
Victorian Aboriginal Legal Service Submission to Department of Families, Fairness and Housing, Victoria

# Review of the *Disability Act 2006*

OCTOBER 2021

# Contents



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# BACKGROUND TO THE VICTORIAN ABORIGINAL LEGAL SERVICE

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

## Legal Services

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

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

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

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

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

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[1] The term "Aboriginal" is used throughout this submission to refer to Aboriginal and/or Torres Strait Islander people.
[2] In 2019-2020, VALS provided legal services in relation to 1,873 criminal law matters. In 2020-2021, VALS has provided legal services in relation to 805 criminal law matters (as of 19 March 2021).
[3] In 2019-2020, VALS provided legal services in relation to 827 civil law matters. In 2020-2021, VVALS has provided legal services in relation to 450 civil law matters (as of 19 March 2021).
[4] In 2019-2020, VALS provided legal services in relation to 835 family law and/or child protection matters. In 2020-2021, VALS has provided legal services in relation to 788 family law and/or child protection matters (as of 19 March 2021).
[5] In 2019-2020, VALS Wirraway provided legal services in relation to 2 legal matters. In 2020-2021, VALS Wirraway has provided legal services in relation to 53 legal matters (as of 19 March 2021).

## Community Justice Programs

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

The Community Justice Programs Team also operates the following programs:

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

## Policy, Research and Advocacy

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

# ACKNOWLEDGEMENTS

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

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

- Dr. Matthew Witbrodt, Policy, Research and Advocacy Officer
- Andreea Lachsz, Head of Policy, Communications and Strategy
- Anna Potter, Civil Lawyer and Your Story Disability Legal Support

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

# EXECUTIVE SUMMARY

VALS welcomes the opportunity to make a submission to the Department of Families, Fairness and Housing review of the *Disability Act 2006*. This submission provides feedback on specific questions identified within the *Review of the Disability Act 2006: Consultation Paper Summary* (**CP**) that fall within the expertise of VALS, including:

- Improving upon and supporting the principles in the Act and Aboriginal disability advocacy (Questions 3, 4, 5 and 20)
- Community Visitors (Questions 21 and 23)
- Strengthening the authorisation model on restrictive practices (Question 29)
- Strengthening the link between criminal orders and disability services (Questions 34 and 6)

# SUMMARY OF RECOMMENDATIONS

**Recommendation 1.** *The Disability Act 2006* should be amended to explicitly recognise the legal status and distinctiveness of Indigenous peoples in Victoria.

**Recommendation 2.** The text of the *Disability Act 2006* should be amended to ensure that the term 'Indigenous' is capitalised throughout the entirety of the Act.

**Recommendation 3.** The principles enumerated in s5 of the *Disability Act 2006* should be amended to include recognition of the right to self-determination of Indigenous peoples in Victoria.

**Recommendation 4.** The existing provisions of the *Disability Act 2006* should be amended to further support Aboriginal disability advocacy by:

- Including further mechanisms in provisions, consistent with the right of Aboriginal peoples' to free, prior and informed consent in Article 19 of the *United Nations Declaration on the Rights of Indigenous Peoples*;
- Including further mechanisms in provisions, consistent with the right to participate in decision-making processes affecting the rights of Aboriginal persons in Article 18 of the *United Nations Declaration on the Rights of Indigenous Peoples*;
- Including provisions recognising Indigenous data sovereignty and Indigenous data governance.

**Recommendation 5**. s8 of the *Disability Act 2006* should be amended to require the Secretary to engage in consultations with Aboriginal communities or ACCOs when determining priorities for policy development, resource allocation and service provision, as well as strategies undertaken to promote awareness and understanding of disability, affecting Aboriginal persons with disability in Victoria.

**Recommendation 6**. s12(3)(b) of the *Disability Act 2006* should be amended to explicitly require a member of the Aboriginal community with lived experience, vested interest and/or expertise in the delivery of disability services and programs to Aboriginal members of the Victorian community to be a member of the Victorian Disability Advisory Council.

**Recommendation 7.** s28 of the *Disability Act 2006* should be amended to require that Aboriginal Community Visitors be appointed to perform oversight and reporting functions in relation to Aboriginal persons with disability, at residential services settings and NDIS dwellings.

**Recommendation 8.** The Department should engage in transparent, inclusive and robust consultations with Aboriginal communities and organisations, such as VALS, to ensure that Community Visitor operations, policies, frameworks and governance are culturally appropriate and safe for Aboriginal people.

**Recommendation 9.** The functions performed by Community Visitors should be culturally appropriate for Aboriginal people. The monitoring and reporting performed by Community Visitors should take into account:

- the legacy and ongoing impacts of colonisation;
- the fact that Aboriginal perspectives of what constitutes torture, or cruel, inhuman or degrading treatment or punishment may diverge from that of non-Aboriginal people;
- the fact 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); and
- Systemic racism.

**Recommendation 10.** In the event that the Community Visitor Program is designated as a body within Victoria's National Preventive Mechanism, its powers, privileges and responsibilities must comply with obligations under OPCAT.

**Recommendation 11.** The restrictive practices regulated by the *Disability Act 2006* should include seclusion, chemical restraint, mechanical restraint, physical restraint, environmental restraint, psycho-social restraint and consequence driven practices, consistent with *the National Framework for Reducing the Use of Restrictive Practices in the Disability Service Sector.*

**Recommendation 12.** The *Disability Act 2006* should include distinct provisions to ensure that restrictive practices used against Aboriginal persons adhere to trauma-informed and culturally-appropriate guidelines, developed in consultation with Aboriginal communities and ACCOs, in a manner consistent with the right to free, prior and informed consent in Article 19 of the *United Nations Declaration on the Rights of Indigenous Peoples*.

**Recommendation 13.** Any authorisation of the use of restrictive practices must take into account

- the legacy and ongoing impacts of colonisation;
- the fact that Aboriginal perspectives of what constitutes torture, or cruel, inhuman or degrading treatment or punishment may diverge from that of non-Aboriginal people;
- the fact 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); and
- Systemic racism.

**Recommendation 14.** The definition of 'disability' in the *Disability Act 2006* should be modelled after the definition provided in the *Equal Opportunity Act 2010* to ensure the provision of forensic disability services

to persons with cognitive impairment, psychiatric impairment, psychosocial impairment and other disabilities that are not allocated funding, supports or services under the current NDIS framework.

**Recommendation 15.** The definition of 'intellectual disability' in the *Disability Act 2006* should be amended to:

- Reflect a disability or mental impairment affecting intellectual functioning and adaptive functioning; and
- Eliminate the need for the disability to manifest before the age of 18 years.

# DETAILED SUBMISSIONS

## Improving Upon and Supporting the Principles in the Act and Aboriginal Disability Advocacy

The section addresses the principles within the *Disability Act 2006* and Aboriginal advocacy; issues raised in Questions 3, 4, 5 and 20 of the CP:

*3. How could we improve the principles in the Act?*

*4. What mechanisms do we need to support the principles in the Act?*

*5. How could the Act support disability advocacy?*

*20. How could we improve the membership requirements for the Victorian Disability Advisory Council?*

**Explicit Recognition of the Legal Status and Distinctiveness of Indigenous peoples in Victoria**

The *Disability Act 2006*, in its current form, fails to properly address Aboriginal rights or interests within its text. Indigenous people are referred to only twice in the Act, once in the principles ("Disability services and regulated disability services should… have regard for any potential increased disadvantage which may be experienced by persons with a disability as a result of their gender, language, cultural or [I]ndigenous background or location") and once in relation to the Victorian Disability Advisory Council, whose members should "reflect the cultural and [I]ndigenous backgrounds of persons with a disability."

VALS notes that the term 'indigenous' is not capitalised on either occasion it is used within the Act, which is disrespectful to Aboriginal persons and communities within Victoria.

The failure to formally recognise the legal status and distinctiveness of Indigenous peoples in Australia has been criticised by international human rights bodies.[11] The omission of explicit recognition of Indigenous peoples in the wording of the current Act is, in and of itself, problematic.

[11] United Nations Committee on the Elimination of Racial Discrimination. 'Concluding observations on the eighteenth to twentieth periodic reports of Australia' (2017). UN Doc. CERD/C/AUS/CO/18-20, at 19-20; United Nations Committee on the Elimination of Racial Discrimination. 'Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia' (2010). UN Doc. CERD/C/AUS/CO/15-17 at 15; United Nations Committee on Economic, Social and Cultural Rights. 'Concluding Observations on the fifth periodic report of Australia' (2017). UN Doc. E/C.12/AUS/CO/5 at 16(a); United Nations Human Rights Committee. 'Concluding observations on the sixth periodic report of Australia' (2017). UN Doc. CCPR/C/AUS/CO/6 at 50(b).

**The Right to Self-Determination**

Similarly, the current Act fails to explicitly recognise the right to self-determination of Indigenous peoples. The Victorian Government has not only recognised the importance of the right to self-determination of Indigenous peoples in the Victorian Aboriginal Affairs Framework 2018-2023 (**VAAF**),[12] but has enshrined in legislation the need to advance and promote the right to self-determination of Indigenous peoples in the Victorian context.[13] The Principles of the *Disability Act 2006* should include a provision explicitly recognising the right to self-determination of Indigenous peoples in Victoria.

While the inclusion of specific references to Indigenous peoples of Victoria and the right to self-determination of Indigenous peoples in Victoria would improve upon the existing Principles of the *Disability Act 2006*, this should be accompanied by further revision and amendment of the Act itself.

**Free, Prior and Informed Consent & Participation in Decision-Making**

Provisions within the Act should be revised, in partnership and consultation with Aboriginal communities and Aboriginal Community Controlled Organisations (**ACCO**s), to specifically address disability services to Aboriginal persons with disability. This would accord further *de facto* recognition of the legal status and distinctiveness of Aboriginal peoples within Victoria.

For instance, the term '[I]ndigenous' appears for the first time in the Principles of the Act, providing that disability services and regulated disability services should have regard for 'any potential increased disadvantage' arising as a result of '[I]ndigenous background or location'.[14] The VAAF explicitly recognises that Aboriginal peoples and ACCOs possess the requisite expertise and knowledge about what is best for the Aboriginal people of Victoria.[15] The direct participation of ACCOs in decision-making processes is critical to ensuring that disadvantage experienced by Aboriginal people is addressed in a culturally-informed and culturally appropriate manner.

The *Disability Act 2006* would be further improved by the revision and amendment of provisions to reflect the right of Aboriginal peoples of Victoria to free, prior and informed consent (**FPIC**) in relation to administrative measures that affect them, in accordance with Article 19 of the *United Nations Declaration on the Rights of Indigenous Peoples* (**UNDRIP**). The *Disability Act 2006* should also be revised and amended to recognise the right of Aboriginal people to participate in decision-making processes affecting the rights and interests of Aboriginal persons with disability in Victoria, in a manner consistent with Article 18 of the UNDRIP.

Two examples of how the above could be accomplished in relation to the *Disability Act 2006* include the revision and amendment of s8 and s12 of the Act.

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[12] Victoria State Government. *Victorian Aboriginal Affairs Framework 2018-2023*, pp. 22-24. Available at https://www.firstpeoplesrelations.vic.gov.au/sites/default/files/2019-09/VAAF%20FINAL.pdf.

[13] Preamble, s. 22 and s. 30(g) of *Advancing the Treaty Process with Aboriginal Victorians Act 2018.*

[14] s. 5(3)(o) of the DA 2006.

[15] Victoria State Government. *Victorian Aboriginal Affairs Framework 2018-2023*, p. 22. Available at https://www.firstpeoplesrelations.vic.gov.au/sites/default/files/2019-09/VAAF%20FINAL.pdf

The roles and functions of the Secretary are established in s8 of the *Disability Act 2006*. At present, there is no requirement for the Secretary to engage in consultations with Aboriginal communities or ACCOs when determining priorities for policy development, resource allocation and service provision,[16] or strategies undertaken to promote awareness and understanding of disability,[17] affecting Aboriginal persons with disability in Victoria. One of the functions of the Secretary is to 'plan, develop, provide and fund or purchase comprehensive services, programs and initiatives for persons with a disability.'[18] For example, the inclusion of a requirement for the Secretary to meaningfully and effectively consult with ACCOs prior to developing and planning services, programs and initiatives affecting Aboriginal persons with disability would reflect FPIC.

Provisions governing the membership of the Victorian Disability Advisory Council (**VDAC**) in s12 of the *Disability Act 2006* should also be amended. The VDAC advises the Minister on policy, strategic planning and initiatives undertaken in respect of persons with disability, as well as undertaking community engagement activities. The section states that the "Minister must ensure that members of the Victorian Disability Advisory Council are appointed from persons who…*reflect* the cultural and [I]ndigenous backgrounds of persons with disability" [emphasis added].[19] In practice, the term 'reflect' in relation to Indigeneity simply refers to knowledge or experience, rather than identity. In light of the aforementioned expertise and knowledge possessed by members of Aboriginal communities in Victoria, the membership of the VDAC should explicitly include a member of the Aboriginal community with lived experience and/or expertise in the delivery of disability services and programs to Aboriginal members of the Victorian community.

Amendments to the *Disability Act 2006* would address multiple issues raised in the CP. The formal recognition of the right to participation in decision-making processes and the right to FPIC outlined above would bolster the existing Act in three key ways:

- The Act would include mechanisms reflective of the right to self-determination of Aboriginal peoples in Victoria if included in the Principles;
- The Act would include mechanisms to better ensure that Aboriginal disadvantage is appropriately addressed in practice; and
- The Act would enhance existing supports for Aboriginal disability advocacy generally.

**Indigenous Data Sovereignty and Indigenous Data Governance**

The *Disability Act 2006* could be further enhanced by recognising Indigenous data sovereignty and Indigenous data governance. The following key concepts relating to Indigenous data sovereignty were defined by consensus by delegates of the Indigenous Data Sovereignty Summit[20]:

- ***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.'

[16] s. 8(2)c) of the DA 2006.
[17] s. 8(2)(a) of the DA 2006.
[18] s. 8(1)(a) of the DA 2006.
[19] s.12(3)(b) of the DA 2006.
[20] The Indigenous Data Sovereignty Summit was held in Canberra, ACT, on 20 June 2018.

- ***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.'[21]

The collection and analysis of data is recognised as an essential component of the functions performed by the Secretary to 'achieve the objectives and perform the functions specified in [the] Act.'[22] The recognition of IDS and IDG in the *Disability Act 2006* would enhance the ability of Aboriginal communities and ACCOs to engage in Aboriginal disability advocacy by:

- Ensuring access to data collected by the Secretary concerning Aboriginal persons with disability to determine advocacy priorities; and
- Allowing for the meaningful participation of Aboriginal communities and ACCOs in the interpretation and analysis of the data, in a manner that reflects Aboriginal priorities, values and culture in Victoria.

**Recommendation 1.** *The Disability Act 2006* should be amended to explicitly recognise the legal status and distinctiveness of Indigenous peoples in Victoria.

**Recommendation 2.** The text of the *Disability Act 2006* should be amended to ensure that the term 'Indigenous' is capitalised throughout the entirety of the Act.

**Recommendation 3.** The principles enumerated in s5 of the *Disability Act 2006* should be amended to include recognition of the right to self-determination of Indigenous peoples in Victoria.

**Recommendation 4.** The existing provisions of the *Disability Act 2006* should be amended to further support Aboriginal disability advocacy by:

- Including further mechanisms in provisions, consistent with the right of Aboriginal peoples' to free, prior and informed consent in Article 19 of the *United Nations Declaration on the Rights of Indigenous Peoples*;
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**Recommendation 5**. s8 of the *Disability Act 2006* should be amended to require the Secretary to engage in consultations with Aboriginal communities or ACCOs when determining priorities for policy development, resource allocation and service provision, as well as strategies undertaken to promote awareness and understanding of disability, affecting Aboriginal persons with disability in Victoria.

**Recommendation 6**. s12(3)(b) of the *Disability Act 2006* should be amended to explicitly require a member of the Aboriginal community with lived experience, vested interest and/or expertise in the delivery of disability services and programs to Aboriginal members of the Victorian community to be a member of the Victorian Disability Advisory Council.

[21] *Indigenous Data Sovereignty, Communique*. Indigenous Data Sovereignty Summit. 20 June 2018, p. 1.
[22] s. 8(1)(c) of the DA 2006.

## Community Visitors

The responses provided in relation to Community Visitors address issues raised in Questions 21 and 23 of the CP concerning the role and powers of Community Visitors in the changed NDIS environment, and the underlying principles that should apply when conducting visits:

> *21. What should the role and powers of community visitors be within the changed NDIS service environment?*
>
> *23. What principles should apply to the role of community visitors when conducting visits?*

Community Visitors are empowered to perform inquiries into abuse and neglect and the use of restrictive practices at premises where residential services are provided[23] and NDIS dwellings.[24] Issues concerning abuse and mistreatment of Aboriginal persons with disability in such circumstances is of considerable concern to VALS, particularly given intergenerational trauma, racism, disadvantage and use of force – both historical and contemporary – endured by Aboriginal people in Victoria.

**Roles, Powers and Principles**

It is crucial that any work concerning the expansion of the existing Community Visitor model under the provisions of the *Disability Act 2006* be undertaken with the meaningful and effective participation of the Aboriginal community and ACCOs, consistent with the right to participation in decision-making and FPIC outlined above. This will be critical to ensuring that the Community Visitors program will be culturally-appropriate for Aboriginal people.

s28 of the *Disabilities Act 2006* should be amended to include a specific provision requiring the appointment of an Aboriginal Community Visitor to perform oversight and reporting functions relating to Aboriginal persons with disabilities placed in residential settings or accommodated at NDIS dwellings. As outlined above, the inclusion of such a provision would further enhance the recognition of the self-determination of Aboriginal peoples of Victoria, as well as the expertise and knowledge of members of the Aboriginal community concerning the needs and interest of Aboriginal persons with disability.

Additionally, Community Visitors should be mandated to not only investigate and evaluate residential service settings and NDIS dwelling in accordance with the relevant Victorian and Commonwealth frameworks and guidelines, but also ensure that the treatment of persons residing within such premises is consistent with international human rights standards, particularly those prohibiting torture or other cruel, inhuman or degrading treatment or punishment.

[23] s. 30(e) and (f) of the DA 2006.
[24] s. 30A(e) and (f) of the DA 2006.

## OPCAT

The *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment* (**OPCAT**) was ratified by Australia in 2017 and mandates the establishment of National Preventive mechanisms (**NPM**s)[25] to visit places where people may be deprived of their liberty, with a view to strengthen protections of such persons against torture and cruel, inhuman or degrading treatment or punishment.[26] VALS reiterates the importance of such mechanisms in providing independent and culturally appropriate oversight of premises where Aboriginal persons are deprived of their liberty.[27]

It is unknown whether the Victorian NPM will be made up of one or several bodies, or whether a new body/bodies will be created or an existing body/bodies will be designated the NPM. While VALS is not advocating for or against Community Visitors program becoming part of the NPM in Victoria, if it is ultimately designated a part of the NPM, its powers, privileges and responsibilities must comply with Victoria's obligations under OPCAT, and it must be culturally appropriate for Aboriginal people.

**Recommendation 7.** s28 of the *Disability Act 2006* should be amended to require that Aboriginal Community Visitors be appointed to perform oversight and reporting functions in relation to Aboriginal persons with disability, at residential services settings and NDIS dwellings.

**Recommendation 8.** The Department should engage in transparent, inclusive and robust consultations with Aboriginal communities and organisations, such as VALS, to ensure that Community Visitor operations, policies, frameworks and governance are culturally appropriate and safe for Aboriginal people.

**Recommendation 9.** The functions performed by Community Visitors should be culturally appropriate for Aboriginal people. The monitoring and reporting performed by Community Visitors should take into account:

- the legacy and ongoing impacts of colonisation;
- the fact that Aboriginal perspectives of what constitutes torture, or cruel, inhuman or degrading treatment or punishment may diverge from that of non-Aboriginal people;
- the fact 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); and
- Systemic racism.

**Recommendation 10.** In the event that the Community Visitor Program is designated as a body within Victoria's National Preventive Mechanism, its powers, privileges and responsibilities must comply with obligations under OPCAT.

[25] Article 3 of OPCAT.
[26] Article 4(1) of OPCAT.
[27] VALS (2021). *Building Back Better: Victorian Aboriginal Legal Service COVID-19 Recovery Plan*, pp. 87-91. Available at https://www.vals.org.au/wp-content/uploads/2021/02/Building-Back-Better-Victorian-Aboriginal-Legal-Service-COVID-19-Recovery-Plan-February-2021-FOR-DISTRIBUTION.pdf.

## Restrictive Practices

The responses provided in relation to restrictive practices address issues raised in Question 29 of the CP concerning how to strengthen the authorisation model of restrictive practices. VALS emphasises that it supports Recommendation 54 of the Royal Commission into Victoria's Mental Health System regarding the elimination of practices involving seclusion and restraint within the next ten years.[28]

The current NDIS framework regulates 5 distinct types of restrictive practices: seclusion, chemical restraint, mechanical restraint, physical restraint and environmental restraint.[29] Meanwhile, the proposed *National Framework for Reducing the Use of Restrictive Practices in the Disability Service Sector* also includes the categories of psycho-social restraints and consequence driven practices as restrictive practices.[30] The regulation of expanded categories of restrictive practices in the *Disability Act 2006* would provide further safeguards to individuals receiving treatment, care and support for mental health and wellbeing issues.

Issues relating to the use of restrictive practices against Aboriginal people are of considerable importance, given historical use of force by agencies of the Australian Government against Aboriginal people, including the use of military expeditions against Aboriginal people to support the expansion of white settlements until the mid-20th century; and the Stolen Generation, whereby Aboriginal children were forcibly removed from the custody of their parents by Australian agencies. The historical use of force, coupled with the intergenerational trauma underpinning much of the mental health and wellbeing issues experienced by Aboriginal people today, has the potential to further (re)traumatise Aboriginal people. Any use of restrictive practices must be trauma-informed and/or culturally-appropriate.

**Recommendation 11.** The restrictive practices regulated by the *Disability Act 2006* should include seclusion, chemical restraint, mechanical restraint, physical restraint, environmental restraint, psycho-social restraint and consequence driven practices, consistent with *the National Framework for Reducing the Use of Restrictive Practices in the Disability Service Sector.*

**Recommendation 12.** The *Disability Act 2006* should include distinct provisions to ensure that restrictive practices used against Aboriginal persons adhere to trauma-informed and culturally-appropriate guidelines, developed in consultation with Aboriginal communities and ACCOs, in a manner consistent with the right to free, prior and informed consent in Article 19 of the *United Nations Declaration on the Rights of Indigenous Peoples*.

**Recommendation 13.** Any authorisation of the use of restrictive practices must take into account

- the legacy and ongoing impacts of colonisation;
- the fact that Aboriginal perspectives of what constitutes torture, or cruel, inhuman or degrading treatment or punishment may diverge from that of non-Aboriginal people;

[28] Royal Commission into Victoria's Mental Health System (2021). Final Report: Summary and Recommendations. p. 90.
[29] s. 6 of the *National Insurance Disabilities Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018* (Cth).
[30] 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.

- the fact 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); and
- Systemic racism.

## Strengthening the Link Between Criminal Orders and Disability Services

The responses provided in relation to strengthening the link between criminal orders and disability services addresses issues raised in Question 34 of the CP, as well as addressing issues relating to the definition of 'disability' raised in Question 6 of the CP.

> *6. How could we improve the definitions of 'disability', 'intellectual disability' and 'developmental delay'?*
>
> *34. How could we improve the link between criminal orders and a person's engagement with disability services, and how should advice on this be provided to the courts? Do you think this is best supported through legislation or other means?*

Aboriginal people are disproportionately represented in the Victorian criminal legal system and among people with cognitive disabilities, meaning that the way criminal legal processes treat people with disability is of huge significance to Aboriginal people's individual and collective wellbeing.[31] In 2019-2020, 16.9% of criminal matters opened by VALS' criminal legal practice involved clients with a disability, although this figure relies on individuals having received a diagnosis that identifies their disability. In reality, a higher number of our clients have disabilities, including undiagnosed and untreated disabilities, such as acquired brain injuries (**ABI**s).

Given the potential impacts of the Victorian transition to the NDIS on forensic disability services, VALS would recommend employing a more expansive definition of 'disability' that includes cognitive impairment, psychiatric impairment and psychosocial impairment, among other potential manifestations of disability. The use of such a definition would ensure that gaps in NDIS funding, supports and services impacting on the compliance with the conditions of a civil or criminal order are provided for in accordance with the *Disability Act 2006*.

An existing Victorian model for the definition can be found within s4 of the *Equal Opportunity Act 2010 (Vic)*, which defines 'disability' as:

> (a) total or partial loss of a bodily function; or
>
> (b) the presence in the body of organisms that may cause disease; or
>
> (c) total or partial loss of a part of the body; or
>
> (d) malfunction of a part of the body, including—
>
> > (i) a mental or psychological disease or disorder;
> >
> > (ii) a condition or disorder that results in a person learning more slowly than people who do not have that condition or disorder; or

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

(e) malformation or disfigurement of a part of the body— and includes a disability that may exist in the future (including because of a genetic predisposition to that disability) and, to avoid doubt, behaviour that is a symptom or manifestation of a disability;

**Recommendation 14.** The definition of 'disability' in the *Disability Act 2006* should be modelled after the definition provided in the *Equal Opportunity Act 2010* to ensure the provision of forensic disability services to persons with cognitive impairment, psychiatric impairment, psychosocial impairment and other disabilities that are not allocated funding, supports or services under the current NDIS framework.

The definition of 'intellectual disability' in the *Disability Act 2006* should also be updated to ensure that people with psychiatric, cognitive and psychosocial impairments, among other potential manifestations of disability, are eligible for Justice Plans under s80 of the *Sentencing Act 1991*. Justice plans are intended to reduce the likelihood that a person will reoffend, by mandating participation in programs and services to address the specific disability-related needs of the person subject to the order.

The present definition of 'intellectual disability' is too restrictive, given contemporary understandings of intellectual disabilities. The present definition of 'intellectual disability' in the *Disability Act 2006* reflects what the American Psychiatric Association (**APA**) classifies as 'intellectual disability (intellectual developmental disorder)', a specific type of intellectual disability manifests in the developmental period. [32] The current definition of 'intellectual disability' in the *Disability Act 2006* replicates these very narrow parameters.

The APA defines 'intellectual disability' as an impairment affecting intellectual functioning (eg. learning, problem solving and judgement) and adaptive functioning (eg. reasoning, knowledge, memory, social judgement, ability to follow rules and ability to live independently without support). [33] Such criteria can arguably be applied more broadly to cognitive impairments and ABIs noted above, as well as psychiatric and psychosocial impairments, in absence of the exclusive limitation to developmental disorder.

Due to the narrow definition of intellectual disability under the *Disability Act 2006*, many of VALS' clients who are in need of additional support are not eligible for a Justice Plan, due to the fact that the 'intellectual disability' was not diagnosed before the client turned 18 years of age. This issue was also identified by the Centre for Innovative Justice in its recent report on Enabling Justice for People with an Acquired Brain Injury.[34]

Due to the fact that intellectual disabilities - such as cognitive impairments resulting from ABIs and psychiatric impairments with late onsets or resulting from traumatic experience - can manifest later in life, the arbitrary restriction of 'intellectual disability' to impairments diagnosed prior to 18 years of age should be omitted in future revisions and amendments of the *Disability Act 2006.*

[32] Federal Register: The Daily Journal of the United States Government (2013). *Change in Terminology: "Mental Retardation" to "Intellectual Disability"*. Available at https://www.federalregister.gov/documents/2013/08/01/2013-18552/change-in-terminology-mental-retardation-to-intellectual-disability.

[33] American Psychiatric Association. *What is Intellectual Disability?* Available at https://www.psychiatry.org/patients-families/intellectual-disability/what-is-intellectual-disability.

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

**Recommendation 15.** The definition of 'intellectual disability' in the *Disability Act 2006* should be amended to:

- Reflect a disability or mental impairment affecting intellectual functioning and adaptive functioning; and
- Eliminate the need for the disability to manifest before the age of 18 years.