



Submission on Current Proposals for the new Mental Health and Wellbeing Act
AUGUST 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), which was established in 1973 to provide culturally safe legal and community justice services to Aboriginal and/or Torres Strait Islander people across Victoria.¹ Our vision is to ensure that Aboriginal people are treated equally before the law, our human rights are respected, and we have the choice to live a life of the quality we wish.

Legal Services

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

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

Our Civil and Human Rights Practice provides advice and casework to Aboriginal people in relation to a range of civil law issues, including: infringements, tenancy, victims of crime, 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 represents families in family law and child protection matters, where we advocate for support to ensure that families can remain together, and for compliance with the Aboriginal Child Placement Principle wherever children are removed from their parents' care.

Our Specialist Legal and Litigation Practice (Wirraway) focuses specifically on police, corrections and government accountability through litigation. It provides legal advice and representation in civil litigation matters against government authorities, including for claims involving excessive force or unlawful detention, police complaints, prisoners' rights issues, and Coronial Inquests (including in relation to deaths in custody).

¹ The term "Aboriginal" is used throughout this submission to refer to Aboriginal and/or Torres Strait Islander peoples.

² In 2017-2018, VALS provided legal services in relation to 1367 criminal law matters, and in 2018-2019, VALS provided legal services in relation to 1,253 criminal law matters.



Community Justice Programs

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

The Community Justice Team also run the following programs:

- Family Violence Client Support Program⁵
- Community Legal Education
- Victoria Police Electronic Referral System (V-PeR)⁶
- Regional Client Service Officers
- Baggarrook Women's Transitional Housing program.⁷

Policy, Research and Advocacy

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

ACKNOWLEDGEMENTS

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

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

- Dr. Matthew Witbrodt, Policy, Research and Advocacy Officer
- Anna Potter, Lawyer, Civil Law and Human Rights Practice
- Andreea Lachs, Head of Policy, Communications and Strategy

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

⁴ Ss. 464AAB and 464FA, *Crimes Act 1958* (Vic).

⁵ VALS has three Family Violence Client Support Officers (FVCSOs) who support clients throughout their family law or civil law matter, providing holistic support to limit re-traumatisation to the client and provide appropriate referrals to access local community support programs and emergency relief monies.

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

⁷ The 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.



EXECUTIVE SUMMARY

VALS welcomes the opportunity to prepare a submission for the Department of Health and Human Services (DHHS) in relation to the development of the new Mental Health and Wellbeing Act in Victoria (Act). The current submission addresses the following issues:

- Areas for improvement in the proposed objectives and principles of the new Act
- Issues identified concerning information collection, use and sharing
- Issues identified concerning compulsory treatment
- Issues identified concerning seclusion and restraint
- Issues identified concerning governance and oversight

SUMMARY OF RECOMMENDATIONS

Recommendation 1. The Objectives of the Mental Health and Wellbeing Act should better reflect the thematic issues underlying the Recommendations of the Royal Commission into Victoria's Mental Health System concerning existing imbalances relating to the provision of mental health and wellbeing services to children, including, but not limited to:

- Increasing the capacity to provide services to children;
- Enhancing and increasing the ability to provide assessments and diagnostic tests and treatment to children; and
- Enhancing and increasing the ability to provide early intervention and treatment for mental health and wellbeing issues among children.

Recommendation 2. The Principles should better reflect the need to:

- Meet demand for mental health and wellbeing services among the age groups identified in the Final Report of the Royal Commission into Victoria's Mental Health System (ie. infants and children; young adults; adults; and older adults) in an equitable and balanced manner; and
- The need to address mental health and wellbeing issues early to ensure the best long-term outcomes for the persons affected.

Recommendation 3. The Objectives should better reflect the need to address existing inequities and imbalances in the provision and delivery of mental health and wellbeing services between communities in metropolitan Victoria and communities in regional and rural Victoria.

Recommendation 4. The Objectives should better reflect the need to address affordability inequities that arise due to income level and disadvantage, that impede access to mental health and wellbeing services.

Recommendation 5. The Principles should better reflect the need to ensure the equitable distribution of the provision and delivery of mental health and wellbeing services between rural and regional Victorian communities and metropolitan Victorian communities.



Recommendation 6. Principle 10 in the current proposal should better reflect that financial circumstances not only influence mental health and wellbeing of individuals, but can also impact and/or impair the ability of a person to access mental health and wellbeing services.

Recommendation 7. The Principles and Objectives should better reflect the need to address:

- Inequities in quality of mental health and wellbeing services and programs offered to persons in the custody of Victoria Police and Corrections Victoria and such services and programs offered within the greater Victorian community; and
- Issues relating to continuity of care following custodial detention, in a manner consistent with Recommendation 37(3) of the Royal Commission into Victoria’s mental health system.

Recommendation 8. The Principles and Objectives should better reflect the intended purpose of the Victorian mental health system to proactively engage with at-risk adults in an effort to prevent (further) engagement with the Victorian criminal legal system, as envisaged under Recommendation 37(2) of the RCMHS.

Recommendation 9. Consistent with the general emphasis on early intervention in the findings and recommendations of the RCMHS, the Objectives and Principles should better reflect the need to increase and enhance the provision of targeted mental health and wellbeing supports, services and programs to at-risk children and young people, in a manner consistent with Recommendation 37(4).

Recommendation 10. The Objective and Principles should better reflect Recommendation 33(2) and (4) concerning the need for the Victorian mental health and wellbeing system to provide adequate support to the Victorian Aboriginal Controlled Community Health Organisation and other Aboriginal Community Controlled Organisations to meet the needs of Aboriginal people in Victoria, to deliver quality, culturally safe infant, child and youth mental health and wellbeing support services to Aboriginal people.

Recommendation 11. The Principles should reflect the need and desirability of mental health and wellbeing services to be provided to Aboriginal people by the Victorian Aboriginal Controlled Community Health Organisations and other Aboriginal Community Controlled Organisations.

Recommendation 12. The Objectives should better reflect the need for the Victorian mental health and wellbeing system to establish and implement the necessary programs, processes and planning required to ensure access to appropriate housing support for people living with mental illness in accordance with Recommendation 25(3); 25(5)(b-c); 25(6) and 47.

Recommendation 13. The Objectives should include a provision that reflects the findings of the RCMHS concerning substance misuse and addiction among people with mental illness; notably Recommendations 35 and 36 concerning the need to enhance and increase support for persons with substance abuse/addiction issues.

Recommendation 14. The term ‘coercive practices’ should be removed from the proposed Objectives.



Recommendation 15. The inclusion of the right of self-determination of Aboriginal and Torres Strait Islander peoples in the Objectives should reflect the fact that self-determination is a right that is exercised rather than an approach that is practised; and that the right is a collective right distinct from other rights enjoyed by individuals.

Recommendation 16. Any decisions made regarding policies and legislation governing the collection, use and sharing of Indigenous data obtained by Victorian mental health and wellbeing services should be premised upon the recognition of, and respect for, the principle of Indigenous Data Sovereignty of Aboriginal people in Victoria.

Recommendation 17. The Secretary of the Department should ensure that decisions made concerning the information-sharing infrastructure, including the identification of persons and entities authorised to access such information, includes:

- Recognising and respecting the Indigenous Data Sovereignty of Aboriginal people in Victoria in a manner consistent with Recommendation 16 of the current submission;
- Broad consultation with Aboriginal people in Victoria at both the community-level and through their representatives; and
- Ensuring that the process and outcomes reflect the rights of Aboriginal people to free, prior and informed consent in legislative and administrative measures that affect them.

Recommendation 18. The development of training, professional guidelines, standards and cultural change to support the new Act and appropriate changes in practice should require broad consultation with Aboriginal people in Victoria and their representatives, reflecting both recognition and respect for the right of Aboriginal people to free, prior and informed consent concerning administrative measures that may affect them.

Recommendation 19. Any proposals made by the Department concerning the sharing of information collected by Victorian mental health and wellbeing services with Victoria Police, Corrections Victoria and Child Protection Services should be the focus of extensive consultation with interested stakeholders, including Aboriginal Community Controlled Organisations and Aboriginal Community Controlled Health Organisations to mitigate and/or prevent unintended consequences for Aboriginal people in Victoria.

Recommendation 20. The Department should ensure that frameworks concerning the sharing of information collected by Victorian mental health and wellbeing services are:

- Based upon person-centred, culturally-appropriate and trauma-informed approaches, as well as best practices;
- Premised upon the provision of appropriate mental health and wellbeing services to consumers in an expedient manner; and
- Wholly premised upon the interests of, and benefit to, the consumers of such services.

Recommendation 21. Future consultations undertaken by the Department concerning the sharing of information collected by Victorian mental health and wellbeing services with a broad range of social services should include further details, including:

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- The type of information envisaged to constitute ‘basic information’;
 - The range of services to whom the ‘basic information’ would be available (aside from the examples provided thus far); and

The purposes for which information could be shared.

Recommendation 22. In accordance with Indigenous Data Sovereignty, the ability to share ‘basic information’ collected by Victorian mental health and wellbeing services with a broad range of social services in the current proposal should be prohibited unless consent is first obtained from an Aboriginal consumer of such services.

Recommendation 23. The department should engage in further consultation with Aboriginal community-controlled organisations and Aboriginal community-controlled health organisations to determine *who* will be permitted to provide consent in the event an Aboriginal consumer lacks sufficient capacity to consent to share information collected by Victorian mental health and wellbeing services, in a manner consistent with Indigenous Data Sovereignty.

Recommendation 24. The definition of ‘last resort’ with regard to compulsory treatment should be further refined and include safeguards to prevent unnecessary use of such an approach to treatment of mental illness.

Recommendation 25. The Department should include separate statutory guidelines in the new Mental Health and Wellbeing Act pertaining to compulsory treatment in instances concerning Aboriginal people, developed in consultations with Aboriginal people, premised upon the right to free, prior and informed consent.

Recommendation 26. In any instances where an Aboriginal person may be subject to compulsory treatment, such treatment should be culturally-safe and only be undertaken following consultations with:

- Victorian Aboriginal Community Controlled Health Organisations in instances involving adults; and
- Victorian Aboriginal Community-Controlled Health Organisation (VACCHO) and Victorian Aboriginal Child Care Agency (VACCA) in instances involving children and young people.

Recommendation 27. The definition of ‘last resort’ as the basis for the use of restrictive practices should be further refined and include safeguards to prevent unnecessary use of such practices against individuals with mental illness.

Recommendation 28. The restrictive practices regulated by the new Mental Health and Wellbeing Act should include seclusion, chemical restraint, mechanical restraint, physical restraint, environmental restraint, psycho-social restraint and consequence driven practices in a manner consistent with *the National Framework for Reducing the Use of Restrictive Practices in the Disability Service Sector*.

Recommendation 29. The Department should include separate statutory guidelines in the new Mental Health and Wellbeing Act pertaining to restrictive practices in instances concerning Aboriginal people, developed in consultations with Aboriginal people, premised upon the right to free, prior and informed consent.



Recommendation 30. In instances where an Aboriginal person may be subject to restrictive practices, such practices should be age- and culturally-appropriate, and only be undertaken following consultations with:

- Victorian Aboriginal Community Controlled Health Organisation (VACCHO) in instances involving adults; and
- Victorian Aboriginal Community Controlled Health Organisation (VACCHO) and Victorian Aboriginal Child Care Agency (VACCA) in instances involving children and young people.

Recommendation 31. The consultations referred to in Recommendation 30 of the present submission should include both the nature of the restrictive practice and the intended duration.

Recommendation 32. The Department should ensure that statutory provisions in the new Mental Health and Wellbeing Act require that Aboriginal people are represented in the membership of the Mental Health and Wellbeing Commission, the Regional Mental Health and Wellbeing Boards and any further bodies established under the Act.

Recommendation 33. Once designated/established:

- The Victorian NPM's mandate should (in compliance with Article 4 of OPCAT and Recommendation 10 of the Australian Human Rights Commission's report), include any place under the Government's jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence.
- This includes both public and private custodial settings which that person is not permitted to leave at will by order of any judicial, administrative or other authority.
- The NPM's mandate should not be restricted by any temporal limitations.
- The NPM's mandate should encompass instances where people who are detained are temporarily absent from the place they are normally detained (eg when they are taken to a hospital for medical treatment).
- The NPM's mandate should include forensic mental health hospitals, closed forensic disability facilities or units, correctional facilities, youth detention facilities, police custody, court custody, and residential secure facilities for children.

Recommendation 34. The Victorian Government should engage in transparent, inclusive and robust consultations, as NPMs are designated/established and operationalised, with Aboriginal and/or Torres Strait Islander communities and organisations, such as VALS, to ensure that NPM operations, policies, frameworks and governance are culturally appropriate and safe for Aboriginal people.

Recommendation 35. The Victorian NPM should be culturally competent for Aboriginal and/or Torres Strait Islander people. The NPM should appreciate the legacy and ongoing impacts of colonisation; that Aboriginal perspectives of what constitutes torture, or cruel, inhuman or degrading treatment or punishment may diverge from that of non-Aboriginal people; and that the long-term impact of torture and ill-treatment can be shaped by the survivors' culture and the historic-political context of the ill-treatment (including the history of colonisation). It should also take into account systemic racism in its work.



Recommendation 36. People with lived experience of detention (or experts by experience), including Aboriginal people, should be involved in the design and operation of the NPM. Experts by experience should be provided with appropriate support, recognising the risk of re-traumatisation, and the value of their contribution and expertise should be acknowledged with appropriate remuneration.

DETAILED SUBMISSIONS

Question 2: Areas for improvement in the current Objectives and Principles of the new Act

The present section addresses Question 2 of the consultation questions regarding the *Mental Health and Wellbeing Act: update and engagement paper (June 2021) (UEP)*; namely how the objectives and principles could be improved. The role of the principles and objectives of a legislative act, as noted by DHHS in the UEP, are to provide guidance on the interpretation and application of the Act.⁸

While VALS acknowledges the effort and resources being invested by DHHS in the development of the new Act to fulfil the recommendations of the Royal Commission into Victoria’s Mental Health System (**RCVMHS**), the Principles and Objectives, as presented in the UEP, have failed to appropriately address significant elements of the reforms called for in the Final Report of the RCVMHS.

Children

VLS highlights the absence of explicit Objectives and Principles pertaining to children. While two of the proposed Principles explicitly recognise the importance of mental health and wellbeing among children and young people,⁹ the principles only extend as far as promoting the best interests of children and protecting the needs, wellbeing and safety of children and young people already receiving mental health and wellbeing services.¹⁰ The objectives, on the other hand, make no mention of the provision of mental health and wellbeing services for children and young people. The absence of explicit objectives in relation to children and young people - and the narrowly constructed principles in relation to the same – is of concern, considering that 2 of the 9 Interim Report Recommendations¹¹ and 10 of the 65 Final Report recommendations of the RCVMHS explicitly referred to the provision of mental health and well-being programs and services to children.¹²

While Recommendations 19-21 of the Final Report of RCVMHS¹³ will undoubtedly be integrated into the new Act being developed by the DHHS, the proposed Principles and Objectives in the UEP fail to adequately reflect the basis of the evidence-based recommendations in any meaningful fashion. The aforementioned Recommendations were based upon the need to increase capacity for the provision of services to children

⁸ Department of Health. *‘Mental Health and Wellbeing Act: update and engagement paper (June 2021)’*, p.8.

⁹ Principles 12 and 13. See Department of Health. *‘Mental Health and Wellbeing Act: update and engagement paper (June 2021)’*, p.11.

¹⁰ Principle 12 in Section 2.1 of the UEP.

¹¹ Interim Recommendations 2 and 3 in Royal Commission into Victoria’s Mental Health System. *Final Report: Summary and recommendations*. (2021), pp. 103-104.

¹² Recommendations 3(2)(c), 4(5), 9(2)(b), 17, 19-21, 24, 25, 37(4) and 63(2) in Royal Commission into Victoria’s Mental Health System. *Final Report: Summary and recommendations*. (2021), pp. 39, 40, 45, 53, 55-57, 60, 61, 73 and 99, respectively.

¹³ Royal Commission into Victoria’s Mental Health System. *Final Report: Summary and recommendations*. (2021), pp. 55-57.



and young people;¹⁴ to enhance and increase the ability to provide assessments and diagnostic tests for mental health and wellbeing issues among children and young people;¹⁵ and better provide for early intervention and treatment as mental health and wellbeing issues emerge.¹⁶ Additionally, the RCMHS emphasised that Victoria's current mental health system failed to provide adequate resources and services to address the mental health and wellbeing needs of children, which, if addressed would decrease the burden on such services among young people and adults if appropriate intervention occurred during childhood.¹⁷

Recommendation 1. The Objectives of the Mental Health and Wellbeing Act should better reflect the thematic issues underlying the Recommendations of the Royal Commission into Victoria's Mental Health System concerning existing imbalances relating to the provision of mental health and wellbeing services to children, including, but not limited to:

- Increasing the capacity to provide services to children;
- Enhancing and increasing the ability to provide assessments and diagnostic tests and treatment to children; and
- Enhancing and increasing the ability to provide early intervention and treatment for mental health and wellbeing issues among children.

Recommendation 2. The Principles should better reflect the need to:

- Meet demand for mental health and wellbeing services among the age groups identified in the Final Report of the Royal Commission into Victoria's Mental Health System (ie. infants and children; young adults; adults; and older adults) in an equitable and balanced manner; and
- The need to address mental health and wellbeing issues early to ensure the best long-term outcomes for the persons affected.

Inequities arising due to location and income level

Two further significant elements omitted from the Objectives and Principles in the current proposal relate to inequities identified by the RCMHS. While many issues relating to the inequities (and inequalities) of access to, and delivery of, mental health and wellbeing services determined by the RCMHS are explicitly addressed in the Principles and Objectives, the current proposal is surprisingly silent on two of the principal inequities identified concerning access to, and delivery of, such services: inequitable service distribution and affordability.¹⁸

¹⁴ See, for example, discussions in Royal Commission into Victoria's Mental Health System. Final Report, Volume 2: Collaboration to support good mental health and wellbeing. (2021), pp. 125, 165-177 and 180.

¹⁵ See, for example, discussions in Royal Commission into Victoria's Mental Health System. *Final Report: Summary and Recommendations* (2021), p. 12; and *Final Report, Volume 2: Collaboration to support good mental health and wellbeing*. (2021), pp. 155-156, 168 and 181.

¹⁶ See, for example, Royal Commission into Victoria's Mental Health System. *Final Report, Volume 2: Collaboration to support good mental health and wellbeing*. (2021), pp. 125, 126 and 158-159; and Royal Commission into Victoria's Mental Health System. Final Report: Summary and recommendations. (2021), p. 12.

¹⁷ Royal Commission into Victoria's Mental Health System. *Final Report, Volume 2: Collaboration to support good mental health and wellbeing*. (2021), p. 125.

¹⁸ See Royal Commission into Victoria's Mental Health System. Interim Report (2019), pp. 169-170.



The existing distribution inequity relating to the provision of mental health system services identified by the RCVMHS served as the basis for Recommendation 39¹⁹ and 40²⁰ in the Final Report - as well as being explicitly identified in Interim Recommendations 3²¹ and 7²² in the Interim Report - of the RCVMHS. The issues relating to inequitable service distribution centre upon the distinction between the mental health and wellbeing services currently available to communities in metropolitan areas of Victoria and the services available in regional and rural communities in Victoria. The lack of mental health and wellbeing services in many rural and regional communities were deemed an impediment for end users and carers in obtaining assessment, treatment and therapy due to the significant costs associated with travelling great distances for such services.²³ As of June 2016, The Australian Bureau of Statistics reported that approximately 21.1% of Aboriginal people in Victoria lived in regional and remote areas,²⁴ while the Report of the Royal Commission into Victoria's Mental Health System suggests the figures could be as high 54%.²⁵

Issues relating to the costs and expenses associated with the inequitable distribution of services in rural and regional areas is compounded in the case of inequities associated with affordability. The issue is of particular importance among Aboriginal people in Victoria since the median personal income of an Aboriginal person in Victoria in 2016 was \$479,²⁶ while the median for the population of Victoria was approximately \$948.²⁷ The costs associated with receiving mental health and wellbeing assessments, services and treatment are prohibitive to many members of the Victorian community due to income level and other financial disadvantage. Financial constraints serving as a barrier to accessing mental health services under the current system among people living in poverty or with disadvantage include a lack of private insurance; costs associated with travel to appointments; the inability to pay out-of-pocket costs associated with receiving treatment;²⁸ and the existing gaps in, and limits of, coverage in Medicare and NDIS plans.²⁹

¹⁹ Dedicated to ensuring that people living in rural and regional Victoria receive the benefits of the changes to the Victorian mental health and wellbeing system mandated by the RCVMHS.

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²¹ Explicitly recognises the need to provide additional clinical outreach services to individuals that have attempted suicide to support such people living in rural and regional areas.

²² Explicitly recognises the need to address workplace reform and workforce shortages issues in the provision of public mental health services in rural and regional locations.

²³ For example, see Royal Commission into Victoria's Mental Health System. *Interim Report Summary* (2019), p. 11; Royal Commission into Victoria's Mental Health System. *Interim Report* (2019), p. 170; Royal Commission into Victoria's Mental Health System. *Final Report, Volume 1: A new approach to mental health and wellbeing in Victoria* (2021), p. 36; and Royal Commission into Victoria's Mental Health System. *Final Report, Volume 3: Promoting inclusion and addressing inequities*. (2021), pp. 435-502.

²⁴ Australian Bureau of Statistics. *Estimates of Aboriginal and Torres Strait Islander Australians, June 2016*. (2018). Available at <https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/estimates-aboriginal-and-torres-strait-islander-australians/latest-release>.

²⁵ Royal Commission into Victoria's Mental Health System. *Final Report, Volume 3: Promoting inclusion and addressing inequities*. (2021), p. 151.

²⁶ Australian Bureau of Statistics. *2016 Census: Aboriginal and/or Torres Strait Islander Peoples Quick Stats* (2017). Available at https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/IQS2#:~:text=The%20median%20weekly%20personal%20income%20for%20Aboriginal%20and%20For%20Total%20personal%20income%20%28INCP%29%20Total%20household%20income%20%28HIND%29.

²⁷ Australian Bureau of Statistics. *Personal Income in Australia Table 2e. Total Income Distribution (2015-16)*. (2020) Available at <https://www.abs.gov.au/statistics/labour/earnings-and-work-hours/personal-income-australia/latest-release>.

²⁸ Dedicated to introducing schemes to address workforce shortages in the mental health and wellbeing sector in rural and regional Victoria.

²⁹ Royal Commission into Victoria's Mental Health System. *Interim Report* (2019), pp. 173-175; Royal Commission into Victoria's Mental Health System. *Final Report: Summary and Recommendations* (2021), p. 10.



Recommendation 3. The Objectives should better reflect the need to address existing inequities and imbalances in the provision and delivery of mental health and wellbeing services between communities in metropolitan Victoria and communities in regional and rural Victoria.

Recommendation 4. The Objectives should better reflect the need to address affordability inequities that arise due to income level and disadvantage, that impede access to mental health and wellbeing services.

Recommendation 5. The Principles should better reflect the need to ensure the equitable distribution of the provision and delivery of mental health and wellbeing services between rural and regional Victorian communities and metropolitan Victorian communities.

Recommendation 6. Principle 10 in the current proposal should better reflect that financial circumstances not only influence mental health and wellbeing of individuals, but can also impact and/or impair the ability of a person to access mental health and wellbeing services.

Adults in contact with, or at risk of contact with, the criminal legal system

A further significant omission from the Principles and Objectives relates to the provision of mental health and wellbeing services to people detained as a result of contact with the Victorian criminal legal system. The findings of the RCMVHS regarding the provision of services to such people underpinned Recommendations 37(3) and 38.

The RCMVHS findings noted that 61% of people detained in Victorian prisons had a diagnosed mental illness and 35% were referred to a prison mental health service.³⁰ While Aboriginal people were found to have similar levels of mental health and wellbeing issues to the general population in prisons, the issue is of particular concern given the overrepresentation of Aboriginal people in such settings (14.43 times the general Victorian population³¹). Despite the aforementioned statistics, the RCMVHS also found that custodial facilities were being expanded and new mental health units were big built within prisons rather than addressing the quality of mental health and wellbeing services in corrections environments.³² The issues were further compounded by the systemic failure to provide continuity of care between custodial mental health services and community mental health services following the release of people from custodial environments.³³

Furthermore, the Objectives and Principles are silent in relation to the proactive approach towards adults at-risk of coming into (further) contact with the Victorian criminal justice system. Recommendation 37(2) of RCMVHS explicitly addresses the need to provide consistent treatment, care and support to such individuals, as well as the need to establish a specialist behaviour response team to provide forensic clinical support to

³⁰ ³⁰ Royal Commission into Victoria's Mental Health System. *Final Report, Volume 2: Collaboration to support good mental health and wellbeing.* (2021), pp. 397-448.

³¹ Victorian Aboriginal Legal Services. *Submission to the Royal Commission into Victoria's Mental Health System.* (2019), p. 33; and Royal Commission into Victoria's Mental Health System. *Final Report, Volume 3: Promoting inclusion and addressing inequities.* (2021), Box 23.1 on p.359.

³² Royal Commission into Victoria's Mental Health System. *Final Report, Volume 3: Promoting inclusion and addressing inequities.* (2021), p.359.

³³ Royal Commission into Victoria's Mental Health System. *Final Report, Volume 3: Promoting inclusion and addressing inequities.* (2021), pp.381-383.



area mental health and wellbeing services to address specific issues arising in relation to adult consumers of generalist inpatient mental health and wellbeing services.³⁴ The ambit being for Victorian mental health and wellbeing services to provide sufficient and appropriate support and treatment to act to prevent at-risk adults living with mental illness from coming into (further) contact with the Victorian criminal justice system.

Recommendation 7. The Principles and Objectives should better reflect the need to address:

- Inequities in quality of mental health and wellbeing services and programs offered to persons in the custody of Victoria Police and Corrections Victoria and such services and programs offered within the greater Victorian community; and
- Issues relating to continuity of care following custodial detention, in a manner consistent with Recommendation 37(3) of the Royal Commission into Victoria’s mental health system.

Recommendation 8. The Principles and Objectives should better reflect the intended purpose of the Victorian mental health system to proactively engage with at-risk adults in an effort to prevent (further) engagement with the Victorian criminal legal system, as envisaged under Recommendation 37(2) of the RCMHS.

Children and young people in contact with the youth justice system

The proposed Objectives and Principles in the UEP omit any reference to children and young people in contact with, or at risk of coming into contact with, the youth justice system, reflected in Recommendation 37(4) of the RCMHS. As noted above, early intervention is of paramount importance for children and young people, particularly in relation to addressing mental health and wellbeing issues at an early stage, before such issues become more severe and have more profound effects on the lives and futures of children and young people.

Recommendation 9. Consistent with the general emphasis on early intervention in the findings and recommendations of the RCMHS, the Objectives and Principles should better reflect the need to increase and enhance the provision of targeted mental health and wellbeing supports, services and programs to at-risk children and young people, in a manner consistent with Recommendation 37(4).

Supporting mental health and wellbeing services by ACCOs

The proposed Objectives and Principles in the UEP fail to explicitly capture the need for the Victorian mental health and wellbeing system to support Aboriginal Community Controlled Health Organisations in the delivery of infant, child and youth mental health and wellbeing services to Aboriginal people. The RCMHS explicitly noted the increased need for such support arising from historical trauma, systemic racism and the failure to adequately fund and resource programs, initiatives and agencies to meet the needs of Aboriginal communities in this regard.³⁵

³⁴ Royal Commission into Victoria’s Mental Health System. *Final Report, Volume 3: Promoting inclusion and addressing inequities.* (2021), pp.395-96.

³⁵ See, generally, Chapter 16 of the Royal Commission into Victoria’s Mental Health System. *Interim Report* (2019), pp. 403-422; and Chapter 20 of the Royal Commission into Victoria’s Mental Health System. *Final Report, Volume 3: Promoting inclusion and addressing inequities.* (2021), pp. 139-203.



Recommendation 10. The Objective and Principles should better reflect Recommendation 33(2) and (4) concerning the need for the Victorian mental health and wellbeing system to provide adequate support to the Victorian Aboriginal Controlled Community Health Organisation and other Aboriginal Community Controlled Organisations to meet the needs of Aboriginal people in Victoria, to deliver quality, culturally safe infant, child and youth mental health and wellbeing support services to Aboriginal people.

Recommendation 11. The Principles should reflect the need and desirability of mental health and wellbeing services to be provided to Aboriginal people by the Victorian Aboriginal Controlled Community Health Organisations and other Aboriginal Community Controlled Organisations.

Need for housing support

The Objectives and Principles do not address meeting the basic needs of people engaged with mental health and wellbeing services in Victoria, particularly in relation to housing. The findings of the RCVMHS highlighted the need of the Victorian mental health and wellbeing system to focus on issues faced by people with mental health and wellbeing issues³⁶ and improve engagement with agencies and programs involved in housing support.³⁷ The issue is of considerable importance for Aboriginal people in Victoria, given Aboriginal people and families comprise 10% of the Victorian homeless population, while 17% had contact with homelessness services in 2018.³⁸

Recommendation 25 calls for the Victorian mental health and wellbeing services to develop internal programs and processes to assist in the selection of candidates for housing support;³⁹ design appropriate housing for adults and young people with mental illness; ensure an appropriate level of treatment, care and support is provided to recipients of such housing support;⁴⁰ and assessing the effectiveness of existing housing and services available to people with mental illness receiving housing support, as well as including housing support as a focal point in the mental health and wellbeing service and capital plans.⁴¹ Recommendation 25 emphasises the need for greater interaction and involvement on the part of the Victorian mental health and wellbeing system in ensuring that housing for people receiving such services is among its priorities.

Recommendation 12. The Objectives should better reflect the need for the Victorian mental health and wellbeing system to establish and implement the necessary programs, processes and planning required to ensure access to appropriate housing support for people living with mental illness in accordance with Recommendation 25(3); 25(5)(b-c); 25(6) and 47.

³⁶ Royal Commission into Victoria's Mental Health System. *Interim Report* (2019), pp. 321 and 324; and, generally, Chapter 16 of the *Final Report, Volume 2: Collaboration to support good mental health and wellbeing*. (2021), pp. 397-448.

³⁷ Royal Commission into Victoria's Mental Health System. *Interim Report* (2019), pp. 336, 369, 376, 399 and 416; and, generally, Chapter 16 of the *Final Report, Volume 2: Collaboration to support good mental health and wellbeing*. (2021), pp. 397-448.

³⁸ Royal Commission into Victoria's Mental Health System. *Final Report, Volume 3: Promoting inclusion and addressing inequities*. (2021), p. 151.

³⁹ Recommendation 25(3) of the Royal Commission into Victoria's Mental Health System.

⁴⁰ Recommendation 25(5)(b-c) of the Royal Commission into Victoria's Mental Health System.

⁴¹ Recommendation 25(6) and Recommendation 47, of the Royal Commission into Victoria's Mental Health System.



Enhanced supports and services for persons who use substances

The current wording of Principle 7 in the UEP notes, albeit in passing, the need to ‘respond to the medical and other health needs’ of people with mental illness, including issues related to the use of alcohol and other drugs. This issue is particularly important in the case of Aboriginal people in Victoria as national statistics in 2019 indicate that Aboriginal people were approximately 62% more likely to engage in risky alcohol consumption than their non-Indigenous counterparts; and were almost 1.4 times more likely to engage in illicit drug use than their non-Indigenous counterparts.⁴²

The findings of the RCMHS placed particular emphasis on issues relating to substance misuse, including recommendations concerning the ability of persons living with both mental illness and substance misuse issues to access emergency treatment and services within their region (as defined in Recommendations 3(3) and 8(3)(c));⁴³ and establish a state-wide specialist service for the dual diagnosis of persons living with mental illness and/or substance abuse issues.⁴⁴ Given the prominence of the issue in the Recommendations of the RCMHS, the issue of substance abuse and addiction should be captured as an Objective as well.

Recommendation 13. The Objectives should include a provision that reflects the findings of the RCMHS concerning substance misuse and addiction among people with mental illness; notably Recommendations 35 and 36 concerning the need to enhance and increase support for persons with substance abuse/addiction issues.

Coercive practices

The inclusion of the term ‘coercive practices’ in Section 2 of the proposed Objectives is problematic in light of recommendations made by the RCMHS.

Recommendation 14. The term ‘coercive practices’ should be removed from the proposed Objectives.

Self-determination

While VALS appreciates the reference to self-determination in the proposed Objectives, the current wording is problematic. The right to self-determination involves the exercise of the right by an Indigenous community as a collective entity, this is not a right that is ‘practised’ as the wording of the proposed objective. Additionally, while the reference to the right to ‘individual choice’ of Aboriginal people is appreciated, the current wording suggests that self-determination is an individual right – which is simply not the case. The existing wording could be amended as follows:

‘respecting Aboriginal and Torres Strait Islander peoples’ collective right to exercise self-determination and decision-making power in matters that may affect them, including their right to

⁴² Australian Institute of Health and Welfare. *Alcohol, tobacco and other drugs in Australia: Aboriginal and Torres Strait Islander People*. Available at <https://www.aihw.gov.au/reports/alcohol/alcohol-tobacco-other-drugs-australia/contents/priority-populations/aboriginal-and-torres-strait-islander-people#alcohol>.

⁴³ Recommendation 35 of the Royal Commission into Victoria’s Mental Health System.

⁴⁴ Recommendation 36 of the Royal Commission into Victoria’s Mental Health System.



free, prior and informed consent; and the rights of Aboriginal and Torres Strait Islanders to individual choice.’

Recommendation 15. The inclusion of the right of self-determination of Aboriginal and Torres Strait Islander peoples in the Objectives should reflect the fact that self-determination is a right that is exercised rather than an approach that is practised; and that the right is a collective right distinct from other rights enjoyed by individuals.

Question 8: Information collection, use and sharing

A number of issues were identified in relation to the proposals concerning the collection, use and sharing of information obtained by Victorian mental health and wellbeing services. Broadly speaking, the issues identified concern the collective rights of Aboriginal people in relation to Indigenous data sovereignty; participation in decision-making processes which would affect their rights; and free, prior and informed consent concerning legislative and administrative measures that may affect them. Additionally, general issues were identified in relation to information sharing, collection and consent.

Indigenous Data Sovereignty and information collection, use and sharing

One issue of particular importance in relation to the collection, use and sharing of information collected by Victorian mental health and wellbeing services pertains to information collected regarding Aboriginal people. While VALS appreciates that the right to self-determination of Aboriginal people is recognised in the proposed principles concerning information collection, use and sharing, the consultation paper is silent in relation to *how* this is intended to be achieved. Decisions made regarding the collection, use and dissemination of information concerning Aboriginal people living with mental illness should be governed by the principle of Indigenous data sovereignty (**IDS**).

The following key concepts relating to IDS were defined by consensus by delegates of the Indigenous Data Sovereignty Summit:⁴⁵

- Indigenous Data: ‘In Australia, ... refers to information or knowledge, in any format or medium, which is about and may affect Indigenous peoples both collectively and individually.’
- Indigenous Data Sovereignty (IDS): ‘refers to the right of Indigenous peoples to exercise ownership over Indigenous Data. Ownership of data can be expressed through the creation, collection, access, analysis, interpretation, management, dissemination and reuse of Indigenous Data.’
- Indigenous Data Governance (**IDG**): ‘refers to the right of Indigenous Peoples to autonomously decide what, how and why Indigenous Data are collected, accessed and used. It ensures that data on or about Indigenous peoples reflects our priorities, values, cultures, worldviews and diversity.’⁴⁶

In practice, the concepts of IDS and IDG are a specific exercise of the right to self-determination as enshrined in Article 3 (as well as numerous other Articles) of the United Nations Declaration on the Rights of Indigenous

⁴⁵ The Indigenous Data Sovereignty Summit was held in Canberra, ACT, on 20 June 2018.

⁴⁶ *Indigenous Data Sovereignty, Communiqué*. Indigenous Data Sovereignty Summit. 20 June 2018, p. 1.



Peoples – an international human rights instrument that has been endorsed by the Australian Government since 2009.

The nature of the relationship between data collected by Victorian mental health and wellbeing services and IDS can be described as follows:

- The right of Aboriginal people, individually and collectively, to access and collect the Indigenous data obtained by Victorian mental health and wellbeing services; and
- The right of Aboriginal people, individually and collectively, to exercise control over the manner in which Indigenous data collected by Victorian mental health and wellbeing services concerning Aboriginal people is gathered, managed and utilised.

The relationship between IDG and data collected by Victorian mental health and wellbeing services concerning Aboriginal people, on the other hand, involves determining the specific circumstances under which the information concerning Aboriginal people can be collected in the first place. It is important to note that both IDS and IDG require the meaningful and effective participation of Aboriginal people before decisions should be made in relation to policies and legislation concerning Indigenous data.

Distinct means by which the concepts of Indigenous data sovereignty and Indigenous data governance can be integrated into policy and legislative frameworks concerning mental health and wellbeing services include:

- Providing ACCHOs with meaningful and effective participation in establishing culturally-appropriate guidelines concerning the nature of the information recorded by Victorian mental health and wellbeing services;
- Providing ACCHOs with access to data collected by Victorian mental health and wellbeing services to assess the accuracy of the data; and to better inform policy and legislative reform initiatives undertaken by ACCHOs relating to the mental health and wellbeing of Aboriginal people;
- Providing ACCHOs access to data collected by Victorian mental health and wellbeing services to better inform the content of community engagement activities;
- Providing ACCHOs with meaningful and effective participation in establishing culturally-appropriate guidelines concerning the storage and deletion of information collected by Victorian mental health and wellbeing services; and engaging in discussions concerning the continued retention of data collected in association with information collected by Victorian mental health and wellbeing services in archives maintained by ACCHOs;
- Allowing for the use of data collected in association with information collected by Victorian mental health and wellbeing services by ACCHOs and Aboriginal people when sharing stories and experiences relating to mental health and the provision of relevant programs and services in Australia; and
- Allowing ACCHOs and interested Aboriginal people access to information collected by Victorian mental health and wellbeing services for the purpose of research, evaluation and interpretation to educate and inform both Aboriginal communities and other communities on issues relating to Aboriginal people in Australian society from an Aboriginal perspective.



Recommendation 16. Any decisions made regarding policies and legislation governing the collection, use and sharing of Indigenous data obtained by Victorian mental health and wellbeing services should be premised upon the recognition of, and respect for, the principle of Indigenous Data Sovereignty of Aboriginal people in Victoria.

Information sharing and the right to free, prior and informed consent of Aboriginal people

The intention under the current proposal to empower the Secretary of the Department to establish new information-sharing systems and develop a new information-sharing infrastructure, including the identification of persons and entities authorised to use them in a process separate to developing the new Act.⁴⁷ While VALS acknowledges the intention to ensure collaboration with interested stakeholders, concerns exist regarding the nature of the intended collaboration.

The right to self-determination of Aboriginal people includes the right to participate in decision-making which would affect their rights,⁴⁸ which includes the right to privacy⁴⁹ and cultural rights.⁵⁰ Furthermore, Aboriginal people have the right to free, prior and informed consent before legislative or administrative measures are implemented that affect them.⁵¹ Any decisions concerning the proposed information-sharing infrastructure will necessarily require community consultations with Aboriginal people in Victoria and their representatives. Furthermore, the consultations should provide for the broadest possible representation to ensure meaningful and effective participation of Aboriginal people in the consultation process,⁵² and the legitimacy of the consent obtained in relation to the information-sharing infrastructure framework, prior to its implementation.⁵³

In a similar fashion, extensive consultations should be undertaken with Aboriginal people at both the community level and through their representatives regarding the proposed development of training, professional guidelines, standards and cultural change to support the new Act and appropriate changes in practice. In accordance with the right to free prior and informed consent of Aboriginal people, such consultation should occur in relation to legislative administrative measures, in whole or in part, which may affect them.

Recommendation 17. The Secretary of the Department should ensure that decisions made concerning the information-sharing infrastructure, including the identification of persons and entities authorised to access such information, includes:

- Recognising and respecting the Indigenous Data Sovereignty of Aboriginal people in Victoria in a manner consistent with Recommendation 16 of the current submission;

⁴⁷ UEP, p. 20.

⁴⁸ Article 18 of the United Nations Declaration on the Rights of Indigenous Peoples.

⁴⁹ s. 13 of the *Charter of Human Rights and Responsibilities Act 2006*.

⁵⁰ S. 15(2) the *Charter of Human Rights and Responsibilities Act 2006*.

⁵¹ Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples.

⁵² Food and Agriculture Organization of the United Nations. *Respecting free, prior and informed consent: practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition*. (2014) pp. 25-28.

⁵³ Food and Agriculture Organization of the United Nations. *Respecting free, prior and informed consent: practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition*. (2014) pp. 34-35.

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- Broad consultation with Aboriginal people in Victoria at both the community-level and through their representatives; and
 - Ensuring that the process and outcomes reflect the rights of Aboriginal people to free, prior and informed consent in legislative and administrative measures that affect them.

Recommendation 18. The development of training, professional guidelines, standards and cultural change to support the new Act and appropriate changes in practice should require broad consultation with Aboriginal people in Victoria and their representatives, reflecting both recognition and respect for the right of Aboriginal people to free, prior and informed consent concerning administrative measures that may affect them.

Information sharing proposals under the new Act

The ability to proactively share information with other service providers is an existing practice within the MARAM framework, which is currently implemented in Victoria in situations involving family violence. The ability to share information obtained from victim-survivors of family violence under the MARAM framework⁵⁴ is governed by trauma-informed and person-centred approaches that include allowing the person to make informed choices and provide input about the risk assessment and management process.⁵⁵ The framework is based upon the careful examination of best practices concerning the assessment and management of family violence incidents. In the experience of legal practitioners at VALS, the approach allows information to be shared if their clients consent, so they are not forced to repeat their stories so many times.

While elements of the proposal appear to be aligned with the MARAM framework, the information sharing proposal includes the sharing of basic information across a broad range of services. The examples of services provided include ambulance, housing, and alcohol and other drug services. Based upon consultations with our legal practices, sharing information collected by Victorian mental health and wellbeing services with Victoria Police, Corrections Victoria and Child Protection Services in a fashion similar to family violence incidents could prove to be problematic depending upon the type of information envisaged to be shared. Existing issues concerning the disproportionate impacts of policy and legislative frameworks experienced by Aboriginal people in Victoria due to bias and systemic racism are of particular concern in this instance.

General recommendations concerning the sharing of information collected by Victorian mental health and wellbeing services would include ensuring that:

- Policies concerning the sharing of information collected by Victorian mental health and wellbeing services is premised upon person-centred, culturally-appropriate and trauma-informed practice;
- The purpose of information sharing is to provide appropriate mental health and wellbeing services to consumers in an expedient manner; and
- The policies and administrative frameworks developed concerning the sharing of information collected by Victorian mental health and wellbeing services are wholly premised upon the interests of, and benefit to, the consumers of such services.

⁵⁴ Pillar 3, Responsibility 6 of the MARAM framework. See Victoria Government. *MARAM Framework: Summary for Organisational Leaders*. (2020), pp. 10-11.

⁵⁵ Victorian government. 'MARAM practice guides: Foundation knowledge guide- Key Concepts for practice.' Available at <https://www.vic.gov.au/maram-practice-guides-foundation-knowledge-guide/key-concepts-practice>.



Further specific feedback, however, cannot be provided at this time regarding further issues of importance in relation to the information sharing proposal owing to a lack of detailed information in the UEP, including:

- What type of information constitutes ‘basic information’;
- The range of services to whom the ‘basic information’ would be available (aside from the examples provided thus far); and
- The purposes for which information could be shared.

Recommendation 19. Any proposals made by the Department concerning the sharing of information collected by Victorian mental health and wellbeing services with Victoria Police, Corrections Victoria and Child Protection Services should be the focus of extensive consultation with interested stakeholders, including Aboriginal Community Controlled Organisations and Aboriginal Community Controlled Health Organisations to mitigate and/or prevent unintended consequences for Aboriginal people in Victoria.

Recommendation 20. The Department should ensure that frameworks concerning the sharing of information collected by Victorian mental health and wellbeing services are:

- Based upon person-centred, culturally-appropriate and trauma-informed approaches, as well as best practices;
- Premised upon the provision of appropriate mental health and wellbeing services to consumers in an expedient manner; and
- Wholly premised upon the interests of, and benefit to, the consumers of such services.

Recommendation 21. Future consultations undertaken by the Department concerning the sharing of information collected by Victorian mental health and wellbeing services with a broad range of social services should include further details, including:

- The type of information envisaged to constitute ‘basic information’;
- The range of services to whom the ‘basic information’ would be available (aside from the examples provided thus far); and
- The purposes for which information could be shared.

Information sharing between services and consent

While the proposal notes that the consumer will be able to request that ‘basic information’ not be shared, there is an absence of guarantee that such information will not be conveyed despite the request. As noted above, Indigenous Data Sovereignty mandates that Aboriginal people, individually and collectively, have the right to determine how their personal information and data is used.

A subsequent issue that arises in relation to consent concerns *who* will provide consent to share information relating to an Aboriginal person who lacks the capacity to provide consent under the current proposal. While ‘basic information’ can potentially be shared without the consent of a consumer, ‘more detailed information’ requires the consent of the consumer. Although the UEP is silent on capacity and consent, this matter is of particular importance given the broader concerns relating to Indigenous Data Sovereignty.



Recommendation 22. In accordance with Indigenous Data Sovereignty, the ability to share ‘basic information’ collected by Victorian mental health and wellbeing services with a broad range of social services in the current proposal should be prohibited unless consent is first obtained from an Aboriginal consumer of such services.

Recommendation 23. The department should engage in further consultation with Aboriginal community-controlled organisations and Aboriginal community-controlled health organisations to determine *who* will be permitted to provide consent in the event an Aboriginal consumer lacks sufficient capacity to consent to share information collected by Victorian mental health and wellbeing services, in a manner consistent with Indigenous Data Sovereignty.

Question 10: Compulsory treatment and assessment

The issues concerning compulsory treatment of Aboriginal people are of considerable importance, given historical use of force by agencies of the Australian Government against Aboriginal peoples. The historical use of force, coupled with the intergenerational trauma underpinning much of mental health and wellbeing issues experienced by Aboriginal people, has the potential to further (re)traumatise Aboriginal people, resulting in unintended consequences as a result of compulsory treatment that is not sufficiently trauma-informed and culturally-safe.

The right to self-determination of Aboriginal peoples in Victoria, which is recognised in the proposed Objectives in the UEP, is relevant to compulsory treatment in instances involving Aboriginal persons.

Definition of ‘last resort’ and compulsory treatment

While the term ‘last resort’ appears in both the proposed Principles and Objectives and Section 4.1 of the UEP concerning compulsory treatment, the criteria provided lack sufficient and precision concerning a number of issues, including:

- What types of mental illness achieve the threshold required to seek a compulsory treatment order;
- What constitutes ‘serious deterioration’ in a person’s physical or mental health;
- At what point restrictive practices would be deemed insufficient to prevent ‘serious harm’ to the person or another person;
- What would constitute ‘serious harm’ in accordance with criteria for compulsory treatment; and
- Under what conditions would the need for treatment be considered ‘immediate’.

Additionally, the UEP discussion in Section 4.1 contains no evidence of safeguards in place to prevent the unnecessary use of compulsory treatment.

Recommendation 24. The definition of ‘last resort’ with regard to compulsory treatment should be further refined and include safeguards to prevent unnecessary use of such an approach to treatment of mental illness.



Separate statutory guidelines for restrictive practices in situations involving Aboriginal people

Separate statutory guidelines should be developed for application to compulsory treatment in instances involving Aboriginal persons. The recognition of the right to self-determination of Aboriginal people in the proposed Objectives implicitly recognises the distinctness of their communities, identity, culture, traditions, norms and history from the majority of Australian society. The statutory guidelines should be developed in a manner consistent with the collective right of Aboriginal peoples in Victoria to free, prior and informed consent before adopting legislative or administrative measures that may affect them.⁵⁶

Recommendation 25. The Department should include separate statutory guidelines in the new Mental Health and Wellbeing Act pertaining to compulsory treatment in instances concerning Aboriginal people, developed in consultations with Aboriginal people, premised upon the right to free, prior and informed consent.

Compulsory treatment and consultation with Aboriginal Community Controlled Organisations

In accordance with the right to self-determination of Aboriginal people recognised in the proposed Objectives in the UEP, the new Mental Health and Wellbeing Act should include provisions mandating consultation with ACCOs in all instances potentially involving the compulsory treatment of an Aboriginal person. The right to self-determination of Aboriginal peoples includes the right to participate in decision-making in matter that affect their rights through representatives of indigenous institutions.⁵⁷ In all cases involving an Aboriginal person, the mental health and wellbeing specialists at Victorian Aboriginal Community-Controlled Health Organisation (**VACCHO**) should be consulted regarding both the assessment and development of the treatment plan. In situations involving an Aboriginal child or young person, the relevant officers at the Victorian Aboriginal Child Care Agency (**VACCA**) should be contacted in addition to VACCHO to ensure the age and cultural appropriateness of both assessment and treatment plan developed.

Recommendation 26. In any instances where an Aboriginal person may be subject to compulsory treatment, such treatment should be culturally-safe and only be undertaken following consultations with:

- Victorian Aboriginal Community Controlled Health Organisations in instances involving adults; and
- Victorian Aboriginal Community-Controlled Health Organisation (VACCHO) and Victorian Aboriginal Child Care Agency (VACCA) in instances involving children and young people.

Question 12: Seclusion and restraint, and regulation of chemical restraint

The recommendations concerning seclusion and restraint are premised upon the two principal areas of concern noted in the above section on compulsory treatment: the historical trauma suffered by Indigenous people, coupled with contemporary experiences of systemic racism and bias; the requisite processes and outcomes associated with the right to self-determination of Aboriginal peoples in Victoria.

⁵⁶ Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples.

⁵⁷ Article 18 of the United Nations Declaration on the Rights of Indigenous Peoples.



Definition of 'last resort' in relation to restrictive practices

Similar to concerns noted regarding 'last resort' in relation compulsory treatment above, the current proposals fail to provide any meaningful clarity regarding the definition and application of such a standard for the purposes of restrictive practices. The purpose, objective and thresholds concerning the use of restrictive practices would need to be clarified prior to any meaningful consultation on the issue.

Recommendation 27. The definition of 'last resort' as the basis for the use of restrictive practices should be further refined and include safeguards to prevent unnecessary use of such practices against individuals with mental illness.

Regulatory framework for restrictive practices

The current proposal concerning 'coercive and restrictive practices' in the new Mental Health and Wellbeing Act is problematic. While the proposed Objectives refer to 'coercive and restrictive practices', Section 4.1 uses the language of 'restrictive interventions' found in the *Mental Health Act 2014*.⁵⁸ Furthermore, Section 4.1 does not raise the issue of 'coercive practices', but focuses exclusively on seclusion, bodily restraint and chemical restraint: the first two practices are regulated in the *Mental Health Act 2014*⁵⁹ and the latter was not mentioned in the *Mental Health Act 2014* at all.⁶⁰ The approach to the issues of restrictive practices in the current proposal, thus far, appears to improve little in regards to the regulation of restrictive practices.

The current NDIS framework regulates 5 distinct types of restrictive practices: seclusion, chemical restraint, mechanical restraint, physical restraint and environmental restraint.⁶¹ Meanwhile, the proposed *National Framework for Reducing the Use of Restrictive Practices in the Disability Service Sector* further includes the categories of psycho-social restraints and consequence driven practices as restrictive practices,⁶² which arguably comprise the 'coercive practices' referred to in the proposed Objectives in the UEP. The regulation of further categories of restrictive practices would provide further safeguards to individuals receiving treatment, care and support for mental health and wellbeing issues.

Furthermore, the regulation of the aforementioned categories of restrictive practice in the statutory framework of the new Mental Health and Wellbeing Act would ensure consistency of the Victorian mental health and wellbeing framework with Commonwealth and NDIS frameworks, ensuring greater policy and operational cohesion in the provision of mental health and wellbeing services, in a manner consistent with the findings of the RCVMHS.⁶³

⁵⁸ Part 6, Division 1 of the *Mental Health Act 2014*.

⁵⁹ Part 6, Divisions 2 and 3, respectively, of the *Mental Health Act 2014*.

⁶⁰ Victorian Mental Illness Awareness Council. *VMIAC Policy Position Paper #3: Seclusion and Restraint*, p. 1. Available at <https://www.vmiac.org.au/wp-content/uploads/Position-Statement-3-Seclusion-and-Restraint-FINAL-1.pdf#:~:text=The%20use%20of%20restrictive%20practices%2C%20as%20defined%20by,of%20extreme%20harm%20and%2C%20in%20some%20cases%20torture.6i>.

⁶¹ s. 6 of the *National Insurance Disabilities Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018* (Cth).

⁶² Australian Department of Social Services. *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector* (the 'National Framework')(2014), p. 5.

⁶³ Royal Commission into Victoria's Mental Health System. *Final Report, Volume 1: A new approach to mental health and wellbeing in Victoria* (2021), p. 387-388.



Recommendation 28. The restrictive practices regulated by the new Mental Health and Wellbeing Act should include seclusion, chemical restraint, mechanical restraint, physical restraint, environmental restraint, psycho-social restraint and consequence driven practices in a manner consistent with *the National Framework for Reducing the Use of Restrictive Practices in the Disability Service Sector*.

Separate statutory guidelines for restrictive practices in situations involving Aboriginal people

Based upon the same reasoning offered above, the Department should enter into further consultations concerning the development of separate statutory guidelines concerning the use of restrictive practices in instances involving Aboriginal persons within the Victorian mental health and wellbeing system.

Recommendation 29. The Department should include separate statutory guidelines in the new Mental Health and Wellbeing Act pertaining to restrictive practices in instances concerning Aboriginal people, developed in consultations with Aboriginal people, premised upon the right to free, prior and informed consent.

Restrictive practices and consultation with Aboriginal Community Controlled Organisations

In accordance with the right to self-determination of Aboriginal people recognised in the proposed Objectives in the UEP, the new Mental Health and Wellbeing Act should include provisions mandating the consultation of ACCOs in all instances potentially involving the use of restrictive practices against an Aboriginal person. The right to self-determination of Aboriginal peoples includes the right to participate in decision-making in matter that affect their rights through representatives of Indigenous institutions.⁶⁴ In all cases involving an Aboriginal person, the mental health and wellbeing specialists at Victorian Aboriginal Community Controlled Health Organisation (**VACCHO**) should be consulted regarding both the nature and intended duration of the restrictive practice. In situations involving an Aboriginal child or young person, the relevant officers at Victorian Aboriginal Child Care Agency (**VACCA**) should be contacted in addition to VACCHO to ensure the age and cultural appropriateness of both the nature of the restrictive practice and the duration envisaged.

Recommendation 30. In instances where an Aboriginal person may be subject to restrictive practices, such practices should be age- and culturally-appropriate, and only be undertaken following consultations with:

- Victorian Aboriginal Community Controlled Health Organisation (VACCHO) in instances involving adults; and
- Victorian Aboriginal Community Controlled Health Organisation (VACCHO) and Victorian Aboriginal Child Care Agency (VACCA) in instances involving children and young people.

Recommendation 31. The consultations referred to in Recommendation 30 of the present submission should include both the nature of the restrictive practice and the intended duration.

⁶⁴ Article 18 of the United Nations Declaration on the Rights of Indigenous Peoples.



Question 13: Governance and oversight

Aboriginal representation in oversight and governance

VALS notes that no information was contained within the proposals within the UEP concerning the participation of Aboriginal representatives on the commissions and boards outlined in the proposal. The Department should ensure that seats designated for Aboriginal representatives are provided for in the new Mental Health and Wellbeing Act.

Recommendation 32. The Department should ensure that statutory provisions in the new Mental Health and Wellbeing Act require that Aboriginal people are represented in the membership of the Mental Health and Wellbeing Commission, the Regional Mental Health and Wellbeing Boards and any further bodies established under the Act.

The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The objective of the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)* is 'to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.' OPCAT, ratified by Australia,¹⁹ requires States to 'set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment.' These bodies are called National Preventive Mechanisms (**NPMs**).

Recommendation 33. Once designated/established:

- The Victorian NPM's mandate should (in compliance with Article 4 of OPCAT and Recommendation 10 of the Australian Human Rights Commission's report), include any place under the Government's jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence.
- This includes both public and private custodial settings which that person is not permitted to leave at will by order of any judicial, administrative or other authority.
- The NPM's mandate should not be restricted by any temporal limitations.
- The NPM's mandate should encompass instances where people who are detained are temporarily absent from the place they are normally detained (eg when they are taken to a hospital for medical treatment).
- The NPM's mandate should include forensic mental health hospitals, closed forensic disability facilities or units, correctional facilities, youth detention facilities, police custody, court custody, and residential secure facilities for children.

Recommendation 34. The Victorian Government should engage in transparent, inclusive and robust consultations, as NPMs are designated/established and operationalised, with Aboriginal and/or Torres



Strait Islander communities and organisations, such as VALS, to ensure that NPM operations, policies, frameworks and governance are culturally appropriate and safe for Aboriginal people.

Recommendation 35. The Victorian NPM should be culturally competent for Aboriginal and/or Torres Strait Islander people. The NPM should appreciate the legacy and ongoing impacts of colonisation; that Aboriginal perspectives of what constitutes torture, or cruel, inhuman or degrading treatment or punishment may diverge from that of non-Aboriginal people; and that the long-term impact of torture and ill-treatment can be shaped by the survivors' culture and the historic-political context of the ill-treatment (including the history of colonisation). It should also take into account systemic racism in its work.

Recommendation 36. People with lived experience of detention (or experts by experience), including Aboriginal people, should be involved in the design and operation of the NPM. Experts by experience should be provided with appropriate support, recognising the risk of re-traumatisation, and the value of their contribution and expertise should be acknowledged with appropriate remuneration.