute for people already marginalised or living with a history of trauma, such as Aboriginal people, those living disability or mental illness and victim-survivors of family violence. Inducing this kind of trauma directly conflicts with the therapeutic approach to rehabilitation and social integration which is needed to address the underlying causes of offending for most people held in Victorian prisons. International evidence has shown that, because of this traumatising effect and the lost opportunity for productive rehabilitation that results, harsher prison conditions tend to raise reoffending rates.[317] Prison conditions are also the focus of international rights obligations and minimum standards, including the Mandela Rules and the Optional Protocol to the Convention Against Torture.[318]

Victoria's prison system has become characterised by poor administration and deteriorating conditions, as the imprisoned population has increased. In 2020-21, one prison guard every week was suspended for reasons including the excessive use of force, smuggling of contraband and sexual harassment.[319] An IBAC inquiry into the corrections system found widespread corruption risks and "problematic workplace cultures", manifesting themselves in misconduct including the inappropriate use of force – including against people with disabilities – and in the lack of real accountability for that misconduct.[320]

Addressing these seriously concerning conditions in custody is essential to upholding human rights and reducing rates of reoffending. A number of specific issues with prison conditions are identified in this subsection, with recommendations to address them. More generally, fuller safeguards against the emergence of systemic problems in prison workplace culture and inhumane conditions are urgently needed. These should include an effective, independent complaints system which people in prison feel genuinely able to access, and which must be culturally safe for Aboriginal people in prison. A functioning complaints and investigation system is an important check on deterioration of prison conditions.[321] It is also crucial that all prison staff are given training to develop their capacity for

[317] Ritchie, Sentencing Advisory Council (2011), *Does Imprisonment Deter? A Review of the Evidence*, p. 49; Cullen et al (2011), 'Prisons Do Not Reduce Recidivism', *The Prison Journal*, p. 58; and Chen & Shapiro (2007), 'Do Harsher Prison Conditions Reduce Recidivism?', *American Law & Economics Review*, p. 22. Accessed at https://www.anderson.ucla.edu/faculty/keith.chen/papers/Final_ALER07.pdf.

[318] United Nations System (2021), *Common Position on Incarceration*.

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

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

[321] Tomczak & McAllister (2021), 'Prisoner death investigations: a means for safety in prisons and societies', *Journal of Social Welfare and Family Law*.

trauma-informed approaches to working with incarcerated people, and to improve their cultural competency towards Aboriginal people held in Victorian prisons.

RECOMMENDATIONS

Recommendation 47. Prison complaints, including complaints against private prisons and contractors, should be handled by an appropriately resourced independent oversight body with sufficient powers to refer matters for criminal investigation.

Recommendation 48. All prison staff should receive extensive training, that is developed and delivered in collaboration with ACCOs, on trauma-informed care, anti-racism, and the specific needs of vulnerable groups including Aboriginal people and women.

COVID-19, Isolation and Prison Lockdowns

VALS has consistently advised that the use of quarantine, isolation and lockdowns as preventative measures in Victorian prisons needs urgent reform. Recommendations reflecting our sentiments concerning such issues have been made to the Public Accounts and Estimates Committee, in our COVID-19 Recovery Plan, and routinely in consultation with Government.

These recommendations have not been acted upon. Victoria's repeated lockdowns highlight that the preventative measures implemented in prisons during the COVID-19 pandemic have continued even after the most severe period of community transmission and restrictions have passed. Prisons continue to be subject to severe limitations, including bans on all visits at the smallest indication of community transmission and the ongoing use of Protective Quarantine (**PQ**) during periods without community transmission.

Solitary confinement has a particularly detrimental impact on Aboriginal people, with the Royal Commission into Aboriginal Deaths in Custody noting that it is "undesirable in the highest degree that an Aboriginal person in prison should be placed in segregation or isolated detention."[322] There is a very serious risk that the use of Protective and Transfer Quarantine (**TQ**) in prisons to limit the spread of COVID-19 can amount to solitary confinement, if these regimes are not implemented with the utmost care and accompanied extensive safeguards for the wellbeing of detained people. Examples VALS is aware of include people being permitted only 12 minutes out of their cell per day, with no opportunity to exercise.

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

Government practice in Victoria has not heeded the advice found in guidelines from the World Health Organization and Communicable Diseases Network Australia.[323] Over more than fifteen months since the introduction of Protective Quarantine, during which the restrictions in place in the community have varied substantially, the 14-day requirement has remained static. In early 2021, the protective quarantine requirement remained unchanged during a period of nearly three months without any cases of COVID-19 in the community. Plainly, in this period, the risk that a newly-detained person would bring COVID-19 from the general Victorian community into the prison population was almost non-existent. VALS is of the view that a 14-day quarantine is self-evidently not the least restrictive available measure in such circumstances, as opposed to isolation while awaiting test results or for a defined shorter period. We have previously noted that a different, commendable approach has been adopted in youth detention settings, where newly admitted children are isolated only while awaiting a negative test result.[324] There is no reason why this approach could not also be adopted in adult prisons.

VALS also wishes to reiterate our concerns about cycles of lockdown in places of detention. Both adult and youth prisons have been placed into immediate lockdowns on the detection of COVID-19 cases, without a careful assessment and balancing of the harm inflicted by confining people in prison to their cells.

A highly effective way of mitigating the risks of COVID-19 in prison settings, and thus reducing the use of harmful lockdown and quarantine requirements, is to improve the rollout of vaccines for people in prison. Given the high risks associated with detention settings and the pre-existing vulnerabilities of many people in prison, particularly Aboriginal people, the prison population should be a priority for vaccination in response to any pandemic disease. The vaccine rollout in Victorian prisons began in June 2021, and although some delay is associated with problems in the broader vaccine rollout, it is clear that prisons have not been appropriately prioritised. The Victorian Government told media that the rollout in prisons would be completed in August 2021.[325] Yet a recent update stated that, on September 10, after that deadline, only 45% of people in adult prisons were fully vaccinated.[326] VALS understands that the vaccination rate for Aboriginal people in prisons is significantly lower than this. Substantially more needs to be done to improve the rollout, including by involving ACCOs in addressing vaccine hesitancy (through both provision of information and administering the vaccine). Improving vaccine coverage is essential to reducing the use of lockdown and quarantine.

[323] VALS (2021), *Building Back Better: COVID-19 Recovery Plan*, pp. 70-87. Available at https://www.vals.org.au/wp-content/uploads/2021/02/Building-Back-Better-Victorian-Aboriginal-Legal-Service-COVID-19-Recovery-Plan-February-2021-FOR-DISTRIBUTION.pdf.
[324] *Ibid.*, p. 76.
[325] Croakey Health Media, (2021), 'Survey raises serious concerns about COVID vaccination rollout to prisons'. Accessed at https://www.croakey.org/survey-raises-serious-concerns-about-covid-vaccination-rollout-to-prisons/.
[326] Bendigo Advertiser (2021), 'Victorian prison records COVID-19 case'. Available at https://www.bendigoadvertiser.com.au/story/7427629/victorian-prison-records-covid-19-case/.

Another important measure for mitigating COVID-19 risks in prisons is surveillance testing of staff and detained people. VALS has previously called for surveillance testing in prisons, in line with the approach in other high-risk environments such as hospitals, aged care facilities and hotel quarantine.[327] Surveillance testing of prison and youth detention employees and contractors is a proactive measure which can help reduce the risk of outbreaks in Victorian prisons without resorting to extremely harsh measures such as the suspension of in-person visits and the ongoing use of quarantine. Prison staff in the UK have been routinely tested for COVID-19 since at least November 2020.[328] Victoria should urgently adopt surveillance testing of prison staff.

Despite calls for reform from VALS and other legal and human rights organisations, the analysis of the serious problems with isolation, quarantine and lockdowns presented in our submission to the PAEC Inquiry remain relevant.[329] Many of the recommendations from that submission and our COVID-19 Recovery Plan are reiterated below. In the context of this Committee's Inquiry, the Government's failure to respond to these recommendations is significant because lockdowns and isolation have highly disruptive and sometimes traumatising effects on people in prison. The prospects for successful rehabilitation and reintegration are very poor when people have been isolated from meaningful human contact on a regular basis while in prison, have had little to no opportunity to engage with programs, and are subjected to the archaic and harmful practice of solitary confinement.

RECOMMENDATIONS

Recommendation 49. The Government should make publicly available the health advice, risk-assessment and human rights assessment upon which it reliesin making decisions about the use of isolation and protective and transfer quarantine.

Recommendation 50. The use of protective and transfer quarantining, and the nature of the quarantine itself, should be

- reviewed on a regular basis,
- guided by medical advice, in consultation with civil society stakeholders,
- adopting the least restrictive measure, in accordance with the *Victorian Charter of Human Rights and Responsibilities.*

Recommendation 51. Legislation should be amended to require that incarcerated people in protective quarantine/transfer quarantine and isolation are regularly observed and verbally communicated with.

[327] VALS (2021), *Building Back Better: Victorian Aboriginal Legal Service COVID-19 Recovery Plan*, p81. Available at https://www.vals.org.au/wp-content/uploads/2021/02/Building-Back-Better-Victorian-Aboriginal-Legal-Service-COVID-19-Recovery-Plan-February-2021-FOR-DISTRIBUTION.pdf.

[328] UK Ministry of Justice, *HM Prison and Probation Service COVID-19 Official Statistics*, p5. Accessed at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/945608/HMPPS_COVID19_NOV20_Pub_Doc.pdf.

[329] VALS (2020), *Submission to the Public Accounts and Estimates Committee COVID-19 Inquiry*, pp. 16-25.

Recommendation 52. Legislation should explicitly provide for the rights of people in protective/transfer quarantine… including guaranteeing meaningful contact with other people and time out of cell, in fresh air, every day.

Recommendation 53. People in protective/transfer quarantine… should be provided supports and services (including mental health services and cultural supports and services provided by ACCOs), and means by which to contact family, lawyers, independent oversight bodies, and ACCOs.

Recommendation 54. The Victorian Government should maintain a register of all people placed in protective/transfer quarantine…:

- The register should include information such as age, gender, disabilities, medical conditions, mental health conditions and Aboriginality of people in protective quarantine.
- Information should also be provided in relation to the length and the nature of meaningful contact provided on a daily basis, how much time people spend out of cell, and the services made available to them and used by them.
- Any incidents, such as attempted self-harm, should also be included.

Recommendation 55. Facilities should not, by default, go into complete lockdown during a COVID-19 outbreak.

Recommendation 56. Staffing and other operational issues should be urgently addressed, to ensure lockdowns do not occur as a result of inadequate staff to safely manage the facility.

Recommendation 57. No one should be in effective solitary confinement as a result of lockdown, particularly… people with mental or physical disabilities, or histories of trauma.

Recommendation 58. If lockdowns occur, people should be provided supports and services (including mental health services and cultural supports and services provided by ACCOs), and means by which to contact family, lawyers, independent oversight bodies, and ACCOs, including VALS.

Recommendation 59. Information on how lockdowns are operationalised should be publicly available and regular updates should be shared.

Recommendation 60. The Victorian Government should add prisons… to the Surveillance Testing Industry List, with both employees and contractors subject to regular surveillance testing.

Recommendation 61. The Victorian Government should improve the COVID-19 vaccine rollout, and put in place preparations for a significantly more effective vaccine rollout for any future pandemic, including by:

- Ensuring that no person in prison is offered a vaccine later than they would be if living freely in the community, in line with the principle of equivalence;
- Involving ACCOs in the delivery of health information and vaccines;
- Giving regular public updates on the status of the vaccine rollout, including demographic information such as Aboriginality.

Emergency Management Days

Emergency Management Days (**EMD**s) are days deducted from an individual's sentence due to the impact of particular situations on the person held in custody. The situations identified in existing legislation include industrial disputes or emergencies within the prison or gaol where the sentence is being served; and other circumstances of an unforeseen and special nature provided the individual in question has exhibited 'good behaviour' during the situation.[330] The sentence reduction can amount to four (4) days for every day, or part of day, where industrial disputes and emergencies exist; and up to fourteen (14) days for circumstances of an unforeseen and special nature.[331] However, as noted by the PAEC, no such equivalent program exists in the Victorian youth justice system.[332]

The continuing COVID-19 pandemic is of particular concern in relation to EMDs. VALS has previously noted the negative impact of the suspension of programs and personal visits and the increased risks of COVID-19 in detention environments, as well as quarantine, isolation and lockdowns.[333] Additionally, VALS has previously noted concern with Corrections policies that allocate only the approximate equivalent of 1 EMD per day of preventative measures instead of allocating up to four (4) days per day in such cases of emergency, as well as failing to include further EMDs on the basis of circumstances of an unforeseen and special nature.[334]

More recently, further changes have occurred in relation to the allocation of EMDs to people on remand. Until 28 July 2021, people in prison on remand may have been granted EMDs before they received their sentence if they had been of good behaviour and suffered disruption or deprivation due to the response to COVID-19. If EMDs were granted, they were applied to any sentence of

[330] s. 58E(1) of the *Corrections Act 1986*. 'Emergencies', however, do not extend to emergencies, riots or other security incidents caused by incarcerated people under s. 58E(3) of the *Corrections Act 1986.*
[331] s. 100 of *Corrections Regulation 2019*.
[332] Parliament of Victoria: Public Accounts and Estimates Committee (2021). Inquiry in the Victorian government's response to the COVID-19 pandemic, p. 287.
[333] VALS, Submission to the Public Accounts and Estimates Committee's Inquiry into the Victorian Government's response to COVID-19 (September 2020) 35, available at https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Submissions/87._Victorian_Aboriginal_Legal_Service.pdf. See also Parliament of Victoria: Public Accounts and Estimates Committee (2021). Inquiry in the Victorian government's response to the COVID-19 pandemic, p. 291-292.
[334] Ibid., 36.

imprisonment they would receive as part of a continuous period of imprisonment. However, after 28 July 2021, people in prison on remand are eligible for EMDs if they have suffered disruption or deprivation due to the response to COVID-19, such as time spent in the protective quarantine unit following reception, but the EMDs are only granted after a person has been sentenced.[335]

VALS further reiterates its concerns regarding the lack of transparency in relation to policies concerning when and how individual EMD applications will be determined by Corrections. While Corrections has stated that incarcerated people who are of 'good behaviour' during preventative measures - including quarantine, isolation and lockdowns – will be eligible for EMDs, the lack and inconsistency of information regarding the process has been problematic for both detainees and their advocates.[336]

Furthermore, VALS is concerned by the introduction of the *Crime Amendment (Remission of Sentences) Bill 2021* (Cth), which, if passed, will eliminate the application of EMDs for people serving sentences for federal offending in a state or territory prison.[337] The proposed amendments to legislation concerning EMDs would result in greater uncertainty about measures available to reduce the sentences of incarcerated people adversely impacted by emergency situations within a prison, which include the preventative measures undertaken in relation to the current COVID-19 pandemic.

As noted in VALS submission to the Public Accounts and Estimates Committee (**PAEC**) in September 2020, situations have arisen where individuals with sentences shorter than one month have been denied EMDs. One such instance involved a client that filed an EMD application on the first day of a 28 day sentence, which was denied. The basis for the decision was EMD assessments only occurred fortnightly and, by the time the application was considered, Corrections needed time to prepare for the individual's release. Increased frequency of EMD assessments are important given that 25.5% of men and 40.9% of women are serving sentences of less than one month.[338]

VALS continues to advocate that disadvantage should not serve as a basis for the denial of EMDs to persons that have otherwise served their sentences. Of particular importance are reports that the lack of housing or the need for other support services for some individuals after being released from prison has served as the basis for the rejection of their EMD applications.[339]

---

[335] Department of Justice and Community Safety (2021). Emergency Management Days – COVID-19: Factsheet for remand prisoners, p. 1.
[336] Ibid., p. 36.
[337] Parliament of the Commonwealth of Australia (2021). *Crimes Amendment (Remissions of Sentences) Bill 2021*: Explanatory Memorandum, at 12.
[338] VALS (2020). Submission to the Public Accounts and Estimates Committee's Inquiry into the Victorian Government's response to COVID-19, pp. 35-36. Available at https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Submissions/87._Victorian_Aboriginal_Legal_Service.pdf
[339] Federation of Community Legal Centres Vic. A Just and Equitable COVID Recovery: A community Legal Sector Plan for Victoria, 40. Available at https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Submissions/101a._Federation_of_Community_Legal_Centres.pdf.

RECOMMENDATIONS

Recommendation 62. Corrections, in making decisions in relation to Emergency Management Days, should acknowledge that the pandemic has negatively impacted on all people in detention, albeit to different degrees. Emergency Management Days should be granted not only to people who have been subject to isolation or mandatory quarantine, but to others as well, in recognition of the additional hardships faced by everyone in detention.

Recommendation 63. Corrections policy should be amended so that people can be granted 4 Emergency Management Days for each day that the 'emergency exists', and the 14 days they could be entitled to due to 'circumstances of an unforeseen and special nature.'

Recommendation 64. Corrections policy should be clarified to provide that people in detention cannot 'lose' EMDs once they have been granted, including if they are bailed and subsequently re-remanded.

Recommendation 65. There should be greater transparency in relation to the process by which Emergency Management Days are granted. Information should also be made available in relation to the number of people released on Emergency Management Days, how many days they were granted (broken down per month and per facility), and how many Aboriginal and non-Aboriginal people were granted Emergency Management Days.

Recommendation 66. Decisions in relation to EMDs should be governed by natural justice. Applicants should be given clear particulars of any reasons as to why an application has been refused and be allowed to seek review.

Recommendation 67. Emergency Management Day assessments should occur on a regular basis, to allow adequate time to prepare for release.

Recommendation 68. No one should be denied Emergency Management Days due to a lack of housing.

[…]

Use of Force and Restraints

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

Such abuses can have extremely harmful consequences, particularly for people already experiencing intergenerational trauma and dealing with mental health or substance use issues. The use of excessive force or unnecessary restraints is a human rights violation and can contribute to re-traumatisation and institutionalisation, worsening prospects for rehabilitation and increasing the risk of recidivism.

There are extensive national and international human rights standards governing the use of force and restraints in prisons that inform VALS' position on the safeguards needed in Victorian prisons. The Victorian Charter of Human Rights specifies that human rights should be limited only by the least restrictive means available. The Mandela Rules on the treatment of people in custody and the Havana Rules for young people both stipulate that restraints and force should be used only as a last resort, and for the shortest period of time possible.[340] The Mandela Rules also require that restraint never be used punitively or as a disciplinary method.[341] The Australian Children's Commissioners have stated that "[t]he use of restraints on a child or young person should be prohibited, except when necessary to prevent an imminent and serious threat of injury," and only after "all other means of control have been exhausted".[342] This is consistent with the views expressed by the UN Committee on the Rights of the Child.[343] These human rights standards also provide for the prohibition of chemical or medical restraints, the prohibition of certain kinds of physical restraints, the prohibition of force and restraints being used against people in certain circumstances such as during childbirth, and the prompt reporting and monitoring of all uses of force or restraints.

As Victoria has not established a prison inspections body to fulfil the state's obligations under OPCAT, discussed below, there is limited public reporting or transparency on the use of force and restraints in Victorian prisons. The Victorian Ombudsman conducted an inspection of the Dame Phyllis Frost Centre (**DPFC**) in 2017, and IBAC published a report in 2021 on several investigations of specific incidents. Regular monitoring and reporting, however, is still not in place. This limits the effectiveness of oversight as a mechanism for creating real accountability for abuses in custody.

The most pressing concern is the use of excessive force or the use of restraints when the situation does not call for them. At DPFC, the Ombudsman observed use of restraints in circumstances where they clearly were not needed, "including reports of pregnant women being handcuffed when attending external medical appointments."[344] These instances were particularly acute in the Swan 2 management unit, where women are kept isolated. In this unit, "[i]ncident reports record instances where staff applied handcuffs to women who were incapacitated or unconscious after self-harming,

[340] Rules 48 and 82 of the Mandela Rules. See also Rule 64 of the Havana Rules.
[341] Rule 43(2) of the Mandela Rules.
[342] Australian Children's Commissioners & Guardians (2017), *Statement on Conditions and Treatment in Youth Justice Detention*. Accessed at https://humanrights.gov.au/our-work/childrens-rights/publications/accg-statement-conditions-and-treatment-youth-justice.
[343] Committee on the Rights of the Child, *General comment No.24 (2019) on children's rights in the child justice system,* CRC/C/GC/24, paragraph 95.
[344] Victorian Ombudsman (2017), *Implementing OPAT in Victoria – report and inspection of Dame Phyllis Frost Centre*, p4. Available at https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/implementing-opcat-in-victoria-report-and-inspection-of-dame-phyllis-frost-centre/.

and before medical assistance was provided" and women being handcuffed and escorted by five officers for a transfer of only a few metres.[345] The use of restraints can be dehumanising and humiliating for people held in prison, and may impact their willingness to engage with medical or other support services while visibly restrained. An ongoing coronial inquest in Western Australia has heard that an Aboriginal man who died of a heart attack had been "too ashamed" to attend medical appointments for his chronic heart condition while handcuffed.[346] The unnecessary use of restraints is continuous with the use of force, as both interfere with detained people's right to humane treatment and reinforce power dynamics in the prison.

IBAC's investigation of particular incidents found manifestly excessive use of force on several occasions in Port Phillip Prison. These included an assault of a person after a strip search, and the continued striking of a person with a disability after he had been taken to ground and restrained. IBAC found that the use of force "was excessive and inconsistent with Port Phillip Prison policy, which requires officers to use the minimum amount of force necessary to achieve control," and in one case amounted to inhuman or degrading treatment under the Victorian Charter.[347]

VALS is of the view that excessive force and the inappropriate use of restraints are widespread practices throughout the Victorian prison system, but not fully captured by existing inquiries due to under-reporting and the lack of continuous monitoring. Reports by the Queensland Crime & Corruption Commission and the WA Inspector of Custodial Services have highlighted systemic issues with regard to assaults on incarcerated people.[348] The Ombudsman's inspection of DPFC found that although there were only five recorded allegations of assaults by staff in 2016-17, 11% of women surveyed in the prison said that they had been assaulted by staff.[349] This is a clear indication that assaults are under-reported by people in prison; 46% of women surveyed in DPFC said they did not feel safe to make a complaint in the prison.[350]

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

[345] Ibid, p53.
[346] ABC News, 4 September 2021, 'Inquest hears how prisoner Mr Yeeda was too ashamed to get medical help in handcuffs'. Accessed at https://www.abc.net.au/news/2021-09-04/mr-yeeda-inquest-ashamed-to-get-medical-help-in-handcuffs/100433356.
[347] IBAC (2021), *Special report on corrections*, p. 34. Accessed at https://www.ibac.vic.gov.au/docs/default-source/special-reports/special-report-on-corrections---june-2021.pdf?sfvrsn=ee450c8c_2.
[348] Queensland Crime and Corruption Commission (2018), *Taskforce Flaxton: An examination of corruption risks and corruption in Queensland prisons*. Accessed at https://www.ccc.qld.gov.au/sites/default/files/Docs/Public-Hearings/Flaxton/Taskforce-Flaxton-An-examination-of-corruption-risks-and-corruption-in-qld-prisons-Report-2018.pdf.
Office of the Inspector of Custodial Services (2021), *Use of force against prisoners in Western Australia*. Accessed at https://www.oics.wa.gov.au/wp-content/uploads/2021/05/Use-of-Force-Review-May-2021.pdf.
[349] Victorian Ombudsman (2017), *Implementing OPAT in Victoria – report and inspection of Dame Phyllis Frost Centre*, p. 63.
[350] Ibid, p. 68.

prisons more than twice a day in 2018 and 2019.[351] Investigations of adult prisons in other states have made similar findings. In WA, force was used against Aboriginal people more frequently than against non-Aboriginal people. Notably, the disproportionality was even more acute for Aboriginal women; while force was used against incarcerated women overall less often than against men, this was not the case for Aboriginal women.[352]

The use of excessive force is unlikely to become less common in Victoria without significant reform to legislation governing the conduct of prison staff. There is substantial evidence of a cultural problem in Victorian prisons that affords minimal accountability for abuses, including misuse of restraints and force. In its investigation of one incident, IBAC found that two officers had intentionally kept their BWCs turned off, while two others had interfered with recordings to hide evidence of wrongdoing.[353] After the incident, Corrections staff produced reports which were "incomplete or failed to give a full account of events." Furthermore, the supervisor's summary of the incident repeated those reports without accounting for ways they contradicted video evidence and made no attempt to critically examine the incident.[354] IBAC also pointed to "a culture of excessive use of force" among Tactical Operations Group officers, the specialist staff who receive training on the use of force and restraints.[355] The Victorian Ombudsman suggested that DPFC may be affected by "a culture within the prison where the application of restraints is prioritised over the provision of medical assistance."[356]

Ingrained problems with the excessive use of force and restraints can only by addressed by legislative reform of the thresholds for the use of force, not by tweaks to prison policy and inconsistently-delivered training programs. New safeguards and thresholds for the use of force must be actively monitored by an inspection body that is compliant with Victoria's OPCAT obligations, to ensure that they are properly implemented.

The analysis and recommendations concerning BWCs presented above, in relation to the use of BWCs by police officers, are also applicable to prison staff. The protection of BWC footage by the *Surveillance Devices Act 1999* obstructs people who face abuses in prison being able to pursue legal remedies. The person assaulted in one of the incidents examined in IBAC's report on the prison system has not been able to access BWC footage to support his legal claim against the prison.[357]

---

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

[352] Office of the Inspector of Custodial Services (2021), *Use of force against prisoners in Western Australia*, pp. 13-15.

[353] IBAC (2021), *Special report on corrections*, p. 34.

[354] Ibid.

[355] Ibid, p. 9.

[356] Victorian Ombudsman (2017), *Implementing OPAT in Victoria – report and inspection of Dame Phyllis Frost Centre*, p. 53.

[357] The Age, 5 September 2021, 'Prisoner bashed by guards unable to access body-camera footage'. Accessed at https://www.theage.com.au/national/victoria/prisoner-bashed-by-guards-unable-to-access-body-camera-footage-20210831-p58nit.html.

RECOMMENDATIONS

Recommendation 69. The regulation of use of force/restraints should be provided for in legislation, not regulations, policies/procedures, written notices, or in Gazette.

Recommendation 70. The default position must be that the use of restraints/force is prohibited, with exceptions where authorised.

Recommendation 71. Prohibitions on use of force/restraints that should be enshrined in legislation:

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

Recommendation 72. When use of force/restraints may be permitted:

- Use of force/restraints must only be permissible when necessary to prevent an imminent and serious threat of injury to the incarcerated person or others, and only as explicitly authorised and specified by law and regulation.
- Use of force/restraints should be exceptional, as a last resort, when all other control methods (including de-escalation techniques) have been exhausted and failed.

- The decision to use physical restraints must be made by more than one person, and must be authorised by senior management.
- Use of force/restraints must be used restrictively, for no longer than is strictly necessary.
- A minimum level of restraint/degree of force must be used.
- Restraint instruments must be used appropriately/restraint techniques properly executed.
- The safety of the incarcerated person must be a prime consideration.

Recommendation 73. Additional safeguards:

- The use of force/restraint should be under close, direct and continuous control of a medical and/or psychological professional.
- The person who is restrained must be regularly observed, while subjected to restraint instruments, at least every 15 minutes.
- Use force/restraint should be reported to senior management as soon as practicable.
- The privacy of restrained people should be respected/protected when the person in restraints is in public.
- Staff who use restraint or force in violation of the rules and standards should be disciplined and/or have their employment ceased. Staff should be prosecuted where appropriate.

Solitary Confinement

[…]

The UN Mandela Rules define solitary confinement as the "'confinement of prisoners for 22 hours or more a day without meaningful human contact," and define prolonged solitary confinement as solitary confinement for a time period in excess of 15 consecutive days.[358] They state that solitary confinement "shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority."[359] They prohibit the use of solitary confinement for people "with mental or physical disabilities when their conditions would be exacerbated by such measures."[360]

The UN Havana Rules, which focus on children, state that "all disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may

[358] Rule 44 of the Mandela Rules.
[359] Rule 45(1), ibid.
[360] Rule 45(2), ibid.

compromise the physical or mental health of the juvenile concerned."[361] The Committee on The Rights of the Child has reiterated that solitary confinement should not be used on children.[362]

Solitary confinement is a fundamentally harmful practice. As Lachsz and Hurley have noted:

> Solitary confinement is 'strikingly toxic to mental functioning' and can cause long-term, irreversible harm (Grassian, 2006, p. 354). As documented by Walsh et al. (2020), the cruel impact of the practice has been recognised in case law from Australia and across the world.
>
> Solitary confinement has a particularly detrimental impact on Aboriginal and Torres Strait Islander people, with the Royal Commission into Aboriginal Deaths in Custody noting the 'extreme anxiety suffered by Aboriginal prisoners committed to solitary confinement' and that it is 'undesirable in the highest degree that an Aboriginal prisoner should be placed in segregation or isolated detention'.[363]

Recently, VALS hosted a webinar on the harms of solitary as part of its *Unlocking Victorian Justice* webinar series. The recording of the webinar can be viewed here. VALS encourages Committee members to view this webinar, which outlines the medical evidence in relation to the harms of solitary confinement (both during and after incarceration) and includes the stories of people with lived experience of this archaic and barbaric practice.

RECOMMENDATIONS

Recommendation 74. Solitary confinement should be prohibited in all places of detention… by legislation.

- No person should ever be placed in solitary confinement, noting people who are particularly vulnerable to the harms… people with mental or physical disabilities, people histories of trauma.
- Prolonged solitary confinement can amount to torture, and no one should be subjected to this.

Recommendation 75. Staffing and other operational issues in places of detention should be urgently addressed, to ensure no one is subjected to solitary confinement.

Strip Searching and Urine Testing

This issue of strip searching is of particular concern to VALS because there is mounting evidence of the disproportionate rates at which Aboriginal people are subjected to strip searching. For example, in the

[361] Rule 6.7 of the Havana Rules.
[362] United Nations Committee on the Rights of the Child (2019). General Comment No. 24 on children's rights in the child justice system, at (95(h).
[363] Lachsz and Hurley, 'Why practices that could be torture or cruel, inhuman and degrading treatment should never have formed part of the public health response to the COVID-19 pandemic in prisons' (2021)

ACT women's prison between October 2020 and April 2021, 58% of strip searches were of Aboriginal women, who made up only 44% of the prison population.[364]

The law in Victoria allows incarcerated people to be strip searched when there is a belief based on reasonable grounds that the search is necessary for the security or good order of the prison, or the safety or welfare of any incarcerated person, or that the incarcerated person being searched is hiding something that may pose a risk.[365] The standards for strip searching in Victoria are lower than those in other Australian jurisdictions. In adult prisons in New South Wales, strip searches can only be performed when absolutely necessary[366] and never involve body cavity searches.[367] Meanwhile, in the ACT, strip searching is only performed on reasonable grounds and in the least restrictive manner possible, while respecting the dignity of the detainee.[368]

Strip searching in prisons is an inherently harmful practice for detained people. Being subjected to an intrusive search can be degrading and a source of re-traumatisation for vulnerable people in the prison system. When time spent in prison serves to re-traumatise people, rather than providing an opportunity for rehabilitation and therapeutic care, the risk of recidivism is greatly increased. This is particularly important given the vulnerable profile of the prison population, in both youth and adult prisons. A large proportion of people held in prisons are victim-survivors of domestic abuse, sexual violence and other forms of trauma.

Legal practitioners at VALS report that some clients had been required to be strip searched in front of multiple guards. These clients often had histories of abuse, and the practice of strip searching was re-traumatising. Some of these clients had medical evidence which suggested that a strip search could be re-traumatising, and this evidence was often not considered before the searches were undertaken. It is clear that the use of strip searching is not confined to situations where it is truly necessary or a last resort for prison staff. At the highest level, data on strip searches reveal that they are extremely ineffective in uncovering contraband. For example, in youth detention, figures obtained by the Human Rights Law Centre showed that "over a four month period between July and October 2019, 1,277 strip searches were conducted on children and young people at the two juvenile justice centres in Victoria [and]… Only 6 items were found as a result."[369] This strongly suggests that strip searches are used far more often than could be justified by any reasonable suspicion that they are necessary or likely to uncover contraband.

---

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

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

[366] Inspector of Custodial Services, New South Wales (2020). Inspection standards: For adult custodial services in New South Wales, at 40.9

[367] Ibid., at 40.13.

[368] Inspector for Custodial Services, ACT (2019). ACT Standards for Adult Correctional Services, Standard 28.

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

In 2017, the Victorian Ombudsman identified "a significant number of routine and unnecessary strip searches", including searches of detained people before and after receiving visits, in violation of the Victorian Charter, the Mandela Rules, and prison policy. The Ombudsman recommended this practice should immediately cease; that recommendation was not accepted by the Government.[370]

Furthermore, in Minogue v. Thompson,[371] the Victorian Supreme Court held that random strip searches and urine testing to be performed within sight of prison officials were violations of Minogue's right to privacy under the *Victorian Charter of Human Rights and Responsibilities 2006*. Based upon the knowledge and experience of legal staff at VALS, people in prison who are required to submit to urine testing are required to do so in the presence of multiple prison guards. This can be re-traumatising for people who have histories of abuse. People in prison should be given an option of passing urine while not in the direct presence of guards (for example, in darkened rooms with the use of urine-sensitive dye in toilets).

IBAC's recent report on the corrections system exposed serious misconduct in the way that strip searches are managed and conducted. Several specific incidents of inappropriate searches were investigated by IBAC, which found that staff were unfamiliar with the human rights standards supposed to govern their behaviour and that prison management did not properly investigate complaints about inappropriate searches.[372]

Most concerningly, IBAC reported that the General Manager of Port Phillip Prison told its investigators that strip searches were "one of the options available to assert control" over people in prison.[373] This is a clear demonstration that strip searches are used not out of necessity, but as a tool of discipline and to exert power over detained people – echoing the concerns of an earlier investigation in Western Australia.[374] The fact that the strip searches investigated by IBAC were conducted shortly after unrelated behavioural incidents reinforces this, as does the escalation of the searches into assaults on incarcerated people by staff. While the IBAC report is disturbing, issues concerning strip searches have been raised in other Australian jurisdictions

Women in Tasmanian jails were subjected to 841 strip searches over a seven-month period, according to figures obtained under a Right To Information request. The Human Rights Law Centre obtained the data from Mary Hutchinson Women's Prison and the Risdon Prison Complex for the period between

[370] IBAC (2021), *Special report on corrections*, p54. Accessed at https://www.ibac.vic.gov.au/docs/default-source/special-reports/special-report-on-corrections---june-2021.pdf?sfvrsn=ee450c8c_2.
[371] [2021] VSC 56
[372] IBAC (2021), *Special report on corrections*, p54, 62.
[373] Ibid, p53.
[374] Ibid, p. 55.

October 2020 and April 2021. The documents show only three searches turned up concealed items: pain medication; tobacco and a lighter; and tobacco and matchsticks.[375]

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

Inappropriate practices need to be reined in through legislative reform and the establishment of robust, independent prison oversight, in line with Australia's OPCAT obligations (discussed below). Prison staff and management have not responded to well-documented patterns of inappropriate searching. Changes to policy are inadequate in the face of a culture of disregard for the human rights concerns associated with strip searching. It is important to note that this culture is not unique to Victoria; reports from NSW also show prison staff conducting strip searches far beyond their legal authority to do so, including on visitors,[376] despite the stringent standards outlined above. These considerations have led human rights groups around Australia to conclude that a ban on routine strip searches, entrenched in legislation, is the only safeguard which can entrench proper protections for people in prison.[377]

RECOMMENDATIONS

Recommendation 76. The threshold for authorising a strip search in adult prisons should be raised by legislation. 'Good order' and 'security of the facility' should be removed as grounds for a strip search and legislation should provide that strip searching must be a last resort and must be based on intelligence. Prior to strip searching, other means of searching such as pat searches, metal detectors and increased surveillance must be used. Strip searching must never be routinely conducted as part of the general routine of the centre or on entry to a centre.

Recommendation 77. Prisons should adopt policies which require them to consider the effect of strip searches on re-traumatisation.

Recommendation 78. Urine testing should only be required upon reasonable grounds and in a manner consistent with the inherent dignity and right to privacy of the detainee involved to the greatest extent possible.

[375] Alvaro, A. (2021). Female inmates in Tasmania subjected to 841 strip searches. ABC.net.au. Available at https://www.abc.net.au/news/2021-09-03/strip-searches-of-female-prisoners-in-tasmania/100431432.
[376] O'Brien Criminal & Civil Solicitors (2021), 'Damages awarded to woman strip-searched by Corrective Services officer'. Accessed at https://obriensolicitors.com.au/damages-awarded-woman-strip-searched-correctives-officer/.
[377] Lawyers Weekly (2021). 'Human rights lawyers call for end to "demoralising" strip searches'. Accessed at https://www.lawyersweekly.com.au/biglaw/31596-human-rights-lawyers-call-for-end-to-demoralising-strip-searches.
Canberra Times, 5 August)2021, 'Call to ban routine strip searches on women in Canberra's prisons'. Accessed at https://www.canberratimes.com.au/story/7370668/call-to-ban-routine-strip-searches-on-women-in-canberras-prison/.

Recommendation 79. Body cavity searches should never be performed on imprisoned people.

Recommendation 80. The Government should invest in technology which enables non-intrusive searching, to provide further alternatives and minimise the use of strip searching.

Equivalence of Healthcare

The provision of high-quality healthcare in prison is essential to maintaining adequate conditions and treatment in custody, avoiding re-traumatisation, and reducing risk factors for reoffending. It is also necessary for upholding the human rights and wellbeing of people in prison. This is the basis of the 'equivalence of care' principle, according to which the Government has an obligation to provide equivalent access to medical care for people in detention as those in the community. People held in prisons are completely dependent on the state to provide adequate healthcare.

The *United Nations Standard Minimum Rules for the Treatment of Prisoners* (**the Mandela Rules**) make clear that "prisoners should enjoy the same standards of health care that are available in the community, and should have access to necessary healthcare services free of charge, without discrimination on the grounds of their legal status."[378] The obligation to provide equivalence of medical care to people deprived of their liberty is echoed in *the International Covenant on Economic, Social and Cultural Rights*, which emphasises "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[379]

The Victorian Charter of Human Rights and Responsibilities requires that "[a]ll persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person".[380] The Victorian Coroners Court has found, in its inquest into the death of Yorta Yorta woman Ms Tanya Day, that in custodial settings this requires police and prison staff to ensure access to medical care, given that people detained are completely dependent on the state to provide for their health.[381]

Equivalence of care is particularly important because people in prison are disproportionately likely to have pre-existing health conditions and vulnerabilities which exacerbate their healthcare needs. This is a characteristic common to prison populations across jurisdictions, and has been found in both

[378] United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), UN Doc A/RES/70/175 (17 December 2015).
[379] International Covenant on Economic, Social and Cultural Rights, Article 12.
[380] Charter of Human Rights and Responsibilities Act 2006, s22(1).
[381] Coronial Inquest into the Death of Tanya Day, [533].

Australian prisons[382] and by international organisations.[383] As discussed above, many incarcerated people have both diagnosed and undiagnosed disabilities. Victoria is no exception to this well-documented phenomenon, which makes the provision of healthcare in prisons an urgent matter for the state.[384] The same is generally observed in youth detention setting,[385] though data in Australia is more limited.[386] Existing evidence indicates that the health needs of incarcerated adolescents are greater than those in non-custodial settings.[387]

A recent tragic example of the lack of equivalence in healthcare in Victorian prisons involved the death of a 12-day-old baby in the mothers and children unit at Dame Phyllis Frost Centre on 18 August 2018. Despite efforts made by the mother and a fellow incarcerated person to elicit assistance to attempt to resuscitate the baby, the prison officers and nurse that arrived in the cell allegedly failed to engage in any efforts to perform CPR.[388] The failure of officers and healthcare staff to attempt to perform lifesaving measures on a newborn baby would be extremely unlikely if the situation had occurred within the greater Victorian community.

Aboriginal people already haveh serious health conditions at a much higher rate than other parts of the Australian population. Aboriginal people detained in prisons are, according to research from the Victorian Aboriginal Community Controlled Health Organisation (**VACCHO**), less healthy than Aboriginal people in the community and less healthy than non-Aboriginal people in prison.[389] In youth

[382] Australian Institute of Health and Welfare (2019). The health of Australia's prisoners: 2018, p. vi. Available at https://www.aihw.gov.au/getmedia/2e92f007-453d-48a1-9c6b-4c9531cf0371/aihw-phe-246.pdf.aspx?inline=true; Royal Australian College of General Practitioners (2019). Custodial health in Australia: Tips for providing healthcare to people in prison, pp. 3-4. Available at https://www.racgp.org.au/FSDEDEV/media/documents/Faculties/SI/Custodial-health-in-Australia.pdf; and Australian Medical Association (2012). Position statement on Health and the Criminal Justice System, 3. Available at https://www.ama.com.au/sites/default/files/documents/Health_%26_the_Criminal_Justice_System_%28final%29.pdf.

[383] United Nations (2021). United Nations System Common Position on Incarceration, p. 12; and World Health Organisation Europe (2007). Health in Prisons: A WHO guide to the essentials in prison health, pp. 15-17. Available at https://www.euro.who.int/__data/assets/pdf_file/0009/99018/E90174.pdf.

[384] Deloitte Consulting. Victorian prisoner health study: Department of Justice, Government of Victoria (February 2003), 1-2. Available at https://files.corrections.vic.gov.au/2021-06/victorian_prisoner_health_study_february_2003_part1.pdf?VersionId=HvouyrKcAd05KLEQ4GICvOJkd_YvB2a6;

[385] See American Academy of Pediatrics. Policy Statement: Health Care for Youth in the Juvenile Justice System (2011), 1. Available at http://yvppolicyportal.safestates.org/wp-content/uploads/2015/09/Health-Care-for-Youth.pdf;

[386] Australian Institute of Health and Welfare. National data on the health of justice-involved young people: A feasibility study, 2016-17 (2018), vi. Available at https://www.aihw.gov.au/getmedia/4d24014b-dc78-4948-a9c4-6a80a91a3134/aihw-juv-125.pdf.aspx?inline=true;

[387] The Royal Australasian College of Physicians. The health and Wellbeing of Adolescents (2011), 4, available at https://www.racp.edu.au/docs/default-source/advocacy-library/the-health-and-wellbeing-on-incarcerated-adolescents.pdf;

[388] Schelle, C. (2021) Coroner to probe newborn baby's tragic death in Melbourne prison. News.com.au. Available at https://www.news.com.au/national/victoria/courts-law/coroner-to-probe-newborn-babys-tragic-death-in-melbourne-prison/news-story/0679b4ba482860ecf392dc6d3ce5ac3a.

[389] Victorian Aboriginal Community Controlled Health Organisation. Keeping our mob healthy in and out of prison: Exploring Prison Health in Victoria to Improve Quality, Culturally Appropriate Health Care of Aboriginal People.(2015), 9, 13. Available at http://www.vaccho.org.au/assets/01-RESOURCES/TOPIC-AREA/RESEARCH/KEEPING-OUR-MOB-HEALTHY.pdf.

detention, across the country, the majority of Aboriginal children are found to have multiple health and social problems upon entering detention.[390]

The principle of equivalency is not only applicable to prisons but – like the jurisdiction of OPCAT monitoring bodies, discussed below – to all places where people are deprived of their liberty. This includes police custody, where ensuring adequate healthcare is an important element in reducing deaths in custody. In July of this year, the Queensland Ambulance Service issued an apology for providing inadequate care before the death of an Aboriginal man detained by police in Townsville.[391] There are far more cases where no accountability has ever been established. The sheer number of deaths in custody, from a variety of causes, are testament to the inadequate provision of health care – including mental health care – and the failure of Australian jurisdictions to enact the principle of equivalency.

Victoria is not an exception to this pattern of failure. But Victoria is unusual among Australian states and territories in not providing healthcare in places of detention through its health department, but through private providers sub-contracted by the Department of Justice and Community Safety.[392] This arrangement falls short of international human rights standards which are themselves inadequate in many respects, and the lack of transparency around places of detention makes scrutiny of healthcare provision extremely difficult.

It should also be acknowledged that it becomes far more difficult to deliver high-quality healthcare in prisons when the prison population is growing and, as a result of the high proportion of people on remand, has high rates of people moving in and out of custody. In NSW, the Inspector of Custodial Services' review of health services noted:

> Overall inmate population increases, combined with high numbers of inmates moving through the custodial system each year even for short periods, has placed extra demand on health services […] This is because each person entering the correctional environment, even for the shortest period of time, needs to be fully assessed from a health, welfare and safety perspective. Previously prescribed medication needs to be confirmed, ordered and administered […] current and emerging acute and chronic health issues need to be identified, assessed and managed.
>
> This is different from what a health service in the community would be expected to do […] This is the predominate workload of health professionals working within the custodial environment. This also diverts nursing, medical and other health professional time from the delivery of acute and chronic

[390] Parliament of the Commonwealth of Australia. Doing Time – Time for Doing: Indigenous youth in the criminal justice system (2011),87-88. Available at https://www.aph.gov.au/binaries/house/committee/atsia/sentencing/report/fullreport.pdf.

[391] The Guardian (2021). 'Tragic on many levels': Queensland ambulance service apologises after death of Indigenous man'. Accessed at https://www.theguardian.com/australia-news/2021/jul/23/tragic-on-many-levels-queensland-ambulance-service-apologises-after-death-of-indigenous-man.

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

> health interventions this vulnerable and disadvantaged high needs population requires, both for themselves and for the community to which they will return.[393]

In Victoria, the tightening of bail laws has increased the number of unsentenced people in prison, which leads to higher numbers of admissions to prisons, more short spells in custody, and more transfers between facilities – putting intense pressure on the delivery of services VALS expects to deliver high-quality healthcare.

Equivalence of care, particularly for Aboriginal people with serious health issues, and a need for culturally safe healthcare services, can only be delivered with substantial resourcing. This requires greater investment from the state Government, but there is also a need for people in prison to have access to funding from Medicare and the Pharmaceutical Benefits Scheme, to ensure that resources are available to provide all the care needed to the same standard enjoyed in the community. This is particularly important for Aboriginal people, as there are a number of specific items in the Medicare Benefits Schedule which support enhanced screenings, assessments and health promotion activities for Aboriginal people. These streams of Medicare funding are critical to the operation of Aboriginal health services.[394] Access to Medicare funding for people in prison would enable the expansion of in-reach care in prisons by Aboriginal health services. It would also bring funding arrangements in line with those for people in the community. ACCHOs receive direct state and federal funding, as well as being eligible for Medicare funding streams. Similar funding arrangements should be available in relation to custodial settings to ensure the same quality of care can be provided.[395]

Good Practice Models

ACT: Since Medicare access is suspended for incarcerated people during incarceration, the ACT Government committed funding to establish an autonomous Winnunga AMC Health and Wellbeing Service to Aboriginal people in prison in Alexander Maconochie Centre (AMC), resulting in Winnunga Nimmityjah Aboriginal Health and Community Services being the first ACCHO to provide primary healthcare service to incarcerated people in 2019.[396]

[393] NSW Inspector of Custodial Services (2021), *Health services in NSW correctional facilities*, p. 14. Accessed at https://www.inspectorcustodial.nsw.gov.au/inspector-of-custodial-services/reports-and-publications/inspection-reports/adult-reports/health-services-in-nsw-correctional-facilities.html.

[394] Ibid, p. 83.

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

[396] Shukralla, H. & Tongs, J. (2020). Austrailan first in Aboriginal and Torres Strait Islander prisoner health care in the Australian Capital Territory. 44(4) Australian and New Zealand Journal of Public Health 324. Available at https://onlinelibrary.wiley.com/doi/full/10.1111/1753-6405.13007

Northern Territory: Successes with in-reach care to Aboriginal children in detention following the commissioning of an Aboriginal community health organisation, Danila Dilba, to deliver healthcare in the Don Dale Youth Detention Centre.[397]

New South Wales: The inspector of Custodial Services made a firm recommendation that access to Medicare would facilitate the expansion of in-reach care in prisons by Aboriginal health services.[398]

The importance of equivalence of care to Aboriginal people in prison was recognised by the Royal Commission into Aboriginal Deaths in Custody more than thirty years ago. Recommendation 150 of the Royal Commission was that "health care available to persons in correctional institutions should be of an equivalent standard to that available to the general public," and specifically identified access to mental health and AOD services and the importance of culturally safe care. Equivalence of care is also the underlying goal of other RCIADIC recommendations regarding healthcare in prisons and police custody, including Recommendations 127, 252, 152, 154, 133, 265 and 283.[399]

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

> For both Aboriginal and Torres Strait Islander people and non-Indigenous people, the most common cause of death was medical problems, followed by self-harm. However, Indigenous people who died in custody were three times more likely not to receive all necessary medical care, compared to non-Indigenous people. For Indigenous women, the result was even worse – less than half received all required medical care prior to death.[400]
>
> Aboriginal and Torres Strait Islander women were less likely to have received all appropriate medical care before death (54%) compared to men (36%)… Agencies such as police watch houses, prisons, and hospitals did not follow all of their own procedures in 43% of the cases in which Aboriginal and Torres Strait Islander people died, compared to 19% of the cases of non-Indigenous people.[401]

Addressing health care inequalities in prisons has been found to provide multiple broader-reaching benefits. Ensuring that the health needs of persons in detention benefits public health outcomes upon release of people in detention, since physical health issues, such as communicable diseases, and mental health issues, which may be a root cause of criminal behaviours in certain instances, are

[397] For further information, see https://ddhs.org.au/services/don-dale-youth-support.
[398] NSW Inspector of Custodial Services (2021), *Health services in NSW correctional facilities*, p. 83. Accessed at https://www.inspectorcustodial.nsw.gov.au/inspector-of-custodial-services/reports-and-publications/inspection-reports/adult-reports/health-services-in-nsw-correctional-facilities.html.
[399] Williams (2021), 'Comprehensive Indigenous health care in prisons requires federal funding of community-controlled services', The Conversation. Accessed at https://theconversation.com/comprehensive-indigenous-health-care-in-prisons-requires-federal-funding-of-community-controlled-services-158131.
[400] Allam, L. et al. (2021). The facts about Australia's rising toll of Indigenous deaths in custody. Available at https://www.theguardian.com/australia-news/2021/apr/09/the-facts-about-australias-rising-toll-of-indigenous-deaths-in-custody.
[401] Ibid.

mitigated or resolved prior to release into the community.[402] Furthermore, addressing health and wellbeing issues increases the likelihood of good health during and following release, as well as decreasing the risk of death following release from custody.[403] Absolutely critical to the context of the present submission, the provision of adequate and appropriate physical and mental health services to persons in detention has also been demonstrated to increase the likelihood of positive reintegration into the community and decrease recidivism.[404]

RECOMMENDATIONS

Recommendation 81. People in detention must be provided medical care that is the equivalent of that provided in the community. Medical care must be provided without discrimination.

Recommendation 82. Health care should be delivered through DHHS rather than DJCS, and not through for-profit organisations.

Recommendation 83. A model of delivery of primary health services by Aboriginal Community Controlled Health Organisations in places of detention in Victoria should be considered, in consultation with VACCHO and member organisations.

Recommendation 84. The Federal Government must ensure that incarcerated people have access to the Pharmaceutical Benefits Scheme (PBS) and the Medicare Benefits Schedule (MBS). The Victorian Government should advocate with the Commonwealth to enable this access in order to provide equivalence of care to Aboriginal people and other vulnerable people held in prison.

Recommendation 85. The Federal and State Governments should ensure that incarcerated people have access to the National Disability Insurance Scheme (NDIS) and are assessed for eligibility for NDIS upon entry to a prison or youth justice centre.

Recommendation 86. The Government should employ more Aboriginal Health Workers and Aboriginal Wellbeing Officers at all levels of the justice health system (Victoria Police, Courts, Forensicare/MHARS, Community Corrections, Correctional Health Services) to work with Aboriginal people at all stages of their engagement with the criminal legal system.

[402] United Nations (2021). United Nations System Common Position on Incarceration, p. 12.
[403] Royal Australian College of General Practitioners (2019). Custodial health in Australia: Tips for providing healthcare to people in prison, p. 5. Available at https://www.racgp.org.au/FSDEDEV/media/documents/Faculties/SI/Custodial-health-in-Australia.pdf
[404] Ibid, p. 12; Australian Institute of Health and Welfare (2019). The health of Australia's prisoners: 2018, p. vi. Available at https://www.aihw.gov.au/getmedia/2e92f007-453d-48a1-9c6b-4c9531cf0371/aihw-phe-246.pdf.aspx?inline=true; Royal Australian College of General Practitioners (2019). Custodial health in Australia: Tips for providing healthcare to people in prison, p. 5. Available at https://www.racgp.org.au/FSDEDEV/media/documents/Faculties/SI/Custodial-health-in-Australia.pdf.

Recommendation 87. The Government should prioritise the development and finalisation of standards for culturally safe, trauma informed health services in the criminal legal system…

Mental Health & Mental Healthcare

High-quality healthcare for people in prison is particularly important given the high rates of mental ill-health among the prison population and among Aboriginal people in Victoria. As noted above, mental illness can cause or exacerbate engagement with the criminal legal system – by leading to police becoming involved, as well as leading to inadequate and insensitive engagement by police officers and courts.

The Mental Health Advice and Response Service (**MHARS**)[405] provides clinical mental health advice to courts concerning the appropriateness of mental health interventions and to Community Corrections concerning the appropriateness of mental health treatment and rehabilitation conditions on Community Corrections Orders (**CCO**) and people on parole with a mandated health order. Additionally, the MHARS also performs a consultation and education function for judges, community corrections officers and other court users on mental health services and issues. Phase 4 of the Aboriginal Justice Agreement includes a commitment to provide access to culturally safe mental health services for Aboriginal people who have a moderate mental health condition or disorder, and who have a CCO with a mental health treatment and rehabilitation condition or are on parole with a mandated health order. VALS reiterates its prior recommendation to establish a specialist Koori Unit within MHARS to lead service delivery for Aboriginal people coming into contact with the criminal legal system.[406]

VALS has also emphasised the need for high-quality, culturally safe mental health care in prisons previously, in work focused on the mental health system more broadly. These recommendations remain important to the context of this Committee's Inquiry. Without adequate care, people in prison may find their mental health problems worsening, creating circumstances which may lead to further contact with the justice system and reoffending upon release.

There is a lack of sustainably resourced culturally appropriate health services and programs to meet the social and emotional wellbeing needs of Aboriginal people in prison.[407] VALS continues to call for increased access to culturally safe, trauma-informed forensic mental health services throughout the criminal legal system.[408] Critically, this should involve resources for VACCHO to guide the development of culturally safe programs. VACCHO has long called for changes in correctional health service delivery, including

[405] For an overview of the MHARS, see https://www.forensicare.vic.gov.au/our-services/community-forensic-mental-health-services/court-mental-health-response-service/.
[406] VALS (2019). Submission to the Royal Commission into Victoria's Mental Health System, pp. 44-45.
[407] Ibid., p.34.
[408] Ibid., p.43.

recommendations around improving cultural safety across the clinical, programs and policy spheres, to decrease service barriers and increase health service utilisation by Aboriginal people in prison.[409]

RECOMMENDATIONS

Recommendation 88. The Government should ensure that all prison officers receive regular gender and culturally sensitive training on how to interact with people with cognitive disabilities.

Recommendation 89. The Government should commit significant resources to improving mental healthcare for Aboriginal people in custody in Victoria, including by:

- Recruiting, training and accrediting more qualified Aboriginal and Torres Strait Islander psychologists, psychiatrists, counsellors, social workers and other mental health workers;
- Introducing a specialised Koori Unit within Mental Health Advice and Response Service;
- Introducing standardised and culturally appropriate screening tools across all custody settings.

OPCAT

VALS has repeatedly called for the Victorian Government to take steps to implement Australia's obligations under the *Optional Protocol on the Convention Against Torture, Cruel, Inhuman and Degrading Treatment and Punishment* (**OPCAT**).[410]

Effective and culturally appropriate implementation of OPCAT is critical to prevent many of the primary concerns in prison environments, including excessive use of force, inappropriate strip searching, excessive use of isolation and lockdowns and woefully inadequate healthcare and mental healthcare. As noted above in relation to protections in police custody, it is also a critical way of protecting the rights of individuals who are in police custody.

Australia ratified OPCAT in December 2017 and has until January 2022 to fully implement its legal obligations under this treaty. OPCAT will be implemented in Australia through a national network of bodies fulfilling the functions of a National Preventive Mechanism (**NPM**). To date, Western Australia is the only State or Territory to have formally designated an NPM.[411] Legislative processes are currently

[409] Victorian Aboriginal Community Controlled Health Organisation (2015). Keeping our mob healthy in and out of prison: Exploring Prison Health in Victoria to Improve Quality, Culturally Appropriate Health Care of Aboriginal People, pp. 9, 13. Available at http://www.vaccho.org.au/assets/01-RESOURCES/TOPIC-AREA/RESEARCH/KEEPING-OUR-MOB-HEALTHY.pdf; and VALS (2019). Submission to the Royal Commission into Victoria's Mental Health System, p. 43.

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

[411] The Western Australian Ombudsman and the Office of the Inspector of Custodial Services have been nominated as Western Australia's NPMs for mental health and other secure facilities, as well as justice-related facilities (including police

underway in Tasmania[412] and South Australia[413] to designate their respective NPMs. Very little progress has been made in Victoria.

The urgent need to implement OPCAT in Victoria has been identified by the Victorian Ombudsman, who carried out two OPCAT style investigations in custodial facilities in 2017 and 2019.[414] The Victorian Government had not responded to the Ombudsman's recommendation to establish, and properly resource, a NPM in Victoria.[415] According to the Ombudsman, "DJCS has advised that a considerable amount of work has been done on the government's implementation of its responsibilities under OPCAT, and that a lack of public statements about OPCAT is not an indicator that progress is not being made."[416]

Since June 2020, the Government has remained silent on its "considerable" progress. The only information in the public record is the allocation of $500,000 for OPCAT implementation between 2021-2025.[417] This is woefully inadequate, and VALS is concerned that this once in a generation opportunity is being squandered.

In August 2021, the Commonwealth Government released the Commonwealth Closing the Gap Implementation Plan, which dedicates funding over two years (2021-2022) to support states and territories to implement OPCAT.[418] Although the document indicates the amount of funding for other actions under the Plan, it is silent on the amount of funding that will be provided to States and Territories for OPCAT implementation.[419]

VALS takes this opportunity to reiterate the recommendations that it has made previously. The Victorian Government must be transparent and provide a public update on its progress in implementing OPCAT. VALS and the Aboriginal Justice Caucus expect the Victorian Government to engage in robust consultations in developing an appropriate model and legislation for Victoria.

---

lock-ups). See Commonwealth Ombudsman (2019). *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT),* p. 3.

[412] In November 2020 the Tasmanian Government announced that it would nominate the Tasmanian Custodial Inspector as its NPM. A draft Bill, the *Custodial Inspector Amendment (OPCAT) Bill 2020*, was released by the Department of Justice for information and comment in November-December 2020. A second draft Bill, the *OPCAT Implementation Bill* 2021, is currently open for submissions.

[413] The *OPCAT Implementation Bill 2021* (South Australia) is currently before the South Australian House of Assembly. The Bill nominates multiple existing bodies as NPMs, each with jurisdiction in relation to different places of detention.

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

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

[416] Ibid., p. 14.

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

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

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

You can find out more about OPCAT from VALS' OPCAT factsheet and *Unlocking Victorian Justice* webinar, *OPCAT: An opportunity to prevent the ill-treatment, torture and death of Aboriginal and Torres Strait Islander people in custody*. VALS' Head of Policy, Communications and Strategy also completed a Churchill Fellowship on culturally appropriate OPCAT implementation for Aboriginal and Torres Strait Islander people.

RECOMMENDATIONS

Recommendation 90. The Victorian Government must urgently undertake robust, transparent and inclusive consultations with the Victorian Aboriginal community, its representative bodies and ACCOs on the implementation of OPCAT in a culturally appropriate way.

Recommendation 91. The operations, policies, frameworks and governance of the designated detention oversight bodies under OPCAT (National Preventive Mechanisms - NPMs) must be culturally appropriate and safe for Aboriginal people.

Recommendation 92. The Victorian Government must legislate for the NPM's mandate, structure, staffing, powers, privileges and immunities.

Recommendation 93. The Victorian and Commonwealth Governments must ensure that the NPM is sufficiently funded to carry out its mandate effectively.

Recommendation 94. In accordance with Article 3(1) of OPCAT, the NPM in Victoria must have jurisdiction over all places where individuals are or may be detained, including… forensic mental health hospitals and other places where people with cognitive disabilities are deprived of their liberty.

Recommendation 95. The Victorian Government must amend COVID-19 Emergency legislation to ensure that visits to correctional facilities and youth detention facilities by independent detention oversight bodies cannot be prohibited.

Disciplinary Proceedings

As noted by the Victorian Ombudsman in her recent report, "[d]isciplinary hearings in Victorian prisons are still carried out 'in the dark' with insufficient scrutiny, oversight or transparency."[420] The disciplinary system in Victoria must operate in accordance with procedural fairness, and key protections derived from procedural fairness must be enshrined in legislation.

[420] Victoria Ombudsman (2021). Investigation into good practice when conducting prison disciplinary hearings, p. 4.

The prison disciplinary system deals with incarcerated people who break prison rules. The process has three stages: (1) investigation of the alleged offence, resulting in a decision to charge the incarcerated person; (2) a disciplinary hearing; and (3) determination of a penalty (if the person pleads guilty or is found guilty of the offence).[421] According to the Victorian Ombudsman, there are approximately 10,000 disciplinary hearings each year across Victoria's 14 prisons.[422]

The prison disciplinary system is regulated through the *Corrections Act 1986* (Vic), *Corrections Regulations* 2019 (Vic), Commissioner's Requirements (setting out high-level policy requirements for all prisons in Victoria), Deputy Commissioner's Instructions (for public prisons) and Operating Instructions (for private prisons) and the Prison Disciplinary Handbook.[423] Prison staff involved in disciplinary hearings are also bound by the *Charter of Human Rights and Responsibilities 2006*, as well as procedural fairness principles arising under common law.[424] Under international law, the Mandela Rules provide detailed requirements for prison disciplinary systems,[425] including that "[n]o prisoner shall be sanctioned except in accordance with…. the principles of fairness and due process."[426]

A recent investigation by the Victorian Ombudsman revealed serious concerns regarding the investigation of prison offences and disciplinary hearings:

- Perception amongst incarcerated people that prison officers investigating the offence and conducting disciplinary hearings are not impartial;
- Use of undocumented pre-hearing discussions;
- Insufficient information provided to incarcerated people about the charge;
- Poor use of discretion in the decision to charge an incarcerated people or a prison offence;
- Limited availability of independent legal advice and support;
- No requirement for written reasons for a decision;
- Use of disciplinary hearings when other less severe options were reasonably are available;
- Inconsistent and disproportionate penalties;
- Limited right of review of the outcome of a disciplinary hearing (incarcerated people who want to challenge the outcome of a disciplinary hearing can only do so in the Supreme Court).[427]

Additionally, the Ombudsman's investigation identified the following concerns relating to disciplinary proceedings for incarcerated people with a cognitive disability or mental illness:[428]

[421] Ibid., p. 11.
[422] Ibid., p. 4.
[423] Ibid., p. 20.
[424] Procedural fairness includes: the hearing rule, the bias rule, the notice rule and the evidence rule. Ibid., p. 16.
[425] *The United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules*), Rules 37 – 43 and Rule 46.
[426] Ibid., Rule 39(1).
[427] Victoria Ombudsman (2021). Investigation into good practice when conducting prison disciplinary hearings, p. 24.
[428] According to data from Corrections Victoria, as noted in the report by the Victorian Ombudsman, 4% of Victoria's 7,808 incarcerated people had a registered intellectual disability, over 54% of incarcerated people were considered at risk of suicide or self-harm, and 42% of incarcerated people had a psychiatric rating (indicating either a suspected or diagnosed psychiatric condition). Ibid., p. 54.

- over-representation of such incarcerated people in disciplinary processes;
- failure to identify and consider the condition of some incarcerated people;
- limited independent support for many incarcerated people with a disability;[429]
- inconsistent consultation with relevant professionals.[430]

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

The Ombudsman's report notes that the "consequences for a prisoner can be serious, can impact on parole and include the loss of 'privileges' – such as telephone calls or out of cell time – and can even result in contact visits with family or children being withdrawn."[431] This is particularly concerning as contact with family is critical to rehabilitation. According to the Mandela Rules, "disciplinary sanctions or restrictive measures shall not include the prohibition of family contact."[432]

Regarding people with disability, the Mandela Rules provide that: "Before imposing disciplinary sanctions, prison administrations shall consider whether and how a prisoner's mental illness or developmental disability may have contributed to his or her conduct and the commission of the offence or act."[433] This is of particular importance, given the report's finding that there was inconsistent use of Corrections Independent Support Officer volunteers for incarcerated people with an intellectual disability.

RECOMMENDATIONS

Recommendation 96. The Victorian Government should implement the recommendations of the Victorian Ombudsman in her July 2021 report on prison disciplinary hearings.

Recommendation 97. Protections relating to procedural fairness in disciplinary proceedings should reflect those outlined in the Mandela Rules and should be enshrined in legislation.

[429] The Office of the Public Advocate has also raised concerns about this. See: Hope, Z. (2020). "Intellectually disabled prisoners punished without oversight,"
[430] Victoria Ombudsman (2021). Investigation into good practice when conducting prison disciplinary hearings, p. 56.
[431] Ibid., p. 4.
[432] Rule 43(3) of the *Mandela Rules*.
[433] Rule 39(3) of the *Mandela Rules*.

Recommendation 98. The rights of incarcerated people with disability must continue to be upheld during the pandemic and recovery period, including the right to be supported through the Office of the Public Advocate during disciplinary hearings.

Privatisation of Prisons

The modern phenomenon of private, or for-profit prisons, originated in the United States in the mid-1980s in an effort to manage rapidly rising prison populations. The model was quickly adopted by Australia and the United Kingdom. In 2013, as the prison population in the United States reached a peak, approximately 15% or 30,000 people in prison were held in privately operated centres.[434]

Under the Obama Administration, the United States began moving away from having privately run prisons. The Biden Administration has continued the trend, with President Joe Biden this year signing a series of executive actions around racial equity which included a focus on prison reform. The President directed the Justice Department not to renew federal contracts with private prisons and has campaigned to eliminate the use of private prisons by the federal government. Notably, the motivation behind the shift is "the fact that prisons are not only encouraged profiteering off of human lives but more importantly, I've been shown by the Department of Justice Inspector General's report to be subpar in terms of safety and security for those incarcerated."[435]

Across Victoria, there are eleven public operated prisons and three privately operated prisons. The three privately managed prisons are Port Phillip Prison run by G4S, and Ravenhall Correctional Centre and Fulham Correctional Centre both run by the GEO Group. As of 31 May 2021, Corrections Victoria reported there were 7,274 people in prison, with 778 of those being Aboriginal people. Around 40% of Victoria's prison population is held in private prisons, a significant proportion compared with 15% of people in privately managed prisons in the United States, and the highest number in Australia.

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

Victoria's history with privately operated prisons should be a stark warning about the risks of privatisation. The Metropolitan Women's Correctional Centre was opened in 1996 as the first privately designed and operated prison in the state. In 2000, the State Government terminated the contracts

[434] U.S Department of Justice (2016) Memorandum for the Acting Director Federal Bureau of Prisons. Accessed at: https://www.justice.gov/archives/opa/file/886311/downloa d

[435] Vazquez, M. (2021) "It's time to act': Biden moves to address racial inequality'. CNN. Accessed at: https://edition.cnn.com/2021/01/26/politics/executive-orders-equity-joe-biden/index.html

and took over the prison after serious concerns about the safety of people in the prison. A report by the Correctional Services Commissioner found "an unacceptably high number of prison incidents," "a disproportionate number of prisoners being classified as Protection Prisoners as they were, or felt unsafe," and up to 29% of the prison population being held in an overcrowded protection unit. Contractual benchmarks came nowhere near being met: "levels of attempted suicide [were] more than double the maximum allowed benchmark," "prisoner assaults on staff [were] almost double the maximum allowed benchmark," and "prisoner on prisoner assaults [were] significantly in excess of the maximum allowed benchmark." Issues with subcontractors led to the prison's health service losing its accreditation. Overall, the report found "an inability by the prison to implement strategies to ensure the welfare and safety of prisoners and staff."[436]

Despite this disastrous outcome of privatisation at what is now the Dame Phyllis Frost Centre, Victoria has continued to offer private contracts for managing prisons. G4S and GEO are global corporations with extensive records of mismanagement and scandal internationally – as was CCA, the contractor which ran the MWCC. The growing role of these corporations in Victoria's prison system should be a cause of serious concern.

Victoria's reliance on private prisons has increased in recent years, as the overall prison population has skyrocketed. The unacceptable incarceration rate is putting increasing numbers of people at risk of mistreatment in private prison environments. Privatisation, by raising the risk of mistreatment, abuse and corruption, increases the number of people who are at risk of leaving prison with traumatic experiences and inadequate progress towards rehabilitation.

Fundamentally, a question that needs to be asked is what incentive is there for a private company that profits from booming prison populations to truly commit to reducing recidivism rates? This concern is clearly demonstrated in the amounts of money that people in prison are charged for basic necessities – VALS has had a client asked by a private prison to pay around $1500 to have a computer in his cell in order to prepare for his trial. This is illustrative of the incentive for private prison operators to focus on financial issues rather than on giving detained people the best chance to leave prison and avoid reoffending. The extensive involvement of private companies in the prison system will, as a result, only serve to increase recidivism if it is not rapidly abandoned.

Challenges in Management and Accountability

Private prisons are monitored by Corrections Victoria using Service Delivery Outcomes, including some intended to measure safety and security. This is consistent with the approach to private prisons in other jurisdictions, where the state takes on an arms-length role in tracking the performance of private

[436] Correctional Services Commissioners' Report on Metropolitan Women's Correctional Centre's Compliance with its Contractual Obligations and Prison Services Agreement, Department of Justice, 1999-2000. Accessed at: https://www.parliament.vic.gov.au/papers/govpub/VPARL1999-2002No40.pdf

contractors. This approach, however, greatly reduces transparency and accountability, and undermines the Government's ability to address misconduct and abuses in prisons.

In its assessment of the prison system in Queensland, the Crime & Corruption Commission (CCC) found that

> [t]his marketised approach, where prisons are operated by private, profit-driven organisations, disconnects the State from direct responsibility for the delivery of privately operated prisons" and "creates challenges for the State in ensuring prisoners […] are treated humanely and have appropriate access to programs and services.[437]

In Victoria, a 2021 report by IBAC found similar issues with the arms-length approach to monitoring and managing prisons. IBAC concluded that "[i]ssues related to transparency are of particular concern in privately managed prisons", in part because of "commercial-in-confidence clauses in contracts between the state and private service providers which may affect the public's ability to identify contractual violations and any remedial actions taken".[438]

The lack of transparency and accountability means that even identified problems can be difficult to remediate in private prisons. Risk management and the response to serious incidents has been a particular cause of concern in Victoria. The Victorian Auditor-General has reported that "[s]erious incidents at both Port Phillip and Fulham have, in some instances, exposed weaknesses in how G4S and GEO manage safety and security risks," and that these incidents are not being investigated in a way that identifies or addresses their underlying causes.[439]

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

Culture and Disciplinary Proceedings

A related problem with private prisons is the difficulty of influencing operational culture and establishing appropriate ethical standards.

Corruption in prisons is not only a risk to public funds and the integrity of the system. It also creates an environment where prison staff feel impunity about breaking rules, and so makes space for serious forms of misconduct including invasive strip-searching, use of force and inappropriate use of solitary confinement. The Queensland CCC found that "the public–private model makes developing a positive,

[437] Queensland Crime & Corruption Commission (2018), *Taskforce Flaxton: An examination of corruption risks and corruption in Queensland prisons*, p10. Accessed at https://www.ccc.qld.gov.au/sites/default/files/Docs/Public-Hearings/Flaxton/Taskforce-Flaxton-An-examination-of-corruption-risks-and-corruption-in-qld-prisons-Report-2018.pdf

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

[439] Victorian Auditor-General's Office (2018), *Safety and Cost Effectiveness of Private Prisons*, p45. Accessed at https://www.audit.vic.gov.au/sites/default/files/2018-03/20180328-Private-Prisons.pdf.

corruption-resistant culture difficult" because the government "has limited visibility of, and ability to influence, the culture of the private centres."[440] More generally, it reported that Queensland's Ethical Standards Unit (**ESU**) for prisons

> has limited influence in private prisons. Once a matter has been assessed, it is referred to the private prison to investigate and manage. The ESU has limited ability to influence professional standards or discipline outcomes in private prisons.[441]

These problems in Queensland are driven by structural features of prison privatisation, and the dynamics are no different in Victoria. IBAC's report identified serious misconduct in both public and private prisons, but it is notable that Port Phillip Prison – a private facility – saw the most inadequate disciplinary response, with some staff only disciplined when IBAC began its external investigation. Some staff at Port Phillip Prison were found to have interfered with their BWCs to obscure footage of misconduct, and investigations into incidents were not conducted in line with government or prison policy.[442]

Inadequate training and tokenistic efforts at investigating abuses are clear indications of a culture where the human rights and wellbeing of people in prison are not taken seriously. Though severe problems also exist in public prisons, privatisation makes it extremely difficult to address this culture in facilities which hold 40% of the prison population.

Healthcare Contracting

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

This vital principle can be undermined by subcontracting. In Australia, all jurisdictions except Victoria have healthcare in prisons managed by the health department. In Victoria, healthcare is managed by the Department of Justice and Community Safety, and service delivery is contracted to six private providers. These providers also subcontract some services.[443] The effect is a patchwork system where continuity of care is very hard to provide, particularly since people in prison may move between facilities, and the reliability and quality of services is highly inconsistent. Reducing the quality of health services and the possibility for people in prison to receive consistent, comprehensive care further

[440] Queensland Crime & Corruption Commission (2018), *Taskforce Flaxton: An examination of corruption risks and corruption in Queensland prisons*, p27.
[441] Ibid, p. 43.
[442] IBAC (2021), *Special report on corrections*, pp34-36. Accessed at https://www.ibac.vic.gov.au/publications-and-resources/article/special-report-on-corrections.
[443] Corrections Victoria, 'Justice Health', https://www.corrections.vic.gov.au/justice-health.

contributes to poor prison conditions, undermining rehabilitation and increasing the risk of reoffending.

RECOMMENDATION

Recommendation 99. The Government should end privatisation of prisons in Victoria. This should include wholly privately-run prisons, as well as particular services, such as healthcare. The Government should move towards public control of all prison facilities as a matter of urgency.

Women in Prison

The female prison population is distinct in many ways from the male prison population, and there are important factors warranting a gender-sensitive approach to criminal justice reform. Women in prison should be provided with appropriate supports to reduce the risk of recidivism and increase successful reintegration into Victorian community. Additionally, the location of the custodial placement of women – particularly Aboriginal women – is critical. In instances where women desire to serve their custodial sentences with dependent children, efforts need to be undertaken to streamline the process and enhance its transparency.

Women in prison should be given particular attention in the design and implementation of programs to rehabilitate and reduce reoffending. This is essential because incarcerated women are, on the one hand, less likely to have committed serious offences, and on the other ,more likely to enter prison with past experiences that make them susceptible to re-traumatisation and cycles of offending without special care. Furthermore, specifically addressing the distinct needs of minorities and Indigenous peoples, the Bangkok Rules contain provisions mandating the development and provision of gender and culturally-relevant programs and services, designed in consultation with Aboriginal women and communities, for Aboriginal women (while in prison,[444] prior to and following release from custody[445]).

Upwards of three quarters of imprisoned women in Australia have suffered violence and abuse,[446] and rates of mental illness, substance use issues and histories of homelessness are higher than among men in prison.[447] These issues disproportionately affect Aboriginal women, and Aboriginal women are imprisoned at extremely high rates – 21 times more than non-Aboriginal women.[448] This is particularly

[444] Rule 54 of the Bangkok Rules.
[445] Rule 55 of the Bangkok Rules.
[446] Johnson, H. (2004). *Drugs and crime: A study of incarcerated female offenders, Research and public policy series*; Justice Health & Forensic Mental Health Network (2017), *2015 Network Patient Health Survey report*; M Wilson, M. et al, (2017). *Violence in the Lives of Incarcerated Aboriginal Mothers in Western Australia,* SAGE Open.
[447] Australian Institute of Health and Welfare (2020). *The Health of Australia's Prisoners*.
[448] Change the Record Coalition (2017). *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment*.

challenging in prison environments, which do not do enough to support women dealing with these vulnerabilities and can instead exacerbate them. Custodial sentences can also be highly traumatising for women because they involve family separation – more than half of women in prison have dependent children[449] – and this is an especially serious issue for Aboriginal women, many of whom live with the intergenerational trauma of state-enforced separation of families in previous generations.

At the same time, the offences that women are imprisoned for tend to be less serious crimes, associated with the vulnerabilities identified above. These include drug offending, theft and property offences, often committed in the context of struggling with addiction, homelessness or mental illness.[450] Women on average serve shorter prison sentences than men and are more likely to be held in prison on remand.[451]

These facts clearly show that women in prison are very often only offending out of necessity and are more likely to have vulnerabilities that make prison environments very damaging for their wellbeing. On the other hand, they are in a good position to be reintegrated into society, if given adequate supports. Many women in prison have sought help from support services prior to being incarcerated.[452] Together, these factors point to the importance of creating therapeutic, trauma-informed approaches to supporting women in prison.

In Victoria, however, support for women in prison is sorely lacking. Women often serve short sentences, or (due to Victoria's bail laws) are only held in prison on remand for offences which ultimately do not lead to prison time. As a result, they are often not given access to rehabilitation programs which have a longer duration.[453] Research evidence suggests that without dedicated rehabilitation support, incarceration alone tends to *increase reoffending* rather than reduce it.[454] Women serve shorter sentences because their offences are less serious and it is a perverse feature of the Victorian criminal legal system that the less serious nature of offending results in women receiving fewer social supports. Improving the provision of support in the community, including for women on Community Corrections Orders, would be a far more effective approach to reducing reoffending.[455] In this context, VALS wishes to emphasise our support for the Aboriginal Justice Caucus' goal of establishing a residential diversion programme for Aboriginal women. Drawing lessons from the

[449] Australian Institute of Health and Welfare (2020) *The Health and Welfare of Women in Australia's Prisons*.
[450] Ibid.
[451] Crime Statistics Agency (2019). *Characteristics and offending of women in prison in Victoria, 2012-2018*.
[452] Victorian Ombudsman (2015). *Investigation into the rehabilitation and reintegration of prisoners in Victoria,* p. 94. Available at https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/investigation-into-the-rehabilitation-and-reintegration-of-prisoners-in-victoria/.
[453] Ibid.
[454] Centre for Innovative Justice (2021), *Leaving custody behind: Foundations for safer communities & gender-informed criminal justice systems*, p. 86. Available at https://cij.org.au/cms/wp-content/uploads/2021/09/leaving-custody-behind-issues-paper-july-2021-.pdf.
[455] Ibid.

Wulgunggo Ngalu Learning Place model, this program could strengthen connections to culture and address causes of offending, with significant benefits over the existing carceral approach.[456]

There are also significant shortcomings in transitional support for women leaving prison. Given that women are more likely to be imprisoned for offences associated with poverty, homelessness and addiction, transitional support is essential to avoiding reoffending among women. However, Victoria's only dedicated transition facility, the Judy Lazarus Transition Centre, holds only men. A similar facility for women with up to a year of their sentence remaining would be highly beneficial, as VALS has previously noted.[457] Beyond transitional prison facilities, improved provision of post-release housing and transitional healthcare and alcohol and drug treatment would greatly reduce the risk of reoffending among women. In addition to the recommendations in this section, VALS highlights that the recommendations below on transition and throughcare are particularly important for women.

The prison where the custodial sentence is served is also an important issue for women. In Victoria, prisons where women are held are geographically isolated, which has considerable impacts on the ability of children and other family members to visit due to transportation time and costs, as well as other disadvantages.[458] The preference for the location of the prison selected to be close as possible to the home of the woman serving a custodial sentence is raised in Rule 3 of the Bangkok Rules. Furthermore, the Royal Commission into Aboriginal Deaths in Custody made similar recommendations concerning the issue in reference to Aboriginal people in custody, 30 years ago. [459]

Data is not publicly available on the number of women in Victorian prisons who have dependent children residing with them. Corrections Victoria runs the Living with Mum program for mothers and dependent children,[460] but prison can never be a healthy environment for a child. While VALS is fundamentally opposed to families being held in prison environments, the issue is addressed in this submission, given the fact that the Victorian criminal legal system makes provision for such circumstances.

While women can apply to have their children live in prison with them, the decisions concerning whether a child is permitted to live in prison with their mother are made by prison managers and senior executives within Corrections Victoria. The manner in which such matters are assessed, however, is far from transparent.[461] The situation is concerning, given the fact that in the recent study conducted by Walker et al., decisions made by corrections agencies resulted in two Aboriginal women

[456] Aboriginal Justice Caucus (2021), submission to this Inquiry, p11.
[457] Victorian Ombudsman (2015)*, Investigation into the rehabilitation and reintegration of prisoners in Victoria,* p127.
[458] Sheehan, R. (2010). Parents as prisoners: A study of the parent-child relationships in the Children's Court of Victoria.11(4) Journal of Social Work 358-374, p. 361.
[459] Recommendation 168 of the Royal Commission into Aboriginal Deaths in Custody.
[460] Corrections Victoria runs the Living with Mum program in Dame Phyliss Frost Centre and the Tarrengower Prison, whereby dependent infants and pre-school age children can reside with their mothers in prison. See Pregnancy and childcare | Corrections, Prisons and Parole
[461] Walker, J. et al. (2021). Residential programmes for mothers and children in prison: Key themes and concepts. 21(1) Criminology & Criminal Justice 21-39, p.27.

not being allowed to keep their babies with them in prison (the only two women in the study to have such applications denied), which was implicitly attributed to the stigma endured by Aboriginal women in society generally. However, the lack of routine data collected concerning women with dependent children in prison presents further difficulties in determining whether such occurrences are widespread; and whether they are the intentional or unintentional consequence of systemic racism.[462]

Another obstacle noted regarding the application process is that mothers with dependent children frequently wanted to have their children with them if possible, but the processing time precluded the application – particularly for mothers who were on remand serving short sentences. Mothers desiring to have their children reside in prison with them in such circumstances face considerable barriers while trying to avoid the damage caused to the mother-child relationship as a result of separation; and the inherent risks associated with their children becoming swept up in the child protection system.[463]

RECOMMENDATIONS

Recommendation 100. The Government should expand the availability of rehabilitation and reintegration supports for women in prison.

Recommendation 101. The Government should improve transitional supports for women, including through:

- The establishment of a pre-release transitional centre for women, equivalent to the Judy Lazarus Transition Centre for men;
- Eliminating exits into homelessness by expanding housing availability for women leaving prison;
- Providing continuity of healthcare, alcohol and drug treatment and other key support services in the community.

Recommendation 102. The Government should fund a dedicated residential diversion program for Aboriginal women, similar to Wulgunggo Ngalu Learning Place.

Recommendation 103. Victorian legislation should require that Corrections Victoria select a location for a woman to serve a custodial sentence that is as close as possible to the place or residence of the imprisoned woman's family and children.

Recommendation 104. Corrections Victoria should be required to maintain records and make statistical data publicly available about all aspects of the Living with Mum program, including applications and outcomes.

[462] Ibid., p. 25.
[463] Stone, U. et al. (2017). Incarcerated Mothers: Issues and Barriers for Regaining Custody of Children. 97(3) The Prison Journal 296-317, pp. 304-305.

Recommendation 105. The time required for the processing of applications for the Living with Mums program by Corrections Victoria should be reduced to ensure that mothers desiring to maintain custody of their dependent children while in prison are not precluded from doing so on the basis of a short custodial sentence.

Older People in Prison

Similar to women in prison, older people in prisons are highly amenable to being successfully reintegrated into society and highly vulnerable if the prison system does not recognise and respond to their particular needs.

An ageing prison population poses many of the same challenges as the ageing population in Australian society more broadly. The effects, however, are accelerated. Research suggests an approximately 10-year gap in overall health between imprisoned people and people in the community – that is, people in prison suffer from age-related conditions around a decade sooner than people outside prison, because of a range of socioeconomic factors.[464] As a result, policy and practice frameworks for caring for older people in prison generally use a minimum age of around 50 to define the 'older' group, and as low as 45 for Aboriginal people.[465]

Empirical reasons for the lower age of an 'older' person in relation to Aboriginal people is that life expectancy that is approximately ten years less than the general population of Australia, owing in part to the early onset of health conditions and comorbidities,[466] which is attributable to disadvantage in relation to social determinants, including education, employment, income, and cultural determinants, including colonisation, racism, loss of language and loss of connection to land.[467] The socioeconomic factors associated with imprisoned people generally that lead to lower life expectancy and the documented sociocultural elements attributed to the lower life expectancy of Aboriginal people specifically raise concerns about the combined impact of such disadvantages resulting in a lower life expectancy for Aboriginal people in prison.

Older populations create pressure on services in prisons, not restricted to higher demand for healthcare. Mainstream services in prisons are generally targeted at younger people, meaning either

[464] Inspector of Custodial Services, Western Australia (2021). Older Prisoners, p. iv. Available at https://www.oics.wa.gov.au/wp-content/uploads/2021/05/Older-Prisoners-Review-April-2021.pdf.
[465] Corrections Victoria (2015), *Ageing Prisoner and Offender Policy Framework 2015-2020*. Accessed at https://files.corrections.vic.gov.au/2021-06/cv_ageing_prisoner%20offender_policyframework15_0.pdf?VersionId=mQntg8_TX5xFu6Prjpy4PJuza8rHxpWl.
[466] Temple, J. et al (2020). Ageing of the Aboriginal and Torres Strait Islander population: numerical, structural, timing and spatial aspects. 44(4) Indigenous Health 271-278, p. 273.
[467] Wettasinghe, P.M. et al. (2020). Older Aboriginal Australians' Health Concerns and Preferences for Healthy Ageing Programs. 17 International Journal of Environmental Research and Public Health 7390.

that prisons need to provide specialised services or – as is more often the case, including in Victoria – that older incarcerated people are unintentionally excluded from services and prison activities. According to the WA Inspector of Custodial Services, this can amount to a "double punishment" for older incarcerated people because being "isolated from the daily regime … intensifies the punishment of imprisonment."[468] To avoid this injustice and the harmful mental health effects it can engender, "adjustments to the regime are required to ensure that older incarcerated people are not routinely excluded from activities like employment, programs, or recreation."[469]

Research evidence generally suggests that, across the world, older incarcerated people are less likely to reoffend after their release than younger people.[470] In Victoria, data availability is limited, but reoffending rates for people under 25 were 8 percentage points higher than the overall rate, showing a strong age effect on the risk of reoffending.[471] At the same time, the Victorian Ombudsman has pointed to evidence that rehabilitation programs have less influence on older people.[472] This highlights the importance of strong supports and reintegration efforts for young people, but it also suggests the need for an alternative approach to older people in prison. Such an approach would recognise that older people generally do not need to be managed or monitored extensively, and are likely to reintegrate into society successfully as long as they are provided the tools to do so. Transitional support with finding housing, accessing healthcare, and navigating new technologies and social contexts may be particularly important for people who have served long sentences in prison.

In Victoria, the strategy for caring for older incarcerated people is set out in the *Ageing Prisoner and Offender Policy Framework 2015-2020*.[473] This document was published in 2015, and there have been no published updates. The 'action plan' proposed in the policy framework has also not been published. Although it is clear that Corrections Victoria and the Government are aware of the broad issues relating to caring for older people in prison, greater transparency is needed to enable accountability, monitoring and evaluation.

[468] Inspector of Custodial Services, Western Australia (2021). Older Prisoners, p. v. Available at https://www.oics.wa.gov.au/wp-content/uploads/2021/05/Older-Prisoners-Review-April-2021.pdf.
[469] Ibid, p. 18.
[470] Rakes et al (2018), 'Recidivism among Older Adults: Correlates of Prison Re-entry', *Justice Policy Journal*. Accessed at http://www.cjcj.org/uploads/cjcj/documents/recidivism_among_older_adults_correlates_of_prison_reentry.pdf; Baidawi et al (2011), 'Older prisoners: a challenge for Australian corrections', Australian Institute of Criminology. Accessed at https://www.aic.gov.au/publications/tandi/tandi426.
[471] Victorian Ombudsman (2015). Investigation into the rehabilitation and reintegration of prisoners in Victoria, p. 34. Available at https://assets.ombudsman.vic.gov.au/assets/Reports/Parliamentary-Reports/1-PDF-Report-Files/Investigation-into-the-rehabilitation-and-reintegration-of-prisoners-in-Victoria.pdf?mtime=20191217123824.
[472] Ibid, p. 97.
[473] Corrections Victoria (2015), *Ageing Prisoner and Offender Policy Framework 2015-2020*. Accessed at https://files.corrections.vic.gov.au/2021-06/cv_ageing_prisoner%20offender_policyframework15_0.pdf?VersionId=mQntg8_TX5xFu6Prjpy4PJuza8rHxpWl.

RECOMMENDATION

Recommendation 106. Corrections Victoria should recognise the unique needs of older incarcerated people and implement necessary policy, program and practice changes in relation to matters including:

- Age-appropriate health services and programs;
- Age-appropriate approaches to rehabilitation and reintegration programs; and
- Increased access to, and frequency of, parole hearings.

[…]

Transition Support

One of the most important factors in avoiding reoffending is supporting people released from prison to have a successful transition back into the community. Transitions can be extremely challenging. Access to housing and employment can be very difficult for people with criminal records. Accessing government services such as healthcare or social security payments is not straightforward for people who have been deprived of their liberty and responsibility over their own lives, often for long periods. In the absence of strong support through the transition period, there is a high risk that people released from prison will be drawn back into offending because of the return of health or social problems they were struggling to deal with before being imprisoned, or because they are forced into crimes of poverty. Most strikingly, these difficulties and the stresses of release from a highly institutionalised carceral environment contribute to making formerly incarcerated people 12 times more likely to die in the four weeks after they are released.[474]

VALS is extremely concerned about the significant unmet need for holistic and targeted culturally safe and responsive pre- and post-release programs for Aboriginal people in prison.[475] Of the incarcerated people in Victoria who were released in 2015-16, 43.7% had returned to prison under sentence within two years of release. We note that the lack of transitional support is acknowledged in *Burra Lotjpa Dunguludja*.[476] Pre- and post-release programs must be sufficiently flexible, recognising the complexity of individual needs and the barriers that exist in access to vital community services such as stable, safe and appropriate housing. They must also ensure continuity of culturally safe mental health care and take an early intervention approach to addressing barriers to opportunities for meaningful employment. Pre- and post-release programs must be designed, developed and implemented in consultation with the Aboriginal

[474] Victorian Ombudsman (2015). Investigation into the rehabilitation and reintegration of prisoners in Victoria, p. 102. Available at https://assets.ombudsman.vic.gov.au/assets/Reports/Parliamentary-Reports/1-PDF-Report-Files/Investigation-into-the-rehabilitation-and-reintegration-of-prisoners-in-Victoria.pdf?mtime=20191217123824.
[475] VALS (2019). Submission to the Royal Commission into Victoria's Mental Health System, pp. 45-46.
[476] Victorian Government (2018) *Burra Lotjpa Dunguludja*, p. 44.

community and in partnership with ACCOs. They need to be accessible at all prisons and at all stages of the custodial process.

From 2015 to 2017, VALS was involved in Corrections Victoria's main post-release transition program, ReConnect. VALS ReConnect workers were able to provide culturally safe, trauma-informed case management and support to people transitioning out of prison, helping to identify complex needs and address risk factors for reoffending. Resources for the ReConnect program, however, were not adequate to sustain a specialist culturally safe service of the kind VALS was delivering, and we were not able to continue providing services with ReConnect.

One of the most important elements in successful transitions is access to safe and stable housing. Homelessness can cause or exacerbate mental illness and is a key driver of reoffending. For Aboriginal people, stable housing is essential for the healthy functioning of family and community relationships.[477] In the most extreme circumstances, people may deliberately reoffend because returning to prison is preferable to ongoing homelessness.[478] More commonly, homelessness or housing insecurity may force people to live in family violence situations, associate with people they might prefer to avoid during a transition back into the community, or commit crimes associated with poverty or mental health issues.

Across Australia, housing support for people released from prison is wholly inadequate given the growing need. The overall strain on social housing providers has led to stricter targeting of their efforts, and a concentration on providing subsidies and support for clients to access private rentals – which many people released from prison simply will not be able to access, even with financial support. Providing public housing to a person released from prison provides them stability and kicks off a beneficial cycle, with long-term effects: police incidents fall by 8.9% each year after being housed, court appearances fall 7.6% each year, time in custody falls by 11.2% per year, and the justice system costs of engaging the person fall by more than $2000 each year.[479]

Victoria has, during the COVID-19 pandemic, expanded the availability of transitional housing to avoid people being released into homelessness amidst high levels of COVID-19 infection.[480] While this is a positive shift, efforts to reduce homelessness among people released from prison should not be limited to a pandemic period, and there are significant problems with how this support has been offered. The main facility developed to provide transitional housing in this period has been a centre at Maribyrnong run out of a former immigration detention centre. The built environment of this facility continues to clearly resemble a prison, and the centre is run by Corrections Victoria rather than

[477] VALS (2019). Submission to the Royal Commission into Victoria's Mental Health System, p. 47.
[478] ABC News (2021). 'Concerns ex-prisoners falling back into crime because of WA rental shortage'. Accessed at https://www.abc.net.au/news/2021-07-22/prisoner-housing-rental-woes/100314090.
[479] Martin et al (2021), *Exiting prison with complex support needs*, p. 4. Accessed at https://apo.org.au/sites/default/files/resource-files/2021-08/apo-nid313664.pdf.
[480] The Age (2021). 'I'm not scared any more: The unique halfway house helping ex-inmates adjust to the outside'. Available at https://www.theage.com.au/national/victoria/i-m-not-scared-any-more-the-unique-halfway-house-helping-ex-inmates-adjust-to-the-outside-20210530-p57wes.html.

by housing providers or support agencies.[481] There are serious limitations on how much reintegration into society can be achieved in such a setting. It would be more suited to being a pre-release transition facility (similarly to the Judy Lazarus Transition Centre) than to use in the post-release period, when a clearer transition away from the prison setting is important.

VALS is a key partner with Aboriginal Housing Victoria in operating Baggarrook, a transitional housing and holistic support program for Aboriginal women transitioning out of prison.[482] This is an important initiative which expands the transition supports for women, who face homelessness after release at about twice the rate men do, and have access to very few dedicated transitional housing supports.[483] Alongside ongoing support and funding for Baggarrook, the Government should work to expand other transition supports for women. These should include a pre-release transition facility equivalent to the Judy Lazarus Transition Centre for men in the last year of their sentence, whose recidivism rate is less than one-quarter the rate of the overall male prison population.[484]

Beyond housing, providing continuity of care is important for Aboriginal people held in prison who are disproportionately likely to have complex health and psychosocial needs. As noted above, the chronic underfunding of mental health services in the community means that prison may be the first time many incarcerated people are able to get the support they need. Ensuring that they are able to stay connected with health services, including ACCHOs, is critical. If support falls away, Aboriginal people may fall back into acute or chronic mental illness and the risk of reoffending is substantially higher. A Queensland initiative to connect people with NDIS support after their sentencing, run in the state's equivalent of Koori Court, has seen no reoffending among the small number of people it has helped to date, compared to a typical recidivism rate of 75%.[485] This is a clear demonstration of the importance of providing and maintaining connection to health and disability services through the transition period

This applies equally to other kinds of support services. Careful case management through pre-release and post-release phases would help Aboriginal people stay connected with healthcare, mental health support, or alcohol and drug programs, as well as empowering them to stay engaged with their legal matters and re-establish their connections with family and community.

[481] Ibid.
[482] VALS, 'Baggarrook', https://www.vals.org.au/baggarrook/.
[483] Victorian Ombudsman (2015). Investigation into the rehabilitation and reintegration of prisoners in Victoria, p.102. Accessed at https://assets.ombudsman.vic.gov.au/assets/Reports/Parliamentary-Reports/1-PDF-Report-Files/Investigation-into-the-rehabilitation-and-reintegration-of-prisoners-in-Victoria.pdf?mtime=20191217123824
[484] Ibid, pp. 127-128.
[485] SBS News (2021) 'A special program is helping Indigenous offenders with disability turn their lives around'. Accessed at https://www.sbs.com.au/news/a-special-program-is-helping-indigenous-offenders-with-disability-turn-their-lives-around/9cfa95bb-8866-4f50-9a54-8b70fa3bca93.

Good Practice Model: NAAJA Throughcare Service

The North Australian Aboriginal Justice Agency's (**NAAJA**) Throughcare service begins working with people in prison and youth detention six months prior to their release, with the aim of supporting people's transition back into the community. The support is provided in recognition of the various issues that might present challenges to a successful transition, including "Homelessness or marginal accommodation; No income, disengagement from Centrelink, or unstable income; Literacy and numeracy issues, and/or English as second, third or fourth language; Problematic family relationships, Involvement with welfare agencies, history of family violence; Cultural/payback issues; Lack of community supports; Substance misuse issues; and Health, including mental health issues, and/or physical disabilities."[486] Support can come in the form of "Ongoing rehabilitation, Accommodation, Employment, Education and training, Health, Life and problem solving skills, and Reconnection to family and community."[487]

In its 2018-2019 Annual Report, NAAJA reported that, "since commencing in February 2010, case management support has been provided to 1102 clients. Only 143 of which (approximately 13.3%) have been returned to prison for re-offending or a conditional breach while participating in the Program. This figure continues to compare favourably with the NT recidivism rate of 60%, notwithstanding the measures are not directly comparable."[488]

RECOMMENDATION

Recommendation 107. The Government should provide long-term and stable funding to ACCOs to deliver pre- and post-release programs, including transitional housing programs run by ACCOs, such as VALS' Baggarrook program, to support men and women leaving prison.

Language, Stigma & Dehumanisation

There is a growing recognition in criminal justice advocacy that stigma around people in prison can be a source of trauma and, after people's release, a barrier to their reintegration into the community. Alongside formal means of tackling stigmatisation, such as the spent convictions scheme discussed above, it is important to address the effects of language and nomenclature on societal perceptions of people who come into contact with the criminal legal system.

A particular area of focus is the use of 'person-first' language to avoid dehumanising people in prison. Referring to 'people in prison' or 'incarcerated individuals' emphasises that imprisonment is a

[486] NAAJA, Throughcare, accessed at http://www.naaja.org.au/law-and-justice/throughcare/
[487] NAAJA, Throughcare, accessed at http://www.naaja.org.au/law-and-justice/throughcare/
[488] NAAJA, Annual Report 2018-2019, accessed at http://www.naaja.org.au/wp-content/uploads/2020/02/BJ1938-NAAJA-Annual-Report-2018-2019-Web-Version.pdf

situation that the person is in, while terms like 'convict' and 'inmate' which treat being in prison as an overriding fact about a person. Some people who have lived experience of prison describe these terms as feeling like a "violat[ion of] their humanity", entrenching a "feeling of powerlessness" and providing implicit justification for poor prison conditions.[489]

In the United States, New York State has formally removed the word 'inmate' from all provisions of state law, in order to respond to and mitigate the stigmatising effect that language can have.[490] As the legislature highlighted in passing the bill, "studies have shown these terminologies have an inadvertent and adverse impact on individuals' employment, housing and other communal opportunities" and can increase the risk of recidivism as a result.[491]

VALS is of the view that changes to everyday terminology can affect social perception of people in prison and released from prison, and even marginal shifts in these perceptions make a difference to people's ability to reintegrate into society and avoid reoffending. VALS makes every effort in our own work to use terminology which avoid dehumanisation and stigma. A broader adoption of these efforts in government, the criminal legal system, and across legal service providers would help create a shift in perception which can have very important ramifications for people released from prison.

However, the question of what language is stigmatising or dehumanising cannot be answered in the abstract or by outside advocates. In the United States, for example, there is significant regional variation in what language is preferred by people in prison.[492] It is crucial that the voices of people with lived experience, and especially Aboriginal people who are profoundly affected by stigmatisation in many parts of society, are heard and respected in all conversations about the criminal legal system in Victoria.

The stigma that attaches to people following the completion of custodial sentences in detention facilities has further effects on their families following release. Families, including the children, of imprisoned people experience "social stigma, isolation and ostracism'" within their respective communities.[493]

[489] Bamenga (2021), 'Good Intentions Don't Blunt the Impact of Dehumanizing Words', The Marshall Project. Accessed at https://www.themarshallproject.org/2021/04/12/good-intentions-don-t-blunt-the-impact-of-dehumanizing-words.
[490] Corrections1, 7 August 2021, 'NY governor signs bill ending use of 'inmate' in state law'. Accessed at https://www.corrections1.com/law-and-legislation/articles/ny-governor-signs-bill-ending-use-of-inmate-in-state-law-2qJIFSum9yza3pvl/.
[491] New York State Assembly, Bill A02395 – Memorandum in Support of Legislation. Accessed at https://assembly.ny.gov/leg/?bn=A02395&term=&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y.
[492] Bartley (2021), 'I am not your 'inmate'', The Marshall Project. Accessed at https://www.themarshallproject.org/2021/04/12/i-am-not-your-inmate.
[493] Sheehan, R. (2010). Parents as prisoners: A study of the parent-child relationship in the Children's Court of Victoria. 11(4) Journal of Social Work 358-374, p. 361.

RECOMMENDATIONS

Recommendation 108. The Victorian Government should undertake, in close consultation with civil society and people with lived experience of imprisonment, an evaluation and examination of the terminology employed in policies, programs, legislation and statements concerning people serving custodial sentences and who are justice system involved with the objective of mitigating the stigmatising effect of such terminology within the Victorian community.

Recommendation 109. The Victorian Government should ensure that specialised services are provided to imprisoned people and their families following the completion of their custodial sentence to address issues arising from stigma experienced within the community.

Voting Rights

Another area where broader social questions affect rehabilitation and reintegration is the issue of voting rights. Most jurisdictions in Australia prevent some people serving time in prison from voting in elections. Under Victorian law, people in prison on a sentence of more than five years are barred from voting.[494] People in Victorian prisons also cannot vote in federal elections if their sentence is more than three years.[495] Some Australian states impose harsher rules – banning voting at sentences of more than three years or, in NSW and WA, twelve months – while the ACT and South Australia do not restrict voting rights of people in prison.[496]

The restriction of voting rights for people in prison is a form of disenfranchisement which heavily affects already marginalised people. The over-incarceration of Aboriginal people means that disenfranchisement disproportionately affects Aboriginal communities which are already neglected by political processes. It has been estimated that 0.6% of Aboriginal people in Australia are disenfranchised by restrictions on voting from prison, compared to 0.075% of non-Aboriginal people.[497] In addition, people removed from the electoral roll while in prison may not re-enrol after their release, particularly in the absence of strong transitional supports, which means that the number of Aboriginal people not enrolled to vote because of their time in prison is much higher than the number in prison at any given time. In New Zealand, the Waitangi Tribunal found that Māori people

[494] Constitution Act 1975 (Vic), s48(2)(b). Accessible at http://classic.austlii.edu.au/au/legis/vic/consol_act/ca1975188/s48.html.
[495] Commonwealth Electoral Act 1918, s93(8AA). Accessible at http://classic.austlii.edu.au/au/legis/cth/consol_act/cea1918233/s93.html.
[496] Churchill (2020), *Voting Rights in Prison: Issues Paper*, University of Queensland, p4. Accessed at https://law.uq.edu.au/files/60196/REP_PBC_MsP_Voting_Rights_Australian_Prisons_FIN_20200715.pdf.
[497] Churchill (2020), Voting Rights in Prison: Issues Paper, University of Queensland, p8. Accessed at https://law.uq.edu.au/files/60196/REP_PBC_MsP_Voting_Rights_Australian_Prisons_FIN_20200715.pdf

removed from the electoral roll – particularly if this occurs when they are young – are less likely to *ever* vote.[498]

Denial of the right to vote to people serving prison sentences constitutes an additional punishment over the jail term itself.[499] It is dubious that this additional punishment is given adequate consideration, either in sentencing decisions or in any assessment of its effects on rehabilitation. Disenfranchisement explicitly treats incarcerated people as though they are not members of the Victorian community, at odds with the goal of rehabilitative interventions.

The Waitangi Tribunal – the body in New Zealand responsible for monitoring the government's treaty obligations to Māori people – has recommended that complying with the Treaty requires abolition of all limits on voting rights for people in prison.[500] This finding recognised both the disproportionate effect of disenfranchisement on Māori people, but also the potential "rehabilitative and reintegrative potential of the franchise."[501] Evidence at the Tribunal showed that people released from prison "are more likely to identify with a society they have had a stake in creating" and that disenfranchisement is inconsistent with an effective focus on reintegration and rehabilitation.[502] The Tribunal also found that restricting voting rights of people in prison had flow-on effects for the political participation of family members and wider Māori communities.

VALS is of the view that denying the right to vote to people in prison is inconsistent with human rights obligations and counterproductive. Disenfranchisement from the electoral roll contributes to a sense of broader social disenfranchisement which obstructs rehabilitation and stigmatises people who have been in prison.

RECOMMENDATIONS

Recommendation 110. Victoria should remove all restrictions in state law on the right of people in prison to vote in state and local elections.

Recommendation 111. Victoria should lead advocacy nationally, including at the Meeting of Attorneys-General, for a consistent, nationwide approach which grants full voting rights to people in prison, including in federal elections.

[498] Waitangi Tribunal (2020), *He Aha I Pera Ai? The Maori Prisoners' Voting Report*, p25. Accessed at https://waitangitribunal.govt.nz/news/tribunal-releases-report-on-maori-prisoners-voting-rights/.
[499] Churchill (2020), Voting Rights in Prison: Issues Paper, University of Queensland, pp7-8. Accessed at https://law.uq.edu.au/files/60196/REP_PBC_MsP_Voting_Rights_Australian_Prisons_FIN_20200715.pdf
[500] Waitangi Tribunal (2020).
[501] Ibid, p. 25.
[502] Ibid, p. 23.

Part 2: Spotlight on VALS' Clients' Experiences

Case Study on Lack of Access to Medical Services in Custody – Morgan* (pseudonym used)

Morgan has an intellectual disability. They have experienced delays in medical care, including:

- twelve hours for an ambulance to come when they were having heart problems and
- six weeks to get medical help after they fell in the shower.

Case Study on Safety in Prisons & Work in Prison – Jac* (pseudonym used)

"Officers have a culture of telling what other people are in for, it happens really frequently. **People get bashed**, it has happened quite a bit." Jac has been 'bashed' a few times, including when they were on remand. They have also been stabbed, after they advised that they were not safe (they were told that if they could not provide names, there was nothing that could be done for them). They had no choice regarding placement after this, and had to be moved to another prison and kept in **isolation**.

Jac was also placed in the long-term slot, spending two months in there while at MAP. They could not access any programs while in there, and there was no way of asking for any. They did not get proper recreational time (they did not get an hour, as it was too difficult because of COVID-19).

They get **paid** to assemble furniture, the work is ok. They get paid $6.50 per hour, which is not bad, as others get paid $4. They use their money at the canteen.

Case Study - Paul* (pseudonym used)

- ***Lack of Access to Medical Services in Custody &***
- ***Isolation &***
- ***Disciplinary Processes &***
- ***Programs***

Paul is an Aboriginal man in his 60s and is currently serving a long-term prison sentence. In 2017, he was assaulted by another prisoner, which caused him to have an acquired brain injury. The injury causes difficulty in his memory and speaking. Medical records of the assault show that Paul suffered bleeding in his brain, post traumatic amnesia and expressive dysphasia. Paul was admitted to hospital for a significant period following the assault.

When discharged from hospital, Paul was placed in isolation for 14 months. Paul was not exposed to any of the ordinary education programs during his lockdown period. He was put in this

lockdown and was told to 'shut up' and 'that was that'. The prison did not provide a reason for this isolation. During this period, his ability to speak deteriorated further.

Paul needs speech therapy to assist him with his speech and communication skills. After around two years of requesting such help, Paul was finally able see a speech therapist. However, there was only three video sessions with the therapist, which was not enough. Paul also needs to see a physiotherapist for his right arm, following the assault. The prison has not provided such assistance. They have instead provided him with an injection which was applied to his neck, but Paul said this did not help. Paul also needs access to a psychologist. A report conducted for Paul's legal matters showed that he lives with Post Traumatic Stress Disorder, anxiety, depression, adjustment disorder, panic attacks, suicidal ideation and nightmares pursuant to the assault that took place. Although the prison does provide access to a nurse, Paul is only able to see a psychologist monthly and if his condition is 'really bad'.

Paul stated the following regarding **medical care**:

> *I'm hoping that they can have more people to help properly, you know, not just give you a pill and that'll do you. Like me trying to get my speech therapy, why did it take so long? That's the sort of thing they need to get on top of, to supply that sort of help when it's really needed. I did ask the screws and the medical staff for help, but they weren't helpful. It was very frustrating trying to get anything happening. Need to look at the way they treat us for rehabilitation. For drug users, they give them a lot of help, like methadone, but they don't go helping people like me with a brain problem, they'd rather lock us up like they did with me. Put me in a thing for 14 months. We get locked up all the time you know. It's just an ongoing battle to try and get help when you really need. You put in a form to see the doctor or psych, you had to wait until it happened. Normally it would take a couple of weeks. I waited 3 months to the eye doctor to get glasses to see. Psych, I could only see him once a month.*

Paul stated the following regarding **isolation**:

> *When I got out of hospital, they put me in a lock down unit by myself for 14 months to put me out of everybody's way. In there I was miss out talking to normal people, just conversation which I needed in early days because the way my speech is. Doctor said that. Very hard being in lock up all the time. They didn't actually say any reason for putting me there. Out of hospital, then in lockup unit. I was put in a corner and told to shut up and that was that. Being in that unit, a lot of education program people don't like coming down there, wasn't good, wasn't a help at all.*

- While he was in isolation, he had access to a phone, when it was his time out of cell (1.5 hour per day). He could call a lawyer, family and other supports. His family knew where he was being kept.
- He did not know why he was in isolation, for how long he would be kept there, or what his rights were (eg. making a complaint).

- During the 1.5 hours out of cell, two people at a time could use the gym to exercise. In terms of time outside in fresh air, he had access to "a little air area outside, not big at all, only the size of a room, during our 1.5 hours."
- The whole time while he was in isolation, he only spoke to one other detained person. He did not know him to start off with, but they became good friends. The Aboriginal Liaison Officer (ALOs) rarely came to visit him, as they "hate being in that unit." When asked whether other staff came and spoke with him or spent time with him every day, James said "not really".
- He "had a program person that came once a week for an hour, the Aboriginal heritage program." His in-cell activity was homework from the Aboriginal heritage program.
- James said that sometimes isolation is needed, as "some people are just really toxic and they need to be taught that they can't be like that." However, James stated that isolation "does get used unfairly at times, it definitely need more checks. Anybody can put the paperwork in and that's it."

Paul stated the following regarding **disciplinary hearings**:

> *Yeah. That's a thing. They just don't let you out. That's their punishment alright. If you behave yourself, it's alright. Twice, I think I argued with them, so they just lock you up. That's it. No meeting they just lock you up and that's it. You are there until the next day or whenever they decide it's enough.*

Paul stated the following regarding **programs**:

> *More support programs would be good. Things that keep us occupied save us getting in trouble. The uni people haven't been here for months. That's no one's fault. It just makes it very hard for us. No teachers. No school, so not good [because of COVID-19].*

Case Study on Failure to provide opportunities to connect with culture – James*

James* is an Aboriginal man, with an intellectual disability, in his 50s who has completed his prison sentence but has been kept in a low security corrections facility for more than 10 years on a supervision order, with no prospects of transitioning into the community, due to adverse risk assessments. He has looked after injured birds that have been found at the facility and would like to become a wildlife carer. James sees looking after birds, in particular, as a way to practice his culture, learn new skills and assist with his rehabilitation. The Correctional facility however has refused this request and instead stated that a caged pet bird would be the only thing permitted, which fails to recognise and support James' connection to his culture.

James said "I have been in the system so long – feels one sided. Only one Indigenous worker. No Indigenous case workers. If we had more Indigenous support we'd be able to learn more about our

cultures. I wouldn't mind finding out about my cultural ways traditional ceremonies, dances. Way things are now, it's not really happening."

Case Study on Parole Applications – Kelly* (pseudonym used)

Kelly knew that their parole date was coming up in July 2021, and they wanted to apply for parole. They did apply for parole, but ultimately withdrew their application.

Kelly thinks that people should be entitled to **legal assistance to apply for parole**. This is important to understand the system, as even "the officers themselves don't understand it." The Aboriginal Liaison Officers (**ALO**s) do not help with parole, they mainly just do programs and art. Kelly was provided no support to fill out the parole form. "They just gave me my parole application form. The case worker told me about applying for parole, gave me the piece of paper, and that was pretty much it. There was no information guides or guidance."

Kelly was **moved around a lot**, and that made things more complex. They moved around 4-5 times. The parole form went missing, and then the other prisons didn't know anything about it.

Kelly does not have any family that they could stay with while on parole. Kelly would be happy to go anywhere, they "[j]ust want to get on with life." CCS does the parole planning, and they do a scan of the proposed property, up to 6 months before. But in Kelly's case, they "didn't have any property to scan." Kelly was not provided any support in organising **housing or residence for their parole application**. Kelly stated that, "[i]f I had housing I think I would get parole. I don't see why not. I got approved to go to the next step of parole planning."

Kelly was not provided information about what **programs they were expected to complete for parole**. **During COVID-19 all programs were suspended**, including AOD. The AOD program was important to Kelly, and the program suspension made it harder for them to apply for parole: "I haven't been able to start it. If had been able to do that program, I would have a better chance at parole." Kelly is not sure when they will be able to start the program. They have been abstinent from drug use while incarcerated, but they are worried that they will start using again on release. The biggest problem for them has been alcohol, but they used other drugs too.

"If they wanted people to get parole, they should help us out. **They need proper programs, there is only group counselling**. Nobody wants to talk about the stuff they did in front of other people. We all did bad stuff, but we want to get better." Kelly wants to improve their own mental health, as they have bad PTSD, which leads them to drink and black out, and then "do bad stuff." Kelly says that "[i]f I could get on top of my PTSD, then I might be alright." They highlighted the shortcomings

of **mental health care in prison**: "There is a psych nurse, but that's only about getting your medication. There is no psychologist."

Part 3: Additional Recommendations

Independent Visitors Scheme

Independent, culturally appropriate detention oversight is critical to improving conditions and treatment in prisons. Safeguards, that are legislated for, must be accompanied by a robust complaints system, auditing, monitoring and inspections.

The current Independent Visitors Scheme (**IPVS**) needs extensive remodelling if it is to continue its monitoring function as an NPM member under OPCAT, in order to ensure that the scheme truly operates independently. Currently:

- volunteers *may* be appointed by the Minister,[503] on the recommendation of the Justice Assurance and Review Office (**JARO**, which advises the Secretary of the Department of Justice and Community Safety),[504] and "[p]rison management has the authority to accept or deem as unsuitable volunteer candidates who do not satisfy the prison's internal security check."[505]
- volunteers provide advice to the Minister.

This is to be contrasted with the Independent Visitor Program that operates at the Commission for Children and Young People (**CCYP**), which recruits its volunteers, who are required to report to the Principal Commissioner seven days after each visit.[506] Through this program, the "Commission seeks to resolve issues either at unit level or by raising them with senior Youth Justice managers. Serious issues are escalated when required."[507]

Currently there is a DJCS review of "the Aboriginal Independent Prison Visitor scheme and how it can best support Aboriginal prisoners."[508]

[503] s35 *Corrections Act 1986 (Vic)*
[504] Corrections Victoria, Justice Assurance and Review Office (JARO), available at https://www.justice.vic.gov.au/contact-us/justice-assurance-and-review-office-jaro
[505] Corrections Victoria, Independent Prison Visitor Scheme, available at https://www.corrections.vic.gov.au/volunteering/independent-prison-visitor-scheme
[506] Commission for Children and Young People, Independent Visitor Program, available at https://ccyp.vic.gov.au/monitoring-and-advocacy/independent-visitor-program/
[507] Commission for Children and Young People, Annual Report 2020 – 2021, available at https://ccyp.vic.gov.au/assets/corporate-documents/Annual-report-2020-21.pdf
[508] Department of Justice and Community Safety, Annual Report 2020 – 2021, available at https://files.justice.vic.gov.au/2021-10/DJCS-Annual-Report-20-21_0.pdf

RECOMMENDATION

Recommendation 112. Visitors under the Independent Visitors Scheme (IPVS) should be appointed independently of the Justice Assurance and Review Office, the Minister for Corrections and prison management. The IPVS should be its own, independent statutory body, or sit within an independent statutory body (such as the Victorian Ombudsman or the NPM, once designated).

Post-Sentence Detention

Victorian Legislation

Victorian legislation allows post-sentence detention (the *Serious Sex Offenders (Detention and Supervision) Act 2009* was replaced by the *Serious Offenders Act 2018*). A person can an 'eligible offender' if they have been found guilty or have been convicted for a serious sex offence or a serious violence offence.[509]

In 2007, the Victorian Sentencing Advisory Council (**SAC**) advised against a continuing detention scheme, post-sentence completion. The Attorney-General at the time had asked the SAC to "advise him on the merits of introducing a scheme that would allow for the continued detention of offenders who have reached the end of their custodial sentence, but who are considered to pose a continued and serious danger to the community."[510] The final SAC report stated that:

> In the end, a majority of the Council has concluded that regardless of how a continuing detention scheme were to be structured, the inherent dangers involved outweigh its potential benefits, particularly taking into account the existence of less extreme approaches to achieving community protection, such as extended supervision.
>
> A majority of the Council is persuaded by the many submissions that have been made to us expressing serious concern about whether such an extreme measure as continuing detention can be justified, particularly when less draconian means exist to promote community safety. We share concerns about the inability of clinicians to predict risk accurately, the potential of such schemes unjustifiably to limit human rights and due process, and the lack of evidence to support claims that continuing detention will reduce overall risks to the community. We agree that there are other, more cost-effective means of reducing risk. In doing so we acknowledge that these issues are complex and that support in the community for the introduction of such measures is far from universal.[511]

[509] See s8.
[510] Victorian Sentencing Advisory Council, 'High-Risk Offenders: Post-Sentence Supervision and Detention Final Report' (May 2007) [2.5.81 -82]
[511] Victorian Sentencing Advisory Council, 'High-Risk Offenders: Post-Sentence Supervision and Detention Final Report' (May 2007) [2.5.81 -82]

Despite this advice, the Victorian Government enacted legislation that enabled post-sentence detention for people who had committed serious sexual offences (*Serious Sex Offenders (Detention and Supervision) Act 2009).*

Following the Harper Review, that recommended that "eligibility for the post-sentence detention and supervision order scheme should be broadened to include serious violent offenders, in addition to sex offenders,"[512] the post-sentence detention scheme was expanded. Liberty Victoria and others opposed the expansion of the detention and supervision order regime under the *Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)* to violence offences.[513]

International Law

Article 9 of *International Covenant on Civil and Political Rights* requires that "[no one shall be subjected to arbitrary arrest or detention." These protections against arbitrary detention are reflected in Victoria too, in s21(2) of the *Charter of Human Rights and Responsibilities Act 2006*: "A person must not be subjected to arbitrary arrest or detention."

In its General Comment, the UN Human Rights Committee (**HRC**) has stated that:

- "If a prisoner has fully served the sentence imposed at the time of conviction, articles 9 and 15 prohibit a retroactive increase in sentence and a State party *may not circumvent that prohibition by imposing a detention that is equivalent to penal imprisonment under the label of civil detention*."[514] (emphasis added)
- "Any substantive grounds for arrest or detention must be prescribed by law and should be defined with *sufficient precision to avoid overly broad or arbitrary interpretation or application*."[515] (emphasis added)

In *Tillman v Australia*, the Human Rights Committee considered a preventive detention order, after completion of initial prison sentence for sexual offences, in NSW.

- The HRC stated that: "The Committee observes that article 9, paragraph 1 of the Covenant recognises for everyone the right to liberty and the security of his person and that no-one may be subjected to arbitrary arrest or detention. The article, however, provides for certain permissible limitations on this right, by way of detention, where the grounds and the procedures for doing so are established by law… However, limitations as part of, or consequent upon, punishment for criminal offences may give rise to particular difficulties. *In the view of the Committee, in these cases, the formal prescription of the grounds and procedures in a law which is envisaged to render these limitations permissible is not sufficient*

[512] Complex Adult Victim Sex Offender Management Review Panel, 'Advice on the legislative and governance models under the Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)' November 2015
[513] Liberty Victoria, 'Comment on *Serious Offenders Bill 2018 (Vic*)" (21 May 2018)
[514] UN Human Rights Committee, General Comment No. 35: Article 9 (Liberty and security of person)* (2014) [22]
[515] Ibid [23]

if the grounds and the procedures so prescribed are themselves either arbitrary or unreasonably or unnecessarily destructive of the right itself."[516] (emphasis added)

- It followed on to conclude that: "The "detention" of the author as a "prisoner" under the CSSOA was ordered because it was feared that he might be a danger to the community in the future and for purposes of his rehabilitation. *The concept of feared or predicted dangerousness to the community applicable in the case of past offenders is inherently problematic. It is essentially based on opinion as distinct from factual evidence, even if that evidence consists in the opinion of psychiatric experts.* But psychiatry is not an exact science. The CSSOA, on the one hand, requires the Court to have regard to the opinion of psychiatric experts on future dangerousness but, on the other hand, requires the Court to make a finding of fact of dangerousness. While Courts are free to accept or reject expert opinion and are required to consider all other available relevant evidence, the reality is that the Courts must make a finding of fact on the suspected future behaviour of a past offender which may or may not materialise. *To avoid arbitrariness, in these circumstances, the State party should have demonstrated that the author's rehabilitation could not have been achieved by means less intrusive than continued imprisonment or even detention, particularly as the State party had a continuing obligation* under article 10, paragraph 3, of the Covenant *to adopt meaningful measures for the reformation, if indeed it was needed, of the author throughout the 10 years during which he was in prison*." [517]

In *Fardon v Australia,* the Human Rights Committee considered preventive detention order, after completion of prison sentence for sexual offences, this time in Queensland, and came to a similar conclusion.[518]

RECOMMENDATION

Recommendation 113. The post-sentence detention order regime under the *Serious Offenders Act 2018* should be abolished.

[516] Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights (Ninety-eighth session) concerning Communication No. 1635/2007 (10 May 2010). [7.3]
[517] Ibid [7.4]
[518] Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights (Ninety-eighth session) concerning Communication No. 1629/2007 (10 May 2010)

Appendices

VALS Factsheet on Strip Searching and Urine Testing

Community fact sheet: VALS intervention in Court of Appeal Strip Searching and Urine Testing Case

On 21-22 October 2021, the Court of Appeal is hearing an appeal in the matter *Thompson v Minogue.* That case is about whether strip searching and urine testing practices in Victorian prisons comply with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**). VALS has been granted leave to intervene in the matter, so that we can advocate for the rights of Aboriginal and Torres Strait Islander people in prison in Victoria.

What is this case about?

Everyone deserves the right to privacy and to be treated with dignity and respect. This case is about the right of people in prison to be treated with dignity and humanity.

Strip searches and Urine Testing

People in prison are far more likely to have a history of trauma than the general population. Upwards of three quarters of imprisoned women in Australia are victim-survivors of domestic abuse and sexual violence. These issues disproportionately affect Aboriginal and Torres Strait Islander people, who are 13.9 times more likely to be imprisoned in Victoria than non-Aboriginal people.

Both strip searches and urine testing, requiring a person to take off their clothing and urinate into a container in full view of prison officers, are inherently harmful. Being subjected to intrusive searches can compound trauma, seriously undermine trust in the system, and impede a person's ability to recover and heal. Not only are strip searches harmful and degrading, but evidence shows they are often over-used, ineffective in uncovering contraband, and unnecessary. There is also evidence that strip searching practices and powers are prone to abuses of power by prison guards. Some data shows that Aboriginal people in prison are subjected to disproportionate rates of strip searching compared to non-Aboriginal people.

1

Victorian Aboriginal Legal Service

Victorian Aboriginal Legal Service

Community fact sheet: VALS intervention in Court of Appeal Strip Searching and Urine Testing Case

What the Supreme Court said

Last year, Craig Minogue, who is detained in Barwon Prison, successfully challenged an order by a prison officer that he submit to a urine test and a strip search before that urine test. Dr Minogue successfully argued that this direction was in breach of his rights under sections 13 and 22 of the Charter to privacy and dignity and humane treatment.

In the Supreme Court, Justice Richards held that the order that Dr Minogue submit to urine testing and strip searches before urine testing breached his rights to privacy and dignity and humane treatment under the Charter. Her Honour held that government authorities had failed to properly consider relevant human rights under s 38(1) of the Charter when making policies regarding urine testing and strip searching.

Her Honour said that there was no evidence demonstrating that the practice of random urine testing was effective in minimising drug or alcohol use in prison. Her Honour noted that urine testing was applied regardless of a person's history with drugs or alcohol. There was also no explanation why urine tests were used instead of less invasive tests, such as breath tests used on motorists. Similarly, her Honour held that the Manager of Barwon prison did not provide reasonable grounds for his belief that strip searches before urine tests were necessary for security and welfare. There was no evidence that alternatives, such as x-ray scanners, used in other prisons, were considered, or that strip searches were necessary. On that basis, her Honour held that these infringements on human rights were not proportionate or justified under s 7(2) of the Charter.

The State of Victoria has appealed the decision and the matter will be heard in the Court of Appeal on 21-22 October 2021.

2

Victorian Aboriginal Legal Service

Victorian Aboriginal Legal Service

Community fact sheet: VALS intervention in Court of Appeal Strip Searching and Urine Testing Case

What rights do people in prison have to privacy and dignity under the Victorian Charter of Human Rights?

People in prison are entitled to the same human rights as other people. This is enshrined in the Preamble to the Charter, which states that "human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community."

The Preamble also states that "human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters".

Under international law, people in prison retain all of their human rights and fundamental freedoms, apart from those unavoidably lost by virtue of their imprisonment.

Under section 38(1) of the Charter, public authorities cannot act incompatibly with human rights. Public authorities must also properly consider human rights when making decisions.

Under section 13(a) of the Charter, all people have the right not to have their privacy arbitrarily interfered with. This right protects a person against invasions into their physical, social or psychological sphere. It protects a person's individual identity, bodily and psychological autonomy and inherent dignity.

Under section 22(1) of the Charter, all people deprived of their liberty have the right to be treated with humanity and respect for the inherent dignity of the human person. Section 22(1) recognises the importance of upholding human rights for persons imprisoned.

Under section 7(2) of the Charter, human rights can only be limited in strict circumstances, when these limits are reasonable and demonstrably justified.

All of these aspects of the Charter are relevant to the current case.

3

Victorian Aboriginal Legal Service

Victorian Aboriginal Legal Service

Community fact sheet: VALS intervention in Court of Appeal Strip Searching and Urine Testing Case

Why this case is important for VALS and Aboriginal and Torres Strait Islander people in Victoria?

The Court of Appeal's decision in this case will impact the human rights of every adult in prison in Victoria. If the case is successful, the decision may mean that current strip searching and urine testing practices in prisons in Victoria will be deemed unlawful.

Through our work with Aboriginal and Torres Strait Islander people who have been imprisoned, we know the devastating impacts of degrading practices such as strip searching and urine testing. These practices can often be used as a tool of power and control by police and prison officers. They can also re-traumatise people in prison and can be used discriminatorily against Aboriginal and Torres Strait Islander people. Harmful practices in prison can impact a person's ability to heal even once they are back in the community.

There are alternatives, such as x-ray scanners, which are more effective at locating contraband and are less likely to be used as a form of re-traumatisation, abuse and control.

Given what we know about the harm caused by strip searching and urine testing, VALS considered it important to provide the Court with information on the impact of strip searching and urine testing on Aboriginal and Torres Strait Islander people in prison, and the importance of upholding the human rights of Aboriginal and Torres Strait Islander people in prison.

4

Victorian Aboriginal Legal Service

Victorian Aboriginal Legal Service

Community fact sheet: VALS intervention in Court of Appeal Strip Searching and Urine Testing Case

What is VALS arguing?

We have been granted leave to intervene in the appeal, and VALS is arguing that:

1. People in prison are entitled to equal protection of their human rights;
2. Courts should stringently scrutinise human rights decisions affecting people in prison under sections 38(1) and 7(2) of the Charter, given the vulnerability of persons in prison to decisions affecting their human rights, systemic racism, and the potential for abuses of power in the prison context;
3. People in prison are entitled to equal protection of their right to privacy under section 13 of the Charter as people outside of prison, and strip searches and urine testing practices breach the right to privacy;
4. People in prison are entitled to dignity and humane treatment under section 22 of the Charter, and strip searches and urine testing clearly breach this right.

Read VALS' Submissions Seeking Leave to Intervene here.

Read VALS' Submissions on the Appeal here.

5

Victorian Aboriginal Legal Service

VALS Factsheet on OPCAT

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

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

What is OPCAT?

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

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

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

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

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

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

1

Victorian Aboriginal Legal Service

Victorian Aboriginal Legal Service

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

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

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

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

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

The NPM should appreciate

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

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

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

2

Victorian Aboriginal Legal Service

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

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

VALS has made a number of recommendations for proper implementation of OPCAT in Victoria, in accordance with an accurate interpretation of OPCAT and established best practice:

- The Victorian NPM's mandate should (in compliance with Article 4 of OPCAT and Recommendation 10 of the Australian Human Rights Commission's report), include any place under the Government's jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence.
- Places of detention should include both public and private custodial settings, which that person is not permitted to leave at will, by order of any judicial, administrative or other authority.
- The NPM's mandate should include (but not be limited to) forensic mental health hospitals, closed forensic disability facilities or units, correctional facilities, youth detention facilities, police custody, court custody, and residential secure facilities for children. It should also include circumstances such as the Victorian public housing towers that were subjected to hard lockdown during the pandemic.
- The Australian Human Rights Commission's expansive understanding of 'place of detention', including that temporal limits should not be erroneously imposed, is an accurate interpretation of OPCAT that should be adopted by the Victorian Government. The Commonwealth Government has suggested excluding from an NPMs' mandate places of detention where people are held for less than 24 hours. This is not only an inaccurate legal interpretation, it also fails to acknowledge research that has shown that the risk of torture is higher in police custody than in correctional facilities.
- The Victorian Government should legislate for the NPM's mandate, structure, staffing, powers, privileges and immunities.
- The Victorian Government must ensure that the NPM is sufficiently funded to carry out its mandate effectively and independently (recognising that this may include funding from the Commonwealth Government).

3

Victorian Aboriginal Legal Service

Victorian Aboriginal Legal Service

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

Where can I learn more about OPCAT?

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

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

The panellists were:

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

You can find out more about the panellists here.

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

- Building Back Better – VALS COVID-19 Recovery Plan
- Submission to the Public Accounts and Estimates Committee – Inquiry into the Victorian Government's Response to COVID-19
- Supplementary submission to the Royal Commission into Victoria's Mental Health System

4

Victorian Aboriginal Legal Service

Culturally Appropriate OPCAT Implementation

See 'OPCAT in Australia: Will Aboriginal and Torres Strait Islander People be Left Behind?'

Diagrama

While Diagrama is an NGO-run youth detention facility, there are certainly parts of the model which could be utilised and adapted in the adult custodial environment.

Good Practice Model: Diagrama

The NGO, Fundacion Diagrama, runs re-education centres in Spain. In Diagrama-run centres children and young people aged 14 to 23 are detained. In Spain, children who are subject to a custodial order may have an order that is closed, semi-open, open regime or weekend custody. If children are subject to the open regime, for example, they attend school, training and employment in the community, and reside in the centre.

David McGuire, CEO of Diagrama Foundation, has compared the UK youth detention system with that in Spain, concluding that in the UK, "there needs to be a cultural shift, not least in the perception of children who offend. Other changes that would be needed include:

- The perception of the purpose of custody – becoming more receptive to the importance of rehabilitation and education, and recognising the need for a highly skilled workforce…
- The regionalisation of facilities to allow children to be placed within their own area, avoiding disconnection of support and improving integration in the community.
- Moving away from the risk-adverse culture that restricts innovation and outcomes."[519]

"Re-education centres provide cognitive and emotional support. As well as being provided with social education, children in the centres receive an average of 30 hours of formal education every week and are encouraged to achieve additional qualifications in sports and leisure activities… The focus is on re-education to rehabilitate. Staff are highly qualified (social educators, social workers, psychologists and teachers will all be at degree-level educated or equivalent)."[520]

A 2009 study found that recidivism rates for children in Diagrama run centres was 28.2%, as opposed to State-run centres, for which it was 50.3%.[521] Diagrama-run centres are cheaper than government-run ones, although cost depends on a number of factors. Generally the cost is It is 80-120K Euro per child per year.

[519] Derren Hayes, 'Tackling youth offending in Spain' (April 2017) Children & Young People Now
[520] Derren Hayes, 'Tackling youth offending in Spain' (April 2017) Children & Young People Now
[521] Dr Antonio Velandrino Nicolás, Study on the effectiveness of the educational intervention with children and young people in custody in Murcia County Council.

The average length of stay for young people in Diagrama-run centres is 9 months, and about 30% of children in centres run by Diagrama are on remand, 70% have been sentenced. In 2018, there were 954 children (14 – 17yo) detained, and 544 young people (18 – 23yo). In that year, 86.7% were male and 13.3% were female. The offences for which children were detained included: 22.04% for violence against the person, 33.79% for robbery, and 15.30% for domestic violence.

Diagrama cannot refuse any children, and some children are only in the centres for a few days, although this is an infrequent occurrence. Diagrama's view is that it is difficult to achieve positive results with children in less than 6 months; the recommendation is 9-12 months to achieve positive outcomes.