



**Victorian Aboriginal
Legal Service**

BUILDING BACK BETTER

**Victorian Aboriginal Legal Service
COVID-19 Recovery Plan**

FEBRUARY 2021

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Background to the Victorian Aboriginal Legal Service

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

Legal Services

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

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

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

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

reduce the risk of recidivism.

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

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

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

Community Justice Programs

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

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

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

The Community Justice Team also run the following programs:

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

Policy, Research and Advocacy

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

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

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

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

Acknowledgements

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

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

- Andreea Lachsz, Senior Policy, Research and Advocacy Officer
- Ren Flannery, Policy, Research and Advocacy Officer
- Alex Walters, Principal Managing Lawyer, Civil Law and Human Rights Practice
- Jay Chandramohan, Senior Lawyer, Civil Law and Human Rights Practice
- Siobhan Doyle, Senior Lawyer, Civil Law and Human Rights Practice
- Rachel Gleeson, Lawyer, Civil Law and Human Rights Practice
- Anna Potter, Civil Lawyer, Your Story Disability Legal Support
- Kin Leong, Principal Managing Lawyer, Criminal Law Practice
- Tamsin Khor, Solicitor, Criminal Law Practice
- Negar Panahi, Solicitor, Criminal Law Practice
- Juergen Kaehne, Principal Managing Lawyer, Aboriginal Families Practice
- Genevieve Yarak, Senior Lawyer, Aboriginal Families Practice
- Orietta Surace, Lawyer, Aboriginal Families Practice
- Lee-Anne Carter, Statewide Community Justice Programs Leader
- Kathryn Morris, Team Leader – Metropolitan Community Services
- Andrew Arden, Regional Team Leader Community Justice Programs
- Nik Barron, Principal Managing Lawyer, Wirraway - Specialist Legal and Litigation Practice
- Tieea Jaya, Senior Lawyer, Wirraway - Specialist Legal and Litigation Practice

- Rebecca Walton, Rainbow Tick Accreditation Officer
- Jacqueline Morris, Quality Improvement Coordinator
- Tracey Hewitt, Human Resource Manager
- Aashna Kataria, Finance Officer
- Patrick Cook, Senior Communications and Media Officer

Executive Summary

'As the world prepares strategies to mitigate the socioeconomic consequences of confinement and reduced economic activity, human rights, including the rights of [I]ndigenous peoples, must be at the centre of recovery programmes. Given continuing or resurgent waves of transmission, national and local *governments must... ensure that human rights-based pandemic emergency protocols are developed together with [I]ndigenous peoples.*'⁸

With the release of the Closing the Gap Agreement in 2020, Governments across Australia promised that they would work with Aboriginal people 'before, during, and after emergencies such as... pandemics to make sure that... Aboriginal and Torres Strait Islander people are not disproportionately affected and can recover as quickly as other Australians from social and economic impacts.'⁹ VALS was already chronically underfunded prior to the pandemic, and as Victoria enters the COVID-19 recovery phase (with anticipated increased demand on our legal and community justice services), our ability to advocate for and support the Victorian Aboriginal community's access to justice is severely jeopardised.

This COVID-19 Recovery Plan, **Building Back Better**, identifies key issues and makes targeted recommendations across all of our practice areas – criminal, civil and family law – with the objective of ensuring Aboriginal people are not left behind. However, VALS calls on the Victorian Government to not just rebuild, but to be ambitious and Build Back Better. We ask the Victorian community to extend again the solidarity they demonstrated last year, with their support for the Black Lives Matter movement, and to hold the Government to account; a Government which should implement those reforms necessary for

⁸ United Nations Special Rapporteur on the rights of Indigenous Peoples, Report of the Special Rapporteur on the rights of [I]ndigenous peoples to the United Nations General Assembly (20 July 2020), available at <https://www.undocs.org/en/A/75/185>

⁹ Coalition of Aboriginal and Torres Strait Islander Peak Organisations and the Australian Governments, The National Agreement on Closing the Gap (July 2020) 12, available at <https://www.closingthegap.gov.au/sites/default/files/files/national-agreement-ctg.pdf?q=0720>

realising a truly equitable legal system, to transform a legal system which was built on a foundation of violence and dispossession and continues to be characterised by systemic racism. 30 years after the Royal Commission into Aboriginal Deaths in Custody, **Building Back Better** makes key recommendations in relation to policing, prisons and detention, as well as child protection, housing and infringements.

Some of the recommendations have been previously put forward by VALS in our submission to the Public Accounts and Estimates Committee's (**PAEC**) Inquiry into the Victorian Government's response to COVID-19.¹⁰ These recommendations have either not been considered, accepted or properly implemented by the Government, and remain relevant during the COVID-19 recovery phase. **Building Back Better** also highlights key reforms that VALS has been advocating for over many years, made all the more urgent with the disproportionate impact of COVID-19 on Aboriginal people, such as raising the age of criminal responsibility and legislative bail reform.

In February 2021, the PAEC recommended that the 'Victorian Government in partnership with Aboriginal Controlled Community Organisations develop a COVID-19 recovery plan with the Victorian Aboriginal community to underpin the Coronavirus Aboriginal Community Response and Recovery Fund.'¹¹ VALS' expectation is that the Government will work with VALS and other Aboriginal Community Controlled Organisations to Build Back Better, to ensure that Aboriginal people are not left behind in the recovery.

¹⁰ VALS, Submission to the Public Accounts and Estimates Committee's Inquiry into the Victorian Government's response to COVID-19 (September 2020), available at https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Submissions/87_Victorian_Aboriginal_Legal_Service.pdf

¹¹ Public Accounts and Estimates Committee, Inquiry into the Victorian Government's response to the COVID-19 pandemic (2 February 2021) 201

Summary of Recommendations

Funding and Resources

Recommendation 1: The Government should, in the upcoming Budget, prioritise properly funding VALS' culturally safe plan to help our communities build back better from the pandemic. This entails funding VALS' place-based model, which will reach regional and remote communities, enabling provision of a flexible, prevention-focused service that accounts for the unique needs of different Victorian communities and that facilitates a collaborative approach.

Recommendation 2: VALS supports the recommendation of the Royal Commission into National Natural Disaster Arrangements that 'nationally consistent, pre-agreed recovery programs [be developed]: Australian, state and territory governments should expedite the development of pre-agreed recovery programs, including those that address social needs, such as legal assistance.'

Recommendation 3: VALS supports the position of the Royal Commission into National Natural Disaster Arrangements that '[n]on-government organisations should be included in recovery planning processes at the local, regional, jurisdictional and national levels as appropriate.' This is relevant for recovery from both the bushfire disaster and the COVID-19 pandemic.

Recommendation 4: VALS supports the position of the Royal Commission into National Natural Disaster Arrangements that '[e]stablishing pre-planned disaster responses for non-government sectors allows for the timely delivery of services, and 'that any planning for these sectors must also be sufficiently flexible to support a local, on-the-ground recovery response that reflects the nature of the disaster and its impacts on existing services.' This is relevant for planning for any future bushfire disasters and any further COVID-19 waves.

Recommendation 5: The Victorian Government should increase funding to VALS during the recovery phase, as restrictions ease, in anticipation of a further increase in demand for legal services. This funding should be long-term and sufficient to meet the legal need, and be responsive to any further increase in need and/or demand.

Current and anticipated increased demand on VALS Legal Services

Recommendation 6: The Victorian Government should provide ongoing funding to re-establish Balit Ngulu at VALS, to provide legal assistance, advice and representation to Aboriginal youth across Victoria who are involved in the child protection system or have matters in the youth justice system.

Recommendation 7: VALS calls for further funding for our legal services, to meet the demands arising from court backlogs of criminal matters, that will now progress with the easing of restrictions.

Recommendation 8: VALS calls for further funding for our legal services, to meet the demands across our civil practice areas, including infringements, consumer law, debt, tenancy and discrimination matters.

Recommendation 9: VALS calls for further funding for our legal services, to meet the demands across our family law practice areas.

Recommendation 10: VALS seeks funding for our services which assist families experiencing domestic and family violence, including our Community Justice Programs and Family Law Section.

Recommendation 11: Funding to VALS should enable it to provide high quality, culturally appropriate services to clients remotely:

- lawyers and support staff to attend court, provide advice and support to clients, and take instructions remotely;
- support staff and lawyers to meet with clients face-to-face and attend court in-person in certain circumstances (such as to provide technological/logistical support, to assist clients who are living with disability, in particularly emotionally difficult matters such as coronial inquests, for matters which are very complex) in a safe manner (including use of PPE and deep cleaning of vehicles and office space).

Current and anticipated increased demand on VALS Community Justice Programs

Recommendation 12: VALS should receive additional funding to ensure CSO staff supporting remote court hearings can do so in a safe manner.

Recommendation 13: In order to meet the identified increased need for and demand on VALS' Custody Notification Service, the Community Justice Projects should receive increased funding.

Recommendation 14: The Victorian Government should significantly increase funding for VALS' Community Legal Education. Funding should be provided for both staffing and creation of resources (using different media, to be disseminated on different platforms, to ensure the legal messages are accessible to and understandable for everyone in the Aboriginal community).

Recommendation 15: The Victorian Government should invest further in transitional housing programs, such as VALS' Baggarrook program.

Prisons and Youth Detention Centres

The Recovery Period – An opportunity to implement reforms to address the overincarceration of Aboriginal people

Recommendation 16: The Victorian Government should decrease the number of people in places of detention as part of a responsible and comprehensive public health strategy during the COVID-19 recovery period. In recognition of the harm of excessive and cyclical lockdowns of places of detention to people's health and wellbeing, VALS recommends that the Victorian Government instead employ a preventive strategy of releasing people from detention and curbing admissions to detention.

Recommendation 17: Aboriginal people should be among those who are prioritised for early or temporary release from places of detention.

Recommendation 18: The Victorian Government should take steps to keep survivors and victims safe, including making suitable housing available for people who are released from custody, and properly funding culturally appropriate supports and services delivered by Aboriginal Community Controlled Organisations, such as VALS' Baggarrook program.

Recommendation 19: Prison and youth detention populations should be decreased by utilising administrative leave (permits, Emergency Management Days or temporary leave).

Recommendation 20: Permits should be prioritised for people with chronic health conditions, disabilities and mental health conditions, elderly people and for Aboriginal people.

Recommendation 21: Corrections, in making decisions in relation to Emergency Management Days, should acknowledge that the pandemic has negatively impacted on all people in detention, albeit to different degrees. EMDs should be granted not only to people who have been subject to isolation or mandatory quarantine, but to others as well, in recognition of the additional hardships faced by everyone in detention.

Recommendation 22: Corrections policy should be amended so that people can be granted 4 Emergency Management Days for each day that the 'emergency exists', and the 14 days they could be entitled to due to 'circumstances of an unforeseen and special nature.'

Recommendation 23: There should be greater transparency in relation to the process by which Emergency Management Days are granted. Information should also be made available in relation to the number of people released on EMDs, how many days they were granted (broken down per month and per facility), and how many Aboriginal and non-Aboriginal people were granted EMDs.

Recommendation 24: EMD assessments should occur on a more regular basis than fortnightly, to allow adequate time to prepare for release.

Recommendation 25: No one should be denied Emergency Management Days due to a lack of housing.

Recommendation 26: There should be a legislated allowance for a reduction in sentence if a child or young person is placed into isolation in a scheme comparable to the legislated Emergency Management Days available to incarcerated adults.

Recommendation 27: There should be an increased use of temporary leave for children and young people.

Recommendation 28: Parole should be made more accessible for children, young people and adults. Parole Boards should sit more frequently to enable them to process more parole applications.

Recommendation 29: Funding should be provided to VALS to hire staff to assist people with their parole applications.

Recommendation 30: Police should exercise their powers responsibly, in order to curb further admissions to places of detention, by issuing summons, releasing people on bail, and having a moratorium on pursuing prosecution for low-level offences and breaches of bail and parole conditions.

Recommendation 31: The Government should urgently consider passing legislation (and utilising this legislation) that would allow for the early release of people detained in prisons and youth detention.

Recommendation 32: The Victorian Government must 'urgently implement all of the recommendations from the Royal Commission into Aboriginal Deaths in Custody, the Australian Law Reform Commission's Pathways to Justice Inquiry... and the many deaths in custody coronial investigation recommendations, and publicly report on their progress with monitoring and public oversight by [Aboriginal] people and... organisations.' An independent statutory body or office should either be established or designated to report on Government responses to, and implementation of, recommendations from relevant Inquests, Royal Commissions and Inquiries.

Recommendation 33: The Victorian Government should recognise the harms of the carceral system and incorporate decarceration in its broader public health strategy, in addition to incorporating it in its public health strategy for COVID-19. This should include decriminalising public drunkenness, in close consultation with the Aboriginal community.

Recommendation 34: The Closing the Gap Agreement justice targets include reducing the rate of Aboriginal and Torres Strait Islander adults incarcerated by at least 15 per cent and reducing the rate of Aboriginal and Torres Strait Islander young people (10-17 years) in detention by at least 30 per cent by 2031. VALS calls on the Victorian Government to set more ambitious goals for itself than these minimum targets, to aim for parity being achieved in this generation's lifetimes.

Recommendation 35: The reverse-onus provisions in the Bail Act should be repealed, particularly the 'show compelling reason' and 'exceptional circumstances' provisions (sections 4AA, 4A, 4C, 4D and schedules 1 and 2 of the Bail Act).

Recommendation 36: There should be a presumption in favour of bail for all offences, except in circumstances where there is a specific and immediate risk to the physical safety of another person. This should be accompanied by an explicit requirement in the Act that a person may not be remanded for an offence that is unlikely to result in a sentence of imprisonment.

Recommendation 37: The offences of committing an indictable offence while on bail (s. 30B), breaching bail conditions (s. 30A) and failure to answer bail (s. 30) should be repealed.

Recommendation 38: The Sentencing Act should be amended to include a legislative requirement to consider Aboriginality as a factor in sentencing, similarly to Section 3A of the Bail Act. A similar requirement should be included in the new Youth Justice Act.

Recommendation 39: There should be increased and mandatory guidance and oversight for police officers, to ensure that they understand and comply with the requirements of the Bail Act. It is essential that police officers are able to appropriately determine when bail should be granted by a police decision maker, and when the individual should be brought to court.

Recommendation 40: The Victorian Government should prioritise investment in a residential bail support and therapeutic program for Aboriginal young people in the 2021-2022 State budget.

Recommendation 41: The Government should raise the age of criminal responsibility to at least 14, and the age at which children can be detained to at least 16. All youth justice legislative, strategy and policy reforms should incorporate and align with raising the age reform.

Protective Quarantine, Transfer Quarantine and Isolation

Recommendation 42: There should be increased transparency in relation to the operationalisation of protective quarantine and isolation under the COVID-19 Omnibus Act, and the safeguards that have been put in place.

Recommendation 43: Regarding solitary confinement:

- No person should ever be placed in solitary confinement, particularly people (and especially children) with mental or physical disabilities, or histories of trauma.
- Prolonged solitary confinement amounts to torture, and no people (especially children) should be subjected to this.
- Staffing and other operational issues should be urgently addressed, to ensure no one is subjected to solitary confinement.

Recommendation 44: Legislation should be amended to require that incarcerated people in protective quarantine and isolation are regularly observed and verbally communicated with. This applies equally to transfer quarantine.

Recommendation 45: The COVID-19 Omnibus Act should be amended to explicitly provide for the rights of people in protective quarantine and children in isolation, including guaranteeing meaningful contact with other people and time out of cell, in fresh air, every day. This applies equally to transfer quarantine.

Recommendation 46: People in protective quarantine and children in isolation should be provided supports and services (including mental health services and cultural supports and services provided by Aboriginal Community Controlled Organisations), and means by which to contact family, lawyers, independent oversight bodies, and Aboriginal Community Controlled Organisations, including VALS. This applies equally to transfer quarantine.

Recommendation 47: DJCS should maintain a register of all people placed in protective quarantine, and children in isolation.

- The register should include information such as age, gender, disabilities, medical conditions, mental health conditions and Aboriginality of people in protective quarantine.
- Information should also be provided in relation to the length and the nature of meaningful contact provided on a daily basis, how much time people spend out of cell, and the services made available to them and used by them.

Any incidents, such as attempted self-harm, should also be included. This applies equally to transfer quarantine.

Recommendation 48: The COVID-19 Omnibus Act should be amended to remove isolation of children as a preventive measure. Isolation should be limited to medical isolation for children who are COVID-19 positive and potentially in cases where they are symptomatic.

Recommendation 49: The Children, Youth and Families Act should be amended to specifically prohibit the Secretary from authorising further periods of isolation of children already placed in isolation, where this would effectively extend the total period of isolation of the child for more than 14 consecutive days.

Recommendation 50: Any legislation in relation to isolation of children must be drafted such that staff do not have wide discretion. Legislation must be clear as to the circumstances in which isolation is permitted.

Recommendation 51: The Children, Youth and Families Act should be amended as follows -

- any force used to place a child in isolation must be only as a last resort;
- minimum force should be used, and only for the duration that is strictly necessary to place the child in isolation;
- any use of force should be filmed and the recording should be made available to the children and their lawyer upon their request;
- there should be a register where staff record the steps taken and alternatives pursued before making the decision to use force, which should also be made available to the children and their lawyer upon their request.

Recommendation 52: There should be additional guidance and training for staff on exercising any powers to place children or young people in isolation, including the use of force.

Recommendation 53: VALS Custody Notification Service should be notified any time an Aboriginal child or young person in detention is placed in isolation under the Children, Youth and Families Act, or is in effective isolation as a result of lockdown. DJCS staff should provide the contact details of the child or young person's family where the child or young person has provided consent for VALS to contact them.

Recommendation 54: The Government should make publicly available the health advice, risk-assessment and human rights assessment upon which it is relying in making decisions regarding the use of isolation and protective and transfer quarantine.

Recommendation 55: People who are admitted into a facility should be screened, and if they exhibit symptoms on reception, they should be placed in medical isolation.

Recommendation 56: People who have either travelled from or lived in an identified high-risk area, or had contact with a known case of COVID-19, should be placed in medical isolation upon reception. The quarantine period should be for 14 days from the date of travel/living in the high-risk area, or last possible day of contact.

Recommendation 57: Detained people must be provided accurate and up-to-date information regarding any restrictive measures being taken, in a language and manner that enables their full comprehension. They must also be advised of their rights in isolation or quarantine, and be provided the means by which to confidentially make complaints and contact external, independent stakeholders during these periods of segregation.

Recommendation 58: VALS supports the decision to cease transfer quarantine where a person is transferred to a prison from another prison, returns from a court appearance in a Corrections Victoria-managed holding cell or any hospital. However, a more nuanced approach should be adopted in assessing risk as it relates to other contexts, in which transfer quarantine continues to apply (including transfers from a youth detention facility or returning from a police cell or custody centre).

Recommendation 59: Transfers between places of detention, and between places of detention and court, should be minimised, to in turn minimise the use of transfer quarantine.

Recommendation 60: Facilities should not, by default, go into complete “lock down” during a COVID-19 outbreak.

Recommendation 61: Staffing and other operational issues should be urgently addressed, to ensure lockdowns do not occur as a result of inadequate staff to safely manage the facility.

Recommendation 62: No one should be in effective solitary confinement as a result of lockdown, particularly children and people with mental or physical disabilities, or histories of trauma.

Recommendation 63: If lockdowns occur, people should be provided supports and services (including mental health services and cultural supports and services provided by Aboriginal Community Controlled Organisations), and means by which to contact family, lawyers, independent oversight bodies, and Aboriginal Community Controlled Organisations, including VALS.

Recommendation 64: Information on how lockdowns are being operationalised should be made publicly available (particularly to families, legal services and Aboriginal Community Controlled Organisations), and regular updates should be shared.

Recommendation 65: Measures taken and practices adopted in places of detention in an attempt to contain COVID-19 must never amount to torture or cruel, inhuman or degrading treatment and should not form part of the Government's strategy to keep detained people and detention centre staff safe and healthy.

Recommendation 66: 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 67: There should be greater clarity in relation to the medical care provided to detained people who are confirmed or suspected of having COVID-19, including while they are in isolation and when they are transferred to hospitals.

Recommendation 68: The practice of having incarcerated people clean any part of prisons must cease immediately. This work should be undertaken by professional cleaning staff, with appropriate measures being put in place to prevent COVID-19 transmission between cleaning staff, people who are detained and the wider community.

Recommendation 69: All places of detention must be subject to regular, preventative cleaning that meets, at a minimum, the CDNA Guidelines on environmental cleaning and disinfection.

Recommendation 70: All people in places of detention must have easy, prompt and ongoing access to appropriate PPE (including masks and, where appropriate, eye protection), and soap and hand sanitiser (all free of charge). Staff, including those involved in transport, should wear appropriate PPE.

Recommendation 71: VALS Custody Notification Services officers and families should be notified immediately of confirmed COVID-19 cases of detained Aboriginal people. In conducting the welfare checks, VALS staff should be provided, at a minimum, the following information: potential contacts with other detained Aboriginal people, medical treatment (and other supports) the person is receiving, contact details of the family (should consent be provided to VALS to contact the family).

Recommendation 72: Prisons and youth detention facilities should be included on the Government's Surveillance Testing Industry List, with both prison and youth detention employees and contractors to be subject to surveillance testing.

Recommendation 73: Easing of restrictions in the community should be reflected in easing of restrictions in detention, albeit with proportionate safeguards to protect the health of those detained, where necessary. In particular, in-person visits should be allowed when health advice permits.

Recommendation 74: Programs should be delivered face-to-face when it is safe to do so. In the interim, they should be delivered remotely where appropriate (for both the program and the participant), and accommodations should be made to enable equitable access and participation.

Recommendation 75: Detained people should not be penalised (for example, when applying for parole) for not participating in and/or completing programs due to the programs' suspension.

Recommendation 76: The rights of detained people living with disability must continue to be upheld during the pandemic and recovery period, including the right to be supported through the Office of the Public Advocate during disciplinary hearings.

Vaccination of People in Detention must be a Priority

Recommendation 77: Staff and contractors working in and people detained in detention facilities should be priority groups for the COVID-19 vaccine, in recognition of

- the increased risk of exposure and transmission in detention facilities; and
- the fact that many incarcerated children and adults have underlying health conditions and thus an increased risk of dying or becoming seriously ill from COVID-19.

Recommendation 78: Health professionals independent of DJCS should provide information to detained people on the vaccine, in recognition of the fact that barriers to consenting to the vaccine may include detained people's mistrust of the prison and youth detention administrations.

Recommendation 79: Robust plans must be put in place where follow-up shots of the vaccine are required after people have been released from detention into the community, a responsibility which cannot fall solely to DJCS. It is the responsibility of the Government to ensure that people have access to the vaccine whether they are in detention or the community, and people must not be detained (or miss out on any necessary vaccine doses) as a result of a failure of the Government to equitably distribute and administer the vaccine as part of an effective and efficient vaccination program.

Transparency, Oversight and OPCAT

Recommendation 80: The Government must urgently undertake robust, transparent and inclusive consultations with the Victorian Aboriginal community, its representative bodies and Aboriginal Community Controlled Organisations, such as VALS, on the implementation of Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) in a culturally appropriate way.

Recommendation 81: The operations, policies, frameworks and governance of the designated detention oversight bodies under OPCAT (National Preventive Mechanisms) must be culturally appropriate and safe for Aboriginal and/or Torres Strait Islander people.

Recommendation 82: The Victorian Government should legislate for the NPM's mandate, structure, staffing, powers, privileges and immunities.

Recommendation 83: The Victorian Government must ensure that the NPM is sufficiently funded to carry out its mandate effectively.

Recommendation 84: The AHRC's expansive understanding of 'place of detention', including that temporal limits should not be erroneously imposed, constitutes an accurate interpretation of OPCAT that should be adopted by the Victorian Government.

Recommendation 85: The Government should amend legislation to ensure that visits to correctional facilities and youth detention facilities by independent detention oversight bodies cannot be prohibited.

Policing

Issues and Recommendations Previously Highlighted by VALS on COVID-19 and Policing

Recommendation 86: Police should prioritise providing public health messaging and supporting people to comply with the current restrictions.

Recommendation 87: Police must responsibly exercise their expansive powers, acknowledging that around the world, policing the pandemic through fines and arrests has disproportionately impacted on marginalised communities, including Indigenous peoples.

Recommendation 88: In relation to exercising discretion and not fining individuals:

- Proactive steps should be taken to address the disproportionate impact of fines on disadvantaged communities;
- Police should be provided guidance and training with regards to the regulations and the use of their discretion in issuing infringements;
- Police should take into account the many legitimate reasons why individuals may be forced to breach COVID-19 restrictions (such as fleeing family violence) and consider cautioning individuals rather than imposing a fine;
- Homeless people should not be fined for COVID-19 related breaches;
- Children living in residential care should not be fined for breaching social distancing rules, particularly if they have run away from their residence.

Recommendation 89: In relation to transparency and oversight:

- There must be robust oversight of police conduct by independent bodies and organisations;
- Disaggregated data in relation to stops, fines and arrests by police (including gender, age, disability and whether people are Aboriginal and/or Torres Strait Islander) should be made publicly available.

Recommendation 90: In relation to arrest and police custody:

- People who have been arrested should not be taken direct to court without being afforded an opportunity to participate in an interview;
- Measures must be put in place to ensure that bail justices attend at police cells or conduct hearings remotely when people are arrested;
- Measures must be put in place to ensure that Independent Third Persons attend at police cells when adults and young people with disability are arrested;
- Children should not be spending extended periods of time in police custody when they have run away from residential care.

Recommendation 91: In relation to bail:

- With people having to comply with bail conditions for longer periods of time due to impacted court operations, there should be greater flexibility in relation to any breaches of bail;
- There should be flexibility and understanding in relation to reporting as per bail conditions, in recognition that many of VALS' clients do not have access to a phone or phone credit.

Recommendation 92: VALS supports the Human Rights Law Centre position that the Victorian Government 'withdraw increased police powers as soon as the states of emergency and disaster end. There is a risk that increased police powers could become the new normal. Any proposed, permanent increased powers must be subject to careful and proper scrutiny after the pandemic.'

Protective Services Officers

Recommendation 93: PSOs should not have powers of detention or arrest, nor the power to carry weapons such as OC spray.

Recommendation 94: Amendments introduced by the Police and Emergency Legislation Amendment Bill 2020, expanding/permitting the expansion of the designated areas in which PSOs operate should be repealed.

Recommendation 95: VALS continues to support Liberty Victoria's recommendation that '[i]f PSOs are used as defacto police, they should receive the same level of training. Further, the expansion of the definition of "designated place" under the Victoria Police Regulations 2014 should be rolled back.'

A Note on Preventative Detention

Recommendation 96: VALS reiterates its previous recommendation that any deprivation of liberty, even during a public health emergency, must not be arbitrary. VALS is of the view that even with safeguards and protections additional to those that had been contained in the COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Bill 2020, preventative detention such as that proposed in that Bill was arbitrary, lacked justification and should not at any stage form part of the Government's future strategy to combat the pandemic.

The Recovery Period – An Opportunity for Police Reform that should not be Squandered

Recommendation 97: The Victorian Government and Victoria Police should work in partnership with the Victorian Aboriginal community and ACCOs to address racism at both an individual and systemic level of Victoria Police. Accountability mechanisms for these extensive reforms should be put in place.

Recommendation 98: Addressing racial profiling:

- Victoria Police should develop, and make publicly available, a policy on racial profiling.
- Victoria Police should develop, and make publicly available, training materials on 'preventing racial profiling... that is to be reviewed regularly to ensure the currency of the training materials' and deliver this training to all staff, including support staff and management.
- Policies and training materials should be developed, delivered and evaluated in partnership with the Aboriginal community and ACCOs.

Recommendation 99: Systems, mechanisms and bodies of accountability and oversight, such as coronial inquests and detention oversight bodies (eg National Preventive Mechanisms under OPCAT) should examine the role of systemic racism when exercising their mandates.

Recommendation 100: Victoria Police should actively foster a culture that respects human rights, through policies, procedures, operations and management.

Recommendation 101: VALS supports NATSILS' recommendation that '[a]s recommended by the Royal Commission, we demand an independent oversight body for... police and prison complaints, this needs to include complaints against corporate prisons and contractors. This body needs to be properly resourced, report directly to parliament, and have sufficient powers to refer matters for criminal investigation. The current system of police investigating themselves when complaints are made against them is fundamentally flawed.'

Recommendation 102: A robust, effective police complaints system should have the following characteristics: independence, capability to conduct adequate investigations, promptness, transparency, be victim-centred.

Recommendation 103: VALS supports NATSILS' recommendation that '[a]ll governments need to hold police, prisons, medical officers, and others accountable through criminal and civil processes for all future and historic black deaths in custody. This includes the immediate referral to the respective Department of Public Prosecutions for criminal charges in all cases where there is sufficient evidence as well as providing adequate compensation to victims where appropriate.'

Recommendation 104: Complaints outcomes should identify if the facts support a finding that Victoria Police has acted unlawfully, and recommend matters to the OPP for prosecution. Where the OPP decides to not prosecute following an independent finding of misconduct by Victoria Police, the reasons for the decision should be provided to the family of the person who has died in custody.

Recommendation 105: Body Worn Camera footage should be made available in civil cases, not limited to coronial inquests, criminal matters and certain family violence matters. s30D(ab) of the Surveillance Devices Act 1999 (Vic) should be amended so that footage is not protected information.

Recommendation 106: VALS should be properly funded to represent families at the coronial inquests of Aboriginal people, particularly inquests involving deaths in custody.

Recommendation 107: The mandate of National Preventive Mechanisms which will be established/designated under OPCAT must include police custody, including places of detention in which people may be detained for less than 24 hours, such as police vehicles and cells.

The Criminal Jurisdiction

Electronic Monitoring

Recommendation 108: People on Community Corrections Orders from the Magistrates Court should not be subject to electronic monitoring.

Procedural Issues – Court

Recommendation 109: In relation to the positive aspects of remote hearings that should be retained:

- Summary pleas on the papers should continue;
- Bail variations by consent on the papers should continue;
- By consent WebEx, AVL and telephone appearances should continue;

The important caveat to the above is that VALS lawyers should not be required to proceed with matters via AVL and through other remote technology where the lawyers have made forensic decisions that this would jeopardise their clients' cases.

Recommendation 110: VALS lawyers should be given timely access to clients to provide advice and take instructions, where matters are being heard remotely. Where possible, lawyers should be afforded the opportunity to speak with their client immediately after the matter is heard.

Recommendation 111: VALS supports steps being taken to adapt Koori Court operations, so that it can continue operating during the pandemic and recovery phase safely. Where it is not possible for both prosecution and defence to attend the hearing in-person, preference should be given to defence lawyers.

Recommendation 112: Elders, Respected Persons and supporting family members should be provided appropriate technological support and access to facilities on the day of the hearing, where necessary.

The Civil Jurisdiction

Infringements

Recommendation 113: Police must routinely and accurately record individuals' Aboriginality on COVID-19 Penalty Infringement Notices, to facilitate the identification of police officers exercising their discretion in a discriminatory manner.

Recommendation 114: VALS supports the following recommendations made by the COVID-19 Fines Community Lawyers Working Group - 'the Victorian Government should establish an efficient mechanism to waive fines on grounds of:

- financial hardship: assess the capacity of a person on a low income or Centrelink benefit to pay the fine;
- fairness: independently review and hear from the person about the circumstances in which they were fined, with interpreters and support people provided where necessary.'

The Victoria Police internal review process too commonly rubberstamps infringements without properly considering the merit or lawfulness of infringements issued. Reviews must properly consider the merit of an application, and the reasons for a decision must be provided.

Recommendation 115: To prevent the significant impact of COVID-19 specific fines on children and young people, the Victorian Government should withdraw all fines issued through the COVID-19 Directions to children and young people aged 18 and under, and instead prioritise a service, education and health-based response.

Tenancy and Housing

Recommendation 116: The Government must have targeted strategies to achieve the Closing the Gap target regarding housing, to ensure that Aboriginal people are not disadvantaged in securing public housing during the COVID-19 recovery period, and beyond. These strategies should be grounded in Aboriginal self-determination and address discrimination experienced by Aboriginal people.

Recommendation 117: If the Government invests in community housing rather than public housing, community housing providers should be required to have policies in place that are at least as favourable to tenants as the policies of DHHS in relation to public housing.

Recommendation 118: The Federal Government should retain the initial higher supplements to JobSeeker, and JobKeeper, in recognition of the fact that during the COVID-19 recovery phase, financial pressures will persist. In fact, the higher payments should be made permanent, beyond the recovery phase, as welfare payments were woefully inadequate prior to the pandemic.

Recommendation 119: The Victorian Government should continue, as necessary, to support short-term, protective measures to assist tenants to maintain housing security. These short-term measures should be complemented by broader, system-wide policy shifts, to be developed and implemented in consultation with ACCOs and other relevant stakeholders.

Recommendation 120: Any proposal to expand the use of alternative dispute resolution in the tenancy sector, through a modified version of the Residential Tenancies Dispute Resolution Scheme or otherwise, should be informed by extensive consultation with the community legal sector throughout 2021. It must also be informed by the capturing of more granular data through current schemes to measure their efficacy to justify longer term reforms.

Recommendation 121: VALS supports the recommendation of the Consumer Action Law Centre that the Victorian Government introduce a public moratorium on energy disconnections until further notice.

Recommendation 122: VALS supports the recommendation of the Consumer Action Law Centre that the Essential Services Commission consider additional safeguards in relation to external debt collection practices and the sale of debts and explore the possibility of debt waivers in appropriate circumstances.

Recommendation 123: VALS supports the recommendation of the Consumer Action Law Centre that the Victorian Government increase energy concessions, particularly via the Utility Relief Grant scheme, and ensure applications for concessions are accessible and processed promptly.

Recommendation 124: VALS supports the following recommendations, jointly made by a number of CLCs in Victoria:

- The 'telecommunications regulatory framework [should be modernised] to align with other essential services regulatory regimes, with direct regulation through independent standards developed by the Australian Communications and Media Authority (ACMA), licensing and an increase in civil penalties;'
- 'ACMA [should] conduct robust, independent consultation on the specific consumer protection provisions in independent standards, as the current matters covered by the TCP Code and the current standards are ineffective at protecting consumers;'
- 'All current industry codes should be replaced by independent, directly enforceable standards developed by ACMA in consultation with stakeholders. Once the re-designed and rewritten standards have been developed, the industry codes should cease operation;'
- 'The industry code-making process must be replaced by a more effective system of direct regulation through the ACMA, to provide the much-needed and overdue consumer protections required in the telecommunications sector.' '[C]ivil penalties and infringement notice maximums [should be increased] to align with those from other sectors and to incentivise compliance.'

Recommendation 125: The Federal Government should not wind back irresponsible lending laws.

The Family Law Jurisdiction

Child Protection and COVID-19

Recommendation 126: Audio-visual hearings, which can save resources and improve efficiency of the court, should be retained. Measures should be put in place to make it easier for clients to participate (eg. clients could attend the local Court, use a room that has access to WiFi, and be provided with an electronic device).

Recommendation 127: Audio hearings and conciliation conferences should also be retained.

Recommendation 128: Audio-visual hearings would be particularly useful in regional areas, where there are no specialist Children's Court Magistrates.

Recommendation 129: There is an urgent need to further reconsider how the COVID-19 pandemic is impacting progress towards family reunification, and taking further steps such as amendments to the Children, Youth and Families Act. This should include extending the timeframes for family reunification.'

Recommendation 130: VALS supports the Victorian Aboriginal Child Care Agency's recommendation that Aboriginal Community Controlled Organisations and the Aboriginal community be involved in determining the local needs of Aboriginal children, young people and families involved in the Child Protection system during COVID-19.

Recommendation 131: The assumption by the Court should be that progress to address the protective concerns has been impeded as a result of the pandemic, unless proven otherwise.

Recommendation 132: Family Reunification Orders should be extended by more than 6 months, as many services continue to not operate at full capacity.

Recommendation 133: Practice directions across each jurisdiction should be consolidated.

Recommendation 134: The Magistrates Courts and Children's Courts of Victoria should take a uniform approach to the practice directions and their overall operations across the state.

Recommendation 135: The Government must develop and implement a strategy, in partnership with ACCOs, to meet the Closing the Gap target – to reduce, by 2031, the rate of over-representation of Aboriginal and Torres Strait Islander children in out-of-home care by 45 per cent.

Recommendation 136: Currently the assessment of placement of a child is an administrative matter for DHHS alone. VALS recommends that instead, the Court be the sole arbiter of placement suitability.

Recommendation 137: Notification that a child has been removed should account for the fact that, in Aboriginal families, it may not only be the parents who have had a significant role in raising the child.

Recommendation 138: DHHS reports to the Court should only include relevant information, such as evidence that a child is placed at unacceptable risk.

Recommendation 139: Comprehensive, individualised cultural plans should be created with Aboriginal and/or Torres Strait Islander families' input.

Recommendation 140: The timeframe for DHHS drafting and endorsing cultural plans should be legislated for.

Recommendation 141: DHHS workers should be adequately trained to work in a culturally safe and supportive manner with Aboriginal children and their families.

Recommendation 142: In relation to placements of children, there must be consistent interpretation and application of legislation. Recommendation

Recommendation 143: There must be improved communication and consultation with the Aboriginal community in relation to the placement of children.

Recommendation 144: Kinship placements should not be rejected for arbitrary reasons, such as very old, irrelevant criminal records.

Recommendation 145: 'Amend reunification timeframes to allow the court to make decisions in the best interest of the child. Allow the Children's Court to make any protection order that it deems to be in the best interests of a child, including making or extending a family reunification order, even if that child has been in court-ordered out-of-home care for a cumulative period of over 24 months.'

Recommendation 146: 'Improve court oversight and discretion through legislative reform to enable better outcomes for children. Allow the Children's Court to, in the best interests of the child: make conditions on any protection orders; and name a placement on an order.'

Recommendation 147: 'Address the ongoing over-representation of Aboriginal and Torres Strait Islander children on care by Secretary orders by:

- continuing to build upon the success of initiatives such as Marram Ngala Ganbu that provide a culturally safe and appropriate response specifically tailored to Aboriginal and Torres Strait Islander families involved in the child protection system; and
- introducing oversight mechanisms to ensure that there is compliance with the requirement for cultural support planning and adherence to the Aboriginal Child Placement Principle.'

VALS would add to this recommendation that, while the Marram Ngala Ganbu model should be rolled out across metro and regional Courts, priority should be given to the latter, where there are fewer specialist magistrates.

Recommendation 148: 'Support parents to reunify with their children safely and quickly by providing more and better resourcing to:

- expand availability and timely access to vital services such as family violence services, public housing, drug and alcohol services, children's services, parenting support, mental health services;
- expand access to culturally safe initiatives and services for Aboriginal and Torres Strait Islander families; and increase the capacity for specialist Children's Court Magistrates to hear matters, especially in regional areas, to mitigate the impacts of COVID-19 adjournments.'



Funding and Resources

COVID-19 Recovery

As already highlighted by VALS, the State November Budget, generous to Victoria Police, to Corrections and to Youth Justice, 'was a missed opportunity to establish the supports necessary for our community to rebuild post-COVID-19,' by failing to address the chronic underfunding of VALS at this critical time.¹² This decision was made despite the fact that '[t]ime and again throughout this pandemic, Aboriginal communities have proven that a self-determined approach is most effective.'¹³

We draw the Government's attention to the Special Rapporteur on the Rights of Indigenous Peoples' (**Special Rapporteur**) statement:

In designing and implementing economic and social recovery plans, States must respect, protect and promote [I]ndigenous peoples' right to self-determination, including autonomy and self-governance... Relevant processes and plans must be driven by [I]ndigenous peoples themselves with the financial and material support of States, with a leadership role for [I]ndigenous women. Given pre-existing marginalization exacerbated by the pandemic, housing, access to food, health care and education for [I]ndigenous peoples, in both rural and urban contexts, should be a priority.¹⁴ (emphasis added)

The COVID-19 pandemic is ongoing, and further funding is required to meet the increased need and demand for legal services, as Victoria faces an inevitably prolonged recovery period. There is a lack of certainty as to the future course and impacts of the pandemic, as well as the Government's response to future developments. One only has to look to other jurisdictions, such as countries

¹² VALS, The Victorian Government's Budget has left Aboriginal People Behind (25 November 2020), available at <https://www.vals.org.au/the-victorian-governments-budget-has-left-aboriginal-people-behind/>

¹³ Ibid

¹⁴ United Nations Special Rapporteur on the rights of Indigenous Peoples, Report of the Special Rapporteur on the rights of [I]ndigenous peoples to the United Nations General Assembly (20 July 2020) [111], available at <https://www.undocs.org/en/A/75/185>

in Europe, where further rounds of strict lockdowns are taking place, months after the pandemic first started, for evidence that the spread and impacts of the pandemic are unpredictable.¹⁵ Of course, we can look much closer to home, with recent community transmission in NSW, and the impact this has had on the Victorian Government's policies.¹⁶

It is crucial to recognise that there will certainly be a lag before some issues evolve into, or are recognised as, legal issues, meaning that the legal needs arising from this crisis will persist not only for months, but years. The Federation of Community Legal Centres (**FCLC**) has also highlighted that the recovery period will be characterised by further financial and economic pressures, particularly as stimulus packages and other relief (such as moratoriums in the tenancy space) end.¹⁷

Recommendation 1: The Government should, in the upcoming Budget, prioritise properly funding VALS' culturally safe plan to help our communities build back better from the pandemic. This entails funding VALS' place-based model, which will reach regional and remote communities, enabling provision of a flexible, prevention-focused service that accounts for the unique needs of different Victorian communities and that facilitates a collaborative approach.

Communities Recovering from the Bushfires

Victoria was the first state to enforce COVID-19 restrictions, and its population was subject to the most extensive restrictions, over the longest period of time. The pandemic hit as Victorian communities were just beginning to recover from the 2019/2020 bushfires that devastated the state.

¹⁵ Germany, France impose national lockdowns due to surge in COVID-19 infections (29 October 2020), available at <https://www.abc.net.au/news/2020-10-29/germany-france-imposing-national-covid-lockdowns-coronavirus/12824912>; UK to enter third national lockdown as coronavirus spirals out of control (5 October 2021), available at <https://www.smh.com.au/world/europe/uk-to-enter-third-national-lockdown-as-coronavirus-spirals-out-of-control-20210104-p56rq3.html>

¹⁶ Victorian Government, Statement From Acting Premier On NSW Border Closure (31 December 2020), available at <https://www.premier.vic.gov.au/statement-acting-premier-nsw-border-closure>

¹⁷ Federation of Community Legal Centres, Legal need and the COVID-19 crisis (April 2020) 3

There are parts of the Victorian community which are still recovering from the bushfires, and will have legal needs arising from both the bushfire crisis¹⁸ and the COVID-19 crisis.

There are findings and recommendations from the Royal Commission into National Natural Disaster Arrangements that are relevant to the COVID-19 context as well:

Recovery support to individuals in the early relief stage includes material aid to address basic needs, such as water, food and clothing, emergency and temporary accommodation and shelter. *Once the immediate crisis passes, recovery support generally includes financial assistance and specialised services, such as legal assistance...* Recovery can include a range of programs and initiatives aimed at addressing impacts across the built, social, economic and natural domains.¹⁹ (emphasis added)

The Royal Commission highlighted that, '[f]ollowing a natural disaster, numerous legal issues can arise, including in relation to insurance, family law and family violence, tenancy and housing and social security issues,' and that '[d]uring the 2019-2020 bushfires, the legal assistance sector mobilised a response to support affected individuals.'²⁰ The Royal Commission noted that, '[d]uring the 2019-2020 bushfires, a number of assistance measures were provided under the National Bushfire Recovery Fund. These measures include: coordinated clean-up assistance, immediate assistance to local governments and *legal assistance services to support bushfire relief and recovery*'²¹ (emphasis added).

The Royal Commission also asserted that 'there were a number of issues that arose due to the absence of pre-planning or strategic framework,'²² and that '[n]on-

¹⁸ A new bushfire crisis is emerging as experts brace for an imminent surge in domestic violence (24 February 2020), available at <https://www.abc.net.au/news/2020-02-24/domestic-violence-anticipated-spike-bushfires-crisis/11980112>

¹⁹ The Royal Commission into National Natural Disaster Arrangements report (28 October 2020) 457

²⁰ Ibid 439

²¹ Ibid 479

²² Ibid 439

government sectors involved in response and recovery should establish their own strategies and plans to address the recovery needs that follow natural disasters.’²³

Recommendation 2: VALS supports the recommendation of the Royal Commission into National Natural Disaster Arrangements that ‘nationally consistent, pre-agreed recovery programs [be developed]: Australian, state and territory governments should expedite the development of pre-agreed recovery programs, including those that address social needs, such as legal assistance.’²⁴

Recommendation 3: VALS supports the position of the Royal Commission into National Natural Disaster Arrangements that ‘[n]on-government organisations should be included in recovery planning processes at the local, regional, jurisdictional and national levels as appropriate.’²⁵ This is relevant for recovery from both the bushfire disaster and the COVID-19 pandemic.

Recommendation 4: VALS supports the position of the Royal Commission into National Natural Disaster Arrangements that ‘[e]stablishing pre-planned disaster responses for non-government sectors allows for the timely delivery of services, and ‘that any planning for these sectors must also be sufficiently flexible to support a local, on-the-ground recovery response that reflects the nature of the disaster and its impacts on existing services.’²⁶ This is relevant for planning for any future bushfire disasters and any further COVID-19 waves.

Funding by the Victorian Government, the Federal Budget and Closing the Gap

Although the Victorian Government announced investments to support legal assistance services,²⁷ the legal need cannot be met at current funding levels. There needs to be certainty with regards to funding, with longer funding cycles, and sufficient levels of funding to ensure that the pandemic does not continue to disproportionately impact

23 Ibid

24 Ibid 479

25 Ibid

26 Ibid 440

27 Aboriginal Justice Forum Focuses On Covid-19 Recovery (22 October 2020), available at <https://www.premier.vic.gov.au/aboriginal-justice-forum-focuses-covid-19-recovery>

on marginalised and disadvantaged communities.

This should particularly be at the forefront of Governments' minds, given the commitment made by them in July, under the Closing the Gap Agreement, which includes justice targets to address the overincarceration of Aboriginal people.²⁸ VALS highlights that 'Aboriginal people were already disproportionately involved in the criminal legal and child protection systems before the pandemic, and there is a very real risk that the justice gap between Aboriginal and non-Aboriginal people will only widen if effective preventive steps are not taken early on.'²⁹ Just a few months ago, under the Closing the Gap Agreement, the Governments 'commit[ted] to engaging with Aboriginal and Torres Strait Islander representatives before, during, and after emergencies such as... pandemics to make sure that... Aboriginal and Torres Strait Islander people are not disproportionately affected and can recover as quickly as other Australians from social and economic impacts.'³⁰

As highlighted by the FCLC, the 'Productivity Commission concluded that the costs of unaddressed legal problems – both tangible and intangible – can be very high, including the risk of significant harm to the mental, physical and financial wellbeing of affected individuals.'³¹ If legal needs are not met, there is a very real risk that the 'gap' will only widen. The Federal Government has committed only \$46.5 million over four years to Closing the Gap,³² and the Victorian Government has announced only \$3.3 million over 4 years for Aboriginal organisations so that Aboriginal people can be at the heart of the Closing The Gap reform

28 Coalition of Aboriginal and Torres Strait Islander Peak Organisations and the Australian Governments, The National Agreement on Closing the Gap (July 2020), available at <https://www.closingthegap.gov.au/sites/default/files/files/national-agreement-ctg.pdf?q=0720>

29 VALS, The Victorian Aboriginal community must not be left behind in the COVID-19 recovery response (11 November 2020), available at <https://www.vals.org.au/the-victorian-aboriginal-community-must-not-be-left-behind/>

30 Coalition of Aboriginal and Torres Strait Islander Peak Organisations and the Australian Governments, The National Agreement on Closing the Gap (July 2020) 12, available at <https://www.closingthegap.gov.au/sites/default/files/files/national-agreement-ctg.pdf?q=0720>

31 Federation of Community Legal Centres, Legal need and the COVID-19 crisis (April 2020) 13

32 National Aboriginal and Torres Strait Islander Legal Services, COVID-19 recovery impossible when the 2020-21 Federal Budget further entrenches Aboriginal and Torres Strait Islander people into poverty and the justice system (6 October 2020), available at <http://www.natsils.org.au/portals/natsils/Media%20Releases/MEDIA%20RELEASE%202020-21%20Federal%20Budget.pdf>

work (a disappointing \$825K per year).³³ The Governments' responsibility to Aboriginal people can be met through a number of preventive steps, including properly funding VALS to provide crucial legal assistance during this critical next phase.

VALS also notes that the 2020-2021 Federal Budget does not allocate additional funding to the Aboriginal and Torres Strait Islander Legal Services (**ATSILS**), despite the Law Council of Australia determining that 'an urgent injection of at least \$310 million a year [is] required [for ATSILS] to address critical gaps in the system.'³⁴ Additionally, despite an increase in family violence incidents during the pandemic (as discussed in greater detail below), the Federal Budget does not confirm funding from December for the National Family Violence Prevention Legal Forum, the only national peak body for Aboriginal and Torres Strait Islander victim-survivors of family violence and sexual assault.³⁵

Funding for Place-Based Service Delivery

VALS has identified the need for funding that will enable it to operate as a place-based service, as opposed to a metro-based organisation that delivers outreach services across Victoria. COVID-19 has exacerbated challenges of operating under the current model to providing a flexible, prevention-focused service that accounts for the unique needs of different Victorian communities and that facilitates a collaborative approach. Any future restrictions across Victoria, in response to COVID-19, could also be better navigated if VALS was funded to deliver a place-based service.

The advantages of the proposed place-based approach include a focus on areas and communities with entrenched disadvantage, local autonomy and flexibility to changing

³³ VALS, VALS calls on the Victorian Government to commit to ambitious justice targets and significant funding to address the overincarceration of Aboriginal people (31 July 2020)

³⁴ National Aboriginal and Torres Strait Islander Legal Services, COVID-19 recovery impossible when the 2020-21 Federal Budget further entrenches Aboriginal and Torres Strait Islander people into poverty and the justice system (6 October 2020), available at <http://www.natsils.org.au/portals/natsils/Media%20Releases/MEDIA%20RELEASE%202020-21%20Federal%20Budget.pdf>

³⁵ Ibid

community needs, reduced costs through better integration of work across justice and support agencies, opportunities for local innovation and co-design of services, and local service delivery tailored through a nuanced understanding of each community's unique needs and issues.

Funding for Balit Ngulu

Balit Ngulu was established by VALS in 2017, to ensure that all Aboriginal and/or Torres Strait Islander youth in Victoria have access to a holistic and culturally safe legal service. With the Victorian Aboriginal youth population over-represented in both the youth justice and the child protection systems, Balit Ngulu provided a critical service aimed at breaking the cycle of disadvantage and giving our youth the chance to thrive. Through a service model combining both lawyers and Client Service Officers, Balit Ngulu focused on maintaining and strengthening connection to culture and family, whilst also assisting clients to access education, employment and leadership opportunities. In doing so, the service was successful in diverting Aboriginal young people from the criminal justice system and prioritising and facilitating placement of children within a kinship network.

With Aboriginal children and young people being particularly and uniquely impacted by the pandemic, we strongly encourage the Victorian and Commonwealth Governments to invest in this crucial legal service, which was widely recognised and endorsed, including by the Law Council of Australia,³⁶ the Law Institute of Victoria,³⁷ Koorie Youth Council, the Victorian Council of Social Services³⁸

³⁶ The Law Council of Australia, Alternative Report to the United Nations Committee on the Rights of the Child (1 November 2018) 10, available at <https://www.lawcouncil.asn.au/publicassets/6dacfe16-0fe6-e811-93fc-005056be13b5/S%20-%202018%2011%2001%20Law%20Council%20Report%20to%20CRC.pdf>

³⁷ Law Institute of Victoria, LIV calls on government to fund Balit Ngulu (5 October 2018), available at <https://www.liv.asn.au/Staying-Informed/Submissions/submissions/October-2018/LIV-calls-on-government-to-fund-Balit-Ngulu>

³⁸ Victorian Council of Social Services, Delivering Fairness: Victorian Budget Submission 2019-2020 (2019) 38, available at https://vcoss.org.au/wp-content/uploads/2019/03/DF_Online.pdf

and the Commissioner for Aboriginal Children and Young People.³⁹

An independent evaluation by Nous Group of Balit Ngulu conducted in late 2019-early 2020, found that

The feedback Nous received on Balit Ngulu's service quality and outcomes was overwhelmingly positive...

Ideally, all organisations delivering legal services to Aboriginal and Torres Strait Islander children and young people – public, private and community-based - would deliver services that reflect the principles and practices Balit Ngulu illuminated. Aboriginal community-controlled organisations, in particular, have an important role in delivering such services in a justice system that prioritises self-determination.

For any future service, early and sustained consideration should be given to securing multi-year funding, and collaborative planning with others in the sector should be undertaken. The importance of achieving financial sustainability for youth legal services cannot be stressed strongly enough, if the goal is to contribute to a substantial and systematic improvement in the outcomes Victoria's justice system delivers for Aboriginal and Torres Strait Islander children and young people.⁴⁰

Recommendation 5: The Victorian Government should increase funding to VALS during the recovery phase, as restrictions ease, in anticipation of a further increase in demand for legal services. This funding should be long-term and sufficient to meet the legal need, and be responsive to any further increase in need and/or demand.

39 Victorian Aboriginal Legal Service shuts down youth service (28 September 2018), available at <https://www.abc.net.au/news/2018-09-28/victorian-aboriginal-legal-service-shuts-down-youth-service/10315948>

40 Nous Group, Evaluation of Balit Ngulu (13 May 2020) 6-7

Recommendation 6: The Victorian Government should provide ongoing funding to re-establish Balit Ngulu at VALS, to provide legal assistance, advice and representation to Aboriginal youth across Victoria who are involved in the child protection system or have matters in the youth justice system.

Current and Anticipated Increased Demand on VALS Legal Services

The Economic and Human Benefits of Properly Funding Legal Services from the Outset

As highlighted by the FCLC, if legal issues are addressed early, this will 'stop the escalation of legal problems, avoiding harm to individual Victorians and leading to significant avoidance of costs to the community and government.'⁴¹

An Increase in Legal Demand during the COVID-19 Crisis and Recovery Period

The FCLC identified last year that, as a result of the pandemic,

- 'the number of legal problems experienced by Victorians will increase;'⁴²
- 'the proportion of Victorians who need free legal assistance to handle their legal problems will increase, as more Victorians become unable to afford private legal representation;'⁴³ and that
- 'the consequences of unresolved legal problems will become more severe, as people lose sources of financial and health resilience to the adverse effects of their legal issues.'⁴⁴

⁴¹ Federation of Community Legal Centres, Legal need and the COVID-19 crisis (April 2020) 3

⁴² Ibid 13

⁴³ Ibid 14

⁴⁴ Ibid

Criminal Law Jurisdiction

Even prior to the pandemic, the time it took matters to progress through the courts was significant (with VALS obtaining a contested hearing date within 6-8 months, and trial dates between 9-12 months from the Initial Directions Hearing, and longer for Circuit Court), with delays impacting negatively on both alleged victims and defendants. The pandemic has only exacerbated this issue, increasing the demand on VALS lawyers.

Due to a significant number of court adjournments during the Victorian lockdown periods, VALS' small Criminal Law team has had a back log of 383 files from March 2020. The County Court alone estimates that 750 trials were delayed by the suspension of hearings (and that figure does not include other accused people who are having trials scheduled for 2022). It has also been reported that, in the Magistrates Court of Victoria, tens of thousands of cases have been adjourned last year.⁴⁵ With such a significant backlog of hearings and trials, VALS is concerned about the increased demand on our small team of criminal lawyers. VALS wishes to make clear that it would not be appropriate to address the backlog through appointing more judges to the bench.

Recommendation 7: VALS calls for further funding for our legal services, to meet the demands arising from court backlogs of criminal matters, that will now progress with the easing of restrictions.

Civil Law Jurisdiction

The Special Rapporteur's report stated that the 'pandemic has exposed weaknesses and exacerbated disparities in public health and social security systems, leaving [I]ndigenous peoples behind in national responses and compounding the wider range of systemic violations they

⁴⁵ Jury trials to return to Victoria in 2020 (21 October 2020), available at <https://www.theage.com.au/national/victoria/jury-trials-to-return-to-victoria-in-2020-20201021-p5672h.html>

already faced.’⁴⁶ VALS clients have been significantly impacted across all areas of civil law due to the pandemic, including over-representation in tenancy, employment, consumer issues and being disproportionately captured by the fines regime. As highlighted by the UN report, ‘[I]ndigenous older persons, persons with disabilities, women, children, youth, lesbian, gay, bisexual, transgender, queer and intersex persons and human rights defenders must... receive specific attention.’⁴⁷ VALS’ experience suggests that our clients with intersecting characteristics will continue to be disproportionately impacted by the economic fallout of the pandemic.

As with VALS’ Criminal Law team, our Civil Law and Human Rights team is under-resourced to deal with the influx of matters. For instance, although Aboriginal people received a disproportionate number of COVID-19 fines (1.9% of the Aboriginal and Torres Strait Islander population in Victoria was charged with a COVID-19 offence, in contrast to the 0.36% of Victoria’s non-Aboriginal population⁴⁸; with most fines issued to Victorians aged 25-34⁴⁹), currently VALS is not properly funded to run a fines clinic (casework is conducted by student volunteers under supervision), and our solicitors have limited capacity to assist clients in dealing with infringements and police complaints as a result of the Government’s policing of the State of Emergency directives. It has been reported that 19,324 fines had been issued by August 24, to the value of \$27,880,978.⁵⁰ However, only 845 of those fines had been paid in full in October, with VALS lawyers anticipating seeing an increased

46 United Nations Special Rapporteur on the rights of Indigenous Peoples, Report of the Special Rapporteur on the rights of [I]ndigenous peoples to the United Nations General Assembly (20 July 2020) [90], available at <https://www.undocs.org/en/A/75/185>

47 Ibid

48 Crime Statistics Agency, COVID Offender by Sex Age Country of Birth and Aboriginal Status (17 December 2020), Table 3; Australia Bureau of Statistics, 2016 Census Data Summary, Aboriginal and Torres Strait Islander Population – Victoria, available at <https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20Population%20-%20Victoria~10002>; Australia Bureau of Statistics, 2016 Census: Victoria, Victoria records highest population rise of all States and Territories (27 June 2020), available at <https://www.abs.gov.au/AUSSTATS/abs@.nsf/mediareleasesbyReleaseDate/C508DD213FD43EA7CA258148000C6BBE?OpenDocument>

49 Crime Statistics Agency, COVID Offender by Sex Age Country of Birth and Aboriginal Status (17 December 2020), Table 1

50 Only a tiny fraction of Victoria’s lockdown fines have been paid (12 October 2020), available at <https://amp.abc.net.au/article/12760192>

demand for the services of the VALS infringements clinic once fines reach the enforcement stage, rather than in the immediate future. Unpaid fines accumulate penalties, and can lead to other negative outcomes for individuals, such as suspension of licence or people having to undertake community work.

Our civil practice provides advice, casework and representation at VCAT for clients with tenancy matters – mostly in the public and community housing context – and with the eviction moratorium due to end in March 2021, tenancy lawyers across the sector are anticipating an inundation of work once changes to residential tenancy laws brought about by COVID-19 restrictions are wound back.

As we enter the recovery phase, VALS clients would benefit from our service being funded to take on discrimination matters.

The VALS and Consumer Action Law Centre Integrated Project is a highly successful project that relies on short term funding, which prevents the project from making long term plans to assist the Aboriginal Community with critical issues as Victoria recovers from the pandemic. Long term sustainable funding is needed to ensure that VALS can meet the prospect of greater legal need for consumer and debt advice and representation, that the financial pressures of the pandemic will produce.

Recommendation 8: VALS calls for further funding for our legal services, to meet the demands across our civil practice areas, including infringements, consumer law, debt, tenancy and discrimination matters.

Family Law Jurisdiction

The COVID-19 pandemic has significantly increased demand on VALS' Family Law team. An analysis of the periods 1 March 2019 to 30 September 2019 (and the same period in 2020), shows that there has been a 740% increase in the VALS' information service, 625% increase in duty work,

and a 9.86% increase in court representation. Although the demand for some aspects of the family law work VALS has decreased, overall, there has been a 10.23% increased demand across the Family Law Section.

Recommendation 9: VALS calls for further funding for our legal services, to meet the demands across our family law practice areas.

The Increased Incidence and Severity of Family Violence, Particularly for Aboriginal women

An Australian Institute of Criminology (**AIC**) study, released in October 2020, concluded that 'the early stages of the COVID-19 pandemic were associated with an increased risk of violence against women in current cohabiting relationships, most likely from a combination of increased economic stress and social isolation.'⁵¹ The report found that:

- 'the probability of repeat or first-time violence was between 1.3 and 1.4 times higher for women who had less frequent contact with family and friends outside of the household during the pandemic;'⁵²
- 'the probability of first-time violence was 1.8 times higher among women who experienced an increase in financial stress;'⁵³
- '[t]here was a strong association between experience of prior emotionally abusive, harassing and controlling behaviour and the onset of violence during the pandemic;'⁵⁴
- Aboriginal and Torres Strait Islander women were significantly over-represented in this data.⁵⁵

The study highlighted the importance of early intervention, finding that 'Aboriginal and Torres Strait Islander women and women who had experienced emotionally abusive, harassing and controlling behaviour prior to February were more likely to experience violence, irrespective of

⁵¹ Australian Institute of Criminology, Social isolation, time spent at home, financial stress and domestic violence during the COVID-19 pandemic (October 2020) 15

⁵² Ibid 1

⁵³ Ibid

⁵⁴ Ibid 9

⁵⁵ Ibid

whether they had previously experienced violence.⁵⁶

Similarly, the Sentencing Advisory Council (**SAC**) released a report in October 2020 that found that prevalence of image-based sexual abuse offences in Victoria 'is becoming increasingly prevalent in 2020: as social and sexual relationships moved online in response to COVID-19, reports of image-based abuse in Australia increased by 600% over the Easter weekend alone, and between March and May, reports increased by 200% on average.'⁵⁷ This is particularly concerning given that 'Aboriginal and Torres Strait Islander people and people with disabilities reported... higher rates of victimisation.'⁵⁸

With an increase in family violence, particularly impacting on Aboriginal women, VALS' family law practice must be properly funded to support women and children experiencing family violence and at increased risk of becoming involved in the child protection system.

Recommendation 10: VALS seeks funding for our services which assist families experiencing domestic and family violence, including our Community Justice Programs and Family Law Section.

The Logistics of Delivering Services under Restrictions

VALS highlights the recommendations, relating to remotely delivering our services and remote court and tribunal operations, made in our submission to the Public Accounts and Estimates Committee's Inquiry into the Victorian Government's response to COVID-19 (**PAEC Inquiry**):⁵⁹

⁵⁶ Ibid 15

⁵⁷ Sentencing Advisory Council, Sentencing Image-Based Sexual Abuse Offences in Victoria (October 2020) 1

⁵⁸ Ibid 5

⁵⁹ VALS, Submission to the Public Accounts and Estimates Committee's Inquiry into the Victorian Government's response to COVID-19 (September 2020), available at https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Submissions/87._Victorian_Aboriginal_Legal_Service.pdf

Remote service delivery to clients of VALS criminal lawyers:

- Recommendation 91: Lawyers should continue to be able to speak with clients at the Melbourne Custody Centre over the phone;
- Recommendation 92: Lawyers should continue to be able to speak to clients who are held in police cells, and appear via phone in bail applications and straight remand mentions.

Remote court operations (criminal law jurisdiction):

- Recommendation 93: Summary pleas on the papers should continue;
- Recommendation 94: Bail variations by consent on the papers should continue;
- Recommendation 95: By consent WebEx, AVL and telephone appearances should continue.

Remote court operations (civil law jurisdiction):

- Recommendation 105: Some VCAT matters should proceed by way of video conference rather than via phone. Parties should be asked whether they would prefer a video conference to a telephone hearing, and VCAT should develop guidelines in relation to which matters will be given priority for video conferencing;
- Recommendation 112: VOCAT should continue to permit lodgement of hard copy applications and other documents by lawyers on behalf of their clients, accompanied by an email authority.

Remote court operations (family law jurisdiction):

- Recommendation 125: Audio-visual hearings, which can save resources and improve efficiency of the court, should be retained;
- Recommendation 126: Audio hearings and conciliation conferences should also be retained;
- Recommendation 127: Audio-visual hearings would be particularly useful in regional areas, where there are no specialist Children's Court Magistrates.

Exceptions/caveats to remote court operations:

- Recommendation 96: The important caveat... is that VALS lawyers should not be required to proceed with matters via AVL and through other remote technology where the lawyers have made forensic decisions that

this would jeopardise their clients' cases;

- Recommendation 104: Some in-person VCAT hearings should recommence once it is safe to do so, recognising that phone hearings are not appropriate in all circumstances (due to the individuals involved, or the complexity of the matter). Any long-term changes to the conduct of hearings as a result of COVID-19, including the increased use of remote hearings (be they for interlocutory or final matters), ought to be informed by qualitative research conducted during the current period. Particular attention should be given to whether those with complex needs have been able to effectively access remotely delivered justice, and how hearings conducted remotely impact on user comprehension, participation, satisfaction and outcomes;
- Recommendation 111: Documents should continue to be provided to parties and the Tribunal in advance of the day of a VCAT hearing. However, Members should take a flexible approach where parties are self-represented, keeping in mind that it may be onerous to expect this of vulnerable community members.

Other remote operations:

- Recommendation 110: Fines Victoria should continue permitting filing by lawyers of draft statutory declarations, accompanied by a signed client authorisation form, for the foreseeable future.

Whilst AVL, WebEx or phone hearings (in circumstances where this was consented to and is appropriate), is an effective way of initially managing court backlog, the procedure will inevitably increase demand on VALS' CSOs. Due to VALS clients not always having access to the requisite technology/internet to attend remote hearings, VALS CSO staff will be required to assist in providing these additional services. This will include transport to and from our offices, assistance in set up and operation of the technology and support for clients to understand what is taking place in the hearings and the outcomes.

Recommendation 11: Funding to VALS should enable it to provide high quality, culturally appropriate services to clients remotely:

- lawyers and support staff to attend court, provide advice and support to clients, and take instructions remotely;
- support staff and lawyers to meet with clients face-to-face and attend court in-person in certain circumstances (such as to provide technological/logistical support, to assist clients who are living with disability, in particularly emotionally difficult matters such as coronial inquests, for matters which are very complex) in a safe manner (including use of PPE and deep cleaning of vehicles and office space).

Current and Anticipated Increased Demand on VALS Community Justice Programs

Magistrates Court Victoria practice directions for Melbourne and Metropolitan courts state that '[a]ll matters currently listed for in-person hearing from Monday 9 November 2020 will, to the extent possible and as determined by the Court, be listed for hearing via the Online Magistrates' Court (OMC) or other technology for remote hearing.'⁶⁰

As many VALS clients do not have access to the requisite technology to attend remote hearing requirements, VALS will be relying on CSOs to support clients to attend these hearings. Support should include:

- Transporting clients to and from the VALS office or local community service provider with video conferencing capability;
- Providing IT support to ensure the hearing runs smoothly;
- Explaining the proceedings and outcome to the clients;
- Supporting clients in the event of unexpected or negative outcomes;
- Supporting families or other concerned parties.

⁶⁰ Magistrates' Court Victoria, Practice Direction No.22 of 2020 (5 October 2020), available at <https://www.mcv.vic.gov.au/sites/default/files/2020-11/Practice%20Direction%20No.%2022%20of%202020%20-%20Melbourne%20and%20Metropolitan%20Courts.pdf>

Significant additional resources will need to be provided to ensure that VALS CSO staff, in particular regional staff, are trained and properly equipped to ensure their health and safety as they fulfill the additional requirements of their role.

Recommendation 12: VALS should receive additional funding to ensure CSO staff supporting remote court hearings can do so in a safe manner.

Custody Notification Service

Throughout the pandemic, VALS' Community Justice Programs (**CJP**) have been undertaking welfare checks of incarcerated Aboriginal people. During these welfare checks, across both the prison and police custody system, the main issues that have been identified are limited family contact (which is especially challenging for people with mental health conditions and disabilities), deterioration of mental health (in some cases leading to self-harm), and people being unable to participate in cultural activities.

With VALS clients remaining in police custody for extended periods of time and protective and transfer quarantine measures in place in prisons, VALS Custody Notification Officers (**CNOs**) have been conducting increased welfare checks, with checks taking longer. The need is acute, with VALS custody notification data showing an increase in reported self-harm incidents from 0.15% between 1/4/2019 – 31/08/2019 to 0.56% between 1/04/2020 – 31/08/2020.⁶¹ More recently, between 21/12/2020 – 3/1/2021, the CNO team, in addition to the current welfare checks being undertaken, received 319 notifications. Many people in custody had significant welfare, medical and mental health concerns. This required CJP staff to maintain consistent contact and extensive notes in client records. Some of the issues staff came across included people in custody presenting as substance-affected, having very poor mental health and various medical conditions, and presenting with challenging behaviours such as pressing the duress button

⁶¹ VALS CNS data on 'incidences of self-harm in police custody' April – Aug 2019-2020

consistently, wiping blood and faeces over themselves and the cell and stripping in the cell.

CJP welfare checks are critical, with staff providing wide-ranging assistance, from ensuring that people with suicidal ideation in prison are supported by the psychiatric team, to identifying when someone is withdrawing from substances in police custody and needs medical care, notifying family or friends that the person has been remanded (which can greatly reduce stress and any potential management issues in custody), and even assisting people who have been remanded and are at risk of losing their housing as a result.

CJP has received extensive positive feedback from family members (both in Victoria and interstate) of people who have been detained in custody. For example, the mother of one person for whom CJP conducted a welfare check stated:

I wish you fellas were around when he was younger, when the police were roughing him up and we didn't know what was happening or how he was. It would have been good having a service like yours back then.

For as long as social distancing and protective quarantine measures are being utilised to mitigate infection risk in police custody, correctional centres and youth justice facilities, the increase in demand and need for welfare checks will continue. Pre-COVID-19, the CNO team was already at capacity, and the extra welfare checks have stretched VALS' resources beyond sustainable service delivery.

VALS notes that its recommendations in its submission to the PAEC Inquiry require funding to ensure that VALS can meet these unprecedented demands on our CNO staff:

- Recommendation 29: VALS Custody Notification Service should be notified any time an Aboriginal child or young person in detention is placed in isolation under the Children, Youth and Families Act, or is in effective isolation as a result of lockdown.

- Recommendation 43: VALS Custody Notification Services officers and families should be notified immediately of confirmed COVID-19 cases of detained Aboriginal people.

Recommendation 13: In order to meet the identified increased need for and demand on VALS' Custody Notification Service, the Community Justice Projects should receive increased funding.

Community Legal Education

The FCLC noted that '[d]ata gathered from CLCs indicate that *uncertainty around legal rights and obligations in the wake of government announcements*, in combination with mass job losses across several industries, is already leading to unprecedented demand for free legal assistance with residential tenancy, employment and social security law matters'⁶² (emphasis added).

The Special Rapporteur on the Rights of Indigenous Peoples stated that 'Indigenous peoples in urban and rural settings should receive timely and accurate information on care and prevention during the pandemic, as well as, for instance, on support services for victims of gender-based violence during any periods of confinement, in accessible languages and formats (radio, social media, easy-read) that have been identified by the communities. *States should also fund [I]ndigenous peoples' own initiatives in this regard*'⁶³ (emphasis added). The report specifies the importance of support services for victims and survivors of family violence to be accessible across various platforms as identified by the local community.

In this challenging time, the Government has responded with two Omnibus Bills which introduced significant changes to legislation across all of VALS' practice areas (in terms of both substantive rights and obligations under

⁶² Federation of Community Legal Centres, Legal need and the COVID-19 crisis (April 2020) 3

⁶³ United Nations Special Rapporteur on the rights of Indigenous Peoples, Report of the Special Rapporteur on the rights of [I]ndigenous peoples to the United Nations General Assembly (20 July 2020) [101], available at <https://www.undocs.org/en/A/75/185>

the law, and procedural matters). It also issued health directives and created other measures which impacted, and continue to impact, on the Victorian community's rights and obligations. The Government's response has been a rapidly evolving, during a time of heightened stress for the Victorian community.

Much of VALS' work is reactive, including during the pandemic, assisting people who have been caught up in the criminal, family or civil law systems. Community Legal Education (**CLE**) can support this important work, but it can also play a crucial role in the prevention space – preventing people from becoming involved in the legal system to begin with, which is, of course, the ideal outcome.

CLE can prompt individuals to recognise that they have existing legal issues, with which VALS can assist. This empowers individuals with the knowledge that they have rights, and that they can access culturally competent legal assistance in realising and protecting those rights. CLE can assist individuals already caught up in these legal systems to navigate their way with more confidence, taking proactive steps to mitigate risks and achieve better outcomes. CLE also has an important role to play in the prevention space, such as avoiding COVID-19 fines to begin with.

Finally, CLE can play an important role in improving VALS' practice, as well as informing policy and law reform. CLE provides an opportunity for the Victorian Aboriginal community to highlight the legal issues which are particularly impacting on them, and their views on current laws or practices. This information can, in turn, be shared with VALS lawyers and the policy team, facilitating a better understanding of Aboriginal people's experiences within the legal systems during the pandemic and recovery period (including how laws and policies are actually impacting people on the ground), their priorities, gaps in service provision, and opportunities for collaboration between Aboriginal Community Controlled Organisations (**ACCOs**).

CLE is thus a mechanism by which Article 18 of the UN Declaration on the Rights of Indigenous Peoples can be realised: 'Indigenous peoples have the right to participate

in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures.’⁶⁴ If people do not understand their rights and responsibilities, they are disempowered, and their ability to work towards achieving a truly just legal system for Aboriginal people is compromised. VALS is committed to representing the interests of the Aboriginal community in Victoria, and CLE assists VALS to achieve this goal.

Recommendation 14: The Victorian Government should significantly increase funding for VALS’ Community Legal Education. Funding should be provided for both staffing and creation of resources (using different media, to be disseminated on different platforms, to ensure the legal messages are accessible to and understandable for everyone in the Aboriginal community).

Transitional Housing

One of the most significant barriers in accessing bail is stable housing (housing instability and homelessness are also key factors contributing to low-level offending). Aboriginal Housing Victoria’s 2020 report noted that ‘Aboriginal people are often detained within the custodial justice system unable to access bail, parole or a corrections order due to their inability to demonstrate access to secure housing.’⁶⁵ The report identified ‘secure affordable housing as the foundation for breaking cycles of disadvantage and homelessness,’ and that those who are high risk such as people in ‘contact with and leaving the justice system’ should have ‘[i]ntensive, culturally appropriate structured case managed approaches... intensive housing, community support and pathways.’⁶⁶

64 United Nations Special Rapporteur on the rights of Indigenous Peoples, Report of the Special Rapporteur on the rights of [I]ndigenous peoples to the United Nations General Assembly (20 July 2020) [18], available at <https://www.undocs.org/en/A/75/185>

65 Aboriginal Housing Victoria, *Mana-na woorn-tyeen maar-takoort, Every Aboriginal Person Has A Home: The Victorian Aboriginal Housing and Homelessness Framework* (2020) 22, available at https://www.vahhf.org.au/cms/uploads/docs/victorian-aboriginal-housing-and-homelessness-framework_complete_26_02_20.pdf

66 Ibid 15

With the national health crisis resulting in an increase in family violence, unemployment, mental ill-health, now, more than ever our most vulnerable Aboriginal community members need safe housing upon exiting custody. VALS' Baggarrook program demonstrates how stable and safe accommodation and case management can support drug and alcohol rehabilitation, family reunification and employment opportunities, which can decrease recidivism. However, Baggarrook's capacity is only six clients at any one time and does not cater for men or children and young people.

VALS welcomed the Government's commitment to invest \$500 million in social housing, including an investment in Aboriginal housing,⁶⁷ and encourages the Government to continue to invest in housing outcomes for Aboriginal communities in Victoria, including for justice housing projects such as VALS' culturally appropriate Baggarrook program, supporting women being released from prison. This would accord with the principle of Aboriginal self-determination, whereby 'housing responses are designed for and delivered by Aboriginal people [and] Aboriginal people are the arbiters of good practice.'⁶⁸ Funding VALS and other ACCOs to provide justice housing would be preferable to housing such as the Maribyrnong Community Residential Facility, which is a highly institutionalised environment.⁶⁹

Recommendation 15: The Victorian Government should invest further in transitional housing programs, such as VALS' Baggarrook program.

67 DHHS, Almost \$500 million social housing boost to strengthen our economy and provide stability for Victorians (18 May 2020), available at <https://www.dhhs.vic.gov.au/news/social-housing-boost-to-strengthen-our-economy>

68 Aboriginal Housing Victoria, Mana-na woorn-tyeen maar-takoort, Every Aboriginal Person Has A Home: The Victorian Aboriginal Housing and Homelessness Framework (2020) 12, available at https://www.vahhf.org.au/cms/uploads/docs/victorian-aboriginal-housing-and-homelessness-framework_complete_26_02_20.pdf

69 Maribyrnong Community Residential Facility: Information for Residents (30 June 2020)



Prisons and Youth Detention Centres

The Recovery Period – An Opportunity to Implement Reforms to Address the Overincarceration of Aboriginal People

Decarceration should form Part of a Responsible COVID-19 Public Health Strategy

During the pandemic, Victoria, unlike other, overseas jurisdictions, has not adopted the recommended public health approach of decarceration. In contrast, in Europe, 25 prison administrations 'released at least 143,000 inmates between March and September. The real number of inmates released should be higher because five of these administrations did not provide data on releases for the whole period, but only for the first months of it.'⁷⁰ Decarceration is a critical preventive measure to protect not only those who are detained, but the rest of the community, as places of detention act as vectors of COVID-19, and outbreaks in detention amplify COVID-19's spread in the community.

Incorporating decarceration in Victoria's public health response to the pandemic (discussed in greater detail in the VALS PAEC submission⁷¹) continues to be critical during the COVID-19 recovery period. There is nothing guaranteed about the future trajectory of the pandemic; expert advice on this matter should be heeded, mistakes in other jurisdictions should be avoided. VALS is certainly not alone in calling for decarceration during the recovery period - the Victorian Equal Opportunity & Human Rights Commission's (**VEOHRC**) foundations for recovery include guidance on how prison populations could be decreased (echoing the previously stated recommendations of VALS), such as through the use of administrative leave, and

⁷⁰ Council of Europe Annual Penal Statistics, Prisons and Prisoners in Europe in Pandemic Times: An evaluation of the medium-term impact of the COVID-19 on prison populations (10 November 2020) 2

⁷¹ VALS, Submission to the Public Accounts and Estimates Committee's Inquiry into the Victorian Government's response to COVID-19 (September 2020) 27-34, available at https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Submissions/87_Victorian_Aboriginal_Legal_Service.pdf

Emergency Management Days (**EMDs**).⁷²

In addition to the recommendations discussed further below, VALS reiterates the following recommendations regarding decarceration - previously made in VALS' PAEC submission, and of continuing relevance during the recovery period:

Recommendation 16: The Victorian Government should decrease the number of people in places of detention as part of a responsible and comprehensive public health strategy⁷³ during the COVID-19 recovery period. In recognition of the harm of excessive and cyclical lockdowns of places of detention to people's health and wellbeing, VALS recommends that the Victorian Government instead employ a preventive strategy of releasing people from detention and curbing admissions to detention.⁷⁴

Recommendation 17: Aboriginal people should be among those who are prioritised for early or temporary release from places of detention.⁷⁵

Recommendation 18: The Victorian Government should take steps to keep survivors and victims safe, including making suitable housing available for people who are released from custody, and properly funding culturally appropriate supports and services delivered by Aboriginal Community Controlled Organisations, such as VALS' Baggarrook program.⁷⁶

Recommendation 19: Prison and youth detention populations should be decreased by utilising administrative leave (permits, Emergency Management Days or temporary leave).⁷⁷

72 Victorian Equal Opportunity & Human Rights Commission, Corrections in the COVID-19 recovery, <https://www.humanrights.vic.gov.au/legal-and-policy/covid-19-and-human-rights/centring-human-rights-in-the-covid-19-recovery/corrections-in-the-covid-19-recovery/>

73 VALS, Submission to the Public Accounts and Estimates Committee's Inquiry into the Victorian Government's response to COVID-19 (September 2020) 34, available at https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Submissions/87._Victorian_Aboriginal_Legal_Service.pdf

74 Ibid 27

75 Ibid 29

76 Ibid 34

77 Ibid 36

Recommendation 20: Permits should be prioritised for people with chronic health conditions, disabilities and mental health conditions, elderly people and for Aboriginal people.⁷⁸

Recommendation 21: Corrections, in making decisions in relation to Emergency Management Days, should acknowledge that the pandemic has negatively impacted on all people in detention, albeit to different degrees. EMDs should be granted not only to people who have been subject to isolation or mandatory quarantine, but to others as well, in recognition of the additional hardships faced by everyone in detention.⁷⁹

Recommendation 22: Corrections policy should be amended so that people can be granted 4 Emergency Management Days for each day that the 'emergency exists', and the 14 days they could be entitled to due to 'circumstances of an unforeseen and special nature.'⁸⁰

Recommendation 23: There should be greater transparency in relation to the process by which Emergency Management Days are granted. Information should also be made available in relation to the number of people released on EMDs, how many days they were granted (broken down per month and per facility), and how many Aboriginal and non-Aboriginal people were granted EMDs.⁸¹

Recommendation 24: EMD assessments should occur on a more regular basis than fortnightly, to allow adequate time to prepare for release.⁸²

Recommendation 25: No one should be denied Emergency Management Days due to a lack of housing.⁸³

Recommendation 26: There should be a legislated allowance for a reduction in sentence if a child or young person is placed into isolation in a scheme comparable to the legislated Emergency Management Days available to incarcerated adults.⁸⁴

78 Ibid 36

79 Ibid 37

80 Ibid 37

81 Ibid 37; see also Federation of Community Legal Centres, A Just and Equitable COVID Recovery – A Community Legal Sector Plan for Victoria, 40

82 Ibid 37; see also Federation of Community Legal Centres, A Just and Equitable COVID Recovery – A Community Legal Sector Plan for Victoria, 40

83 Ibid 37; see also Federation of Community Legal Centres, A Just and Equitable COVID Recovery – A Community Legal Sector Plan for Victoria, 40; see also Fitzroy Legal Service Inc, Information about Emergency Management Days (17 December 2020) 1

84 Ibid 22

Recommendation 27: There should be an increased use of temporary leave for children and young people.⁸⁵

Recommendation 28: Parole should be made more accessible for children, young people and adults. Parole Boards should sit more frequently to enable them to process more parole applications.⁸⁶

Recommendation 29: Funding should be provided to VALS to hire staff to assist people with their parole applications.⁸⁷

Recommendation 30: Police should exercise their powers responsibly, in order to curb further admissions to places of detention, by issuing summons, releasing people on bail, and having a moratorium on pursuing prosecution for low-level offences and breaches of bail and parole conditions.⁸⁸

Recommendation 31: The Government should urgently consider passing legislation (and utilising this legislation) that would allow for the early release of people detained in prisons and youth detention.⁸⁹

A positive development during the pandemic is that the number of incarcerated people in Victoria has decreased⁹⁰ (albeit not to the degree that would meet the expectations of a robust, evidence-based public health response). However, Aboriginal people continue to be overincarcerated. Moreover, VALS anticipates that the numbers of incarcerated people will increase again as courts make their way through their backlog, and with the easing of restrictions in the community.

There is still urgent need for system reform, including legislative bail reform, raising the age of criminal responsibility, addressing systemic racism, and moving

85 Ibid 37

86 Ibid 37

87 Ibid 37

88 Ibid 38

89 Ibid 40

90 Australian Bureau of Statistics, Corrective Services, Australia (26 November 2020), available at <https://www.abs.gov.au/statistics/people/crime-and-justice/corrective-services-australia/latest-release>; noting that 'Victoria was the main contributor to the national decrease, decreasing by 6% (484) for the quarter to 7,025;' 'Victoria was the main contributor to the national decrease in unsentenced prisoners, down 12% (328) for the quarter to 2,466;' 'Victoria had the greatest Aboriginal and Torres Strait Islander imprisonment rate decrease of all states and territories, down 140 persons for the quarter to 1,837 persons per 100,000 Aboriginal and Torres Strait Islander adult population.'

away from an overreliance on policing to address socioeconomic and public health issues. Any gains made in terms of reduced prison populations should not only be protected as we enter the recovery period, but should be built upon. Our objective must be more ambitious than simply getting back to pre-pandemic 'business-as-usual'. It is past time for a justice system overhaul; if the pandemic has taught us anything is that we are all interconnected and interdependent, and shortcomings in our systems and holes in our society's safety net urgently need to be addressed.

The American Public Health Association has highlighted that decarceration is crucial to any public health strategy, not just in response to COVID-19:

public health solutions for addressing pressing COVID-19 concerns are the same as those needed to address more widespread, chronic health harms of carceral systems. Now, as ever, intervention necessitates prioritizing health by centering public health strategies. Therefore, APHA recommends moving towards the abolition of carceral systems and building in their stead just and equitable structures that advance the public's health by: (1) urgently reducing the incarcerated population; (2) divesting from carceral systems and investing in the societal determinants of health (e.g., housing, employment); (3) committing to non-carceral measures for accountability, safety, and well-being.⁹¹

A public health approach that effectively incorporates decarceration would, of course, also align with the Closing the Gap justice targets, which the Victorian Government has committed to achieving:

- 'By 2031, reduce the rate of Aboriginal and Torres Strait Islander adults held in incarceration by at least 15 per cent.'⁹²
- 'By 2031, reduce the rate of Aboriginal and Torres Strait Islander young people (10-17 years) in detention by at

91 American Public Health Association, *Advancing Public Health Interventions to Address the Harms of the Carceral System* (24 October 2020), available at <https://www.endingpoliceviolence.com/>

92 Coalition of Aboriginal and Torres Strait Islander Peak Organisations and Australian Governments, *National Agreement on Closing the Gap* (July 2020) 26

least 30 per cent.’⁹³

This year marks the 30 year anniversary of the Royal Commission into Aboriginal Deaths in Custody. Governments’ track records of substituting action for tokenistic consultations and the symbolic ritualism of initiating costly Inquiries and Royal Commissions, and then failing to implement the resulting recommendations, and repeatedly ignoring the recommendations of Coronial Inquests and the Aboriginal community and Aboriginal organisations such as VALS, has led to a state of inertia.

Recommendation 32: The Victorian Government must ‘urgently implement all of the recommendations from the Royal Commission into Aboriginal Deaths in Custody, the Australian Law Reform Commission’s Pathways to Justice Inquiry... and the many deaths in custody coronial investigation recommendations, and publicly report on their progress with monitoring and public oversight by [Aboriginal] people and... organisations.’⁹⁴ An independent statutory body or office should either be established or designated to report on Government responses to, and implementation of, recommendations from relevant Inquests, Royal Commissions and Inquiries.

Recommendation 33: The Victorian Government should recognise the harms of the carceral system and incorporate decarceration in its broader public health strategy, in addition to incorporating it in its public health strategy for COVID-19. This should include decriminalising public drunkenness, in close consultation with the Aboriginal community.

Recommendation 34: The Closing the Gap Agreement justice targets include reducing the rate of Aboriginal and Torres Strait Islander adults incarcerated by at least 15 per cent and reducing the rate of Aboriginal and Torres Strait Islander young people (10-17 years) in detention by at least 30 per cent by 2031. VALS calls on the Victorian Government to set more ambitious goals for itself than these minimum targets, to aim for parity being achieved in this generation’s lifetimes.

93 Ibid 28

94 National Aboriginal and Torres Strait Islander Services, Black Lives Matter: always have, always will (2020), available at <http://www.natsils.org.au/portals/natsils/Policy%20statement%20on%20Black%20Lives%20Mattercc3b.pdf?ver=2020-07-09-171028-630>

Bail Reform

VALS has repeatedly called for the below bail reforms, as the current, punitive bail system in Victoria disproportionately impacts on Aboriginal communities. Particularly of note, even before the harmful bail changes, Aboriginal people were overrepresented in remand populations.

The urgent need for bail reform is demonstrated by the tragic death on 2 January 2020 of Ms Veronica Nelson, a proud Yorta Yorta woman, who was refused bail after being arrested for shop-lifting and remanded at the female maximum-security prison, Dame Phyllis Front Centre. As VALS has previously stated, Ms Walker's

imprisonment is a direct result of the punitive bail system introduced in Victoria in 2018, which has significantly increased remand rates and has had a disproportionate impact on Aboriginal communities, particularly Aboriginal women... Ms. Walker's death is a devastating and piercing reminder that Aboriginal women are the fastest growing cohort to be incarcerated in Australia. In Victoria, Aboriginal women make up 13% of the prison population, but only represent 1% of the general population; whilst nationally, Aboriginal women represent 34% of the prison population and only 2% of the general population. Many of our women are remanded before they are provided with opportunities to engage in culturally appropriate programs and/or supports.⁹⁵

The Sentencing Advisory Council's (**SAC**) report, released in 2020, found that Aboriginal and Torres Strait Islander children were over-represented in the remand population (15%), especially in rural and regional areas, prior to the bail changes.⁹⁶ The SAC's report also showed that of the 442 children remanded in 2017–18, two-thirds did not receive a custodial sentence, with those children spending 10,755 days on remand, at a cost of \$15 million.⁹⁷ Other

⁹⁵ VALS, VALS outraged by death in custody of proud Yorta Yorta woman (13 January 2020)

⁹⁶ Sentencing Advisory Council, *Children Held on Remand in Victoria: A Report on Sentencing Outcomes* (September 2020) ix

⁹⁷ Ibid xi

stakeholders have called for bail reform, including VEOHRC, who recommended fast-tracking bail reform during COVID-19 recovery.⁹⁸

Recommendation 35: The reverse-onus provisions in the Bail Act should be repealed, particularly the ‘show compelling reason’ and ‘exceptional circumstances’ provisions (sections 4AA, 4A, 4C, 4D and schedules 1 and 2 of the Bail Act).⁹⁹

Recommendation 36: There should be a presumption in favour of bail for all offences, except in circumstances where there is a specific and immediate risk to the physical safety of another person. This should be accompanied by an explicit requirement in the Act that a person may not be remanded for an offence that is unlikely to result in a sentence of imprisonment.¹⁰⁰

Recommendation 37: The offences of committing an indictable offence while on bail (s. 30B), breaching bail conditions (s. 30A) and failure to answer bail (s. 30) should be repealed.¹⁰¹

Recommendation 38: The Sentencing Act should be amended to include a legislative requirement to consider Aboriginality as a factor in sentencing, similarly to Section 3A of the Bail Act. A similar requirement should be included in the new Youth Justice Act.¹⁰²

Recommendation 39: There should be increased and mandatory guidance and oversight for police officers, to ensure that they understand and comply with the requirements of the Bail Act. It is essential that police officers are able to appropriately determine when bail should be granted by a police decision maker, and when the individual should be brought to court.¹⁰³

Recommendation 40: The Victorian Government should

98 Victorian Equal Opportunity & Human Rights Commission, Corrections in the COVID-19 recovery, <https://www.humanrights.vic.gov.au/legal-and-policy/covid-19-and-human-rights/centring-human-rights-in-the-covid-19-recovery/corrections-in-the-covid-19-recovery/>

99 VALS, Submission to the Public Accounts and Estimates Committee’s Inquiry into the Victorian Government’s response to COVID-19 (September 2020) 38, available at https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Submissions/87_Victorian_Aboriginal_Legal_Service.pdf

100 Ibid

101 Ibid

102 VALS, Submission to the Commission for Children and Young People Inquiry: Our Youth, Our Way (October 2019) 4

103 VALS, Submission to the Public Accounts and Estimates Committee’s Inquiry into the Victorian Government’s response to COVID-19 (September 2020) 38, available at https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Submissions/87_Victorian_Aboriginal_Legal_Service.pdf

prioritise investment in a residential bail support and therapeutic program for Aboriginal young people in the 2021-2022 State budget.¹⁰⁴

Raising the Age of Criminal Responsibility to at least 14, with a Minimum Age of 16 for Detention

In July 2020, the Council of Attorneys-General decided not to raise the age of criminal responsibility. This decision was made despite research from the Australia Institute and Change the Record that shows that most Australians agree children as young as 10 years old do not belong in prison,¹⁰⁵ and the UN Committee on the Rights of the Child recommending that Governments acknowledge scientific findings and increase the minimum age to at least 14 years, as well as fixing an age limit below which kids may not be detained, such as 16 years (noting also that over 50 States parties have raised the minimum age following ratification of the Convention on the Rights of the Child, and that the most common minimum age of criminal responsibility internationally is 14).¹⁰⁶ Although raising the age could have reduced the incarceration of Aboriginal children by 15% nationally,¹⁰⁷ the decision to defer formulating a position on the age of criminal responsibility took place in the same week that the Closing the Gap Agreement was released.

VALS has called on the Victorian Government to go it alone and show leadership by raising the age, and incorporating these reforms in the new youth justice act currently being

¹⁰⁴ VALS, Submission to the Commission for Children and Young People Inquiry: Our Youth, Our Way (October 2019) 4

¹⁰⁵ The Australia Institute and Change the Record, Raising the Age of Criminal Responsibility (July 2020), available at <https://apo.org.au/node/307114>

¹⁰⁶ UN Committee on the Rights of the Child, General Comment No. 24 (2019) on children's rights in the child justice system (18 September 2019) [20-24], [89], available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f24&Lang=en

¹⁰⁷ Productivity Commission for the Steering Committee for the Review of Government Service Provision, Overcoming Indigenous Disadvantage Key Indicators 2020 Report (2020) 4.143

developed.¹⁰⁸ The ACT has already begun the process, by including raising the minimum age of criminal responsibility in its 'ambitious legislative and administrative reform agenda over the coming term.'¹⁰⁹

Although Governments have been citing a lack of existing support services and programs as alternatives to criminal justice responses for children aged 10 to 13 years old, should the minimum age of criminal responsibility be raised to 14, the Victorian Government's (commendable) efforts during the pandemic to reduce the number of children in detention demonstrates that a swift, effective response is, in fact, possible. The Council of Attorneys-General position that there is a 'need for further work to occur regarding the need for adequate processes and services for children who exhibit offending behaviour,'¹¹⁰ is one that VALS strongly disputes. That is not to say that the Victorian Budget for youth detention infrastructure and programs should not be reallocated to early prevention and intervention services (particularly to ACCOs delivering culturally appropriate services to Aboriginal children and families), but what is missing is not processes and services; shamefully, what is missing is political will and leadership.

Recommendation 41: The Government should raise the age of criminal responsibility to at least 14, and the age at which children can be detained to at least 16. All youth justice legislative, strategy and policy reforms should incorporate and align with raising the age reform.¹¹¹

108 VALS, VALS calls for the Victorian Government to proceed with raising the age of criminal responsibility to at least 14 (27 July 2020), available at <https://www.vals.org.au/vals-calls-victorian-government-to-raise-the-age-of-criminal-responsibility-to-14/>; VALS, VALS calls on the Victorian Government to commit to ambitious justice targets and significant funding to address the overincarceration of Aboriginal people (31 July 2020)

109 10th Legislative Assembly of the Australian Capital Territory, Parliamentary & Governing Agreement (2020) available at https://www.cmtedd.act.gov.au/__data/assets/pdf_file/0003/1654077/Parliamentary-Agreement-for-the-10th-Legislative-Assembly.pdf?fbclid=IwAR24UwRy8uqLMWGbPyEo8XU8-qGu9qIUoGNzZKJZCVCjkUJhcrBt6o2OmuE

110 Council of Attorneys-General (CAG) communiqué (27 July 2020), available at <https://www.attorneygeneral.gov.au/media/media-releases/council-attorneys-general-cag-communique-27-july-2020>

111 VALS, Submission to the Public Accounts and Estimates Committee's Inquiry into the Victorian Government's response to COVID-19 (September 2020) 40, available at https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Submissions/87_Victorian_Aboriginal_Legal_Service.pdf

Protective Quarantine, Transfer Quarantine and Isolation

Protective Quarantine in Prisons and Isolation in Youth Detention Facilities

VALS restates below our recommendations from the VALS submission to the PAEC Inquiry. These recommendations have not been accepted and/or implemented by the Victorian Government, and remain relevant and pressing as Victoria moves into the COVID-19 recovery phase and beyond. VALS particularly notes that many of its previously voiced concerns with regards to the April 2020 *COVID-19 Omnibus (Emergency Measures) Act 2020* (**April Omnibus Act**) (both the Act's provisions, and operationalisation of those provisions) were not addressed in the subsequent *COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Act 2020* in September 2020 (**September Omnibus Act**). Particularly, the September Omnibus Act extended the operation of many of the April Omnibus Act's problematic provisions relating to prisons and youth detention to 26 April 2021.¹¹² As such, the below recommendations, relating to protective quarantine, continue to be relevant in the COVID-19 recovery phase.

Recommendation 42: There should be increased transparency in relation to the operationalisation of protective quarantine and isolation under the COVID-19 Omnibus Act, and the safeguards that have been put in place.¹¹³

Recommendation 43: Regarding solitary confinement:

- No person should ever be placed in solitary confinement, particularly people (and especially children) with mental or physical disabilities, or histories of trauma.
- Prolonged solitary confinement amounts to torture, and no people (especially children) should be subjected to this.
- Staffing and other operational issues should be urgently addressed, to ensure no one is subjected to solitary

¹¹² COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Act 2020 s10, s20

¹¹³ Ibid 18 and 22

confinement.¹¹⁴

Recommendation 44: Legislation should be amended to require that incarcerated people in protective quarantine and isolation are regularly observed and verbally communicated with.¹¹⁵ This applies equally to transfer quarantine.¹¹⁶

Recommendation 45: The COVID-19 Omnibus Act should be amended to explicitly provide for the rights of people in protective quarantine and children in isolation, including guaranteeing meaningful contact with other people and time out of cell, in fresh air, every day.¹¹⁷ This applies equally to transfer quarantine.¹¹⁸

Recommendation 46: People in protective quarantine and children in isolation should be provided supports and services (including mental health services and cultural supports and services provided by Aboriginal Community Controlled Organisations), and means by which to contact family, lawyers, independent oversight bodies, and Aboriginal Community Controlled Organisations, including VALS.¹¹⁹ This applies equally to transfer quarantine.¹²⁰

Recommendation 47: DJCS should maintain a register of all people placed in protective quarantine, and children in isolation.

- The register should include information such as age, gender, disabilities, medical conditions, mental health conditions and Aboriginality of people in protective quarantine.
- Information should also be provided in relation to the length and the nature of meaningful contact provided on a daily basis, how much time people spend out of cell, and the services made available to them and used by them.¹²¹

Any incidents, such as attempted self-harm, should also be included. This applies equally to transfer quarantine.¹²²

Recommendation 48: The COVID-19 Omnibus Act should

114 Ibid 18, 19, 22

115 Victorian Aboriginal Legal Service, Submission to the Submission to the Public Accounts and Estimates Committee Inquiry into the Victorian Government's response to COVID-19 (September 2020) 18, available at https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Submissions/87._Victorian_Aboriginal_Legal_Service.pdf

116 Ibid 19

117 Ibid 18 and 22

118 Ibid 19

119 Ibid 18 and 22

120 Ibid 19

121 Ibid 18 and 22

122 Ibid 19

be amended to remove isolation of children as a preventive measure. Isolation should be limited to medical isolation for children who are COVID-19 positive and potentially in cases where they are symptomatic.¹²³

Recommendation 49: The Children, Youth and Families Act should be amended to specifically prohibit the Secretary from authorising further periods of isolation of children already placed in isolation, where this would effectively extend the total period of isolation of the child for more than 14 consecutive days.¹²⁴

Recommendation 50: Any legislation in relation to isolation of children must be drafted such that staff do not have wide discretion. Legislation must be clear as to the circumstances in which isolation is permitted.¹²⁵

Recommendation 51: The Children, Youth and Families Act should be amended as follows -

- any force used to place a child in isolation must be only as a last resort;
- minimum force should be used, and only for the duration that is strictly necessary to place the child in isolation;
- any use of force should be filmed and the recording should be made available to the children and their lawyer upon their request;
- there should be a register where staff record the steps taken and alternatives pursued before making the decision to use force, which should also be made available to the children and their lawyer upon their request.¹²⁶

Recommendation 52: There should be additional guidance and training for staff on exercising any powers to place children or young people in isolation, including the use of force.¹²⁷

Recommendation 53: VALS Custody Notification Service should be notified any time an Aboriginal child or young person in detention is placed in isolation under the Children, Youth and Families Act, or is in effective isolation as a result of lockdown.¹²⁸ DJCS staff should provide the contact details of the child or young person's family where the child or young person has provided consent for VALS

123 Ibid 21

124 Ibid 22

125 Ibid 21

126 Ibid 21-22

127 Ibid 22

128 Ibid 22; please note above the identified need for increased funding for VALS to conduct this work.

to contact them.

VALS has previously recommended that 'the use of both protective and transfer quarantine, and the nature of the quarantine itself, should be reviewed on a regular basis, guided by medical advice, and in consultation with civil society stakeholders, adopting the least restrictive measure, in accordance with the Victorian Charter of Human Rights and Responsibilities.'¹²⁹ This position aligns with that of the United Nations Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which has stated that, in places of detention, 'medical isolation must be on the basis of an independent medical evaluation, proportionate, limited in time and subject to procedural safeguards.'¹³⁰ Quarantine and medical isolation must be used 'only as medically necessary, and these procedures should result in living conditions clearly distinct from those found in solitary confinement'¹³¹ (emphasis added), and should never be used as a pretext to introduce administrative punishment by alternate means.

VALS notes that VEOHRC's position echoes that of the UN and VALS, recommending that foundations for COVID-19 recovery include '[c]onsider[ing] less restrictive measures to mandatory 14-day quarantine and additional safeguards to ensure prisoner rights and wellbeing.'¹³² VEOHRC 'encourage[s] prisons to consider less restrictive measures (for example, testing on reception and a shorter period of quarantine) and additional safeguards that might minimise the impacts on prisoners' rights and wellbeing.'¹³³ VEOHRC stated that quarantine conditions 'are, in some ways, akin to solitary confinement' and highlighted the 'impact

¹²⁹ Ibid 19

¹³⁰ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic (adopted on 25th March 2020) 3

¹³¹ Amend at University of San Francisco California, The Ethical Use of Medical Isolation – Not Solitary Confinement – to Reduce COVID-19 Transmission in Correctional Settings (9 April 2020) 2

¹³² Victorian Equal Opportunity & Human Rights Commission, Corrections in the COVID-19 recovery, <https://www.humanrights.vic.gov.au/legal-and-policy/covid-19-and-human-rights/centring-human-rights-in-the-covid-19-recovery/corrections-in-the-covid-19-recovery/>

¹³³ Ibid

it may have on prisoners with particular vulnerabilities, including Aboriginal and Torres Strait Islander people, people with mental health issues and people living with a disability.’¹³⁴ The FCLC, in its COVID-19 recovery plan, recommended that the ‘use of Protective Quarantine must be necessary and proportionate to the risk of contracting or spreading COVID-19,’ that there be clarity regarding the ‘medical basis for restrictions’ and that ‘accessible, up-to date information about Protective Quarantine restrictions to prisoners, families, and legal representatives’ be provided.¹³⁵ Others have strongly advocated for an end to mandatory quarantine, such as the Human Rights Law Centre, which has ‘call[ed] for an end to 14-day mandatory quarantine for Victorian prisoners when they first enter jail because there’s no COVID-19 in the community... calling the measure disproportionately harsh.’¹³⁶

However, although in Metropolitan Melbourne, ‘COVID Normal’ commenced on 6 December 2020,¹³⁷ and restrictions for the general community were lifted, the easing of restrictions in the community was not in turn reflected in the approach in prisons. Corrections Victoria’s policy that ‘[a]ll new prisoners are tested and required to spend 14 days in protective quarantine, *regardless of coronavirus (COVID-19) risk*’¹³⁸ (emphasis added) remained the same, in spite of there being low or no community transmission of COVID-19 in Victoria. The fact that policy is apparently not generally informed by regular assessments of COVID-19 risk, especially given the harms caused by restrictive practices such as quarantine, is highly concerning. It is positive that Corrections Victoria advised that ‘[p]rotective quarantine of new receptions, quarantine of people with symptoms, and isolation of confirmed cases will... be reviewed in COVID Normal,’¹³⁹ but what continues

¹³⁴ Ibid

¹³⁵ Federation of Community Legal Centres, A Just and Equitable COVID Recovery – A Community Legal Sector Plan for Victoria, 39

¹³⁶ Tammy Mills, Lawyers call for an end to mandatory quarantine for new prisoners (14 December 2020), available at <https://www.theage.com.au/national/victoria/lawyers-call-for-an-end-to-mandatory-quarantine-for-new-prisoners-20201209-p56m15.html>

¹³⁷ Victorian Government, Victoria’s roadmap for reopening – How we live in Metropolitan Melbourne (27 October 2020)

¹³⁸ Corrections Victoria, Our response to coronavirus (COVID-19), available at <https://www.corrections.vic.gov.au/covid19#admission>

¹³⁹ DJCS, Changes to coronavirus (COVID-19) restrictions - Fact sheet for stakeholders (23 November 2020) 2-3

to be lacking is any transparency regarding risk assessment and the health advice being relied upon. In any event, the use of protective mandatory quarantine has persisted uninterrupted in prisons.

The seemingly inflexible approach in relation to the use of protective quarantine does not align with the recommendations of the World Health Organization (**WHO**). In relation to whether all individuals newly admitted to prison should be put in quarantine for 14 days, WHO has stated that '[i]t is more cost-effective to have newly admitted individuals screened. Unnecessary medical isolation has negative impacts on mental health.'¹⁴⁰ The WHO has stated that:

Any detainee who has (a) travelled from or lived in an identified high-risk area, or (b) had contact with a known case of COVID-19, should be placed in quarantine, in single accommodation, for 14 days from the date of travel or last possible day of contact... During isolation, the isolated person should be under medical observation at least twice a day, including taking body temperature and checking for symptoms of COVID-19 infection.¹⁴¹
(emphasis added)

This position is reflected in the Communicable Diseases Network Australia (CDNA) Guidelines:

*New inmates/detainees to the facility, who have been in geographic areas with elevated risk of community transmission within the past 14 days, should be quarantined until 14 days from when they were last in the area with community transmission, prior to being allowed to mix with other inmates/detainees.'*¹⁴²
(emphasis added)

¹⁴⁰ WHO Regional Office for Europe, FAQ: Prevention and control of COVID-19 in prisons and other places of detention (2020) 1, available at <https://www.euro.who.int/en/health-topics/health-determinants/prisons-and-health/focus-areas/prevention-and-control-of-covid-19-in-prisons-and-other-places-of-detention/faq-prevention-and-control-of-covid-19-in-prisons-and-other-places-of-detention>

¹⁴¹ WHO Regional Office for Europe, Preparedness, prevention and control of COVID-19 in prisons and other places of detention Interim guidance (15 March 2020) 21

¹⁴² Communicable Diseases Network Australia, CDNA National Guidelines for the Prevention, Control and Public Health Management of COVID-19 Outbreaks in Correctional and Detention Facilities in Australia Version 3.1 (12 August 2020) 15

Prison receptions in Victoria increased in the September quarter, with Australian Bureau of Statistics (**ABS**) data showing that '[t]here were quarterly increases in prisoner receptions in six states and territories, the greatest of which were in... Victoria (by 12% or 313) up to 2,988.'¹⁴³ This increase in prison receptions is particularly troubling, given that people are being subjected to protective quarantine upon reception, with units established across five prisons (Melbourne Assessment Prison, Metropolitan Remand Centre, Port Phillip Prison, Ravenhall Correctional Centre and Dame Phyllis Frost Centre¹⁴⁴).

The approach in prisons is to be contrasted with that in youth detention facilities, and VALS commends the changed approach to receptions of children and young people to detention:

From Monday 30 November, the 14-day admission isolation process ceased and young are placed in isolation on admission only for the minimum period necessary to return a negative test result... All young people entering custody are continuing to be tested for coronavirus (COVID-19) on arrival. Young people who are confirmed cases, suspected cases, close contacts or who present with coronavirus (COVID-19) risk factors, such as common symptoms, are subject to isolation arrangements in line with health advice.¹⁴⁵

Protective quarantine, isolation and transfer quarantine are particularly onerous restrictions, with potential for great harm to those detained under these regimes. It is critical that any use of quarantine and isolation is demonstrably necessary, proportionate, time-bound and non-discriminatory in its application. For these requirements to be met, the Government must undertake transparent, regular, rigorous reassessment of the use

¹⁴³ Australian Bureau of Statistics, Corrective Services, Australia (26 November 2020), available at <https://www.abs.gov.au/statistics/people/crime-and-justice/corrective-services-australia/latest-release>

¹⁴⁴ Corrections Victoria, Our response to coronavirus (COVID-19), available at <https://www.corrections.vic.gov.au/covid19#admission>

¹⁴⁵ Victorian Department of Justice and Community Safety, Youth Justice coronavirus (COVID-19) update - Fact sheet for stakeholders, 2, available at <https://www.liv.asn.au/getattachment/Professional-Practice/Supporting-You/COVID-19-Hub/Information-from-Profession/Fact-sheet-for-stakeholders---Roadmap-for-YJ-custodial-facilities---December-2020.pdf.aspx>

of quarantine and isolation of adults and children upon reception to places of detention.

As it is anticipated that restrictions in places of detention will change in response to the trajectory of COVID-19 transmission in the community, it is essential that detained people are provided accurate and up-to-date information in relation to any restrictive measures being taken. They must also be advised of their rights in isolation or quarantine, and be provided the means by which to confidentially contact external, independent statutory bodies and organisations during these periods of segregation.

Recommendation 54: The Government should make publicly available the health advice, risk-assessment and human rights assessment upon which it is relying in making decisions regarding the use of isolation and protective and transfer quarantine.

Recommendation 55: People who are admitted into a facility should be screened, and if they exhibit symptoms on reception, they should be placed in medical isolation.

Recommendation 56: People who have either travelled from or lived in an identified high-risk area, or had contact with a known case of COVID-19, should be placed in medical isolation upon reception. The quarantine period should be for 14 days from the date of travel/living in the high-risk area, or last possible day of contact.

Recommendation 57: Detained people must be provided accurate and up-to-date information regarding any restrictive measures being taken, in a language and manner that enables their full comprehension. They must also be advised of their rights in isolation or quarantine, and be provided the means by which to confidentially make complaints and contact external, independent stakeholders during these periods of segregation.

Transfer Quarantine

Under the arrangements announced in November 2020, changes to prison policy included ending transfer quarantine where a detained person is transferred 'from a prison or returns from a court appearance in a [Corrections

Victoria]-managed holding cell or any hospital.’¹⁴⁶ However, transfer quarantine was still to apply ‘if a prisoner returns from being held in a police cell or at the Custody Centre or are transferring from Judy Lazarus Transition Centre to another prison, or from a Youth Justice centre.’¹⁴⁷ VALS welcomes the Government’s reassessment, in light of reduced community transmission, of the necessity of continuing to use transfer quarantine in certain contexts. However, there needs to be greater transparency in relation to the decision to continue requiring transfer quarantine in circumstances where people have been held in youth detention, for example. Again, risk assessments and health advice relied upon should be available for external scrutiny by relevant stakeholders and experts.

Particularly noting the CDNA Guidelines provide the following, VALS recommends a more nuanced approach to the use of transfer quarantine:

Some inmates/detainees, although located in areas with known community transmission, may be considered *lower risk*. These include those who have been *transferred directly from another facility* and: Where *that facility has no suspect, probable or confirmed cases of COVID-19*, Where the *inmate/detainee has only been in that facility within the preceding 14 days*, Where the inmate/detainees has been screened for COVID-19 and is *asymptomatic on entry*.¹⁴⁸ (emphasis added)

Recommendation 58: VALS supports the decision to cease transfer quarantine where a person is transferred to a prison from another prison, returns from a court appearance in a Corrections Victoria-managed holding cell or any hospital. However, a more nuanced approach should be adopted in assessing risk as it relates to other contexts, in which transfer quarantine continues to apply (including transfers from a youth detention facility or returning from a police cell or custody centre).

¹⁴⁶ DJCS, Changes to coronavirus (COVID-19) restrictions - Fact sheet for stakeholders (23 November 2020) 2-3

¹⁴⁷ Ibid

¹⁴⁸ Communicable Diseases Network Australia, CDNA National Guidelines for the Prevention, Control and Public Health Management of COVID-19 Outbreaks in Correctional and Detention Facilities in Australia Version 3.1 (12 August 2020) 16

VALS reiterates the recommendation made in the PAEC submission:

Recommendation 59: Transfers between places of detention, and between places of detention and court, should be minimised, to in turn minimise the use of transfer quarantine.¹⁴⁹

Lockdowns

In the VALS PAEC submission, the following recommendations were made regarding the use of lockdowns. These remain relevant in the COVID-19 recovery phase.

Recommendation 60: Facilities should not, by default, go into complete “lock down” during a COVID-19 outbreak.¹⁵⁰

Recommendation 61: Staffing and other operational issues should be urgently addressed, to ensure lockdowns do not occur as a result of inadequate staff to safely manage the facility.¹⁵¹

Recommendation 62: No one should be in effective solitary confinement as a result of lockdown, particularly children and people with mental or physical disabilities,¹⁵² or histories of trauma.

Recommendation 63: If lockdowns occur, people should be provided supports and services (including mental health services and cultural supports and services provided by Aboriginal Community Controlled Organisations), and means by which to contact family, lawyers, independent oversight bodies, and Aboriginal Community Controlled Organisations, including VALS.¹⁵³

Recommendation 64: Information on how lockdowns are being operationalised should be made publicly available (particularly to families, legal services and Aboriginal Community Controlled Organisations), and regular updates should be shared.¹⁵⁴

149 VALS, Submission to the Public Accounts and Estimates Committee’s Inquiry into the Victorian Government’s response to COVID-19 (September 2020) 20, available at https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Submissions/87_Victorian_Aboriginal_Legal_Service.pdf

150 Ibid 27

151 Ibid 27

152 Ibid 27

153 Ibid 27

154 Ibid 27

Conditions and Treatment in Detention - General

VALS reiterates recommendations that it has made previously in its PAEC submission, in relation to the conditions and treatment in detention. These recommendations include:

- ensuring that conditions and treatment in detention never amount to torture or cruel, inhuman or degrading treatment or punishment;
- equivalency of medical care in detention;
- rigorous hygiene and sanitation practices (for both the facilities and staff/detained people); and
- in-person visits.

Recommendation 65: Measures taken and practices adopted in places of detention in an attempt to contain COVID-19 must never amount to torture or cruel, inhuman or degrading treatment and should not form part of the Government's strategy to keep detained people and detention centre staff safe and healthy.¹⁵⁵

Recommendation 66: 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.¹⁵⁶

Recommendation 67: There should be greater clarity in relation to the medical care provided to detained people who are confirmed or suspected of having COVID-19, including while they are in isolation and when they are transferred to hospitals.¹⁵⁷

Recommendation 68: The practice of having incarcerated people clean any part of prisons must cease immediately. This work should be undertaken by professional cleaning staff, with appropriate measures being put in place to prevent COVID-19 transmission between cleaning staff, people who are detained and the wider community.¹⁵⁸

Recommendation 69: All places of detention must be subject to regular, preventative cleaning that meets, at a minimum, the CDNA Guidelines on environmental cleaning and disinfection.¹⁵⁹

¹⁵⁵ Ibid 41

¹⁵⁶ Ibid 40

¹⁵⁷ Ibid 41

¹⁵⁸ Ibid 27

¹⁵⁹ Ibid 29

Recommendation 70: All people in places of detention must have easy, prompt and ongoing access to appropriate PPE (including masks and, where appropriate, eye protection), and soap and hand sanitiser (all free of charge).¹⁶⁰ Staff, including those involved in transport, should wear appropriate PPE.¹⁶¹

Recommendation 71: VALS Custody Notification Services officers and families should be notified immediately of confirmed COVID-19 cases of detained Aboriginal people.¹⁶² In conducting the welfare checks, VALS staff should be provided, at a minimum, the following information: potential contacts with other detained Aboriginal people, medical treatment (and other supports) the person is receiving, contact details of the family (should consent be provided to VALS to contact the family).

Surveillance Testing

The Victorian Government's surveillance testing industry list does not include prisons and youth detention facilities, although it does include residential aged care facilities, hotel quarantine, hospitals, and highly recommends testing at meat, poultry and seafood processing.¹⁶³ Although 50% of the workforce at metro residential aged care facilities is required to be tested per week,¹⁶⁴ there is no similar requirement in the prison environment, that similarly has a high risk of transmission and a population particularly vulnerable to becoming seriously ill or dying should they contract COVID-19. The Government almost immediately suspended personal visits with the recent community transmission (see below), yet is failing to take proactive steps by way of surveillance testing of staff that enter and leave the prisons on a daily basis, an approach to be contrasted with that in the UK, for example, where prison staff are regularly tested.¹⁶⁵

160 Ibid 29

161 Ibid 29

162 Ibid 30

163 DHHS, Surveillance testing industry list and requirements as at 11 December 2020, available at <https://www.dhhs.vic.gov.au/surveillance-testing-industry-list-covid-19>

164 Ibid

165 UK Ministry of Justice, HM Prison and Probation Service COVID-19 Official Statistics (18 December 2020)

Recommendation 72: Prisons and youth detention facilities should be included on the Government's Surveillance Testing Industry List, with both prison and youth detention employees and contractors to be subject to surveillance testing.

Visits

Although in-person personal visits resumed on 11 December 2020, they were then suspended as of 1 January 2021, 'until further notice while the current coronavirus (COVID-19) situation is assessed,'¹⁶⁶ reinstated on 23 January 2021.¹⁶⁷ VALS supports VEOHRC's suggestion that COVID-19 recovery should entail '[a]dopt[ing] positive innovations resulting from COVID-19, such as increased access to digital technologies for people in prison, as part of prisons' business as usual.'¹⁶⁸ However, virtual 'visits' must not replace in-person visits, as these are inferior substitutes in many circumstances (for example, for young children visiting their incarcerated parents).

Recommendation 73: Easing of restrictions in the community should be reflected in easing of restrictions in detention, albeit with proportionate safeguards to protect the health of those detained, where necessary. In particular, in-person visits should be allowed when health advice permits.¹⁶⁹

Programs

During VALS CJP's welfare checks of incarcerated Aboriginal people, the lack of programs, and disconnection from community and culture, was frequently raised. VALS welcomes the decision to recommence from 'Monday 23

¹⁶⁶ Corrections Victoria, Our response to coronavirus (COVID-19), available at <https://www.corrections.vic.gov.au/covid19>

¹⁶⁷ Ibid.

¹⁶⁸ Victorian Equal Opportunity & Human Rights Commission, Corrections in the COVID-19 recovery, <https://www.humanrights.vic.gov.au/legal-and-policy/covid-19-and-human-rights/centring-human-rights-in-the-covid-19-recovery/corrections-in-the-covid-19-recovery/>

¹⁶⁹ VALS, Submission to the Public Accounts and Estimates Committee's Inquiry into the Victorian Government's response to COVID-19 (September 2020) 41, available at https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Submissions/87_Victorian_Aboriginal_Legal_Service.pdf

November 2020, some face-to-face, group-based programs and services'¹⁷⁰ in prisons, and that, in youth detention, '[f]rom October 2020, Youth Justice precincts resumed one-on-one and group-based delivery for assessments and programs, including: psychosocial programs, criminogenic programs, alcohol and other drugs (AOD) health stream programs.'¹⁷¹ Given the suspension of many programs during the pandemic (and recovery), it is critical that detained people are not penalised for failing to participate in and/or complete programs that are not being run (for example, when applying for parole).

Recommendation 74: Programs should be delivered face-to-face when it is safe to do so. In the interim, they should be delivered remotely where appropriate (for both the program and the participant), and accommodations should be made to enable equitable access and participation.

Recommendation 75: Detained people should not be penalised (for example, when applying for parole) for not participating in and/or completing programs due to the programs' suspension.

Detained People Living with Disability

VALS notes with concern reports that the Office of the Public Advocate received only 50 calls from prisons from January to October 2020 for 'volunteer Corrections Independent Support Officers to accompany intellectually disabled prisoners – either in person or via video-link – during disciplinary hearings... despite prisons convening 433 such hearings from January 1 to October 13 for people with diagnosed intellectual disabilities.'¹⁷² This is to be contrasted with previous financial years (eg 299 support officers attended hearings in 2018-2019, where 30% of the clients were Aboriginal). The Public Advocate voiced her concern that '[m]any prisoners with an intellectual disability may be unlikely to understand what happened

¹⁷⁰ Changes to coronavirus (COVID-19) restrictions - Fact sheet for stakeholders (23 November 2020) 1-2

¹⁷¹ Youth Justice coronavirus (COVID-19) update - Fact sheet for stakeholders, 1

¹⁷² Zach Hope, Intellectually disabled prisoners punished without oversight (24 October 2020), available at <https://www.theage.com.au/national/victoria/intellectually-disabled-prisoners-punished-without-oversight-20201023-p5680g.html>

to trigger the need for discipline in the first place, may not remember, may not understand the process, may be encouraged to plead guilty or plead guilty to please authorities.’¹⁷³

Recommendation 76: The rights of detained people living with disability must continue to be upheld during the pandemic and recovery period, including the right to be supported through the Office of the Public Advocate during disciplinary hearings.

Vaccination of People in Detention Must be a Priority

The WHO’s framework for the allocation and prioritisation of COVID-19 vaccination includes the following principles:

- ‘Equal Respect: Recognize and treat all human beings as having equal moral status and their interests as deserving of equal moral consideration;’ and
- ‘Human Well-Being: Protect and promote human well-being including health, social and economic security, human rights and civil liberties, and child development.’¹⁷⁴

Under the latter, ‘[s]ocial groups unable to social distance’, such as those in detention facilities, have been identified as ‘[p]opulations with significantly elevated risk of being infected,’ to be specifically considered under the objective of ‘[r]educ[ing] deaths and disease burden from the COVID-19 pandemic’.¹⁷⁵

In other jurisdictions, such as the US, linking the ethical principle of preventing death and illness to the vaccine objective of ‘protect[ing] those at greatest risk of infection and further transmission’ has led to recommendations that both detention staff and detained people be prioritised for

¹⁷³ Zach Hope, Intellectually disabled prisoners punished without oversight (24 October 2020), available at <https://www.theage.com.au/national/victoria/intellectually-disabled-prisoners-punished-without-oversight-20201023-p5680g.html>

¹⁷⁴ World Health Organization, WHO SAGE values framework for the allocation and prioritization of COVID-19 vaccination (14 September 2020) 2

¹⁷⁵ Ibid 10

the COVID-19 vaccine.¹⁷⁶ This approach was recommended even in the event that pressure is put on the government to deprioritise people in prisons.¹⁷⁷ Experts from seven US universities (including Amend at UCSF, UCLA School of Law COVID-19 Behind Bars Data Project, Colombia Justice Lab, and Seiche at Yale) have all recommended that 'States should prioritize vaccine distribution to all incarcerated people at the same stage as correctional officers (essential workers/first responders) or higher.'¹⁷⁸ These experts identified that detained people are at greater risk than correctional staff and that prioritising vaccinating staff over detained people may also create tensions within facilities.¹⁷⁹ The same conclusion has been reached by experts at the University of Oxford.¹⁸⁰

VALS supports the current position in Australia, at the Federal level, that people in detention should be prioritised for the vaccination. The Australian Technical Advisory Group on Immunisation (**ATAGI**) advice to the Commonwealth Government included among the possible priority population groups both Aboriginal and Torres Strait Islander people (under those 'who have an increased risk, of developing severe disease or dying from COVID-19'¹⁸¹) and residents in correctional and detention facilities, 'where the risk of virus transmission is increased' (under those 'who are at increased risk of exposure and hence of being infected with and transmitting SARS-CoV-2 to others at risk of severe disease or are in a setting with high transmission potential'¹⁸²).

176 Eric Toner MD et al, Interim Framework for COVID-19 Vaccine Allocation and Distribution in the United States (August 2020) John Hopkins, 20; see also The Marshall Project, Should Prisoners Get Covid-19 Vaccines Early? (03 December 2020), available at <https://www.themarshallproject.org/2020/12/03/should-prisoners-get-covid-19-vaccines-early>

177 Katie Rose Quandt, Incarcerated people and corrections staff should be prioritized in COVID-19 vaccination plans, Prison Policy Initiative (8 December 2020), available at <https://www.prisonpolicy.org/blog/2020/12/08/covid-vaccination-plans/>

178 Emily Wang et al, Recommendations for prioritization and distribution of COVID-19 vaccine in prisons and jails (16 December 2020) 1

179 Emily Wang et al, Recommendations for prioritization and distribution of COVID-19 vaccine in prisons and jails (16 December 2020) 3

180 University of Oxford, People in prison should be prioritised for any COVID-19 vaccine (20 November 2020), available at <https://www.ox.ac.uk/news/2020-11-20-people-prison-should-be-prioritised-any-covid-19-vaccine#>

181 Australian Technical Advisory Group on Immunisation (ATAGI), Preliminary advice on general principles to guide the prioritisation of target populations in a COVID-19 vaccination program in Australia (13 November 2020) 4

182 Ibid 5

The Commonwealth Department of Health advice, as at 13 November 2020, is that initial priority groups for a COVID-19 vaccine include '[p]eople who have an increased risk, relative to others, of developing severe disease or dying from COVID-19', such as Aboriginal and Torres Strait Islander people, and '[p]eople at an increased risk of exposure, infection and transmission of COVID-19, or are in a setting with high transmission potential,' such as people in correctional and detention facilities.¹⁸³ On 9 December, 'a Health Department spokeswoman confirmed the priority list also included prisoners and those in detention facilities.'¹⁸⁴

VALS particularly highlights, and supports, the Australian Government's position that vaccines are to be free and not mandatory.¹⁸⁵ In order to maximise uptake of the vaccine in detention, health professionals independent of DJCS should provide information on the vaccine, in recognition that the barriers to consenting to the vaccine may include detained people's mistrust of prison and youth detention administrations.

It is also important to have robust plans in place where follow-up shots are required (eg. the Pfizer/BioNTech vaccine requires two shots separated by 3-4 weeks) after people have been released into the community, a responsibility which cannot fall solely to DJCS.¹⁸⁶ People must not be denied EMDs, bail or parole on account of the fact that they have not received the vaccine. It is the responsibility of the Government to ensure that people have access to the vaccine whether they are in detention or the community, and people must not be detained as a result of a failure by the Government to equitably distribute and

¹⁸³ Australia Government Department of Health, COVID-19 vaccination prioritisation (13 November 2020), available at <https://www.health.gov.au/covid-19-vaccination-prioritisation>

¹⁸⁴ Liam Mannix, Prisoners and the obese priority groups for COVID-19 vaccine (9 December 2020), available at <https://www.smh.com.au/national/prisoners-and-the-obese-priority-groups-for-covid-19-vaccine-20201208-p56lj3.html>

¹⁸⁵ Australian Government Department of Health, About COVID-19 vaccines (11 December 2020) available at <https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/about-covid-19-vaccines#will-a-vaccine-be-mandatory>; Australia secures a further 50 million doses of COVID-19 vaccine (5 November 2020), available at <https://www.health.gov.au/ministers/the-hon-greg-hunt-mp/media/australia-secures-a-further-50-million-doses-of-covid-19-vaccine> (17 November 2020)

¹⁸⁶ Emily Wang et al, Recommendations for prioritization and distribution of COVID-19 vaccine in prisons and jails (16 December 2020) 3

administer the vaccine as part of an effective vaccination program.

Recommendation 77: Staff and contractors working in and people detained in detention facilities should be priority groups for the COVID-19 vaccine, in recognition of

- the increased risk of exposure and transmission in detention facilities; and
- the fact that many incarcerated children and adults have underlying health conditions and thus an increased risk of dying or becoming seriously ill from COVID-19.

Recommendation 78: Health professionals independent of DJCS should provide information to detained people on the vaccine, in recognition of the fact that barriers to consenting to the vaccine may include detained people's mistrust of the prison and youth detention administrations.

Recommendation 79: Robust plans must be put in place where follow-up shots of the vaccine are required after people have been released from detention into the community, a responsibility which cannot fall solely to DJCS. It is the responsibility of the Government to ensure that people have access to the vaccine whether they are in detention or the community, and people must not be detained (or miss out on any necessary vaccine doses) as a result of a failure of the Government to equitably distribute and administer the vaccine as part of an effective and efficient vaccination program.

Transparency, Oversight and OPCAT

As outlined in the VALS supplementary submission to the Royal Commission into Victoria's Mental Health System:

The objective of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) is 'to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.' OPCAT, ratified by Australia, requires

States to 'set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment.' These bodies are called National Preventive Mechanisms (NPMs).¹⁸⁷

The below recommendations, made in the VALS PAEC submission, should be accepted and implemented by the Victorian Government. The utmost importance of having independent, culturally appropriate detention oversight in compliance with OPCAT has been highlighted during the pandemic, with detained people being subjected to restrictive practices such as quarantine and isolation, in the context of reduced formal and informal oversight.

Recommendation 80: The Government must urgently undertake robust, transparent and inclusive consultations with the Victorian Aboriginal community, its representative bodies and Aboriginal Community Controlled Organisations, such as VALS, on the implementation of Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) in a culturally appropriate way.¹⁸⁸

Recommendation 81: The operations, policies, frameworks and governance of the designated detention oversight bodies under OPCAT (National Preventive Mechanisms) must be culturally appropriate and safe for Aboriginal and/or Torres Strait Islander people.¹⁸⁹

VALS also highlights the following from the FCLC COVID-19 Recovery Plan:

The Federation supports the position of member CLC the Victorian Aboriginal Legal Service ('VALS') that the Victorian Government must undertake robust, transparent and inclusive consultations with the Victorian Aboriginal community on the implementation of OPCAT. Aboriginal people are over-represented in the Victorian criminal justice system, including in police

¹⁸⁷ Victorian Aboriginal Legal Service, Supplementary submission to the Royal Commission into Victoria's Mental Health System (August 2020) 8, available at <https://www.vals.org.au/royal-commission-into-victorias-mental-health-system-supplementary-submission/>

¹⁸⁸ Ibid 45

¹⁸⁹ Ibid 45

custody and especially in the youth justice context, and the operations, policies, frameworks and governance of the oversight body must be culturally appropriate and safe for Aboriginal people.’¹⁹⁰

The FCLC recommended that the Victorian Government ‘[i]nstitute a National Preventative Mechanism under the Optional Protocol to the Convention Against Torture in consultation with the Victorian Aboriginal community to monitor detention conditions.’¹⁹¹

In October 2020, Senator Lydia Thorpe asked several questions of the Federal Government on OPCAT implementation in Australia.¹⁹² The Federal Government’s responses included that it is of the view that it is not necessary to incorporate the provisions of OPCAT into federal legislation, and that it is up to States whether they will legislate for OPCAT. Best practice OPCAT implementation includes legislation that makes clear the NPMs’ powers, privileges and immunities. VALS recommends that the Victorian Government legislates for the NPMs’ powers, privileges and immunities, in order to achieve OPCAT’s objective of preventing the torture and ill-treatment of detained people.

When responding to the Senator’s questions, the Federal Government did not provide further information in relation to potential Commonwealth funding for States to establish and operate the NPMs. The Victorian Government must ensure that the NPM is sufficiently funded to carry out its mandate effectively. Recently, there have been concerns publicly raised by the Victorian Ombudsman (which does not carry out inspections, but does have a detention oversight function) that it is not being funded at a sustainable level to carry out its statutory functions.¹⁹³ The NPM, once established or designated, must be properly funded to ensure its efficacy and independence,

190 Federation of Community Legal Centres, A Just and Equitable COVID Recovery – A Community Legal Sector Plan for Victoria, 41

191 Ibid

192 Legal and Constitutional Affairs Budget estimates 2020-21, available at https://www.aph.gov.au/Parliamentary_Business/Senate_estimates/legcon/2020-21_Budget_estimates

193 Nick McKenzie and Paul Sakkal, Ombudsman accuses Daniel Andrews of undermining corruption fight (10 December 2020), available at <https://www.theage.com.au/national/victoria/ombudsman-accuses-daniel-andrews-of-undermining-corruption-fight-20201210-p56map.html>

whether the funding is provided by the Commonwealth, the Victorian Government, or both.

The Federal Government again referred to its previously stated position that 'primary' places of detention should include police lock-up and cells where people are held for equal to, or greater than 24 hours. This is of concern, as studies have shown that the greatest risk of torture is in police custody, rather than prisons.¹⁹⁴ VALS revisits its previously made recommendation, that the Australian Human Rights Commission's (**AHRC**) 'expansive understanding of 'place of detention', including that temporal limits should not be erroneously imposed, constitutes an accurate interpretation of OPCAT that should be adopted by the Victorian Government.'¹⁹⁵

Recommendation 82: The Victorian Government should legislate for the NPM's mandate, structure, staffing, powers, privileges and immunities.

Recommendation 83: The Victorian Government must ensure that the NPM is sufficiently funded to carry out its mandate effectively.

Recommendation 84: The AHRC's expansive understanding of 'place of detention', including that temporal limits should not be erroneously imposed, constitutes an accurate interpretation of OPCAT that should be adopted by the Victorian Government.¹⁹⁶

Of immediate concern is the fact that amendments introduced by the Omnibus Bill could restrict independent oversight bodies' ability to enter correctional facilities¹⁹⁷ and youth detention facilities.¹⁹⁸

194 Richard Carver and Lisa Handley, 'Conclusion' in *Does Torture Prevention Work?* (Liverpool University Press 2016) 630.

195 VALS, Supplementary Submission to the Royal Commission into Victoria's Mental Health System (August 2020) 10, available at <https://www.vals.org.au/wp-content/uploads/2020/08/Royal-Commission-into-Victorias-Mental-Health-System-Supplementary-Submission.pdf>

196 Ibid

197 s600S(1) and (2) *Children, Youth and Families Act 2005*, inserted by the *COVID-19 Omnibus (Emergency Measures Act) 2020*.

198 s112G *Corrections Act 1986*, inserted by the *COVID-19 Omnibus (Emergency Measures Act) 2020*.

Recommendation 85: The Government should amend legislation to ensure that visits to correctional facilities and youth detention facilities by independent detention oversight bodies cannot be prohibited.



Policing

Issues and Recommendations Previously Highlighted by VALS on COVID-19 and Policing

In VALS' Submission to the Public Accounts and Estimates Committee Inquiry into the Victorian Government's response to COVID-19 in September 2020,¹⁹⁹ VALS highlighted a number of concerns regarding the policing of, and policing during, the pandemic, including the following:

- 'Policing the pandemic disproportionately impacts on marginalised communities, is not an effective means of delivering public health messaging and does not align with the experts' advice that we need to curb admissions to places of detention;'²⁰⁰
- 'There has been confusion among police with regard to the COVID-19 regulations and exercise of their discretion;'²⁰¹
- 'Children being picked up by police after running away from residential care;'²⁰²
- 'Children in care being left at police stations for significant periods of time;'²⁰³
- 'People in police custody going direct to court without being offered an opportunity to interview.'²⁰⁴

VALS reiterates the following recommendations from the VALS PAEC submission, that have not been accepted and/or implemented by the Victorian Government, and remain relevant and pressing as Victoria moves into the COVID-19 recovery phase:

Recommendation 86: Police should prioritise providing public health messaging and supporting people to comply with the current restrictions.²⁰⁵

199 Victorian Aboriginal Legal Service, Submission to the Submission to the Public Accounts and Estimates Committee Inquiry into the Victorian Government's response to COVID-19 (September 2020), available at https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Submissions/87._Victorian_Aboriginal_Legal_Service.pdf

200 Ibid 46

201 Ibid

202 Ibid 47

203 Ibid

204 Ibid 48-49

205 Ibid

Recommendation 87: 'Police must responsibly exercise their expansive powers, acknowledging that around the world, policing the pandemic through fines and arrests has disproportionately impacted on marginalised communities, including Indigenous peoples.'²⁰⁶

Recommendation 88: In relation to exercising discretion and not fining individuals:

- Proactive steps should be taken to address the disproportionate impact of fines on disadvantaged communities;²⁰⁷
- Police should be provided guidance and training with regards to the regulations and the use of their discretion in issuing infringements;²⁰⁸
- Police should take into account the many legitimate reasons why individuals may be forced to breach COVID-19 restrictions (such as fleeing family violence) and consider cautioning individuals rather than imposing a fine;²⁰⁹
- Homeless people should not be fined for COVID-19 related breaches;²¹⁰
- Children living in residential care should not be fined for breaching social distancing rules, particularly if they have run away from their residence.²¹¹

Recommendation 89: In relation to transparency and oversight:

- There must be robust oversight of police conduct by independent bodies and organisations;²¹²
- Disaggregated data in relation to stops, fines and arrests by police (including gender, age, disability and whether people are Aboriginal and/or Torres Strait Islander) should be made publicly available;²¹³

Recommendation 90: In relation to arrest and police custody:

- 'People who have been arrested should not be taken direct to court without being afforded an opportunity to participate in an interview;'²¹⁴

206 Ibid 49

207 Ibid

208 Ibid

209 Ibid

210 Ibid

211 Ibid 50

212 Ibid

213 Ibid

214 Ibid 50

- Measures must be put in place to ensure that bail justices attend at police cells or conduct hearings remotely when people are arrested;²¹⁵
- Measures must be put in place to ensure that Independent Third Persons attend at police cells when adults and young people with disability are arrested;²¹⁶
- 'Children should not be spending extended periods of time in police custody when they have run away from residential care.'²¹⁷

Recommendation 91: In relation to bail:

- With people having to comply with bail conditions for longer periods of time due to impacted court operations, there should be greater flexibility in relation to any breaches of bail;²¹⁸
- There should be flexibility and understanding in relation to reporting as per bail conditions, in recognition that many of VALS' clients do not have access to a phone or phone credit.²¹⁹

Recommendation 92: VALS supports the Human Rights Law Centre position that the Victorian Government 'withdraw increased police powers as soon as the states of emergency and disaster end. There is a risk that increased police powers could become the new normal. Any proposed, permanent increased powers must be subject to careful and proper scrutiny after the pandemic.'²²⁰

Protective Services Officers

Protective Service Officers (**PSOs**) have expansive powers, including arrest and apprehension (despite not having the same degree of training as police) and significant issues have been previously raised by the Independent Broad-based Anti-Corruption Commission (**IBAC**) in relation to PSO conduct.²²¹ The *Police and Emergency Legislation Amendment Bill 2020* expands the areas in which PSOs

²¹⁵ Ibid 53-54

²¹⁶ Ibid 54, 55

²¹⁷ Ibid

²¹⁸ Ibid 54, 55

²¹⁹ Ibid 55

²²⁰ Ibid

²²¹ IBAC, *Transit Protective Services Officers - An exploration of corruption and misconduct risks* (22 December 2016), available at <https://www.ibac.vic.gov.au/publications-and-resources/article/transit-protective-services-officers>

may operate. Areas may be designated 'for a period not exceeding 48 hours if the police officer is satisfied that urgent or unforeseen circumstances require the deployment of protective services officers in the specified place or area.'²²² VALS emphasises that there was no demonstrated need for such an expansion, and that the provision shifted responsibility for designating places from the government to the police. History has demonstrated that there is a real risk that measures taken to address 'anti-social behaviour' will disproportionately impact on Aboriginal people, homeless people, people who have mental health or substance misuse issues, and children.

VALS, in the PAEC submission, highlighted our concerns with regard to the expanded use of PSOs during the pandemic,²²³ and reiterates the recommendations it has already made. With the easing of restrictions, designated places in which PSOs may operate should also be reduced.

Recommendation 93: PSOs should not have powers of detention or arrest, nor the power to carry weapons such as OC spray.

Recommendation 94: Amendments introduced by the *Police and Emergency Legislation Amendment Bill 2020*, expanding/permitting the expansion of the designated areas in which PSOs operate should be repealed.

Recommendation 95: VALS continues to support Liberty Victoria's recommendation that '[i]f PSOs are used as defacto police, they should receive the same level of training. Further, the expansion of the definition of "designated place" under the Victoria Police Regulations 2014 should be rolled back.'²²⁴

222 s3A Victoria Police Act 2013(4)

223 Victorian Aboriginal Legal Service, Submission to the Submission to the Public Accounts and Estimates Committee Inquiry into the Victorian Government's response to COVID-19 (September 2020) 47-48, available at https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Submissions/87._Victorian_Aboriginal_Legal_Service.pdf

224 Ibid 50

A Note on Preventative Detention

VALS commends the Victorian Government on responding to the concerns of the legal sector with regard to the proposed preventative detention measures. In its submission to the Scrutiny of Acts and Regulations Committee on the COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Bill 2020, VALS noted:

- The Government had not demonstrated that preventative detention is necessary;
- The Government had not demonstrated that preventative detention is a proportionate means by which to achieve the purported public health objectives;
- There was a concerning absence of legislated safeguards;
- Our concerns that Aboriginal people and those who are most vulnerable will be disproportionately impacted by the legislation.²²⁵

VALS highlighted that:

the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) does not permit arbitrary detention, and the UN Working Group on Arbitrary Detention (WGAD) has reiterated that the prohibition on arbitrary detention is absolute, even during a public health emergency such as COVID-19. The Charter states that a 'person must not be subjected to arbitrary arrest or detention.'²²⁶ Early in the pandemic, the WGAD stated that 'Arbitrary detention can never be justified, whether it be for any reason related to national emergency, maintaining public security or health... Consequently, the Working Group calls upon all States to respect the absolute prohibition of arbitrary deprivation of liberty as public health emergency measures are introduced to combat the pandemic.'²²⁷

The proposed legislation would have 'enable[d] individuals without the requisite public health expertise,

225 Victorian Aboriginal Legal Service, Submission to the Scrutiny of Acts and Regulations Committee - COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Bill 2020 (October 2020) 5-6

226 *Charter of Human Rights and Responsibilities Act 2006* s21(2)

227 UN Working Group on Arbitrary Detention, 'Deliberation No. 11 on prevention of arbitrary deprivation of liberty in the context of public health emergencies' (8 May 2020) [5]

experience and training to carry out an ostensibly public health function, to pre-emptively detain people who are suspected of being likely to refuse or fail to comply with public health directives, rather than because of an actual failure to comply,' including police officers and PSOs.²²⁸ VALS had supported VEOHRC's recommendation that there be 'more precision in the legislation regarding the types of people who can be authorised under section 30, and the limitations on who can be authorised to exercise particular powers.'²²⁹ VALS additionally recommended that police officers and PSOs should be explicitly excluded from those who can be designated authorised officers.

Recommendation 96: VALS reiterates its previous recommendation that any deprivation of liberty, even during a public health emergency, must not be arbitrary. VALS is of the view that even with safeguards and protections additional to those that had been contained in the COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Bill 2020, preventative detention such as that proposed in that Bill was arbitrary, lacked justification and should not at any stage form part of the Government's future strategy to combat the pandemic.²³⁰

228 Victorian Aboriginal Legal Service, Submission to the Scrutiny of Acts and Regulations Committee - COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Bill 2020 (October 2020) 7-8

229 Victorian Equal Opportunity and Human Rights Commission, Submission to Scrutiny of Acts and Regulations Committee (30 September 2020), available at <https://www.humanrights.vic.gov.au/static/VEOHRC-letter-to-SARC-on-pre-emptive-detention-powers-dd5d47215a773f6b83ef2b18b94193e2.pdf>

230 Victorian Aboriginal Legal Service, Submission to the Scrutiny of Acts and Regulations Committee - COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Bill 2020 (October 2020) 9

The Recovery Period – An Opportunity for Police Reform that should not be Squandered

Addressing Racism and Systemic Racism

The Black Lives Matter movement has brought national attention to the long-standing injustice that is systemic racism, with the voices of Aboriginal and Torres Strait Islander people being amplified through the solidarity of non-Aboriginal Australians. Acknowledging how this country's colonial history has created and shaped structures and institutions characterised by racism, which so often fail to deliver true justice for Aboriginal people, is crucial. The legal system is built on a foundation of violence and dispossession, denial of sovereignty (and of course, humanity), with the colonial project continuing through policies of protection and assimilation. Today's injustices are inextricably linked to the injustices of the past, and achieving a collective understanding of Victoria's colonial legacy can help guide the reforms necessary for realising a truly equitable legal system.

An example of inappropriate behaviour is police disputing or questioning the claims of people detained in police custody that they are Aboriginal and/or Torres Strait Islander. As discussed above, our Community Justice Projects staff are called under the Custody Notification Service when an Aboriginal person is arrested by police and taken into custody, and our staff conduct welfare checks. This is a crucial safeguard that was recommended by the Royal Commission into Aboriginal Deaths in Custody - that police should notify the Aboriginal Legal Service whenever they take an Aboriginal person into custody. On a number of occasions, VALS staff has come across police questioning a detained person's Aboriginality. Such practices undermine a number of important safeguards that are necessary because of Aboriginal people's vulnerability when taken into custody; they impact on bail (as under s3A of the Bail Act, Aboriginality is a factor considered for bail), and on VALS' ability to conduct welfare checks on detained people.

It is not a matter for Victoria Police to confirm or question a person's Aboriginality, regardless of what information they may have about them in their system or whether the person who has been arrested and taken into police custody has previously identified as Aboriginal. This practice by police is not only inappropriate, but harmful, in light of Australia's history of dispossession, the Stolen Generations, and the devastating impact this has had on Aboriginal communities, that manifests itself today as intergenerational trauma, and for some, disconnection from land, culture and community. There have been police officers who have told our CNO staff that these important rights that are afforded to Aboriginal people, amount to 'special treatment,' 'bail privileges' or (demonstrating a shocking lack of understanding of the purpose of the CNS or why it is needed in the first place) 'racism.' Thirty years after RCIADIC, the fact that these sorts of attitudes persist indicate that there is still much to be done.

Professor Thalia Anthony's report at the Tanya Day Coronial Inquest described systemic racism as 'how laws, policies and practices across agencies work together to produce a discriminatory outcome for racial or cultural groups.'²³¹ Cultural awareness training will not address the issue of racism and systemic racism, although this is frequently the proposed solution. Anti-racist or unconscious bias training cannot address systemic racism, although it may achieve results at an individual level.

Cultural awareness and anti-racist training are crucial, but the issue of systemic racism is deep-rooted, complex and is ultimately not about individuals within a system that otherwise operates well. What is required is a strategy that addresses racism at both the individual and the systemic level.

Both historic and contemporary relationships between police and Aboriginal communities have been fraught, and a commitment to addressing systemic racism and ending impunity is crucial for moving towards a more just, equal and safe future for everyone, in which Aboriginal people

are treated in the same manner as non-Aboriginal people.

Anti-Racist Policies and Training

The Police Accountability Project has previously recommended that:

- 'With extensive input from community representatives, Victoria Police should immediately introduce a comprehensive and integrated training program that aims to eliminate unconscious racial/religious biases (anti-bias training).
- Anti-Bias training should include training on the following:
 - an awareness of police officers' own internally held bias' and prejudices;
 - harmful racial and other stereotypes that are pervasive in society;
 - methods and tools to act in an operational capacity in a non-biased way.'²³²

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

officer in charge of the Professional Development Centre... shall ensure that: training materials relevant to understanding and preventing racial profiling are developed, training is reviewed regularly to ensure the currency of the training materials, [and] anti-racial profiling sessions are delivered to all new recruits, currently serving officers, new and currently serving supervisors, as well as all new and current civilian members. The training can be tailored depending on the delivery group.²³³

The Ontario Human Rights Commission has recommended that training for police include '[e]ducating officers on the history of stereotyping and racism against racialized and Indigenous groups' and '[i]nvolve local racialized

232 Police Accountability Project, Anti-Racial Profiling training, available at <https://www.policeaccountability.org.au/issues-and-cases/racial-profiling/anti-racial-profiling-training/#>

233 Ottawa Police Service, Racial Profiling (27 June 2011) 5, available at https://www.ottawapolice.ca/en/news-and-community/resources/Racial_Profiling_Policy27Jun11_FINALpdf.pdf

and marginalized communities in design, delivery and evaluation, including identifying relevant racial profiling scenarios.’²³⁴

Recommendation 97: The Victorian Government and Victoria Police should work in partnership with the Victorian Aboriginal community and ACCOs to address racism at both an individual and systemic level of Victoria Police. Accountability mechanisms for these extensive reforms should be put in place.

Recommendation 98: Addressing racial profiling:

- Victoria Police should develop, and make publicly available, a policy on racial profiling.
- Victoria Police should develop, and make publicly available, training materials on ‘preventing racial profiling... that is to be reviewed regularly to ensure the currency of the training materials’²³⁵ and deliver this training to all staff, including support staff and management.
- Policies and training materials should be developed, delivered and evaluated in partnership with the Aboriginal community and ACCOs.

Accountability and Oversight

The systems of police accountability and oversight (discussed in greater detail below) should also examine the role of systemic racism. For example, while VALS welcomed the improvements to the Coroner Inquest process through Practice Direction 6 in 2020,²³⁶ which aim to implement some of the recommendations of the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**), and can assist Aboriginal families whose loved ones have died while in custody, this represented a missed opportunity to heed the call of the Black Lives Matter movement to examine the role that systemic racism plays in the deaths

234 Ontario Human Rights Commission, Response to the Race Data and Traffic Stops in Ottawa Report - 6.2. Training (28 November 2016), available at <http://www.ohrc.on.ca/en/book/export/html/19676>

235 Ottawa Police Service, Racial Profiling (27 June 2011) 5, available at https://www.ottawapolice.ca/en/news-and-community/resources/Racial_Profiling_Policy27Jun11_FINALpdf.pdf

236 Practice Direction 6 of 2020 - Indigenous Deaths in Custody (2020), available at <https://www.coronerscourt.vic.gov.au/sites/default/files/2020-09/2020.09.21%20-%20Practice%20Direction%20on%20Indigenous%20Deaths%20in%20Custody%20-%20FINAL.pdf>

of Aboriginal people in police custody.²³⁷

Similarly, in exercising its mandate, the National Preventive Mechanism (the detention oversight body which must be designated or established by the Victorian Government, as per Australia's obligation under OPCAT) should :

[assess] the risk of torture or ill-treatment of Aboriginal detainees... [turn] its mind to the possibility of systemic racism, making clear that one of its expectations is that there is an absence of systemic racism within detaining authorities and at detention sites. As identified by NATSILS, Australian NPMs 'can assist in... preventing ill-treatment, which may arise as a result of prejudice, cultural incompetency.²³⁸

Recommendation 99: Systems, mechanisms and bodies of accountability and oversight, such as coronial inquests and detention oversight bodies (eg National Preventive Mechanisms under OPCAT) should examine the role of systemic racism when exercising their mandates.

Fostering a Culture of Respect for Human Rights among Police

In the Coronial Inquest into the death of Tanya Day, it was recommended to the Chief Commissioner of Victoria Police 'that Victoria Police request VEOHRC to conduct a s41(c) review of the compatibility of its training materials with the human rights set out in the Charter.'²³⁹ Victoria Police should actively foster a culture that respects human rights, through policies, procedures and operations, as well as by ensuring that 'unwritten rules and informal

237 Calla Walquhist, Victorian coroner changes how Indigenous deaths in custody are investigated (22 September 2020), available at <https://www.theguardian.com/australia-news/2020/sep/22/victorian-coroner-changes-how-indigenous-deaths-in-custody-are-investigated>

238 Lachsz, Andreea, Culturally appropriate oversight of conditions of detention and treatment of detained Aboriginal and Torres Strait Islander people in the Northern Territory's criminal justice system – in compliance with the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (2019) 258, available at <https://www.churchilltrust.com.au/fellow/andreea-lachsz-nt-2018/>

239 Finding into Death with Inquest, (9 April 2020) 108

endorsement by managers which motivate the behaviour of staff'²⁴⁰ promote respect for human rights.

Recommendation 100: Victoria Police should actively foster a culture that respects human rights, through policies, procedures, operations and management.

Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody and Other Relevant Royal Commissions, Inquiries and Inquests

In the Coronial Inquest into the death of Tanya Day, it was recommended to the Chief Commissioner of Victoria Police 'that there be a review of training and education within Victoria Police regarding the findings and recommendations of the Royal Commission into Aboriginal Deaths in custody.'²⁴¹

A few months ago, the National Aboriginal and Torres Strait Islander Legal Services (**NATSILS**), repeated the call yet again for '[a]ll governments... to urgently implement all of the recommendations from the Royal Commission into Aboriginal Deaths in Custody, the Australian Law Reform Commission's Pathways to Justice Inquiry... and the many deaths in custody coronial investigation recommendations, and publicly report on their progress with monitoring and public oversight by our people and our organisations.'²⁴² VALS supports NATSILS' recommendation.

VALS particularly notes that the Deloitte Review of the Governments' performance regarding the implementation of the recommendations of RCIADIC²⁴³ is a review that is frequently referenced by Governments, despite

²⁴⁰ Stevens, Jem, Institutional culture in detention: a framework for preventive monitoring, Penal Reform International and the Association for the Prevention of Torture (2015) 4

²⁴¹ Finding into Death with Inquest, (9 April 2020) 108

²⁴² National Aboriginal and Torres Strait Islander Services, Black Lives Matter: always have, always will (2020), available at <http://www.natsils.org.au/portals/natsils/Policy%20statement%20on%20Black%20Lives%20Mattercc3b.pdf?ver=2020-07-09-171028-630>

²⁴³ Deloitte, Review of the implementation of the recommendations of the Royal Commission into Aboriginal deaths in custody (August 2018), available at <https://www.niaa.gov.au/sites/default/files/publications/rciadic-review-report.pdf>

attracting significant criticism.²⁴⁴ This should not be relied upon to assess the Victorian Government's progress in implementing the RCIADIC recommendations.

As already stated above, the perpetual cycle of substituting inquiries for action needs to end – this symbolism and ritualism cannot achieve a just criminal legal system, and certainly cannot prevent further Aboriginal deaths in custody, nor end police impunity. As stated above, recommendations from relevant Royal Commissions, inquiries and coronial inquests must be implemented.

Accountability and Oversight

Complaints Mechanisms

During the pandemic, footage of a police officer stomping on the head of a man who was being treated for mental health issues was shared by media.²⁴⁵ IBAC decided to investigate the matter, a step that has been welcomed, although '[i]ndependent investigation of police misconduct should be the norm, not the exception.'²⁴⁶ For too long, police investigating police in Victoria has been a process of whitewashing misconduct, while IBAC has been ineffective, providing little oversight or independent review.

VALS reiterates recommendations that it has previously made, in *The effectiveness of the Victoria Police Complaint System for VALS clients*, that there should be an independent oversight body into police complaints.²⁴⁷ That report also highlighted the findings of the Koori Complaints Project:

244 Indigenous deaths in custody report 'largely worthless', academics say (20 December 2018), available at <https://www.theguardian.com/australia-news/2018/dec/20/indigenous-deaths-in-custody-report-largely-worthless-academics-say>; The Joint response to the Deloitte Review of the implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody (2018), available at <https://caepr.cass.anu.edu.au/research/publications/joint-response-deloitte-review-implementation-recommendations-royal-commission>

245 Joseph Dunstan, Man stomped on during police arrest in Melbourne's north in induced coma, lawyer says (14 September 2020), available at <https://www.abc.net.au/news/2020-09-14/arrest-to-be-examined-by-victoria-police-professional-standards/12661334>

246 Victorian Aboriginal Legal Service, Human Rights Law Centre, Australian Lawyers Alliance, Flemington & Kensington Community Legal Centre, Joint Media Release - Premier Andrews must ensure greater police accountability following recent incidents of police violence (16 September 2020), available at <https://www.hrlc.org.au/news/2020/9/15/premier-andrews-must-ensure-greater-police-accountability-following-recent-incidents-of-police-violence>

247 Victorian Aboriginal Legal Service, *The effectiveness of the Victoria Police Complaint System for VALS clients* (December 2016) 7

Indigenous people experienced that it was pointless to make a complaint against the Police and that it was challenging to reach a desirable outcome when making a complaint against the police. The Koori Complaints Project showed disappointment among members of the Koori communities in regards to the complaints system and the Koori Complaints Project insisted to develop a complaints system that the Koori community can trust.²⁴⁸

VALS reaffirms its support, as outlined in its Submission to the Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria, for an effective complaints system characterised by the following:

- Independent: Institutionally, practically, culturally, and politically, from the police force and associated unions;
- Capable of conducting adequate investigations: adequately resourced to be able to ascertain whether police have breached legal or disciplinary standards, and whether they have acted in compliance with human rights;
- Prompt: Immediate interviewing of suspects and witnesses, enforceable timelines for investigation, and prioritising the provision of documents by police;
- Transparent: Regular and public reporting of police complaints including outcomes, disciplinary action, civil litigation and prosecutions;
- Victim-centred and victim-participation: protected from victimisation after making a complaint such as scrutinising any charges laid after a complaint has been made of as possible misconduct, permitted to provide evidence, provided with a full and detailed explanation of the reasons for their Complaint outcome.²⁴⁹

That submission recommended independent police oversight.²⁵⁰ It also recommended:

- Complaint histories for police should be available to investigators;²⁵¹
- Documents associated with police complaints should

²⁴⁸ Ibid 14

²⁴⁹ Ibid 22

²⁵⁰ Ibid 4

²⁵¹ Ibid

be accessible;²⁵²

- Culturally appropriate mediation should be developed for police complaints, to be available where both parties consent. This should be developed in partnership with Aboriginal and Torres Strait Islander communities and organisations, including VALS;²⁵³
- Additional funding should be provided to VALS and other legal services currently assisting Aboriginal and Torres Strait Islander to make police complaints;²⁵⁴
- There needs to be a focus on collecting and publishing accurate data of police complaints, including data on Aboriginal and Torres Strait Islander complainants;²⁵⁵
- where complaints continue to be investigated by Victoria Police (for example, customer service complaints), that complainants should have the ability to request an external review of the investigation of their complaint.²⁵⁶

Recommendation 101: VALS supports NATSILS' recommendation that '[a]s recommended by the Royal Commission, we demand an independent oversight body for... police and prison complaints, this needs to include complaints against corporate prisons and contractors. This body needs to be properly resourced, report directly to parliament, and have sufficient powers to refer matters for criminal investigation. The current system of police investigating themselves when complaints are made against them is fundamentally flawed.'²⁵⁷

Recommendation 102: A robust, effective police complaints system should have the following characteristics: independence, capability to conduct adequate investigations, promptness, transparency, be victim-centred.

Prosecution

In the almost 30 years since the Royal Commission into Aboriginal Deaths in Custody handed down its report, at least 455 Aboriginal and Torres Strait Islander people have

252 Ibid

253 Ibid

254 Ibid 5

255 Ibid

256 Ibid

257 National Aboriginal and Torres Strait Islander Services, Black Lives Matter: always have, always will (2020), available at <http://www.natsils.org.au/portals/natsils/Policy%20statement%20on%20Black%20Lives%20Mattercc3b.pdf?ver=2020-07-09-171028-630>

died in custody.²⁵⁸ Aboriginal communities, organisations, and families whose loved ones have died in custody continue to advocate for an end to police impunity, including advocating that '[a]ll deaths associated with police contact must be investigated by an independent body. This should include deaths occasioned by the failure of police to discharge their duties where it is foreseeable that a failure of police to act could lead to a real and immediate risk of death caused by the actions of a third party.'²⁵⁹

In August 2020, with the OPP's decision not to prosecute in the Tanya Day case, VALS supported the Day family's calls for justice:

The Day family has courageously and tirelessly advocated for justice for Tanya Day, for an end to police impunity, for no other families to experience the loss and pain they have had to endure.

VALS supports the Day Family's assertion that 'it is in the public interest – and the interests of Aboriginal people across Australia – that the police be held accountable for their actions.' With the Coroner's referral of Tanya Day's matter for criminal investigation of the police officers' conduct, there was an opportunity to achieve justice. This opportunity has been squandered, and it has been squandered in the context of the Black Lives Matter movement gaining momentum across the world, and in Australia.²⁶⁰

As we move into the COVID-19 recovery phase, VALS urges the Victorian Government to reflect on the need for robust police accountability mechanisms, particularly in light of the significant expansion of police powers during the pandemic. This should include prosecution of police officers, in cases where there is sufficient evidence.

258 Australian Institute of Criminology, Deaths in custody in Australia 2018-19 (2020), available at <https://www.aic.gov.au/publications/sr/sr31>

259 Victorian Aboriginal Legal Service, Submission to the Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria (September 2017) 5

260 Victorian Aboriginal Legal Service, VALS supports the Day family's call for justice and police accountability (27 August 2020), available at <https://www.vals.org.au/vals-supports-the-day-familys-call-for-justice-and-police-accountability/>

Recommendation 103: VALS supports NATSILS' recommendation that '[a]ll governments need to hold police, prisons, medical officers, and others accountable through criminal and civil processes for all future and historic black deaths in custody. This includes the immediate referral to the respective Department of Public Prosecutions for criminal charges in all cases where there is sufficient evidence as well as providing adequate compensation to victims where appropriate.'²⁶¹

Recommendation 104: Complaints outcomes should identify if the facts support a finding that Victoria Police has acted unlawfully, and recommend matters to the OPP for prosecution. Where the OPP decides to not prosecute following an independent finding of misconduct by Victoria Police, the reasons for the decision should be provided to the family of the person who has died in custody.

Recommendation 105: Body Worn Camera footage should be made available in civil cases, not limited to coronial inquests, criminal matters and certain family violence matters. s30D(ab) of the Surveillance Devices Act 1999 (Vic) should be amended so that footage is not protected information.

Coronial Inquests

Although the new practice directions²⁶² provide for VALS being contacted to facilitate legal advice being provided to senior next of kin on their rights in relation to the coronial process, with our current funding levels we are unable to meet this need. VALS has already highlighted that it 'is best placed to provide culturally safe legal services at this crucial and traumatic time for Aboriginal families, and recognition of this in the practice directions should be matched with sufficient government funding so we can do this important work,'²⁶³ and on several occasions has stated that '[g]reater funding should be provided to allow

261 National Aboriginal and Torres Strait Islander Services, Black Lives Matter: always have, always will (2020), available at <http://www.natsils.org.au/portals/natsils/Policy%20statement%20on%20Black%20Lives%20Matterccc3b.pdf?ver=2020-07-09-171028-630>

262 Practice Direction 6 of 2020 - Indigenous Deaths in Custody (2020), available at <https://www.coronerscourt.vic.gov.au/sites/default/files/2020-09/2020.09.21%20-%20Practice%20Direction%20on%20Indigenous%20Deaths%20in%20Custody%20-%20FINAL.pdf>

263 Calla Walqhuist, Victorian coroner changes how Indigenous deaths in custody are investigated (22 September 2020), available at <https://www.theguardian.com/australia-news/2020/sep/22/victorian-coroner-changes-how-indigenous-deaths-in-custody-are-investigated>

for improved representation of Aboriginal and Torres Strait Islander persons involved in coronial inquests.’²⁶⁴

However, there seems to be no political will to fund this crucial work, as evidenced recently by the response of the Federal Attorney-General’s Department to Senator Thorpe’s questions on this matter to the Legal and Constitutional Affairs Legislation Committee on 21 October 2020.²⁶⁵

Recommendation 106: VALS should be properly funded to represent families at the coronial inquests of Aboriginal people, particularly inquests involving deaths in custody.

Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)

As already discussed above, the mandate of National Preventive Mechanisms (**NPMs**) which will be established/ designated under OPCAT must encompass police custody, including places of detention in which people may be detained for less than 24 hours.

The importance of robust detention oversight of police custody has been demonstrated:

Carver and Handley, in their study on whether prevention of torture works, found that despite the fact that the greatest risk of torture (noting this study did not extend to ill-treatment) is in police custody, monitoring bodies focused more on prisons. They recommended that monitoring bodies more frequently visit police stations. Similarly, the SPT recognises that ‘while all detainees are in a position of vulnerability, those in police cells awaiting questioning and those in pretrial custody... are particularly vulnerable.’²⁶⁶

264 Victorian Aboriginal Legal Service, Submission to the Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria (September 2017) 5

265 Legal and Constitutional Affairs Budget estimates 2020-21, available at https://www.aph.gov.au/Parliamentary_Business/Senate_estimates/legcon/2020-21_Budget_estimates

266 Lachsz, Andreea, Culturally appropriate oversight of conditions of detention and treatment of detained Aboriginal and Torres Strait Islander people in the Northern Territory’s criminal justice system – in compliance with the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (2019) 196-196, available at <https://www.churchilltrust.com.au/fellow/andreea-lachsz-nt-2018/>

Recommendation 107: The mandate of National Preventive Mechanisms which will be established/designated under OPCAT must include police custody, including places of detention in which people may be detained for less than 24 hours, such as police vehicles and cells.



The Criminal Jurisdiction

Electronic Monitoring

The *COVID-19 Omnibus (Emergency Measures) Act 2020*²⁶⁷ gives Magistrates the power to impose electronic monitoring on Community Corrections Orders (CCOs). VALS is concerned that the Act gives the Court power to impose electronic monitoring on people who have been charged with lower level, non-violent offences. Electronic monitoring creates significant stigma and can negatively impact on a person's rehabilitation and integration. Wearing an electronic monitoring device may also discourage people from seeking employment and engaging in social and community activities. VALS is also concerned that electronic monitoring may result in a greater number of breaches of minor conditions, which will result in an escalation in the *Bail Act* schedules and make it difficult for people to get bail in the future.

Recommendation 108: People on Community Corrections Orders from the Magistrates Court should not be subject to electronic monitoring.

Procedural Issues – Court

VALS' PAEC Submission noted the following:

During the pandemic, there have been a number of adjustments to procedures which have been positive, and which should continue throughout and beyond the pandemic. Summary pleas on the papers are less stressful for VALS' clients, as they do not have to attend court, and are also less resource-intensive. Bail variations by consent on the papers is less resource and time intensive, while also allowing VALS lawyers to appear in more matters, meaning there are fewer Aboriginal people unrepresented before the court. By consent WebEx, AVL and telephone appearances have been particularly beneficial for clients in custody and are useful where VALS is unable to organise a lawyer to

267 *COVID-19 Omnibus (Emergency Measures) Act 2020* s171-173

be physically present when they are called in at the last minute.²⁶⁸

Koori Courts

As noted in VALS' PAEC Submission, '[d]ue to significant risks for Elders and Respected Persons, Koori Courts initially suspended all proceedings, meaning that Aboriginal people had not been able to access culturally safe court during this time, and were faced with the choice of waiting or transferring to generalist court.'²⁶⁹ VALS commends the efforts made to train Elders on remote technology²⁷⁰ (noting that Elders may need additional technical support during the proceedings), and is supportive of the resumption of Koori Courts. We acknowledge that mitigating the significant risks for Elders and Respected Persons requires that proceedings be held, in part, remotely. VALS does highlight, however, that the cultural appropriateness of the hearings is impacted by the fact that hearings are held remotely, and we encourage the courts to move to in-person hearings as soon as sufficient safeguards can be put in place to protect participants.

Challenges VALS lawyers have noted with regards to remote hearings of Koori Court have included significant lags during hearings (exacerbated where many people attend remotely), and family members of our clients having technical difficulties logging on, or not being able to understand the proceedings.

VALS notes that in the Magistrates Koori Court, our lawyers appear remotely, whereas prosecutors appear in person. On balance, it would be preferable to prioritise VALS lawyers' in-person attendance, as they are more likely to

268 Victorian Aboriginal Legal Service, Submission to the Submission to the Public Accounts and Estimates Committee Inquiry into the Victorian Government's response to COVID-19 (September 2020) 50-51, available at https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Submissions/87_Victorian_Aboriginal_Legal_Service.pdf

269 VALS, Submission to the Public Accounts and Estimates Committee's Inquiry into the Victorian Government's response to COVID-19 (September 2020), p. 51 available at https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Submissions/87_Victorian_Aboriginal_Legal_Service.pdf

270 Judge Irene Lawson, The County Koori Court - An Information Paper for Legal Practitioners (8 October 2020) 8, available at <https://www.cpdinsession.com.au/wp-content/uploads/2020/10/Paper-and-Presentation.pdf>

participate than prosecution, and it would significantly benefit our clients. VALS endorses the approach by which VALS lawyers are able to be in court to support their client:

The model adheres to the processes developed over the years of its operations, however necessity dictates that there needs to be heavy reliance on the parties providing written submissions on sentence and that the Sentencing Conversation is the focus of the hearing, with the Elders & Respected Persons appearing remotely. The Koori Participant and defence counsel are present in Court. The Prosecutor appears remotely as well as any other participant. The Sentencing Conversation proceeds in the usual way with the Judge seated at the bar table. A Koori Court officer is present during the plea hearing to support the Koori participant in Court. This is deemed essential to ensure that there is cultural support in the courtroom.²⁷¹

Being in the court with our clients enables lawyers to obtain instructions before the hearing if necessary (where lawyers may negotiate with prosecution on the day of the hearing, for example), support our clients during the process if they are feeling uncomfortable (noting that the Court Officer must maintain neutrality and cannot fulfil the supportive role of the lawyer), and speak with them immediately after sentencing to provide advice and answer questions as needed. The latter is particularly important where clients are sentenced to a term of imprisonment and it may be some time before advice can be given on matters such as appealing sentence if the lawyer and client do not physically attend the hearing, and advice must instead be provided remotely. Accommodating physical attendance of VALS lawyers in Koori Court has other benefits too, such as facilitating lawyers informing clients awaiting their appearance of any court delays, thus minimising clients' stress. Enabling lawyers to make oral submissions, rather than requiring them to make written submissions in advance, will also have a significant positive impact on their workloads.

271 Ibid

Recommendation 109: In relation to the positive aspects of remote hearings that should be retained:

- Summary pleas on the papers should continue;
- Bail variations by consent on the papers should continue;
- By consent WebEx, AVL and telephone appearances should continue;

The important caveat to the above is that VALS lawyers should not be required to proceed with matters via AVL and through other remote technology where the lawyers have made forensic decisions that this would jeopardise their clients' cases.

Recommendation 110: VALS lawyers should be given timely access to clients to provide advice and take instructions, where matters are being heard remotely. Where possible, lawyers should be afforded the opportunity to speak with their client immediately after the matter is heard.

Recommendation 111: VALS supports steps being taken to adapt Koori Court operations, so that it can continue operating during the pandemic and recovery phase safely. Where it is not possible for both prosecution and defence to attend the hearing in-person, preference should be given to defence lawyers.

Recommendation 112: Elders, Respected Persons and supporting family members should be provided appropriate technological support and access to facilities on the day of the hearing, where necessary.



The Civil Jurisdiction

Infringements

Detailed recommendations have been made above, under 'Issues and recommendations previously highlighted by VALS on COVID-19 and policing' in relation to issuing of COVID-19 fines, and the data relating to those fines. Considered below are the steps that should be taken in relation to fines that have already been issued.

Aboriginal People have Received a Disproportionate Number of COVID-19 Fines

VEOHRC has highlighted that during the pandemic, the Charter has continued to operate and that Victoria Police must continue to 'fulfil its obligations to consider human rights in its decision-making and act compatibly with human rights. This includes, for example, when officers are determining whether to stop and question someone, or deciding to exercise discretion when issuing a warning or a fine.'²⁷² Despite these obligations under the Charter, VEOHRC advises that it has received reports 'of over-policing and disproportionate issuing of fines towards Aboriginal people and people experiencing homelessness [and] concerns about the adequacy and efficiency of the review process for people who wish to contest a fine they've received.'²⁷³

Aboriginal people have been disproportionately fined during the COVID-19 pandemic. 1.9% of the Aboriginal and Torres Strait Islander population in Victoria was charged with a COVID-19 offence (928 fines were issued,²⁷⁴ and the Aboriginal and/or Torres Strait Islander population in Victoria according to the 2016 census was 47,788²⁷⁵).

272 Victorian Equal Opportunity and Human Rights Commission, Policing and emergency powers in the COVID-19 recovery (accessed 23 December 2020), <https://www.humanrights.vic.gov.au/legal-and-policy/covid-19-and-human-rights/centring-human-rights-in-the-covid-19-recovery/policing-and-emergency-powers-in-the-covid-19-recovery/>

273 Ibid.

274 Crime Statistics Agency, COVID Offender by Sex Age Country of Birth and Aboriginal Status (17 December 2020), Table 3

275 Australia Bureau of Statistics, 2016 Census Data Summary, Aboriginal and Torres Strait Islander Population – Victoria, available at <https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20Population%20-%20Victoria~10002>

22,596 fines were issued to non-Aboriginal people and people whose Aboriginal status was unknown,²⁷⁶ and given that according to the 2016 census, the Victorian population was 6,244,227,²⁷⁷ only 0.36% of Victoria's non-Aboriginal population was fined. It should also be noted that 'Aboriginal status was not routinely recorded for COVID-19 Penalty Infringement Notices (PINs),'²⁷⁸ and so the overrepresentation of Aboriginal people receiving COVID-19 fines may well be higher.

Recommendation 113: Police must routinely and accurately record individuals' Aboriginality on COVID-19 Penalty Infringement Notices, to facilitate the identification of police officers exercising their discretion in a discriminatory manner.

In October, it was reported that of the 19,324 fines issued until August 24 2020 (the total value being a staggering \$27,880,978), only 845 of those fines had been paid in full.²⁷⁹ VALS is concerned about the impact of these unpaid fines on the Aboriginal community, particularly once the fines reach enforcement stage. With Aboriginal people being disproportionately fined, they will, in turn, be disproportionately and adversely impacted as fines are enforced in the coming months.

A further issue of concern for us is Victoria Police refusing to exercise their internal review powers for infringements where they are the issuing agency, despite instances of infringements potentially being issued without lawful basis. Police are also not providing reasons for refusing these requests, despite their own Internal Review Guidelines requiring them to do so. VEOHRC has suggested that the Government reset its approach to reviewing fines, a

²⁷⁶ Crime Statistics Agency, COVID Offender by Sex Age Country of Birth and Aboriginal Status (17 December 2020), Table 3

²⁷⁷ Australia Bureau of Statistics, 2016 Census: Victoria, Victoria records highest population rise of all States and Territories (27 June 2020), available at <https://www.abs.gov.au/AUSSTATS/abs@.nsf/mediareleasesbyReleaseDate/C508DD213FD43EA7CA258148000C6BBE?OpenDocument>

²⁷⁸ Crime Statistics Agency, COVID Offender by Sex Age Country of Birth and Aboriginal Status (17 December 2020)

²⁷⁹ Only a tiny fraction of Victoria's lockdown fines have been paid (12 October 2020), available at <https://amp.abc.net.au/article/12760192>

position supported by VALS.²⁸⁰

Recommendation 114: VALS supports the following recommendations made by the COVID-19 Fines Community Lawyers Working Group - 'the Victorian Government should establish an efficient mechanism to waive fines on grounds of:

- financial hardship: assess the capacity of a person on a low income or Centrelink benefit to pay the fine;
- fairness: independently review and hear from the person about the circumstances in which they were fined, with interpreters and support people provided where necessary.'

The Victoria Police internal review process too commonly rubberstamps infringements without properly considering the merit or lawfulness of infringements issued. Reviews must properly consider the merit of an application, and the reasons for a decision must be provided.²⁸¹

COVID-19 Fining of Children

In the PAEC submission, VALS noted the following:

Children may have a range of reasons for being outside past curfew, including not having a safe home. Additionally, magistrates are only able to fine children under 15 years old \$165.20, and children between 15 and 17 years \$826.²⁸² Children do not have the financial capacity to pay fines, and their culpability is less than that of adults, given their age and maturity.²⁸³

With at least 2000 children aged 14 to 17 years old

²⁸⁰ Victorian Equal Opportunity and Human Rights Commission, Policing and emergency powers in the COVID-19 recovery (accessed 23 December 2020), <https://www.humanrights.vic.gov.au/legal-and-policy/covid-19-and-human-rights/centring-human-rights-in-the-covid-19-recovery/policing-and-emergency-powers-in-the-covid-19-recovery/>

²⁸¹ Ibid.

²⁸² *Children Youth and Families Act (Vic)*, s373

²⁸³ VALS, Submission to the Public Accounts and Estimates Committee's Inquiry into the Victorian Government's response to COVID-19 (September 2020) 56-57, available at https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Submissions/87_Victorian_Aboriginal_Legal_Service.pdf

being fined \$200, \$1652 or \$5000,²⁸⁴ there is significant financial pressure on families to whom the responsibility falls to pay these fines.²⁸⁵ The COVID-19 Fines Community Lawyers Working Group has rightly criticised the fact that the COVID-19 fines issued to children exceed the amount of fines that can be imposed by a court, that fines are not being 'registered with the Children's Court through the specialist Children and Young Persons Infringement Notice System (CAYPINS) process... [which] allows for enforcement orders without criminal proceedings or a criminal record resulting,' and that in some instances, fines have been withdrawn and converted to criminal charges.²⁸⁶

On 9 December 2020, the Smart Justice for Young People coalition 'of forty Victorian youth advocates, legal centres, Aboriginal and Torres Strait Islander services and other organisations... called on the State Government to withdraw an estimated \$3 million in COVID-19 fines handed out to around 2000 children and young people during the pandemic.'²⁸⁷

Dr Tim Read, Greens MP, similarly suggested to the Attorney-General that fines for children should be waived, noting that

the government's decision to outright reject the idea of waiving these fines was cruel and didn't take into account the potential long-standing impacts they would have on young people saddled with them... [w]hile fines have played a role in ensuring Victoria's compliance with COVID rules, holding serious criminal sanctions over vulnerable children will now increase the risk of their ongoing engagement with the criminal justice system.²⁸⁸

284 Youth Law, Submission on behalf of COVID-19 Fines Community Lawyers Working Group to the Inquiry into the Victorian Government's Response to the COVID-19 Pandemic (30 November 2020) 2, available at https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Submissions/209._Youthlaw_Redacted.pdf

285 Ibid.

286 Ibid.

287 Smart Justice For Young People, State Government must waive COVID-19 fines handed out to 2000 Victorian children (9 December 2020), available at <https://ysas.org.au/media-releases/9th-december-2020-media-statement>

288 Victorian Greens, Victorian Government refuses to waive COVID fines for young people (8 December 2020), available at <https://greens.org.au/vic/news/victorian-government-refuses-waive-covid-fines-young-people>

Recommendation 115: '[T]o prevent the significant impact of COVID-19 specific fines on children and young people, the Victorian Government should withdraw all fines issued through the COVID-19 Directions to children and young people aged 18 and under, and instead prioritise a service, education and health-based response.'²⁸⁹

Homelessness and Tenancy

Housing for Aboriginal People

As stated in Launch Housing's report, '[h]omelessness is bad for health and bad for society at all times, not just during pandemics.'²⁹⁰ VALS highlights the following from Launch Housing's report:

COVID-19 has... demonstrated how homeless people living on the street or in shelter accommodation experience pandemic shock in a more urgent way than the population at large. Equally, the crisis also showed the capacity for humane response to these problems...²⁹¹ COVID-19 has shown that governments can overcome departmental silos and work together (in addition to working across levels of government), and that government departments and diverse sections of the sector can work together for the purposes of rapidly accommodating people experiencing homelessness.²⁹²

The Victorian Government has stated that its response to the pandemic included 'act[ing] swiftly to support over 2000 Victorians off the streets and into accommodation in vacant hotels,' and that these people would be provided hotel accommodation until April 2020, and would be, in turn, 'supported to access stable, long term housing.'²⁹³

²⁸⁹ VALS, Submission to the Public Accounts and Estimates Committee's Inquiry into the Victorian Government's response to COVID-19 (September 2020) 57, available at https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Submissions/87_Victorian_Aboriginal_Legal_Service.pdf

²⁹⁰ Launch Housing, Australian Homelessness Monitor 2020 (August 2020) 88.

²⁹¹ Ibid 87

²⁹² Ibid 61

²⁹³ Premier of Victoria, Homes For Homeless Victorians During Pandemic And Beyond (28 July 2020), available at <https://www.premier.vic.gov.au/homes-homeless-victorians-during-pandemic-and-beyond>

Securing long-term housing for people is critical, as the pandemic has demonstrated that 'crisis accommodation or homeless accommodation with shared amenity is inadequate for anything beyond a crisis';²⁹⁴ and 'COVID-19 has shown that Australia needs to invest in a range of social and affordable housing options, including models of permanent supportive housing.'²⁹⁵

While VALS welcomes the Victorian Government's announcement in November 2020 that 'it will spend \$5.3 billion to build more than 12,000 public housing homes over the next four years,' this policy and budgetary decision should be understood in the current context; Victoria having 'the lowest proportion of public housing per capita compared to other Australian states' and spending 'the least amount on public housing per head of population out of all Australian states and territories last financial year.'²⁹⁶

Investment in public housing needs to be sufficient to properly address homelessness, which may well increase during the COVID-19 recovery period. After all, the need for public housing increased during the pandemic (for example, during March-August 2020 the rate of Aboriginal clients of homelessness services who were rough sleeping was 14% higher than the 2019 average²⁹⁷). And as demonstrated in the Australian Bureau of Statistics 2016 census, the rate of homeless persons per 10,000 of the Victorian population had already increased prior to the pandemic (38.9 per 10,000 of the population in 2001; 41.9 in 2016²⁹⁸) and the 'proportion of persons classified as homeless who are aged 12–24 years is highest, at 26%, in

294 Launch Housing, Australian Homelessness Monitor 2020 (August 2020) 61

295 Ibid

296 Victorian Government aims to create 43,000 jobs with \$5.3 billion public housing spend (15 November 2020), available at [https://www.abc.net.au/news/2020-11-15/victorian-government-announces-\\$5.3b-to-build-new-public-housing/12884962?utm_source=sfmc%e2%80%8b%e2%80%8b&utm_medium=email%e2%80%8b%e2%80%8b&utm_campaign=abc_news_newsletter_pm_sfmc%e2%80%8b%e2%80%8b&utm_term=%e2%80%8b&utm_id=1482992%e2%80%8b%e2%80%8b&sfmc_id=103568918](https://www.abc.net.au/news/2020-11-15/victorian-government-announces-$5.3b-to-build-new-public-housing/12884962?utm_source=sfmc%e2%80%8b%e2%80%8b&utm_medium=email%e2%80%8b%e2%80%8b&utm_campaign=abc_news_newsletter_pm_sfmc%e2%80%8b%e2%80%8b&utm_term=%e2%80%8b&utm_id=1482992%e2%80%8b%e2%80%8b&sfmc_id=103568918); see also Premier of Victoria, Victoria's Big Housing Build (15 November 2020), available at <https://www.premier.vic.gov.au/victorias-big-housing-build>

297 Department of Prime Minister and Cabinet statistics (16 October 2020)

298 Census of Population and Housing: Estimating Homelessness (14 March 2018), available at <https://www.abs.gov.au/statistics/people/housing/census-population-and-housing-estimating-homelessness/2016>

The Closing the Gap Agreement includes a target to 'increase the proportion of Aboriginal and Torres Strait Islander people living in appropriately sized (not overcrowded) housing to 88 per cent' by 2031.³⁰⁰ The objectives of the Victorian Aboriginal Housing and Homelessness Framework include that Aboriginal Victorians should achieve quality housing outcomes in a generation,³⁰¹ and that the strategies put in place to achieve this objective must be guided by Aboriginal self-determination, with 'housing responses... [to be] designed for and delivered by Aboriginal people.'³⁰² VACCA has additionally recommended that the Government and media outlets 'challenge negative perceptions of people facing homelessness, including addressing systemic racism.'³⁰³

Recommendation 116: The Government must have targeted strategies to achieve the Closing the Gap target regarding housing, to ensure that Aboriginal people are not disadvantaged in securing public housing during the COVID-19 recovery period, and beyond. These strategies should be grounded in Aboriginal self-determination and address discrimination experienced by Aboriginal people.

Recommendation 117: If the Government invests in community housing rather than public housing, community housing providers should be required to have policies in place that are at least as favourable to tenants as the policies of DHHS in relation to public housing.

Tenancy

While there is a strategy being implemented to address overcrowding and homelessness, it must be recognised that high unemployment rates, reduced opportunities to secure employment, and reductions in welfare benefits, will

²⁹⁹ Ibid

³⁰⁰ Coalition of Aboriginal and Torres Strait Islander Peak Organisations and Australian Governments, National Agreement on Closing the Gap (July 2020) 25

³⁰¹ Mana-na woorn-tyeen maar-takoort Every Aboriginal Person Has A Home: The Victorian Aboriginal Housing and Homelessness Framework (2020) 10

³⁰² Ibid 11

³⁰³ Victorian Aboriginal Child Care Agency, Submission to Inquiry into Homelessness in Victoria (2020) 13, available at https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Homelessness_in_Victoria/Submissions/S258_-_VACCA_Redacted.pdf

lead to increased housing insecurity during the COVID-19 recovery phase.

As Pawson and Parsell have stated:

Governments at all levels must recognise that the growing homelessness problem of the past two decades calls for a comprehensive housing policy rethink. The extent of any surge in homelessness will depend on the public health situation, the timing and vitality of post-pandemic economic recovery, and on *how quickly eviction bans and income-support measures are withdrawn*.³⁰⁴ (emphasis added)

VALS, like many in the sector providing tenancy advice and representation, is of the view that there needs to be meaningful changes in the residential tenancies sector to respond to the potential for a significant rise in evictions in 2021, which may have otherwise been stayed by virtue of emergency COVID-19 measures.

In the June 2020 quarter, the Aboriginal jobactive caseload in Victoria increased to 8,911 from 6,063 in the previous quarter, a 47% increase.³⁰⁵ With supplements to JobSeeker and other payments being reduced on 1 January 2021 from \$250 to \$150, and to end entirely on 1 April 2021,³⁰⁶ there is an increased risk of not only homelessness, but a myriad of legal issues that arise from poverty. NATSILS has identified that cuts to JobKeeper and JobSeeker (with the increase in the latter being the 'first and highest increase in a generation') would see Aboriginal people further entrenched in poverty and the justice system.³⁰⁷ And with an end to the moratorium on giving notices to vacate, and other emergency measures implemented through the *Omnibus Act*, VALS anticipates that persisting

304 Hal Pawson, Cameron Parsell, COVID spurred action on rough sleepers but greater homelessness challenges lie ahead (19 October 2020), available at <https://theconversation.com/covid-spurred-action-on-rough-sleepers-but-greater-homelessness-challenges-lie-ahead-147102>

305 Department of Prime Minister and Cabinet statistics (16 October 2020)

306 The Coronavirus Supplement is extending (10 November 2020), available at <https://www.servicesaustralia.gov.au/individuals/news/coronavirus-supplement-extending>

307 NATSILS, COVID-19 recovery impossible when the 2020-21 Federal Budget further entrenches Aboriginal and Torres Strait Islander people into poverty and the justice system (6 October 2020)

unemployment and financial strains may lead to a flood of rent arrears, followed by evictions.

Baker et al have identified that short-term, protective mechanisms are of assistance, but cannot be a substitute for the 'system-wide policy shifts' that are necessary.'³⁰⁸ While '[m]any renters are currently buffered from the full economic effects of the pandemic by... rent deferment, as well as temporary government supports in the form of eviction moratoriums, JobKeeper and JobSeeker... a policy-important cohort of tenants in Australia are lined up on the brink of a financial precipice.'³⁰⁹

One proposal worth examining is the potential for an expanded role for alternative dispute resolution in tenancy matters, particularly to facilitate negotiation between tenants and landlords, as an alternative to summarily seeking eviction through VCAT. We understand that an expanded role for the Residential Tenancies Dispute Resolution Scheme (**RTDRS**) – a conciliation process established in 2020 to negotiate rent reductions between landlords and tenants where rent payments had been affected by COVID-19 – is in contemplation, with the scheme potentially being expanded to other areas of residential tenancy law. While VALS is supportive of any scheme that might broker problem solving and informed negotiation between landlord and tenant, as an alternative to eviction, the establishment of any new scheme must be an informed process. To date, the data the sector has seen from the RTDRS has been quantitative and at times too anecdotal. There has been an absence of qualitative data measuring the procedural justice metrics necessary to demonstrate the scheme is (a) effective; (b) guaranteeing access to justice; and (c) trusted. A wholesale expansion of ADR in the tenancy sector, particularly as it relates to potentially vulnerable clients, may be of benefit to both landlords and tenants, but must be informed by consultation with the community legal sector and a commitment to capture more granular and specific data, to measure the efficacy of any scheme against procedural justice and access to justice metrics.

308 Baker, E., Bentley, R., Beer, A. and Daniel, L., Renting in the time of COVID-19: understanding the impact (2020) 1

309 Ibid

Recommendation 118: The Federal Government should retain the initial higher supplements to JobSeeker, and JobKeeper, in recognition of the fact that during the COVID-19 recovery phase, financial pressures will persist. In fact, the higher payments should be made permanent, beyond the recovery phase, as welfare payments were woefully inadequate prior to the pandemic.

Recommendation 119: The Victorian Government should continue, as necessary, to support short-term, protective measures to assist tenants to maintain housing security. These short-term measures should be complemented by broader, system-wide policy shifts, to be developed and implemented in consultation with ACCOs and other relevant stakeholders.

Recommendation 120: Any proposal to expand the use of alternative dispute resolution in the tenancy sector, through a modified version of the Residential Tenancies Dispute Resolution Scheme or otherwise, should be informed by extensive consultation with the community legal sector throughout 2021. It must also be informed by the capturing of more granular data through current schemes to measure their efficacy to justify longer term reforms.

Consumer Rights

Essential services

VALS reiterates the following recommendations made in the PAEC submission:

Recommendation 121: VALS supports the recommendation of the Consumer Action Law Centre that the Victorian Government introduce a public moratorium on energy disconnections until further notice.³¹⁰

Recommendation 122: VALS supports the recommendation of the Consumer Action Law Centre that the Essential Services Commission consider additional safeguards in relation to external debt collection practices and the sale

310 VALS, Submission to the Public Accounts and Estimates Committee's Inquiry into the Victorian Government's response to COVID-19 (September 2020) 58, available at https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Submissions/87_Victorian_Aboriginal_Legal_Service.pdf

of debts and explore the possibility of debt waivers in appropriate circumstances.³¹¹

Recommendation 123: VALS supports the recommendation of the Consumer Action Law Centre that the Victorian Government increase energy concessions, particularly via the Utility Relief Grant scheme, and ensure applications for concessions are accessible and processed promptly.³¹²

Telecommunications

VALS, along with other CLCs, is of the firm view that:

telecommunications services, including internet services and mobile phones, are necessary for social inclusion and daily participation in essential activities. The ongoing COVID-19 emergency and associated social distancing, border closures, office and school closures, and quarantine requirements have made this painfully obvious. But telecommunications have been an essential service for years.³¹³

However,

despite the publishing of the Government and industry 'Joint statement of principles' our clients have experienced the following failures to provide meaningful hardship assistance:

- refusals to offer hardship arrangements altogether;
- attempts to offer only clearly unaffordable hardship arrangements; and
- threats to disconnect, effective disconnections (i.e. restriction of service so no calls can be made) or actual disconnections from telecommunications services.³¹⁴

311 Ibid

312 Ibid

313 Consumer Action Law Centre, WEstJustice, VALS, Financial Counselling Victoria Inc., Barwon Community Legal Centre, Hume Riverina Community Legal Service, Housing for the Aged Action Group Inc., Telecommunications Consumer Safeguards Part C – Choice and Fairness (September 2020) 5, available at https://consumeraction.org.au/wp-content/uploads/2020/09/200922-CSR-Part-C_-Consumer-Sub-FINAL-002-1.pdf

314 Ibid

Recommendation 124: VALS supports the following recommendations, jointly made by a number of CLCs in Victoria:

- The 'telecommunications regulatory framework [should be modernised] to align with other essential services regulatory regimes, with direct regulation through independent standards developed by the Australian Communications and Media Authority (ACMA), licensing and an increase in civil penalties.'³¹⁵
- 'ACMA [should] conduct robust, independent consultation on the specific consumer protection provisions in independent standards, as the current matters covered by the TCP Code and the current standards are ineffective at protecting consumers.'³¹⁶
- 'All current industry codes should be replaced by independent, directly enforceable standards developed by ACMA in consultation with stakeholders. Once the re-designed and rewritten standards have been developed, the industry codes should cease operation.'³¹⁷
- 'The industry code-making process must be replaced by a more effective system of direct regulation through the ACMA, to provide the much-needed and overdue consumer protections required in the telecommunications sector.'³¹⁸ '[C]ivil penalties and infringement notice maximums [should be increased] to align with those from other sectors and to incentivise compliance.'³¹⁹

Predatory Lenders

In the PAEC submission, VALS stated that:

In April, more than 30 consumer and community organisations called for a ban on payday lending during the COVID-19 crisis, to prevent payday lenders exploiting people in vulnerable financial situations. For people who were unable to pay for essentials such as food and rent, high-interest loans with high fees are a recipe for financial disaster. Research carried out by VALS and the Consumer Law Action Centre in 2019

³¹⁵ Ibid 8

³¹⁶ Ibid 23

³¹⁷ Ibid 26

³¹⁸ Ibid 28

³¹⁹ Ibid 35

indicates that Aboriginal communities in Victoria are affected by irresponsible lending, including payday lenders and utilities debt and disconnection. We expect that consumer law needs will continue to increase as predatory lenders take advantage of increasing debt levels associated with unemployment and other flow on effects arising from the pandemic.³²⁰

The Federal Government is considering winding back irresponsible lending laws, which is of particular concern to VALS, as consumer credit and debt issues disproportionately affect Aboriginal communities in Victoria. Products like payday loans, consumer leases, car loans, personal loans and credit cards in our communities can often leave families in considerable debt. The laws as they currently stand prohibit lenders offering credit until they have verified that people can afford to make repayments without suffering substantial financial hardship and assess that the loan is 'not unsuitable'. These laws are crucial as they provide recourse against banks and other lenders.

Recommendation 125: The Federal Government should not wind back irresponsible lending laws.

320 VALS, Submission to the Public Accounts and Estimates Committee's Inquiry into the Victorian Government's response to COVID-19 (September 2020) 58-59, available at https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Submissions/87._Victorian_Aboriginal_Legal_Service.pdf



The Family Jurisdiction

Child Protection and COVID-19

VALS reiterates the following recommendations from the PAEC submission:

Recommendation 126: 'Audio-visual hearings, which can save resources and improve efficiency of the court, should be retained.'³²¹ Measures should be put in place to make it easier for clients to participate (eg. clients could attend the local Court, use a room that has access to WiFi, and be provided with an electronic device).

Recommendation 127: 'Audio hearings and conciliation conferences should also be retained.'³²²

Recommendation 128: 'Audio-visual hearings would be particularly useful in regional areas, where there are no specialist Children's Court Magistrates.'³²³

Recommendation 129: 'There is an urgent need to further reconsider how the COVID-19 pandemic is impacting progress towards family reunification, and taking further steps such as amendments to the Children, Youth and Families Act. This should include extending the timeframes for family reunification.'³²⁴

Recommendation 130: 'VALS supports the Victorian Aboriginal Child Care Agency's recommendation that Aboriginal Community Controlled Organisations and the Aboriginal community be involved in determining the local needs of Aboriginal children, young people and families involved in the Child Protection system during COVID-19.'³²⁵

VALS holds concerns that the *COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Act 2020* extended Family Reunification Orders by only 6 months, given that many services (programs, as well as drug and alcohol screening services) have continued to operate with limited staff capacity, adhering to COVID-19 restrictions, not offering full services, only offering services online or via telephone and offering fewer places for clients. Clients have also been impacted by the pandemic in terms of the in-person contact they have been able to

³²¹ Ibid 64

³²² Ibid

³²³ Ibid

³²⁴ Ibid

³²⁵ Ibid

have with their children, and other issues such as personal concerns around COVID-safe transport to appointments or programs.

We also highlight that currently the Court must be satisfied that the reason progress towards reunification could not occur was a result of the pandemic. It should be a given that reunification was not able to occur because the parents' progress to address the protective concerns was impeded as a result of the pandemic.

Recommendation 131: The assumption by the Court should be that progress to address the protective concerns has been impeded as a result of the pandemic, unless proven otherwise.

Recommendation 132: Family Reunification Orders should be extended by more than 6 months, as many services continue to not operate at full capacity.

As identified in Victoria Legal Aid's report, '[m]ost child protection matters were adjourned for three to five months at a minimum and all directions hearings, interim and final contested hearings were also adjourned', '[w]ith only the most urgent matters and new protection applications being heard.'³²⁶

In order to effectively address the backlog of the courts, resulting from the pandemic, VALS recommends the following:

Recommendation 133: Practice directions across each jurisdiction should be consolidated.

Recommendation 134: The Magistrates Courts and Children's Courts of Victoria should take a uniform approach to the practice directions and their overall operations across the state.

326 Victoria Legal Aid, Achieving safe and certain homes for children: Recommendations to improve the permanency amendments to the Children, Youth and Families Act 2005 based on the experience of our clients (November 2020) 23

Broader Reform

As Victoria recovers from the pandemic, there is an opportunity for broader reforms to address the gross overrepresentation of Aboriginal children involved in the Child Protection system. VALS particularly highlights the Closing the Gap Agreement's targets, which include to reduce, by 2031, 'the rate of over-representation of Aboriginal and Torres Strait Islander children in out-of-home care by 45 per cent.'³²⁷

The single biggest issue in child protection is the limit on the jurisdiction of the Children's Court. Under the Act, the assessment of placement is an administrative matter for the applicant (DHHS) alone and, as such, is beyond the Court's jurisdiction. The principles in the State child protection legislation and the Family Law Act both spring from the UN Convention on the Rights of the Child. Yet the threshold for who is considered suitable to care for a child is applied differently, with the State generally having a much higher (and sometimes seemingly arbitrary) threshold. Given the gravity of placement, it is imperative that the Court be the arbiter of suitability.

VALS has identified a number of other areas which could be reformed as Victoria enters the COVID-19 recovery phase. For example, there could be increased training and support for workers who prepare or draft cultural plans, with an emphasis on engaging immediate and extended Aboriginal family in drafting the cultural plans. Additionally, specialist courts such as Marram Ngala Ganbu have greater adherence to Aboriginal Child Placement Principles and kinship placements, as well as completion of cultural plans for children in out-of-home-care. Expanding this specialist court to the regions of Victoria, particularly those regions with high rates of child removals and a higher Aboriginal population, such as the Gippsland region, should be a priority. Whilst there is a DHHS policy regarding a timeframe for the implementation of a cultural plan (16 weeks from a child entering out-of-home-care), there is no timeframe prescribed in legislation. In order to try and

improve the number of children with a cultural plan, the timeframe for DHHS drafting and endorsing cultural plans should be legislated for.

Recommendation 135: The Government must develop and implement a strategy, in partnership with ACCOs, to meet the Closing the Gap target – to reduce, by 2031, the rate of over-representation of Aboriginal and Torres Strait Islander children in out-of-home care by 45 per cent.

Recommendation 136: Currently the assessment of placement of a child is an administrative matter for DHHS alone. VALS recommends that instead, the Court be the sole arbiter of placement suitability.

Recommendation 137: Notification that a child has been removed should account for the fact that, in Aboriginal families, it may not only be the parents who have had a significant role in raising the child.

Recommendation 138: DHHS reports to the Court should only include relevant information, such as evidence that a child is placed at unacceptable risk.

Recommendation 139: Comprehensive, individualised cultural plans should be created with Aboriginal and/or Torres Strait Islander families' input.³²⁸

Recommendation 140: The timeframe for DHHS drafting and endorsing cultural plans should be legislated for.

Recommendation 141: DHHS workers should be adequately trained to work in a culturally safe and supportive manner with Aboriginal children and their families.

Recommendation 142: In relation to placements of children, there must be consistent interpretation and application of legislation.

Recommendation 143: There must be improved communication and consultation with the Aboriginal community in relation to the placement of children.

Recommendation 144: Kinship placements should not be rejected for arbitrary reasons, such as very old, irrelevant criminal records.

328 Noting that the proportion of children in out-of-home-care with a completed cultural support plan at 30 June 2019 was lowest in Victoria and the Northern Territory - Australian Institute of Health and Welfare, The Aboriginal and Torres Strait Islander Child Placement Principle Indicators 2018–19: Measuring progress (2020) 10

VALS also welcomes Victoria Legal Aid's timely report, which considers the impact of the permanency reforms on families and children. Particularly, VALS supports Victoria Legal Aid's recommendations regarding how to improve the permanency amendments to the *Children, Youth and Families Act 2005*:

Recommendation 145: 'Amend reunification timeframes to allow the court to make decisions in the best interest of the child. Allow the Children's Court to make any protection order that it deems to be in the best interests of a child, including making or extending a family reunification order, even if that child has been in court-ordered out-of-home care for a cumulative period of over 24 months.'³²⁹

Recommendation 146: 'Improve court oversight and discretion through legislative reform to enable better outcomes for children. Allow the Children's Court to, in the best interests of the child: make conditions on any protection orders; and name a placement on an order.'³³⁰

Recommendation 147: 'Address the ongoing over-representation of Aboriginal and Torres Strait Islander children on care by Secretary orders by:

- continuing to build upon the success of initiatives such as Marram Ngala Ganbu that provide a culturally safe and appropriate response specifically tailored to Aboriginal and Torres Strait Islander families involved in the child protection system; and
- introducing oversight mechanisms to ensure that there is compliance with the requirement for cultural support planning and adherence to the Aboriginal Child Placement Principle.'³³¹

VALS would add to this recommendation that, while the Marram Ngala Ganbu model should be rolled out across metro and regional Courts, priority should be given to the latter, where there are fewer specialist magistrates.

Recommendation 148: 'Support parents to reunify with their children safely and quickly by providing more and better resourcing to:

- expand availability and timely access to vital services such as family violence services, public housing, drug

329 Victoria Legal Aid, Achieving safe and certain homes for children: Recommendations to improve the permanency amendments to the Children, Youth and Families Act 2005 based on the experience of our clients (November 2020) 26

330 Ibid

331 Ibid 27

and alcohol services, children's services, parenting support, mental health services;

- expand access to culturally safe initiatives and services for Aboriginal and Torres Strait Islander families; and increase the capacity for specialist Children's Court Magistrates to hear matters, especially in regional areas, to mitigate the impacts of COVID-19 adjournments.'³³²

Contact Andreea Lachsz, Senior Policy, Research and Advocacy Officer - alachsz@vals.org.au



**Victorian Aboriginal
Legal Service**

vals.org.au

vals@vals.org.au

1800 064 865