



**Victorian Aboriginal Legal Service Submission to the Inquiry into Children of
Imprisoned Parents**

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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 (**CSOs**). CSOs are the first point of contact when an Aboriginal person is taken into custody, through to the finalisation of legal proceedings.

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

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

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

Our Specialist Legal and Litigation Practice, Wirraway, provides legal advice and representation in civil litigation matters against government authorities. This includes for claims involving excessive force or

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

unlawful detention; police complaints; prisoners' rights issues; and coronial inquests (including deaths in custody).

Community Justice Programs

VALS operates a Custody Notification System (**CNS**). The Crimes Act 1958² requires that Victoria Police notify VALS within 1 hour of an Aboriginal person being taken into police custody in Victoria.³ 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 Program⁴
- Community Legal Education
- Victoria Police Electronic Referral System (**V-PeR**)⁵
- Regional Client Service Officers
- Baggarook Women's Transitional Housing program⁶

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.

ACKNOWLEDGEMENT

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.

² Ss. 464AAB and 464FA, Crimes Act 1958 (Vic).

³ 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).

⁴ 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.

⁵ 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.

⁶ The Baggarook 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.

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

- Andreea Lachs (Head of Policy, Communications & Strategy)
- Negar Panahi (Senior Solicitor, Balit Ngulu)
- Sarah Schwartz (Senior Lawyer, Wirraway Specialist Legal & Litigation Practice)

INTRODUCTION

The Legal and Social Issues Committee (Legislative Council) at the Parliament of Victoria is conducting an inquiry into the children of imprisoned parents.

The Committee is investigating the adequacy of policies and services to assist the children of imprisoned parents in Victoria, with particular reference to:

- (a) the social, emotional and health impacts on affected children;
- (b) what policies exist and what services are available, including consideration of those in other jurisdictions;
- (c) how effective these services are, including —
 - (i) consideration of evaluation of work already done in this area; and
 - (ii) identifying areas for improvement.

VALS welcomes the opportunity to make a submission to the Inquiry.

SUMMARY OF RECOMMENDATIONS

Recommendation 1. Existing legislation and policies should be reformed to ensure that Aboriginal people and Aboriginal Community Controlled Organisations (**ACCOs**) are provided access to data collected which concerns Aboriginal individuals and communities. This should also extend to participation in decisions regarding the evaluation and dissemination of such data, in a manner consistent with Indigenous Data Sovereignty (**IDS**) and Indigenous Data Governance (**IDG**). Both IDS and IDG require the meaningful and effective participation of Aboriginal people before decisions are made in relation to policies and legislation concerning Indigenous data.

Recommendation 2. The Victorian Government must commence publicly reporting, on a regular basis, data and information relating to the impact of incarcerating parents (and other primary carers), on children. Particularly, this information should identify when children come into contact with the Child Protection system and/or are removed from their families subsequent to their carers' incarceration. The way this data is reported should be consistent, and presented in a manner which will enable comparisons across different regions of Victoria, and include information on whether parents/carers and children are Aboriginal and/or Torres Strait Islander. It should enable identification of gaps in programs and services, and systemic racism.

Recommendation 3. VALS supports the Council of Europe's recommendations that "before a judicial order or a sentence is imposed on a parent, account shall be taken of the rights and needs of their children and the potential impact on them. The judiciary should examine the possibility of a reasonable suspension of pre-trial detention or the execution of a prison sentence and their possible replacement with community sanctions or measures... Where a custodial sentence is being contemplated, the rights and best interests of any affected children should be taken into consideration and alternatives to detention be used as far as possible and appropriate, especially in the case of a parent who is a primary caregiver."

Recommendation 4. The bail laws must be urgently amended to:

- (a) Remove the presumption against bail;
- (b) Create a presumption in favour of bail for all offences, with the onus on the prosecution to demonstrate that bail should not be granted due to there being a specific and immediate risk to the physical safety of another person; a serious risk of interfering with a witness; or the person posing a demonstrable flight risk;
- (c) Clarify that "flight risk" is a risk that the person will flee the jurisdiction. Bail must not be refused due to a risk that the person will not attend court for other reasons;
- (d) Explicitly require that a person must not be remanded for an offence that is unlikely to result in a sentence of imprisonment; and
- (e) Remove the offences of committing an indictable offence while on bail, breaching bail conditions and failure to answer bail.

Recommendation 5. Bail hearings must take place in person, unless absolutely necessary, as the decision to grant or refuse bail is one of the most significant decisions in a criminal matter, and provides a critical opportunity to assess the person’s health and welfare.

Recommendation 6. The Department of Justice and Community Safety (**DJCS**) should increase the number and diversity of bail justices, particularly in regional and rural areas. There should be targeted efforts at recruiting Aboriginal and/or Torres Strait Islander people as bail justices.

Recommendation 7. Bail justice hearings should not take place via Audio-Visual Link (**AVL**) unless absolutely necessary. There should be a prescriptive and legally enforceable protocol to ensure that remote bail justice hearings are strictly limited.

Recommendation 8. Aboriginal Community Justice Panels (**ACJP**) should be adequately funded to provide culturally safe support to Aboriginal people in police custody, including during police bail or bail justice hearings.

Recommendation 9. Access to an Independent Third Person (**ITP**) must be a legislated right for any person who has a disability or mental illness. ITPs should receive extensive training on cultural awareness and systemic racism, that is developed and implemented by Aboriginal communities.

Recommendation 10. To ensure that bail decision makers genuinely comply with their obligation to consider someone’s Aboriginality, the bail laws should be amended so that:

- (a) If someone is unrepresented in a bail hearing, the bail decision maker must be required to make inquiries as to whether the person is Aboriginal;
- (b) All bail decision makers must be required to explain how they have discharged their obligation to consider Aboriginality in bail decisions. This would require bail decision makers to explain what information they have taken into account to understand why and how someone’s Aboriginality is relevant to the bail hearing. It is not acceptable that an individual identifies as Aboriginal, yet their Aboriginality is not considered or referred to during the bail hearing.

Recommendation 11. When considering someone’s Aboriginality in relation to a bail decision, courts and other bail decision makers should consider relevant matters identified in case law and coronial findings, including:

- (a) “over-policing of Aboriginal communities and their overrepresentation amongst the prison population;”
- (b) Aboriginality is relevant to bail decisions even if the individual’s connection to their Aboriginality and culture has been intermittent throughout their life;
- (c) “Cultural connection can play a significant role in the rehabilitation of offenders who are of Aboriginal heritage;”
- (d) The importance of supporting and encouraging Aboriginal people to learn more about their Aboriginality and strengthen their family bonds;

- (e) Custody is likely to be disruptive to the person’s “personal and cultural development”;
- (f) The availability of support “based on therapeutic community principles and Aboriginal cultural practices”;
- (g) If the decision whether or not to grant bail is a close one, the person’s Aboriginality should weigh in favour of them being granted bail; and
- (h) Breach of bail conditions by non-attendance at court should not be grounds for bail refusal and should be avoided due to the adverse impact on Aboriginal people.

Recommendation 12. VALS should be funded to work with Aboriginal communities to develop a formal guide and training for bail decision makers (police, bail justices, magistrates and judges), so that they understand the relevance of Aboriginality for bail decisions. These resources should include information on the unique systemic and background factors affecting Aboriginal people in the justice system, including the way that colonisation has impacted on their lives, families and communities. They should also identify the strengths of Aboriginal communities, including connection to culture, language and Country, and non-custodial, culturally-appropriate alternatives to remand. These resources should also be used by practitioners representing/who may represent Aboriginal and/or Torres Strait Islander people, and prosecutors.

Recommendation 13. All bail decision makers (police, bail justices, magistrates and judges), and practitioners representing/who may represent Aboriginal and/or Torres Strait Islander people, and prosecutors must be required to undertake mandatory training on cultural awareness and the requirement to consider Aboriginality in bail decisions, including, but not limited to, leading court decisions on this issue. Training must be delivered on a regular basis, not just as a “one off.”

Recommendation 14. To improve access to culturally safe bail proceedings across Victoria, it is critical to:

- (a) Provide funding to VALS to provide a culturally safe duty lawyer service at the Bail and Remand Court (**BaRC**);
- (b) Ensure that all Aboriginal people appearing at BaRC are visited by an Aboriginal person employed by the court, when they first arrive at the Melbourne Custody Centre;
- (c) Give priority to Aboriginal applicants appearing at BaRC;
- (d) Increase access to after-hours bail courts across all of metro and regional Victoria, and for children.

Recommendation 15. The Government should work with Koori Courts and Aboriginal communities to consider how Koori Courts can be expanded to hear bail applications.

Recommendation 16. The Government and the Magistrates Court of Victoria must increase the number of Koori workers in the Court Integrated Support Service (**CISP**).

Recommendation 17. To increase access to bail, the Government must invest in:

- (a) Culturally safe residential bail accommodation and support;
- (b) Culturally safe drug and alcohol rehabilitation and support services;
- (c) Culturally safe mental health services.

Recommendation 18. The Victorian Government should establish sentencing guidelines that require magistrates and judges to consider the best interests of any affected child when making sentencing decisions.

Recommendation 19. The Victorian Government must support self-determined initiatives to improve sentencing outcomes for Aboriginal people. This includes by directing dedicated funding from *Burra Lotjpa Dunguludja* to the Aboriginal Community Justice Reports⁷ project currently carried out by VALS and partners, as well as providing ongoing funding beyond the pilot Project.

Recommendation 20. The Victorian Government should increase community-based sentencing options. This includes creating additional sentencing options between an adjourned undertaking and a Community Corrections Order (CCO).

Recommendation 21. The Victorian Government should repeal mandatory sentencing schemes under the Sentencing Act 1991 (Vic), including for the following offences:

- (a) Category 1 and Category 2 offences;
- (b) Offences against “emergency workers”;
- (c) Category A and Category B “serious youth offences.”

Recommendation 22. Bangkok Rule 63 should be implemented in Victoria, and enshrined in legislation: “Decisions regarding early conditional release (parole) shall favourably take into account women prisoners’ caretaking responsibilities, as well as their specific social reintegration needs.” VALS recommends expanding this to carers, rather than just limiting the approach to women.

Recommendation 23. The Victorian Government should amend the *Corrections Act 1986* (Vic) to provide for automatic court-ordered parole for sentences under five years.

Recommendation 24. The Victorian Government should repeal Section 77C of the *Corrections Act 1986* (Vic) and adopt a new provision which provides that time spent on parole, before a parole order is cancelled, counts as time served.

Recommendation 25. The Victorian Government should amend the *Corrections Act 1986* (Vic) to include a legislative requirement to have Aboriginal people on the Adult Parole Board. Membership

⁷ VALS, Aboriginal Community Justice Reports, <https://www.vals.org.au/aboriginal-community-justice-reports/>

of the Parole Board must include people with professional backgrounds and with relevant lived experience.

Recommendation 26. The Victorian Government should amend the *Corrections Act 1986* (Vic) and the Adult Parole Board Manual, to provide that parole cannot be denied on the basis that a required program has not been completed, where this program is unavailable or unsuitable for Aboriginal people.

Recommendation 27. The Victorian Government should work with Aboriginal organisations to ensure that Aboriginal people who are incarcerated, particularly Aboriginal women, have access to culturally safe rehabilitation programs. Funding must be given to Aboriginal organisations to design and deliver these programs.

Recommendation 28. The Victorian Government must work with Aboriginal organisations to develop and provide culturally appropriate transitional housing and support for Aboriginal people exiting prison.

Recommendation 29. The Victorian Government must repeal regulation 5 of the *Charter of Human Rights and Responsibility (Public Authorities) Regulation 2013* (Vic), which exempts the Adult Parole Board from the operation of the Charter.

Recommendation 30. The Victorian Government must repeal section 69(2) of the *Corrections Act 1986* (Vic), which provides that the Adult Parole Board is not bound by the rules of natural justice.

Recommendation 31. The Victorian Government must amend the *Corrections Act 1986* to include the purpose of parole and the criteria on which parole decisions are made. The legislated purpose of parole should highlight that the release of the individual on parole will contribute to the protection of society by facilitating their rehabilitation and reintegration into society.

Recommendation 32. The Victorian Government must amend the *Corrections Act 1986* to provide for the following rights of incarcerated people in relation to any decisions made by the Adult Parole Board regarding parole:

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

Recommendation 33. The Victorian Government should provide funding to VALS to provide legal assistance, support and representation to Aboriginal people who are applying for parole.

Recommendation 34. The Victorian Government should amend the *Corrections Act 1986 (Vic)* so that the Adult Parole Board is required to take into account cultural considerations when making decisions on parole applications, suspension and cancellation of parole for Aboriginal people. The Adult Parole Board Manual should be amended to provide guidance to the Adult Parole Board on complying with this requirement. All parole officers should be required to undertake mandatory and ongoing cultural awareness training.

Recommendation 35. The Government should invest in culturally appropriate prevention and early intervention services, rather than continuing to rely on imprisonment, with the view to reduce incarceration of Aboriginal and/or Torres Strait Islander parents and other carers.

Recommendation 36. VALS supports the Council of Europe’s recommendations that

- (a) [d]ue consideration should be given by the police to the impact that arrest of a parent may have on any children present. In such cases, where possible, arrest should be carried out in the absence of the child or, at a minimum, in a child-sensitive manner.
- (b) Prior to, or on admission, individuals with caregiving responsibilities for children shall be enabled to make arrangements for those children, taking into account the best interests of the child.
- (c) The prison administration shall endeavour to collect and collate relevant information at entry regarding the children of those detained.
- (d) At admission, the prison administration should record the number of children a prisoner has, their ages, and their current primary caregiver, and shall endeavour to keep this information up-to-date.
- (e) On admission and on a prisoner’s transfer, prison authorities shall assist prisoners who wish to do so in informing their children (and their caregivers) of their imprisonment and whereabouts or shall ensure that such information is sent to them.
- (f) Enforcing restrictions on contact of an arrested or a remanded parent shall be done in such a way as to respect the children’s right to maintain contact with them.

Recommendation 37. VALS supports Her Majesty’s Inspectorate Of Prisons’ (**HMIP**) requirements that “[w]omen can make immediate contact with their children, families and other people who are significant to them to put in place appropriate care arrangements... Women who have been recently separated from a child or have dependent children in the community are provided with information to allow them to access support services and resources.” This obligation should extend to both Victoria Police and prison staff.

Recommendation 38. All carers with dependent children, who are incarcerated (either remanded or sentenced), should be afforded culturally appropriate legal advice and representation, particularly in the event that Child Protection becomes involved. Access to legal advice should be provided as a matter of priority. VALS should receive notifications of child protection involvement where the incarcerated carer is Aboriginal and/or Torres Strait Islander, and should be properly funded to provide

assistance (other legal service providers should also be appropriately funded, for circumstances where VALS is unable to act due to a conflict of interest).

Recommendation 39. Incarcerated parents should be allocated to a facility close to their children, to “facilitate maintaining child-parent contact, relations and visits without undue burden either financially or geographically.” Where there is not a prison located close to the child’s place of residence, this should be taken into account in bail decision-making and/or sentencing, centring the best of the interests of the child.

Recommendation 40. Children have a right to maintain contact, and their relationship, with their incarcerated parent.

- (a) Any “[r]estrictions imposed on contact between [incarcerated parents] and their children shall be implemented only exceptionally, for the shortest period possible.”
- (b) “A child’s right to direct contact shall be respected, even in cases where disciplinary sanctions or measures are taken against the imprisoned parent.”

The above should be enshrined in legislation.

Recommendation 41. “Support and information shall be provided by the prison, as far as possible, about contact and visiting modalities, procedures and internal rules in a child-friendly manner.”

Recommendation 42. With regard to security considerations related to children visiting their parents:

- (a) Legislation should explicitly prohibit any intrusive searches of children, including body cavity searches, strip searches and pat down searches.
- (b) “Any searches of [incarcerated people] prior to visits shall be conducted in a manner which respects their human dignity in order to enable them to interact positively with their children during visits.”

Recommendation 43. With regard to supporting children to exercise their right to visit, and maintain their relationship with their incarcerated parent:

- (a) Visits by children should be facilitated within a week of their parent’s detention. Afterwards, “[c]hild-friendly visits should be authorised in principle once a week, with shorter, more frequent visits allowed for very young children, as appropriate”.
- (b) “[A]uthorities shall endeavour to provide sufficient resources to State agencies and civil society organisations to support children with imprisoned parents and their families... including offering logistic and financial support, where necessary, in order to maintain contact.”
- (c) “Visits shall be organised so as not to interfere with other elements of the child’s life, such as school attendance. If weekly visits are not feasible, proportionately longer, less frequent visits allowing for greater child-parent interaction should be facilitated.”

- (d) “In cases where the current caregiver is not available to accompany a child’s visit, alternative solutions should be sought, such as accompanying by a qualified professional or representative of an organisation working in this field or another person as appropriate.”
- (e) “When a child’s parent is imprisoned far away from home, visits shall be arranged in a flexible manner, which may include allowing prisoners to combine their visit entitlements.”

Recommendation 44. With regard to conducting the visit itself:

- (a) Children shall be permitted to visit their parent together, regardless of general restrictions that may be in place, such as those used in Corrections Victoria’s response to the pandemic.
- (b) Children shall be permitted physical contact with their parent.
- (c) “Measures should be taken to ensure that the visit context is respectful to the child’s dignity and right to privacy, including facilitating access and visits for children with special needs.”
- (d) “Prison visits shall provide an environment conducive to play and interaction with the parent.”

Recommendation 45. Visits should be permitted “to take place in the vicinity of the detention facility, with a view to promoting, maintaining and developing child-parent relationships in as normal a setting as possible.”

Recommendation 46. Free Zoom meetings should continue to be provided, at least once a week, to facilitate contact between children and their incarcerated parents.

Recommendation 47. With regards to phone calls:

- (a) Phone calls from prison facilities should be free.
- (b) “When feasible, children should be authorised to initiate telephone communications with their imprisoned parents.”

Recommendation 47. There should be a direct mailing system between children and their parents, whereby the incarcerated parent is permitted to keep the original letter or artwork, rather than being provided copies. Parents should be permitted to keep drawings and other artworks that their children have completed in their cells.

Recommendation 48. Parents should be afforded the opportunity to attend significant events in their child’s life (including, but not limited to, birthdays, first days of school, events that are of cultural significance, supporting children during difficult events such as funerals, or hospitalisation), free of charge.

Recommendation 49. “Arrangements should be made to facilitate an imprisoned parent, who wishes to do so, to participate effectively in the parenting of their children, including communicating with school, health and welfare services and taking decisions in this respect, except in cases where it is not in the child’s best interests.”

Recommendation 50. Women should be provided adequate opportunity to bond with their baby after birth. They should have a chance to breastfeed, and also have photos taken at the birth, and in the days afterwards.

Recommendation 51. The opportunity to take photos should also be extended to visits by children.

Recommendation 52. The following Bangkok Rules should be implemented in Victoria:

- (a) Rule 42(2) The regime of the prison shall be flexible enough to respond to the needs of pregnant women, nursing mothers and women with children. Childcare facilities or arrangements shall be provided in prisons in order to enable women prisoners to participate in prison activities.
- (b) Rule 42(3) Particular efforts shall be made to provide appropriate programmes for pregnant women, nursing mothers and women with children in prison.

Recommendation 53. The following Bangkok Rule should be legislated:

- (a) Rule 24 Instruments of restraint shall never be used on women during labour, during birth and immediately after birth

Recommendation 54. The following Bangkok Rules, relating to breastfeeding parents/parents who have recently given birth, should be implemented in Victoria:

- (a) Rule 48 (1) Pregnant or breastfeeding women prisoners shall receive advice on their health and diet under a programme to be drawn up and monitored by a qualified health practitioner. Adequate and timely food, a healthy environment and regular exercise opportunities shall be provided free of charge for pregnant women, babies, children and breastfeeding mothers.
- (b) Rule 48 (2) Women prisoners shall not be discouraged from breastfeeding their children, unless there are specific health reasons to do so.

Recommendation 55. Given that children are permitted to remain with their mother in prison, the following Bangkok Rules should be implemented in Victoria:

- (a) Rule 49 Decisions to allow children to stay with their mothers in prison shall be based on the best interests of the children. Children in prison with their mothers shall never be treated as prisoners.
- (b) Rule 50 Women prisoners whose children are in prison with them shall be provided with the maximum possible opportunities to spend time with their children.
- (c) Rule 51(1) Children living with their mothers in prison shall be provided with ongoing health-care services and their development shall be monitored by specialists, in collaboration with community health services.
- (d) Rule 51(2) The environment provided for such children's upbringing shall be as close as possible to that of a child outside prison.

- (e) Rule 33(3) Where children are allowed to stay with their mothers in prison, awareness-raising on child development and basic training on the health care of children shall also be provided to prison staff, in order for them to respond appropriately in times of need and emergencies.
- (f) Rule 52(1) Decisions as to when a child is to be separated from its mother shall be based on individual assessments and the best interests of the child...
- (g) Rule 52(2) The removal of the child from prison shall be undertaken with sensitivity, only when alternative care arrangements for the child have been identified.

Recommendation 56. The following Bangkok Rules should be implemented in Victoria:

- (a) Rule 9 If the [incarcerated] woman... is accompanied by a child, that child shall also undergo health screening, preferably by a child health specialist, to determine any treatment and medical needs. Suitable health care, at least equivalent to that in the community, shall be provided.
- (b) Rule 15 Prison health services shall provide or facilitate specialised treatment programmes designed for women substance [users], taking into account prior victimisation, the special needs of pregnant women and women with children, as well as their diverse cultural backgrounds.

Recommendation 57. People in detention must be provided medical care that is the equivalent of that provided in the community. Medical care must be provided without discrimination.

Recommendation 58. Health care should be delivered through DHHS rather than DJCS, and not through for-profit organisations.

Recommendation 59. The Federal Government must ensure that incarcerated people have access to the Pharmaceutical Benefits Scheme (**PBS**) and the Medicare Benefits Schedule (**MBS**). The Victorian Government should advocate with the Commonwealth to enable this access in order to provide equivalence of care to Aboriginal people and other vulnerable people held in prison.

Recommendation 60. The Federal and State Governments should ensure that incarcerated people have access to the National Disability Insurance Scheme (**NDIS**) and are assessed for eligibility for NDIS upon entry to a prison or youth justice centre.

Recommendation 61. Incarcerated people must not be required to pay out-of-pocket medical expenses. Incarcerated people have been deprived of their liberty by the State, and are entirely dependent on the State for both their (drastically reduced) income and healthcare provision.

Recommendation 62. Incarcerated people must be entitled to a free, second medical opinion.

Recommendation 63. The Government must properly address the issue of individual and systemic racism, in regards to healthcare in prison. The medical care provided to children and their incarcerated

mother must be provided in a manner that is competent, culturally safe and free from racism or discrimination.

Recommendation 64. A model of delivery of primary health services by Aboriginal Community Controlled Health Organisations in places of detention in Victoria should be considered, in consultation with VACCHO and member organisations.

Recommendation 65. Culturally safe rehabilitation services should be available to people held in prison on remand.

Recommendation 66. Funding for rehabilitation in prisons, including culturally safe rehabilitation support provided by Aboriginal organisations, should be significantly increased.

Recommendation 67. Rehabilitation programs, both in prisons and for people transitioning out of prison or diverted from prison, should be run on a voluntary basis, not penalising or threatening people for breaching behavioural requirements.

Recommendation 68. The Government should provide long-term and stable funding to ACCOs to deliver pre- and post-release programs, including transitional housing programs run by ACCOs, such as VALS' Baggarook program, to support men and women leaving prison. Assistance provided should be in the form of housing, employment, parenting programs, financial literacy programs and follow-up with drug rehabilitation and counselling.

DETAILED SUBMISSIONS

Introduction: Relevant Rights

Rights Under the *Charter of Human Rights and Responsibilities Act 2006*

VALS highlights the following relevant rights under the Charter:

17 Protection of families and children

- (1) Families are the fundamental group unit of society and are entitled to be protected by society and the State.
- (2) Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.

19 Cultural rights

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

Rights Under the *Convention on The Rights of The Child (CRC)*

There are a number of relevant Articles in the CRC, including:

Article 8(1)

States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and *family relations* as recognized by law without unlawful interference. (emphasis added)

Article 9

- (1) States Parties shall ensure that a child *shall not be separated* from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that *such separation is necessary for the best interests of the child...*

- (b) States Parties shall respect the right of the child who is separated from one or both parents to *maintain personal relations and direct contact with both parents on a regular basis*, except if it is contrary to the child's best interests. (emphasis added)

Article 16

- (1) *No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.*
- (2) The child has the right to the protection of the law against such interference or attacks.

Article 20 (1)

A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State. (emphasis added)

Introduction: The Impact on Children of Imprisoning their Parents

85% of women in prison in Australia have been pregnant at some point in their lives, and more than half have a dependent child at the time of their imprisonment.⁸ Research indicates that approximately 5% of all children in Australia will have an imprisoned parent, while approximately 20% of Aboriginal children will experience the incarceration of a parent.⁹

Themes Arising from VALS' Practice Experience

- For children who have witnessed their parents go in and out of prison throughout their childhood, visiting a parent/parents in prison, going to court regularly, witnessing police contact and arrest, prison and contact with the criminal legal system is normalised. Children then expect the same for their future.
- Some children have committed crimes with their parents/family and their idea of morality is different (or underdeveloped, as is with kids who are assessed and found *doli incapax*) to that of other children in our community, who are not exposed to the same family dynamics.
- We hear comments such as “mum/dad/aunty made me do it, that’s just what we do, I have to”. Whether this expectation is verbalised or children intuit this to be the case, it puts them in a difficult position. Even if they really want to break away from that cycle and not have contact with the criminal legal system, it is not easy for them.
- Children with parents in custody/or previously in custody will gravitate towards other children with similar upbringings and often engage in risk-taking behaviour together. It is

⁸ Australian Institute of Health and Welfare, *The Health of Australian Prisoners*, 2018, pp. 14 and 72.

⁹ Quilty, S. (2011). The Magnitude of Experience of Parental Incarceration in Australia. 12(1) *Psychiatry, Psychology and Law* 256-257.

evident that those relationships give them a sense of belonging/family that they have not experienced (at least not consistently or in a stable way). Often, as they fall behind in state schools and they are enrolled in alternative schools (like OPTIONS), they connect to peers of similar background in those settings.

- As has been extensively documented, children with Child Protection involvement have a greater risk of youth justice and/or criminal justice involvement. These children have been described as ‘crossover kids’.

Increased Contact of Children with the Child Protection System, and Youth and Adult Criminal Legal Systems

Having a parent in prison has a dramatic effect on children’s wellbeing and development. If a child continues to live with the other parent or another family member, the disappearance of their imprisoned parent can leave the household in poverty, increasing the likelihood of unstable housing, disengagement from education and a range of other harms. In other cases, particularly when single mothers are imprisoned, children may come into the care of the child protection system. Any of these scenarios greatly increase the risk of children becoming involved in the youth justice system and with the criminal legal system later in life.¹⁰ Rod Barton MP noted that around 77,000 young people have imprisoned parents, and these children are up to six times more likely to end up in prison themselves.¹¹

Children of imprisoned parents are at considerably greater risk of being in contact with child protection services. Although there is no routine reporting of the prevalence or outcomes of parental incarceration, children with a history of out-of-home placement are at greater risk of mental ill-health, behavioural issues and poor school performance,¹² as well as increased rates of juvenile detention and adult incarceration.¹³ These children are commonly referred to as ‘crossover children.’ 1 in 3 Aboriginal children who had received diversion or sentences under the existing Victorian youth justice framework had been the subject of child protection reports, while 1 in 6 had been placed in out-of-home care at some point.¹⁴ Furthermore, research conducted by the Australian Law Reform Commission indicates

¹⁰ J Sherwood et al, *Reframing Space by Building Relationships: Community Collaborative Participatory Action Research with Aboriginal Mothers in Prison*, 2013, p.83, 85

¹¹ Rod Barton, MP. The Invisible Victims of Crime in Victoria. Available at <https://rodbarton.com.au/the-invisible-victims-of-crime-in-victoria/>.

¹² Dowell, C. Et al. (2018). Maternal Incarceration, child protection, and infant mortality: a descriptive study of women prisoners in Western Australia. 6(2) Health and Justice 1-12, p. 2. Available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5768585/pdf/40352_2018_Article_60.pdf.

¹³ Australian Law Reform Commission (2018). Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, at 15.5. Available at <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/>; NSW Child, Family and Community Peak Aboriginal Corporation. (2021) The growing link between child protection and incarceration. Available at <https://www.absec.org.au/growing-link-between-child-protection-and-incarceration.html>.

¹⁴ Commission for Children and Young People. (2021). Our youth, our way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system, p. 81.

90% of Aboriginal young people who appeared in a children’s court appeared in adult court within 8 years, with 36% receiving a prison sentence later in life.¹⁵

The Need for Improved Data Collection and Publication

The issues discussed above are particularly significant for Aboriginal families, given the extensive history of family separation and consequent intergenerational trauma that has been experienced by Aboriginal communities in Australia. Data on the number of children who come into the child protection system as a result of their parents being incarcerated is not being made publicly available by the government, making it impossible to assess the scope of this issue and undermining transparency about the extent to which children are being adversely affected by the criminal legal system’s treatment of their parents. In particular, the lack of data makes it difficult to identify what VALS believes is a major factor in worsening this problem – the changes to bail laws, which have led to increased incarceration and extended remand periods, especially for Aboriginal women.

Addressing Systemic Racism

VALS highlights recent developments in Canada, with the introduction of the *Anti-Racism Data Act*, “one of the first pieces of new legislation to be co-developed with Indigenous leadership under the Declaration on the Rights of Indigenous Peoples Act”:

The B.C. government has introduced first of its kind legislation in an attempt to “dismantle systemic racism and discrimination” faced by Indigenous, Black and people of colour in the province. The Anti-Racism Data Act will provide a tool to ensure all the data collected will help identify gaps in programs and services, the province said... for too long, systemic racism and the long-lasting effects of colonialism have unfairly held people back when it comes to education, job opportunities, housing and more... These injustices are compounded when Indigenous Peoples and racialized communities ask for action, only to be told by government to provide evidence using data that is not being collected.¹⁶

It is clear that the issue of inadequate data being collected, “for the purposes of identifying systemic racism and advancing racial equity,”¹⁷ is not unique to the Victorian context. And yet, robust data is essential to the development of evidence-based, effective policy development, that reflects the lived experiences of people impacted by Government policies (and policy failures). Publishing this data in a regular and accessible manner is fundamental for transparent and accountable government. It is also crucial to addressing systemic racism across government institutions, particularly noting that the Victorian Government has established an “Anti-Racism Taskforce [which] will provide strategic advice

¹⁵ Australian Law Reform Commission (2018). Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, at 15.6. Available at <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/>.

¹⁶ B.C. becomes first in North America to introduce Anti-Racism Data Act, Available at <https://globalnews.ca/news/8802898/bc-government-systemic-racism-announcement/>

¹⁷ B.C.’s new anti-racism legislation allows us to turn intersectional data into systemic change, Available at <https://www.theglobeandmail.com.cdn.ampproject.org/c/s/www.theglobeandmail.com/amp/opinion/article-bcs-new-anti-racism-legislation-allows-us-to-intersectional-data-into/>

to the Victorian Government on effective approaches to tackling racism in Victoria”.¹⁸ VALS draws the Committee’s attention to our submission to this Taskforce.¹⁹

Indigenous Data Sovereignty

The concepts of Indigenous Data Sovereignty and Indigenous Data Governance are a specific exercise of the right to self-determination as enshrined in Article 3 (as well as numerous other Articles) of the *United Nations Declaration on the Rights of Indigenous Peoples*. The following key concepts relating to Indigenous Data Sovereignty were defined by consensus by delegates of the Indigenous Data Sovereignty Summit: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.’
- *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 nature of the relationship between data collected concerning Aboriginal peoples and IDS can be described as follows:

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

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

¹⁸ See <https://www.vic.gov.au/anti-racism-taskforce>

¹⁹ VALS, Victorian Aboriginal Legal Service Submission on Victoria’s Anti-Racism Strategy, December 2021, available at <https://www.vals.org.au/wp-content/uploads/2022/01/VALS-submission-Anti-Racism-Strategy.pdf>.

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

²¹ *Indigenous Data Sovereignty, Communique*. Indigenous Data Sovereignty Summit. 20 June 2018, p. 1.

RECOMMENDATIONS

Recommendation 1. Existing legislation and policies should be reformed to ensure that Aboriginal people and Aboriginal Community Controlled Organisations (**ACCOs**) are provided access to data collected which concerns Aboriginal individuals and communities. This should also extend to participation in decisions regarding the evaluation and dissemination of such data, in a manner consistent with Indigenous Data Sovereignty (**IDS**) and Indigenous Data Governance (**IDG**). Both IDS and IDG require the meaningful and effective participation of Aboriginal people before decisions are made in relation to policies and legislation concerning Indigenous data.

Recommendation 2. The Victorian Government must commence publicly reporting, on a regular basis, data and information relating to the impact of incarcerating parents (and other primary carers), on children. Particularly, this information should identify when children come into contact with the Child Protection system and/or are removed from their families subsequent to their carers' incarceration. The way this data is reported should be consistent, and presented in a manner which will enable comparisons across different regions of Victoria, and include information on whether parents/carers and children are Aboriginal and/or Torres Strait Islander. It should enable identification of gaps in programs and services, and systemic racism.

Moving away from Incarcerating Parents: Bail, Sentencing and Parole Reform

VALS is of the view that the impacts of custodial sentences on the children of imprisoned people are not adequately considered during decisions about criminal charges, bail, sentencing and parole of parents/carers. Separating a dependent child from their parent is effectively imposing a punishment on them, and this fact should be recognised when considering the appropriateness of laying charges, making decisions regarding bail/remand, sentencing and parole. The CRC provides that the best interests of a child must be “a primary consideration” in all state actions concerning children,²² including in judicial proceedings that affect the interests of the child indirectly.²³ However, in practice in Victoria, courts are hesitant to consider children’s rights or the hardships that would be experienced by children as a result of the custodial sentences to parents as children are not the ‘core business’ of the adult criminal legal system.²⁴

²² Article 3(1) of the UNCRC. See also Mole & Sloan (2020), ‘Children with imprisoned parents and the European Court of Human Rights’, *European Journal of Parental Imprisonment*. Accessed at https://childrenofprisoners.eu/wp-content/uploads/2021/05/EJPI_2020-ENGLISH_COPE.pdf.

²³ Article 12 of the UNCRC.

²⁴ Flynn, C. et al. (2016). Responding to the needs of the children of parents arrested in Victoria, Australia. The role of the adult criminal justice system. 49(3) *Australian & New Zealand Journal of Criminology* 351-369, pp. 355-360.

VALS brings to the attention of the Committee the following recommendations of the Council of Europe (CoE):²⁵

Without prejudice to the independence of the judiciary, before a judicial order or a sentence is imposed on a parent, account shall be taken of the rights and needs of their children and the potential impact on them. The judiciary should examine the possibility of a reasonable suspension of pre-trial detention or the execution of a prison sentence and their possible replacement with community sanctions or measures.

The Need for Urgent Bail Reform

VALS has recently published a Policy Brief on Victoria's bail laws (Fixing Victoria's Broken Bail Laws²⁶), which we encourage the Legal and Social Issues Committee to read. A summary of the recommendations are included below.

In 2017-18, in response to the Bourke Street incident, the Victorian Government changed the bail laws to make it easier to lock people up before criminal charges are finalised. The changes aimed to restrict access to bail for individuals accused of serious violent offences; however, they have had wider and more devastating impacts.

The punitive bail system has disproportionately impacted Aboriginal and/or Torres Strait Islander people, and has resulted in a dramatic increase in the number of Aboriginal people in prison who have not been sentenced. This is the opposite of what the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) recommended, over thirty years ago.

- In June 2021, 51% of Aboriginal people in prison in Victoria were on remand, compared to 32% in June 2017 and 20% in June 2010.
- In June 2019, 57.5% of Aboriginal women in prison in Victoria were on remand, compared to 48% in June 2017 and 29.6% in June 2010.
- Between 2009-2010 and 2019-2020, the number of Aboriginal women entering prison on remand increased by 440%, compared to a 210% increase for the total prison population.
- In June 2019, 46.7% of Aboriginal men in prisons in Victoria were on remand, compared to 30% in June 2017 and 19% in June 2010.
- In 2020-2021, 68.7% of Aboriginal children in youth custody in Victoria were on remand on an average day.

²⁵ Council of Europe, Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents

²⁶ Available at <https://www.vals.org.au/wp-content/uploads/2022/05/Fixing-Victorias-Broken-Bail-Laws.pdf>



In July 2021, VALS sent an open letter²⁷ (signed by 55 organisations) and an expert petition²⁸ (signed by over 250 experts) to Ministers Symes, Hutchins and Williams calling for urgent bail reform. We have still not received an official response. Recently, we have also launched a community petition, calling on urgent bail reform,²⁹ which has already been signed by 1,473 people.

RECOMMENDATIONS

Recommendation 3. VALS supports the Council of Europe’s recommendations that “before a judicial order or a sentence is imposed on a parent, account shall be taken of the rights and needs of their children and the potential impact on them. The judiciary should examine the possibility of a reasonable suspension of pre-trial detention or the execution of a prison sentence and their possible replacement with community sanctions or measures... Where a custodial sentence is being contemplated, the rights and best interests of any affected children should be taken into consideration and alternatives to detention be used as far as possible and appropriate, especially in the case of a parent who is a primary caregiver.”

Recommendation 4. The bail laws must be urgently amended to:

- (a) Remove the presumption against bail;
- (b) Create a presumption in favour of bail for all offences, with the onus on the prosecution to demonstrate that bail should not be granted due to there being a specific and immediate risk to the physical safety of another person; a serious risk of interfering with a witness; or the person posing a demonstrable flight risk;
- (c) Clarify that “flight risk” is a risk that the person will flee the jurisdiction. Bail must not be refused due to a risk that the person will not attend court for other reasons;
- (d) Explicitly require that a person must not be remanded for an offence that is unlikely to result in a sentence of imprisonment; and
- (e) Remove the offences of committing an indictable offence while on bail, breaching bail conditions and failure to answer bail.

Recommendation 5. Bail hearings must take place in person, unless absolutely necessary, as the decision to grant or refuse bail is one of the most significant decisions in a criminal matter, and provides a critical opportunity to assess the person’s health and welfare.

²⁷ VALS, Bail Reform is Urgently Needed, May 2021, available at [Bail-Reform-Letter-May-2021-5.pdf](https://www.vals.org.au/Bail-Reform-Letter-May-2021-5.pdf) (vals.org.au)

²⁸ VALS, Expert Petition calling for Urgent Reform of Victoria’s Bail Laws, [VALS-Bail-Reform-Petition.pdf](https://www.vals.org.au/VALS-Bail-Reform-Petition.pdf)

²⁹ Available at <https://www.vals.org.au/bail-petition/>

Recommendation 6. The Department of Justice and Community Safety (**DJCS**) should increase the number and diversity of bail justices, particularly in regional and rural areas. There should be targeted efforts at recruiting Aboriginal and/or Torres Strait Islander people as bail justices.

Recommendation 7. Bail justice hearings should not take place via Audio-Visual Link (**AVL**) unless absolutely necessary. There should be a prescriptive and legally enforceable protocol to ensure that remote bail justice hearings are strictly limited.

Recommendation 8. Aboriginal Community Justice Panels (**ACJP**) should be adequately funded to provide culturally safe support to Aboriginal people in police custody, including during police bail or bail justice hearings.

Recommendation 9. Access to an Independent Third Person (**ITP**) must be a legislated right for any person who has a disability or mental illness. ITPs should receive extensive training on cultural awareness and systemic racism, that is developed and implemented by Aboriginal communities.

Recommendation 10. To ensure that bail decision makers genuinely comply with their obligation to consider someone's Aboriginality, the bail laws should be amended so that:

- (a) If someone is unrepresented in a bail hearing, the bail decision maker must be required to make inquiries as to whether the person is Aboriginal;
- (b) All bail decision makers must be required to explain how they have discharged their obligation to consider Aboriginality in bail decisions. This would require bail decision makers to explain what information they have taken into account to understand why and how someone's Aboriginality is relevant to the bail hearing. It is not acceptable that an individual identifies as Aboriginal, yet their Aboriginality is not considered or referred to during the bail hearing.

Recommendation 11. When considering someone's Aboriginality in relation to a bail decision, courts and other bail decision makers should consider relevant matters identified in case law and coronial findings, including:

- (a) "over-policing of Aboriginal communities and their overrepresentation amongst the prison population;"
- (b) Aboriginality is relevant to bail decisions even if the individual's connection to their Aboriginality and culture has been intermittent throughout their life;
- (c) "Cultural connection can play a significant role in the rehabilitation of offenders who are of Aboriginal heritage;"
- (d) The importance of supporting and encouraging Aboriginal people to learn more about their Aboriginality and strengthen their family bonds;
- (e) Custody is likely to be disruptive to the person's "personal and cultural development";
- (f) The availability of support "based on therapeutic community principles and Aboriginal cultural practices";

(g) If the decision whether or not to grant bail is a close one, the person's Aboriginality should weigh in favour of them being granted bail; and

(h) Breach of bail conditions by non-attendance at court should not be grounds for bail refusal and should be avoided due to the adverse impact on Aboriginal people.

Recommendation 12. VALS should be funded to work with Aboriginal communities to develop a formal guide and training for bail decision makers (police, bail justices, magistrates and judges), so that they understand the relevance of Aboriginality for bail decisions. These resources should include information on the unique systemic and background factors affecting Aboriginal people in the justice system, including the way that colonisation has impacted on their lives, families and communities. They should also identify the strengths of Aboriginal communities, including connection to culture, language and Country, and non-custodial, culturally-appropriate alternatives to remand. These resources should also be used by practitioners representing/who may represent Aboriginal and/or Torres Strait Islander people, and prosecutors.

Recommendation 13. All bail decision makers (police, bail justices, magistrates and judges), and practitioners representing/who may represent Aboriginal and/or Torres Strait Islander people, and prosecutors must be required to undertake mandatory training on cultural awareness and the requirement to consider Aboriginality in bail decisions, including, but not limited to, leading court decisions on this issue. Training must be delivered on a regular basis, not just as a "one off."

Recommendation 14. To improve access to culturally safe bail proceedings across Victoria, it is critical to:

- (a) Provide funding to VALS to provide a culturally safe duty lawyer service at the Bail and Remand Court (**BaRC**);
- (b) Ensure that all Aboriginal people appearing at BaRC are visited by an Aboriginal person employed by the court, when they first arrive at the Melbourne Custody Centre;
- (c) Give priority to Aboriginal applicants appearing at BaRC;
- (d) Increase access to after-hours bail courts across all of metro and regional Victoria, and for children.

Recommendation 15. The Government should work with Koori Courts and Aboriginal communities to consider how Koori Courts can be expanded to hear bail applications.

Recommendation 16. The Government and the Magistrates Court of Victoria must increase the number of Koori workers in the Court Integrated Support Service (**CISP**).

Recommendation 17. To increase access to bail, the Government must invest in:

- (a) Culturally safe residential bail accommodation and support;
- (b) Culturally safe drug and alcohol rehabilitation and support services;
- (c) Culturally safe mental health services.

Sentencing

VALS brings to the attention of the Committee the following recommendations of the COE:³⁰

Where a custodial sentence is being contemplated, the rights and best interests of any affected children should be taken into consideration and alternatives to detention be used as far as possible and appropriate, especially in the case of a parent who is a primary caregiver.

VALS also draws attention to Rule 64 of the United Nations *Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules)*:

Non-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent or the woman represents a continuing danger, and after taking into account the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children.

RECOMMENDATIONS

Recommendation 18. The Victorian Government should establish sentencing guidelines that require magistrates and judges to consider the best interests of any affected child when making sentencing decisions.

Recommendation 19. The Victorian Government must support self-determined initiatives to improve sentencing outcomes for Aboriginal people. This includes by directing dedicated funding from *Burra Lotjpa Dungaludja* to the Aboriginal Community Justice Reports³¹ project currently carried out by VALS and partners, as well as providing ongoing funding beyond the pilot Project.

Recommendation 20. The Victorian Government should increase community-based sentencing options. This includes creating additional sentencing options between an adjourned undertaking and a Community Corrections Order (CCO).

Recommendation 21. The Victorian Government should repeal mandatory sentencing schemes under the Sentencing Act 1991 (Vic), including for the following offences:

- (a) Category 1 and Category 2 offences;
- (b) Offences against “emergency workers”;
- (c) Category A and Category B “serious youth offences.”

³⁰ Council of Europe, Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents

³¹ VALS, Aboriginal Community Justice Reports, <https://www.vals.org.au/aboriginal-community-justice-reports/>

Parole

As with the above, there needs to be broader reform to Victoria's parole process, as well as specific considerations for incarcerated carers. Many people, especially Aboriginal people, serve out the entirety of their sentence, rather than being released on parole. To reduce the amount of time that children are separated from their parents, there needs to be a fundamental overhaul of the parole system.

RECOMMENDATIONS

Recommendation 22. Bangkok Rule 63 should be implemented in Victoria, and enshrined in legislation: "Decisions regarding early conditional release (parole) shall favourably take into account women prisoners' caretaking responsibilities, as well as their specific social reintegration needs." VALS recommends expanding this to carers, rather than just limiting the approach to women.

Recommendation 23. The Victorian Government should amend the *Corrections Act 1986 (Vic)* to provide for automatic court-ordered parole for sentences under five years.

Recommendation 24. The Victorian Government should repeal Section 77C of the *Corrections Act 1986 (Vic)* and adopt a new provision which provides that time spent on parole, before a parole order is cancelled, counts as time served.

Recommendation 25. The Victorian Government should amend the *Corrections Act 1986 (Vic)* to include a legislative requirement to have Aboriginal people on the Adult Parole Board. Membership of the Parole Board must include people with professional backgrounds and with relevant lived experience.

Recommendation 26. The Victorian Government should amend the *Corrections Act 1986 (Vic)* and the Adult Parole Board Manual, to provide that parole cannot be denied on the basis that a required program has not been completed, where this program is unavailable or unsuitable for Aboriginal people.

Recommendation 27. The Victorian Government should work with Aboriginal organisations to ensure that Aboriginal people who are incarcerated, particularly Aboriginal women, have access to culturally safe rehabilitation programs. Funding must be given to Aboriginal organisations to design and deliver these programs.

Recommendation 28. The Victorian Government must work with Aboriginal organisations to develop and provide culturally appropriate transitional housing and support for Aboriginal people exiting prison.

Recommendation 29. The Victorian Government must repeal regulation 5 of the *Charter of Human Rights and Responsibility (Public Authorities) Regulation 2013* (Vic), which exempts the Adult Parole Board from the operation of the Charter.

Recommendation 30. The Victorian Government must repeal section 69(2) of the *Corrections Act 1986* (Vic), which provides that the Adult Parole Board is not bound by the rules of natural justice.

Recommendation 31. The Victorian Government must amend the *Corrections Act 1986* to include the purpose of parole and the criteria on which parole decisions are made. The legislated purpose of parole should highlight that the release of the individual on parole will contribute to the protection of society by facilitating their rehabilitation and reintegration into society.

Recommendation 32. The Victorian Government must amend the *Corrections Act 1986* to provide for the following rights of incarcerated people in relation to any decisions made by the Adult Parole Board regarding parole:

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

Recommendation 33. The Victorian Government should provide funding to VALS to provide legal assistance, support and representation to Aboriginal people who are applying for parole.

Recommendation 34. The Victorian Government should amend the *Corrections Act 1986* (Vic) so that the Adult Parole Board is required to take into account cultural considerations when making decisions on parole applications, suspension and cancellation of parole for Aboriginal people. The Adult Parole Board Manual should be amended to provide guidance to the Adult Parole Board on complying with this requirement. All parole officers should be required to undertake mandatory and ongoing cultural awareness training.

A Pivot to Community-Based Supports and Services

In VALS' extensive submission to the Criminal Justice Inquiry,³² we made a number of recommendations relating to improved sentencing practices, and focusing on community-based supports and services, rather than continuing with the current reliance on incarceration. These recommendations are relevant to this Inquiry as well, as the focus should be on avoiding having circumstances where children are deprived of their parents, as a result of their parents' incarceration.

We note the following, from the Bangkok Rules:

Rule 60 Appropriate resources shall be made available to devise suitable alternatives for women offenders in order to combine non-custodial measures with interventions to address the most common problems leading to women's contact with the criminal justice system. These may include therapeutic courses and counselling for victims of domestic violence and sexual abuse; suitable treatment for those with mental disability; and educational and training programmes to improve employment prospects. Such programmes shall take account of the need to provide care for children and women-only services.

Rule 62 The provision of gender-sensitive, trauma-informed, women-only substance abuse treatment programmes in the community and women's access to such treatment shall be improved, for crime prevention as well as for diversion and alternative sentencing purposes.

RECOMMENDATIONS

Recommendation 35. The Government should invest in culturally appropriate prevention and early intervention services, rather than continuing to rely on imprisonment, with the view to reduce incarceration of Aboriginal and/or Torres Strait Islander parents and other carers.

Prioritising the Health and Wellbeing of Children During Arrest and Remand

The Bangkok Rules state the following:

Rule 2(2) Prior to or on admission, women with caretaking responsibilities for children shall be permitted to make arrangements for those children, including the possibility of a reasonable suspension of detention, taking into account the best interests of the children.

Rule 3(1) The number and personal details of the children of a woman being admitted to prison shall be recorded at the time of admission. The records shall include, without prejudicing the rights of the mother, at least the names of the children, their ages and, if not accompanying the mother, their location and custody or guardianship status.

³² VALS, Victorian Aboriginal Legal Service Submission on Victoria's Anti-Racism Strategy, December 2021, available at <https://www.vals.org.au/wp-content/uploads/2022/01/VALS-submission-Anti-Racism-Strategy.pdf>.

VALS brings to the attention of the Committee the following CoE recommendations:³³

Due consideration should be given by the police to the impact that arrest of a parent may have on any children present. In such cases, where possible, arrest should be carried out in the absence of the child or, at a minimum, in a child-sensitive manner...

Enforcing restrictions on contact of an arrested or a remanded parent shall be done in such a way as to respect the children's right to maintain contact with them...

The prison administration shall endeavour to collect and collate relevant information at entry regarding the children of those detained...

At admission, the prison administration should record the number of children a prisoner has, their ages, and their current primary caregiver, and shall endeavour to keep this information up-to-date.

Prior to, or on admission, individuals with caregiving responsibilities for children shall be enabled to make arrangements for those children, taking into account the best interests of the child.

On admission and on a prisoner's transfer, prison authorities shall assist prisoners who wish to do so in informing their children (and their caregivers) of their imprisonment and whereabouts or shall ensure that such information is sent to them.

VALS emphasises the importance of detention staff (both police and prison staff) supporting carers to make arrangements for their dependent children, as a matter of urgency, upon their detention. For example, Her Majesty's Inspectorate Of Prisons' (**HMIP**) Expectations require the following:³⁴

Women can make immediate contact with their children, families and other people who are significant to them to put in place appropriate care arrangements. More than one telephone call is allowed if needed...

Women who have been recently separated from a child or have dependant children in the community are provided with information to allow them to access support services and resources...

All potential child safeguarding concerns are relayed to the prison safeguarding lead. Contact is made with children's services as necessary, action is followed up and information is promptly shared with women.

Particularly noting Australia's history of removing children and tearing Aboriginal and Torres Strait Islander families apart, all carers with dependent children, who are incarcerated (either remanded or sentenced), should be afforded culturally appropriate legal advice and representation, particularly in the event that Child Protection becomes involved. Access to legal advice should be provided as a matter of priority. VALS should receive notifications of child protection involvement where the incarcerated carer is Aboriginal and/or Torres Strait Islander, and should be properly funded to provide assistance (other legal service providers should also be appropriately funded, for circumstances where VALS is unable to act due to a conflict of interest).

³³ Council of Europe, Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents

³⁴ Her Majesty's Inspectorate Of Prisons, Expectations Criteria for assessing the treatment of and conditions for women in prison, Version 2, 2021, available at <https://www.justiceinspectrates.gov.uk/hmiprisoners/wp-content/uploads/sites/4/2021/08/Womens-Expectations-FINAL-July-2021-1.pdf>

RECOMMENDATIONS

Recommendation 36. VALS supports the Council of Europe's recommendations that

- (g) [d]ue consideration should be given by the police to the impact that arrest of a parent may have on any children present. In such cases, where possible, arrest should be carried out in the absence of the child or, at a minimum, in a child-sensitive manner.
- (h) Prior to, or on admission, individuals with caregiving responsibilities for children shall be enabled to make arrangements for those children, taking into account the best interests of the child.
- (i) The prison administration shall endeavour to collect and collate relevant information at entry regarding the children of those detained.
- (j) At admission, the prison administration should record the number of children a prisoner has, their ages, and their current primary caregiver, and shall endeavour to keep this information up-to-date.
- (k) On admission and on a prisoner's transfer, prison authorities shall assist prisoners who wish to do so in informing their children (and their caregivers) of their imprisonment and whereabouts or shall ensure that such information is sent to them.
- (l) Enforcing restrictions on contact of an arrested or a remanded parent shall be done in such a way as to respect the children's right to maintain contact with them.

Recommendation 37. VALS supports Her Majesty's Inspectorate Of Prisons' (**HMIP**) requirements that "[w]omen can make immediate contact with their children, families and other people who are significant to them to put in place appropriate care arrangements... Women who have been recently separated from a child or have dependent children in the community are provided with information to allow them to access support services and resources." This obligation should extend to both Victoria Police and prison staff.

Recommendation 38. All carers with dependent children, who are incarcerated (either remanded or sentenced), should be afforded culturally appropriate legal advice and representation, particularly in the event that Child Protection becomes involved. Access to legal advice should be provided as a matter of priority. VALS should receive notifications of child protection involvement where the incarcerated carer is Aboriginal and/or Torres Strait Islander, and should be properly funded to provide assistance (other legal service providers should also be appropriately funded, for circumstances where VALS is unable to act due to a conflict of interest).

The Right of Children to Visit and Stay in Contact with their Parents in Custody

Children have the right to maintain contact with parents while in custody.³⁵ While the Bangkok Rules specifically address the need for the government to encourage and facilitate visitation of imprisoned mothers, including measures to counterbalance disadvantages,³⁶ VALS is of the opinion that the rights of the child place an obligation on the Victorian Government to implement such policies and practices in relation to the visitation of parents and other carers generally.³⁷

When visitation does occur, children visiting a parent in custody in a detention facility, can, in and of itself, be a traumatic event that deters future visits. Factors that negatively affect the visits of children to detention facilities include:

- The oppressive and secure nature of the visiting areas in prisons with little attention to the needs of children;
- Surveillance and the lack of privacy during visits; and
- Intimidating and disrespectful attitudes of custodial staff.³⁸

While the barriers to visitation of a parent in custody infringe upon the rights of the child, the situation is exacerbated for mothers in custody, who receive fewer visits than fathers while in custody and are at greater risk of losing contact with their children.³⁹

Placement of Parents

VALS brings to the attention of the Committee the following CoE recommendations.⁴⁰

Whenever a parent is detained, particular consideration shall be given to allocating them to a facility close to their children... Apart from considerations regarding requirements of administration of justice, safety and security, the allocation of an imprisoned parent to a particular prison, shall, where appropriate, and in the best interests of their child, be done such as to facilitate maintaining child-parent contact, relations and visits without undue burden either financially or geographically.

³⁵ Article 9(3) of the UNCRC.

³⁶ Rule 26 of the Bangkok Rules.

³⁷ Article 3 and 9 on the UNCRC.

³⁸ Flynn, C. (2014). Getting there and being there: Visits to prisons in Victoria - the experiences of women prisoners and their children., pp. 179-180.

³⁹ Ibid., p. 177.

⁴⁰ Council of Europe, Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents

RECOMMENDATION

Recommendation 39. Incarcerated parents should be allocated to a facility close to their children, to “facilitate maintaining child-parent contact, relations and visits without undue burden either financially or geographically.” Where there is not a prison located close to the child’s place of residence, this should be taken into account in bail decision-making and/or sentencing, centring the best of the interests of the child.

Visits by Children to the Prison

Case Study – Frances’ children (a pseudonym)

During the pandemic, not all of Frances’ children were able to visit her at the same time, due to restrictions. This was really detrimental, as the focus should have been on keeping the children together, as each others’ safety net, particularly when visiting their mother in such a foreign environment. This was also particularly important to enable the older children, who had a stronger connection with their mother, to be there at the same time as the younger children, who were not as bonded.

The visiting room was pretty barren, without toys. Frances’ children’s carer was unable to bring food into the family room (other than baby formula), including bottles of water for the older children, and there was no nutritious food that could be bought there. There was only junk food in the vending machine available.

After visits, Frances’ children demonstrated their grief in different ways - regressing, throwing tantrums, swearing, lashing out, screaming, waking up at 3am and swearing/playing. The children could not articulate that they are missing their mum, but the “trauma is unbelievable”.

There have been some positives to zoom calls, as this allowed Frances to see where her children are living, including their bedroom and toys. It also meant that Frances could observe the interactions between her children and carers, which was reassuring. However, zoom calls should be additional to child-friendly, in-person visits, not substitutes.

VALS highlights the following from the Corrections Commissioner's Requirements:⁴¹

Visits, including video visit contact with children and family, cannot be withdrawn as a punishment for disciplinary offences, *except where it is demonstrably justifiable...* (emphasis added)

The number of visitors (including children under 16 years of age and infants) who will be permitted to visit a prisoner at a time is based on a density quotient of 1 person per 2 square metres in the visit centre...

Visitors and prisoners are permitted to elbow bump or fist bump at the start and end of their visit. At all other times, physical distancing must be maintained, however, staff should be mindful that not having physical contact will be difficult for some visitors, particularly children. Staff should therefore provide a gentle reminder or warning to visitors regarding the requirement for physical distancing. Where a visitor refuses to comply after being reminded/warned to maintain physical distancing, staff may consider terminating the visit.

Only items that can be suitably cleaned/disinfected should be present in the visit centre. The availability of toys, books and play equipment for children, as well as the operation of visit centre canteens and vending machines will depend on health advice at the time of the visit.

In contrast, VALS notes the following Bangkok Rules:

Rule 23 Disciplinary sanctions for women prisoners shall not include a prohibition of family contact, especially with children.

Rule 26 Women prisoners' contact with their families, including their children, and their children's guardians and legal representatives shall be encouraged and facilitated by all reasonable means. Where possible, measures shall be taken to counterbalance disadvantages faced by women detained in institutions located far from their homes.

Rule 28 Visits involving children shall take place in an environment that is conducive to a positive visiting experience, including with regard to staff attitudes, and shall allow open contact between mother and child. Visits involving extended contact with children should be encouraged, where possible.

Rule 21 Prison staff shall demonstrate competence, professionalism and sensitivity and shall preserve respect and dignity when searching both children in prison with their mother and children visiting prisoners.

Additionally, VALS brings to the attention of the Committee the following CoE recommendations.⁴²

Special measures shall be taken to encourage and enable imprisoned parents to maintain regular and meaningful contact and relations with their children, thus safeguarding their development. Restrictions imposed on contact between prisoners and their children shall be implemented only exceptionally, for the shortest period possible, in order to alleviate the negative impact the restriction might have on children and to protect their right to an emotional and continuing bond with their imprisoned parent... A child's right to direct contact shall be respected, even in cases where disciplinary sanctions or measures are taken against the imprisoned parent. In cases where security requirements are so extreme as to necessitate non-contact visits, additional measures shall be taken to ensure that the child-parent bond is supported...

⁴¹ Corrections Victoria Commissioner, Commissioner's Requirements, Programs and Industry, 3.2.1 Management of Visits to Prisoners (October 2021)

⁴² Council of Europe, Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents

Support and information shall be provided by the prison, as far as possible, about contact and visiting modalities, procedures and internal rules in a child-friendly manner and in different languages and formats as necessary...

Any security checks on children shall be carried out in a child-friendly manner that respects children's dignity and right to privacy, as well as their right to physical and psychological integrity and safety. Any intrusive searches on children, including body cavity searches, shall be prohibited...

Any searches of prisoners prior to visits shall be conducted in a manner which respects their human dignity in order to enable them to interact positively with their children during visits. As far as possible, children shall be authorised to leave the visiting area prior to the imprisoned parent, as this can be traumatic for some children. Where prisoners are provided with clothes by prison authorities, this clothing shall not offend their dignity, particularly during visits with their children...

Children shall be offered the opportunity, when feasible and in the child's best interests, and with the support of an appropriate adult, to visit or receive information (including images) about areas in which their imprisoned parent spends time, including the parent's prison cell.

Children should normally be allowed to visit an imprisoned parent within a week following the parent's detention and, on a regular and frequent basis, from then on. Child-friendly visits should be authorised in principle once a week, with shorter, more frequent visits allowed for very young children, as appropriate...

[A]uthorities shall endeavour to provide sufficient resources to State agencies and civil society organisations to support children with imprisoned parents and their families to enable them to deal effectively with their particular situation and specific needs, including offering logistic and financial support, where necessary, in order to maintain contact...

Visits shall be organised so as not to interfere with other elements of the child's life, such as school attendance. If weekly visits are not feasible, proportionately longer, less frequent visits allowing for greater child-parent interaction should be facilitated...

In cases where the current caregiver is not available to accompany a child's visit, alternative solutions should be sought, such as accompanying by a qualified professional or representative of an organisation working in this field or another person as appropriate...

When a child's parent is imprisoned far away from home, visits shall be arranged in a flexible manner, which may include allowing prisoners to combine their visit entitlements...

Measures should be taken to ensure that the visit context is respectful to the child's dignity and right to privacy, including facilitating access and visits for children with special needs...

A designated children's space shall be provided in prison waiting and visiting rooms (with a bottle warmer, a changing table, toys, books, drawing materials, games, etc.) where children can feel safe, welcome and respected. Prison visits shall provide an environment conducive to play and interaction with the parent...

Consideration should also be given to permitting visits to take place in the vicinity of the detention facility, with a view to promoting, maintaining and developing child-parent relationships in as normal a setting as possible...

Child-parent activities should include extended prison visits for special occasions (Mother's Day, Father's Day, end of year holidays, etc.) and other visits to further the child-parent relationship, in addition to regular visits. Consideration on such occasions should be given to prison and other staff in visiting areas being dressed less formally, in an effort to normalise the atmosphere.

RECOMMENDATIONS

Recommendation 40. Children have a right to maintain contact, and their relationship, with their incarcerated parent.

- (c) Any “[r]estrictions imposed on contact between [incarcerated parents] and their children shall be implemented only exceptionally, for the shortest period possible.”
- (d) “A child’s right to direct contact shall be respected, even in cases where disciplinary sanctions or measures are taken against the imprisoned parent.”

The above should be enshrined in legislation.

Recommendation 41. “Support and information shall be provided by the prison, as far as possible, about contact and visiting modalities, procedures and internal rules in a child-friendly manner.”

Recommendation 42. With regard to security considerations related to children visiting their parents:

- (c) Legislation should explicitly prohibit any intrusive searches of children, including body cavity searches, strip searches and pat down searches.
- (d) “Any searches of [incarcerated people] prior to visits shall be conducted in a manner which respects their human dignity in order to enable them to interact positively with their children during visits.”

Recommendation 43. With regard to supporting children to exercise their right to visit, and maintain their relationship with their incarcerated parent:

- (f) Visits by children should be facilitated within a week of their parent’s detention. Afterwards, “[c]hild-friendly visits should be authorised in principle once a week, with shorter, more frequent visits allowed for very young children, as appropriate”.
- (g) “[A]uthorities shall endeavour to provide sufficient resources to State agencies and civil society organisations to support children with imprisoned parents and their families... including offering logistic and financial support, where necessary, in order to maintain contact.”
- (h) “Visits shall be organised so as not to interfere with other elements of the child’s life, such as school attendance. If weekly visits are not feasible, proportionately longer, less frequent visits allowing for greater child-parent interaction should be facilitated.”
- (i) “In cases where the current caregiver is not available to accompany a child’s visit, alternative solutions should be sought, such as accompanying by a qualified professional or representative of an organisation working in this field or another person as appropriate.”
- (j) “When a child’s parent is imprisoned far away from home, visits shall be arranged in a flexible manner, which may include allowing prisoners to combine their visit entitlements.”

Recommendation 44. With regard to conducting the visit itself:

- (e) Children shall be permitted to visit their parent together, regardless of general restrictions that may be in place, such as those used in Corrections Victoria’s response to the pandemic.
- (f) Children shall be permitted physical contact with their parent.
- (g) “Measures should be taken to ensure that the visit context is respectful to the child’s dignity and right to privacy, including facilitating access and visits for children with special needs.”
- (h) “Prison visits shall provide an environment conducive to play and interaction with the parent.”

Recommendation 45. Visits should be permitted “to take place in the vicinity of the detention facility, with a view to promoting, maintaining and developing child-parent relationships in as normal a setting as possible.”

Other Means by which Children Can Maintain Contact with their Incarcerated Parent

Case Study – Belinda (a pseudonym)

We have been told that it would have been useful to have a direct mailing system between children and their parents. There are significant delays (months) between letters being sent and them being received. Even when Belinda’s children’s correspondence was shared with Belinda, it was a photocopy, not the original.

Belinda should have been able to keep drawings that her children had done and photos of them in her cell, but this was not facilitated.

VALS brings to the attention of the Committee the following CoE recommendations.⁴³

In accordance with national law and practice, the use of information and communication technology (video-conferencing, mobile and other telephone systems, internet, including webcam and chat functions, etc.) shall be facilitated between face-to-face visits and should not involve excessive costs. Imprisoned parents shall be assisted with the costs of communicating with their children if their means do not allow it. These means of communication should never be seen as an alternative which replaces face-to-face contact between children and their imprisoned parents.

Rules for making and receiving telephone calls and other forms of communication with children shall be applied flexibly to maximise communication between imprisoned parents and their children. When feasible, children should be authorised to initiate telephone communications with their imprisoned parents.

⁴³ Council of Europe, Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents

RECOMMENDATIONS

Recommendation 46. Free Zoom meetings should continue to be provided, at least once a week, to facilitate contact between children and their incarcerated parents.

Recommendation 47. With regards to phone calls:

- (c) Phone calls from prison facilities should be free.
- (d) “When feasible, children should be authorised to initiate telephone communications with their imprisoned parents.”

Recommendation 47. There should be a direct mailing system between children and their parents, whereby the incarcerated parent is permitted to keep the original letter or artwork, rather than being provided copies. Parents should be permitted to keep drawings and other artworks that their children have completed in their cells.

Leave for Parents

VALS brings to the attention of the Committee the following CoE recommendation:⁴⁴

Significant events in a child’s life – such as birthdays, first day of school or hospitalisation – should be considered when granting prison leave to imprisoned parents.

RECOMMENDATION

Recommendation 48. Parents should be afforded the opportunity to attend significant events in their child’s life (including, but not limited to, birthdays, first days of school, events that are of cultural significance, supporting children during difficult events such as funerals, or hospitalisation), free of charge.

⁴⁴ Council of Europe, Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents

Opportunities for Parents to Continue to be Involved in Decisions Regarding their Child

VALS brings to the attention of the Committee the following CoE recommendation:⁴⁵

Arrangements should be made to facilitate an imprisoned parent, who wishes to do so, to participate effectively in the parenting of their children, including communicating with school, health and welfare services and taking decisions in this respect, except in cases where it is not in the child's best interests.

RECOMMENDATION

Recommendation 49. "Arrangements should be made to facilitate an imprisoned parent, who wishes to do so, to participate effectively in the parenting of their children, including communicating with school, health and welfare services and taking decisions in this respect, except in cases where it is not in the child's best interests."

Pregnant and Breastfeeding People, and Children Staying with their Parents in Custody

General

Case Study – Melanie (a pseudonym)

Melanie had a C-section. Usually, women stay in hospital for 5 days after their c-section, but this did not happen for Melanie. There was also no bonding time for Melanie with her baby, who was taken to their carer within a day of Melanie giving birth. Melanie was not able to breastfeed her baby, and so her baby did not get colostrum.

When children are born to mothers who are in custody, photos at the birth are not taken. Families, including Melanie, should not be deprived of the opportunity to capture/document this special moment.

The opportunity to take photos should be extended to visits by children. Irrespective of Melanie's actions that led to her incarceration, she loves her children, and both she and her children deserve to have family photos as the children are growing up, particularly when mothers are serving lengthier prison sentences and the children are young. This is crucial for everyone, and the prison's failure to make such a small accommodation reflected a lack of compassion.

⁴⁵ Council of Europe, Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents

RECOMMENDATIONS

Recommendation 50. Women should be provided adequate opportunity to bond with their baby after birth. They should have a chance to breastfeed, and also have photos taken at the birth, and in the days afterwards.

Recommendation 51. The opportunity to take photos should also be extended to visits by children.

VALS has made recommendations below, which reflect the Bangkok Rules, as they relate to pregnant people, breastfeeding parents, and children who remain with their parents in prison. VALS highlights that both legislation and the Commissioner's Requirements should properly address issues relating to pregnancy and birth.

RECOMMENDATIONS

Recommendation 52. The following Bangkok Rules should be implemented in Victoria:

- (c) Rule 42(2) The regime of the prison shall be flexible enough to respond to the needs of pregnant women, nursing mothers and women with children. Childcare facilities or arrangements shall be provided in prisons in order to enable women prisoners to participate in prison activities.
- (d) Rule 42(3) Particular efforts shall be made to provide appropriate programmes for pregnant women, nursing mothers and women with children in prison.

Recommendation 53. The following Bangkok Rule should be legislated:

- (b) Rule 24 Instruments of restraint shall never be used on women during labour, during birth and immediately after birth

Recommendation 54. The following Bangkok Rules, relating to breastfeeding parents/parents who have recently given birth, should be implemented in Victoria:

- (c) Rule 48 (1) Pregnant or breastfeeding women prisoners shall receive advice on their health and diet under a programme to be drawn up and monitored by a qualified health practitioner. Adequate and timely food, a healthy environment and regular exercise opportunities shall be provided free of charge for pregnant women, babies, children and breastfeeding mothers.
- (d) Rule 48 (2) Women prisoners shall not be discouraged from breastfeeding their children, unless there are specific health reasons to do so.

Recommendation 55. Given that children are permitted to remain with their mother in prison, the following Bangkok Rules should be implemented in Victoria:

- (h) Rule 49 Decisions to allow children to stay with their mothers in prison shall be based on the best interests of the children. Children in prison with their mothers shall never be treated as prisoners.
- (i) Rule 50 Women prisoners whose children are in prison with them shall be provided with the maximum possible opportunities to spend time with their children.
- (j) Rule 51(1) Children living with their mothers in prison shall be provided with ongoing health-care services and their development shall be monitored by specialists, in collaboration with community health services.
- (k) Rule 51(2) The environment provided for such children's upbringing shall be as close as possible to that of a child outside prison.
- (l) Rule 33(3) Where children are allowed to stay with their mothers in prison, awareness-raising on child development and basic training on the health care of children shall also be provided to prison staff, in order for them to respond appropriately in times of need and emergencies.
- (m) Rule 52(1) Decisions as to when a child is to be separated from its mother shall be based on individual assessments and the best interests of the child...
- (n) Rule 52(2) The removal of the child from prison shall be undertaken with sensitivity, only when alternative care arrangements for the child have been identified.

The Need for Equivalency of Healthcare in Custody

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

The *United Nations Standard Minimum Rules for the Treatment of Prisoners* (**the Mandela Rules**) make clear that "prisoners should enjoy the same standards of health care that are available in the community, and should have access to necessary healthcare services free of charge, without discrimination on the grounds of their legal status."⁴⁶ The obligation to provide equivalence of medical care to people deprived of their liberty is echoed in *the International Covenant on Economic, Social and Cultural Rights*, which emphasises "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."⁴⁷

The Victorian Charter of Human Rights and Responsibilities requires that "[a]ll persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human

⁴⁶ United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), UN Doc A/RES/70/175 (17 December 2015).

⁴⁷ International Covenant on Economic, Social and Cultural Rights, Article 12.

person”.⁴⁸ The Victorian Coroners Court has found, in its inquest into the death of Yorta Yorta woman Aunty Tanya Day, that in custodial settings this requires police and prison staff to ensure access to medical care, given that people detained are completely dependent on the state to provide for their health.⁴⁹

Last year, a Guardian analysis of 474 Aboriginal and/or Torres Strait Islander Deaths in Custody since 1991, on the 30th anniversary of the report of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), found that:

For both Aboriginal and Torres Strait Islander people and non-Indigenous people, the most common cause of death was medical problems, followed by self-harm. However, Indigenous people who died in custody were *three times more likely not to receive all necessary medical care*, compared to non-Indigenous people. For Indigenous women, the result was even worse – *less than half received all required medical care* prior to death.⁵⁰ (emphasis added)

A recent tragic example of the apparent lack of equivalence in healthcare in Victorian prisons involved the death of a 12-day-old baby in the mothers and children unit at Dame Phyllis Frost Centre on 18 August 2018. Despite efforts made by the mother and a fellow incarcerated person to elicit assistance to attempt to resuscitate the baby, the prison officers and nurse that arrived in the cell allegedly failed to engage in any efforts to perform CPR.⁵¹ The failure of officers and healthcare staff to attempt to perform lifesaving measures on a newborn baby would be extremely unlikely if the situation had occurred within the greater Victorian community.

VALS bring to the attention of the Committee the following Bangkok Rules:

Rule 9 If the woman prisoner is accompanied by a child, that child shall also undergo health screening, preferably by a child health specialist, to determine any treatment and medical needs. Suitable health care, at least equivalent to that in the community, shall be provided.

Rule 15 Prison health services shall provide or facilitate specialized treatment programmes designed for women substance abusers, taking into account prior victimization, the special needs of pregnant women and women with children, as well as their diverse cultural backgrounds.

Victoria is unusual among Australian states and territories in not providing healthcare in places of detention through its health department, but through private providers sub-contracted by the Department of Justice and Community Safety.⁵² This arrangement falls short of international human

⁴⁸ Charter of Human Rights and Responsibilities Act 2006, s22(1).

⁴⁹ Coronial Inquest into the Death of Tanya Day, [533].

⁵⁰ Allam, L. et al. (2021). The facts about Australia’s rising toll of Indigenous deaths in custody. Available at <https://www.theguardian.com/australia-news/2021/apr/09/the-facts-about-australias-rising-toll-of-indigenous-deaths-in-custody>.

⁵¹ Schelle, C. (2021) Coroner to probe newborn baby’s tragic death in Melbourne prison. News.com.au. Available at <https://www.news.com.au/national/victoria/courts-law/coroner-to-probe-newborn-babys-tragic-death-in-melbourne-prison/news-story/0679b4ba482860ecf392dc6d3ce5ac3a>.

⁵² For further information concerning contracted providers of healthcare in Victorian prisons, see <https://www.corrections.vic.gov.au/justice-health>.

rights standards which are themselves inadequate in many respects, and the lack of transparency around places of detention makes scrutiny of healthcare provision extremely difficult.

Equivalence of care, particularly for Aboriginal people with serious health issues, and a need for culturally safe healthcare services, can only be delivered with substantial resourcing. This requires greater investment from the state Government, but there is also a need for people in prison to have access to funding from Medicare and the Pharmaceutical Benefits Scheme, to ensure that resources are available to provide all the care needed to the same standard enjoyed in the community. This is particularly important for Aboriginal people, as there are a number of specific items in the Medicare Benefits Schedule which support enhanced screenings, assessments and health promotion activities for Aboriginal people. These streams of Medicare funding are critical to the operation of Aboriginal health services.⁵³ Access to Medicare funding for people in prison would enable the expansion of in-reach care in prisons by Aboriginal health services. It would also bring funding arrangements in line with those for people in the community. ACCHOs receive direct state and federal funding, as well as being eligible for Medicare funding streams. Similar funding arrangements should be available in relation to custodial settings to ensure the same quality of care can be provided.⁵⁴

RECOMMENDATIONS

Recommendation 56. The following Bangkok Rules should be implemented in Victoria:

- (a) Rule 9 If the [incarcerated] woman... is accompanied by a child, that child shall also undergo health screening, preferably by a child health specialist, to determine any treatment and medical needs. Suitable health care, at least equivalent to that in the community, shall be provided.
- (b) Rule 15 Prison health services shall provide or facilitate specialised treatment programmes designed for women substance [users], taking into account prior victimisation, the special needs of pregnant women and women with children, as well as their diverse cultural backgrounds.

Recommendation 57. People in detention must be provided medical care that is the equivalent of that provided in the community. Medical care must be provided without discrimination.

Recommendation 58. Health care should be delivered through DHHS rather than DJCS, and not through for-profit organisations.

Recommendation 59. The Federal Government must ensure that incarcerated people have access to the Pharmaceutical Benefits Scheme (**PBS**) and the Medicare Benefits Schedule (**MBS**). The

⁵³ Ibid, p. 83.

⁵⁴ ABC News, 19 October 2020, 'Greg Hunt rejects Danila Dilba's request for Medicare-funded health services in Don Dale'. Available at <https://www.abc.net.au/news/2020-10-19/don-dale-medicare-health-services-rejected-by-greg-hunt/12776808>.

Victorian Government should advocate with the Commonwealth to enable this access in order to provide equivalence of care to Aboriginal people and other vulnerable people held in prison.

Recommendation 60. The Federal and State Governments should ensure that incarcerated people have access to the National Disability Insurance Scheme (NDIS) and are assessed for eligibility for NDIS upon entry to a prison or youth justice centre.

Recommendation 61. Incarcerated people must not be required to pay out-of-pocket medical expenses. Incarcerated people have been deprived of their liberty by the State, and are entirely dependent on the State for both their (drastically reduced) income and healthcare provision.

Recommendation 62. Incarcerated people must be entitled to a free, second medical opinion.

Culturally Safe Healthcare

Culturally safe healthcare for Aboriginal and/or Torres Strait Islander children and their incarcerated mothers is critical to protecting their health and wellbeing, and must be provided where children reside in prison with their parent.

The Australian Health Practitioner Regulation Authority has defined cultural safety as follows:

Cultural safety is determined by Aboriginal and Torres Strait Islander individuals, families and communities. Culturally safe practise is the ongoing critical reflection of health practitioner knowledge, skills, attitudes, practising behaviours and power differentials in delivering safe, accessible and responsive healthcare *free of racism*.⁵⁵ (emphasis added)

Cultural safety is understood as follows:

Cultural safety is an environment that is spiritually, socially and emotionally safe, as well as physically safe for people; where there is no assault, challenge or denial of their identity, of who they are and what they need. It is about shared respect, shared meaning, shared knowledge and experience, of learning together with dignity, and truly listening.⁵⁶

RECOMMENDATIONS

Recommendation 63. The Government must properly address the issue of individual and systemic racism, in regards to healthcare in prison. The medical care provided to children and their

⁵⁵ Australian Health Practitioner Regulation Authority, National Scheme's Aboriginal and Torres Strait Islander Health and Cultural Safety Strategy, available at <https://www.ahpra.gov.au/About-Ahpra/Aboriginal-and-Torres-Strait-Islander-Health-Strategy/health-and-cultural-safety-strategy.aspx>

⁵⁶ Robyn Williams, 'Cultural Safety – What does it mean for our work practice?' (1999) 23 Australian and New Zealand Journal of Public Health 2.

incarcerated mother must be provided in a manner that is competent, culturally safe and free from racism or discrimination.

Recommendation 64. A model of delivery of primary health services by Aboriginal Community Controlled Health Organisations in places of detention in Victoria should be considered, in consultation with VACCHO and member organisations.

Supporting Parents when they Leave Prison

Case Study – Jessica (pseudonym)

Jessica cares for children of incarcerated parents. She has told us that their parents, in their hearts, want to look after their children, and might be able to look after their children long-term with the right support. However, parents need to be given better support upon their release from prison, both general support, as well as support to get their children back. There needs to be assistance in the form of housing, employment, parenting programs, financial literacy programs and follow-up with drug rehabilitation and counselling.

RECOMMENDATIONS

Recommendation 65. Culturally safe rehabilitation services should be available to people held in prison on remand.

Recommendation 66. Funding for rehabilitation in prisons, including culturally safe rehabilitation support provided by Aboriginal organisations, should be significantly increased.

Recommendation 67. Rehabilitation programs, both in prisons and for people transitioning out of prison or diverted from prison, should be run on a voluntary basis, not penalising or threatening people for breaching behavioural requirements.

Recommendation 68. The Government should provide long-term and stable funding to ACCOs to deliver pre- and post-release programs, including transitional housing programs run by ACCOs, such as VALS' Baggarrook program, to support men and women leaving prison. Assistance provided should be in the form of housing, employment, parenting programs, financial literacy programs and follow-up with drug rehabilitation and counselling.