



Victorian Aboriginal Legal Service Submission on
Victoria's Anti-Racism Strategy

December 2021



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BACKGROUND TO THE VICTORIAN ABORIGINAL LEGAL SERVICE

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

Legal Services

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

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

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

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

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



Community Justice Programs

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

The Community Justice Team also run the following programs:

- Family Violence Client Support Program¹
- Community Legal Education
- Victoria Police Electronic Referral System (**V-PeR**)²
- Regional Client Service Officers
- Baggarrook Women's Transitional Housing program.³
- Aboriginal Community Justice Reports⁴

Policy, Research and Advocacy

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

ACKNOWLEDGEMENTS

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

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

- Isabel Robinson, Senior Policy, Research and Advocacy Officer
- Andreea Lachs, Head of Policy, Communications and Strategy
- Matthew Witbrodt, Policy, Research and Advocacy Officer
- Fergus Peace, Policy, Research and Advocacy Officer

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

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

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

⁴ See <https://www.vals.org.au/aboriginal-community-justice-reports/>

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- Alex Walters, Principal Managing Lawyer, Civil Law and Human Rights Practice
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SUMMARY OF RECOMMENDATIONS

Principles to Guide the Anti-Racism Strategy

Recommendation 1. Development of the Victorian Anti-Racism Strategy should be guided by the following principles, proposed by the Australian Human Rights Commission for the purposes of developing a National Anti-Racism Framework:

- **Intersectionality:** equality measures are more effective if they recognise and address intersectional experiences of racism.
- **International human rights law:** including Australia’s binding legal obligations under the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Rights of the Child (CRC), the Convention on the Rights of Persons with Disabilities (CRPD) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).
- **The United Nations Declaration on the Rights of Indigenous Peoples:** including the right of Aboriginal peoples to meaningfully participate in, and have control over, the policy and legislative decision-making that affects them.
- **Rights based-approach:** Governments must respect, protect and fulfil human rights, including the rights to equality and non-discrimination.

Recommendation 2. In addition to the principles proposed by the AHRC to guide the National Anti-Racism Framework, development of the Victorian Anti-Racism Strategy should also be guided by the following principles:

- *Self-determination:* implementing the right of Aboriginal peoples and communities to self-determination is a fundamental way of addressing racism.
- *Strengths-based approach:* the Strategy must celebrate the resilience and strength of Aboriginal people and communities with lived experience of racism; as well as the diversity and richness of Aboriginal communities and cultures in Victoria.
- *A comprehensive and holistic approach:* the Strategy must address all dimensions of racism, including individual, interpersonal and systemic racism.
- *Prioritise the voices of people and communities with lived experiences of racism:* the Government must not only listen to individuals’ and communities’ experiences of racism; it must also incorporate the solutions put forward by these individuals and communities on how to address racism.

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- *Outcome focused:* the Strategy should identify existing measures to address racism; however, it must do more than simply regroup existing Government commitments. The Strategy must result in concrete outcomes.
 - *Accountability and independent monitoring:* Government must be accountable for implementing the Strategy through a robust and independent monitoring and evaluation framework that includes individuals and communities with lived experience of racism.

Increase Awareness of Racism and its Impacts in Victoria

State-wide Guidance on Key Concepts, Definitions and Language relating to Racism

Recommendation 3. The Anti-Racism Strategy should provide a shared understanding of the key dimensions of racism, including individual, interpersonal and systemic/institutional racism, as well as intersectional experiences of racism. The Anti-Racism Taskforce must work with individuals and communities with lived experience of racism, to ensure that their voices are at the centre of identifying and defining a shared understanding of racism.

Recommendation 4. The Anti-Racism Strategy should provide a framework and guidance for public and private organisations and agencies to develop their own organisational strategies on Anti-Racism and Cultural Awareness. The Strategy must include the development of organisational strategies for public authorities that have well-documented challenges with racism, including Victoria Police, Child Protection, Corrections Victoria and health services.

Aboriginal-Controlled Data and Research on Racism

Recommendation 5. The Anti-Racism Strategy must include measures to increase collection of and access to data on racism in all its forms in Victoria:

- Data relating to Aboriginal peoples' experiences of racism in Victoria must be gathered, managed and used in accordance with Indigenous Data Sovereignty (IDS) and Indigenous Data Governance (IDG).
- The Victorian Government must work with Aboriginal people and communities, including ACCOs, to develop a model for Aboriginal controlled data and research on racism.

Recommendation 6. The Anti-Racism Strategy must include legislative and policy reform to protect Indigenous Data Sovereignty (IDS) and Indigenous Data Governance (IDG) for Aboriginal people and communities in Victoria, as a concrete manifestation of the right to self-determination. In particular, relevant legislation and policies must protect:

- 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.



Recommendation 7. The Anti-Racism Strategy should include initiatives to fund Aboriginal-led research on Aboriginal people’s experiences of racism in Victoria, including funding to VALS to undertake research on racism within Victoria Police, for example, on racial profiling by Victoria Police in their use of stop and search powers.

Mandatory Anti-Racism and Cultural Awareness Training for Public Authorities

Recommendation 8. Anti-racism training should be mandatory for all public authorities, particularly Victoria Police, Corrections Victoria and Child Protection. The Anti-Racism Strategy must include measures to increase anti-racism training across public authorities, including to fund the development and implementation of anti-racism training for public authorities.

Recommendation 9. Anti-racism training must be developed by people and communities with lived experience of racism, including Aboriginal people. Wherever possible, anti-racism training should also be delivered by Aboriginal people.

Truth-telling: Yoo-rrook Commission

Recommendation 10. The Anti-Racism Strategy should prioritise measures to increase awareness amongst non-Aboriginal Victorians, about the resilience and strength of Aboriginal communities, as well as the diversity and richness of Aboriginal communities and cultures.

Recommendation 11. To ensure that Aboriginal people and communities can share their stories and experiences in a culturally safe and trauma-informed way, the Government must fund access to culturally safe legal assistance and support for Aboriginal people who wish to engage with the Yoo-rrook Commission.

Recommendation 12. The Victorian Government must not use the Yoo-rrook Commission as an excuse to defer urgent reforms, that have been proposed by Aboriginal communities.

Recommendation 13. To ensure that the Yoo-rrook Commission results in concrete outcomes for Aboriginal people in Victoria, the Victorian Government should publicly indicate its intention to implement the recommendations from the Commission, and to publicly and regularly report on its progress regarding implementation.

Aboriginal Self-determination

Recommendation 14. The Anti-Racism Strategy should acknowledge the distinctiveness of Aboriginal peoples in Victorian society, their unique experiences of racism and their rights to self-determination. In particular, the Strategy must acknowledge the right to free, prior and informed consent (FPIC).

Recommendation 15. The Anti-Racism Strategy should include measures to strengthen the legislative framework for the right to self-determination for Aboriginal peoples in Victoria, including:

- Amend the *Victoria Charter of Human Rights and Responsibilities 2006* to include the right to self-determination of Aboriginal peoples in Victoria.

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- Amend the *Children, Youth and Families Act (CYFA) 2005* to include a Statement of Recognition, including the right to self-determination.
 - Enshrine the right to self-determination in the new *Youth Justice Act*
 - Amend the *Corrections Act 1986* to include the right to self-determination.

Recommendation 16. The Anti-Racism Strategy should emphasise the need for concrete measures to realise the right to self-determination of Aboriginal peoples in Victoria, including:

- Increase access to Koori Courts by increasing the locations and frequency of sitting days, and by expanding the jurisdiction of the courts to:
 - (i) divert Aboriginal people to culturally appropriate diversion programs;
 - (ii) hear bail applications;
 - (iii) hear matters that are contested and have not resolved to a plea of guilty;
 - (iv) make Drug and Alcohol Treatment Orders where appropriate.
- The Government should provide long-term and stable funding to ACCOs to deliver pre- and post-release programs for Aboriginal people, including transitional housing programs run by ACCOs, such as VALS' Baggarrook program, to support men and women leaving prison.
- The Victorian Government should support Aboriginal organisations to increase their capacity to take on the guardianship of Aboriginal children in out of home care, pursuant to Section 18 of the Children, Youth and Families Act (2005).

Recommendation 17. The Anti-Racism Strategy should recognise the critical role of ACCOs in advocating for legislative/policy reforms to address systemic racism experienced by Aboriginal people, including by:

- Providing funding to ACCOs to carry out research on systemic racism;
- Reaffirming the need for long-term, flexible and multi-year funding for ACCOs, in line with the Government's commitment to Aboriginal self-determination.

Anti-Vilification Protections

Recommendation 18. The Anti-Racism Strategy must commit the Government to implement the recommendations from the Parliamentary Inquiry into Anti-Vilification as a matter of urgency, including the recommendations relating to enhancing the powers of VEOHRC and legislative amendment of the RRTA and the EOA.

Recommendation 19. The Anti-Racism Strategy must include measures to support Aboriginal people who have experienced racism to take legal action under the RRTA and/or the EOA, including funding for VALS to provide culturally safe legal assistance, representation and support for racial vilification and discrimination matters.



Human Rights

Recommendation 20. The Anti-Racism Strategy should include measures to strengthen legal protection of human rights in Victoria, including:

- Strengthening the protection provided by the Charter, by ensuring that there is a stand-alone ground for judicial review of Charter rights;
- Incorporating human rights into relevant legislation, including the *Corrections Act 1986*, the *Children, Youth and Families Act*, and the new Youth Justice Act, the *Public Health and Wellbeing Act 2008*, the *Mental Health Act 2014* and the *Police Act 2013*.

Aboriginal Cultural Rights

Recommendation 21. The Anti-Racism Strategy should include measures to increase protection of cultural rights in adult custodial facilities and youth justice centres, including:

- Increase access to culturally appropriate health care and mental health care in prisons by:
 - working with VACCHO and other member organisations to jointly examine new models for delivery of primary health services by Aboriginal Community Controlled Health Organisations; and
 - finalising standards for culturally safe, trauma informed health services in the criminal legal system and youth justice;
- Funding and supporting Aboriginal organisations to design, develop and deliver culturally safe rehabilitation programs for Aboriginal people in custody, particularly Aboriginal women and girls;
- Continue to improve and invest in strategies to recruit, support and retain more Aboriginal people at all levels within Corrections Victoria and Youth Justice.

Recommendation 22. The Anti-Racism Strategy should include measures to reform policies and legislation that contribute to systemic racism experienced by Aboriginal people in Victoria, including:

- Raise the age of criminal responsibility to at least 14 years and the age at which children can be detained to at least 16;
- Reform the punitive bail system;
- Strengthen Section 3A of the *Bail Act 1977*⁵ by creating a statutory obligation for bail decision makers to demonstrate how they have complied with the obligation in Section 3A;
- Implement a legislated cautioning scheme in both the adult and youth justice systems;
- Implement the following reforms to enhance access to culturally appropriate diversion for Aboriginal people:
 - remove police discretion as to which offences are suitable for diversion;
 - remove the requirement for prosecutors to consent to diversion;

⁵Section 3A of the Bail Act provides that: “In making a determination under this Act 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.”

- progress options for greater self-determination in relation to diversion; and
- require police to complete a 'Failure to Divert Declaration' for all police briefs.
- Amend the *Summary Offences Act 1966* to repeal outdated offences that disproportionality impact Aboriginal people (eg. begging, obstruction of foot paths, obscene language);
- Decriminalise the use of cannabis and possession of cannabis for personal use;
- Create a legislative base for the Independent Third Person (ITP) program;
- Amend the *Sentencing Act 1991* to introduce a statutory obligation for judges and magistrates to consider Aboriginality for the purposes of sentencing, as well as an obligation to demonstrate how they have discharged this obligation;
- Amend the *Sentencing Act 1991* (Vic) to ensure that individuals with an acquired brain injury and/or an intellectual disability that was not diagnosed before the age of 18 years, are eligible for a Justice Plan;
- Strengthen access to and support for Aboriginal people on community-based sentences;
- Increase access to Koori Courts by increasing the locations and frequency of sitting days, and by expanding the jurisdiction of the courts to:
 - (i) divert Aboriginal people to culturally appropriate diversion programs;
 - (ii) hear bail applications;
 - (iii) hear matters that are contested and have not resolved to a plea of guilty;
 - (iv) make Drug and Alcohol Treatment Orders where appropriate;
- Prohibit harmful practices in custody that disproportionality impact Aboriginal people, including solitary confinement and strip searching;
- Reform the model of health care in all places of detention – including police custody, prisons and youth justice – to ensure that Aboriginal people in custody can access culturally appropriate and timely health care, which is equivalent to the care available in the community. At a minimum, this must include:
 - provision of health care through the Department of Health, rather than DJCS;
 - development and implementation of standards for culturally safe, trauma informed health services for all custodial settings⁶;
 - working with VACCHO and member organisations to develop a model for delivery of primary health services by Aboriginal Community Controlled Health Organisations; and
 - ensuring access to Medicare and the Pharmaceutical Benefits Scheme;
- Introduce standardised and culturally appropriate mental health screening tools across all custodial settings;
- Amend Section 6 of the *Equal Opportunity Act 2010* (Vic) to include irrelevant criminal record as a protected attribute;

⁶ Under *Burra Lotjpa Dunguludja* (Goal 3.1), Justice Health is responsible for leading the development cultural safety standards for health services in the adult and youth justice systems. See [Burra Lotjpa Dunguludja](#), above note 42. As at December 2021, "development of standards was on hold while Justice Health engages with VACCHO regarding VACCHO's proposed cultural safety framework and accreditation process." See [AJA4 In Action](#).

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- Amend reunification timeframes in the *Children, Youth and Families Act 2005*, to provide the Children’s Court with greater discretion to make reunification decisions that are in the best interests of the child.
 - Strengthen Accountability and Oversight Mechanisms

Oversight Mechanisms and Systemic Racism

Recommendation 23. The Anti-Racism Strategy should include measures to ensure that systems, mechanisms and bodies of accountability and oversight, such as coronial inquests, complaints mechanisms and detention oversight bodies (e.g. National Preventive Mechanisms under OPCAT) examine the role of systemic racism when exercising their mandates.

Recommendation 24. Complaints mechanisms should be able to receive representative complaints, without the need to name an individual complainant, or complaints submitted by an organisation on behalf of a group.

Recommendation 25. Practice Direction 6 of 2020 of the Coroners Court relating to “Indigenous Deaths in Custody” should be amended to provide that, if requested by the family, the investigating coroner should include within the scope of the inquest, whether systemic racism or racial bias contributed to the cause or circumstances of the person’s death. The Coroner must be open to receiving expert evidence regarding systemic racism and racial bias.

Complaints Systems

Recommendation 26. The Anti-Racism Strategy must prioritise measures to strengthen the police complaints system, including the following:

- Establish a new independent police complaints body that complies with international principles, and is complainant-centred, transparent, has adequate powers and resources to carry out independent investigations, and responds to the needs of Aboriginal complainants.
- Police must not be responsible for investigating and handling police complaints, except minor customer service matters. All police complaints other than minor customer service matters must be investigated and managed by the independent police complaints body. This includes serious police misconduct, systemic police misconduct, police-contact deaths and incidents involving serious injuries.
- Complainants must have the right to request a review of the classification of their complaint.
- The independent police complaints body should have own-motion powers to conduct investigations of individual incidents, thematic investigations of related incidents, and systemic investigations of wider problems within Victoria Police.
- The independent police complaints body should have a ‘super-complaints’ process which allows representative organisations to make complaints about systemic issues on behalf of a group of affected people. Those representative organisations must include Aboriginal Community Controlled Organisations.

- The independent police complaints body should develop a strategy for identifying and investigating systemic racism, in consultation with Aboriginal Community Controlled organisations.
- The independent police complaints body must respond to the needs of Aboriginal complainants, including by establishing a Koori Engagement Unit.
- Complainants should be able to access footage from body-worn cameras (BWCs) worn by police and Protective Service Officers (PSOs).
- Complainants should be able to access documents relating to the police complaint, including the investigation file:
 - (a) The legislation establishing a new independent body should not exempt documents and footage relating to the police complaint from the Freedom of Information Act 1982, as is currently the case for IBAC;
 - (b) the Freedom of Information Act 1982 should be amended to ensure that documents and footage relating to the police complaint are not exempted from this Act.
- Legislation establishing a new independent body for police complaints should include robust protections for complainants, including:
 - (a) making it an offence to threaten or intimidate, persuade or attempt to persuade another person not to make a complaint, or subject them to any detriment;
 - (b) monitoring charges laid against a complainant once they have submitted a complaint.
- Both the independent police complaints body and Victoria Police must publish regular and easily accessible disaggregated data on complaints.

Recommendation 27. The Anti-Racism Strategy must prioritise measures to strengthen independent complaints mechanisms, including through the following:

- 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.
- Establish an independent, specialised child and young person-centred complaints function to receive complaints from children and young people in care, including concerns about their immediate safety or ongoing concerns about their wellbeing while in care.
- All public authorities, including Corrections Victorian and Child Protection, should publish annual data arising from their internal complaints mechanisms, including data on complaints relating to racism.



Independent Monitoring of Police Powers

Recommendation 28. The Anti-Racism Strategy must prioritise measures to strengthen independent monitoring of police powers, including through the following:

- Enhance recording keeping and data collection within Victoria Police: Victoria Police should be required by legislation to keep records in relation to the exercise of specific police powers, and provide disaggregated data to an independent body for the purposes of monitoring.
- Increase transparency through public reporting on exercise of police powers, both by Victoria Police and an independent monitoring body
- Increase Aboriginal controlled data and Aboriginal led research on racism within Victoria Police
- Procedural and substantive monitoring of police powers by an independent oversight body, including the following police powers that are used disproportionality against Aboriginal people:
 - Any new police powers relating to public drunkenness
 - Police stops and searches
 - Move-on orders
 - Powers under the Mental Health Act
 - Charges against children in out-of-home care
 - Arrest of child or young person rather than proceeding by way of summons
 - Cautioning
 - Diversion
 - Use of weapons at rallies/protests (rubber bullets, OC spray, armoured vehicles etc.)
 - Use of force during arrest
 - Treatment in police custody, including use of force, drug testing, strip searching and provision of medical care
 - Police use of Custody Notification Service (CNS), bail justices, Aboriginal Community Justice Panels (ACJP), Independent Third Person services and Youth Referral and Independent Person Program (YRIPP).
 - Police bail decisions.

Recommendation 29. The Anti-Racism Strategy must prioritise measures to increase compliance with legislative requirements relating to the Aboriginal Child Placement Principle (ACPP) (including engagement with Lakidjeka - Aboriginal Child Specialist Advice and Support Service ACSASS), Aboriginal Family-Led Decision Making (AFLDM) and Cultural Support Planning (CSP). This should include:

- Judicial oversight of child protection decisions that are currently considered to be administrative decisions and are not determined or regulated by the Court, for example, the name of the placement;
- Enhanced recording, data collection and public reporting on compliance with relevant legislative requirements, including in the annual report of DFFS;
- Independent monitoring of compliance with relevant legislative requirements;

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- Strategies and oversight mechanisms to ensure high-quality CSPs are developed, implemented, monitored, reviewed and updated in a timely manner;
 - Aboriginal led monitoring and evaluation of relevant policy frameworks, including the VAAF, Closing the Gap Implementation Plan and Wungurilwil Gagapduir: Aboriginal Children and Families Agreement;
 - Hold Child Protection staff accountable for completing their mandatory responsibilities to confirm Aboriginality, comply with requirements arising from the ACPP, CSP, AFLDM;
 - Incorporate accountability and performance measures for improved outcomes for Aboriginal children, into the individual performance plans of operational DHHS Deputy Secretaries.

Independent Coronial Investigations

Recommendation 30. Coronial investigations into police-contact deaths must not be carried out by police. They must be carried out by a specialist civilian investigation team that is independent from police, is culturally appropriate and includes Aboriginal staff and leadership.

Recommendation 31. The Government should consult with the families of Aboriginal people who have died in custody regarding the mechanism for independent coronial investigation of police-contact deaths.

Recommendation 32. Family members of an Aboriginal person who has died in police custody should be given the option of providing a statement through the Koori Engagement Unit at the Coroners Court or VALS lawyers.

Aboriginal Social Justice Commissioner

Recommendation 33. The Anti-Racism Strategy should include a commitment to establish an independent, statutory office of the Aboriginal and Torres Strait Islander Social Justice Commissioner. The mandate of the Commissioner should include monitoring the implementation of RCIADIC recommendations, relevant inquiries as well as recommendations from coronial inquests into Aboriginal deaths in custody.

Culturally Appropriate OPCAT Implementation

Recommendation 34. 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 35. 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 36. The Victorian Government must legislate for the NPM's mandate, structure, staffing, powers, privileges and immunities.



Recommendation 37. 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 all police places of detention, residential care facilities, forensic mental health hospitals and other places where people with cognitive disabilities are deprived of their liberty.

Recommendation 38. The Victorian and Commonwealth Governments must ensure that the NPM is sufficiently funded to carry out its mandate effectively.

Culturally Safe Legal Assistance and Community Legal Education

Recommendation 39. The Anti-Racism Strategy should include measures to increase access to culturally safe legal assistance and support for Aboriginal people who have experienced racism, including funding to VALS to provide legal assistance, representation and wrap around support in relation to:

- Coronial investigations and inquests;
- Police complaints;
- Spent Convictions;
- Stolen Generation redress Scheme
- Racial discrimination and vilification
- Prison complaints;
- Parole applications for Aboriginal people serving sentences
- Disciplinary proceedings for Aboriginal people who are incarcerated.

Recommendation 40. The Anti-Racism Strategy should include measures to increase awareness about legal rights and remedies for individuals who have experienced racism, including funding to VALS to develop and provide community legal education (CLE) on the following topics:

- The new Spent Convictions Scheme;
- Anti-vilification laws;
- The rights of incarcerated people (including CLE sessions in prisons);
- Police powers, interacting with police and police complaints; and
- The Stolen Generation Redress Scheme.

Robust Monitoring and Evaluation for the Anti-Racism Strategy

Recommendation 41. The Anti-Racism Strategy must have a robust monitoring and evaluation framework which includes:

- Regular and publicly available reporting on implementation of the Strategy: all government authorities with responsibilities under the Strategy must be required to report regularly on progress in implementing their obligations (e.g. in their own Annual Reports and on their websites). Reporting must be outcome focused.
- Internal oversight within Government: DPC should have responsibility for following up with all departments and agencies regarding implementation of the Strategy. They should coordinate



an annual report to be tabled in Parliament on overall progress in implementing the Strategy, and should include input from Aboriginal communities and organisations.

- Independent review of progress in implementing the Strategy. This must include input from Aboriginal communities, and/or independent oversight by the Aboriginal Social Justice Commissioner.

DETAILED SUBMISSIONS

Introduction

VALS welcomes the opportunity to provide feedback on the development of the Victorian Anti-Racism Strategy. We note the parallel process being led by the Australian Human Rights Commission (AHRC), to develop a National Anti-Racism Framework,⁷ and the potential for both of these frameworks to result in concrete change across all sectors.

The lives of Aboriginal communities in Victoria have been impacted by racism since invasion and continue to be shaped by racism across all areas of society. Racism takes many forms – individual, interpersonal and systemic/institutional – and is as pervasive today as it has been in the past; yet Aboriginal communities and families continue to survive and thrive.

At an individual level, Aboriginal people are disproportionately impacted by racial discrimination and vilification, which takes place in workplaces, in public, online, in social housing contexts, and in the provision of goods and services. Aboriginal people also experience racial abuse and discrimination in their interactions with police and other actors within the criminal legal and youth justice systems; as well as other government service providers.

At a systemic level, Aboriginal people, families and communities continue to be disproportionately impacted by laws, policies and institutions that are built on a foundation of violence and dispossession. Systemic racism is not about individual racist views; it is the way that laws, policies and practices produce a discriminatory outcome for racial or cultural groups. It is a key factor contributing to over-representation of Aboriginal people in the youth justice, criminal legal and child protection systems, as well as housing instability and homelessness.

Addressing racism in all its forms is an enormous task. It requires a fundamental shift in individual attitudes, as well as extensive legislative, policy and institutional reforms to address the ongoing legacy from this country's racist and violent history. While the Anti-Racism Strategy cannot address racism comprehensively at all levels, it presents a critical opportunity to better understand racism across all areas, and to achieve real change.

⁷ Australian Human Rights Commission (AHRC), [Concept Paper for a National Anti-Racism Framework](#) (March 2021).



This submission identifies core components for the Anti-Racism Strategy, needed to address both individual and interpersonal racism, as well as institutional and systemic racism:

- Improve our understanding of racism, including through publicly available data and research
- Acknowledge and commit to addressing racism in all its forms, including systemic and institutional racism
- Address laws and policies that disproportionality and negatively impact Aboriginal people
- Strengthen legal protection for Aboriginal self-determination and cultural rights
- Strengthen protections for Aboriginal people in custody
- Strengthen independent complaints systems and oversight for Victoria Police, Child Protection and Corrections Victoria
- Develop robust accountability systems, including independent monitoring
- Implement mandatory anti-racism training across all public authorities
- Strengthen mechanisms to hold the Government accountable for its existing legislative and policy obligations, including implementing recommendations from the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**) and Coronial Inquests.

Aboriginal communities have told their stories about racism time and time again; and have continued to propose solutions to address racism in all its forms. What we need now is sustained and concerted action. The Government must listen to the voices of Aboriginal people and take action to achieve real change.

Part 1: Aboriginal Peoples' Experiences of Racism in Victoria

The Experience of our Clients

VALS' clients experience racism across all areas in which VALS provides legal and community justice services. This includes racial abuse and discrimination, as well as systemic and institutional racism entrenched within laws, policies, practices and institutions.

The impacts of racism for our clients are far-reaching, and include significant impacts for health, mental health, and feelings of exclusion and concerns for safety.⁸ Historic and ongoing racism and violence perpetrated by public authorities also contributes to widespread distrust of public authorities

⁸ VALS and Victoria Legal Aid (VLA), [*Fair and accessible anti-vilification protections for all Victoria's: Submission to the Victorian Parliamentary Inquiry into Anti-Vilification Protections*](#) ("Submission to the Parliamentary Inquiry into Anti-Vilification Laws") (2020). See also VicHealth, [*Mental health impacts of racial discrimination in Victorian Aboriginal communities: Experiences of Racism Survey: A Summary*](#) (2012); Department of Health and Human Services, [*Racism in Victoria and what it means for the health of Victorians*](#) (2017); A. Markwick, Z. Ansari & J. McNeil (2019). "Experiences of racism among Aboriginal and Torres Strait Islander adults living in the Australian state of Victoria: a cross-sectional population-based study," *BMC Public Health*; Parliament of Victoria, Legal and Social Issues Committee, [*Inquiry into Anti-Vilification Protections*](#) ("Parliamentary Inquiry into Anti-Vilification Laws") (March 2021).



by Aboriginal people.⁹ In addition, systemic racism results in intergenerational trauma¹⁰ and over-representation of Aboriginal people in criminal legal, youth justice, child protection, housing instability and homelessness, and in a range of indicators relating to health and wellbeing.

The following summarises Aboriginal people's experiences of racism and the way that racism manifests across police, prisons, youth justice centres, child protection, healthcare, social housing and social welfare. Appendix 1 summarises the publicly available data in relation to each area.

Victoria Police

- Racial abuse by police officers;
- Denial of Aboriginality by police officers, which undermines the rights of Aboriginal people in police custody, including access to the Custody Notification Service (**CNS**);
- Over-policing of Aboriginal communities eg. in relation to police searches, fines (including COVID-19 fines), summary offences;
- Over-representation of Aboriginal people in police custody;
- Inadequate assistance from police when needed eg. in relation to police complaints, breaches of Personal Safety Intervention Orders (**PSIOs**) and family violence;
- Arresting Aboriginal children rather than proceeding by way of summons;
- Arresting and detaining Aboriginal children, as a way of punishing them for “breaching” bail conditions;
- Lower cautioning and diversion rates for Aboriginal people;
- Racial profiling (including reports of police using predictive policing tools);
- Criminalisation of Aboriginal children in residential care;
- Mistreatment and denial of rights in police custody, including inadequate cell checks and inadequate healthcare;
- Lack of accountability for racist policing and systemic racism within Victoria Police because of the fundamentally broken complaints system.

Prisons and youth justice centres

- Over-representation of Aboriginal people in prisons and youth justice systems, including on remand and serving sentences;
- Harmful practices that disproportionately impact Aboriginal people in custody: use of force and restraints; solitary confinement; strip searching / urine analysis;
- Inadequate healthcare;
- Lack of accountability for racism in prisons and youth justice centres because of the inadequate complaints and oversight system.

⁹ *Parliamentary Inquiry into Anti-Vilification Laws*, above note 8, p. 200.

¹⁰ *Ibid.*, p. 28.



Child protection

- Over representation of Aboriginal children and young people in the child protection system, including: children receiving child protection services; notifications; substantiations following a notification; children on care and protection orders; children on Care by Secretary Orders and long-term care orders; children in out of home care (**OOHC**);
- Failure to respect and protect the cultural rights of Aboriginal children in OOHC, including non-compliance with the Aboriginal Child Placement Principle (**ACPP**) and the legislative requirements relating to Cultural Support Planning (**CSP**) and Aboriginal Family led Decision-making conference (**AFLDM**);
- Criminalisation of Aboriginal children in residential care;
- Timeframes for family reunification for Aboriginal children on Family Reunification Orders (introduced as part of the permanency amendments);
- Inadequate complaints and oversight systems for addressing individual and systemic racism.

Housing and social welfare

- Over-representation of Aboriginal people in housing instability and homelessness;
- Aboriginal people are less likely to receive the age pension, due to lower life expectancies and the age requirement for accessing the pension.

Healthcare and mental health care

- Discriminatory and differential treatment by healthcare providers, including inappropriate and inadequate levels of care;
- Culturally inappropriate healthcare;
- Individuals' health issues not taken seriously.

Consumer Law

- Predatory targeting of Aboriginal people by companies, including, for example, Australian Community Benefit Fund (**ACBF**) and Telstra.

Stories from Aboriginal People who have Experienced Racism

The following case studies highlight the experiences of our clients across the following areas: hate speech in public; racist policing; health services. In addition, VALS recently prepared a submission for the [Independent Cultural Review into Adult Custodial Corrections System](#), which includes case studies highlighting systemic racism within prisons, particularly in relation to Aboriginal cultural rights.¹¹

¹¹ VALS, [Submission to Cultural Review of the Adult Custodial Corrections System](#) (December 2021) p. 129 (“Case Study on Failure to provide opportunities to connect with culture – James*”)



The below case study was included in VALS' submission to the Anti-Vilification Inquiry (it has not been amended subsequently). You can read Charmaine Clarke's response to the Inquiry's report here: [Charmaine Clarke and VALS welcome Anti-Vilification Protections Inquiry recommendations](#).

Racial vilification in public: Charmaine's story¹²

I am a proud Gunditjmara Elder and am employed as an Indigenous Family Violence Researcher for my community organisation in Warrnambool.

Recently I attended a local restaurant for lunch. During the course of my meal, I heard a young man making racist comments about Aboriginal people. I looked to where he was seated and he was expressing his views to a number of people seated with him. He was saying things like the country does not belong to Aborigines and he was complaining about the closure of Uluru. As an Elder, I felt responsible to educate others about our history and heritage, so I approached the table and addressed the young man, explaining who I am and trying to bring greater understanding. Unfortunately the mother snidely told her son to just ignore 'those people'. As soon as she said this, the young boy became aggressive towards me, and started racially abusing me and calling me offensive names. Both he and others smirked and scoffed at me.

I felt a deep humiliation, belittling and fear during the incident. I was nervous even to approach the table in the first place, but felt honour bound to address misinformation and promote reconciliation. I am an advocate for reconciliation in the community, and I actively do 'welcome to country' for a number of services and community events.

This incident of racism is not in isolation, but has a cumulative affect and impacts my self-esteem, my mental health (I'm stolen generation) and my sense of safety in public. Having experienced years of racial vilification, this incident adds to the burden of yet another assault, another wounding, another stripping of dignity and safety. I made a formal complaint to the management of the restaurant and was satisfied with their prompt and sincere response. They apologised and worked collaboratively with both myself and Victoria Police in gathering information around the incident.

When I discussed legal representation with the Victorian Aboriginal Legal Service, I learnt that very few cases have met the standards set out under this act. This was a shock to me and a great disappointment and immense source of frustration. I mean what's the point of the piece of legislation that isn't interested in either you (the victim) or the offender, but focuses on the impact on bystanders? Why call it racial vilification when it's so narrowly defined and tested? I can only hope that my case is one of those very few that meet the threshold. It's a lot to put yourself through to just get one small shot at justice.

¹² See VALS and VLA, *Submission to the Parliamentary Inquiry into Anti-Vilification Laws*, above note 8, p. 5. See also, Parliamentary of Victoria, Legal and Social Issues Committee, [Inquiry into Anti-Vilification Protections, Transcript of Evidence](#) (28 May 2020), pp. 22-23; Parliament of Victoria, *Parliamentary Inquiry into Anti-Vilification Laws*, above note 8, p. 27.

Racist policing: The Coronial Inquest into the Passing of Raymond Noel Thomas

Raymond Noel Thomas was a proud Gonnai, Gunditjmara and Wiradjuri man. He passed away on 25 June 2017 during a police pursuit in Thornbury, Melbourne.

During the Coronial Inquest, Raymond Noel's father recounted the following incident from his son's childhood:

"... the boys were playing on a woodchip mound, you know, on the docks with a couple of other cousins. Just being young boys, ten or eleven years old. Just what they do. And two police officers came along and their cousins run off and two police apprehended our boys, handcuffed them and made them sit on the gutter and one of the officers said, "If you move I'll shoot ya". Now, that's the first interaction with police for a ten year old, eleven year old. So you could imagine the fear they must have felt..."¹³

Although systemic racism was not within the scope of the Raymond Noel Inquest, Coroner Olle highlighted the disproportionate representation of Aboriginal people in pursuit related fatalities, and the fact that "Raymond Noel and his family's adverse interactions with police is sadly the reality of the lived experience of many Aboriginal people in our community. Whilst we will never know why Raymond Noel took flight, the potential contribution of his adverse experiences with police cannot be excluded."¹⁴

The attendance of uniformed police officers on the final day of the Raymond Noel Inquest is a pertinent and disgraceful sign of the deeply entrenched racism within Victoria Police. The following are extracts from VALS' media release¹⁵:

Quotes Attributable to Uncle Ray, Raymond Noel's father

"It is disgusting and offensive behaviour from the police once again towards us as an Aboriginal family at such a critical time like this, when we are trying to find answers in relation to the death of our son, Raymond Noel. After waiting four years, this is unacceptably immoral and says something about their level of humanity."

Quotes Attributable to Lee-Anne Carter, Statewide Community Justice Programs Leader

"Victoria Police's decision to deploy police to the coronial hearing with absolutely no justification shows an utter lack of respect for the Thomas family. Any family or community member who has experienced the loss of a loved one is in pain and grieving. This is often harder when there is no closure and your loved one's matter is delayed as a result of processes and/or inquiries or coronial investigations. This pain and wait is indescribable."

¹³ Raymond Noel Thomas passed away on 25 June 2017 during a police pursuit in Thornbury, Melbourne. See [Finding into the Death of Raymond Noel Lindsey Thomas](#), COR 2017 003012, para 139.

¹⁴ Ibid., para 141.

¹⁵ VALS, "[Uniformed Victoria Police attend Coronial Inquest for 'security', compounding the grief and trauma of the Thomas Family](#)" (Media Release), 1 July 2021.



“It is well known that Aboriginal people feel distrust and are fearful of court settings due to their experience of both courts and police. It is inevitable that yesterday’s actions led to distress. Victoria Police showed inexcusable disregard of the feelings of the Thomas family, friends and community present.”

“Victoria Police’s actions undermine the work that the Coroner’s Court has been doing with Victorian Aboriginal communities in changing their protocols and practices to ensure a safe environment, and ensuring every Aboriginal person is treated with respect and dignity. These practices work towards addressing trauma and institutional distrust, by implementing practices and procedures that ensure cycles of grief and loss are not perpetuated.”

“Aboriginal Communities have worked tirelessly to improve Victoria Police culture and practices, but they cannot do this alone. Yesterday’s behaviour is an example of what we have been fighting against for generations – the criminalisation of our people when they are grieving, when they are respectfully participating in the justice system, when they advocate for change that would benefit everyone, not only Aboriginal people.”

Racist policing: Extracts from Our Youth, Our Way

In March 2021, the Commission for Children and Young People (CCYP) published a report, *Our Youth, Our Way: inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system*. The following quotes are from Aboriginal children and young people who spoke to the Commission about their experiences of racism and abuse, at the hands of Victoria Police.¹⁶

Some of them, recently when they were chasing me, they were saying, ‘I’ll catch you one day, you little black dog.’ They said to my brother, ‘Fuck this little cunt, this little black dog.’ – Otis, 14

All 4 cops tackled me, put my head in the mud. I had mud all over my face. They said they had the right to arrest me for giving a false name. They handcuffed me to the fence, got in my face, asked my nasho [nationality]. They said, ‘How would you like it if I called you “Abo”?’ – Corei, 17

Last year, New Year’s Day, me and my cousin and my uncle were driving and we got into a police chase, and we stopped the car and I got out and put my hands up and they battered me with a baton, calling us black dogs. – Jasper, 17

Some Koori kids maybe been assaulted by police so as soon as they see their uniform they might start running. It’s just their instincts now. – Dustin, 15

¹⁶ Commission for Children and Young People (CCYP), [*Our Youth Our Way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system*](#) (“Our Youth, Our Way”) (2020). Pp. 432-433.



I went into an interview room and said I couldn't remember what had happened. I said, 'No comment' and they paused the video, took a phone book and smashed me across the head. Then they pressed play, and asked me again, and I said, 'No comment.' So they pressed pause again, hit me again... Police need to stop bashing young people. – Malkar, 19

The worst thing was probably this one police officer who jumped up and picked me up and like he slammed me – it happened so quick – he put his knee into my back. I was like 14. He was just crunching it and crunching it and he was full standing on my head with one foot, putting all his weight on it, and it was all in public.– Karrwin, 20

Culturally appropriate/safe care passing of Harley Larking

Harley, a Nunga and Palawa man, passed away on 13 May 2016 at the age of 23 years. On that day, Harley absconded from the North Western Mental Health Service's (NWMHS) psychiatric unit where he was an involuntary inpatient, and then lost his life in a nearby park some hours later.¹⁷ Harley suffered from schizophrenia and substance abuse, and had been an inpatient on multiple occasions in the four years preceding his death. During the Inquest, VALS represented Harley's mother, Annemarie, on behalf of Harley's family.

As part of the Inquest, the Coroner considered whether the mental health services provided to Harley were culturally competent. The evidence indicated that Harley engaged better with his treating team with the support of Aboriginal Mental Health Workers and Aboriginal Social and Emotional Wellbeing Workers from ACCOs such as Wadamba Wilam. However, evidence presented by the Social Wellbeing Officer at Wadamba Wilam, suggested that neither the nursing staff nor the treating team doctors were culturally competent in their interactions with Harley.¹⁸

The Coroner recommended that NWMHS implement cultural competency training for all inpatient psychiatric staff, with a focus on working with Koori workers and culturally informed treatment planning.¹⁹ The Coroner also recommended a review of public mental health service inpatient units that do not have an Aboriginal mental health liaison officer, "with a view to encouraging the embedding of the principles and practice of cultural competence in the provision of mental health services to Aboriginal and Torres Strait Islander patients."²⁰

¹⁷ The Coronial Inquest into his passing confirmed "effects of fire" as the cause of death. See [Finding into Death with Inquest: Inquest into the Death of Harley Robert Larking](#), COR 2016 2137, para 41.

¹⁸ Ibid., para 211.

¹⁹ Ibid., p. 44.

²⁰ Ibid., p. 45.

Data on Racism

Data on Aboriginal peoples' experiences of racism in Victoria is not easily available. This is due to range of reasons, including limited research on racism and its impacts for Aboriginal people, as well as under-reporting by Aboriginal people who have experienced racism. Nevertheless, it is important to highlight the following sources of data:

- The landmark report commissioned by the VEOHRC in 2005 on *Systemic Racism as a Factor in the Overrepresentation of Aboriginal People in the Criminal Justice System* (2005).²¹
- Data and analysis collated by The Guardian Australia, relating to Aboriginal Deaths in Custody.²² Following the RCIADIC – which recommended that there should be annual reporting on all deaths in custody²³ – the Australian Institute of Criminology undertook this role. However, the data and reports were inconsistent and delayed. The gap in publicly available data prompted The Guardian Australia to establish the Deaths on the Inside Project.
- Data from bodies that receive complaints about racial abuse and vilification eg. the Australian Human Rights Commission²⁴ and the Victorian Equal Opportunity and Human Rights Commission.²⁵
- The Victorian Population Health Survey, which provides an annual assessment of the health status and wellbeing of adults living in Victoria.²⁶ Based on this data, there have been several key reports looking at the impacts of racism for the health and mental health of Aboriginal people in Victoria.²⁷
- The Independent Broad-based Anti-Corruption Commission (**IBAC**) is currently carrying out an audit of how Victoria Police handles complaints made by Aboriginal people.²⁸ The publication of this audit was due in 2020 but has been repeatedly delayed.²⁹ Given significant under-reporting of police complaints by Aboriginal people (see further below), the findings from this report will be limited; however, it is expected that the audit will provide some insights in relation to racist policing and Aboriginal people's experiences with the police complaints system.
- The Parliamentary Inquiry into Anti-Vilification Protections (2019-2021) considered some data relating to the prevalence of racism, and its impacts for Aboriginal people and communities; however, this was limited primarily to racial discrimination and vilification.³⁰

²¹ H. Blagg, N. Morgan, C. Cunneen, A. Ferrante, *Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Criminal Justice System* (2005).

²² The Guardian Australia, *Deaths Inside: Indigenous Australian deaths in custody* (Website).

²³ *Royal Commission into Aboriginal Deaths in Custody National Report* Volume 5 (Recommendations), ("RCIADIC National Report") (1991), Recommendation 17.

²⁴ See for example, AHRC, *2018-2019 Complaint Statistics*.

²⁵ Victorian Equal Opportunity and Human Rights Commission (VEOHRC), *Annual Report 2019-2020* (December 2020), pp. 6-7, 14.

²⁶ Department of Health (DH), *Victorian Population Health Survey*, (website).

²⁷ See DHHS, *Racism in Victoria and what it means for the health of Victorians*, supra note 8; Markwick et al., *Experiences of racism among Aboriginal and Torres Strait Islander adults living in the Australian state of Victoria*, above note 8.

²⁸ IBAC, *Annual Report 2020/21*, (2021) p.77.

²⁹ *Ibid.*, p. 42.

³⁰ *Parliamentary Inquiry into Anti-Vilification Laws*, above note 8, pp. 27-30.

- Victorian Government reports on progress in implementing policy frameworks, for example:
 - Various Government agencies and Divisions provide quarterly reports to the Aboriginal Justice Forum in relation to implementation of *Burra Lotjpa Dunguludja: Aboriginal Justice Agreement Phase 4*. This includes reports from Youth Justice on Aboriginal children and young people in contact with the youth justice system. However, this data is not available publicly.
 - The Department of Premier and Cabinet (DPC) reports annually on its progress in implementing the *Victorian Aboriginal Affairs Framework (VAAF)*.³¹ Under the VAAF, the Government committed to establish an Aboriginal-led Evaluation and Monitoring Mechanism, to evaluate the Government’s progress in implementing the VAAF; however, this has not yet been established.³²
 - The Victorian Government will also report annually on implementation of the *Victorian Closing the Gap Implementation Plan*;³³ reporting on CTG will be incorporated into the annual *Victorian Government Aboriginal Affairs Reports (VGAAR)* existing reporting mechanism.
 - Additionally, the Government has developed the *Self-Determination Reform Framework*,³⁴ which requires all Government Departments to report annually on action taken to enable self-determination, including under the goal of eliminating racism experienced by Aboriginal Victorians.
- The 2019 *State of Victoria’s Children Report*, which reported on the health, wellbeing, learning, safety and development of Victoria’s Aboriginal children and young people.³⁵
- Data on systemic racism is also available through the Federal Government data agencies such as the Productivity Commission, Australian Institution for Health and Welfare and the Australian Bureau of Statistics.

Even where data is available, it does not present an accurate representation of the scope and pervasiveness of racism, given chronic under-reporting. For example, the Parliamentary Inquiry into Anti-Vilification Protections found that Aboriginal people chose not to report or take action in relation to racism for many reasons, including: “distrust or lack of confidence in police and other public authorities.”³⁶ Additionally, research indicates that Aboriginal people in Victoria are also more likely to ignore or confront a perpetrator, as opposed to making a complaint or taking legal action.³⁷

³¹ Department of Premier and Cabinet (DPC), [Victorian Aboriginal Affairs Framework 2018-2023](#) (VAAF) (October 2018). Under the Victorian Government Aboriginal Affairs Report, the Government reports annually on action taken to address racism experienced by Aboriginal people and promote cultural safety. See Department of Premier and Cabinet, [Victorian Government Aboriginal Affairs Report](#) (VGAAR).

³² DPC, VAAF, above note 31, pp. 58-59.

³³ See DPC, [Victorian Closing the Gap Implementation Plan 2021-2023](#) (“CTG Implementation Plan”) (June 2021).

³⁴ DPC, *Victorian Government Self-Determination Reform Framework* (July 2019). Departments were due to complete their first report under this framework by June 2020. See DPC, [Self-Determination Reform Framework](#) (website).

³⁵ Department of Education, [2019 The State of Victoria’s Children: Aboriginal Children and Young People](#), (March 2021).

³⁶ Parliament of Victoria, *Parliamentary Inquiry into Anti-vilification Laws*, above note 8, p. 9.

³⁷ VicHealth, *Mental health impacts of racial discrimination in Victorian Aboriginal communities*, above note 8, p. 6, cited in VALS and VLA, *Submission to the Parliamentary Inquiry into Anti-Vilification Laws*, above note 8, p. 16.



Existing data is also limited because it is often not disaggregated on the basis of Aboriginality and other characteristics. For example, Corrections Victoria publishes monthly and annual data, including in relation to Aboriginal people in prisons; however, data is not disaggregated by Aboriginality and gender, meaning that it is not possible to obtain data on the number of Aboriginal women in prison or on community-based sentences. Youth Justice publishes quarterly data on isolations and incidents within youth justice centres, however the data is not disaggregated.³⁸

Appendix A contains a summary of data that is publicly available on all forms of racism, including individual, interpersonal, systemic and institutional racism. It does not seek to be comprehensive; however, it incorporates recent data relating to racism in criminal justice, youth justice, health/mental health, employment, access to the age pension, tenancy and consumer law.

As discussed further below, the Victorian Government must work with Aboriginal communities to address the gaps in existing data on racism in Victoria, including through Aboriginal led and controlled data and research in this area.

Part 2: The Victorian Anti-Racism Strategy

Addressing racism in Victoria is an enormous task. It requires stronger legal protections and extensive legislative and policy reform across all areas of Government. Due to its pervasiveness across Victoria, there are limits to what can be achieved through an Anti-Racism Strategy. Nevertheless, an Anti-Racism Strategy can make a key contribution in the following areas:

1. Increase awareness of racism in Victoria, particularly awareness of systemic racism
2. Strengthen anti-vilification laws and human rights protections
3. Reform laws and policies that disproportionality impact Aboriginal people
4. Strengthen accountability and oversight mechanisms
5. Increase access to culturally safe legal assistance for victims of racism

Principles to Guide the Development of the Anti-Racism Strategy

Guiding Principles for the National Framework on Anti-Racism

The Concept paper for the National Framework on Anti-Racism, currently being developed by the Australian Human Rights Commission proposes that the following principles should guide the development of a national anti-racism framework:³⁹

³⁸ Department of Justice and Community Safety (DJCS), [“Youth justice isolation quarterly reporting \(1 July to 30 September 2021\)”](#) (website).

³⁹ AHRC, *Concept Paper for a National Anti-Racism Framework*, above note 7, pp. 10 – 12.



Intersectionality: the framework should recognise and address intersectional experiences of racism. As noted in the concept note for development of a National Framework, “[c]onceptualising discrimination on the basis of race, colour, descent or national or ethnic origin in isolation limits the effectiveness of equality measures. People can be disproportionately affected and disadvantaged at the intersection of two or more attributes for example by race interacting with age, gender, sexual orientation, or having a disability.”⁴⁰

International human rights law: the framework should be informed by Australia’s human rights obligations, including obligations under the Convention on the Elimination of All Forms of Racial Discrimination (**CERD**), the Convention on the Rights of the Child (**CRC**), the Convention on the Rights of Persons with Disabilities (**CRPD**) and the Convention on the Elimination of All Forms of Discrimination Against Women (**CEDAW**).

In particular, the framework should be informed by the following obligations under CERD:

- Governments take measures to ensure that no public authority or institution engages in racial discrimination (art. 2.1(a))
- Regular review of governmental policies that create or perpetuate racial discrimination (art. 2.1(c))
- Effective legal prohibitions of racial discrimination (art 2.1(d))
- Strengthening of multiculturalism (art 2.1(e))
- Adoption of positive or special measures to address inequalities experienced on the basis of race (art 2.2)
- Protection against dissemination of racial propaganda and race hate (art 4)
- Guarantees of equality before the law on the basis of race in relation to civil and political and economic, social and cultural rights (art 5)
- Guarantee of effective protection against racial discrimination and remedies (art 6)
- Measures to combat prejudices (through teaching, education, culture and information) and to promote understanding, tolerance and friendship (art 7).

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP): the framework should be guided by UNDRIP, which entails:

- States take effective measures, in consultation and cooperation with Aboriginal peoples, to combat prejudice and discrimination against Aboriginal peoples under Article 15(2) of the UNDRIP; and
- Ensuring mechanisms and structural reforms that guarantee Aboriginal peoples can meaningfully participate in, and have control over, the policy and legislative decision-making that affects them under Articles 18 and 19 of the UNDRIP.

⁴⁰ Ibid., para 20.



Rights-based approach: the framework should be informed by a rights-based approach to racism, which requires governments to respect, protect and fulfil all human rights, including the right to equality and non-discrimination:

- *Respect:* governments do not discriminate through their own actions
- *Protect:* Governments put in place protective measures to prevent others from breaching human rights and provide effective remedies where breaches occur
- *Fulfil:* Governments take measures to ensure equal enjoyment of human rights and address inequality (especially structural or institutional discrimination)

Additional Principles to Guide the Victorian Anti-Racism Strategy

VALS supports the principles proposed by the AHRC for the development of a National Anti-Racism Framework, and believes that these principles should also guide the development of the Victorian Anti-Racism Strategy. In addition, the Victorian Anti-Racism Strategy should also be guided by the following principles:

Self-determination: implementing the right of Aboriginal peoples and communities to self-determination, as set out under the UNDRIP, is a fundamental way to address racism.

Strengths-based approach: the Strategy must identify and address the devastating impacts of racism in Victoria. However, it must do so in way that recognises and celebrates the resilience and strength of Aboriginal people and communities with lived experience of racism, as well as the diversity and richness of Aboriginal communities and cultures in Victoria.

A comprehensive and holistic approach: Racism exists in many forms, including individual, interpersonal and systemic racism. To address racism, the Anti-Racism Strategy must address racism in all its dimensions.

Prioritise the voices of individuals and communities with lived experience of racism: This requires the Government to not only listen to individuals' and communities' experiences of racism, but to also prioritise the solutions put forward by individuals and communities on how to address racism.

Too often, the Government 'consults' with people and communities with lived experience of a particular issue, but ignores the solutions that these people and communities put forward. In developing the Anti-Racism Strategy, the Government must prioritise both the experiences and solutions proposed by individuals and communities with lived experience of racism.

Individuals and communities with lived experience of racism should also be involved in the process of independently monitoring implementation of the Strategy. This should include participation in the development of the expected, measurable outcomes of successful implementation, as well as accountability and transparency in relation to implementation.



Outcome focused: although the Anti-Racism Strategy will be the first of its kind in Victoria, there are many existing strategies, frameworks and measures that seek to address racism, particularly systemic racism. For example, *Burra Lotjpa Dunguludja: Aboriginal Justice Agreement Phase 4* incorporates measures to address systemic racism in the justice system. Whilst it is important for the Anti-Racism Strategy to identify and amplify the measures that are already on foot, the Strategy must not simply regroup existing commitments. Aboriginal people and communities need concrete outcomes, not just more Government bureaucracy.

Accountability and independent monitoring: to ensure that the Anti-Racism Strategy leads to concrete outcomes, the Government must be accountable for implementing the Strategy through a robust and independent monitoring and evaluation framework. Core components of an independent monitoring and evaluation framework are discussed further below.

RECOMMENDATIONS

Recommendation 1. Development of the Victorian Anti-Racism Strategy should be guided by the following principles, proposed by the Australian Human Rights Commission for the purposes of developing a National Anti-Racism Framework:

- Intersectionality: equality measures are more effective if they recognise and address intersectional experiences of racism.
- International human rights law: including Australia's binding legal obligations under the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Rights of the Child (CRC), the Convention on the Rights of Persons with Disabilities (CRPD) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).
- The United Nations Declaration on the Rights of Indigenous Peoples: including the right of Aboriginal peoples to meaningfully participate in, and have control over, the policy and legislative decision-making that affects them.
- Rights based-approach: Governments must respect, protect and fulfil human rights, including the rights to equality and non-discrimination.

Recommendation 2. In addition to the principles proposed by the AHRC to guide the National Anti-Racism Framework, development of the Victorian Anti-Racism Strategy should also be guided by the following principles:

- Self-determination: implementing the right of Aboriginal peoples and communities to self-determination is a fundamental way of addressing racism.
- Strengths-based approach: the Strategy must celebrate the resilience and strength of Aboriginal people and communities with lived experience of racism; as well as the diversity and richness of Aboriginal communities and cultures in Victoria.
- A comprehensive and holistic approach: the Strategy must address all dimensions of racism, including individual, interpersonal and systemic racism.

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- Prioritise the voices of people and communities with lived experiences of racism: the Government must not only listen to individuals' and communities' experiences of racism; it must also incorporate the solutions put forward by these individuals and communities on how to address racism.
 - Outcome focused: the Strategy should identify existing measures to address racism; however, it must do more than simply regroup existing Government commitments. The Strategy must result in concrete outcomes.
 - Accountability and independent monitoring: Government must be accountable for implementing the Strategy through a robust and independent monitoring and evaluation framework that includes individuals and communities with lived experience of racism.

Increase Awareness of Racism and its Impacts in Victoria

Racism in Victoria exists at individual, interpersonal, systemic and institutional levels; and is pervasive across all areas. Despite increasing awareness of racism arising from the Black Lives Matter campaign, the extent and scope of racism in Victoria is not well understood. This is particularly true in relation to systemic racism, which is “the most insidious form of racism because it is difficult to quantify.”⁴¹

While the Victorian Government has long recognised the existence and impact of systemic racism for Aboriginal people⁴² and has committed “to address racism and promote cultural safety” to enable self-determination;⁴³ there continues to be limited understanding of the issue amongst the general public, as well as frontline public authorities, eg. police officers, custodial officers and child protection workers.

One of the most significant contributions that an Anti-Racism Strategy can make is to increase awareness about the prevalence and scope of racism, particularly amongst frontline workers in public organisations and agencies. Whilst there are multiple ways to increase awareness about racism, the following measures should be prioritised:

- State-wide guidance on key concepts, definitions and language relating to racism, including individual, interpersonal, systemic and institutional/structural racism;

⁴¹ H. Blagg et al., *Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Criminal Justice System* above note 21, p. 7.

⁴² Institutional racism was acknowledged in the first Aboriginal Justice Agreement in 1999, and has been a key priority under subsequent Aboriginal Justice Agreements. See Victorian Government, *Burra Lotjpa Dungaludja: Aboriginal Justice Agreement Phase 4, A partnership between the Victorian Government and Aboriginal Community*, (“Burra Lotjpa Dungaludja”) (2018).

⁴³ The VAAF includes four enablers for self-determination, including: addressing racism and promoting cultural safety. The Self-determination guiding principles in the VAAF also commit the Government to actively identify and eliminate “[s]ystemic and structural racism, discrimination and unconscious bias.” Goal 20 under the VAAF is to eliminate racism. See DPC, VAAF, above note 31, p. 13, 26. This goal is also incorporated into Priority Reform 3 of the Victorian Closing the Gap Implementation Plan, which commits the Government to “transform Government institutions” in order to decrease the proportion of Aboriginal people who experience racism. See DPC, *CTG Implementation Plan*, above note 33.

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- Measures to increase Aboriginal-controlled data and Aboriginal-led research on racism experienced by Aboriginal people;
 - Mandatory anti-racism training for all public authorities.

State-wide Guidance on Key Concepts, Definitions and Language relating to Racism

The Anti-Racism strategy can provide a state-wide framework for shared definitions and concepts relating to racism and race-based discrimination, as well as providing guidance for public authorities and organisations to develop organisational level Anti-Racism Strategies.

Given the complexity of racism and its different dimensions and impacts, the Strategy should provide guidance on what racism is. In particular, the strategy can help to develop a shared understanding of the following dimensions of racism:

- **Individual or internalised racism**, “which occurs when an individual incorporates ideologies within their world view which serve to maintain or exacerbate the unequal distribution of opportunity across ethnoracial groups.”⁴⁴
- **Interpersonal racism**, which “occurs when interactions between people serve to maintain or exacerbate the unequal distribution of opportunity across ethnoracial groups.”⁴⁵
- **Systemic or institutional racism** is when laws, policies and practices across agencies work together to produce a discriminatory outcome for racial or cultural groups.⁴⁶
- **Unconscious/implicit bias** is an attitude towards a person or a group of people which the individual may not even be aware of. It can be both favourable and unfavourable.
- **“Direct racism** is based in differential treatment that results in an unequal distribution of power, resources or opportunities across different groups, such as a refusal to hire people from a particular ethnic group.”⁴⁷
- **“Indirect racism** is equal treatment that affects groups differently and results in an unequal distribution of power, resources or opportunities.”⁴⁸

Increasing awareness of systemic and institutional racism is particularly important, given that it is often less understood and identified. While the Victorian Government has acknowledged the existence and impacts of systemic racism for Aboriginal people,⁴⁹ much more needs to be done to address this form of racism through systemic reforms. Additionally, there is still a need for public

⁴⁴ G. Berman and Y Paradies, “Racism, disadvantage and multiculturalism: Toward effective anti-racist praxis,” *Ethnic and Racial Studies* (2008) 1-19, p. 4.

⁴⁵ Ibid.

⁴⁶ According to H. Blagg et al, systemic racism arises in “situations where what appear to be ‘facially neutral’ laws, policies and practices operate in an uneven or unfair manner that is detrimental to Indigenous people.” See H. Blagg et al., *Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Criminal Justice System*, above note 21, p. 12.

⁴⁷ N. Priest, A. Ferdinand, R. Perry, Y. Paradies, M. Kelaher, *Mental health impacts of racism and attitudes to diversity in Victorian schools: A Summary of Survey Findings*, p. 2.

⁴⁸ Ibid.

⁴⁹ See for example, DPC, VAAF, above note 31, p. 13, 26.



authorities and agencies to acknowledge and address system racism at their organisational level, including through Anti-Racism strategies.

The Anti-Racism Strategy should also address intersectional experiences of racism. Intersectionality is particularly poignant for Aboriginal people, given that there are high numbers of Aboriginal people who, for example, have a disability or mental health issue, or live in regional or rural locations in Victoria.

As will be discussed below, there is a need to strengthen the capacity of accountability mechanisms – including complaints systems, monitoring bodies and coronial processes – to investigate and address systemic racism. For example, it is critical that the police complaints system includes a mechanism for independent, own motion investigations into systemic racism within Victoria Police. Developing a state-wide framework that incorporates systemic racism will help to advance progress in this regard.

Developing a shared understanding of the different dimensions of racism and its impacts can also provide guidance to organisations – both private and public – to help them understand and address racism. In particular, the Anti-Racism Strategy will be a key reference for organisations that are developing organisational anti-racism strategies.

RECOMMENDATIONS

Recommendation 3. The Anti-Racism Strategy should provide a shared understanding of the key dimensions of racism, including individual, interpersonal and systemic/institutional racism, as well as intersectional experiences of racism. The Anti-Racism Taskforce must work with individuals and communities with lived experience of racism, to ensure that their voices are at the centre of identifying and defining a shared understanding of racism.

Recommendation 4. The Anti-Racism Strategy should provide a framework and guidance for public and private organisations and agencies to develop their own organisational strategies on Anti-Racism and Cultural Awareness. The Strategy must include the development of organisational strategies for public authorities that have well-documented challenges with racism, including Victoria Police, Child Protection, Corrections Victoria and health services.

Aboriginal-Controlled Data and Research on Racism

Disaggregated data is critical for understanding racism in all its forms and developing evidence-based policies and initiatives. Currently, there are significant gaps in the data that is available on racism in Victoria, including in relation to racism experience by Aboriginal people. The Anti-Racism Strategy must provide avenues for addressing these gaps, in line with Aboriginal self-determination and principles deriving from Indigenous Data Sovereignty (IDS) and Indigenous Data Governance (IDG).



The need for better quality data on racism has been identified by the United Nations Committee on the Elimination of All Forms of Racial Discrimination,⁵⁰ the Parliamentary Inquiry into Anti-Vilification Protections⁵¹ and in the ongoing consultations on a National Anti-Racism Framework.⁵² The need for better data on vilification conduct and prejudice-motivated crime has also been recognised by the Victorian Government in its response to the Final report of the Anti-Vilification Inquiry.⁵³ Additionally, both the VAAF and the Victorian Closing the Gap Implementation Plan recognise that open, transparent and meaningful data is essential for Government accountability; moreover both frameworks recognise that “increasing Aboriginal ownership and control of data is a key enabler of self-determination.”⁵⁴

While there is some data available relating to over-representation of particular groups, including Aboriginal people, there are many gaps in the data that is available on systemic racism. This includes, for example, a lack of disaggregated data in relation to exercise of police powers (eg. cautioning rates, police bail, move on powers, stop and search).

Data that does exist, is usually collected and controlled by public authorities; and in many cases, is not made available, either to the general public or to concerned groups, such as ACCOs. For example, although Court Services Victoria must have data on court-ordered diversion, it has not been possible for VALS to obtain data on this issue. Moreover, data is often not available in a timely manner. For example, it has not been possible to access accurate and timely data on the number of Aboriginal children impacted by lockdowns in youth justice centres. Limited access to data severely restricts the capacity of organisations such as VALS to effectively advocate for legislative and policy reforms to address systemic racism.

Even where data is made available by Government agencies and Departments, ACCOs are often subjected to restrictions in the way that they can use this data, including not being able to use it in public facing advocacy. While there may be genuine privacy and security concerns in some instances that require data to be kept confidential; there are other instances where it appears that the Government simply wants to avoid any unfavourable public attention.

⁵⁰ In its most recent Concluding Observations on Australia, the United Nations Committee on the Elimination of Racial Discrimination recommended that Australia collect disaggregated data to provide an empirical basis to evaluate the equal enjoyment of the rights under the CERD. See Committee on the Elimination of Racial Discrimination, “Concluding Observations on the eighteenth to twentieth periodic reports of Australia,” CERD/C/AUS/CO/18-20 (26 December 2017), para 12.

⁵¹ *Parliamentary Inquiry into Anti-Vilification Laws*, above note 8, Recommendation 34 (“That the Victorian Government work with agencies—including the Victorian Equal Opportunity and Human Rights Commission, Victoria Police, Victorian Crime Statistics Agency and the Victorian Civil and Administrative Tribunal—to develop a strategy to collect, monitor and regularly report government data on vilification conduct and prejudice motivated crime. Data should refer to outcome measures and indicators to monitor the effectiveness of legislation, programs and services in reducing vilification.”)

⁵² AHRC, Concept Paper for a National Anti-Racism Framework, above note 7.

⁵³ [Victorian Government response to the recommendations of the Legislative Assembly Legal and Social Issues Committee’s Inquiry into Anti-Vilification Protections](#), (“Response to the Anti-Vilification Inquiry”), 2 September 2021.

⁵⁴ DPC, VAAF, above note 31, p. 59; DPC, *CTG Implementation Framework*, above note **Error! Bookmark not defined.**, p. 26-27.



Finally, it should be noted that ACCOs and other organisations should not be required to go through Freedom of Information (FOI) processes to access straightforward data relating to racism and its impacts across Victoria. FOI requests are time consuming, resource intensive, and Government agencies and departments are often significantly delayed in responding to requests.

Aboriginal Data Sovereignty

Collection and publication of data relating to racism in Victoria must be informed by the fundamental principles of IDS and IDG. These two concepts derive from the right to self-determination, as enshrined in the United Nations Declaration on the Rights of Indigenous Peoples.

In 2018, the Indigenous Data Sovereignty Summit in Australia developed the following definitions for key concepts relating to IDS and IDG:

- Indigenous data is “information or knowledge, in any format or medium, which is about and may affect Indigenous peoples both collectively and individually.”⁵⁵
- 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.”⁵⁶
- IDG refers to “the right of Indigenous Peoples to autonomously decide what, how and why Indigenous Data are collected, accessed and used. It ensures that data on or about Indigenous peoples reflects our priorities, values, cultures, worldviews and diversity.”⁵⁷

IDS and IDG are still relatively new concepts, and progress towards Aboriginal data sovereignty and governance in Victoria has been limited. In the justice sector, the AJA4 seeks to increase Aboriginal community ownership of and access to justice data,⁵⁸ including through improved collection and availability of Aboriginal justice data.⁵⁹ To date, this has included work by the Crime Statistics Agency to improve “the availability of high-quality data,” investment by Victoria Police in IT enhancements “to improve the recording and reporting of Standard Indigenous Question (SIQ) data,” and measures to improve police practice in relation to asking individuals whether they identify as Aboriginal.⁶⁰

⁵⁵ Indigenous Data Sovereignty, Communique. Indigenous Data Sovereignty Summit, 20 June 2018, p. 1.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ [Burra Lotjpa Dunguludja](#), above note 42, p 50: Goal 4.1 (“Greater accountability for justice outcomes”), Outcome 4.1.2 (“Increased Aboriginal community ownership of and access to data”).

⁵⁹ Measures under [Burra Lotjpa Dunguludja](#), Outcome 4.1.2 (“Increased Aboriginal community ownership of and access to data”) include: Develop minimum data set for AJA programs; reduce the rate of unknowns in Victoria Police Standard Indigenous Question response data; improve collection and reporting of diversions data; improve collection and reporting of Aboriginal family violence data; access relevant data sharing/linkage projects; Implement the Court Services Victoria Data Collection and Improvement Project. See [Burra Lotjpa Dunguludja](#), above note 42, p 51.

⁶⁰ In relation to Victoria Police Standard Indigenous Question (SIQ), the “AJA4 In Action” website indicates the following: “In parallel, Victoria Police implemented a communications plan to encourage asking the SIQ for every victim, every offender – every time. A suite of educational and communication packages has been distributed across the organisation complementing local initiatives. These materials are available internally to all members on a communication hub. The Victoria Police Aboriginal Cultural Awareness Training package will also encourage asking and recording the SIQ.” See [Aboriginal Justice Agreement In Action](#) (website).



It is positive that the AJA4 includes measures to increase Aboriginal ownership of and access to data; however, there is still a significant need for progress, both in relation to implementing relevant AJA4 measures (eg. improving collection and reporting of diversion data) as well as additional measures across other sectors. Additionally, the Government has committed to implement data sovereignty commitments, including:

- “departments to develop sector wide data access and data sharing agreements with and for ACCOs and Traditional Owners in their sector (local, state wide and peak) with advice and input from the appropriate Aboriginal governance mechanism; and
- departments to prioritise additional investment in ACCO data management and analytics as a core function of ACCOs and Traditional Owners and collaboratively develop options to properly resource this function through allocations from departmental funding programs and through the annual budget process.”⁶¹

Although Aboriginal data sovereignty and governance will no doubt be advanced through the Treaty process, it is critical that steps are taken immediately to support the rights of Aboriginal people and communities, individually and collectively, to:

1. Exercise control over the manner in which data concerning Aboriginal individuals and communities is gathered, managed, interpreted and utilised; and
2. Access and collect data obtained about Aboriginal individuals and communities.

In developing mechanisms to increase access to data on racism in Victoria, the Anti-Racism Strategy must do so in accordance with IDS and IDG. This will require further consultation with Aboriginal communities and ACCOs.

The UK Race Disparity Audit

In the UK, the Government collects and publishes disaggregated data across various sectors on the Ethnicity Facts and Figures website.⁶² The website evolved from the UK Race Disparity Audit in 2016, whereby all Government Departments identified the data that they had, that could be analysed by ethnicity. The aim of the audit was to improve understanding of the way that people of different ethnicities were treated across public services, including health, education, employment and the criminal justice system.

The Ethnicity Facts and Figures website is a permanent resource that is regularly updated. In relation to the criminal justice system, it includes data on policing (eg. stop and search, arrests, youth cautions and confidence in local police) as well as prison and custody incidents (eg. use of force, self-harm, restrictive physical interventions).⁶³

⁶¹ DPC, CTG Implementation Plan, above note 33, p. 27.

⁶² UK Government, *Ethnicity facts and figures, Crime, Justice and the Law* (website).

⁶³ Ibid.



Finally, we note recommendation 3 of the Parliamentary Inquiry into Anti-Vilification, “that the Victorian Government fund ongoing research on the drivers behind vilification conduct and prejudice, and effective strategies to prevent this conduct.”⁶⁴ Currently, the Victorian Multicultural Commission receives funding to partner with research institutions to conduct research on issues related to racial vilification.⁶⁵ To better understand the drivers behind vilification and hate speech against Aboriginal people, the Victorian Government should fund Aboriginal-led research on this issue.

RECOMMENDATIONS

Recommendation 5. The Anti-Racism Strategy must include measures to increase collection of and access to data on racism in all its forms in Victoria:

- Data relating to Aboriginal peoples’ experiences of racism in Victoria must be gathered, managed and used in accordance with Indigenous Data Sovereignty (IDS) and Indigenous Data Governance (IDG).
- The Victorian Government must work with Aboriginal people and communities, including ACCOs, to develop a model for Aboriginal controlled data and research on racism.

Recommendation 6. The Anti-Racism Strategy must include legislative and policy reform to protect Indigenous Data Sovereignty (IDS) and Indigenous Data Governance (IDG) for Aboriginal people and communities in Victoria, as a concrete manifestation of the right to self-determination. In particular, relevant legislation and policies must protect:

- 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.

Recommendation 7. The Anti-Racism Strategy should include initiatives to fund Aboriginal-led research on Aboriginal people’s experiences of racism in Victoria, including funding to VALS to undertake research on racism within Victoria Police, for example, on racial profiling by Victoria Police in their use of stop and search powers.

⁶⁴ Victorian Parliament, *Parliamentary Inquiry into Anti-Vilification Laws*, above note 8, p. 65.

⁶⁵ Victorian Government, *Response to the Anti-Vilification Inquiry*, above note 53, p. 3.



Mandatory Anti-Racism and Cultural Awareness Training for Public Authorities

Although training is not a panacea, mandatory anti-racism training for all public authorities in Victoria is an important mechanism for increasing awareness of racism and its impacts for Aboriginal communities. Ideally, training should be mandatory for all individuals engaged in developing and implementing public policies and legislation; however, we acknowledge that this is an enormous task. As a priority, anti-racism training must be prioritised for public agencies/organisations where racism is known to be widespread, including for example, Victoria Police and staff in all custodial facilities.

VALS does not have a comprehensive understanding of the anti-racism and cultural awareness training requirements across all public authorities, however, we are aware that there are significant gaps. The VGAAR 2020 indicates that “there is no uniform or mandatory cultural safety training provided across all departments, and departments and agencies should commit to, and expand upon, ongoing training to build greater awareness among their staff.”⁶⁶ Cultural awareness training is also noted under the Victorian Implementation Plan for Closing the Gap, which includes a commitment by the Government to decrease the proportion of Aboriginal people who experience racism, including by embedding and practicing “meaningful cultural safety.”⁶⁷

While there has been increase in cultural awareness training across both public and private organisations in recent years,⁶⁸ anti-racism training is far less common. In this regard, it is encouraging to see that the Cultural Safety Framework, which was developed in 2019 for health and community services across the State, highlights the importance of both cultural safety and anti-racism training in creating a culturally safe workplace and organisation.⁶⁹ According to the Framework, “[c]reating a culturally safe workplace is an ongoing process and cannot be achieved through a professional development or training program alone. Racism and discrimination towards Aboriginal Victorians remains a systemic issue across the sector, and organisational change to improve cultural safety is an essential step towards enabling optimal health, wellbeing and safety outcomes for Aboriginal people.”⁷⁰

In implementing the Cultural Safety Framework, it is important to ensure that anti-racism and cultural awareness training is not seen as a tick-box exercise. Training must be developed by people and communities with lived experience of racism, including Aboriginal people; and wherever possible, anti-racism training should also be delivered by Aboriginal people.

⁶⁶ DPC, [Victorian Government Aboriginal Affairs Report 2020](#) (“VGAAR 2020”) (June 2021) p. 23.

⁶⁷ DPC, [CTG Implementation Plan](#), above note 33, p. 22.

⁶⁸ For example, in 2019-2020, VACCHO carried out a cultural safety audit of the Department of Environment, Land, Water and Planning (DELWP), which was provided for under the DELWP Cultural Safety Framework. The Audit found that “a significant proportion of DELWP’s Aboriginal staff experienced racism at work.” Following the audit, DELWP is rolling out Aboriginal cultural safety and awareness training to its staff. See DPC, [VGAAR 2020](#), above note 66, p. 23.

⁶⁹ *Ibid.*, pp. 9, 11, 20 and 23.

⁷⁰ DHHS, [Aboriginal and Torres Strait Islander Cultural Safety Framework: Cultural Safety Continuum Reflective Tool for the Victorian health, human and community services sector](#) (2019) p. 5.



Anti-racism training must address Aboriginal peoples' experiences of racism in Victoria, as well as the impacts and drivers of all forms of racism. Importantly, it must incorporate a strong focus on systemic racism and the way that our current laws, policies and institutions are shaped by Australia's violent and racist history. It must also address unconscious bias and trauma/healing-informed approaches.

Anti-Racism Training and Victoria Police

The Police Accountability Project (**PAP**) has previously recommended that: "With extensive input from community representatives, Victoria Police should immediately introduce a comprehensive and integrated training program that aims to eliminate unconscious racial/religious biases (anti-bias training)." According to PAP, "[a]nti-Bias training should include training on the following: an awareness of police officers' own internally held bias' and prejudices; harmful racial and other stereotypes that are pervasive in society; methods and tools to act in an operational capacity in a non-biased way."⁷¹

In 2020, one of the key recommendations from the Coronial Inquest into the passing of Tanya Day was that "Victoria Police request VEOHRC to conduct a Section 41(c) review of the compatibility of its training materials with the human rights set out in the Charter."⁷²

In this regard, Victoria Police is currently developing cultural awareness training which will consist of a 2-hour training module. VALS has been advised that anti-racism training will also be included within the 2 hour module. In addition, we note that Victoria Police is due to undertake a complete review of its training curriculum in 2022, and emphasise the need for substantive and stand-alone anti-racism training to be incorporated into the curriculum during this process, both for new recruits as well as part of refresher training.

Police training on racial profiling occurs in other jurisdictions. For example, the Ottawa Police Service 'Racial Profiling' policy document requires that the:

officer in charge of the Professional Development Centre... shall ensure that: training materials relevant to understanding and preventing racial profiling are developed, training is reviewed regularly to ensure the currency of the training materials, [and] anti-racial profiling sessions are delivered to all new recruits, currently serving officers, new and currently serving supervisors, as well as all new and current civilian members. The training can be tailored depending on the delivery group.⁷³

The Ontario Human Rights Commission has recommended that training for police include '[e]ducat[ing] officers on the history of stereotyping and racism against racialized and Indigenous

⁷¹ Police Accountability Project, [Anti-Racial Profiling training](#) (website).

⁷² See [Finding into Death with Inquest: Inquest into the Death of Tanya Louise Day](#), 9 April 2020, COR 2017 6424.

⁷³ Ottawa Police Service, [Racial Profiling](#) (27 June 2010) p. 5.



groups’ and ‘[i]nvolve local racialized and marginalized communities in design, delivery and evaluation, including identifying relevant racial profiling scenarios.’⁷⁴

RECOMMENDATIONS

Recommendation 8. Anti-racism training should be mandatory for all public authorities, particularly Victoria Police, Corrections Victoria and Child Protection. The Anti-Racism Strategy must include measures to increase anti-racism training across public authorities, including to fund the development and implementation of anti-racism training for public authorities.

Recommendation 9. Anti-racism training must be developed by people and communities with lived experience of racism, including Aboriginal people. Wherever possible, anti-racism training should also be delivered by Aboriginal people.

Truth-Telling: Yoo-rrook Commission

Aboriginal communities have been calling for truth-telling in Victoria for decades. The Yoo-rrook Commission was established in 2021, in response to calls from the First People’s Assembly of Victoria, which identified the need for truth-telling as a prerequisite for Treaty.

Yoo-rrook can make an important contribution to addressing racism within Victoria, by providing a culturally safe space for Aboriginal people and communities in Victoria can share their experiences of racism, and by developing a shared truth about Victoria’s racist and violent history. Yoo-rrook can also help to raise awareness about the richness and diversity of Aboriginal cultures and communities in Victoria, as well as their resilience and strength, including in response to both historical and contemporary racism. Providing a space for both individuals and groups to share their experiences directly with the Commission, will be critical to achieve a genuine truth-telling process.

That said, it is vital that Yoo-rrook provides Aboriginal people with the opportunity to share their stories and experiences in a trauma-informed and culturally safe way. Providing culturally safe legal assistance and support for people who wish to share their experiences is a critical component of the Commission’s work and must not be overlooked.

Additionally, it is critical that Yoo-rrook results in concrete outcomes for Aboriginal communities, including substantive changes to address racism in all its dimensions. The Commission must not be used as an excuse by Government to defer urgent reforms that Aboriginal communities have been calling for, for decades (for example, the creation of an Aboriginal Social Justice Commissioner). It must not become another process whereby Aboriginal people share their experiences and propose

⁷⁴ Ontario Human Rights Commission, [Response to the Race Data and Traffic Stops in Ottawa Report](#) - 6.2. Training (28 November 2016).



solutions; only to find that decades later, the recommendations of the Commission have still not been implemented.

RECOMMENDATIONS

Recommendation 10. The Anti-Racism Strategy should recognise and prioritise measures to increase awareness amongst non-Aboriginal Victorians, about the resilience and strength of Aboriginal communities, as well as the diversity and richness of Aboriginal communities and cultures.

Recommendation 11. To ensure that Aboriginal people and communities can share their stories and experiences in a culturally safe and trauma-informed way, the Government must fund access to culturally safe legal assistance and support for Aboriginal people who wish to engage with the Yoo-rrook Commission.

Recommendation 12. The Victorian Government must not use the Yoo-rrook Commission as an excuse to defer urgent reforms, that have been proposed by Aboriginal communities.

Recommendation 13. To ensure that the Yoo-rrook Commission results in concrete outcomes for Aboriginal people in Victoria, the Victorian Government should publicly indicate its intention to implement the recommendations from the Commission, and to publicly and regularly report on its progress regarding implementation.

Aboriginal Self-Determination

Aboriginal self-determination is referred to in numerous Government policies, strategies and commitments; yet there is still significant progress required to substantially realise self-determination for Aboriginal peoples in Victoria. Realisation of self-determination for Aboriginal people and communities in Victoria is critical to address racism against Aboriginal people, particularly systemic racism. Although the Government recognises the importance of Aboriginal self-determination in addressing discrimination and racism,⁷⁵ further efforts are required to concretely recognise and realise the right to self-determination, and associated rights under the UNDRIP.

Anti-racism strategies and frameworks must reflect human rights frameworks relevant to Aboriginal peoples. As such, the Strategy must not only take into account racism experienced by Aboriginal persons by virtue of their status as minorities in Victorian society, but also the continued systemic racism experienced by Aboriginal peoples as collective entities under international law.

⁷⁵ See for example, DPC, VAAF, above note 31, p. 55: (Goal 20: “Racism is eliminated”).



Aboriginal Peoples: Minority Rights and Racism

Traditional concepts of racism focus on prejudice and discrimination against a person or people on the basis of their membership in a minority group. The definition of 'minority' is as follows:

'A group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law.'⁷⁶

Minority rights, in a manner consistent with the traditional international human rights frameworks concerning racial discrimination,⁷⁷ focuses on the rights of equality and non-discrimination accorded to the individual members or the group, rather than the group itself being recognised as being the bearer of a specific right.⁷⁸ Furthermore, international human rights instruments, such as the International Covenant on the Elimination of All Forms of Racial Discrimination (**CERD**), generally place the onus on the State to determine the means by which to combat and eliminate racial discrimination within their respective jurisdictions, without any obligation for consultation with the individuals or groups effected by racism.⁷⁹

Aboriginal Peoples: Racism and Self-determination

While Aboriginal persons can correctly be considered 'minorities', international law also recognises Aboriginal peoples as being distinct 'peoples' that exist alongside the non-Aboriginal population of a state - communities vested with collective rights alongside the individual rights of their membership under international human rights law. As a result, the right to self-determination of Aboriginal peoples, as enshrined in Article 3 of the UNDRIP, is of paramount importance in relation to both the development and outcomes of an anti-racism strategy.

As 'groups', minorities are guaranteed participatory rights as individuals within a State, which often leaves their interests cast aside as a result of majority rule.⁸⁰ Aboriginal peoples are guaranteed more than just the opportunity to provide feedback and voice opinions on matters that affect their rights individually as minorities: they have collective rights to meaningful and effective consultation and a role in decision-making in relation to matters that affect their rights and interests.⁸¹ The Government

⁷⁶ United Nations (1985). *Proposal Concerning a Definition of the Term "Minority"*, by Jules Deschenes. UN Doc. E/CN.4/Sub.2/1985/31 (1985), at 181

⁷⁷ See, for example, Articles 1(4), 2(1)(a) and 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination*, which specifically addresses discrimination against 'persons' and 'groups of persons'.

⁷⁸ See, for example, United Nations Human Rights Committee. *Chief Bernard Ominayak and the Lubicon Lake Band v. Canada*, Communication No. 167/1984 (1990), at 13.4; and United Nations Human Rights Committee. *General Comment 23: The rights of minorities*. UN Doc. CCPR/C/21/Rev.1/Add.5, General Comment No. 23. (General Comments), at 3.2

⁷⁹ See, for example, Articles 2, 4, 5 and 7 of the *International Convention on the Elimination of All Forms of Racial Discrimination*.

⁸⁰ Raic, David. *Statehood and the Law of Self-Determination* (2002). pp. 277-281.

⁸¹ Article 18 of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).



is also obligated to obtain the free, prior and informed consent of Aboriginal peoples before adopting and implementing legislative or administrative measures that may affect them.⁸² In essence, Aboriginal peoples have more than a mere right to a seat at the table, but a say in the outcomes.

While the CERD does not obligate States to consult with, or otherwise provide for the participation of, minorities or other marginalised groups during the development of anti-racism strategies or frameworks, this is not the case in relation to Aboriginal peoples. The UNDRIP mandates that anti-racism strategies and frameworks implemented by States be developed and implemented with the consultation and cooperation of Aboriginal peoples.⁸³ The requirement is based upon the right to self-determination of Aboriginal peoples in Article 3, as well as requirements for participation and consultation in Article 18 and 19 of the UNDRIP.

Aboriginal Self-Determination in Victorian Legal and Policy Frameworks

The Victorian Government's commitment to self-determination is reflected in the following legal and policy frameworks:

- 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.⁸⁴ The government reports annually on its efforts to enable self-determination through the Victorian Government Aboriginal Affairs Report (*VGAAR*)⁸⁵ and the Self-Determination Reform Framework, which requires all Departments to report annually on what they are doing to action the VAAF's self-determination enablers, including addressing racism.⁸⁶
- *Burra Lotjpa Dunguludja* is the 4th phase of the Aboriginal Justice Agreement in Victoria and includes a number of commitments to further self-determination,⁸⁷ including development of the Aboriginal Youth Justice Strategy which will incorporate self-determination.⁸⁸
- The following policies also acknowledge self-determination of Aboriginal people in Victoria: *Wungurilwil Gaggapduir Aboriginal Children and Families Agreement; Dhelk Dja: Safe Our Way (Strong Culture, Strong Peoples, Strong Families), Marrung: Aboriginal Education Plan 2016-2026, Balit Marrup: Aboriginal social and emotional wellbeing framework 2017-2027, Korin Korin Balit-Djak: Aboriginal Health, Wellbeing and Safety Strategic Plan 2017-2027.*

⁸² Article 19, UNDRIP.

⁸³ Article 15(2), UNDRIP.

⁸⁴ DPC, VAAF, above note 31 pp. 20-27.

⁸⁵ DPC, VGAAR 2020, above note p. 17.

⁸⁶ *Ibid.*, p. 17.

⁸⁷ This includes initiatives to achieve the following outcomes: initiatives to enhance independent oversight of Aboriginal justice outcomes (outcome 4.1.1), increased Aboriginal community ownership of and access to data (outcome 4.1.2), Aboriginal people have greater roles in leadership, governance and decision making (outcome 4.2.1) and Resource allocation reflects Aboriginal community priorities (outcome 4.2.2). See *Burra Lotjpa Dunguludja*, above note 42, p. 11, 50-53.

⁸⁸ The Strategy is being jointly developed by the Aboriginal Youth Justice Unit within DJCS and the Aboriginal Justice Caucus. Early work in the development of the Strategy including the following Research Report: C. Cunneen, *Self-determination and the Youth Justice Strategy*, (2020).

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- The Closing the Gap Agreement (CTG),⁸⁹ and the Victorian State Implementation Plan for CTG recognise self-determination as the basis for shared decision making,⁹⁰ while further recognising ACCOs as self-determined institutions of Aboriginal peoples.⁹¹

Existing legislation that references self-determination in relation to Aboriginal peoples in Victoria is, at best, representative of a step towards Aboriginal self-determination in practice. The *Children, Youth and Families Act 2005 (CYFA)* recognises the principle of ‘Aboriginal self-management and self-determination’,⁹² but was enacted in the absence of effective and meaningful participation of Aboriginal peoples;⁹³ and grants authority to the Secretary to determine whether an ACCO will be involved in a child protection matter involving an Aboriginal child.⁹⁴

Further steps are being taken towards the legislative recognition and furtherance of self-determination in the new Youth Justice Act. For example, in its inquiry into the over-representation of Aboriginal children and young people in the youth justice system (“Our Youth, Our Way”), the CCYP recommended that the new Youth Justice Act:

(a) enable the Secretary of DJCS to authorise Aboriginal communities to design, administer and supervise elements of the youth justice system, including:

- delivering cautions and alternatives to proceedings, including diversionary options
- delivering family group conferencing and restorative justice group conferencing
- determining the location and delivery of hearings (including Koori Court hearings)
- determining the conditions of community-based youth justice orders
- designing and administering community-based youth justice options, including alternatives to custody

(b) place a positive duty on the Secretary of DJCS to develop strategic partnerships with Aboriginal communities, and report regularly on measures taken to improve outcomes for Aboriginal children and young people.⁹⁵

While such proposals are reflective of future steps towards Aboriginal self-determination, it is important to note that the discretion concerning both the authorisation and involvement of Aboriginal peoples and ACCOs in the youth justice system continues to rest with agencies of the Victorian Government, rather than based upon decisions made by Aboriginal peoples or ACCOs. As such, the proposal is also a step towards self-determination, rather than being an exercise of self-determination.

⁸⁹ [National Agreement on Closing the Gap](#) (and Agreement between the Coalition of Aboriginal and Torres Strait Islander Peak Organisations and all Australian Governments) (July 2020), para 32(c)(5).

⁹⁰ DPC, *CTG Implementation Plan*, above note 33, (“Priority Reform One: Partnership and shared decision-making”)

⁹¹ [National Agreement on Closing the Gap](#), above note 89, para 44.

⁹² Section 12, *Children, Youth and Families Act 2005 (Vic)*.

⁹³ See commentary concerning FPIC below.

⁹⁴ Section 18, *Children, Youth and Families Act 2005 (Vic)*.

⁹⁵ CCYP, *Our Youth, Our Way*, above note 16, Recommendation 1.

Legislative Recognition of the Right to Self-Determination

The Commonwealth of Australia has been criticised by United Nations human rights bodies for its continuing failure to constitutionally acknowledge the legal distinctiveness and status of Aboriginal peoples.⁹⁶ While constitutional recognition is a matter to be addressed at the Commonwealth level, the 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.

Despite the emphasis placed on the self-determination by the Victorian Government, and numerous references to self-determination in policy frameworks, 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;⁹⁷ the definition of ‘Aboriginal’;⁹⁸ and the distinct cultural rights of Aboriginal peoples in Victoria.⁹⁹

When the Charter was reviewed in 2010,¹⁰⁰ the Review conducted by the Scrutiny of Acts and Regulations Committee (**SARC**) recommended that the right to self-determination should not be included in the Charter because of the obscurity of the content of the right. Rather, the Review recommended that the Victorian Government should continue to consult with Victorian Aboriginal communities to continue to develop programs that foster improved outcomes for Aboriginal Victorians.¹⁰¹ This recommendation contradicted the submissions prepared by numerous ACCOs (including VALS).¹⁰²

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

⁹⁶ United Nations Committee on the Elimination of Racial Discrimination (2017). ‘Concluding observations on the eighteenth to twentieth periodic reports of Australia’. UN Doc. CERD/C/AUS/CO/18-20, at 19-20; United Nations Committee on the Elimination of Racial Discrimination (2010). ‘Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia’. UN Doc. CERD/C/AUS/CO/15-17 at 15; United Nations Committee on Economic, Social and Cultural Rights (2017). ‘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 (2017). ‘Concluding observations on the sixth periodic report of Australia’. UN Doc. CCPR/C/AUS/CO/6 at 50(b).

⁹⁷ Preamble of the *Charter of Human Rights and Responsibilities 2006*.

⁹⁸ s. 3(1), *ibid*.

⁹⁹ s. 15(2), *ibid*.

¹⁰⁰ Pursuant to s44(2) of the *Charter of Human Rights and Responsibilities 2006*.

¹⁰¹ 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.

¹⁰² 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



to self-determination of Aboriginal peoples in Victoria be recognised in the Charter.¹⁰³ 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.

Rights to Consultation and Participation in Matters Affecting Aboriginal Peoples

As noted above, the right to self-determination is the right of Aboriginal peoples to participate in decision-making in matters which would affect their rights (Article 18 UNDRIP), as well as an obligation for Governments to obtain the free, prior and informed consent (**FPIC**) of Aboriginal peoples before adopting and implementing legislative or administrative measures that may affect them (article 19 UNDRIP).

The inherent failure of the Victorian Government to implement article 18 and 19 UNDRIP is a key contributor to ongoing racism in Victoria, particularly systemic racism. The failure to engage in shared decision-making, resulting from meaningful and effective consultation directly with Aboriginal peoples at the community level and indirectly through ACCOs, contributes to ongoing inequalities and a failure to improve outcomes within the Aboriginal communities of Victoria.

While the right to FPIC generally refers to a requirement to consult with representative institutions (ie. 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. The implementation of policies and practices consistent with the right to FPIC requires 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.

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 of Aboriginal peoples in relation to legislative and policy measures that may affect them.

In Australia, the need for Aboriginal participation and consultation in matters affecting Aboriginal peoples has been recognised prior to the UNDRIP. In 1991, the RCIADIC recommended that “governments negotiate with appropriate Aboriginal organisations and communities to determine guidelines as to procedures and processes which should be followed to ensure that the self-

¹⁰³ 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.



determination principle is applied in the design and implementation of any policy or program, or the substantial modification of any policy or program, which will particularly affected Aboriginal people.”¹⁰⁴ However, more than thirty years after the RCIADIC made its recommendations and 12 years after Australia endorsed the UNDRIP, the right of Aboriginal peoples to participation and consultation in matters affecting Aboriginal communities is not reflected in practice.

Aboriginal Self-Determination and the Victorian Government

The Victorian Government has committed to respecting and promoting Aboriginal self-determination in the policies and frameworks outlined above and steps towards Aboriginal self-determination are reflected in legislation such as the CYFA, as noted above. However, the Victorian government is failing to recognise and respect Aboriginal self-determination in practice and the current approach taken towards Aboriginal peoples is reflective of the overarching systemic racism that continues to exist in Victoria.

Although Aboriginal peoples are recognised as bearers of the right to self-determination under international law, the approach of the Victorian Government in practice appears to be premised upon the traditional concept of ‘peoples’ as the population of a state.¹⁰⁵ In VALS’ experience, the participation of ACCOs in decision making processes and consultations with ACCOs concerning administrative and legislative measures affecting Aboriginal peoples in Victoria are not consistent with Articles 18 and 19 of the UNDRIP. VALS is routinely asked to provide feedback within short timeframes, making it extremely challenging to provide comprehensive feedback. Moreover, feedback provided by VALS is not typically reflected in the measures implemented by the Government and minimal feedback is provided on why VALS’ input is not incorporated. In many instances, the “consultation” process appears to be a tick-box exercise, rather than a genuine commitment to incorporate the views of ACCOs. As such, Victorian governmental practices reflect the continued treatment of Aboriginal peoples as ‘minorities’ rather than ‘peoples.’

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 s15(2) of the *Charter of Human Rights and Responsibilities 2006* were detected by *their* legal teams. 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 Aboriginal peoples themselves - whether that be directly or through their representatives and institutions.

¹⁰⁴ RCIADIC National Report, above note 23, Recommendation 188.

¹⁰⁵ 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.



The failure on the part of the Victorian Government to ensure that the rights accorded to Aboriginal peoples in accordance Articles 3, 18 and 19 of the UNDRIP is, in itself, reflective of overarching problems in Victorian society concerning systemic racism. Failing to recognise, respect and reflect the collective rights of Aboriginal peoples as ‘peoples’ in Victorian Government practices and processes denies Aboriginal peoples the enjoyment and exercise of their rights in political, economic, social cultural and other fields of public life, which meets the criteria for ‘racial discrimination’ established in Article 1(1) of the ICERD.

Aboriginal self-determination is referred to in numerous Government policies, strategies and commitments. Although the Government recognises the importance of self-determination in addressing discrimination and racism, further effort is required to concretely recognise and respect Aboriginal self-determination in practice by the Victorian Government. Further action to achieve self-determination for Aboriginal people and communities in Victoria is critical to address racism against Aboriginal people, particularly systemic racism.

RECOMMENDATIONS

Recommendation 14. The Anti-Racism Strategy should acknowledge the distinctiveness of Aboriginal peoples in Victorian society, their unique experiences of racism and their rights to self-determination. In particular, the Strategy must acknowledge the right to free, prior and informed consent (FPIC).

Recommendation 15. The Anti-Racism Strategy should include measures to strengthen the legislative framework for the right to self-determination for Aboriginal peoples in Victoria, including:

- Amend the *Victoria Charter of Human Rights and Responsibilities* to include the right to self-determination of Aboriginal peoples in Victoria.
- Amend the *Children, Youth and Families Act (CYFA) 2005* to include a Statement of Recognition, including the right to self-determination.
- Enshrine the right to self-determination in the new Youth Justice Act
- Amend the *Corrections Act 1986* to include the right to self-determination.

Recommendation 16. The Anti-Racism Strategy should emphasise the need for concrete measures to realise the right to self-determination of Aboriginal peoples in Victoria, including:

- Increase access to Koori Courts by increasing the locations and frequency of sitting days, and by expanding the jurisdiction of the courts to:
 - (i) divert Aboriginal people to culturally appropriate diversion programs;
 - (ii) hear bail applications;
 - (iii) hear matters that are contested and have not resolved to a plea of guilty;
 - (iv) make Drug and Alcohol Treatment Orders where appropriate.

- The Government should provide long-term and stable funding to ACCOs to deliver pre- and post-release programs for Aboriginal people, including transitional housing programs run by ACCOs, such as VALS' Baggarrook program, to support men and women leaving prison.
- The Victorian Government should support Aboriginal organisations to increase their capacity to take on the guardianship of Aboriginal children in out of home care, pursuant to section 18 of the *Children, Youth and Families Act* (2005).

Recommendation 17. The Anti-Racism Strategy should recognise the critical role of ACCOs in advocating for legislative/policy reforms to address systemic racism experienced by Aboriginal people, including by:

- Providing funding to ACCOs to carry out research on systemic racism;
- Reaffirming the need for long-term, flexible and multi-year funding for ACCOs, in line with the Government's commitment to Aboriginal self-determination.

Strengthen Legal Frameworks to Prevent Racial Vilification and Discrimination

VALS welcomes the report of the Parliamentary Inquiry on Anti-Vilification¹⁰⁶ and the Government's response to the report,¹⁰⁷ indicating that it will implement the vast majority of the Committee's recommendations.¹⁰⁸

Currently, the legal framework regulating hate speech and racial discrimination fall drastically short of providing effective protections against hate speech. Strengthening Victoria's anti-vilification laws – including both the *Racial and Religious Tolerance Act 2001 (RRTA)* and Equal Opportunity Act 2010 (**EOA**) - is a critical step to prevent hate speech and promote inclusion and diversity.

As was highlighted in the Final Report of the Parliamentary Inquiry on Anti-Vilification, Aboriginal people experience racial vilification and discrimination at disproportionate rates. In 2017-18, "approximately one in four complaints raised with the Australian Human Rights Commission in relation to offences under the *Racial Discrimination Act 1975 (Cth)* (RDA) were made by complainants who identified as Aboriginal or Torres Strait Islander."¹⁰⁹

¹⁰⁶ Victorian Parliament, *Parliamentary Inquiry into Anti-vilification Laws*, above note 8.

¹⁰⁷ Victorian Government *Response to the Inquiry into Anti-Vilification Protections*, above note 53.

¹⁰⁸ VALS, '[VALS welcomes the Victorian Government's Move to strengthen anti-vilification laws](#)', 2 September 2021.

¹⁰⁹ AHRC, *2017 – 2018 Complaint Statistics* (2018) ("Table 12: Indigenous status of complaints"), cited in Victorian Parliament, *Parliamentary Inquiry into Anti-vilification Laws*, above note 8, p. 29.



Amend the Racial and Religious Tolerance Act and Equal Opportunity Act

In its response to the Parliamentary Inquiry, the Government has indicated that it supports in principle, the following recommendations relating to stronger legal protections and enhanced powers for VEOHRC:

- The Government extend anti-vilification provisions (in civil and criminal laws) to cover additional protected attributes (recommendation 1);
- That the Victorian Government lower the civil incitement test from ‘conduct that incites’ to ‘conduct that is likely to incite’ (recommendation 8);¹¹⁰
- That the Victorian Government introduce a new civil harm-based provision to assess harm from the perspective of the target group (recommendation 9);¹¹¹
- That the Victorian Government formulate the harm-based provision to make unlawful conduct that ‘a reasonable person would consider hateful, seriously contemptuous, or reviling or seriously ridiculing of a person or a class of persons’ (recommendation 10);
- That the Victorian Government adopt the definition of ‘public act’ in s93Z(5) of the *Crimes Act 1900* (NSW), and ensure it apply to civil and criminal incitement-based and harm-based provisions in Victoria’s anti-vilification laws (recommendation 13);
- That the Victorian Government streamline anti-vilification legislation by moving provisions to the *Equal Opportunity Act 2010* (Vic) and review the operation and effectiveness of the laws, as described in the report, in five years (recommendation 14);¹¹²
- That the Victorian Government extend current powers of the Victorian Equal Opportunity and Human Rights Commission under the *Equal Opportunity Act 2010* (Vic) to vilification regulation. These powers relate to practice guidelines, research, legal interventions, compliance reviews, action plans and conducting investigations (recommendation 15).

VALS takes this opportunity to reiterate its support for the recommendations noted above, and emphasises that the Government must reform the RRTA and the EOA as a matter of urgency. We stand ready to work with the Government in relation to the legislative amendments.

¹¹⁰ In its response to the Parliamentary Inquiry into Anti-Vilification Laws, the Government indicated that it will “carefully consider all options, including models in other jurisdictions, to ensure any change to the civil incitement test appropriately balances the rights to equality and freedom of expression under the Charter of Human Rights and Responsibilities Act 2006 (Charter).” See *Victorian Government Response to the Inquiry into Anti-Vilification Protections*, above note 53, p. 6.

¹¹¹ In its response to the Parliamentary Inquiry into Anti-Vilification Laws, the Government recognised that “a new civil harm-based provision would increase recognition of harm experienced by people who experience vilification and in turn facilitate an increase in enquiries and complaints, providing redress to those who have suffered from the impacts of vilification.” *Ibid.*

¹¹² In its response to the Final Report of the Parliamentary Inquiry into Anti-Vilification, the Government indicated that it is “carefully considering options to streamline anti-vilification legislation, including moving provisions into the *Equal Opportunity Act 2010*.” *Ibid.*, p. 7.



Culturally Safe Legal Assistance and Community Legal Education

The Parliamentary Inquiry also recommended that the Government fund services to provide support to impacted communities which experience vilification,¹¹³ and fund organisations such as VALS and Victoria Legal Aid (VLA) to engage in strategic litigation on vilification matters.¹¹⁴

VALS reiterates the need for culturally safe legal assistance, representation and community legal education, to ensure that Aboriginal people are aware of and are supported to take legal action under the amended laws.¹¹⁵ We note that the Government supports Recommendations 27 and 28 “in principle,”¹¹⁶ and we look forward to working with the Government to determine appropriate funding arrangements.

RECOMMENDATIONS

Recommendation 18. The Anti-Racism Strategy must commit the Government to implement the recommendations from the Parliamentary Inquiry into Anti-Vilification as a matter of urgency, including the recommendations relating to enhancing the powers of VEOHRC and legislative amendment of the RRTA and the EOA.

Recommendation 19. The Anti-Racism Strategy must include measures to support Aboriginal people who have experienced racism to take legal action under the RRTA and/or the EOA, including funding for VALS to provide culturally safe legal assistance, representation and support for racial vilification and discrimination matters.

Strengthen Legal Protection of Human Rights

Strong legislative protections to prevent racial discrimination and vilification are critical; but an equally important way of addressing racism – particularly systemic racism – is to ensure strong legal protection for all human rights. In particular, respecting, protecting and fulfilling human rights is an important way to address less visible forms of racism, including systemic racism.

¹¹³ Victorian Parliament, *Parliamentary Inquiry into Anti-Vilification Laws*, above note 8, Recommendation 27.

¹¹⁴ *Ibid.*, Recommendation 28.

¹¹⁵ VALS and VLA, *Submission to the Parliamentary Inquiry into Anti-Vilifications Laws*, above note 8, Recommendation 15.

¹¹⁶ The Inquiry recommended: That the Victorian Government fund services to provide support to impacted communities who experience vilification including: (a) services and programs that provide counselling and other support, and (b) services and programs providing legal information and assistance to navigate the system for reporting vilification. See *Parliamentary Inquiry into Anti-Vilification Laws*, above note 8, Recommendation 27.



In Victoria, human rights are primarily protected under the Charter, which protects twenty fundamental rights, including the right to equality¹¹⁷ and Aboriginal cultural rights.¹¹⁸ In addition, individual rights are protected under various laws and policies, including for example, rights relating to criminal procedure, which are enshrined in criminal legislation.¹¹⁹

Victorian Charter of Human Rights and Responsibilities

The Charter is an important mechanism for protecting the rights of individuals and preventing racism. In particular, the Charter provides legal protection for individual rights by requiring that:

- all new laws must comply with the Charter;
- public authorities must comply with the Charter when making decisions;
- Courts and tribunals must interpret all Victorian laws in light of the Charter; and
- the Supreme Court has the power to declare that a law or provision is inconsistent with the Charter (but does not have the power to strike the law down).

To date, there have been several important decisions by the Supreme Court, to uphold the rights of Aboriginal people under the Charter, including Aboriginal cultural rights. In particular, the *Cemino v Cannan & Ors* case considered the cultural rights of Aboriginal people in Victoria in relation to transferring proceedings from the Magistrates Court to the Koori Court.¹²⁰

Despite a number of important cases, including the *Cemino* case, one of the persisting challenges with the Charter is the limited scope for judicial review of alleged breaches of rights. As was highlighted at length during the 2015 Review of the Charter, an individual can only seek judicial review of their rights under the Charter if they establish a non-Charter ground for review. In this regard, litigation must “piggyback” off another ground of review. In VALS’ experience, the limitations and complexities associated with judicial review of Charter rights continues to restrict the protection provided by the Charter. As was noted by many organisations during the 2015 Review, the Charter should be amended to create a stand-alone ground for judicial review of charter rights.¹²¹

Additional Legislative Protection of Human Rights

In addition to the legal protection provided by the Charter, the Anti-Racism Strategy should examine other avenues for enshrining human rights into legislation, including laws relating to the criminal justice and youth justice systems, as well as child protection. In the absence of amendments to the

¹¹⁷ Victorian Charter of Human Rights and Responsibilities 2006 (Vic), (“Human Rights Charter”), Section 8(2).

¹¹⁸ *Ibid.*, Section 19(2): “Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community— (a) to enjoy their identity and culture; and (b) to maintain and use their language; and (c) to maintain their kinship ties; and (d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.”

¹¹⁹ See for example, *Crimes Act 1958* (Vic); *Criminal Procedure Act 2009* (Vic); *Police Act 2013* (Vic).

¹²⁰ *Cemino v Cannan and Ors* [2018] VSC 535.

¹²¹ See for example, VLA, [Charter of Human Rights and Responsibilities Act 2006: Eight-year review](#) (June 2015), Recommendation 2.



Charter, this would be an alternative way of expanding judicial oversight of human rights within Victoria.

Human Rights Protections for People in Custody

Legislative protection of human rights is particularly important for individuals who are in custody, including, but not limited to, police custody, prisons (both public and private), youth justice centres, secure welfare and involuntary mental health facilities. By their nature, closed environments present a high risk of racism and human right abuses, due to: the inherent power imbalance and subsequent risk of powers being abused; the lack of transparency and the risk of wrongdoing being covered up; and limited access to support and services for individuals in those environments. For example, a recent report by IBAC highlighted serious corruption risks in prisons. The report investigated serious misconduct in the way that strip searches are managed and conducted, as well as excessive use of force, including against one individual who had an intellectual disability.¹²²

As noted above, systemic racism in prisons and other custodial facilities manifests in the way that Aboriginal people are disproportionately impacted by invasive and dehumanising practices such as solitary confinement, use of force/restraints, strip searching and urine analysis. While the Charter provides some protection – for example, VALS intervened in a case relating to alleged violation of rights in relation to strip searching and urinalysis practices¹²³ – legal protection of the rights of incarcerated peoples must be strengthened.

An additional compelling reason for further legal protection of the rights of people in custody is the alarming lack of understanding and knowledge about the Charter and Charter rights amongst staff working in custodial environments. For example, the recent IBAC report into allegations of corruption in prisons noted limited staff awareness of human rights, including in relation to the human rights considerations relevant to strip searching.¹²⁴ Similarly, a 2018 audit by IBAC of Victoria Police’s oversight of serious incidents, found that:

- (1) although human rights is a key oversight principle, 61% of the oversights audited by IBAC did not address human rights;
- (2) “even where human rights were discussed, some oversights failed to identify relevant human rights issues, did not address rights in sufficient detail, or demonstrated a poor understanding by mischaracterising other issues as ‘rights’.”¹²⁵

Incorporating human rights protections into the legal frameworks that directly regulate custodial environments (eg. the *Corrections Act*); as well as the regulations and policies that are derived from these laws, is an important step to increase the protections afforded to people in these environments.

¹²² Independent Broad-based Anti-Corruption Commission (IBAC), [*Special Report on Corrections: IBAC Operations Rous, Caparra, Nisidia and Molaro*](#) (“Corrections Report”) (June 2021) p. 9.

¹²³ VALS, [*Community fact sheet: VALS intervention in Court of Appeal Strip Searching and Urine Testing Case*](#) (2021).

¹²⁴ IBAC, *Corrections Report*, above note 122, p. 9.

¹²⁵ IBAC, [*Audit of Victoria Police’s oversight of serious incidents*](#) (March 2018) p. 6.



At a minimum, fundamental human rights, including Aboriginal cultural rights and the right to equality and non-discrimination should be incorporated into the following laws:

- *Corrections Act 1986* (Vic)
- The new Youth Justice Act (due to be passed in 2022)
- *Children, Youth and Families Act* (Vic) (the Bill is currently before Parliament)
- Legislation regulating Victoria Police, including the *Police Act 2013* (Vic)
- *Public Health and Wellbeing Act 2008* (Vic)
- *Mental Health Act 2014* (Vic) (and the new Mental Health and Wellbeing Act currently being developed)

RECOMMENDATIONS

Recommendation 20. The Anti-Racism Strategy should include measures to strengthen legal protection of human rights in Victoria, including:

- Strengthening the protection provided by the Charter, by ensuring that there is a stand-alone ground for judicial review of Charter rights;
- Incorporating human rights into relevant legislation, including the *Corrections Act 1986*, the *Children, Youth and Families Act*, the new Youth Justice Act, the *Public Health and Wellbeing Act 2008*, the *Mental Health Act 2014* and the *Police Act 2013*.

Strengthen Protection of Aboriginal Cultural Rights

Strengthening protection of Aboriginal cultural rights is another fundamental way of countering and addressing systemic forms of racism, including laws and policies that disproportionately impact Aboriginal people and communities. Connection to culture is a protective factor that can reduce other risk factors, which might otherwise increase an individual's exposure to racism, including the impacts of systemic racism.

As noted above, an important avenue for increasing protection of Aboriginal cultural rights is to strengthen legislative protection of these rights. However, legislative protection is by no means enough. As has been recognised by a number of inquiries, there is a critical need for substantive investments in programs and services that support fulfilment of Aboriginal cultural rights. This includes increased access to culturally appropriate or safe services and processes (eg. Koori Court) and a significant investment in support programs (eg. cultural programs for incarcerated people or children in out of home care). As discussed below, it also includes better accountability and oversight mechanisms, to increase accountability and improve compliance with legislative and policy obligations.

Aboriginal Cultural Rights in Prisons and Youth Justice Centres

Protection of Aboriginal cultural rights is particularly important in custodial settings, given that incarcerated people are not able to connect with family, kin, country or culture in the same way that they may do so if they were not incarcerated.

In relation to youth justice centres, protection of Aboriginal cultural rights has been addressed in a number of recent inquiries.¹²⁶ In 2021, the Commission for Children and Young People found that the following recommendations from its 2018 report on Aboriginal Cultural Rights in Youth Justice Centres had still not been implemented:

- a dedicated art program taught by Koori artists, which allows art supplies to be kept in bedrooms
- a radio program to share the voices of young people in custody, similar to Kutcha Edwards's Beyond the Bars radio show in prisons
- an art exhibition to show and sell young people's artwork made in custody
- a choir where the young people sing in language
- Charcoal Lane cooking classes
- Family tracing, including helping young people to learn about their family history and develop a family tree.¹²⁷

In adult prisons, recent inquiries have also highlighted the need for culturally safe services and programs to support Aboriginal people in custody to maintain connection to culture and country.¹²⁸ The lack of access to culturally appropriate health care and mental health care is particularly concerning.¹²⁹ No doubt the ongoing independent Cultural Review into Prisons¹³⁰ will expose additional concerns relating to protection of Aboriginal cultural rights in adult custodial facilities.

RECOMMENDATIONS

Recommendation 21. The Anti-Racism Strategy should include measures to increase protection of cultural rights in adult custodial facilities and youth justice centres, including:

- Increase access to culturally appropriate health care and mental health care in prisons by:
 - working with VACCHO and other member organisations to jointly examine new models for delivery of primary health services by Aboriginal Community Controlled Health Organisations; and

¹²⁶ VEOHRC and CCYP, *Aboriginal Cultural Rights in Youth Justice Centres* (2018); CCYP, *Our Youth, Our Way*, above note 16; Victorian Ombudsman, *OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people* ("Investigation of practice related to solitary confinement") (2019).

¹²⁷ CCYP, *Our Youth, Our Way*, above note 16, p. 512.

¹²⁸ Victorian Ombudsman, *Investigation into the Rehabilitation and Reintegration of Prisoners* (2015), p. 82.

¹²⁹ VALS, *Submission to the Cultural Review of the Adult Custodial Corrections System* (December 2021); Victorian Ombudsman, *Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre* ("Inspection of the DPFC") (2017), p. 92.

¹³⁰ DJCS, *Cultural Review of the Adult Custodial Corrections System* (website).

- finalising standards for culturally safe, trauma informed health services in the criminal legal system and youth justice.
- Funding and supporting Aboriginal organisations to design, develop and deliver culturally safe rehabilitation programs for Aboriginal people in custody, particularly Aboriginal women and girls;
- Continue to improve and invest in strategies to recruit, support and retain more Aboriginal people at all levels within Corrections Victoria and Youth Justice.

Aboriginal Cultural Rights in Child Protection

The need to drastically improve the protection of Aboriginal cultural rights in child protection is well documented, particularly for Aboriginal children in out of home care.¹³¹ The experience of VALS' clients mirrors the concerns raised by other actors.

Under the CYFA and relevant policy frameworks, the following measures are in place to protect the cultural rights of Aboriginal children and young people in out of home care (OOHC):

- The requirement for all Aboriginal children in OOHC to have a Cultural Support Plan (CSP);¹³²
- Requirements deriving from the Aboriginal Child Placement Principle (ACPP), including the requirement to take into account the following when determining an OOHC placement: the hierarchy of OOHC placement options;¹³³ advice of the relevant Aboriginal agency,¹³⁴ and the principles set out in Section 14 of the CYFA.¹³⁵

¹³¹ CCYP, *Always Was, Always Will be Koori Children: Systemic Inquiry into services provided to Aboriginal children and young people in out-of-home care in Victoria* ("Always Was, Always Will be Koori Children") (2016); CCYP, *In the Child's Best Interests: Inquiry into compliance with the intent of the Aboriginal Child Placement Principle in Victoria* ("In the Child's Best Interests") (2016); CCYP, *Safe and Wanted: Inquiry into the implementation of the Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014* (2017); CCYP, *In Our Own Words: Systemic Inquiry into the lived experience of children and young people in the Victorian out-of-home care system* ("In Our Own Words") (2021), particularly Chapter 4.

¹³² Section 176, *Children, Youth and Families Act 2005* (Vic). Prior to December 2016, cultural support plans were only required for Aboriginal children on a care by Secretary order or a long-term care order. The Child Protection Manual provides that a cultural support plan will be developed for an Aboriginal child, within 16 weeks of the child entering out-of-home care.

¹³³ Section 13(2), *Children, Youth and Families Act 2005* (Vic). The placement hierarchy under Section 13(2) provides that: (a) as a priority, wherever possible, the child must be placed within the Aboriginal extended family or relatives and where this is not possible other extended family or relatives; (b) if, after consultation with the relevant Aboriginal agency, placement with extended family or relatives is not feasible or possible, the child may be placed with— (i) an Aboriginal family from the local community and within close geographical proximity to the child's natural family; (ii) an Aboriginal family from another Aboriginal community; (iii) as a last resort, a non-Aboriginal family living in close proximity to the child's natural family; (c) any non-Aboriginal placement must ensure the maintenance of the child's culture and identity through contact with the child's community.

¹³⁴ Section 13(1)(a), *Children, Youth and Families Act 2005* (Vic).

¹³⁵ Section 13(1)(c), *Children, Youth and Families Act 2005* (Vic). The principles in Section 14 of the Act are: (1) In determining where a child is to be placed, account is to be taken of whether the child identifies as Aboriginal and the expressed wishes of the child; (2) If a child has parents from different Aboriginal communities, the order of placement set out in sections 13(2)(b)(i) and 13(2)(b)(ii) applies but consideration should also be given to the child's own sense of belonging; If a child with parents from different Aboriginal communities is placed with one parent's family or community, arrangements must be made to ensure that the child has the opportunity for continuing contact with his or her other parent's family, community and

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- The requirement to hold an Aboriginal Family Led Decision Making (**AFLDM**)¹³⁶ conference where ‘protective concerns have been substantiated’ or an Aboriginal child or young person is subject to a protection order.¹³⁷

In 2016, CCYP carried out a systemic inquiry into compliance with the ACPP and made 54 recommendations, including: enhance recording and reporting, as well as independent monitoring and oversight; enhance processes for confirming Aboriginality; update policies and protocols for staff relating to ACPP, AFLDM and engagement with *Lakidjeka*, the Aboriginal Child Specialist Advice and Support Service (**ACSASS**); better and more frequent training for staff; strengthen mechanisms to identify and address non-compliance with the ACPP.¹³⁸

Despite some improvements in complying with these requirements, the 2021 CCYP *Inquiry into the Experiences of Children in Out-of-home Care* found that there continues to be poor compliance with the ACPP, as well as requirements relating to CSPs and AFLDM.¹³⁹ For example, in December 2018, only 47% of Aboriginal children who had been in OOH for more than 12 months had had an AFLDM conference.¹⁴⁰ Moreover, in December 2018, 61% of Aboriginal children who should have had a CSP did not.¹⁴¹ The experience of VALS solicitors and clients confirms that the level of compliance with these requirements continues to be poor.

As will be discussed further below, there is a fundamental need to strengthen accountability mechanisms for Child Protection, particularly compliance with legislative requirements to protect Aboriginal cultural rights.

Additionally, the Anti-Racism Strategy should prioritise measures to strengthen protection of Aboriginal cultural rights for children, young people and families in contact, or at risk of contact with the Child Protection System. In particular, the Government should increase funding to Aboriginal organisations to allow for increased capacity to take on the management of Aboriginal children on child protection orders eg. Nugel. Additionally, the Government should continue to expand access to

culture; (4) If a child has one Aboriginal parent and one non-Aboriginal parent, the child must be placed with the parent with whom it is in the best interests of the child to be placed; (5) If an Aboriginal child is placed with a person who is not within an Aboriginal family or community, arrangements must be made to ensure that the child has the opportunity for continuing contact with his or her Aboriginal family, community and culture.

¹³⁶ Aboriginal Family-Led Decision Making (AFLDM) is the primary case planning process for all Aboriginal children and young people on protection orders.

¹³⁷ Department policy requires that an AFLDM conference is held where ‘protective concerns have been substantiated’ or where an Aboriginal child or young person is subject to a protection order. See DHHS, *Aboriginal family-led decision: initiating an AFLDM meeting – practitioner’s responsibilities* (2019), cited in CCYP, *In Our Own Words*, above note 131, p. 96.

¹³⁸ CCYP, *In the Child’s Best Interests*, above note 131. See recommendations 3, 7, 14, 16, 11, 28, 30, 31, 32, 33, 36, 46, 47, 48, 49.

¹³⁹ CCYP, *In our Own Words*, above note 131, p. 96.

¹⁴⁰ *Ibid.*, p. 96.

¹⁴¹ CCYP, *In Our Own Words*, above note 131, p. 94.



the Koori Family Hearing Day, Marram Ngala Ganbu (meaning “we are one” in Woiwurrung language) to allow for greater access to culturally appropriate court processes at the Children’s Court.¹⁴²

RECOMMENDATIONS

Recommendation 21. The Anti-Racism Strategy must include measures to increase protection of cultural rights for Aboriginal children in contact with, or at risk of contact with the child protection system, including:

- Increase access to culturally safe programs and services for Aboriginal families, including early intervention and support to reduce the risk of child removal, as well as culturally safe services to support parents to reunify with their children safely and quickly.
- Increase access to culturally appropriate court processes, by expanding Marram Ngala Ganbu to other courts;
- Continue to increase transfer of functions and powers to Aboriginal organisations in relation to Aboriginal children on child protection orders, including through increased investment in ACCOS (eg. Aboriginal children in Aboriginal care program).

Reform Laws and Policies that Disproportionality Impact Aboriginal People

In addition to providing a state-wide framework for understanding systemic and institutional racism, the Anti-Racism Strategy should also include concrete measures to address this form of racism. In particular, the Strategy should identify key legislative and policy reforms across each sector, in order to reduce the disproportionate impacts of laws and policies for Aboriginal people.

VALS encourages the Anti-Racism Taskforce to consider the following legislative and policy reforms, which would lead to significant change in addressing systemic racism experienced by Aboriginal people in Victoria:

- Raise the age of criminal responsibility to at least 14 years and the age at which children can be detained to at least 16;
- Reform the punitive bail system;
- Strengthen Section 3A of the *Bail Act 1977*¹⁴³ by creating a statutory obligation for bail decision makers to demonstrate how they have complied with the obligation in Section 3A;
- Implement a legislated cautioning scheme in both the adult and youth justice systems;

¹⁴² Marram-Ngala was first recommended (as a concept) by the Aboriginal Justice Forum in 2009, and began operating at Broadmeadows Children’s Court in July 2016. In 2021, it started in Shepperton Children’s Court. See Children’s Court of Victoria, [Marram-Ngala Ganbu \(Koori Family Hearing Day\)](#) (website); SVA Consulting and Karabena Consulting, [Evaluation of Marram-Ngala Ganbu: A Koori Family Hearing Day at the Children’s Court of Victoria in Broadmeadows](#) (2019).

¹⁴³ Section 3A of the *Bail Act* provides that: “In making a determination under this Act 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.”

- Implement the following reforms to enhance access to culturally appropriate diversion for Aboriginal people: remove police discretion as to which offences are suitable for diversion; remove the requirement for prosecutors to consent to diversion; progress options for greater self-determination in relation to diversion; require police to complete a 'Failure to Divert Declaration' for all police briefs;
- Amend the *Summary Offences Act 1966* to repeal outdated offences that disproportionality impact Aboriginal people (eg. begging, obstruction of foot paths, obscene language);
- Decriminalise the use of cannabis and possession of cannabis for personal use;
- Create a legislative base for the Independent Third Person (ITP) program;
- Amend the *Sentencing Act 1991* to introduce a statutory obligation for judges and magistrates to consider Aboriginality for the purposes of sentencing, as well as an obligation to demonstrate how they have discharged this obligation;
- Amend the *Sentencing Act 1991* (Vic) to ensure that individuals with an acquired brain injury and/or an intellectual disability that was not diagnosed before the age of 18 years, are eligible for a Justice Plan;
- Strengthen access to and support for Aboriginal people on community-based sentences;
- Increase access to Koori Courts by increasing the locations and frequency of sitting days, and by expanding the jurisdiction of the courts to:
 - (i) divert Aboriginal people to culturally appropriate diversion programs;
 - (ii) hear bail applications;
 - (iii) hear matters that are contested and have not resolved to a plea of guilty;
 - (iv) make Drug and Alcohol Treatment Orders where appropriate;
- Prohibit harmful practices in custody that disproportionality impact Aboriginal people, including solitary confinement and strip searching;
- Reform the model of health care in all places of detention – including police custody, prisons and youth justice – to ensure that Aboriginal people in custody can access culturally appropriate and timely health care, which is equivalent to the care available in the community. At a minimum, this must include: provision of health care through the Department of Health, rather than DJCS; development and implementation of standards for culturally safe, trauma informed health services for all custodial settings¹⁴⁴; working with VACCHO and member organisations to develop a model for delivery of primary health services by Aboriginal Community Controlled Health Organisations; ensuring access to Medicare and the Pharmaceutical Benefits Scheme;
- Introduce standardised and culturally appropriate mental health screening tools across all custodial settings;
- Amend Section 6 of the *Equal Opportunity Act 2010* (Vic) to include irrelevant criminal record as a protected attribute;

¹⁴⁴ Under *Burra Lotjpa Dunguludja* (Goal 3.1), Justice Health is responsible for leading the development cultural safety standards for health services in the adult and youth justice systems. See [Burra Lotjpa Dunguludja](#), above note 42. As at December 2021, “development of standards was on hold while Justice Health engages with VACCHO regarding VACCHO’s proposed cultural safety framework and accreditation process.” See [AJA4 In Action](#).

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- Amend reunification timeframes in the *Children, Youth and Families Act 2005*, to provide the Children’s Court with greater discretion to make reunification decisions that are in the best interests of the child.

VALS Submission to the Criminal Justice Inquiry

Recently, VALS examined a number of these reforms in its submission to the Parliamentary Inquiry into Victoria’s Criminal Justice System. For ease of reference, relevant extracts from this submission are included in Appendix II. Issues relating to reforms outside of the criminal justice and youth justice systems are discussed in further detail below.

Permanency Amendments and Family Reunification

Changes to time frames for family reunification have had a significant and disproportionate impact on Aboriginal children and families. Whilst there are many aspects of the child protection system that entrench and perpetuate systemic racism, this is one significant hurdle that contributes to the high rates of Aboriginal children in Victoria being removed from their parents on a permanent basis. There is a critical need for the Anti-Racism Strategy to examine systemic racism within the Child Protection System, including the impact of family reunification timeframes and other permanency amendments. In 2014, a range of amendments were made to the CYFA, with the intention of enhancing stability for children in the child protection system, by achieving a permanent care arrangement within a timely manner. One of the most significant amendments included the rigid timeframes for reunification, when a child is removed from their parent’s care and placed on a Family Reunification Order. In particular, the CYFA imposes a 12-month timeframe for the parent to address protective concerns and achieving reunification.¹⁴⁵ In certain circumstances, the court may extend the timeframe for an additional 12 months, if reunification is likely to be achieved or a permanent alternative sought.¹⁴⁶

VALS has consistently raised concerns about the impact of the permanency amendments for Aboriginal children and families, including in relation to recent proposals to amend the CYFA.¹⁴⁷ In particular, the rationale for the two-year timeframe fails to take into account the stress and trauma resulting from Child Protection intervention and child removal from parent(s), which is destabilising for children (particularly Aboriginal children). Additionally, there has been limited access to programs and services during the COVID-19 pandemic. Although the *COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Act 2020* provided for a 6-month extension to the reunification timeframe, this is inadequate, due to the duration of the pandemic and implications for access to services.

¹⁴⁵ Section 287A(2), *Children, Youth and Families Act 2005* (Vic).

¹⁴⁶ Section 287A(3), *Children, Youth and Families Act 2005* (Vic).

¹⁴⁷ VALS, *Permanency Amendments: Submission Paper from the Victorian Aboriginal Legal Service* (2016); VALS, *Briefing Paper: Children, Youth and Families Act 2005 (CYFA) Amendments* (2021).



In 2020, VLA reviewed the impact of the permanency amendments on its clients, and found that the intention of the amendments was not being achieved.¹⁴⁸ In particular, VLA found that the rigid timeframes placed on parents to address protective concerns are not achieving the intention of minimising the time that the child is in OOHC, and “may be unfairly penalising parents for circumstances outside of their control.”¹⁴⁹ Additionally, the report raised concern that the reduced level of court oversight arising from the amendments, may lead to “outcomes that are not always in the best interests of the child and inadvertently prolonging court proceedings.”¹⁵⁰ VLA recommended that reunification timeframes be amended, to allow the Children’s Court to make decisions in the best interests of the child,¹⁵¹ and that court oversight be increased, including to allow the court to make conditions on any protection orders and name a placement on an order.¹⁵²

In addition to the work carried out by VLA, the permanency amendments were also reviewed by CCYP in 2016.¹⁵³ However, at that stage, the amendments had only been in effect for 6 months, so CCYP recommended further review of the impacts of the amendments 24 months later.¹⁵⁴ In 2018, the Government funded a two-year longitudinal study to understand the impacts of the permanency amendments on child protection practices.¹⁵⁵ The Study was due to be completed and delivered to the Department in early 2021; however, to date, the report has not been finalised/made public.

The CYFA was due to be amended in late 2020, however, this has been delayed until early 2022. This presents a critical opportunity to amend the reunification timeframes, to allow the court to make decisions in the best interests of the child.¹⁵⁶

RECOMMENDATIONS

Recommendation 22. The Anti-Racism Strategy should include measures to reform policies and legislation that contribute to systemic racism experienced by Aboriginal people in Victoria, including:

- Raise the age of criminal responsibility to at least 14 years and the age at which children can be detained to at least 16;
- Reform the punitive bail system;

¹⁴⁸ VLA, *Achieving safe and certain homes for children: Recommendations to improve the permanency amendments to the Children, Youth and Families Act 2005 based on the experience of our clients* (2020).

¹⁴⁹ *Ibid.*, p. 2.

¹⁵⁰ *Ibid.*, p. 3.

¹⁵¹ *Ibid.*, Recommendation 1, p. 26.

¹⁵² *Ibid.*, Recommendation 2, p. 26.

¹⁵³ CCYP, *Safe and Wanted*, above note 131.

¹⁵⁴ *Ibid.*, Recommendation 40, p. 34.

¹⁵⁵ DHHS, *Safe and wanted - An inquiry into the implementation of permanency arrangements* (website).

¹⁵⁶ VLA, *Achieving safe and certain homes for children*, above note 148, Recommendation 1, p. 26.

- Strengthen Section 3A of the *Bail Act 1977*¹⁵⁷ by creating a statutory obligation for bail decision makers to demonstrate how they have complied with the obligation in Section 3A;
- Implement a legislated cautioning scheme in both the adult and youth justice systems;
- Implement the following reforms to enhance access to culturally appropriate diversion for Aboriginal people:
 - remove police discretion as to which offences are suitable for diversion;
 - remove the requirement for prosecutors to consent to diversion;
 - progress options for greater self-determination in relation to diversion; and
 - require police to complete a 'Failure to Divert Declaration' for all police briefs.
- Amend the *Summary Offences Act 1966* to repeal outdated offences that disproportionality impact Aboriginal people (eg. begging, obstruction of foot paths, obscene language);
- Decriminalise the use of cannabis and possession of cannabis for personal use;
- Create a legislative base for the Independent Third Person (**ITP**) program;
- Amend the *Sentencing Act 1991* to introduce a statutory obligation for judges and magistrates to consider Aboriginality for the purposes of sentencing, as well as an obligation to demonstrate how they have discharged this obligation;
- Amend the *Sentencing Act 1991* (Vic) to ensure that individuals with an acquired brain injury and/or an intellectual disability that was not diagnosed before the age of 18 years, are eligible for a Justice Plan;
- Strengthen access to and support for Aboriginal people on community-based sentences;
- Increase access to Koori Courts by increasing the locations and frequency of sitting days, and by expanding the jurisdiction of the courts to:
 - (i) divert Aboriginal people to culturally appropriate diversion programs;
 - (ii) hear bail applications;
 - (iii) hear matters that are contested and have not resolved to a plea of guilty; and
 - (iv) make Drug and Alcohol Treatment Orders where appropriate.
- Prohibit harmful practices in custody that disproportionality impact Aboriginal people, including solitary confinement and strip searching;
- Reform the model of health care in all places of detention – including police custody, prisons and youth justice – to ensure that Aboriginal people in custody can access culturally appropriate and timely health care, which is equivalent to the care available in the community. At a minimum, this must include:

¹⁵⁷Section 3A of the *Bail Act* provides that: "In making a determination under this Act 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."

- provision of health care through the Department of Health, rather than DJCS; development and implementation of standards for culturally safe, trauma informed health services for all custodial settings¹⁵⁸;
 - working with VACCHO and member organisations to develop a model for delivery of primary health services by Aboriginal Community Controlled Health Organisations; and
 - ensuring access to Medicare and the Pharmaceutical Benefits Scheme.
- Introduce standardised and culturally appropriate mental health screening tools across all custodial settings;
 - Amend Section 6 of the *Equal Opportunity Act 2010 (Vic)* to include irrelevant criminal record as a protected attribute;
 - Amend reunification timeframes in the *Children, Youth and Families Act 2005*, to provide the Children’s Court with greater discretion to make reunification decisions that are in the best interests of the child.

Strengthen Accountability and Oversight Mechanisms

Whilst the Anti-Racism Strategy should prioritise measures to prevent racism; it is equally important to ensure that there are culturally appropriate and easily accessible avenues for holding individuals and organisations accountable for racism once it has occurred. In some cases, accountability mechanisms can also lead to systemic changes in order to prevent further patterns of abuse.

The Anti-Racism Strategy must prioritise measures to strengthen accountability and oversight mechanism for racism, including individual, interpersonal and systemic racism. This section addresses the following reforms, focusing particularly on the need for stronger accountability mechanisms to address racism within Victoria Police and Child Protection:

- Increase the capacity of oversight mechanisms to investigate systemic racism;
- Strengthen internal and independent complaints systems;
- Independent monitoring of police powers;
- Strengthen oversight mechanisms for child protection;
- Independent coronial investigations;
- Establish an Aboriginal Social Justice Commissioner;
- Implement OPCAT through an independent and culturally appropriate National Preventative Mechanism (NPM).

¹⁵⁸ Under *Burra Lotjpa Dunguludja* (Goal 3.1), Justice Health is responsible for leading the development cultural safety standards for health services in the adult and youth justice systems. See [Burra Lotjpa Dunguludja](#), above note 42. As at December 2021, “development of standards was on hold while Justice Health engages with VACCHO regarding VACCHO’s proposed cultural safety framework and accreditation process.” See [AJA4 In Action](#).



Oversight Mechanisms and Systemic Racism

The Anti Racism Strategy should include measures to expand the jurisdiction of existing and future accountability and oversight bodies and processes, to include systemic racism.

Independent inquiries and systemic racism

The CCYP, Victorian Ombudsman and VEOHRC play an important role in investigating systemic issues across public service delivery, including in relation to systemic racism and the disproportionate impacts of particular laws and policies for Aboriginal people and communities in Victoria.

- CCYP is mandated to conduct systemic inquiries into provision of services to children, including in relation to child protection, youth justice, community services, health services, human services and schools. Under the leadership of the Aboriginal Children and Young People's Commissioner, CCYP have carried out a number of ground-breaking reports into systemic issues affecting Aboriginal children, including systemic racism.¹⁵⁹
- The Victorian Ombudsman is empowered to conduct an 'own motion' investigation into any administrative action taken by or in an 'authority.'¹⁶⁰ In particular, the Victorian Ombudsman has carried out multiple investigations into systemic issues arising in prisons and youth justice centres, including in relation to the disproportionate impact of laws and policies on Aboriginal people in these environments.¹⁶¹
- VEOHRC can carry out an own motion investigation into systemic discrimination that may be in breach of the EOA.¹⁶² It also carries out independent reviews in collaboration with organisations, to assess whether the authority's programs and practices are compatible with human rights;¹⁶³ and can be requested by the Attorney-General to review the effect of statutory provisions and common law on human rights.¹⁶⁴

Government and Parliamentary Inquiries can also play an important role in investigating systemic racism, including Royal Commissions and independent Government inquiries. For example, in 2021,

¹⁵⁹ For example: CCYP, *Our Youth, Our Way*, above note 16; CCYP, *In the Child's Best Interests*, above note 131; CCYP, *Always Was, Always Will be Koori Children*, above note 131.

¹⁶⁰ In addition, the Victorian Ombudsman receives individual complaints in relation to: councils; Government Departments and organisations; universities and TAFEs; publicly funded community services; prisons and certain professional boards. It does not deal with complaints relating to Victoria Police. See Victorian Ombudsman, [Complaints](#) (website).

¹⁶¹ See for example: Victorian Ombudsman, [Investigation into good practice when conducting prison disciplinary hearings](#) (July 2021); Victorian Ombudsman, [Investigation into the rehabilitation and reintegration of prisoners in Victoria](#), above note 128; Victorian Ombudsman, [Inspection of the DPFC](#), above note 129; Victorian Ombudsman, [Investigation of practice related to solitary confinement](#), above note 126.

¹⁶² *Equal Opportunity Act 2010* (Vic), Part 9.

¹⁶³ Section 41(c), *Victorian Charter of Human Rights and Responsibilities 2006* (Vic) ("Human Rights Charter"). VEOHRC also conducts conciliation for complaints in relation to the RRTA and the EOA, including discrimination, sexual harassment, racial and religious vilification, and victimisation. VEOHRC does not deal with complaints under the Charter.

¹⁶⁴ Section 41(b), *Human Rights Charter*.



the Government commissioned the independent cultural review of the adult custodial corrections system, which is due to report back to Government in June 2022.¹⁶⁵

Although it is not independent, we also note the existence of the Justice Assurance and Review Office (**JARO**) which plays a role in investigating systemic issues within Corrections Victoria and Youth Justice, although JARO has been criticised for its lack of transparency and lack of independence from Corrections Victoria. JARO is a business unit within the DJCS, which operates as internal assurance and review function. It is responsible for advising the Secretary on areas of risk, the adequacy of existing controls, and opportunities for improvement in the performance of youth justice precincts, youth justice community services, prisons, community correctional services and prisoner transport services.¹⁶⁶ It also investigates the circumstances and management of deaths in custody and parolee deaths that occur within three months of release.¹⁶⁷

Complaints Mechanisms and Systemic Racism

In addition to the important role played by bodies such as CCYP, Victorian Ombudsman and VEOHRC, there are many complaints mechanisms across various sectors, that are mandated to carry out investigations into systemic issues and/or are obliged to take further action if they become aware of a systemic issue. Independent complaints bodies/mechanisms that are empowered to investigate systemic issues and/or refer for investigation include: the Health Complaints Commissioner;¹⁶⁸ the Mental Health Complaints Commissioner;¹⁶⁹ the Australian Financial Complaints Authority (**ACFA**).¹⁷⁰ For example, the AFCA is the dispute resolution body which deals with complaints from individuals in relation to financial services.¹⁷¹ ACFA has received many complaints for Aboriginal consumers relating to the Australian Community Benefit Fund (**ACBF**), which has systematically engaged in predatory and misleading conduct towards Aboriginal consumers, including falsely advertising the company as Aboriginal owned and targeting Aboriginal consumers for low value funeral insurance policies.¹⁷² In 2018, the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry exposed widespread misconduct by ACBF.¹⁷³ In all complaints submitted to ACFA by

¹⁶⁵ DJCS, [Cultural Review of the Adult Custodial Corrections System](#) (website).

¹⁶⁶ DJCS, [Justice Assurance and Review Office](#) (website)

¹⁶⁷ Ibid.

¹⁶⁸ Health Complaints Commissioner (HCC), [Major Sector Inquiries](#), (website)

¹⁶⁹ Mental Health Complaints Commissioner (MHCC), [The Role of the Mental Health Complaints Commissioner](#), (website).

¹⁷⁰ Australian Financial Complaints Authority (ACFA) [Systemic Issues](#), (website).

¹⁷¹ ACFA deals with individual complaints in relation to: superannuation, investments and financial advice, banking deposits and payments, insurance and credit, finance and loans. See ACFA, [About ACFA](#) (website).

¹⁷² H. Barry, ["Funeral insurer ACBF \(Youpla\) forced to refund Kimberley woman over 'misleading' conduct"](#) (ABC News)

¹⁷³ In July 2018, the Royal Commission heard evidence from Tracey Walsh, an Aboriginal woman who held a plan with ACBF, and Bryn Jones, the director of ACBF at the time of the Commission. See *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services*, Transcript of Proceedings, 3 July 2018.



Aboriginal consumers, ACFA has found in favour of the consumer;¹⁷⁴ and in late 2020, the Australian Securities and Investments Commission (ASIC) commenced proceedings against ACBF.¹⁷⁵

In addition to its role in handling individual complaints, AFCA is obliged to identify, refer and report systemic issues to the relevant regulatory body, including ASIC, APRA, the ATO or another appropriate body.¹⁷⁶ While this function of ACFA may already provide an avenue for identifying and responding to systemic racism within the financial sector, this is not clear. In VALS' perspective, the capacity of existing and future complaints mechanisms such as ACFA to hold public authorities' accountable for systemic racism should be strengthened, by explicitly referring to systemic racism in their mandates and providing relevant powers and resources to investigate this issue.

Additionally, where appropriate, complaints mechanisms should be empowered to receive complaints that involve multiple complainants and/or are submitted by an organisation, on behalf of the individual or group. For example, the Parliamentary Inquiry into Anti-Vilification laws recommended that "the Victorian Government enable a representative complaint to be made to the Victorian Equal Opportunity and Human Rights Commission without the need to name an individual complainant."¹⁷⁷

Good Practice: Super-complaints in the United Kingdom

The United Kingdom has adopted a super-complaints system in a wide range of consumer affairs areas, and more recently introduced it for policing. This model allows designated organisations to bring a complaint about general or systemic issues that are harming the community, and have this complaint be treated as a priority by the relevant regulatory body.

In policing, super-complaints are received by Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services – a monitoring and inspection body which does not receive individual complaints – and then assessed by HMICFRS, the Independent Office for Police Conduct, and the College of Policing.¹⁷⁸ Since the introduction of the super-complaints system for policing in 2018, HMICFRS has investigated super-complaints on matters including police cooperation with immigration authorities,¹⁷⁹ the treatment of victims of modern slavery,¹⁸⁰ and the protection of women and girls from domestic violence.¹⁸¹ Sixteen organisations are 'designated' by the government as able to make super-complaints.¹⁸²

¹⁷⁴ L. Allam and B. Butler, "[Aboriginal people stung by funeral scheme the watchdog ruled 'deceptive' may not get a cent back](#)," (The Guardian), 16 December 2021.

¹⁷⁵ ASIC, "[20-262MR ASIC commences proceedings against ACBF Funeral Plans and Youpla Group concerning funeral expenses insurance](#)" 29 October 2020.

¹⁷⁶ Australian Financial Complaints Authority (ACFA) '[Systemic Issues](#),' (website).

¹⁷⁷ Victorian Parliament, *Parliamentary Inquiry into Anti-Vilification Laws*, above note 8, Recommendation 29.

¹⁷⁸ Independent Office for Police Conduct (IOPC), '[Super-complaints and working with other policing oversight bodies](#)' (website).

¹⁷⁹ HMICFRS, *Safe to share? Liberty and Southall Black Sisters' super-complaint on policing and immigration status* (2020).

¹⁸⁰ HMICFRS, *Report on Hestia's super-complaint on the police response to victims of modern slavery* (2021).

¹⁸¹ HMICFRS, *A duty to protect: Police use of protective measures in cases involving violence against women and girls* (2021).

¹⁸² UK Government, '[Police super-complaints](#)' (website).



Judicial Review of Systemic Racism

In recent years, there has been some limited progress towards incorporating systemic racism into judicial oversight mechanisms. For example, in the Inquest into the passing of Tanya Day, the Coroner considered whether systemic racism contributed to the cause and circumstances of the passing of Tanya Day,¹⁸³ and found that the decision-making process of the V/Line train conductor was influenced by Ms Day's Aboriginality and the train conductor's unconscious bias.¹⁸⁴ This is the only coronial inquest in Australia to date to consider systemic racism.

Although systemic racism was not within the scope of the Raymond Noel Inquest, Coroner Olle highlighted the disproportionate representation of Aboriginal people in pursuit related fatalities, and the fact that "Raymond Noel and his family's adverse interactions with police is sadly the reality of the lived experience of many Aboriginal people in our community. Whilst we will never know why Raymond Noel took flight, the potential contribution of his adverse experiences with police cannot be excluded."¹⁸⁵

With regard to coronial processes, *Practice Direction 6 of 2020* Court relating to "Indigenous Deaths in Custody," has provided further guidance on the scope of coronial inquests into the passing of an Aboriginal person in custody, by requiring the coroner to consider, "the quality of care, treatment and supervision of the deceased prior to death."¹⁸⁶ This is a direct implementation of Recommendations 12 and 35 of RCIADIC and is a welcome development. However, we believe that Practice Direction 6 of 2020 could be strengthened, by requiring a coroner to include systemic racism within the scope of the inquest, if requested by the family of the deceased.

To provide further oversight and accountability in relation to systemic racism, the Anti-Racism Strategy should include measures to include systemic racism within the mandates of relevant accountability and oversight mechanisms and bodies.

RECOMMENDATIONS

Recommendation 23. The Anti-Racism Strategy should include measures to ensure that systems, mechanisms and bodies of accountability and oversight, such as coronial inquests, complaints mechanisms and detention oversight bodies (eg. National Preventive Mechanisms under OPCAT) examine the role of systemic racism when exercising their mandates.

¹⁸³ Early on in the inquest, the Coroner ruled that she would "allow witnesses to be questioned as to whether racism played a part of their decision making, including Ms Day's treatment, options considered, their motivations and potential unintended effects of their decision making." See Human Rights Law Centre, [Tanya Day Inquest: Summary of findings](#) (website).

¹⁸⁴ [Inquest into the Death of Tanya Louise Day](#), above note 72, para 225.

¹⁸⁵ [Inquest into the death of Raymond Noel Lindsay Thomas](#), above note 13, para 142.

¹⁸⁶ State Coroner, [Practice Direction 6 of 2020](#) ("Indigenous Deaths in Custody"), para 6.3.



Recommendation 24. Complaints mechanisms should be able to receive representative complaints, without the need to name an individual complainant, as well as complaints submitted by an organisation on behalf of a group.

Recommendation 25. Practice Direction 6 of 2020 of the Coroners Court relating to “Indigenous Deaths in Custody” should be amended to provide that, if requested by the family, the investigating coroner should include within the scope of the inquest, whether systemic racism or racial bias contributed to the cause or circumstances of the person’s death. The Coroner must be open to receiving expert evidence regarding systemic racism and racial bias.

Complaints Systems

In addition to judicial accountability for racism (including civil litigation under the RRTA, the EOA and the Human Rights Charter), complaints mechanisms are an important component of the broader accountability system for addressing racism. By investigating systemic issues, including systemic racism, complaints mechanisms can also play an important preventative role by recommending systemic reforms.

Complaints about racial abuse/vilification and/or systemic racism can be submitted to a range of bodies, depending on which individual or authority is responsible for the alleged behaviour. Public authorities that provide services generally have internal complaints mechanisms; although these processes are often opaque and their effectiveness is limited by their lack of independence. Individuals may be reluctant to make a complaint about racism to an internal complaints mechanism, because of concerns about retaliation or a lack of trust in the system.¹⁸⁷ Additionally, complaints can be submitted to an independent complaints mechanism, including the Victorian Ombudsman, IBAC, VEOHRC, the Health Complaints Commissioner, and the Mental Health Complaints Commissioner.

In relation to Victoria Police, Corrections Victoria, private prison contractors, and Child Protection, there is a fundamental need to reform the existing complaints mechanisms, so that individuals (and groups, where appropriate) are able to access robust and independent complaints mechanisms that are culturally appropriate, complainant-centred and trauma-informed.

¹⁸⁷ For example, recently CCYP found that children and young people in residential care were reluctant to make a complaint because they feared negative repercussions. See CCYP, *In Our Own Words*, above note 131, p. 127. Similarly, Aboriginal people under-report police complaints because of lack of trust in the system and fear about retaliation or other repercussions. See Victoria Police and Department of Justice, [Koori Complaints Project 2006-2008: Final Report](#) (2008).



Police Complaints

As noted above, under Section 1, racism is deeply entrenched within Victoria Police, including overtly racist policing, as well as institutional and systemic racism. The existing police complaints system fundamentally fails to provide accountability for racism within Victoria Police, which in turn permits and encourages a culture where racist policing thrives. Establishing an independent police complaints body that can adequately respond to complaints involving racism must be a key priority under the Anti-Racism Strategy.

The current police complaints system provides for almost no independent investigation of complaints against police. While complaints can be submitted to either Victoria Police or the Independent Broad-based Anti-corruption Commission (IBAC), the vast majority of complaints received by IBAC are referred back to Victoria Police. For example, in 2020-21, IBAC assessed 2,726 allegations against police and determined that 1,217 required investigation.¹⁸⁸ Only 5 complaints were investigated directly by IBAC, and of those referred to other bodies – mostly Victoria Police – only 64 were comprehensively reviewed. This leaves 94.3% of allegations which were either investigated by Victoria Police without any meaningful involvement from IBAC, or not investigated.¹⁸⁹

Audits of Victoria Police’s handling of complaints¹⁹⁰ have highlighted multiple challenges with Victoria Police’s complaints process, including a serious and systematic disregard for conflicts of interest, including within the Professional Standards Command.¹⁹¹ This is clear evidence that proper investigation of police misconduct cannot be achieved through Victoria Police.

Aboriginal people do not trust the complaints system because it lacks independence, is culturally unsafe and consistently fails to provide tangible outcomes. Complainants often feel that their matters are not being taken seriously because they are being investigated by colleagues of the officer subject to the complaint, or police are closing ranks to protect their own, or to avoid substantiating a complaint about behaviour that is widespread. As a result, Aboriginal people are less likely to report a police complaint.¹⁹²

¹⁸⁸ IBAC, [Annual Report 2020/21](#) (2021), p. 26.

¹⁸⁹ *Ibid.*, p. 26.

¹⁹⁰ Office of Police Integrity, [Managing conflict of interest in Victoria Police](#) (2010); IBAC, [Audit of Victoria Police Complaints Handling Systems at Regional Level: Summary Report](#) (“Regional Level Audit”) (2016), p. 11; IBAC, [Audit of Complaints Investigated by Professional Standards Command, Victoria Police](#) (“PSC Audit”) (2018), p. 5.

¹⁹¹ “Professional Standards Command is the central area within Victoria Police responsible for the organisation’s ethical health and integrity. As at March 2018, PSC employed 200 full-time equivalent (FTE) staff and is comprised of five divisions: Conduct and Professional Standards Division; Investigations Division; Intelligence, Innovation and Risk Division; Support Services Division; Forensic Investigations Division.” Professional Standards Command is meant to be independent and specifically constituted to provide for more independent investigation. See IBAC, PSC Audit, above note 190, p. 10.

¹⁹² While Aboriginal people are more likely to experience serious police misconduct involving excessive force, duty failure and demeanour problems including racism, they are also less likely to make a formal complaint. See Victoria Police and Department of Justice, [Koori Complaints Project](#), above note 187, pp. 18-21; Victorian Parliament, Independent Broad-based Anti-corruption Commission (IBAC) Committee, [Inquiry into the External Oversight of Police Corruption and Misconduct](#) (“IBAC Committee Inquiry”) (2018), pp. 152 – 154; VALS, [Submission to the Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria](#) (“Submission to IBAC Inquiry”) (2017). p. 8.



Furthermore, the experience of lawyers at VALS is that IBAC rarely makes any findings of impropriety, even where there is sufficient evidence of misconduct to proceed with civil litigation. Even where there is a finding of impropriety, police officers are rarely charged or reprimanded. Due to the inadequacy of the current complaints system, VALS regularly advises clients to pursue civil litigation, rather than submitting a complaint to IBAC.

The inability of IBAC to achieve tangible outcomes for complainants is demonstrated by the recent investigation into the Assistant Commissioner for Professional Standards Command (“Operation Turon”). IBAC found that this senior police officer had posted racist and homophobic material on the internet over a period of several years and faced civil litigation for using racist language in person, but concluded that this had no bearing on his decision-making about complaints investigations.¹⁹³

The lack of independent investigation also impacts on the ability of the oversight body to identify and respond to systemic issues, including systemic racism. The excessive use of referrals to Victoria Police has contributed to IBAC’s failure to grapple with systemic issues in the police force, because there is limited capacity to identify patterns and systemic issues when investigations into individually ‘minor’ incidents are conducted by police rather than IBAC itself.

The Government is currently carrying out a Systemic Review of the Police Oversight System,¹⁹⁴ which responds to recommendations from the 2018 Parliamentary Inquiry into the External Oversight of Police Corruption and Misconduct (“IBAC Committee Inquiry”)¹⁹⁵ and the Royal Commission into Police Informants.¹⁹⁶ We have provided confidential feedback to this review, and have raised our concerns in previous submission, including our submission to the IBAC Committee Inquiry.¹⁹⁷ In early 2022, VALS will be publishing a policy paper on police accountability, with detailed recommendations relating to the broken police complaints system.

In addition to the Government’s Review of Police Oversight System, the Anti-Racism Strategy must include measures to strengthen police accountability in Victoria, including through a new independent police complaints system.

¹⁹³ IBAC, *Operation Turon: An investigation into alleged misconduct by a former Victoria Police Assistant Commissioner* (“Operation Turon”), (2021), p. 4.

¹⁹⁴ Victorian Government, Engage Victoria, *Systemic Review of Police Oversight* (website).

¹⁹⁵ Victorian Parliament, *IBAC Committee Inquiry*, above note 192.

¹⁹⁶ Royal Commission into Management of Police Informants, *Final Report: Summary and Recommendations* (2020), Recommendation 61, p. 54.

¹⁹⁷ VALS and the Centre for Innovative Justice, *The Effectiveness of the Victoria Police Complaints System for VALS Clients* (2016); VALS, *Submission to IBAC Inquiry*, above note 192.

RECOMMENDATIONS

Recommendation 26. The Anti-Racism Strategy must prioritise measures to strengthen the police complaints system, including the following:

- Establish a new independent police complaints body that complies with international principles, and is complainant-centred, transparent, has adequate powers and resources to carry out independent investigations, and responds to the needs of Aboriginal complainants.
- Police must not be responsible for investigating and handling police complaints, except minor customer service matters. All police complaints other than minor customer service matters must be investigated and managed by the independent police complaints body. This includes serious police misconduct, systemic police misconduct, police-contact deaths and incidents involving serious injuries.
- Complainants must have the right to request a review of the classification of their complaint.
- The independent police complaints body should have own-motion powers to conduct investigations of individual incidents, thematic investigations of related incidents, and systemic investigations of wider problems within Victoria Police.
- The independent police complaints body should have a ‘super-complaints’ process which allows representative organisations to make complaints about systemic issues on behalf of a group of affected people. Those representative organisations must include Aboriginal Community Controlled Organisations.
- The independent police complaints body should develop a strategy for identifying and investigating systemic racism, in consultation with Aboriginal Community Controlled organisations.
- The independent police complaints body must respond to the needs of Aboriginal complainants, including by establishing a Koori Engagement Unit.
- Complainants should be able to access footage from body-worn cameras (**BWCs**) worn by police and Protective Service Officers (**PSOs**).
- Complainants should be able to access documents relating to the police complaint, including the investigation file:
 - (a) The legislation establishing a new independent body should not exempt documents and footage relating to the police complaint from the *Freedom of Information Act 1982*, as is currently the case for IBAC; and
 - (b) the *Freedom of Information Act 1982* should be amended to ensure that documents and footage relating to the police complaint are not exempted from this Act.
- Legislation establishing a new independent body for police complaints should include robust protections for complainants, including:
 - (a) making it an offence to threaten or intimidate, persuade or attempt to persuade another person not to make a complaint, or subject them to any detriment; and

- (b) monitoring charges laid against a complainant once they have submitted a complaint.
- Both the independent police complaints body and Victoria Police must publish regular and easily accessible disaggregated data on complaints.

Prison Complaints

Complaints about racism experienced in prisons can be submitted to Corrections Victoria,¹⁹⁸ or to an independent body, including the Victorian Ombudsman,¹⁹⁹ the Health Complaints Commissioner (in relation to prison health services), the Mental Health Complaints Commissioner (in relation to prison services provided by public mental health services in prisons), the Disability Services Commissioner (in relation to disability services), IBAC (in relation to corruption) and VEOHRC (in relation to the RRTA or EOA). In 2020-2021, the Victorian Ombudsman received 3,367 complaints about Corrections Victoria, which was the second highest, following complaints regarding Local Councils.²⁰⁰

Information and data regarding the Corrections Victoria complaints system is not easily available. In 2017, the Victorian Ombudsman carried out an OPCAT-style inspection of the Dame Phyllis Frost Centre (DPFC), which found that 46% of women who engaged with the Ombudsman did not feel comfortable making a complaint.²⁰¹ Additionally, 29% of women “reported that staff had tried to stop them making a complaint within the prison,” and 21% “said staff had attempted to stop them complaining to an external agency like the Ombudsman.”²⁰²

In VALS’ experience, there are also challenges in making a complaint to the Victorian Ombudsman, VEOHRC and IBAC, including limited awareness of these mechanisms and limited access to legal assistance and support to make a complaint.

VALS does not receive targeted government funding to provide legal advice to people regarding prison complaints, including in relation to racism experienced in prison. Fitzroy Legal Service operates a specialist prison law advice line, which provides legal services for prisoners and their families, including in relation to rights of incarcerated people. Free legal advice is also provided via the Legal Help phone line run by VLA.²⁰³ However, there are significant challenges for incarcerated people to access these services, including limited awareness about the existence of the services, as well as administrative hurdles in accessing the services. Challenges in accessing legal assistance for prison complaints has been exacerbated during COVID-19 due to lock downs and protective quarantine.

¹⁹⁸ Corrections Victoria, [Making a Complaint](#) (website).

¹⁹⁹ Victorian Ombudsman, [Complaints](#) (website).

²⁰⁰ Victorian Ombudsman, [Annual Report 2021](#) (October 2021), p. 33.

²⁰¹ Victorian Ombudsman, Inspection of DFPC, above note 129, p. 68.

²⁰² Ibid.

²⁰³ VLA previously operated a Prisoner Legal Help Service, which commenced in Feb 2017 and provided more accessible legal help to people in Victorian prisons. See VLA, [Prisoner Legal Help Evaluation Report](#), (June 2018).



In 2021, the Government commissioned an independent Cultural Review of the Adult Custodial Corrections System, which will inquire into the culture, safety, including and integrity within public and private prisons in Victoria.²⁰⁴ It is expected that this Review will examine the prison complaints system, including the complaint mechanism operated by Corrections Victoria, as well as access to, and availability of, an independent complaints process.

Child Protection Complaints

Complaints involving racism within the Child Protection system, can be submitted to the internal complaints process managed by Child Protection, to a complaints mechanism operated by a service provider,²⁰⁵ or to the Victorian Ombudsman.²⁰⁶ In 2020-2021, the Victorian Ombudsman received 1,478 complaints about Child Protection.

Regarding the internal complaints mechanism, CCYP has raised concerns about the current system over a number of years. Most recently, the CCYP *Inquiry into Experiences of Children in Out-of-Home Care* noted the following challenges: children are not provided with information about how to make a complaint and are often unfamiliar with the process; even if they are aware that the complaints system exists, many children do not trust the system due to concerns about confidentiality and mistrust in the complaint outcome.²⁰⁷ In addition, the current use of the complaints mechanism is unknown due to limited data capture, and data that is collected is not used to drive systemic change.²⁰⁸

In 2015, CCYP recommended that a complaints body, independent of the Department and funded agencies, be established to hear directly from children.²⁰⁹ In its response, the Department for Human Services (now the Department for Families, Fairness and Housing – DFFH) indicated that:

- In 2016, it was investigating the feasibility of establishing an independent complaints mechanism for children and young people;
- In 2017, the Victorian Ombudsman had agreed that DHHS could promote it as an independent complaints mechanism for children and young people;
- In 2018, DHHS invested new resources in raising awareness about complaints among children in OOHC.²¹⁰

The Government has still not established a specialised independent complaints body. In its report regarding the experiences of children in OOHC, CCYP reiterated its recommendation to establish an

²⁰⁴ DJCS, [Cultural Review of the Adult Custodial Corrections System](#) (website).

²⁰⁵ CCYP, *In our Own Words*, above note 131, p. 126; DFFH, [Making a complaint - for children and young people in out-of-home care](#) (website).

²⁰⁶ Victorian Ombudsman, [Complaints](#) (website).

²⁰⁷ CCYP, *In our Own Words*, above note 131, pp. 40, 124-129, 269-270.

²⁰⁸ *Ibid.*, p. 269.

²⁰⁹ CCYP, ['...as a good parent would...': Inquiry into the adequacy of the provision of residential care services to Victorian children and young people who have been subject to sexual abuse or sexual exploitation whilst residing in residential care](#), ("As a Good Parent Would...") (2015) Recommendation 3, p. 21.

²¹⁰ CCYP, *In our Own Words*, above note 131, p. 126.

independent, specialised child and young person-centred complaints function to receive complaints from children and young people in care.²¹¹

In 2020, the Victorian Ombudsman recommended that the Minister for Protection consider establishing an independent children’s advocacy function within CCYP to enable it to support or represent children to make complaints about their care, among other things.²¹²

RECOMMENDATIONS

Recommendation 27. The Anti-Racism Strategy must prioritise measures to strengthen independent complaints mechanisms, including through the following:

- 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.
- Establish an independent, specialised child and young person-centred complaints function to receive complaints from children and young people in care, including concerns about their immediate safety or ongoing concerns about their wellbeing while in care.
- All public authorities, including Corrections Victorian and Child Protection, should publish annual data arising from their internal complaints mechanisms, including data on complaints relating to racism.

Independent Monitoring of Police Powers

In addition to an effective police complaints system, independent monitoring of police decision-making is a crucial component of an effective oversight system, and a critical way of addressing racism within Victoria Police. Independent monitoring relies on improved record keeping practices and greater transparency about the use of ‘everyday police powers,’ which disproportionately affect Aboriginal people in Victoria. If implemented effectively, independent monitoring of police powers can enable patterns of racist behaviour and systemic racism to be identified and addressed, even where there is not an individual willing or able to make or complaint.

Failure of Existing Monitoring Schemes

There are some police powers that are currently subject to independent monitoring processes, including by IBAC and the Victorian Inspectorate.²¹³ However, existing monitoring is limited to small set of coercive and intrusive police powers, including preventative police detention and applications for a covert search warrant under the *Terrorism (Community Protection) Act 2003*. Even where

²¹¹ Ibid.

²¹² Victorian Ombudsman, [*Investigation into complaints about assaults of five children living in Child Protection residential care units*](#) (October 2020) p. 86.

²¹³ For example, the Victorian Inspectorate has monitoring functions in relation to preventative police detention, applications for a covert search warrant and use of surveillance devices. See: *Terrorism (Community Protection) Act 2003* and the *Surveillance Devices Act 1999*. IBAC monitors exercise of police powers under the *Sex Offenders Registrate Act 2004* and DNA sampling under the *Crimes Act 1958*.



independent monitoring currently exists, it is fragmented and is mostly limited to procedural, rather than substantive monitoring; that is, oversight bodies monitor compliance with reporting and other procedural requirements, rather than assessing the substance of police decision-making and resultant outcomes.²¹⁴

Powers that are currently monitored are generally powers that do not have a significant impact for Aboriginal people. For example, there is no independent monitoring of police powers that have a significant disproportionate impact on Aboriginal people and communities, such as: arresting children, rather than proceeding by way of summons²¹⁵ and/or issuing a caution or diversion;²¹⁶ arresting for certain offences eg. COVID-19 fines²¹⁷ and public intoxication;²¹⁸ inadequate police responses to family violence call outs.²¹⁹

When combined with the broken police complaints system, the lack of public reporting and independent monitoring of the use of these powers means that systemic racism and patterns of racist policing persist, with a complete lack of accountability. For example, VALS has consistently raised unlawful and punitive targeting of Aboriginal children, including in relation to bail conditions. Although it is not a criminal offence for children and young people to breach bail (as is the case for adults),²²⁰ police consistently arrest Aboriginal children for “breaching” bail conditions and detain them on remand. Often, arrests are carried out late on a Friday afternoon, meaning that there is a high risk that the child will be remanded in custody (initially in the police station, and then transferred to Parkville) until they can appear before a Magistrate on Monday morning. When queried by VALS lawyers, police often justify their actions on the basis of “teaching the child a lesson” for breaching bail conditions. This practice particularly problematic in some regional and rural areas.

Another example of a police power that is not currently subject to independent monitoring is the power to stop and search. Police searches are not generally regarded as a major or ‘intrusive’ power

²¹⁴ The Royal Commission into the Management of Police Informants highlighted problems with existing monitoring of police powers and recommended that “the Government undertake a principle-based review of the institutional and legal structures for the oversight of police powers in Victoria, to bring greater coherence to the police oversight system. *Royal Commission in the Management of Police Informants*, above note 196, pp. 234-235.

²¹⁵ The CYFA creates a presumption for police to proceed against children and young people by way of summons (not arrest); yet police regularly disregard this obligation and arrest Aboriginal children and young people. See Section 345, *Children, Youth and Families Act 2005* (Vic).

²¹⁶ Data shows that Aboriginal children and young people in Victoria are approximately twice as likely to be charged by police than cautioned. K. Shirley, ‘[The cautious approach: police cautions and the impact on youth reoffending](#),’ *In Brief: Crimes Statistics Agency*, (September 2017), p 13.

²¹⁷ A 2021 study on trends in policing targeting Aboriginal people in Victoria found that Victoria Police disproportionately stopped Aboriginal people when policing COVID offences. See L. Boon-Kuo, A. Brodie, J. Keene-McCann, V. Sentas and L. Weber, “Policing biosecurity: police enforcement of special measures in New South Wales and Victoria during the COVID-19 pandemic,” *Current Issues in Criminal Justice* (2021) Vol 33:1, 77-88, p. 80.

²¹⁸ Expert Reference Group on Decriminalising Public Drunkenness (ERG), [Seeing the Clear light of Day: Expert Reference Group on Decriminalising Public Drunkenness, Report to the Victorian Attorney-General](#) (“Decriminalising Public Drunkenness Final Report”) (August 2020), p. 25.

²¹⁹ VALS and the Centre for Innovative Justice, *The Effectiveness of the Victoria Police Complaints System for VALS Clients*, above note 197; VALS, *Submission to IBAC Inquiry*, above note 191; Victoria Police and Department of Justice, [Koori Complaints Project](#), above note 187.

²²⁰ Section 30A(3), *Bail Act 1977* (Vic).



that needs specific monitoring. Searches are, however, highly intrusive for individuals from over-policed and marginalised communities, like Aboriginal people, for whom the cumulative effect of routine searching can be very harmful. ‘Minor’ powers like police stops are also significant because everyday police activity is where deep cultural problems can develop and perpetuate themselves. There is strong evidence, for example, of a problem with racial profiling in police searches in Victoria.²²¹ This is both a symptom of systemic racism, and contributes to it by exposing new police officers to an everyday culture of racially-biased searching.

This lack of monitoring stands in contrast to the practice in the United Kingdom, as discussed above. National data on police stop and search is published annually, with breakdowns by ethnicity and geography.²²² This overall data is complemented by Stop and Search Community Monitoring Groups, which are empowered to examine individual incidents (including viewing body-worn camera footage), as well as data on stops.²²³ VALS is one of many civil society groups which have previously called for the establishment a police stops monitoring scheme in Victoria.²²⁴

Inadequate Recording-Keeping and Reporting

As noted above, there is a significant lack of data on racism and its impacts for Aboriginal communities. This is particularly true for Victoria Police, where data on both interpersonal and systemic racism is not publicly available and is not provided to an independent oversight mechanism, for the purposes of monitoring. In relation to many police powers, it is likely that the data does not even exist internally within Victoria Police, because of poor recording keeping practices.

For example, Police do record information about stops and searches in LEAP as part of their standard practice. This information is not developed into a dataset enabling monitoring of police searches. As a result, the best information on racial profiling in stop and search powers, comes from an analysis that was made available through the course of a lawsuit.²²⁵ The analysis was conducted on a limited subset of LEAP data for two suburbs more than a decade ago. Even that data was limited by the fact that police are highly inconsistent in whether they record key variables like ethnicity and country of birth, and how they do so.

²²¹ Court documents from *Haile-Michael v. Konstantinidis*, [‘Summary of Professor Gordon’s and Dr Henstridge’s First Reports’](#).

²²² UK Government, [Stop and Search](#) (website).

²²³ Mayor of London, [Stop and Search](#) (website).

²²⁴ Police Stop Data Working Group (2017), [Monitoring Racial Profiling - Introducing a scheme to prevent unlawful stops and searches by Victoria Police](#).

²²⁵ Court documents from *Haile-Michael v. Konstantinidis*, ‘Summary of Professor Gordon’s and Dr Henstridge’s First Reports’, above note 221.



Recording-Keeping and Public Reporting

Independent monitoring relies on internal recording keeping and data collection practices, as well as transparent reporting. Where data does not currently exist internally about exercise of certain police powers, there is a critical need to improve police record-keeping practices. Where the data does exist internally, internal reporting mechanisms can be leveraged into effective monitoring through the use of trend analysis of the exercise of police powers. This may not be possible in relation to major crime powers which are not frequently exercised, but for police powers that are exercised more regularly, a robust reporting requirement can create the basis for a rich dataset, which can give significant insight into whether police are conducting themselves appropriately.

Detailed data on, for example, police stops or drug testing in police custody can reveal important patterns, even without a substantive judgement about particular incidents. If data revealed a low percentage of searches or tests result in any contraband being found, that would suggest that the powers are being used inappropriately. If the data reveals a disproportionate use of these powers against Aboriginal people – which we anticipate it would – that would reveal a problem with systemic racism, and help identify particular stations or commands where that problem is particularly serious. Trend analysis based on reporting requirements can be an effective form of monitoring only if certain standards are met. The key is a high degree of transparency. Data must be published on a regular basis, not as a subject of occasional or one-off reports. It should be published in a format which enables comparison of trends over time and comparison with other data sources. The completeness of data must be guaranteed by strong reporting requirements, with penalties for police who fail to record key information.

Increase Procedural and Substantive Monitoring of Police Powers

Given the inadequacies with existing monitoring of police powers, there is clear need to increase independent monitoring of ‘everyday’ police powers, particularly powers that are used and abused to systematically target Aboriginal people, as well as those that contribute to systemic racism through disproportionate impacts on Aboriginal people.

Monitoring of police powers must be carried out by an independent body, in line with the following key principles:

- All kinds of monitoring should be conducted by an independent body, with oversight of a range of police powers, rather than being fragmented between different oversight bodies and internal Victoria Police functions.
- All types of monitoring must be highly transparent, with regular publication of reports, which do not only summarise information reported by police but analyse what it shows about the exercise of police powers. Transparency through public reporting is critical to improve the public’s confidence in policing.

- Monitoring should be both procedural as well as substantive/outcome-focused; it should include substantive review of the exercise of police powers, particularly where detailed reporting requirements provide the materials for a full assessment of decision-making.
- The practice and culture of the monitoring body must support and engage with parallel accountability mechanisms implemented through civil society.

Independent monitoring should be established in relation to a range of everyday police powers that disproportionality impact Aboriginal people, including through overtly racist policing practices that target Aboriginal people. This should include:

- Police stops and searches, arrest of children under the *Children, Youth and Families Act*, rather than proceeding by way of summons²²⁶ – as discussed above.
- *Move-on orders*²²⁷ – these powers give police a significant amount of discretion, making space for biased enforcement. Requiring recording of (at least) Aboriginality, race, gender, and the reason for the order would enable monitoring of whether powers are being used discriminatorily.
- *Any new police powers relating to public drunkenness* – when the decriminalisation of public drunkenness takes effect, police callouts relating to inebriation should be subject to strict recording requirements, to enable monitoring of whether police are contravening the purpose of public drunkenness reforms, by laying other types of charges or misusing any powers (eg. to transport) granted under the reforms.²²⁸
- *Powers under the Mental Health Act* – similarly to public drunkenness, police involvement in mental health crisis incidents should be strictly limited, and the exercise of any powers under the *Mental Health Act*²²⁹ (including powers under the new Act) should be monitored.
- *Charges against children in OOHC* – Victoria Police has made commitments under the *Framework to reduce criminalisation of young people in residential care*.²³⁰ Requiring detailed reporting before and after any arrests or charges would help prevent unnecessary police contact, and allow monitoring of whether police commitments are being met.
- *Cautioning* – cautions for young people play an important role in reducing unnecessary contact with the criminal legal system and avoiding the risk of further offending. Regularly published statistics would enable monitoring of whether police commitments to expand the use of cautions are being met.
- *Diversion* – diversion offers an important alternative to criminal prosecution for many offences and can help reduce reoffending and incarceration rates. At present, police consent is required for a person charged with an offence to enter a diversion program. Police should be required to prepare reports whenever this consent is not given, enabling monitoring of aggregate consent rates and substantive review of a sample of individual decisions.

²²⁶ Section 345, *Children, Youth and Families Act 2005* (Vic). See above note 215.

²²⁷ Section 6, *Summary Offences Act 1966* (Vic).

²²⁸ ERG, [Decriminalising Public Drunkenness Final Report](#), above note 218, Recommendation 28, p. 7.

²²⁹ Section 351, *Mental Health Act 2014* (Vic).

²³⁰ DHHS, [Framework to reduce criminalisation of young people in residential care](#) (2020).

- *Use of weapons at rallies/protests (rubber bullets, OC spray, armoured vehicles etc.)* – police should be required to prepare written reports explaining why the use of this equipment was required and demonstrating that all alternatives were properly considered. These reports should be audited for accuracy and consistency with the public record and, in some cases, subjected to substantive review.
- *Treatment in police custody, including use of force, drug testing, strip searching* – people in police custody are particularly vulnerable to physical harm and traumatisation by police decisions. Documenting of actions such as the use of force, drug testing and strip searching would enable the monitoring body to assess whether these measures are being overused.
- *Medical care in police custody* – people in custody are entirely dependent on police decision-making for their medical needs to be met. There should be thorough documentation and monitoring of police decisions about contacting a doctor, calling an ambulance, or decisions not to seek medical assistance when a person in custody has requested it.
- *Police bail* – documentation of decisions about whether to grant police bail should facilitate regular publication of statistics about how often bail is being denied, whether bail denials are disproportionately affecting Aboriginal people, and how often people in custody are subsequently granted bail by a magistrate or bail justice. The decrease in bail being granted by police or a bail justice has been a major factor in Victoria’s increasing incarceration rate and more effective monitoring of bail is crucial to understand and address the causes of this problem.
- *Custody Notification Service (CNS), bail justice, Aboriginal Community Justice Panels (ACJP), Independent Third Person services and Youth Referral and Independent Person Program (YRIPP) services* – people in custody have a right to various supports including notification to VALS’ CNS for Aboriginal people, access to a bail justice, and support from an Independent Third Person for those with cognitive disabilities, the ACJP and YRIPP. Regular statistics should be published on the number of requests for these supports and the time taken to provide them, broken down by Aboriginal status and by police station.

RECOMMENDATIONS

Recommendation 28. The Anti-Racism Strategy must prioritise measures to strengthen independent monitoring of police powers, including through the following:

- *Enhance recording keeping and data collection within Victoria Police:* Victoria Police should be required by legislation to keep records in relation to the exercise of specific police powers and provide disaggregated data to an independent body for the purposes of monitoring.
- *Increase transparency* through public reporting on exercise of police powers, both by Victoria Police and an independent monitoring body.
- *Increase Aboriginal controlled data and Aboriginal led research* on racism within Victoria Police.

- *Procedural and substantive monitoring of police powers by an independent oversight body*, including the following police powers that are used disproportionately against Aboriginal people:
 - Any new police powers relating to public drunkenness
 - Police stops and searches
 - Move-on orders
 - Powers under the *Mental Health Act*
 - Charges against children in out-of-home care (OOHC)
 - Arrest of child or young person rather than proceeding by way of summons
 - Cautioning
 - Diversion
 - Use of weapons at rallies/protests (rubber bullets, OC spray, armoured vehicles etc.)
 - Use of force during arrest
 - Treatment in police custody, including use of force, drug testing, strip searching and provision of medical care
 - Police use of Custody Notification Service (CNS), bail justices, Aboriginal Community Justice Panels (ACJP), Independent Third Person services and Youth Referral and Independent Person Program (YRIPP).
 - Police bail decisions.

Strengthen Accountability for Protection of Cultural Rights in Child Protection

As noted above, there are serious and well-documented concerns regarding the capacity of Child Protection to respect, protect and fulfil Aboriginal cultural rights for Aboriginal children and families in contact with the child protection system. In particular, this includes a lack of compliance with legislative requirements relating to the Aboriginal Child Placement Principle (ACPP) (including engagement with *Lakidjeka – Aboriginal Child Specialist Advice and Support Services ACASS*),²³¹ Aboriginal Family-Led Decision Making (AFLDM),²³² and Cultural Support Planning (CSP).²³³

Concerns about non-compliance and the lack of transparency and accountability have been raised consistently, including by VALS, the CCYP²³⁴ and VLA.²³⁵ Yet still, there are serious problems with non-compliance, and a fundamental lack of oversight to ensure accountability for child protection decisions.

²³¹ Section 13, *Children, Youth and Families Act 2005* (Vic).

²³² Department policy requires that an AFLDM conference is held where 'protective concerns have been substantiated' or where an Aboriginal child or young person is subject to a protection order. See DHHs, *Aboriginal family-led decision: initiating an AFLDM meeting – practitioner's responsibilities* (2019), cited in CCYP, *In Our Own Words*, above note 131, p. 96.

²³³ Section 176, *Children, Youth and Families Act 2005* (Vic).

²³⁴ CCYP, *In the Child's Best Interests*, above note 131; CCYP, *Always Was, Always Will Be Aboriginal Children*, above note 131.

²³⁵ VLA, *Achieving Safe and Certain Homes for Children*, above note 148.



The following recommendations have been put forward previously to enhance oversight and accountability:

- Enhanced recording processes and practices. For example, to develop a mechanism to make it mandatory that staff responsible for placement decisions record evidence of why placement was not made at each higher level of the ACPP placement hierarchy.²³⁶
- Data collection and public reporting on compliance with requirements, including in the Department’s Annual Report;²³⁷
- Independent monitoring of compliance with relevant requirements;
- Strategies and oversight mechanisms; for example, to ensure high-quality CSPs are developed, implemented, monitored, reviewed and updated in a timely manner;²³⁸
- Involving the Aboriginal community in reviewing the cultural competency of a CSP;²³⁹
- Incorporating accountability and performance measures for improved outcomes for Aboriginal children, into the individual performance plans of operational DHHS Deputy Secretaries;²⁴⁰
- Support and holding CP staff accountable for completing their mandatory responsibilities to confirm Aboriginality;²⁴¹
- Place a greater level of accountability on CP staff when a kinship placement is made that is not at the highest level of the ACPP placement hierarchy.²⁴² VLA has also recently recommended the introduction of oversight mechanisms to ensure compliance with the ACPP;²⁴³
- Review and amendment of all pro formas, templates and reporting documents to include provisions relating to compliance with all legislative requirements.²⁴⁴

VALS supports these recommendations, and notes that although many of them were made in 2016, they have still not been implemented. For example, the Department has still not developed or implemented a mechanism to accurately measure “regular reporting or external review of the system’s compliance with the intent of the ACPP.”²⁴⁵

Additionally, we believe there is a critical need for increased judicial oversight of child protection decisions. Currently, whilst the Children’s Court determines key aspects of the Care and Protection Order, it does not have oversight over many aspects, including, for example, the placement for a child who is in OOHC. According to VLA’s report on permanency amendments, there is a need to improve

²³⁶ CCYP, *In the Child’s Best Interests*, above note 131, Recommendation 33.

²³⁷ CCYP, *Always Was, Always Will Be Koori Children*, above note 131, Recommendation 6.7.

²³⁸ *Ibid.*, Recommendation 4.7. VLA has also recently recommended the introduction oversight mechanisms to ensure compliance with the requirement for cultural support planning. See VLA, *Achieving Safe and Certain Homes for Children*, above note 148, p. 27.

²³⁹ CCYP, *Always Was, Always Will Be Koori Children*, above note 131, Recommendation 5.5

²⁴⁰ *Ibid.*, Recommendation 6.1.

²⁴¹ CCYP, *In the Child’s Best Interests*, above note 131, Recommendation 11.

²⁴² *Ibid.*, Recommendation 36.

²⁴³ VLA, *Achieving Safe and Certain Homes for Children*, above note 148, p. 27.

²⁴⁴ *Ibid.*, Recommendation 6.16.

²⁴⁵ CCYP, *In Our Own Words*, above note 131, p. 97.



court oversight and discretion to allow the court to make conditions on any protection orders, and name a placement on an order.²⁴⁶

Additionally, experience and evidence has demonstrated better compliance with requirements relating to ACPP, CSP and AFLDM when the child is managed by an Aboriginal organisation. As noted above, concrete realisation of the right to self-determination is one of the most powerful ways of addressing systemic racism, and this must include transfer of more Aboriginal children into the care of Aboriginal organisations.

Finally, as per the recommendations above relating to accessible and timely data, there must be mechanisms in place to ensure public reporting by Child Protection on all aspects of the child protection system where Aboriginal children and young people are over-represented.

As the lack of accountability continues, the over-representation of Aboriginal children at all stages of the child protection system also continues to increase. In 2021, Victoria had the second highest rate of over-representation of Aboriginal children in OOHC out of any State or Territory in Australia.²⁴⁷ This is one of the clearest indications of systemic racism in Victoria.

Accountability for complying with legislative requirements relating to Aboriginal children's cultural rights must be strengthened as a matter of urgency. The Anti-Racism Strategy must address this ongoing problem, including through measures to enhance recording, reporting, monitoring and independent oversight of child protection decisions, including judicial oversight.

RECOMMENDATIONS

Recommendation 29. The Anti-Racism Strategy must prioritise measures to increase compliance with legislative requirements relating to the Aboriginal Child Placement Principle (**ACPP**) (including engagement with *Lakidjeka - Aboriginal Child Specialist Advice and Support Service ACSASS*), Aboriginal Family-Led Decision Making (**AFLDM**) and Cultural Support Planning (**CSP**). This should include:

- Judicial oversight of child protection decisions that are currently considered to be administrative decisions and are not determined or regulated by the Court; for example, the name of the placement;
- Enhanced recording, data collection and public reporting on compliance with relevant legislative requirements, including in the annual report of DFFH;
- Independent monitoring of compliance with relevant legislative requirements;

²⁴⁶ VLA, *Achieving Safe and Certain Homes for Children*, above note 148, p. 26.

²⁴⁷ SNAICC, the Family Matters Campaign and the University of Melbourne, *Family Matters Report 2021: Measuring Trends to Turn the Tide on the Over-Representation of Aboriginal and Torres Strait Islander Children in Out-of-Home Care in Australia* (2021), p. 25.

- Strategies and oversight mechanisms to ensure high-quality CSPs are developed, implemented, monitored, reviewed and updated in a timely manner;
- Aboriginal led monitoring and evaluation of relevant policy frameworks, including the VAAF, Closing the Gap Implementation Plan and *Wungurilwil Gapgapduir: Aboriginal Children and Families Agreement*;
- Hold Child Protection staff accountable for completing their mandatory responsibilities to confirm Aboriginality, and comply with requirements arising from the ACPP, CSP, AFLDM;
- Incorporate accountability and performance measures for improved outcomes for Aboriginal children, into the individual performance plans of operational DHHS Deputy Secretaries.

Independent Coronial Investigations

All deaths in police custody²⁴⁸ are subject to a mandatory coronial inquest, and other police contact deaths may also trigger a coronial investigation and inquest, depending on the circumstances.²⁴⁹ Coronial investigation of police contact deaths is carried out by a police officer (“the Coronial Investigator”), on behalf of the Coroner, and is usually carried out by the Homicide Squad²⁵⁰ with support and oversight from the Police Coronial Support Unit (**PCSU**).²⁵¹ The role of the police in preparing the coronial brief, and the relationship between the Coroner and the police officer is not clearly regulated under legislation.²⁵²

As outlined above, police investigating police fundamentally undermines international law and principles. This is particularly the case for police-related injuries and police contact deaths, where the right to life and the right to an effective remedy under international human rights law²⁵³ and the Victorian Charter²⁵⁴ require an independent investigation. The United Nations Human Rights

²⁴⁸ Under the *Coroners Act 2008* (Vic), when a person dies in police custody, the death must be reported to the Coroner and a coronial investigation and inquest into the death is mandatory (ss. 4 and 11). The purpose of the coronial investigation and inquest is to establish the identity, cause and circumstances of the death and contribute to a reduction in the number of preventable deaths (s 1(c)). A coronial inquest is not required if a person has been charged with an indictable offence in respect of the death (s. 52(3)(b)). The coronial inquest may result in the matter being referred to the Director of Public Prosecution for a criminal investigation (s. 72).

²⁴⁹ Under the *Coroners Act 2008* (Vic), when a person dies in connection with a police operation (but not in police custody), the death must be reported to the coroner (s. 4) and the coroner may carry out an investigation and possibly an inquest, depending on the circumstances.

²⁵⁰ See Victorian Police Manual (VPM), ‘Death or Serious Injury/Illness incidents involving police.’

²⁵¹ The Police Coronial Support Unit (PCSU) is staffed by members of Victoria Police who assist coroners with their investigations into deaths and fires. The PCSU can attend scenes at the request of the coroner, provides coronial briefs of evidence for the coroner and supports Victoria Police members who are investigating matters on behalf of a coroner.

²⁵² Under Section 59 of the *Victoria Police Act 2013* (Vic), a police officer may assist a coroner in the investigation of a death. The role of police in preparing the coronial brief is set out under: State Coroner, *Practice Direction 3 of 2021* (“Police Contact Deaths”).

²⁵³ Article 6, *International Covenant on Civil and Political Rights* (ICCPR); Article 14, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).

²⁵⁴ Section 9, *Charter of Human Rights and Responsibilities Act 2006* (Vic).



Committee (UNHRC) has found internal investigations by Victoria Police into alleged human rights abuses by police are in breach of the *International Covenant on Civil and Political Rights*.²⁵⁵

While previous inquiries have noted concerns with the current coronial process and recommended that the investigating coroner be given authority under the *Coroners Act 2008* to direct the police investigation,²⁵⁶ this is not enough to meet international requirements for an independent investigation.

In addition to the lack of independence, there are often serious deficiencies in the coronial investigations carried out by police. This includes failures to preserve critical evidence, poor exercise of discretion regarding the investigation and “an alarming lack of rigour.”²⁵⁷

Practice Direction 6 of 2020 (“Indigenous Deaths in Custody”) of the Coroners Court addresses some of these concerns by requiring, where practicable, that the State Coroner and/or delegate (such as the duty coroner) immediately attend the scene of the death, when an Aboriginal person dies in custody.²⁵⁸ Moreover, the investigating coroner should contact the coroner’s investigator at the earliest opportunity to determine appropriate arrangements for the collection of time-critical evidence (such as CCTV footage).²⁵⁹ Although the Direction applies specifically to Aboriginal deaths in custody, coroners are encouraged to apply the Direction in relation to all Aboriginal deaths that are subject to a coronial investigation and possibly an inquest.²⁶⁰ This direction is an important development and has contributed to enhancing the quality of recent investigations.

Additionally, *Practice Direction 3 of 2021* (“Police Contact Deaths”) provides that “the investigating coroner as soon as reasonably practicable will refer the matter to the In-House Legal Service (IHLS) to take carriage of and assist the investigating coroner at all stages of the investigation (from inception to closure).” It also provides that “under no circumstances are the Police Coronial Support Unit (PCSU) to take carriage of or have any substantive involvement in the investigation of a *police contact death*.”²⁶¹ However, even when In-house legal counsel (IHLC) has carriage of a matter, they still rely on police officers (usually from the Homicide Squad) to do the investigatory work.

²⁵⁵ UN Human Rights Committee, Views: Communication No. 1885/2009 (5 June 2014), 110th sess (*Horvath v Australia*).

²⁵⁶ RCIADIC National Report, Volume 5, above note 23, Recommendation 29; Parliament of Victoria, *Inquiry into the Review of the Coroners Act 1985* (2006), Recommendation 42; *Inquest into the Death of Tanya Day*, above note 72, Recommendation 2, p. 107. In 2011, the OPI carried out a review of the investigative process following a death associated with police contact, and recommended that: “That the Victorian Government consults with key stakeholders regarding an optimal legislative framework for the investigation and oversight of deaths associated with police contact in Victoria.” See OPI, [Review of the investigative process following a death associated with police contact](#) (“Review of police contact death investigations”) 2011, Recommendation 3, p. 16.

²⁵⁷ See for example, *Inquest into the Death of Raymond Noel Lindsey Thomas*, above note 13, p. 28. The coroner criticised the independent police investigation for an “alarming lack of internal rigour,” para. 148.

²⁵⁸ State Coroner, *Practice Direction 6 of 2020*, above note 186, para 3.1.

²⁵⁹ *Ibid.*, para 3.4.

²⁶⁰ *Ibid.*, para 1.5.

²⁶¹ *Practice Direction 3 of 2021*, above note 252, paras 3.1 and 3.2.



Additionally, Aboriginal families have raised concerns with VALS regarding police practice and approaches when taking statements from family member. Often, family members are required to give statements in the days immediately following the passing of their loved one, even when there are no clear reasons for the statement to be provided so quickly (eg. for reasons related to freshness of evidence). In some cases, family members have been required to wait in police stations for hours to give their statements and have received inappropriate direction from police officers on what they should include in their statement.

In response to some of these concerns, *Practice Direction 6 of 2020* provides that the investigating coroner will ensure that the coroner's investigator is contacted at the earliest possible opportunity to determine appropriate arrangements for "obtaining statements (such as to facilitate witness interviews being held in a location other than a police station, or for the presence of support persons at interviews of family members where requested)."²⁶² To ensure the evidence gathering process does not unnecessarily retraumatise a client, and is done at a time that works best for them, VALS has also started taking client statements for the Coroner in recent inquest matters.

Practice Direction 6 of 2020 is a welcome development that can help to alleviate some of the trauma experienced by Aboriginal family members in the days immediately following the death of their loved one. However, it does not address the fundamental issue of police carrying out investigations, including the well-founded distrust that Aboriginal communities have of police, and their ongoing experiences of systemic racism.

To address the concerns raised above, coronial investigations into the death of an Aboriginal person in police custody or as a result of a police operation must not be carried out by police. They must be carried out by a specialist civilian investigation team that is independent from police,²⁶³ is culturally appropriate and includes Aboriginal staff and leadership.

There are a number of options for independent coronial investigations, including the models identified below. Whichever model is preferred, the voices of Aboriginal families whose loved ones have died in police custody or as a result of a police operation must be centred.

- An independent Aboriginal-led body to investigate Aboriginal deaths in custody: this was recommended by the Jumbunna Institute in its submission to the NSW Parliamentary Inquiry into high level of First Nations People in Custody and Oversight and Review of Deaths in Custody.²⁶⁴

²⁶² *Practice Direction 6 of 2020*, above note 186, para 3.4.

²⁶³ Federation of Community Legal Centres (FCLC), [*Effective, Transparent, Accountable: An independent system to investigate police-related deaths in Victoria*](#) ("Effective, Transparent, Accountable") (2011); Police Accountability Project, [*Independent Investigation of Complaints against the Police – Policy Briefing Paper*](#) ("Independent Investigations") (2017); T. Hopkins, [*An Effective System for Investigating Complaints Against Police: A Study on Human Rights Compliance in Police Complaint Models in the US, Canada, UK, Northern Ireland and Australia*](#) (2009), p. 7.

²⁶⁴ Jumbunna Institute of Education and Research, Research Unit, [*Submission to the Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody*](#), 7 September 2020, para 144.

- A specialised investigation team at the Coroners Court and an independent investigations office for all police contact deaths and serious injuries. This is the case in British Columbia, Canada where:
 - The Independent Investigations Office (**IIO**) conducts investigations into all police-related incidents resulting in death or serious harm to determine whether any offences have been committed;²⁶⁵
 - The Special Investigations Unit (**SIU**) at the BC Coroners Service, which includes a Special Investigations Coroner who provide specialised knowledge and expertise for police-involved deaths.²⁶⁶
- A specialised team at the independent police complaints body: This is the case in Northern Ireland, where the Police Ombudsman of Northern Ireland (**PONI**) investigates all deaths where police appear to be involved or implicated, for the purposes of determining whether any criminal or disciplinary offences have occurred as well as to prepare a brief for the coronial proceeding and make recommendations to this inquiry.²⁶⁷ Similarly, the independent police complaints body for England and Wales, the Independent Office for Police Conduct (**IOPC**), investigates all deaths where the person had direct or indirect contact with police at the time of, or shortly before their death, and the investigation report is shared with the coroner.²⁶⁸

The coronial investigation is in addition to the immediate independent investigation of all police contact deaths and serious injuries for criminal and disciplinary purposes, discussed above. Any model for independent coronial investigations should attempt to minimise duplication and, in particular, avoid repeated re-questioning of family members. This can be achieved either by having a coronial brief prepared by the team that conducts the criminal investigation (the third model above) or by facilitating information-sharing.

In addition to independent coronial investigations, there must also be a robust oversight mechanism for implementation of coronial recommendations relating to police contact deaths. The Government should establish an Aboriginal Social Justice Commissioner to perform this function, and the Commissioner should also provide oversight for implementation of recommendations from the RCIADIC and other Aboriginal justice outcomes in Victoria.

RECOMMENDATIONS

Recommendation 30. Coronial investigations into police-contact deaths must not be carried out by police. They must be carried out by a specialist civilian investigation team that is independent from police, is culturally appropriate and includes Aboriginal staff and leadership.

²⁶⁵ Independent Investigations Office (IIO), 'What We Do.'

²⁶⁶ BC Coroners Service, 'Special Investigations Unit.'

²⁶⁷ FCLC, *Effective, Transparent, Accountable*, above note 263, p. 8.

²⁶⁸ Independent Office for Police Contact (IOPC) 'What We Investigate and Next Steps,' (website)



Recommendation 31. The Government should consult with the families of Aboriginal people who have died in custody regarding the mechanism for independent coronial investigation of police-contact deaths.

Recommendation 32. Family members of an Aboriginal person who has died in police custody should be given the option of providing a statement through the Koori Engagement Unit at the Coroners Court or VALS lawyers.

Aboriginal Social Justice Commissioner

The Aboriginal Justice Caucus (**AJC**) has repeatedly called for an Aboriginal Social Justice Commissioner (**ASJC**), to oversee Aboriginal justice outcomes in Victoria. Independent oversight by an Aboriginal person with an independent and authoritative voice is seen by the Aboriginal community as the next logical step in progressing self-determination in a practical and meaningful way. In particular, the ASJC would have oversight of implementation of RCIADIC recommendations in Victoria, as well as recommendations arising from coronial inquests into the deaths of Aboriginal people.

The creation of an ASJC was first recommended by the Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody in 2005. Since then, establishing an independent and well-resourced ASJC has been, and continues to be, a priority for VALS and the AJC.

Precedent for an Aboriginal Commissioner already exists in Victoria; for example, the Victorian Commissioner for Aboriginal Children and Young People which was created in 2013 to provide independent scrutiny and oversight of services for Aboriginal children and young people, particularly those in OOHC, child protection and youth justice systems; and the Victorian Treaty Advancement Commissioner, which was created in 2018 to engage with Aboriginal communities about their aspirations for Treaty or Treaties and to establish the Aboriginal Representative Body (The First People's Assembly of Victoria).

RECOMMENDATIONS

Recommendation 33. The Anti-Racism Strategy should include a commitment to establish an independent, statutory office of the Aboriginal and Torres Strait Islander Social Justice Commissioner. 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.

Culturally Appropriate OPCAT Implementation

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)*.²⁶⁹

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.²⁷⁰ Legislative processes are currently underway in Tasmania and South Australia to designate their respective NPMs. Very little progress has been made in Victoria.²⁷¹

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 2019.²⁷² The Victorian Government had not responded to the Ombudsman's recommendation to establish, and properly resource, a NPM in Victoria.²⁷³ 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."²⁷⁴

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 2021-2025.²⁷⁵ This is woefully inadequate, and VALS is concerned that this once in a generation opportunity is being squandered.

²⁶⁹ 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.

²⁷⁰ 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 lock-ups). See Commonwealth Ombudsman, *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)*, (2019), p. 3.

²⁷¹ Lachsz, [Dragging its feet on torture prevention: Australia's international shame](#) (December 2021)

²⁷² Victorian Ombudsman, *Inspection of DPFC*, above note 129; Victorian Ombudsman, *Investigation of practices related to solitary confinement of children and young people*, above note 161, p. 61.

²⁷³ Victorian Ombudsman, *Ombudsman's Recommendations – Third Report* (2020), p. 14.

²⁷⁴ *Ibid.*, p. 14.

²⁷⁵ VALS, ['This International Day in Support of Victims of Torture, the Andrews Government must do better on OPCAT'](#) (1 July 2021)



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.²⁷⁶ 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.²⁷⁷

According to the Commonwealth Government, OPCAT will initially be implemented in Australia in “primary places of detention” including police lock-up or police station cells (where people are held for equal to, or greater than, 24 hours).²⁷⁸ VALS strongly disagrees with the narrow approach being proposed by the Commonwealth Government. As noted by the Australian Human Rights Commission, OPCAT does not permit any temporal limit – such as a minimum time in custody – to be imposed on when oversight obligations are engaged.²⁷⁹ OPCAT implementation in Victoria must include all police places of detention. This will provide for routine visits to police cells and vehicles to ensure that conditions are adequate and that people’s rights and welfare are being protected.

VALS takes this opportunity to reiterate the recommendations that it has made previously. The Victorian Government must be transparent and provide a public update on its progress in implementing OPCAT. VALS and the Aboriginal Justice Caucus expect the Victorian Government to engage in robust consultations in developing an appropriate model and legislation for Victoria.

You can find out more about OPCAT from VALS’ [OPCAT factsheet](#) and [Unlocking Victorian Justice webinar](#), *OPCAT: An opportunity to prevent the ill-treatment, torture and death of Aboriginal and Torres Strait Islander people in custody*. VALS’ Head of Policy, Communications and Strategy also completed a [Churchill Fellowship on culturally appropriate OPCAT implementation for Aboriginal and Torres Strait Islander people](#).

RECOMMENDATIONS

Recommendation 34. 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.

²⁷⁶ Commonwealth of Australia, [Commonwealth Closing the Gap Implementation Plan](#), (2021) 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%).

²⁷⁷ Ibid., pp. 152 and 157.

²⁷⁸ G Brandis, *2017 DFAT-NGO Forum on Human Rights*, Canberra, 9 February 2017, cited in Commonwealth Ombudsman, [Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment \(OPCAT\)](#), September 2019, p. 5.

²⁷⁹ AHRC, [Implementing OPCAT in Australia](#) (2020).

Recommendation 35. 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 36. The Victorian Government must legislate for the NPM's mandate, structure, staffing, powers, privileges and immunities.

Recommendation 37. 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 all police places of detention, residential care facilities, forensic mental health hospitals and other places where people with cognitive disabilities are deprived of their liberty.

Recommendation 38. The Victorian and Commonwealth Governments must ensure that the NPM is sufficiently funded to carry out its mandate effectively.

Culturally Safe Legal Assistance and Community Legal Education

Many Aboriginal people who experience racism do not seek legal recourse because they are not aware of their rights and legal options, and because they are unable to access culturally safe legal assistance. The need to provide culturally safe and competent legal representation to Aboriginal people who have experienced racism cannot be understated.²⁸⁰

In 1991, the RCIADIC made a series of recommendations relating to funding of Aboriginal organisations, including:

- Implementing a system whereby Aboriginal communities and organisations are provided with a minimum level of funding on a triennial basis;²⁸¹
- Governments ensure that Aboriginal communities and organisations are given prompt advice as to decisions concerning funding applications and as to financial and other matters relevant to the assessment of applications for funding made by those organisations and communities, so as to enable those organisations and communities to make appropriate planning decisions.²⁸²

The continued lack of funding for ACCOs is a serious impediment for the right to self-determination. While Aboriginal peoples have a right to financial and technical assistance from States to enjoy the rights enumerated in the UNDRIP,²⁸³ issues concerning the funding and resourcing of Aboriginal

²⁸⁰ F. Allison, C. Cunneen and M. Schwartz, *Submission to the Select Committee on First Nations People in Custody in New South Wales: Inquiry into First Nations people in custody in New South Wales*, (2020) pp. 9-11

²⁸¹ *Ibid.*, Recommendation 190.

²⁸² *Ibid.*, Recommendation 196.

²⁸³ Article 39, UNDRIP.



organisations and institutions have been highlighted by United Nations human rights bodies in criticisms of the Commonwealth Government,²⁸⁴ and concerns about under-funding have also been repeatedly identified by VALS and other ACCOs.²⁸⁵ 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.

ACCOs, by their very nature, are capable of providing culturally safe and competent services to Aboriginal families. Aboriginal legal services, in particular, are capable of providing Aboriginal families with the ‘wraparound support’ required throughout a legal process.²⁸⁶

The Anti-Racism Strategy must prioritise measures to ensure that Aboriginal people who have experienced racism are able to access culturally-safe legal assistance and other services. In particular, VALS should receive funding to provide legal assistance and representation to individuals who have experienced racism, including in the following areas:

- Complaints and/or civil litigation under the RRTA and EOA;
- Legal assistance for incarcerated people, including in relation to prison complaints, disciplinary processes and parole applications;
- Applications under the new Spent Convictions Scheme;
- Police complaints;
- Coronial investigations and inquests;
- Stolen Generation Redress Scheme;
- Individuals engaging with the Yoo-rrook Commission.

RECOMMENDATIONS

Recommendation 39. The Anti-Racism Strategy should include measures to increase access to culturally safe legal assistance and support for Aboriginal people who have experienced racism, including funding to VALS to provide legal assistance, representation and wrap around support in relation to:

- Coronial investigations and inquests;

²⁸⁴ 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.

²⁸⁵ See, for example, VALS, [Submission to the Royal Commission into Victoria’s Mental Health System](#) (July 2019), Recommendations 7- 10; VALS, [Submission to the Victorian Law Reform Commission Project: Improving the Response of the Justice System to Sexual Offences](#), Recommendations 1 and 3 (March 2021); VALS, [Building Back Better: Victorian Aboriginal Legal Service COVID-19 Recovery Plan](#) (February 2021), Recommendations 1 and 5-11.

²⁸⁶ Aboriginal Legal Service (NSW/ACT) Limited, [Inquiry into high level of First Nations people in custody and oversight and review of deaths in custody](#) (2020) pp. 33-34.

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- Police complaints;
 - Spent Convictions;
 - Stolen Generation redress Scheme
 - Racial discrimination and vilification
 - Prison complaints;
 - Parole applications for Aboriginal people serving sentences
 - Disciplinary proceedings for Aboriginal people who are incarcerated.

Recommendation 40. The Anti-Racism Strategy should include measures to increase awareness about legal rights and remedies for individuals who have experienced racism, including funding to VALS to develop and provide community legal education (CLE) on the following topics:

- The new Spent Convictions Scheme;
- Anti-vilification laws;
- The rights of incarcerated people (including CLE sessions in prisons);
- Police powers, interacting with police and police complaints;
- The Stolen Generation Redress Scheme.

Robust Monitoring and Evaluation for the Anti-Racism Strategy

As highlighted throughout this submission, there are a multitude of laws, regulations, polices and operational level frameworks which seek to address racism in varying ways. Many of the concerns raised in this submission relate to non-compliance with existing requirements, including lack of progress in implementing existing policy and legislative commitments, and a lack of accountability for this non-compliance. It is essential that the Anti-Racism Strategy does not operate as another bureaucratic framework that fails to achieve concrete outcomes for people and communities who experience racism.

To ensure accountability for implementing the Anti-Racism Strategy, there must be a robust monitoring and evaluation framework which includes:

- Regular and publicly available reporting on implementation of the Strategy: all government authorities with responsibilities under the Strategy must be required to report regularly on progress in implementing their obligations (eg. in their own Annual Reports and on their websites). Reporting must be outcome focused.
- Internal oversight within Government: DPC should have responsibility for following up with all departments and agencies regarding implementation of the Strategy. They should coordinate an annual report to be tabled in Parliament on overall progress in implementing the Strategy, and should include input from Aboriginal communities and organisations.
- Independent review of progress in implementing the Strategy: This must include input from Aboriginal communities, and/or independent oversight by the Aboriginal Social Justice Commissioner.



RECOMMENDATIONS

Recommendation 41. The Anti-Racism Strategy must have a robust monitoring and evaluation framework which includes:

- *Regular and publicly available reporting on implementation of the Strategy:* all government authorities with responsibilities under the Strategy must be required to report regularly on progress in implementing their obligations (e.g. in their own Annual Reports and on their websites). Reporting must be outcome focused.
- *Internal oversight within Government:* DPC should have responsibility for following up with all departments and agencies regarding implementation of the Strategy. They should coordinate an annual report to be tabled in Parliament on overall progress in implementing the Strategy, and should include input from Aboriginal communities and organisations.
- *Independent review of progress in implementing the Strategy.* This must include input from Aboriginal communities, and/or independent oversight by the Aboriginal Social Justice Commissioner.

APPENDIX A: PUBLICLY AVAILABLE DATA ON ABORIGINAL PEOPLE’S EXPERIENCES OF RACISM

<p><u>Racial discrimination and vilification</u></p>	<p>Racial discrimination and vilification</p>	<ul style="list-style-type: none"> • In 2012, a VicHealth report into the mental health impacts of discrimination in Victorian Aboriginal communities found that 97% of the 755 Aboriginal Victorians surveyed had experienced racism in the previous 12 months. Over 70% had experienced 8 or more racist incidents, and many reported experiencing serious vilification. A total of 67% reported being spat at, having an object thrown at them, being hit or threatened to be hit on the basis of their race.²⁸⁷ • In 2017, a report by DHHS found that Aboriginal Victorians are likely to experience racism, and that racism is a significant health risk factor for both mental and physical health.²⁸⁸ • A 2019 study analysis data from the Victorian Population Health Surveys found that Aboriginal Victorian adults were four times more likely to have experienced racism in the preceding 12 months than the broader public, and seven times more likely in comparison to adults of Anglo-Celtic origin.²⁸⁹ • In 2017–18, approximately one in four complaints raised with the Australian Human Rights Commission in relation to offences under the <i>Racial Discrimination Act 1975</i> (Cth) were made by complainants who identified as Aboriginal or Torres Strait Islander.²⁹⁰ • In 2019–2020, 17% of complaints relating to the RDA were from complainants who identified as Aboriginal and/or Torres Strait Islander.²⁹¹ • According to the 2019 report on the State of Victoria’s Children: Aboriginal Children and Young People, “experiences of racism and discrimination also continue to negatively impact physical and mental health.”²⁹²
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²⁸⁷ VicHealth, Mental health impacts of racial discrimination in Victorian Aboriginal communities: Experiences of Racism Survey: A Summary, 2012, p. 2, cited in Parliamentary Inquiry report, p. 28.

²⁸⁸ Department of Health and Human Services, Racism in Victoria and what it means for the health of Victorians, Victorian Government, Melbourne (2017) p. 13.

²⁸⁹ Markwick, A., Ansari, Z., & McNeil, J. (2019). *Experiences of racism among Aboriginal and Torres Strait Islander adults living in the Australian state of Victoria: a cross-sectional population-based study*. BMC Public Health, 19(309).

²⁹⁰ Australian Human Rights Commission, 2017 – 2018 Complaint statistics, 2018., Table 12: Indigenous status of complaints, cited in Parliamentary Inquiry report, p. 28.

²⁹¹ Australian Human Rights Commission, 2019 – 2020 Complaint statistics, 2019, Table 12, Indigenous status of Complainants, p. 12.

²⁹² Department of Education and Training, [2019 The State of Victoria’s Children: Aboriginal Children and Young People](#) (2021) p. 15.



		<ul style="list-style-type: none"> - “In 2014-15, 37.1 per cent of Aboriginal Victorians aged 15 to 24 reported having experienced unfair treatment in the past 12 months because of being Aboriginal.”²⁹³ - Analysis of data from the Victorian Population Health Survey, which provides information on Victorian adults, found that Aboriginal people were among the groups most likely to experience racism, and that frequent experiences of racism were associated with significantly increased risks of poor physical and mental health.
	<p>Inadequacy of current anti-vilification laws</p>	<ul style="list-style-type: none"> • Of the approximate 16 cases that proceeded to a hearing under the <i>Racial and Religious Tolerance Act (RRTA)</i> since it was enacted in 2001, only 2 have been successful.²⁹⁴ • The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) indicates that there has only been one successful prosecution of serious vilification: in 2017 three men were convicted in the Melbourne Magistrates’ Court, of inciting serious religious vilification of Muslims by staging a mock beheading to protest the building of a mosque in Bendigo.
<p><u>Racism within Victoria Police</u></p>	<p>Explicitly racist policing</p>	<ul style="list-style-type: none"> • In 2021, the CCYP Inquiry into over-representation of Aboriginal Children and Young People in the Victorian Youth Justice System (“Our Youth Our Way”) found that over 70% of Aboriginal children and young people consulted throughout the Inquiry spoke about racism, violence or mistreatment by police; 25 Aboriginal children mentioned racism and racial abuse in the context of police interactions.²⁹⁵ • In 2008, the <i>Koori Complaints Project</i> found that the largest number of allegations made by Aboriginal people whose complaint data was reviewed as part of the project, related to assaults by police at arrest, followed by racist language or abuse and failure to provide medical assistance and harassment.²⁹⁶ • A 2005 landmark study, <i>Systemic racism as a factor in the overrepresentation of Aboriginal people in the Victorian criminal justice system</i>, noted that racism was particularly pronounced in the treatment of young people, and was

²⁹³ Ibid., p. 17.

²⁹⁴ The two successful cases are: *Ordo Templi Orientis v Legg* (Anti Discrimination) [2007] VCAT 1484 (27 July 2007) and *Kahlil v Sturgess* (Anti Discrimination) [2005] VCAT 2446 (23 November 2005). See VALS and VLA, *Fair and accessible anti-vilification protections for all Victoria’s: Submission to the Victorian Parliamentary Inquiry into Anti-Vilification Protections* (2020), p. 8.

²⁹⁵ See CCYP, *Our Youth Our Way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system* (“Our Youth, Our Way”) (2020), p. 433.

²⁹⁶ See *Koori Complaints Project 2006-2008: Final Report*, p. 18.



		<p>‘frequently experienced at critical junctures and in extreme crisis situations, where sensitive, timely support was required to prevent re-engagement with the criminal justice system’.²⁹⁷</p> <ul style="list-style-type: none"> • In 2021, uniformed police attended the coronial inquest into the death of Raymond Noel, who died in 2017 during a police pursuit. The police allegedly attended due to ‘security concerns.’ VALS’ Acting CEO responded to this incident, calling for an acknowledgment of racism, and a commitment to addressing it: “We call on the Police Commissioner and the Minister to publicly acknowledge that systemic racism exists in Victoria Police, and undertake to immediately establish an independent inquiry led by the Aboriginal Community into systemic racism within Victoria Police.”²⁹⁸ • In 2021, IBAC’s investigation into the Assistant Commissioner for Professional Standards Command (“Operation Turon”) found that this senior police officer had posted racist and homophobic material on the internet over a period of several years and faced civil litigation for using racist language in person, but concluded that this had no bearing on his decision-making about complaints investigations.²⁹⁹
	Over-policing	<ul style="list-style-type: none"> • Aboriginal people in Victoria are more likely to be apprehended and arrested by police, and they report higher rates of being hassled by police.³⁰⁰ • Aboriginal children and young people are substantially over-represented in arrests: the CCYP inquiry, <i>Our Youth, Our Way</i>, found that 47% of incidents involving Aboriginal children and young people resulted in arrest, compared to 35% of incidents involving non-Aboriginal children and young people.³⁰¹ • Excessive policing of Aboriginal women in Victoria was noted by the Coroner in the Inquest into the Death of Tanya Day.³⁰²

²⁹⁷ Blagg et al., *Systemic racism as a factor in the overrepresentation of Aboriginal people in the Victorian criminal justice system*, p 107. Cited in CCYP Report, p. 431.

²⁹⁸ VALS, [Uniformed Victoria Police attend Coronial Inquest for ‘security’, compounding the grief and trauma of the Thomas Family](#) (1 July 2021).

²⁹⁹ IBAC, *Operation Turon: An investigation into alleged misconduct by a former Victoria Police Assistant Commissioner* (2021), p. 4.

³⁰⁰ See H. Blagg, N. Morgan, C. Cunneen, A. Ferrante, *Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Criminal Justice System* (2005).

³⁰¹ See CCYP, [Our Youth, Our Way](#), p. 430.

³⁰² See [Finding into Death with Inquest: Inquest into the Death of Tanya Louise Day](#), 9 April 2020, COR 2017 6424.



		<ul style="list-style-type: none">• Data from Victorian police attendance registries in 2006 reveals that Aboriginal people are almost six times more likely to be held in a police station.³⁰³ The CCYP Inquiry, <i>Our Youth, Our Way</i>, also found that Aboriginal children are more likely to be held in police custody than non-Aboriginal children.³⁰⁴• A 2021 study on trends in policing targeting Aboriginal people in Victoria found that Victoria Police disproportionately stopped Aboriginal people when policing COVID offences.³⁰⁵• Data from the Crimes Statistics Agency (CSA) on COVID-19 fines shows that at least 1.6% of Aboriginal people in Victoria had COVID-19-related offences recorded by Victoria Police, compared to 0.2% of non-Indigenous Victorians.³⁰⁶ This disproportion is striking because 84% of offences were recorded in metropolitan Melbourne. Only 49.5% of Aboriginal Victorians live in Melbourne, compared to 75% of other Victorians.³⁰⁷ With the concentration of COVID-19 restrictions and recorded offences in Melbourne, one would expect that Aboriginal people in Victoria would receive <i>fewer</i> fines per capita than non-Aboriginal people. Instead, they received at least eight times more.³⁰⁸• Data from the CSA on COVID-19 fines also shows that Aboriginal people in Victoria were also significantly more likely to have COVID-19 offences recorded alongside other offences: from April to September 2020, this was the case for 90% of Aboriginal people who had a public health offence recorded, compared to only 74% of non-Indigenous people.³⁰⁹ This suggests either that police are using public health rules as an opportunity to stop and question people for other policing purposes, or that they are recording public health offences simply to increase the penalties for people they had already stopped over other offences.
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³⁰³ See Victoria Police and Department of Justice, *Koori Complaints Project 2006-2008: Final Report (2008)*, p. 17.

³⁰⁴ See CCYP, *Our Youth, Our Way*, p. 427.

³⁰⁵ L. Boon-Kuo, A. Brodie, J. Keene-McCann, V. Sentas and L. Weber, "Policing biosecurity: police enforcement of special measures in New South Wales and Victoria during the COVID-19 pandemic," *Current Issues in Criminal Justice* (2021) Vol 33:1, 77-88, p. 80.

³⁰⁶ Crime Statistics Agency (2021), *COVID-19 Unique Offenders – year ending December 2020*, Table 05.

³⁰⁷ Crime Statistics Agency (2021), *COVID-19 Recorded offences by LGA – year ending December 2020*, Table 02.

³⁰⁸ The data suggest extremely high enforcement rates in some areas – in the City of Melbourne and City of Yarra, the number of Aboriginal people issued fines was 13-15% of the Aboriginal population. However, many fines were likely issued in these LGAs to non-residents, and there is no comparable data for the non-Aboriginal population to support proper analysis of whether these areas saw more disproportionate enforcement approaches.

³⁰⁹ Crime Statistics Agency (2020), *COVID Offenders by Sex, Age, Country of Birth and Aboriginal Status*, Table 3.



	Racial profiling / use of predictive policing tools	<ul style="list-style-type: none"> Victoria Police used predictive policing tools in Operation Wayward, which was established in 2017 in response to sensationalist media coverage of youth offending, and operated by identifying young people at high risk of reoffending for particular police attention, mostly in Melbourne’s northwest. This included random checks by police officers on the location of children.³¹⁰ There is no data available on the people targeted by Operation Wayward, including demographic data which could reveal the impact of this pre-emptive operation on racial minorities. Victoria Police has also used a predictive policing tool in south-eastern Melbourne. The tool classified young people as ‘youth network offenders’ or ‘core youth network offenders’, and police have claimed that this classification enables them to predict “how many crimes [a child] is going to commit before he is 21” based on their current profile.³¹¹ Police have not provided data relating to the use of this tool, either publicly, or in response to research requests. Research from NSW has found that the police “Suspect Targeting Management Plan,” which attempts to target people likely to commit offences, disproportionately identified Aboriginal young people for police focus.³¹² The NSW Law Enforcement Conduct Commission found that many of these children had committed no offence – some had come to police attention because they were at risk of suffering domestic abuse – and that they were targeted with “unreasonable, unjust and oppressive” policing tactics, including home visits in the middle of the night.³¹³
	Lower cautioning rates	<ul style="list-style-type: none"> From January 2018 to December 2019, Aboriginal children and young people were cautioned in 13% of incidents compared to 21% of incidents involving non-Aboriginal children and young people.³¹⁴ Data shows that Aboriginal children and young people in Victoria are approximately twice as likely to be charged by police than cautioned, and that Aboriginal children and young people who are charged with an offence are considerably more likely to allegedly reoffend than other young people apprehended by police.³¹⁵

³¹⁰ Herald Sun, 15 May 2018, [‘New Victoria police taskforce targeting wayward teens in home invasion crackdown’](#).

³¹¹ Nino Bucci, [‘Victoria police refuses to reveal how many young people tracked using secretive data tool’](#) (23 November 2020) The Guardian.

³¹² Youth Justice Coalition (2017), [‘A study of the Suspect Targeting Management Plan’](#), p14.

³¹³ The Guardian, 14 February 2020, [‘NSW police put children as young as nine, many of them Indigenous, under surveillance.’](#)

³¹⁴ Cunneen et al., *Juvenile justice*, p 154; L Jordan and J Farrell, ‘Juvenile justice diversion in Victoria: a blank canvas?’ *Current Issues in Criminal Justice*, 2013, 24(3):419–437, p 422, cited in CCYP, [‘Our Youth, Our Way’](#), p. 419 and 426.

³¹⁵ K. Shirley, [‘The cautious approach: police cautions and the impact on youth reoffending.’](#) *In Brief: Crimes Statistics Agency*, (September 2017), p 13.



	<ul style="list-style-type: none"> The CCYP Report notes that: “Stakeholders have identified police bias and uninformed application of criteria for issuing cautions to Aboriginal children and young people as reasons for the disparity.”³¹⁶
Police searches	<ul style="list-style-type: none"> Hard evidence on racial profiling in Victoria is difficult to obtain because of a lack of data around police stops. The best available evidence comes from a race discrimination lawsuit settled in 2013, in the course of which Victoria Police released data to an expert analyst who found that young African-Australians were stopped by police at a rate around 2.5 times higher than people of other racial backgrounds in Flemington and North Melbourne from 2005-2008.³¹⁷
Inadequate assistance from police	<ul style="list-style-type: none"> VALS clients have reported complaints regarding police failure to adequately respond eg. failure to investigate allegations and inadequate police responses to callouts regarding family violence.³¹⁸
Abuse of police powers: arrest instead of summons	<ul style="list-style-type: none"> The <i>Children, Youth and Families Act 2005</i> creates a presumption for police to proceed against children and young people by way of summons (not arrest); yet police regularly disregard this obligation and arrest Aboriginal children and young people. Data from the Crimes Statistics Agency shows that between January 2018 and December 2019 police were substantially more likely to arrest Aboriginal children and young people aged 10 to 17 years than proceed in any other way.³¹⁹
Punishment of Aboriginal children for “breaching” bail conditions	<ul style="list-style-type: none"> Section 30A(3) of the <i>Bail Act 1977</i> provides that breaching bail conditions is not an offence for children; yet police regularly arrest Aboriginal children and young people for “breaching bail conditions.” This is particularly problematic in regional and rural areas. Often the arrest is carried out late on a Friday afternoon, meaning that the child or young

³¹⁶ CCYP, *Our Youth, Our Way*, p. 427.

³¹⁷ Court documents from *Haile-Michael v. Konstantinidis*, ‘Summary of Professor Gordon’s and Dr Henstridge’s First Reports’. Accessed at https://www.policeaccountability.org.au/wp-content/uploads/2014/03/Summary-of-Experts_report.pdf.

³¹⁸ VALS and the Centre for Innovative Justice, *The Effectiveness of the Victoria Police Complaints System for VALS Clients* (2016). VALS, *Submission to the Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria* (“Submission to IBAC Inquiry”) (2017).

³¹⁹ CCYP, *Our Youth, Our Way*, p. 430.



		<p>person is remanded in a police cell until a bail justice can attend and/or until they are transferred to Parkville to appear before the Magistrate on Monday morning.</p> <ul style="list-style-type: none"> Data is not available on this pattern of behaviour; however, it is a practice observed by VALS solicitors.
	<p>Mistreatment and racism in police custody</p>	<ul style="list-style-type: none"> The CCYP Inquiry, <i>Our Youth Our Way</i>, found that: “Twenty-one children and young people talked about overt racism, mistreatment or abuse in police custody. This included not having access to essential medical care or requisite legal assistance, and being physically and verbally abused.”³²⁰ The CCYP Inquiry, <i>Our Youth, Our Way</i>, found that: “Most children and young people who talked about their time in police custody (n = 43) mentioned negative emotions, which included feeling scared, angry, stressed, depressed and bored. Children and young people spoke about poor conditions and treatment while in police custody, such as being cold and not being provided with blankets or clothing, which negatively affected their health and wellbeing.”³²¹ The CCYP Inquiry, <i>Our Youth, Our Way</i>, found that: “Eight children and young people said that they were denied a lawyer or a support person.”³²² The CCYP Inquiry, <i>Our Youth, Our Way</i>, found that: “Twenty-eight children and young people spoke about being left in cells for an extended period of time with little information, and spending multiple days or weeks detained in regional police stations.”³²³
	<p>Cell checks and health care</p>	<ul style="list-style-type: none"> The CCYP Inquiry, <i>Our Youth, Our Way</i>, found that: “Twenty-one children and young people talked about overt racism, mistreatment or abuse in police custody. This included not having access to essential medical care or requisite legal assistance, and being physically and verbally abused.”³²⁴ According to the Guardian, “An analysis of deaths in custody cases over 10 years conducted by Guardian Australia shows that while the most common causes of death in custody for both Indigenous and non-Indigenous people were medical issues followed by self-harm, Indigenous people who died in custody were three times more likely to not

³²⁰ CCYP, *Our Youth, Our Way*, p. 428.

³²¹ CCYP, *Our Youth, Our Way*, p. 428.

³²² CCYP, *Our Youth, Our Way*, p. 429.

³²³ CCYP, *Our Youth, Our Way*, p. 429.

³²⁴ CCYP, *Our Youth, Our Way*, p. 428.



		<p>receive all required medical care, according to coronial reports. For Indigenous women, the result was even worse – less than half received all required medical care prior to death.”³²⁵</p> <ul style="list-style-type: none"> • Aunty Tanya Day died in December 2017, after being arrested and detained by police for public intoxication. In the Inquest into her passing, the Coroner found that the physical checks and monitor checks that were carried out by police custodial officers when Aunty Tanya Day was in police custody were inadequate,³²⁶ finding that they did not comply with relevant guidelines. The Coroner found that if checks were made in compliance with guidelines, “it may well be that Ms Day’s deterioration would have been identified and actioned earlier.”³²⁷
	<p>Lack of accountability for police racism allows this behaviour to continue</p>	<ul style="list-style-type: none"> • The police complaints system further reinforces all forms of racism within Victoria Police, as it fails to hold police accountable due to lack of independence and other challenges. <ul style="list-style-type: none"> - In 2020-2021, 94.3% of complaints against police were investigated by Victoria Police without meaningful involvement from IBAC, or not investigated.³²⁸ - In 17% of regional command level complaint files audited by IBAC in 2016, Victoria Police’s choice of investigator was not appropriate.³²⁹ - In 95% of Professional Standards Command complaint files audited by IBAC in 2018, potential and actual conflicts of interest were not considered.³³⁰ - 22% of audited complaints treated as customer service issues by police had been misclassified.³³¹ • The Independent Broad-based Anti-Corruption Commission (IBAC) is currently carrying out an audit of how Victoria Police handles complaints made by Aboriginal people.³³² The publication of this audit was due in 2020 but has been

³²⁵ L. Allam, C. Wahlquist and N. Evershed, [The facts about Australia’s rising toll of Indigenous deaths in custody](#), 9 April 2021.

³²⁶ [Finding into Death with Inquest: Inquest into the Death of Tanya Louise Day](#), 9 April 2020, COR 2017 6424, para 528.

³²⁷ [Finding into Death with Inquest: Inquest into the Death of Tanya Louise Day](#), 9 April 2020, COR 2017 6424, para 530.

³²⁸ IBAC, [Annual Report 2020/21](#) (2021), p. 26.

³²⁹ IBAC, [Audit of Victoria Police Complaints Handling Systems at Regional Level: Summary Report](#) (“Regional Level Audit”) (2016), p. 11.

³³⁰ IBAC, [Audit of Complaints Investigated by Professional Standards Command, Victoria Police](#) (“PSC Audit”) (2018), p. 5.

³³¹ IBAC Committee, [IBAC Committee Inquiry](#), above note **Error! Bookmark not defined.**, p. 128.

³³² IBAC, [Annual Report 2020/21](#), above note 328, p.77.



		repeatedly delayed. ³³³ VALS expects that the findings of this audit will provide further evidence of the critical need for a new independent body to handle police complaints.
<u>Systemic racism within prisons and YJ centres</u>	Over-representation of Aboriginal people on remand	<ul style="list-style-type: none"> • Of the Aboriginal women in prison, 46% were unsentenced in June 2020. This increases to 89% in relation to prison receptions for Aboriginal women. By contrast, 43% of women in prison overall were unsentenced. • In June 2020, 44% of Aboriginal people in prison in Victoria were on remand, compared to only 35% of the total prison population.³³⁴ • In 2017-2018, 15% of children on remand identified as Aboriginal.³³⁵ • In 2018-2019, 48% of all Aboriginal children in youth justice custody on an average day were on remand (versus 33% in 2014-2015).³³⁶ • Research by the VEOHRC in 2013 found that “Koori women are more likely to be on remand than non-Koori women. Our research also found that many Koori women are refused bail because there is a chronic under-supply of accommodation that they can be bailed to.”³³⁷
	Over-representation of Aboriginal children aged 10-14 years	<ul style="list-style-type: none"> • The CCYP Inquiry found that 41% of children and young people were aged 14 years and under when they first experienced contact with the youth justice system.³³⁸

³³³ Ibid., p. 42.

³³⁴ 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](#)

³³⁵ 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>

³³⁶ CCYP, *Our Youth, Our Way*, p. 34.

³³⁷ Victorian Equal Opportunity and Human Rights Commission (2013) *Unfinished Business: Koori Women and the Justice System*, p. 2

³³⁸ CCYP, *Our Youth, Our Way*, p. 424.



	<p>Discrimination in access to health care</p>	<ul style="list-style-type: none"> • A study by health scholars Kendall et al (2020) found, ‘Aboriginal women experienced institutional racism and discrimination in the form of not being listened to, stereotyping, and inequitable healthcare compared with non-Indigenous women in prison and the community.’³³⁹ • The Royal Commission into Aboriginal Deaths in Custody found that Aboriginal and Torres Strait Islander people are less likely to receive appropriate health care compared to non-Indigenous people when in prison. • An investigation by the Guardian Australia found that Aboriginal and Torres Strait Islander people “who died in custody were three times as likely to not receive all required medical care, when compared to non-Indigenous people.” It found that “[f]or Indigenous women, the result was even worse – less than half received all required medical care prior to death.”³⁴⁰ • According to the Guardian investigation, “Coroners were also twice as likely to find that police, prisons or hospitals failed to follow all of their own procedures in cases involving an Indigenous death in custody than a non-Indigenous death in custody.”³⁴¹
	<p>Use of force and restraints</p>	<ul style="list-style-type: none"> • The CCYP Inquiry, <i>Our Youth, Our Way</i>, found that “Aboriginal children and young people were alarmingly overrepresented in relation to injury as a result of a serious assault in custody”; and that force and restraints were used against Aboriginal children in youth prisons more than twice a day in 2018 and 2019.³⁴² • The CCYP Inquiry, <i>Our Youth, Our Way</i>, found: “In 2018 and 2019, force and restraints were used against Aboriginal children and young people in Victorian youth justice centres in 1,689 incidents, which translates to more than twice a day, each day. The use of handcuffs on Aboriginal girls and young women was disproportionately high, accounting for 48% of incidents involving girls and young women.”³⁴³

³³⁹ Kendall et al. Incarcerated Aboriginal women’s experiences of accessing healthcare and the limitations of the ‘equal treatment’ principle. *International Journal for Equity in Health* (2020) 19:48)

³⁴⁰ L. Allam, C. Wahlquist and N. Evershed, [The facts about Australia’s rising toll of Indigenous deaths in custody](#), 9 April 2021.

³⁴¹ L. Allam, C. Wahlquist and N. Evershed, [The facts about Australia’s rising toll of Indigenous deaths in custody](#), 9 April 2021.

³⁴² 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/>.

³⁴³ CCYP, *Our Youth, Our Way*, p. 38



	Bail conditions	<ul style="list-style-type: none"> In a review of the Bail Act in 2002, the Victoria Law Reform Commission accepted that there were numerous environmental and cultural reasons why Indigenous people might fail to answer bail, other than through an intention to defy the court.³⁴⁴ Under <i>Burra Lotjpa Dungaludja: Aboriginal Justice Agreement Phase 4</i>, the Victorian Government has committed to a research project looking at the impact of the Bail reforms on Aboriginal people.³⁴⁵
	Punitive approach to enforcing bail conditions	<ul style="list-style-type: none"> Between 2010-2013, the third main categories of offences for which Indigenous women were arrested and charged in Victoria was breach of justice procedures (N=859 representing 14% of the top 10 charges).³⁴⁶
Child protection	Over-representation in children receiving child protection services	<ul style="list-style-type: none"> In 2019-2020, Aboriginal and Torres Strait Islander children across Australia received child protection services at a rate of 166 per 1,000 Aboriginal children (almost 8 times the rate for non-Aboriginal children). In Victoria, Aboriginal children received child protection services at a rate of 280 per 1,000 Aboriginal children.³⁴⁷
	Over-representation in notifications	<ul style="list-style-type: none"> In 2019-2020, Aboriginal children in Victoria were the subject of a notification at a rate of 273.6 per 1,000 Aboriginal children, compared to 37.2 per 1,000 for non-Aboriginal children.
	Over-representation in substantiations following a notification	<ul style="list-style-type: none"> In 2019-2020, Aboriginal and Torres Strait Islander children across Australia were almost 7 times more likely to have a notification substantiated than non-Aboriginal children (43 per 1,000). In Victoria, the rate was significantly higher, at 96 per 1,000.³⁴⁸

³⁴⁴ Victorian Law Reform Commission 2002:22-23; see Blagg et al: (2005) *Systemic Racism as a Factor in the Overrepresentation of Aboriginal People in the Victorian Criminal Justice System*, Equal Opportunity Commission of Victoria p. 59).

³⁴⁵ Victorian Government, *Burra Lotjpa Dungaludja: Aboriginal Justice Agreement Phase 4, A partnership between the Victorian Government and Aboriginal Community*, Outcome 2.1.2.

³⁴⁶ P. MacGillivray and E. Baldry, "[Australian Indigenous Women's Offending Patterns](#)," Indigenous Justice Clearinghouse: Brief 19, June 2015.

³⁴⁷ AIHW 2019-2020, p. 15.

³⁴⁸ AIWH Report on Child Protection, 2019-2020, p. 28. Child protection Services, Report on Government Services 2021, Table 16A.1.



	<p>Over-representation in children on care and protection orders</p>	<ul style="list-style-type: none"> As at 30 June 2020, 38% of children on care and protection orders across Australia were Aboriginal. Nationally, the rate of Aboriginal children on orders was 70 per 1,000 Aboriginal children, which was 10 times the rate for non-Aboriginal children (7 per 1,000). In Victoria, the rate of Aboriginal children on care and protection orders was 140.6 per 1,000, compared with 8.1 per 1,000 for non-Aboriginal children.³⁴⁹
	<p>Over-representation in out of home care (OOHC)</p>	<ul style="list-style-type: none"> Between 2008-09 and 2017-18, the number of Aboriginal children removed from their parents and living in the care system has tripled from 687 to 2,027.³⁵⁰ Despite Aboriginal people representing less than one per cent of Victoria’s population, about one in four children currently in out-of-home care in Victoria is Aboriginal.³⁵¹ As at 31 December 2018, there were 403 children and young people in care who had experienced 10 or more placements over the duration of their time in care. Of these, a disproportionate number were Aboriginal (33 per cent).³⁵² Aboriginal children are more likely to enter care at an earlier age. Infant and preschool Aboriginal children (aged under six years) make up 38 per cent of all Aboriginal children and young people in care compared with 33 per cent of non-Aboriginal children and young people.³⁵³ Aboriginal children and young people are also more likely to spend more time in out-of-home care than their non-Aboriginal peers. The average length of stay in care for Aboriginal children and young people in March 2019 was six months longer than non- Aboriginal children and young people (three years versus two years and six months).³⁵⁴ In 2021, The highest rate of over-representation of Aboriginal children and young people in OOHC was observed in Western Australia (17.6), followed closely by Victoria (17.2).³⁵⁵

³⁴⁹ AIHW 2019-2020, p. 43-44.

³⁵⁰ CCYP report, In Our Own Words (2021) p. 20.

³⁵¹ CCYP Report, In Our Own Words (2021) p. 20.

³⁵² CCYP Report, In our Won Words (2021) p. 25.

³⁵³ CCYP report, p. 88.

³⁵⁴ CCYP report p. 89.

³⁵⁵ SNAICC, the Family Matters Campaign and the University of Melbourne, *Family Matters Report 2021: Measuring Trends to Turn the Tide on the Over-Representation of Aboriginal and Torres Strait Islander Children in Out-of-Home Care in Australia* (2021), p. 25.



	Over-representation on Care by Secretary orders and long-term care orders	<ul style="list-style-type: none"> As at 31 December 2018, a higher proportion of Aboriginal children were the subject of care by Secretary orders (36 per cent) and long-term care orders (10 per cent) than non-Aboriginal children (34 per cent and 7 per cent respectively).³⁵⁶ Aboriginal children and young people in care are less likely than their non-Aboriginal counterparts to have a case plan which has the permanency objective of family reunification (29 per cent versus 36 per cent) and more likely to have a permanency objective of 'long-term out-of-home care' (42 per cent versus 34 per cent).³⁵⁷
	Criminalisation in residential care	<ul style="list-style-type: none"> Many of the children and young people in residential care told the Commission that residential care providers rely too much on police to resolve incidents of challenging behaviour by young people.³⁵⁸
	Failure to respect and protect cultural rights	<ul style="list-style-type: none"> Despite improvements since 2016, there are still significant challenges with cultural support plans. As at 31 December 2018, 61 per cent of Aboriginal children and young people who should have had a cultural support plan did not.³⁵⁹ As at 31 December 2018, 47 per cent of Aboriginal children and young people who had been in care for over 12 months had not had an Aboriginal family-led decision-making conference.³⁶⁰
	Non-compliance with the Aboriginal Child Placement Principle	<ul style="list-style-type: none"> Data obtained by CCYP from the Department for Human Services suggests the department is complying with the Aboriginal Child Placement Principle in about two-thirds of all placements (66 per cent).³⁶¹
Age Pension		<ul style="list-style-type: none"> The standard pension age, which will increase to 67 years of age by 2023, does not account for the stark differences in life expectancy and health outcomes for Aboriginal and Torres Strait Islander people

³⁵⁶ CCYP report p. 92.

³⁵⁷ CCYP report p. 92.

³⁵⁸ CCYP Report, Finding 18, p. 42.

³⁵⁹ CCYP report, p. 78.

³⁶⁰ CCYP report, p. 78.

³⁶¹ CCYP report, p. 97.



		<ul style="list-style-type: none"> • Aboriginal and Torres Strait Islander men have an average life expectancy 8.6 years lower than non-Indigenous men, and Aboriginal and Torres Strait Islander women’s lives are on average 7.8 years shorter than non-Indigenous women. • Fewer than 1% of people currently receiving the Age Pension are Aboriginal or Torres Strait Islander.
<p><u>Consumer law</u></p>	<p>Predatory targeting of Aboriginal people</p>	<ul style="list-style-type: none"> • Predatory targeting of Aboriginal people by funeral insurance company Australian Community Benefit Fund (ACBF). The Banking Royal Commission revealed a number of issues arising from ACBF, including misleading conduct (falsely advertising the company as Aboriginal-owned). <ul style="list-style-type: none"> - As a result of the Banking Royal Commission, ACBF was required to register with the Australian Securities and Investments Commission (ASIC) and is currently unable to accept new clients until this registration is complete. - Many Aboriginal funeral insurance holders have made complaints to the Australian Financial Complaints Authority (AFCA) about ACBF, and in each matter, ACFA has awarded in favour of the complainant. - In October 2020, ASIC commenced legal proceedings against ACBF for alleged contravention of the ASIC Act, including misleading conduct.³⁶² Legal proceedings are ongoing. • Predatory targeting of Aboriginal people by telecommunications companies, including Telstra, selling services to Aboriginal people that they often don’t need. In May 2021, the Federal Court ordered Telstra to pay a fine of \$50 million, for committing unconscionable conduct in the sale of post-paid mobile products to Aboriginal consumers in remote Aboriginal communities in the Northern Territory.³⁶³ VALS is aware that similar practices take place in Victoria, with disproportionate impacts for Aboriginal communities.

³⁶² [20-262MR ASIC commences proceedings against ACBF Funeral Plans and Youpla Group concerning funeral expenses insurance | ASIC - Australian Securities and Investments Commission](#)

³⁶³ [Telstra to pay \\$50m penalty for unconscionable sales to Indigenous consumers | ACCC](#)



APPENDIX B: RELEVANT EXCERPTS AND RECOMMENDATIONS FROM VALS' SUBMISSION TO THE CRIMINAL JUSTICE INQUIRY

Raise The Age of Criminal Responsibility

VALS has advocated for many years to raise the minimum age of criminal responsibility, in Victoria and across Australia.³⁶⁴ The minimum age of criminal responsibility should be raised to 14, and the minimum age for incarceration should be 16. These protections should be enhanced by a legislated presumption of *doli incapax* for children aged between 14 and 17, with a requirement that the prosecution rebut this presumption in order to achieve a finding of guilt. The evidence base for these reforms is extremely strong and has been repeatedly put before decision-makers.

Raising the age of criminal responsibility is a particularly urgent issue for VALS because of the serious overrepresentation of Aboriginal children and young people in the youth justice system. As of June 2020, there were 10.9 Aboriginal children under 18 in detention on an average night in Victoria, compared to 97.2 non-Aboriginal children.³⁶⁵ This equates to an incarceration rate of 10.7 per 10,000 Aboriginal children and just 1.6 per 10,000 non-Aboriginal children.³⁶⁶ Aboriginal children are detained at nearly seven times the rate of non-Aboriginal children. Eliminating criminal charges for children under 14 and incarceration for children under 16 would, by reducing the youth detention population overall, substantially reduce the overincarceration of Aboriginal children. We direct the Inquiry to the case study of Michael*in VALS' submission to the Commission for Children and Young People Inquiry, *Our Youth, Our Way*.³⁶⁷

Victoria introduced Aboriginal justice targets in 2012 which commit the Government to eliminating the difference in the rate of Aboriginal and non-Aboriginal people under youth justice supervision by 2031. To achieve this target, the current Aboriginal Justice Agreement requires the Government to reduce the number of Aboriginal children under youth justice supervision by at least 43 young people by 2023.³⁶⁸ The Productivity Commission has found that, nationally, raising the age to 14 would reduce the number of Aboriginal children in prison by 15%.³⁶⁹ This makes raising the age of criminal responsibility an important step towards meeting the Government's existing commitments under the Aboriginal Justice Agreement and the Closing The Gap Agreement and Implementation Plan.³⁷⁰

³⁶⁴ VALS (2017), *Position Paper: Age of Criminal Responsibility*.

VALS (2019), *Submission to the Commission for Children & Young People Inquiry: Our Youth, Our Way*.

³⁶⁵ AIHW (2021), *Youth detention population in Australia 2020*, Supplementary Tables S2 and S5.

³⁶⁶ *Ibid*, Supplementary Tables S31, S2 and S5.

³⁶⁷ Available at <http://www.vals.org.au/wp-content/uploads/2021/08/VALS-Submission-to-CCYP-Inquiry-Our-Youth-Our-Way-November-2019.pdf>

³⁶⁸ *Burra Lotjpa Dungaludja: Victorian Aboriginal Justice Agreement Phase 4*, p30. Available at <https://files.aboriginaljustice.vic.gov.au/2021-02/Victorian%20Aboriginal%20Justice%20Agreement%20Phase%204.pdf>.

³⁶⁹ Productivity Commission for the Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage Key Indicators 2020 Report* (2020) 4.143

³⁷⁰ Victorian Government (2021), *The Victorian Closing the Gap Implementation Plan*. Available at <https://www.aboriginalvictoria.vic.gov.au/victorian-closing-gap-implementation-plan>.



There is also a substantial body of medical, sociological and criminological evidence in favour of raising the age, presented in VALS' submission to the Council of Attorneys-General,³⁷¹ along with the submissions of dozens of other organisations to the same consultation.³⁷² Key considerations include the following:

- Lack of culpability: medical science shows that children below the age of 14 years lack the maturity to fully comprehend the impact of their actions and meet legal standards of culpability³⁷³
- International law: Australia has legal obligations under the Convention on the Rights of the Child, and has repeatedly been called on to raise the age by the Committee on the Rights of the Child, the UN Special Rapporteur on the Rights of Indigenous Peoples, and the UN Human Rights Council³⁷⁴
- Recidivism: early involvement with the youth justice system significantly increases the likelihood of reoffending, including reoffending as an adult; the younger someone is when they are first sentenced, the higher their chance of reoffending³⁷⁵
- Existing protections are ineffective: current Victorian practice tries to protect children through a rebuttable presumption of *doli incapax*, but this presumption is frequently overlooked or incorrectly applied in practice³⁷⁶
- Reinforcing disadvantage: children in the youth justice system are among the most vulnerable children in Victoria, with a far higher likelihood of coming from low socio-economic backgrounds, being in the child protection system, experiencing homelessness, and a range of

³⁷¹ VALS (2020), *Submission to Council of Attorneys-General Age of Criminal Responsibility Working Group*. Accessed at <https://static1.squarespace.com/static/5eed2d72b739c17cb0fd9b2d/t/60a396058b42b505d0cbaa45/1621333513306/VALS.pdf>.

³⁷² Raise The Age (2021), *CAG Submissions*. Available at <https://www.raisetheage.org.au/cag-submissions>.

³⁷³ See for example, E. Cauffman and L. Steinberg, L., '(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults', (2000) *Behavioral Sciences and the Law*, 18, 741–60; E. Delmage, 'The Minimum Age of Criminal Responsibility: A Medico-Legal Perspective', (2013) *Youth Justice* 13(2), 102–110; T. Crofts T, 'A Brighter Tomorrow: Raise the Age of Criminal Responsibility', (2015) *Current Issues in Criminal Justice* 27(1), 123–31; C. Fried C. and N. Reppucci, 'Criminal Decision Making: The Development of Adolescent Judgement, Criminal Responsibility, and Culpability,' (2001) *Law and Human Behaviour*

³⁷⁴ VALS (2020), *Submission to Council of Attorneys-General Age of Criminal Responsibility Working Group*, p10. Accessed at <https://static1.squarespace.com/static/5eed2d72b739c17cb0fd9b2d/t/60a396058b42b505d0cbaa45/1621333513306/VALS.pdf>.

³⁷⁵ Sentencing Advisory Council, *Reoffending by Children and Young People in Victoria*, (2016), p. 26. See also: R. Loeber and D. Farrington, 'Young Children Who Commit Crime: Epidemiology, Developmental Origins, Risk Factors, Early Interventions and Policy Implications' (2000) *Development and Psychopathy* 12(4), 737; Walter Forrest and Ben Edwards, 'Early Onset of Crime and Delinquency among Australian Children', in Australian Institute of Family Studies (ed.), *The Longitudinal Study of Australian Children Annual Statistical Report 2014* (2014) 131–150, 131; Shuling Chen et al., *The Transition from Juvenile to Adult Criminal Careers*, New South Wales Crime and Justice Bulletin no. 86 (2005); Parliament of Victoria, *Drugs and Crime Prevention Committee, Inquiry into Strategies to Prevent High Volume Offending and Recidivism by Young People*, Final Report, no. 218 (2009), 63; Don Weatherburn et al., *Screening Juvenile Offenders for Further Assessment and Intervention*, Crime and Justice Bulletin no. 109 (2007).

³⁷⁶ VALS (2020), *Submission to Council of Attorneys-General Age of Criminal Responsibility Working Group*, p13. Accessed at <https://static1.squarespace.com/static/5eed2d72b739c17cb0fd9b2d/t/60a396058b42b505d0cbaa45/1621333513306/VALS.pdf>.



other vulnerabilities. The stigma and disruption of criminal prosecution reinforces these vulnerabilities

- Harms of detention: as detailed below, in response to this Committee's second term of reference, conditions in youth detention are very likely to re-traumatise children, further disrupt their development and make reoffending more likely.

VALS is firmly of the view that there must be no carve outs to raising the age of criminal responsibility, and that serious offending must not be excluded from the proposed reform. VALS also opposes any therapeutic or rehabilitative response outside the criminal legal system that relies on some form of deprivation of liberty. Even administrative detention has a serious risk of traumatising a child. It also risks removing a child from protective factors or potential protective factors, such as re-engaging with education, and potentially could have a stigmatising impact on the child (which certainly does not assist with making the child feel a part of a community, or having or developing a sense of belonging, civic duty and responsibility).

Ultimately, children who offend in serious ways have invariably been let down by the adults and systems in their lives – a responsible government would address this, to both support the child and to promote community safety. It is critical that the focus is not on punishment, but on accountability, rehabilitation, community safety and supporting the victims. This could include:

- Supporting victims – restorative justice processes (which have the added benefit of supporting the child to take responsibility for their actions) if the victim consents, and properly supporting victims.
- Rehabilitation of children – the rhetoric on the issue of the age of criminal responsibility needs to change. No child should be categorised as being beyond rehabilitation or community support, no matter what their harmful behaviour is. We should be dedicating more resources to the children most at risk of further offending and serious offending, not less. We should be intervening at the earliest possible stage with our support and care, to prevent contact with the criminal legal system in the first place, and to provide culturally appropriate diversion wherever possible for Aboriginal children.

Children need to be given opportunities to thrive, and that means that some children need more support because they come from backgrounds of disadvantage or trauma. Some communities need more services and more support, so that entrenched disadvantage and impacts of intergenerational trauma can be addressed, which would in turn assist families and children.

There needs to be tailored, intensive supports for the child and their family, while the child is in the community, not a facility. The focus should be on providing a wrap-around service, addressing the underlying causes of offending, assisting the family and child to navigate systems they have been excluded from or do not know to navigate (such as housing support, centrelink, education), and building a solid, extensive support network in the community (where the child will ultimately always return) to ensure that the chances of reoffending are reduced.



There will also need to be consideration of the potential trauma for the child that will result from the harm they have caused), and the potential social exclusion and stigma that will attach to the child and family. They will need support for this as well.

There are existing services and models, that could be provided greater funding and more capacity so that they could more effectively work together (rather than in silos), to achieve this intensive, tailored, community-based, ongoing support. Part of having a tailored response will also entail taking into account the child's culture and background. The Government must recognise that the Aboriginal community and ACCOs are experts in how to best support Aboriginal children and families. Respecting Aboriginal self-determination ultimately would lead to improved outcomes for not only Aboriginal children, but more broadly for community safety. The Government's responsibility in this reform will be to provide the proper funding and support for these community-driven responses. We refer you to the case study of *Daniel in VALS' submission to Council of Attorneys-General Age of Criminal Responsibility Working Group,³⁷⁷ as a case study which highlights the underlying causes of offending. At the UN Human Rights Council's Universal Periodic Review of Australia's human rights obligations, twenty-nine countries specifically recommended that Australia increase the minimum age of criminal responsibility.³⁷⁸ Several others made broader recommendations that Australian jurisdictions bring their youth justice systems in line with the Convention on the Rights of the Child, which the relevant UN Committee has interpreted as requiring a minimum age of criminal responsibility of 14.³⁷⁹ The Commonwealth Government's response highlighted the responsibility of state and territory governments for raising the age in their jurisdictions, and noted the intention of some state and territory governments to do so.³⁸⁰

Despite the extensive evidence and legal considerations in favour of raising the age, the Victorian Government continues to needlessly delay reform, along with other states and territories. The then-Council of Attorneys-General (since succeeded by the Meeting of Attorneys-General) first established a working group on the age of criminal responsibility in November 2018, giving it 12 months to report back. After that reporting deadline had passed, the working group finally called for submissions from stakeholders by February 2020. The Working Group presented its report to the Council of Attorneys-General in July 2020, with recommendations, but a decision was deferred. In March 2021, the Meeting of Attorneys-General did not prioritise discussion of raising the age and deferred the issue for further discussion.³⁸¹ It is now more than 18 months since the Working Group received submissions on raising

³⁷⁷ Available at <http://www.vals.org.au/wp-content/uploads/2021/08/VALS-submission-to-the-COAG-Working-Group-on-the-Age-of-Criminal-Responsibility-February-2020.pdf>

³⁷⁸ UN General Assembly – Human Rights Council (2021), *Report of the Working Group on the Universal Periodic Review: Australia*. Accessed at <https://undocs.org/A/HRC/47/8>.

³⁷⁹ United Nations Committee on the Rights of the Child (hereafter referred to as "CRC"), General Comment No. 24 (2019) on children's rights in the child justice system, CRC/C/GC/24, (18 September 2019) para 22.

³⁸⁰ UN General Assembly – Human Rights Council (2021), *Report of the Working Group on the Universal Periodic Review: Australia – Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review*. Accessed at <https://undocs.org/A/HRC/47/8/Add.1>.

³⁸¹ VALS, 23 April 2021, 'Victoria must raise the age of criminal responsibility immediately as the federal government process stalls'. Available at <https://www.vals.org.au/statement-victoria-must-raise-the-age-of-criminal-responsibility-immediately-as-the-federal-government-process-stalls/>.



the age, and more than fifteen months since the Working Group finalised its report. The Meeting of Attorneys-General has not come to any decision, made any commitment, or even released the Working Group report. In May this year, 48 submissions to the Working Group – including the submission prepared by VALS – were released publicly by their authors, to make clear the substantial amount of analysis which the MAG has received but to which it has not responded.³⁸² VALS has also highlighted the particular impact of the low age of criminal responsibility on Aboriginal children in our *Justice Yarns* series, speaking with Aunty Rosemary Roe, the aunt of G.J. Roe, who died in custody in 1997 aged 11.³⁸³

After almost three years, VALS is of the view that the national process has only led to delay and inaction. While a nationally coordinated approach would ensure that the rights of children are protected across the country, there is no impediment to Victoria raising the age before national agreement can be reached. The ACT Government is proceeding with raising the age, and is taking expert advice on how to develop alternative models of care for children under 14.³⁸⁴ While improving services and care for young people is important, it does not need to be a precursor for raising the age. Increasing the age of criminal responsibility by itself would be a substantial improvement to Victoria's youth justice practice. The Victorian Government's (commendable) efforts during the pandemic to reduce the number of children in detention demonstrates that a swift, effective response is, in fact, possible.³⁸⁵ Following that blueprint, Victoria should commit to raising the age immediately.

RECOMMENDATIONS

Recommendation 41. The Victorian Government must raise the age of criminal responsibility to at least 14, and the age at which children can be detained to at least 16.

Recommendation 42. The Victorian Government must have no carve outs to raising the age of criminal responsibility.

Recommendation 43. The presumption of *doli incapax* should be extended by legislation to young people aged 14 to 17, with further amendments to ensure its effective operation:

- Create a legislative requirement for prosecutors to rebut the presumption;
- Place legislative restrictions on the kinds of evidence that can be produced to rebut the presumption;

³⁸² Raise The Age (2021), 'Dozens of submissions made public after AGs refuse to act on raising the age of criminal responsibility'. Accessed at <https://www.raisetheage.org.au/news/dozens-of-submissions-made-public-after-ag-refuse-to-act-on-raising-the-age-of-criminal-responsibility>.

³⁸³ VALS, 23 April 2021, *Justice Yarns Podcast – RCIADIC 30th Anniversary chat with Aunty Rosemary Roe*. Recording available at https://www.youtube.com/watch?v=yT88cOK_W9Q.

³⁸⁴ National Indigenous Times, 25 June 2021, 'ACT takes next step on raising the age'. Accessed at <https://nit.com.au/act-takes-next-step-on-raising-the-age/>.

³⁸⁵ VALS (2021), *Building Back Better: Victorian Aboriginal Legal Service COVID-19 Recovery Plan*, p69. 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>.

- Increase funding to the Children’s Court to improve the quality of clinical reports;
- Increase funding to Victoria Legal Aid to cover the cost of specialist reports requested by defence lawyers;
- Create a legislative requirement for all police and Crown prosecutors to undergo training on the presumption of *doli incapax*;
- Incorporate mandatory training on *doli incapax* into training for admission to become a solicitor;
- Require all criminal defence lawyers to undergo training on *doli incapax* as part of their annual CDP;
- Incorporate mandatory training on *doli incapax* into training for admission to become a solicitor;
- Require all criminal defence lawyers to undergo training on *doli incapax* as part of their annual CDP.

Reform the Punitive Bail System

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,³⁸⁶ versus only 28.9% in June 2016.³⁸⁷ In the women’s system, the situation is even more dire, with more women currently on remand than serving sentences.³⁸⁸ In the youth justice system, the number of children on remand has more than doubled between 2010 and 2019.³⁸⁹ 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.³⁹⁰ In June 2020, 44% of Aboriginal people in prison in Victoria were on remand, whereas only 35% of the total prison population was on remand.³⁹¹ In 2017-2018, 15% of children on remand identified as

³⁸⁶ Corrections Victoria, Monthly Time Series Prisoner and Offender Data: [Monthly time series prisoner and offender data | Corrections, Prisons and Parole](#)

³⁸⁷ 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.

³⁸⁸ Corrections Victoria, Monthly Time Series Prisoner and Offender Data. In July 2021, 53% of women in Victoria’s prisons are unsentenced.

³⁸⁹ 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>.

³⁹⁰ 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](#)

³⁹¹ 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](#)



Aboriginal³⁹² 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).³⁹³

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.³⁹⁴ In July 2021, VALS sent an open letter³⁹⁵ (signed by 55 organisations) and an expert petition³⁹⁶ (signed by over 250 experts) to Ministers Symes, Hutchins and Williams calling for urgent bail reform. We have still not received a response.

Harmful Changes to the Bail Laws

The current bail laws are the product of major reforms in 2017 and 2018,³⁹⁷ which followed the Bourke Street incident in 2017 and the Coghlan Review,³⁹⁸ commissioned by the Government. Additionally, the bail laws were amended in 2013 to introduce two new criminal offences related to breaching bail.³⁹⁹

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 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

³⁹² 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>.

³⁹³ 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.

³⁹⁴ 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.

³⁹⁵ VALS, *Bail Reform is Urgently Needed*, May 2021, available at [Bail-Reform-Letter-May-2021-5.pdf \(vals.org.au\)](#)

³⁹⁶ VALS, *Expert Petition calling for Urgent Reform of Victoria’s Bail Laws*, [VALS-Bail-Reform-Petition.pdf](#)

³⁹⁷ *Bail Amendment (Stage One) Act 2017* (Vic) and *Bail Amendment (Stage Two) Act 2018* (Vic)

³⁹⁸ 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.

³⁹⁹ 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.



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.⁴⁰⁰

- 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.⁴⁰¹
- Only a court can grant bail for a Schedule 1 offence⁴⁰² or where an accused is on two or more undertakings of bail.⁴⁰³

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”⁴⁰⁴ (for Schedule 1 offences) or “compelling reasons”⁴⁰⁵ (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.⁴⁰⁶ 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.⁴⁰⁷ The burden of proof lies with the prosecutor.

⁴⁰⁰ 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.

⁴⁰¹ *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).

⁴⁰² *Bail Act 1977* (Vic), Section 13(3).

⁴⁰³ *Bail Act 1977* (Vic), Section 13A.

⁴⁰⁴ *Bail Act 1977* (Vic), Section 4A.

⁴⁰⁵ *Bail Act 1977* (Vic), Section 4C.

⁴⁰⁶ *Bail Act 1977* (Vic), Sections 4D and 4E.

⁴⁰⁷ *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.”⁴⁰⁸

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.”⁴⁰⁹

The evidence is clear that the current bail system disproportionality impacts Aboriginal people.⁴¹⁰ Aboriginal people experience higher rates of housing instability,⁴¹¹ 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.⁴¹² Aboriginal people are also

⁴⁰⁸ VALS Media Release, [Coronial Inquest into death of Veronica Marie Nelson to examine healthcare in Victorian prisons and bail laws – Victorian Aboriginal Legal Service \(vals.org.au\)](#)

⁴⁰⁹ VALS Media Release, “[Coronial Inquest into death of Veronica Marie Nelson to examine healthcare in Victorian prisons and bail laws](#),” 29 March 2021.

⁴¹⁰ 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](#)

⁴¹¹ 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/LCL_SIC_59-06_Homelessness_in_Vic_Final_report.pdf.

⁴¹² Under *Burra Lotjpa Dungaludja* (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 2013,⁴¹³ which serve no purpose other than to further criminalise people who are already criminalised.

Case Study – Jordan (a pseudonym)

Our client was a 16-year-old child who was involved in a car accident. They were alleged to have been the driver of the car. The client did not have a prior history of involvement with the youth justice system, they had a stable address and youth justice was supportive of bail being granted.

The Magistrate refused bail on the basis that the child may receive a youth justice detention order and was also of the view that the client posed an “unacceptable risk” that could not be mitigated. The child spent one week in detention prior to being granted bail with onerous bail conditions.

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), 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, as well as the use of diversionary and alternative pretrial measures in lieu of custodial measures.

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

⁴¹³ 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).



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, and this trend particularly impacts Aboriginal children, families and communities. Across Australia, at least 54% of women in prisons have at least one dependent child. 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.

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,” and non-custodial sentences are explicitly preferred for pregnant women or women with dependent children in most cases. Further, the Bangkok Rules require governments to develop and implement gender-specific pretrial alternatives that take into account the caretaking responsibilities of incarcerated women.

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. 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, and future involvement in the criminal legal system. This includes an increased likelihood of receiving a custodial sentence. 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.”

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

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. Of this, approximately \$15 million was spent remanding children who did not receive a custodial sentence. 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.

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, and its commitment under the National Closing the Gap Agreement to reduce Aboriginal incarceration rates. We note that under *Burra Lotjpa Dunguludja*, the Government has committed to carrying out research on the impact of the bail reforms on Aboriginal people. 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,” and “legislate to enforce the principle that imprisonment should be utilised only as a sanction of last resort.” It is time for the government to stop paying lip service to its commitments and take action.

RECOMMENDATIONS

Recommendation 14. 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 15. 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 16. 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 17. 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 18. The Victorian Government must amend the *Bail Act 1977* (Vic) to reflect a child-centred approach and the best interests of the child principle. Children should not be subject to the same bail tests as adults, given that children are not at the same developmental stage, and do not have the same degree of autonomy and responsibility as adults. Similarly, bail conditions to which children are subject must account for their age and developmental stage.

Recommendation 19. 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 20. The Victorian Government must prohibit on the detention of children under the age of 16 years, including detention on remand, consistent with recommendations of the Commission for Children and Young People.

Recommendation 21. The Government should invest in culturally safe residential bail accommodation and bail support for Aboriginal people, consistent with recommendations of the Commission for Children and Young People.

Recommendation 22. 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.

Diversion & Cautions

Diversions in the Adult System

A key reason for the continued growth in Victoria's prison population is the underuse of diversion and formal cautioning, approaches which can avoid extended contact with the criminal legal system and reduce incarceration. VALS has set out our positions on the need for greater diversion and appropriate models on numerous occasions.

Currently, diversion is only available in limited circumstances, and even when it is available, the Criminal Justice Diversion Program does not adequately cater for the needs and experiences of Aboriginal people. Significant changes are required in order to ensure that diversion is available and effective in diverting Aboriginal people away from the criminal legal system.



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

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

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

Data from the Victorian Sentencing Advisory Council indicates that in 2019-20, 6.4% of cases before the Magistrates' Court were adjourned for diversion, a figure which has not shifted substantially in the last decade. Unfortunately, data is not available publicly on the number of Aboriginal people who received diversion in Victoria. However, research from across Australia indicates that Aboriginal people are less likely than non-Aboriginal people to receive a police caution and less likely to have their matters adjourned for diversion. In 2019-20, only 2.5% of VALS criminal law matters were adjourned for diversion, and this fell to 1.3% in 2020-21. These are well below the already low figure of around 4% we experienced from 2017 to 2019. This is a phenomenon seen in many parts of the justice system, with data from NSW revealing that Aboriginal people were far less likely to receive cautions for cannabis possession than non-Aboriginal people.

The current approach to diversion fails Aboriginal people for a number of reasons:

- Inconsistent decisions by police informants as to when diversion is available;
- Even when diversion is approved by the informant and considered suitable by the diversion coordinator, the prosecution at court can refuse to consent;
- Generally diversion is only available in cases of first offence – as Aboriginal people are engaged in the system earlier than non-Aboriginal people, they often use up diversion options and escalate more quickly up the sentencing hierarchy;
- Financial contributions can be problematic for many of our clients;
- Lack of culturally appropriate diversion programs, particularly in rural and regional areas;
- An expectation of cooperativeness with police, which Aboriginal people may not initially meet due to mistrust rooted in personal and/or intergenerational trauma – in the ACT, criteria for a restorative justice programme were altered to make eligible anyone who did not deny responsibility for offending, rather than requiring full and proactive confession at the outset.

While some of these issues can be mitigated through reforms to and expansion of existing diversion programmes, VALS is of the view that the full benefits of diversion for Aboriginal people can only be realised through diversion processes developed and implemented by Aboriginal communities,



grounded in self-determination. This is a model seen in some parts of Canada, as part of a much broader approach to Aboriginal self-determination in the justice system.

Good Practice Model: Old City Hall Gladue Court, Toronto, Canada⁴¹⁴

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

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

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

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

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

VALS believes that there is a lot to learn from experiences in other jurisdictions, where diversion programs operate as a culturally appropriate way of reducing recidivism and preventing Aboriginal people from escalating up the sentencing hierarchy.

In Victoria, Koori Court has demonstrated that culturally appropriate court processes and responses can be far more effective and relevant for Aboriginal people. Similarly, diversion should be a culturally relevant for Aboriginal people and Aboriginal communities should have a much greater role in

⁴¹⁴ Aboriginal Legal Services, *Evaluation of the Gladue Court Old City Hall, Toronto* (2016), 43-44.



developing and implementing diversion. An expanded role for Elders and Respected Persons would be beneficial, with the condition that Aboriginal people must continue to consent to the Koori Court process and have access to legal representation to support them through all stages of that process.

RECOMMENDATIONS

Recommendation 144. Data on the number of Aboriginal people who received diversion in Victoria should be made available publicly.

Recommendation 145. The Government must progress options for increasing access to culturally appropriate diversion in Victoria, including:

- Expanding Koori Courts so that they operate not only as a plea and resolution court, but to also have jurisdiction to divert people to culturally appropriate diversion programs;
- Create independent self-determined Aboriginal bodies that have responsibility for developing and agreeing to a diversion plan with the person (similar to the Community Council at Aboriginal Legal Services Canada).

Recommendation 146. Remove police discretion as to which offences are suitable for diversion and remove the requirement for prosecutors to consent to diversion.

Recommendation 147. Introduce a requirement for Victoria Police to complete a 'Failure to Divert Declaration' for all police briefs. This must require police members to detail the precise grounds for failing to recommend diversion. Magistrates should review the Declaration at the mention of criminal matters and if grounds are insufficient, the matter should be referred to the Diversion Coordinator.

Diversions in the Youth Justice System

Diversion and cautioning are particularly important for children and young people. Early contact with the criminal legal system has a tendency to reproduce itself, and children are particularly likely to be fully integrated into society and avoid reoffending if they are given appropriate support. There is clear evidence from Victoria that diversion away from the court system has a positive impact in reducing reoffending for young people. Avoiding the use of full judicial proceedings for children is also part of Australia's obligations under the Convention on the Rights of the Child.

For children, the principal options for diversion in the current system are:

- Pre-charge caution by Victoria Police;
- Referral to a pre-charge cautioning program, where available;
- Court-based diversion through the Children's Court Youth Diversion (CCYD) Service.



There are challenges with the current cautioning and court-based diversion mechanisms, which mean that they are inconsistently applied. In particular, we believe that the lack of a legislative basis for pre-charge cautions, the discretionary powers of police in relation to cautions, and the police veto on court-based diversion undermine the potential for a rehabilitative approach to youth justice and instead channel children and young people into a cycle of reoffending.

To strengthen the mechanisms for diverting Aboriginal children and young people away from the youth justice system, we believe that there is a need for significant legislative and policy reform. In relation to the legislative framework, VALS believes that several key changes must be incorporated into the CYFA and the new Youth Justice Act, detailed in the recommendations below. These would operate to expand the circumstances in which diversion is available.

Additionally, we believe that there is a significant need to invest in culturally appropriate pre-charge and court-based diversion programs that are gender-sensitive and respond to the intersectional needs of Aboriginal youth. We believe that ACCOs are best placed to develop and implement such programs, building on the existing work by ACCOs in this space.

Case Study: Successful Diversion

James was a 15-year-old boy in regional Victoria who had his first criminal matter in January 2018 and received diversion. He didn't engage at all with his previous lawyer and therefore failed to comply with the court's conditions.

The matter was referred to Balit Ngulu by the Diversion Co-ordinator, who was disappointed to have to file a report that would have seen a warrant issued for his arrest. We pleaded with the Magistrate to adjourn the matter for a month to give our unique service the chance to get him to attend court without police arresting him.

Our application was granted, and thanks to our Client Service Officer, we were able to support our client to enrol in a TAFE course, engage in drug and alcohol counselling, and explore a community and social group. As a result of the support from Balit Ngulu, James is now on track to avoid a criminal conviction.

Cautions in the Youth Justice System

VALS is firmly of the view that there must be a statutory presumption in favour of cautioning children, that there should be no limit to the number of cautions a child can receive, and that children with a criminal history should not be excluded. Cautioning should not be conditional on a child or young person formally admitting an offence – cautions should be available to children who do not deny the offence.



Snap decisions by police regarding cautioning can have lifelong and devastating impacts for children; children who have often been let down by multiple systems. The data shows that Aboriginal and Torres Strait Islander children are less likely to receive a caution from police than non-Aboriginal children.

The CCYP report, *Our Youth Our Way* noted the following:

The cautioning rate for Aboriginal children and young people in Victoria declined from 14.6% of outcomes in 2008 to 3.9% of outcomes in 2015, while the proportion of arrests increased over the same period. Data from the Crimes Statistics Agency shows that between January 2018 and December 2019 Aboriginal children and young people aged 10 to 17 years were cautioned in 13% of incidents compared to 21% of incidents involving non-Aboriginal children and young people. This is important given that most children and young people who are effectively cautioned will not have further contact with the criminal justice system.⁴¹⁵

We also know that many of the children who come into contact with police and the criminal legal system are involved in the child protection system. It is critical that reforms in relation to cautioning, and more broadly, reforms aimed at diverting children away from the criminal legal system, have the appropriate protections and safeguards in place to ensure that the objectives can be achieved. We would expect cautioning reforms to be reflected in legislation, not only police policies and procedures, and updated training to Victoria Police. We would expect police to make consistent and genuine efforts to build relationships with Aboriginal children, families, communities and services. And we would expect Victoria Police to address racism at both an individual and systemic level, so that Aboriginal children are not left behind in these reforms.

There is an opportunity, that is too often squandered by Victoria Police, to support Aboriginal children, particularly those children who have been removed from their families, to strengthen their connection to their community and culture. There is an opportunity missed when police do not consider what might be happening in the child's family or whether the child might have an undiagnosed disability; when police do not step aside, and make space for community-driven solutions. Cautioning more Aboriginal children, and involving Elders in this process, would be a positive step forward. We hope to see the promise of such an approach be realised.

In relation to pre-charge cautioning, we note that the current five-year Aboriginal Youth Cautioning Pilot (**ACYC**) program is a priority under *Burra Lotjpa Dunguludja* (AJA4), and we support this collaboration between Victoria Police and Aboriginal communities in the three pilot sites (Echuca, Dandenong and Bendigo).⁴¹⁶ However, we are concerned that this is now the second Koori specific youth cautioning pilot program in Victoria, and the Government has still not committed to long-term sustainable funding to ensure that pre-charge cautioning programs are available across Victoria. VALS

⁴¹⁵ CCYP, *Our Youth Our Way* report, p33

⁴¹⁶ Under *Burra Lotjpa Dunguludja*, the Aboriginal Justice Forum has committed to implement this program in four sites over the next 5 years. See AJF, *Burra Lotjpa Dunguludja* (2018), p. 41.



welcomes Victoria Police’s intended change of policy, but emphasises that it is critical that changes are enshrined in legislation.⁴¹⁷

Diversions at Court in the Youth Justice System

Regarding court-based diversion, we are concerned that the lack of culturally safe diversion programs, particularly for Aboriginal youth in rural and regional Victoria means that an Aboriginal young person may be eligible for Court-based diversion, but there are no programs available to support diversion. It is critical to ensure that the commitment under *Burra Lotjpa Dunguludja* (AJA4) to deliver community-based diversion programs is adequately funded and implemented in a timely manner.⁴¹⁸ Additionally, there is a need to enhance the cultural safety of the CCYD, by ensuring that there are Koori Diversion Coordinators.

RECOMMENDATIONS

Recommendation 148. The Victorian Government should create a legislative presumption in favour of alternative pre-charge measures, including verbal warnings, written warnings, cautions and referral to cautioning programs, and youth justice conferencing.

Recommendation 149. There should be no exclusion of specific offences from the presumption in favour of cautions and/or diversion.

Recommendation 150. There should be no limit to the number of cautions a child can receive. Children with a criminal history should not be excluded.

Recommendation 151. Cautioning should not be conditional on a child or young person formally admitting an offence. Cautions should be available to children who do not deny the offence.

Recommendation 152. Cautions should not be conditional upon a child engaging with or completing a program, or complying with conditions or directives.

Recommendation 153. A caution or other alternative response should be offered to a child or young person regardless of the capacity or willingness of their parent or guardian.

Recommendation 154. Victoria Police should make consistent and genuine efforts to build relationships with Aboriginal children, families, communities and services. Victoria Police must address racism at both an individual and systemic level, so that Aboriginal children are not left behind in any cautioning reforms.

⁴¹⁷ Tammy Mills, Police Change Tack on Youth Cautions, The Age (9 September 2021)

⁴¹⁸ See *Burra Lotjpa Dunguludja*, p. 43. Development and delivery of community based diversion programs is yet to commence. See [AJA4 in Action](#).



Recommendation 155. The Government should resource ACCOs to develop and implement pre-charge and court-based diversion programmes responding to the intersectional needs of Aboriginal youth.

Recommendation 156. Where pre-charge diversion is not possible, there should be a legal requirement to prioritise diversion at all stages of the legal process.

Recommendation 157. Where police decide not to proceed with pre-charge diversions, they should be required to complete a ‘failure to caution or divert’ notice, which is to be reviewed by the prosecution unit prior to charges being allowed to proceed. This notice should be provided to the child’s legal team.

Recommendation 158. If a child is cautioned or diverted, the legislation should specify that

- no charges or proceedings can be commenced or continued against the child or young person for the offence;
- the child or young person is not required to disclose to any other person for any purpose information concerning the caution or diversionary process;
- the caution/diversion does not result in a criminal record;
- evidence of, or relating to, a caution, should not be able to be adduced except with the permission of the child or young person concerned, following legal advice;
- any identifying material including fingerprints, palm prints, photographs or intimate samples including forensic material (if obtained) relating to the child or young person should be destroyed.
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Recommendation 159. The Courts should recruit and retain Koori Diversion Coordinators to improve the cultural safety of the Children’s Court Youth Diversion service.

Summary Offences Reform

As VALS has previously noted in submissions to the Royal Commission into Victoria’s Mental Health System, there a number of criminal offences in statute in Victoria which serve no significant public benefit, and have the effect of creating unnecessary contact with the criminal legal system for vulnerable people. Many summary offences are difficult to avoid committing for people who are homeless, experiencing mental health or cognitive disabilities, or dealing with substance addiction.

In the context of Victoria’s soaring prison population and the urgent need to reduce incarceration rates of Aboriginal people, low-level offences which unnecessarily funnel vulnerable people in the criminal legal system are deeply problematic.



A significant shift in Victoria’s approach to summary offences is particularly urgent because of the punitive bail reforms discussed above. The restriction of bail means that any contact with police that leads to a charge has a higher chance of leading to people being remanded in custody. Though only indictable offences trigger some of the harsher provisions of the Bail Act, the existence of these summary offences brings police into contact with people who may have trauma-affected responses because of past experience with law enforcement. Up-charging on the basis that someone resists arrest or assaults a police officer, or the enforcement of old warrants against people who come to police attention because of minor summary offending, can lead to people being remanded when there was no significant reason for police to be involved with them in the first instance.

VALS supports the decriminalisation of low-level offences that have a disproportionate impact on Aboriginal people experiencing mental health and cognitive disabilities, including offences such as drunk and disorderly offences, begging, homelessness or other poverty related public order offences. To this end, the Victorian Government should work with relevant stakeholders (including with Aboriginal Community Controlled Organisations, such as VALS) to address unmet needs that lead to low level offending, and meet gaps in service provision to support people on bail or divert people to suitable services and programs. This includes resourcing of more frontline social and community services and culturally informed health services and safe, affordable and appropriate housing.

RECOMMENDATIONS

Recommendation 91. The Victorian Government should decriminalise offences in the *Summary Offences Act 1966 (Vic) (SOA)* that disproportionately target persons experiencing mental ill-health and/or who are homelessness. This includes:

- Begging (s49A of the SOA)
- Obstruction of foot paths (s5 of the SOA)
- Move on directions (s6 of the SOA)
- Obscene language (s17 of the SOA)

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. 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. These include:

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- 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.”
 - That Victoria Police’s cannabis cautioning program is inconsistently applied and is overly restrictive.
 - That Aboriginal people are “significantly overrepresented in sentencing statistics for minor cannabis offences compared to other Victorians” and that Aboriginal people face particular trauma from interactions with the criminal legal system.
 - 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.

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. 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.

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

- 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.

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.

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- 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.

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

- 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 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. The court system in Victoria does not enable equivalent data analysis, but case studies that VALS has presented show a similar pattern.



Case Study – Cameron (a pseudonym)

Cameron, employed and with no prior criminal history, was arrested, placed on bail and charged with possessing a drug of dependence. Despite it being a small amount of cannabis, a caution was not given. Cameron suffers from post-traumatic stress disorder (PTSD) due to a previous abusive relationship and childhood trauma and abuse.

This approach to drug offences reflects a view that a criminal charge and court outcome represents the end of a person's attempt to address their use and abuse of drugs, rather than an opportunity to begin, or re-engage in, the process of rehabilitation. Instead, a guilty verdict could affect Cameron's ability to work and travel, without addressing any of the issues underlying their cannabis use.

The financial cost to the community of taking this matter through the courts is not justified by the negligible damage done by simple use of cannabis, with no allegations of more serious offending.

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.

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;

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- Reduces social costs to individuals, including improving employment prospects;
 - Does not increase drug use;
 - Does not increase other crime.”

The Australian Lawyers Alliance (ALA) has also recently published a report endorsing a public health-led, harm minimisation response to drug use. 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.” 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 80. The use of cannabis and the possession of cannabis for personal use should be decriminalised.

Recommendation 81. In the event that the use of cannabis and the possession of cannabis for personal use is not decriminalised:

- Cautions should be utilised as a first preference;
- To improve access to cautions and diversion, cautions should be available regardless of criminal history, and the necessity for police consent to and recommendation for diversion should be removed;
- Diversion, the Court Integrated Services Program (CISP) and other support services, including culturally appropriate services provided by ACCOs, should be expanded, to avoid recordable court outcomes;
- The use of cannabis and the possession of cannabis for personal use should be a summary offence.



Recommendation 82. The use of drugs should be approached as a public health issue, not a criminal justice issue. This should include:

- Recognition that use or possession of small amounts of a drug is unlikely to pose a social problem and need not trigger Police involvement;
- For repeat or heavy users, drug use should trigger a health and support services response, not a criminal justice response;
- The design of this public health response should be informed by international experience and best practice.

Recommendation 83. People charged with minor drug offences should have access to the Victorian Drug Court on a voluntary basis, with appropriate changes to ensure that they are not at risk of imprisonment as a result of a Drug Treatment Order.

Recommendation 84. Koori Court should be able to make Drug Treatment Orders as an alternative to imposing a custodial sentence, in cases where imprisonment is likely and the person's offending is related to drug use.

Recommendation 85. 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.

Independent Third Persons and Youth Referral & Independent Person Program

Independent Third Persons (ITPs) attend police interviews of people with disability or mental illness, to help these marginalised people understand the process and their rights. ITPs are provided by the Office of the Public Advocate, and trained to ensure that they can provide safe and effective support to people held in police custody. This is a vital safeguard, and VALS is concerned that the ITP scheme is not operating effectively. In early 2020, during the early stages of pandemic restrictions, VALS received 145 notifications about Aboriginal people in custody requiring support from an ITP, but only 81 were able to access it. 14 of these 81 accessed support only via telephone, which cannot provide the same safeguards given that ITPs' responsibilities include observing the person in custody for signs of distress and requesting breaks in interviews if necessary. The ITP service overall remains heavily underutilised, with some police stations making almost no calls to the ITP service each year.

VALS supports the numerous options for improving the ITP service identified by the Centre for Innovative Justice in a 2018 report. The critical starting point is that the requirement to call an ITP when interviewing people who may have a disability or mental illness should be included in legislation, not only in Victoria Police policy as at present. This core reform would support further steps, including the expansion of resourcing, improved training for police about the ITP service, and improved cultural



awareness training for ITPs. Extensive training on cultural awareness is particularly important given the disproportionate rates at which Aboriginal people have disabilities, mental illness and acquired brain injuries. Cultural competence training and anti-racism training for police is also necessary to reduce the risk that signs of a disability are, due to racial stereotyping, perceived by police simply as an Aboriginal person being uncooperative or under the influence of drugs or alcohol.

For young people, independent persons are provided through the Youth Referral and Independent Person Program (YRIPP), run by the Centre for Multicultural Youth, in collaboration with other organisations, in 157 police stations across Victoria. YRIPP is a more expansive programme than the ITP scheme, since legislation requires the presence of an Independent Person for a police interview of any young person if a parent or guardian is not attending. YRIPP Independent Persons play a broadly similar role during the interview itself, but they also speak with the young person before and after the interview and can offer them referrals to appropriate support services. YRIPP is an effective scheme, but its effectiveness for Aboriginal youth is highly dependent on the project being properly connected to culturally safe support services – so that Aboriginal young people can be referred to appropriate services – and on Independent Persons receiving proper training on how to work with Aboriginal young people. To this end, VALS has been involved in developing and implementing training for YRIPP Independent Persons. It is critical that YRIPP and all the organisations involved in implementing it are funded adequately to maintain this high level of training and coordination.

RECOMMENDATIONS

Recommendation 140. The Victorian Government should legislate for Independent Third Persons to attend police interviews with adults and young people.

Recommendation 141. Independent Third Persons, Independent Persons under the Youth Referral and Independent Person Program (YRIPP), and Victoria Police should receive comprehensive cultural awareness and anti-racism training regarding dealing with Aboriginal people with cognitive disabilities and Aboriginal young people.

Recommendation 142. The Victorian Government should adequately fund VALS and organisations involved in the Youth Referral and Independent Person Program (YRIPP).

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. 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:

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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.

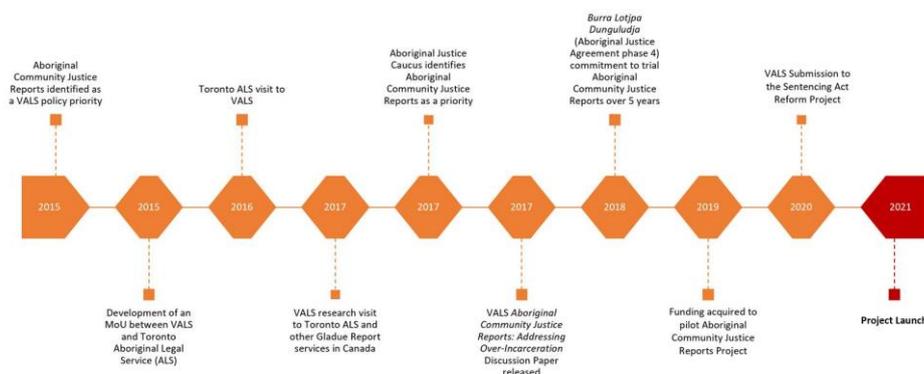
In 2017, VALS released its discussion paper, *Aboriginal Community Justice Reports: Addressing Over-Incarceration*. In this paper, VALS proposed trialling “Aboriginal Community Justice Reports... a pre-sentence, community written report, which aims to gather information about underlying impacts on any 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 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.”

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.”

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.”

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.”

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



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.
- 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.

Sentencing decisions are regularly informed by pre-sentence reports (PSRs), which do not adequately consider cultural identity or community circumstances of Aboriginal people. 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. 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.”

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*. 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.”



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 considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.” 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. 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) 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](#).⁴¹⁹ 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 this pilot. Case works support will be made available to each person who participates in order to provide support and care.

⁴¹⁹ *Aboriginal Community Justice Reports Project: Improving sentencing outcomes and reducing overincarceration of Aboriginal people*, available at <https://www.vals.org.au/unlocking-victorian-justice/>



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 92. 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.
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Recommendation 93. The new Youth Justice Act should provide 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/or Torres Strait Islander peoples.

Recommendation 94. All Judges and Magistrates should be required to complete regular face-to-face training in cultural awareness, systemic racism and unconscious bias.

Recommendation 95. 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 96. 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.

Lack of Support for Clients on a CCO with an 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.

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.

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.

RECOMMENDATIONS

Recommendation 161. 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.



Community-Based Sentences

Aboriginal people are less likely to receive a community-based sentence than non-Aboriginal people, less likely to complete their orders, and more likely to be imprisoned as a result of breaching an order. In VALS' experience, this is because CCOs are not appropriately tailored to Aboriginal people, and the mechanisms for supporting Aboriginal people to successfully complete their community-based orders continue to be grounded in punitive and paternalistic approaches.

In 2018-2019 in Victoria, Aboriginal people made up 6.87% of the average daily community corrections population versus 9.5% of the average daily incarcerated population. In the same year, 5.82% of VALS criminal law matters resulted in a CCO versus 6.7% which resulted in a custodial sentence.

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

- Introducing sentencing options between a CCO and an adjourned undertaking;
- Investing in and increasing access to culturally appropriate services and programs to support Aboriginal people on community-based orders.

Since the introduction of CCOs in 2012 and abolition of a range of other community-based orders (intensive correction order, home detention, community-based order, suspended sentences), there are now only two community-based orders in Victoria: a Drug Treatment Order and a CCO.

CCOs were introduced as a flexible option, allowing a judge or magistrate to tailor the order. Conditions attached to a CCO include standard core terms (e.g. not reoffending, not leaving Victoria without permission, reporting to a community corrections centre, complying with written directions from the Secretary to the DJCS) as well as at least one additional condition (e.g. medical treatment, unpaid community work, supervision by corrections worker, non-association with certain people, complying with curfew, staying away from a specific place or area). If an individual breaches a condition of a CCO, they may be resentenced for the original offence and may face up to 3 months additional imprisonment for the breach.

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

In particular, we see the following issues:

- CCO conditions are often not culturally appropriate;
- Corrections Victoria take a punitive, inflexible approach to enforcing CCO conditions;

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- There is a shortage in Aboriginal-led culturally appropriate programs and services to support clients on CCOs, particularly in rural and regional areas;
 - Electronic monitoring of people on CCOs.

Culturally Inappropriate CCO conditions

In 1991, the RCIADIC recommended that non-custodial sentences be available, accessible and culturally appropriate, and that authorities work with Aboriginal and Torres Strait Islander groups in implementing programs. Thirty years later, we continue to see culturally inappropriate conditions, which essentially set Aboriginal people up to fail.

In VALS' experience, inappropriate conditions include:

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

Punitive Approach Taken by Corrections

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

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



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

RECOMMENDATIONS

Recommendation 99. The Victorian Government should increase community-based sentencing options. This includes creating additional sentencing options between an adjourned undertaking and a Community Corrections Order (CCO).

Recommendation 100. The Victorian Government must work with Aboriginal organisations to implement measures to ensure that CCOs are culturally appropriate, including:

- Amending section 48A of the *Sentencing Act* so that for the purpose of attaching conditions to a CCO, courts are required to take into account the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples.
- Requiring all Judges and Magistrates to complete regular cultural competence training, to ensure that the conditions set on CCOs for Aboriginal people are culturally appropriate and achievable.
- Investing in culturally appropriate programs and supervision for Aboriginal people on CCOs, including more facilities and programs modelled off Wulgunggo Ngalu Learning Place, particularly for women.

Koori Court

Koori Court is a specialist court which aims to incorporate elements of Aboriginal and Torres Strait Islander culture, authority and process, in order to make the legal process more culturally appropriate for Aboriginal people. Notably, Aboriginal Elders participate in the process, as a trusted and authoritative voice to both denounce wrongdoing and assure Aboriginal people of community support in their rehabilitation. Koori Court hearings involve a ‘sentencing conversation’, where the judge does not speak from the bench but sits around a table with the person before the court, Elders, lawyers, family members and support workers. The conversation covers the circumstances of the offence, as well as the Aboriginal person’s personal and family history, their ties to their community, and their plans for rehabilitation. The conversation is led by the Elders. A sentencing discount is available when the judge assesses that the defendant’s participation has been genuine, recognising that the conversation is confronting and difficult, and has significant rehabilitative and shaming power for defendants.

Evaluation of the first two Koori Courts found that they led to fewer breaches of correctional orders and fewer failures to appear on bail, caused less alienation for the Aboriginal people before the Court,



and did better at integrating court outcomes with access to other support services.⁴²⁰ The model has been expanded to the Children’s Court and County Court, and there are now more than 100 Elders who participate in Koori Court across Victoria. County Court Koori Court is leading the trial of Aboriginal Community Justice Reports, discussed above, to further improve the Court’s approach to rehabilitation and bring more understanding of people’s Aboriginality and the effects of colonialism into the judicial process.

In the context of Victoria’s efforts to realise the right of Aboriginal self-determination, and the clear success of Koori Court in improving outcomes for Aboriginal people, the Government should expand the scope of the Koori Court system. VALS believes that a Koori Court model is an important aspect in progressing Aboriginal self-determination in the Victorian justice system. In the short term, Victoria can make progress towards this goal by increasing the range of functions performed by Koori Courts, and the geographical reach of the Court. Aboriginal people have a right to culturally safe judicial processes at all stages of their legal matters, across all of Victoria.

This should include, as a starting point, increased access to Koori Courts in more locations across Victoria. This is discussed above in relations to Children’s Koori Court, but is also an important priority for adult Koori Court. The Supreme Court’s decision in *Cemino v. Cannan and Ors* has meant that Aboriginal people can have their matters heard at a different venue in order to access Koori Court.⁴²¹ However, Aboriginal people should not be forced to choose between a local court and a culturally appropriate judicial process, and establishing Koori Court at every regional court should be a priority. Beyond this, the remit of Koori Courts should be expanded so that they can hear bail applications and the sentencing hearings of all matters for Aboriginal people, not only those where a guilty plea is entered. Koori Court bail hearings are particularly important given the disproportionate impact of Victoria’s bail laws on Aboriginal people, and the recognised success of Koori Court in reducing rates of breaches and reoffending. Koori Court jurisdiction should also expand to divert people to culturally appropriate diversion programs.

Access to Koori Court has been sharply limited by COVID-19 restrictions. In 2020-21, VALS clients came before Koori Court for criminal matters on 40 occasions, compared to 124 in 2019-20.⁴²² Special effort is needed to ensure that wider access to Koori Court is restored, both in the pandemic recovery period and in any future pandemic.

RECOMMENDATIONS

Recommendation 276. The Victorian Government should increase access to culturally appropriate legal processes, by expanding the jurisdiction of Koori Courts to:

- divert Aboriginal people to culturally appropriate diversion programs;

⁴²⁰ Judge Irene Lawson, County Court of Victoria (2020), ‘The County Koori Court: An Information Paper for Legal Practitioners’, pp2-3. Accessed at <https://www.cpdinsession.com.au/wp-content/uploads/2020/10/Paper-and-Presentation.pdf>.

⁴²¹ *Cemino v. Cannan and Ors* [2018] VSC 535.

⁴²² VALS data.

- hear bail applications;
- hear matters that are contested and have not resolved to a plea of guilty;
- make Drug and Alcohol Treatment Orders where appropriate.
-

Recommendation 277. The number of Koori Courts and frequency of sitting days should be expanded across the Magistrates' Court, County Court and Children's Court jurisdictions, to ensure access to culturally appropriate courts, particularly in regional and rural areas.

Culturally Appropriate Bail Courts

In addition to the urgent need to reform the punitive bail system, there are also significant opportunities to reduce the number of Aboriginal people on remand by expanding the jurisdiction of Koori Courts to include culturally appropriate bail proceedings. Building on the experiences of First Nations courts in Canada, VALS strongly believes that Koori Courts in Victoria should have jurisdiction over bail. However, this would require adequate resourcing for the Koori Court to manage the large additional caseload and adequate funding for VALS to represent Aboriginal people in these matters. Since the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), Koori Courts have been established in the Magistrates Court (2002), the Children's Court (2005) and the County Court (2008) across various locations in Victoria. Each year, VALS criminal law solicitors make approximately 300 appearances in Koori Courts across Victoria. In our experience, there is greater understanding and acknowledgment of Aboriginal culture and identity in Koori Courts, including through the critical role of Elders and Respected Person (ERPs), as well as Koori Court officers.

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

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

Whilst the intention behind section 3A is positive, the introduction of section 3A in 2010 has not had the effect of reducing the number of Aboriginal people on remand. VALS experience is that section 3A is not taken into account unless raised specifically by the defence, and in some cases, it is raised but not considered seriously. In 2017, the Australian Law Reform Commission recommended that Governments work with Aboriginal organisations "to develop guidelines on the application of bail provisions requiring bail authorities to consider any issues that arise due to a person's Aboriginality."



This has not yet happened in Victoria, however VALS and Fitzroy Legal Service are currently developing a guide on how Aboriginality can be relevant to bail proceedings.

Recently, the Supreme Court decision in RE: Hopper (No 2) found that Aboriginality is a relevant factor for bail applications, even where connection has been intermittent over the course of the person's life. That said, VALS believes that culturally appropriate bail proceedings/courts would significantly reduce the number of Aboriginal people in prisons, both on remand and serving sentences. This will go a long way in achieving the Victorian Government's commitment to reduce over-representation of Aboriginal people on remand and more broadly in the criminal legal system.

RECOMMENDATIONS

Recommendation 30. The Victorian Government should work with the County Court, Magistrates Court and Children's Court, to expand the jurisdiction of Koori Courts to hear bail applications.

Recommendation 31. The Courts should work with Aboriginal organisations to develop guidelines on the application of section 3A of the *Bail Act*, as recommended by the Australian Law Reform Commission.

Recommendation 32. Where a person appears unrepresented in a bail hearing, the Magistrate should proactively make inquiries as to whether the person is Aboriginal, and if so, they must meaningfully take into account Section 3A of the *Bail Act 1977* (Vic).

Recommendation 33. The Victorian Government should require all bail decision makers to receive regular training on Section 3A of the *Bail Act*.

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. 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.” They prohibit the use of solitary confinement for people “with mental or physical disabilities when their conditions would be exacerbated by such measures.”

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



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

Solitary confinement is a fundamentally harmful practice. As Lachs 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’.

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 214. Regarding the use of isolation of children

- Use of isolation on a child must be prohibited, except when necessary to prevent an imminent and serious threat of injury to the child or others, and only when all other means of control have been exhausted.
- Isolation must be used restrictively and only for the shortest necessary period of time, and be publicly reported to an independent oversight mechanism.
- The use of isolation as punishment, or on a vulnerable child, must be prohibited. Isolation must not be used for discipline or as a generalised behaviour management strategy (including a means by which to obtain compliance with staff instructions.)
- Children who are at risk of suicide or self-harm must not be placed in isolation.

Recommendation 215. Solitary confinement should be prohibited in all places of detention (including police custody, youth detention facilities and prisons) by legislation.

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



Recommendation 216. Staffing and other operational issues in places of detention should be urgently addressed, to ensure no one is subjected to solitary confinement.

Strip Searching

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

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. 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 and never involve body cavity searches. 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.

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.” This strongly suggests that strip searches are used far more often than could be justified by any reasonable suspicion that they are necessary or likely to uncover contraband.



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

Furthermore, in *Minogue v. Thompson*, 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.

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

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

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, 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.

RECOMMENDATIONS

Recommendation 217. 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 218. Strip searching in youth detention facilities should be prohibited by legislation.

Recommendation 219. Prisons should adopt policies which require them to consider the effect of strip searches on re-traumatisation.

Recommendation 220. 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 221. Body cavity searches should never be performed on imprisoned people.

Recommendation 222. The Government should invest in technology which enables non-intrusive searching, to provide further alternatives and minimise the use of strip searching.

Equivalency 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.” 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.”

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”. 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.

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 Australian prisons and by international organisations. 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. The same is generally observed in youth detention setting, though data in Australia is more limited. Existing evidence indicates that the health needs of incarcerated adolescents are greater than those in non-custodial settings.

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



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

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. 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.

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.

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.

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.

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.

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.

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.

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 mitigated or resolved prior to release into the community. 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. 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.

RECOMMENDATIONS

Recommendation 223. 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 224. Health care should be delivered through DHHS rather than DJCS, and not through for-profit organisations.

Recommendation 225. 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 226. 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 227. 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 228. 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 229. The Government should prioritise the development and finalisation of standards for culturally safe, trauma informed health services in the criminal legal system and youth justice.

Mental Health & Mental Healthcare

High-quality healthcare for people in prison is particularly important given the high rates of mental illness 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) 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.

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. VALS continues to call for increased access to culturally safe, trauma-informed forensic mental health services throughout the criminal legal system. 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 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.

RECOMMENDATIONS

Recommendation 230. 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 231. 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.

Spent Convictions

VALS commends the Government for enacting a legislated Spent Convictions Scheme in February 2021. We would also like to acknowledge the work of the Parliamentary Inquiry into a Legislated Spent Convictions Scheme, which was pivotal for this important reform.

The Act is an important step forward in promoting rehabilitation for individuals who have previously been convicted of a criminal offence. However, we believe that additional reform is required to ensure that the Act is effective in supporting genuine rehabilitation and reintegration. VALS strongly believes that rehabilitation is the most effective way of ensuring community safety.

To further strengthen the legislated Spent Convictions Scheme, we strongly recommend that the impact of the Act is closely monitored, with opportunities for review. We also recommend the following key changes:

1. **Discrimination on the basis of an irrelevant criminal record must be prohibited.** While the Equal Opportunity Act has been amended to prohibit discrimination on the basis of a spent conviction, we believe that discrimination on the basis of an irrelevant criminal record should also be prohibited. Under the new Spent Convictions Scheme, individuals have to wait for 5 or 10 years for a conviction to be spent and are likely to experience discrimination on the basis of their criminal record during this time. To ensure that individuals are able to genuinely rehabilitate and reintegrate back to the community, all efforts must be made to ensure that they are not discriminated against on the basis of an irrelevant criminal record.
2. **The “crime-free” periods for both children and adults must be shorter.** The Act requires that children and young people aged 15 – 20 years at the time of the offence, must wait 5 years for their convictions to be spent, and adults must wait 10 years. In both cases, the time



period starts again if the individual is convicted of another offence, unless - no conviction is recorded; no penalty is imposed; the penalty imposed is an order to pay restitution or compensation; or the penalty imposed for the subsequent offence is less than 10 penalty units (for 2021/2022, this is \$1817.40). These time periods are arbitrary and onerous, and they undermine the rehabilitative aims of the Act.

Five years is a long period of time for a child or young person, particularly given that offending behaviour is most likely to occur between the ages of 16 and 17. Waiting five years at this age can have a significant impact on future education and/or employment opportunities, as young people are particularly vulnerable to stigma and discrimination in employment settings and are also at a high risk of reoffending and becoming trapped in a cycle of offending behaviour. The ten-year waiting period for adults is also excessive and will have a discriminatory effect for Aboriginal people, given that the life expectancy of Aboriginal people is significantly lower than non-Aboriginal people.

The Spent Convictions Scheme in Victoria should adopt a graduated model whereby the “crime-free” period is determined with reference to the severity of the sentence imposed and the person’s age.

3. **The “crime-free” period should not restart for low-level offences that receive a prison sentence.** As noted above, the crime-free period does not restart for some offences. However, it does restart if the individual is convicted of a low-level offence and receives a short prison sentence, for example, breaching bail conditions (30 penalty units or 3 months imprisonment) or failure to answer bail (Level 7 imprisonment - 2 years maximum).

The evidence is clear that Aboriginal people are over-policed and are disproportionality charged and convicted of low-level crimes. We are therefore concerned that the threshold for restarting the crime-free period is too low. Many poverty crimes are committed out of necessity and because the individual needs support. The risk of such a low threshold is that many individuals who are trapped into a cycle of offending will never have their convictions spent and will, thus, never have a genuine opportunity for rehabilitation and reintegration.

4. **No convictions should be excluded from the scheme: all convictions should be capable of being spent, including through special circumstances applications.** VALS is firmly of the view that no offences should be excluded from the scheme. Once a sentence is complete, individuals should not have to suffer further punishment as a result of a criminal record. We believe that risks to community safety are adequately addressed through other mechanisms, including for example Working with Children checks and the Sexual Offences Register.

The new law provides that individuals convicted of a sexual offence, a serious violent offence, or an offence for which the penalty imposed was more than 30 months imprisonment, can apply to the Magistrates Court to have their conviction spent, but only if: (a) the person was between 15-20 years at the time of the offence; or the offence was a serious violence or sexual offence, but no term of imprisonment was imposed; or the offence was not a serious violence or sexual offence and the term of imprisonment was not more than 5 years.



VALS supports the mechanism in the new Act whereby serious convictions can be spent in some cases. However, we believe that this mechanism should apply to all convictions. The effect of excluding some convictions from the scheme is that the individual will continue to be discriminated against and punished for the rest of their life, despite the fact that they have served their sentence. There will always be convictions where the circumstances are exceptional, and the individual deserves a second chance. The law should recognise this by allowing applications to be made for convictions that currently do not fall within the scope of the law, where this is in the interests of justice to do so.

Additionally, we believe that applications under the Spent Convictions Act 2021 should be considered by VCAT, because it is more accessible and less formal than the Magistrates Court.

RECOMMENDATIONS

Recommendation 256. The impact of the *Spent Convictions Act 2021* (Vic) should be closely monitored, and data should be publicly available each year, including:

- the number and type of convictions spent;
- the age of the individual at the time of the conviction vs the age when the conviction was ‘spent’; and
- whether the individual identifies as Aboriginal.

Recommendation 257. The Government should amend Section 6 of the *Equal Opportunity Act 2010* (Vic) to include irrelevant criminal record as a protected attribute.

Recommendation 258. The *Spent Convictions Act 2021* (Vic) should be amended to adopt a graduated model whereby the “crime-free” period is determined with reference to the severity of the sentence imposed and the person’s age.

Recommendation 259. The “crime-free” period should not restart for low-level offences that receive a prison sentence, including “survival crimes” and bail offences.

Recommendation 260. No types of offences should be excluded from the scheme. All convictions should be capable of being spent, including through special circumstances applications to the Victorian Administrative Appeals Tribunal (VCAT).

Recommendation 261. VALS should be funded to carry out targeted Community Legal Education on the new Spent Conviction Scheme, and to provide legal advice and representation for individuals applying to have their convictions spent.