



Royal Commission into Victoria's Mental Health System
Supplementary Submission

AUGUST 2020



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BACKGROUND TO THE VICTORIAN ABORIGINAL LEGAL SERVICE

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

Legal Services

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

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

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

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

Community Justice Programs

VALS run a Custody Notification System (CNS) which requires Victoria Police to notify VALS within 1 hour every time an Aboriginal person in Victoria is taken into police custody.³ Since October 2019, this requirement

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

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

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



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.

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

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:

- Andreea Lachs, Senior Policy, Research and Advocacy Officer
- Ren Flannery, Policy, Research and Advocacy Officer

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.



SUMMARY OF RECOMMENDATIONS

Recommendation 1: Given the over-representation of people with cognitive disabilities in the justice system and within Aboriginal and Torres Strait Islander communities, further investment should be made in VALS to enable it to deliver culturally safe support to clients with disabilities. This should include an ongoing funding commitment that would expand VALS' service:

- As per the proposal in VALS' funding bid, funding a sustainable place-based service delivery presence to enhance community access to high quality legal services across Victoria (including in areas and to communities outside metro Melbourne, that experience entrenched disadvantage).
- Funding support workers to assist VALS clients with intellectual, cognitive and psychosocial disabilities and complex communication needs to participate in criminal, civil and family law proceedings, with the view to achieving equality before the law. The support workers would assist clients to attend meetings, liaise with community support services, provide communication support to clients before the courts, and assist lawyers and legal services to operate in a more accessible way.

Recommendation 2:

Once designated/established:

- The Victorian NPM's/NPMs' mandate should (in compliance with Article 4 of OPCAT and Recommendation 10 of the AHRC'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 NPMs' 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 3: 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 4: 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 5: The Victorian NPM must be urgently be established, given the heightened risk of torture and ill-treatment of those who are detained during the pandemic.

Recommendation 6: People with lived experience of detention (or experts by experience), including Aboriginal people, should be involved in the design and operation of the NPM.

Recommendation 7: 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

On 5 July 2019, VALS made a submission to the Royal Commission into Victoria’s Mental Health System. This is a supplementary submission to assist the Commission, specifically focusing on the following of the Royal Commission’s Terms of Reference:

4. How to improve mental health outcomes, taking into account best practice and person-centred treatment and care models, for those in the Victorian community, especially those at greater risk of experiencing poor mental health, including but not limited to people:

4.1. from Aboriginal and Torres Strait Islander backgrounds;

4.4. in contact, or at greater risk of contact, with the forensic mental health system and the justice system.

Unfitness to plead project

1. Project overview

‘While unfitness to plead laws are aimed at avoiding unfair trials for persons with cognitive disabilities, declarations of unfitness can lead to detention and/or supervision for periods which exceed the length of a sentence had such persons been convicted.’⁸

The University of Melbourne’s 2017 *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities* project sought to evaluate two major research gaps in relation to unfitness to plead laws. The first relates to the United Nations Convention on the Rights of Persons with Disabilities (**CRPD**), which entered into force in 2008 and which Australia has ratified. The second major research gap concerned effective support for accused persons with cognitive disabilities to participate in criminal proceedings.

The aim of the research project was to address the legal barriers facing people with cognitive disabilities engaged in the justice system and to create appropriate alternative supports in the community. The research team conducted their assessment through a human rights analysis of the current unfitness to plead laws and implementing a 6-month Disability Justice Support Program across three community organisations, including VALS. The project provided VALS with a Disability Justice Support Person three days a week for six months. ‘The aim of the formal support was to optimise the participation of accused persons with cognitive disabilities

⁸ McSherry et al, *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities* (2017) University of Melbourne, 58.



in proceedings against them by focusing on the supports they may require to exercise legal capacity and access to justice on an equal basis with others.⁹

2. Value of project

The project identified that ‘there is a need to maximise rights protections for persons with cognitive disabilities in existing criminal justice processes, such as the unfitness to plead law.’¹⁰

Clients, their families, lawyers and support workers shared the view that there were significantly better outcomes for the individuals involved in the project, with many gaining access to support programs rather than a custodial sentence. Identified benefits of the program included support workers being able to bridge the communication gap between their client, lawyers, magistrates, police and court personnel. Additional benefits noted by participants included the support workers’ knowledge and understanding of the client’s disability, their ability to provide referrals to appropriate support services and assistance in managing tasks that might otherwise compound the client’s stress, such as paying bills and grocery shopping.

A comprehensive costs analysis conducted by the research team confirmed significant short-term savings, with it being estimated that the long-term savings would be even greater. The research team published a detailed account of these findings with a full explanation of the costing’s methodology.¹¹

The evaluation process identified a number of issues that would need to be addressed should the program continue, including:

- The unique cultural requirements of Aboriginal and/or Torres Strait Islander clients;
- The assessment process, which echoed concerns around the unfitness to plead test;
- The Disability Justice Support Workers’ lack of legal knowledge and training;
- The fact that, as non-legal representatives, support workers can be called to give evidence that may go against their client.

3. Further investment

Research indicates that persons with cognitive disabilities are significantly over-represented in the justice system in Australia. In 2011 the Victorian Department of Justice and Community Safety (DJCS) reported 42% of male prisoners and 33% of female prisoners had an acquired brain injury, compared to 2.2% of the general population.¹² A 2013 Victorian parliamentary inquiry reported that individuals with an intellectual disability were ‘anywhere between 40 and 300 per cent more likely’ to be jailed than those without an intellectual disability.¹³

⁹ McSherry et al, *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities* (2017) University of Melbourne, 30.

¹⁰ McSherry et al, *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities* (2017) University of Melbourne, 58.

¹¹ McCausland et al, *Cost Benefit Analysis of Support Workers in Legal Services For People with Cognitive Disability* (2017) University of Melbourne

¹² Martin Jackson et al, ‘Acquired Brain Injury in the Victorian Prison System’, Corrections Research Paper No 4, Department of Justice (2011) 22.

¹³ Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (2013).



The University of Melbourne's Unfitness to Plead project report states:

Indigenous people with disabilities face particular disadvantage in the criminal justice system, including under unfitness to plead laws.¹⁴ Mindy Sotiri and colleagues reported in 2012 that all nine individuals on indefinite supervision orders as a result of findings of unfitness to plead in Western Australia were Indigenous, as were 11 of 33 individuals found unfit to plead or 'unsound of mind' under the jurisdiction of the Western Australian Mentally Impaired Accused Review Board.¹⁵

Through the evaluation process of the project, researchers found that Aboriginal and/or Torres Strait Islander participants presented with significantly unique needs with regards to cultural protocols, lore, societal structures, gender, language, remoteness and the complex impacts of colonialism on disability and disadvantage. Aboriginal participants and lawyers from the two participating Aboriginal legal services identified that the success of the Disability Justice Support Program required the following:

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

The report found that Victorian participants who were able to access Koori Court and the Assessment and Referral Court List were significantly better off. The supportive environment with the Elders and support worker present and the Magistrate sitting at the table with the client, assisted the client to feel less vulnerable throughout the hearing. The process was a conversation, without the confusing legal jargon, facilitating the client's ability to comprehend and actively participate in the process.


From 2018-2019 VALS serviced 925 clients identifying as having a disability. Of those only 12% clearly stated having just a physical disability, the rest had cognitive disabilities or a number of disabilities.¹⁶ Whilst the DJCS publish weekly statistics showing age, gender, offence, sentence, Aboriginality, country of birth, marital status, employment status and level of education, Corrections Victoria does not provide a breakdown of prisoners identifying as having a disability.¹⁷

¹⁴ Eileen Baldry et al, *A Predictable and Preventable Path: Aboriginal People with Mental and Cognitive Disabilities in the Criminal Justice System* (University of New South Wales, 2015) 164, 167; Harry Blagg, Tamara Tulich and Zoe Bush, 'Diversions Pathways for Indigenous Youth with FASD in Western Australia: Decolonising Alternatives' (2015) 40 *Alternative Law Journal* 257; First Peoples Disability Justice Consortium, Submission No 39 to Senate Community Affairs References Committee, *Indefinite Detention of People with Cognitive Disabilities in Australia*, April 2016, 40-51.

¹⁵ Mindy Sotiri, Patrick McGee and Eileen Baldry, 'No End in Sight: The Imprisonment, and Indefinite Detention of Indigenous Australians with a Cognitive Impairment' (Report, Aboriginal Disability Justice Campaign, September 2012) 24. The Mentally Impaired Accused Review Board is responsible for periodic reviews of ongoing detention under the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 33. It is the Board that ultimately recommends the release of a person from a custodial order following a finding of unfitness to plead.

¹⁶ VALS Service Data 2018-2019.

¹⁷ Department of Justice and Community Safety - Corrections Victoria, Monthly prisoner and offender statistics 2019-20, available at <https://www.corrections.vic.gov.au/monthly-prisoner-and-offender-statistics-2019-20>



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Culturally appropriate, OPCAT-compliant independent detention oversight of secure forensic mental hospitals, prisons and other places of detention

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.'¹⁸ 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.'²⁰ These bodies are called National Preventive Mechanisms (NPMs).

1. Scope of OPCAT includes forensic mental health hospitals

The Australian Human Rights Commission's (**AHRC**) recently released report, 'Implementing OPCAT in Australia', asserted that 'OPCAT has broad application to any place where an individual cannot leave of their own free will, and where that place of detention is linked, either directly or indirectly, to a public authority.'²¹ The AHRC also affirmed that 'there is no temporal limitation on the concept of detention in OPCAT. Therefore, places where people are routinely detained for periods of less than 24 hours, should be included in the places open to inspection by NPMs.'²² It thus departed from the Commonwealth's suggestion that NPMs should focus on 'closed facilities or units where people may be involuntarily detained by law for mental health assessment or treatment (*where people are held for equal to, or greater than, 24 hours, such as a locked ward or residential institution*)... [and] closed forensic disability facilities or units where people may

¹⁸ *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006) Art 1.

¹⁹ *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006) Declarations and Reservations: Australia.

²⁰ *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006) Art 3.

²¹ Australian Human Rights Commission, *Implementing OPCAT in Australia* (29 June 2020) 43.

²² Australian Human Rights Commission, *Implementing OPCAT in Australia* (29 June 2020) 46.



be involuntarily detained by law for care (*where people are held for equal to, or greater than, 24 hours*), such as a Disability Forensic Assessment and Treatment Service.²³

The AHRC's expansive understanding of 'place of detention', including that temporal limits should not be erroneously imposed,²⁴ constitutes an accurate interpretation of OPCAT that should be adopted by the Victorian Government.

According to Forensicare's website, at the end of May 2018 there were 85 people on custodial supervision orders at Thomas Embling Hospital, and 11 men waiting in prison to be transferred to the Hospital (and some had been waiting for more than 10 months).²⁵ Places of detention such as the Thomas Embling Hospital, where '[p]atients are generally admitted to the hospital from the criminal justice system under the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997, Mental Health Act 2014 or the Sentencing Act 1991'²⁶ should fall within the NPM's inspection mandate (once the Victorian NPM is established).

Of note, although the focus of this submission is forensic mental health hospitals, the Commission should consider both the Government's obligations in relation to, and the need for, OPCAT-compliant detention oversight in all places of detention, including (but not limited to) correctional facilities, youth detention facilities, police custody, court custody, and residential secure facilities for children. Prevention of torture and ill-treatment through OPCAT-compliant detention oversight of all of these places of detention will be of interest to the Commission, as ill-treatment has a detrimental effect on the mental health of people deprived of their liberty (many of whom already have existing mental health conditions). Particularly of note, torture is understood to include severe mental pain or suffering²⁷ and "cruel, inhuman or degrading treatment or punishment" should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental.²⁸

People with mental health conditions are held in all of the above mentioned places of detention. The AHRC report highlighted that its 'research has found that prisoners with disability have been subjected to a range of harmful practices, including being physically shackled, medically restrained, segregated for long periods of time, and denied family visits or support persons as punishment. The impact of such treatment is compounded for people with disability who have been declared unfit to stand trial, when detention can be indefinite.'²⁹

²³ Australian Human Rights Commission, *Implementing OPCAT in Australia* (29 June 2020) 45.

²⁴ Australian Human Rights Commission, *Implementing OPCAT in Australia* (29 June 2020) 46.

²⁵ Victorian Institute of Forensic Mental Health, *Mental illness and the criminal law*, <https://www.forensicare.vic.gov.au/about-us/mental-illness-and-the-law/>

²⁶ Victorian Institute of Forensic Mental Health, Thomas Embling Hospital, <https://www.forensicare.vic.gov.au/our-services/thomas-embling/>

²⁷ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) Art 1(1).

²⁸ *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, GA Res 43/173, UN GAOR, 49th sess, 76th plen mtg, Supp.No.49, UN Doc A/43/49 (9 December 1988) General Clause.

²⁹ Australian Human Rights Commission, *Implementing OPCAT in Australia* (29 June 2020) 26.



Recommendation 2:

Once designated/established:

- The Victorian NPM's/NPMs' mandate should (in compliance with Article 4 of OPCAT and Recommendation 10 of the AHRC'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 NPMs' 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.

2. Consultation with and participation of Aboriginal and/or Torres Strait Islander communities and organisations

The AHRC Report recommended that the Australian Government 'adopt an OPCAT implementation strategy, which includes a measurable timeframe for implementation, identifying key dates and milestones [and] the process for ensuring that each body designated with an NPM function is OPCAT compliant.'³⁰ In Victoria, NPMs have yet to be designated/established.

The National Aboriginal and Torres Strait Islander Legal Services' (**NATSILS**) position is that

'[a]ll governments need to urgently designate and/or establish National Preventive Mechanisms (NPM) to oversee the conditions of detention and treatment of people in places of detention, which must, at a minimum, comply with international human rights standards. Governments need to engage with civil society, including our organisations, in transparent, inclusive and robust consultations as they are established and operationalised. NPMs need to ensure that their operations, policies, frameworks and governance are always culturally appropriate and safe for our people. NPMs need to also ensure their findings are publicly available and published in different formats and languages, including our languages.'³¹

Recommendation 3: 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.

³⁰ Australian Human Rights Commission, *Implementing OPCAT in Australia* (29 June 2020) 60.

³¹ National Aboriginal and Torres Strait Islander Services, *Black Lives Matter: always have, always will*, available at <http://www.natsils.org.au/portals/natsils/Policy%20statement%20on%20Black%20Lives%20Matter.pdf?ver=2020-07-09-171028-630>



3. NPMs should be culturally competent for detained Aboriginal and/or Torres Strait Islander people

The AHRC's report recognised that

'Aboriginal and Torres Strait Islander peoples, who have long been over-represented in many forms of detention and are affected by conditions of detention in distinct ways due to numerous factors including ongoing social and historical marginalisation and disadvantage, over-policing and experience of police bias, and intergenerational trauma. Aboriginal and Torres Strait Islander peoples in places of detention also have specific cultural requirements that differ from other people deprived of their liberty, such as the need to maintain strong cultural identity and connection to culture, country and community.'³²

It also recommended that the Australian Government 'adopt national principles regarding minimum conditions of detention to protect the human rights of detainees (National Conditions Principles). These principles should deal with issues including: the protection of particularly vulnerable detainees, such as... people with disability, Aboriginal and Torres Strait Islander peoples...'³³

Culturally appropriate OPCAT implementation should consider the following:

- 'The ongoing impact of colonisation on the criminal justice system (particularly in relation to places of detention and detaining authorities) and the legacy of the systemic human rights abuses that occurred in Australia should inform the work of [the NPM]. This includes an understanding of the consequent intergenerational trauma.'³⁴
- 'In order to properly assess the risk of torture or ill-treatment of Aboriginal detainees, the [NPM] should incorporate into its expectations/standards an expectation that there is an absence of systemic racism.'³⁵
- 'Aboriginal perspective[s] of what constitutes torture, or cruel, inhuman or degrading treatment or punishment, may diverge from that of non-Aboriginal people. The suffering experienced by an individual, the significance that they attribute to particular conduct or a situation in detention, and their emotional response, will be determined in part by how their culture shapes their worldview... [NPMs] should appreciate that Aboriginal people may experience imprisonment differently.'³⁶
- 'The [NPM] should appreciate, in its preventative work, that the long-term impact of torture and ill-treatment can be shaped by survivors' culture and the historic-political context of the ill-treatment (including the history of colonisation).'³⁷

These recommendations were echoed in the 'Joint Submission for the Report of the Special Rapporteur on the Rights of Indigenous Peoples to the General Assembly – Impact of COVID-19 on Indigenous Peoples.'³⁸

³² Australian Human Rights Commission, *Implementing OPCAT in Australia* (29 June 2020) 26.

³³ Australian Human Rights Commission, *Implementing OPCAT in Australia* (29 June 2020) 51-52.

³⁴ Andreea Lachsz, *Culturally appropriate oversight of conditions of detention and treatment of detained Aboriginal and Torres Strait Islander people in the Northern Territory's criminal justice system – in compliance with the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (2019) 21, available at <https://www.churchilltrust.com.au/project/?id=PR0014391>

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ NATSILS, Aboriginal Peak Organisations Northern Territory, Danila Dilba Health Service, Andreea Lachsz, *Joint Submission for the Report of the Special Rapporteur on the Rights of Indigenous Peoples to the General Assembly – Impact of COVID-19 on Indigenous Peoples* (2020), available at https://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/Callforinput_COVID19.aspx



Recommendation 4: 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.

4. A note on the importance of culturally appropriate detention oversight during the COVID-19 pandemic

The UN Anti-Torture mechanisms recently unanimously warned that ‘the COVID-19 pandemic is leading to an escalation of torture and ill-treatment worldwide.’³⁹ The ‘Joint Submission for the Report of the Special Rapporteur on the Rights of Indigenous Peoples to the General Assembly – Impact of COVID-19 on Indigenous Peoples’ stated that

‘Those who are marginalised are more vulnerable to torture and ill-treatment and detained Indigenous people are at a higher risk of torture and ill-treatment... these risks are heightened during COVID-19. Across Australia, detention oversight mechanisms are currently inadequate, limiting the opportunities to prevent torture and ill-treatment and to ensure detaining authorities do not act with impunity.’⁴⁰

A joint submission to the *Select Committee on COVID-19 to inquire into the Australian Government’s response to the COVID-19 pandemic*, ‘OPCAT, places of detention and COVID-19’ by an alliance of civil society organisations and academics recommended that:

‘Federal, State and Territory Governments must urgently designate and/or establish National Preventive Mechanisms as part of their response to the COVID-19 pandemic, to oversee the conditions of detention and treatment of people in places of detention, which must, at a minimum, comply with international human rights standards. Governments must engage with civil society, including Aboriginal and Torres Strait Islander organisations, in transparent, inclusive and robust consultations during this process.’⁴¹

‘Federal, State and Territory Governments must guarantee all oversight bodies, including National Preventive Mechanisms, unimpeded access to all places of detention and persons detained throughout (and beyond) the duration of the COVID-19 pandemic. Governments and places of detention must co-operate with oversight bodies, accommodate inspections and respond to requests for information.’⁴²

Recommendation 5: The Victorian NPM must be urgently be established, given the heightened risk of torture and ill-treatment of those who are detained during the pandemic.

³⁹ UN Committee against Torture, the UN Subcommittee on Prevention of Torture, the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, and the Board of Trustees of the UN Voluntary Fund for Victims of Torture, *COVID-19 exacerbates the risk of ill-treatment and torture worldwide – UN experts* (2020), available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25995&LangID=E>

⁴⁰ NATSILS, Aboriginal Peak Organisations Northern Territory, Danila Dilba Health Service, Andreea Lachsz, *Joint Submission for the Report of the Special Rapporteur on the Rights of Indigenous Peoples to the General Assembly – Impact of COVID-19 on Indigenous Peoples* (2020), available at https://www.ohchr.org/EN/Issues/IPeoples/SRIIndigenousPeoples/Pages/Callforinput_COVID19.aspx

⁴¹ OPCAT, *places of detention and COVID-19: Joint Submission to the Select Committee on COVID-19*, Submission 79 (2020) 7, available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/COVID-19/COVID19/Submissions

⁴² OPCAT, *places of detention and COVID-19: Joint Submission to the Select Committee on COVID-19*, Submission 79 (2020) 8, available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/COVID-19/COVID19/Submissions



5. Consultations with and participation of people with lived experience of secure forensic mental health hospitals and other places of detention

The AHRC's report identified the importance of including people with lived experience in the OPCAT process.⁴³

The Victorian NPM should consider the following:

- 'People with lived experience can, and should, be involved in a myriad of ways, including the design of the NPM, in drafting expectations/standards and the inspection framework, in preparing for inspections, partaking in the inspection itself, providing feedback during the inspection regarding what evidence might need to be properly triangulated (should they not be entering the place of detention themselves), in drafting recommendations, in analysing the detaining authority's response and providing training to staff.'⁴⁴
- 'Including staff with lived experience improves an NPM's ability to effectively carry out its mandate, by increasing its ability to genuinely appreciate the culture of an institution and through challenging assumptions... which could in turn assist an NPM to build a better understanding of what should be classified as torture and cruel, inhuman or degrading treatment or punishment.'⁴⁵

For example, the New Zealand Ombudsman (a designated NPM) secured funding to train people with lived experience of caring or using mental health services, so that they could assist in inspections.⁴⁶

Recommendation 6: People with lived experience of detention (or experts by experience), including Aboriginal people, should be involved in the design and operation of the NPM.

Recommendation 7: 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.⁴⁷

⁴³ Australian Human Rights Commission, *Implementing OPCAT in Australia* (29 June 2020) 14.

⁴⁴ Andreea Lachs, *Culturally appropriate oversight of conditions of detention and treatment of detained Aboriginal and Torres Strait Islander people in the Northern Territory's criminal justice system – in compliance with the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (2019) 101, available at <https://www.churchilltrust.com.au/project/?id=PR0014391>

⁴⁵ Ibid 102.

⁴⁶ Ibid 103.

⁴⁷ Ibid 108.