Victorian Aboriginal Legal Service Submission to the Implementation of the United Declaration of the Rights of Indigenous Peoples in Australia

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Contents

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Background to the Victorian Aboriginal Legal Service

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

Legal Services

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

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

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

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

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

Community Justice Programs

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

The Community Justice Team also run the following programs:

- Family Violence Client Support Program[1]
- Community Legal Education
- Victoria Police Electronic Referral System (**V-PeR**)[2]
- Regional Client Service Officers
- Baggarrook Women's Transitional Housing program.[3]

Policy, Research and Advocacy

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

Acknowledgements

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

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

- Morgan O'Sullivan (Policy, Research and Data Officer)
- Isabel Robinson (Senior Policy, Research and Advocacy Officer)
- Andreea Lachsz (Head of Policy, Communications and Strategy)

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1 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.

2 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.

3 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.

SCOPE OF THE INQUIRY

On 29 March 2022, the Senate referred an Inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) in Australia to the Legal and Constitutional Affairs References Committee for inquiry and report by 15 September 2022.

The application of the UNDRIP in Australia, with particular reference to:

a) the history of Australia's support for and application of the UNDRIP;
b) the potential to enact the UNDRIP in Australia;
c) international experiences of enacting and enforcing the UNDRIP;
d) legal issues relevant to ensure compliance with the UNDRIP, with or without enacting it;
e) key Australian legislation affected by adherence to the principles of the UNDRIP;
f) Australian federal and state government's adherence to the principles of the UNDRIP;
g) the track record of Australian Government efforts to improve adherence to the principles of UNDRIP;
h) community and stakeholder efforts to ensure the application of UNDRIP principles in Australia;
i) the current and historical systemic and other aspects to take into consideration regarding the rights of First Nations people in Australia; and
j) any other related matters.

EXECUTIVE SUMMARY

VALS welcomes the opportunity to make a submission to the Inquiry into the application of the UNDRIP in Australia. Our submission draws on nearly 50 years expertise of delivering a dedicated, culturally safe legal service for Aboriginal and/or Torres Strait Islander people in Victoria.

Despite the Australian Government formally supporting the implementation of UNDRIP in Australia in 2009, following an embarrassing absence of support for the instrument in 2007, the principles of UNDRIP still have not been implemented in Australian legislation or policy. This submission addresses the following points in relation to the implementation of UNDRIP in Australia:

- Self-determination as the foundation for the effective implementation of UNDRIP in Australia;
- Free, prior and informed consent;
- Indigenous Data Sovereignty (**IDS**) and Indigenous Data Governance (**IDG**);
- Accountability for the implementation of UNDRIP in Australia.

UNDRIP is a critical framework that guides the work VALS undertakes, including our policy and advocacy efforts for policy reform.

SUMMARY OF RECOMMENDATIONS

Self-determination

Recommendation 1. The Federal Government should pass legislation to implement UNDRIP in Australia. Legislation implementing UNDRIP must:

a) Enshrine the right of Aboriginal and Torres Strait Islander peoples and communities to self-determination, as defined under UNDRIP;
b) Establish a clear pathway for implementing UNDRIP in Australia, including through a National Action Plan that is developed with Aboriginal communities and Aboriginal Community Controlled Organisations (**ACCO**s).

Recommendation 2. The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) should be amended to require statements of compatibility to address the rights of Aboriginal and Torres Strait Islander peoples and self-determination.

Recommendation 3. Aboriginal and/or Torres Strait Islander peoples should have the opportunity to review and report on the Prime Minister's Progress Report annually. This will require dedicated funding, and may also involve the creation of a new Aboriginal organisation to perform this function.

Recommendation 4. Aboriginal and/or Torres Strait Islander communities and ACCOs must be able to function and make decisions without interference from non-Aboriginal entities.

Recommendation 5. ACCOs must receive adequate, long-term and sustainable funding to allow them to achieve their purpose.

Free, Prior and Informed Consent

Recommendation 6. Aboriginal and/or Torres Strait Islander communities and ACCOs must be genuinely consulted at the earliest possible opportunity in the development of programs, policies and legislation that impact Aboriginal and Torres Strait Islander communities. Genuine consultation means allowing adequate time for Aboriginal and/or Torres Strait Islander communities to provide feedback and explaining why or why not, their feedback is taken into account.

Recommendation 7. The Free, Prior and Informed Consent (**FPIC**) of Aboriginal and/or Torres Strait Islander peoples must be respected by all Australian Governments. Governments must put in place effective mechanisms to allow Aboriginal and/or Torres Strait Islander people to provide FPIC on issues that affect them, if they choose to.

Recommendation 8. Once feedback is provided to Governments regarding the program, policy or legislation, Governments must meaningfully engage with the responses provided.

Indigenous Data Sovereignty (IDS) and Indigenous Data Governance (IDG)

Recommendation 9. Indigenous Data Sovereignty and Indigenous Data Governance should be enshrined in all legislation that relates to and impacts upon Aboriginal and/or Torres Strait Islander people. In particular, relevant legislation should enshrine the rights of Aboriginal people individually and Aboriginal and/or Torres Strait Islander peoples collectively:

a) To access and collect data obtained about Aboriginal and/or Torres Strait Islander individuals and communities;
b) To exercise control over the manner in which data concerning Aboriginal and/or Torres Strait Islander individuals and communities is gathered, managed and utilised.

Recommendation 10. The State and Federal Governments should make disaggregated data available to Aboriginal and/or Torres Strait Islander communities and ACCOs.

Recommendation 11. Data about Aboriginal and/or Torres Strait Islander people should be owned and controlled by Aboriginal and/or Torres Strait Islander people and their representatives.

Recommendation 12. Data about Aboriginal and/or Torres Strait Islander people must be readily available to ACCOs for their use in advocacy and policy work and the development of programs.

Recommendation 13. Data about Aboriginal and/or Torres Strait Islander people must not be provided to ACCOs with the caveat that they cannot use or disseminate the data (with the exception of legislative requirements under privacy laws).

Accountability for Implementing UNDRIP

Recommendation 14. All Australian governments must genuinely consult with Aboriginal and/or Torres Strait Islander communities on the way in which UNDRIP is implemented in Australia.

Recommendation 15. The Victorian Parliament should amend the *Charter of Human Rights and Responsibilities 2006* (Vic) to explicitly include the right of Aboriginal and/or Torres Strait Islander peoples to self-determination, and to ensure that it is consistent with UNDRIP.

Recommendation 16. Any State or Territory legislation that conflicts with UNDRIP, or the Bill, should be amended to remedy the contradiction.

DETAILED SUBMISSIONS

Introduction

VALS welcomes the opportunity to make a submission to the Inquiry into the application of UNDRIP in Australia. Our submission draws on nearly 50 years of expertise delivering a dedicated, culturally safe legal service for Aboriginal and Torres Strait Islander people in Victoria.

The Australian Government formally supported UNDRIP in 2009, following an embarrassing absence of support for the Declaration in 2007. However, since then, little progress has been made in implementing UNDRIP in Australia, both at the Commonwealth and State and Territory levels. This is a significant failure, given the important framework provided by UNDRIP, which continues to guide the work of VALS and other ACCOs.

The Australian and Victorian Government's failure to implement UNDRIP in legislation is directly in contravention of Article 38 of the Declaration. Article 38 requires states to engage in consultation with Aboriginal and/or Torres Strait Islander peoples to take appropriate measures, including legislative, to achieve the ends of the Declaration. Implementation of UNDRIP on a Federal level is the first step in implementing UNDRIP in Australia. Following this, States and Territories must amend existing legislation to ensure compatibility with UNDRIP. Recognition of UNDRIP at a Federal legislative level creates a legal protection that allows for mechanisms of accountability and transparency to be developed and enforced. Reference to self-determination in policy materials is simply not enough - UNDRIP must be incorporated into legislation.[4]

This submission addresses the following points in relation to the implementation of UNDRIP in Australia:

- Self-determination as the foundation for the effective implementation of UNDRIP in Australia;
- Free, prior and informed consent of Aboriginal persons and communities;
- Indigenous Data Sovereignty (**IDS**) and Indigenous Data Governance (**IDG**);
- Strengthening Legal Protection of Human Rights;
- Accountability for the implementation of UNDRIP in Australia.

UNDRIP is a critical framework that guides the work that VALS undertakes, including our policy and advocacy efforts for policy reform.

Although the term '[I]ndigenous' is used throughout UNDRIP, VALS' preference is to use the term 'Aboriginal and/or Torres Strait Islander' and 'Aboriginal' when referring to Aboriginal communities in Victoria. We note, however, that the United Nations has not capitalised the word Indigenous in the

[4] *United Nations Declaration on the Rights of Indigenous Peoples* Art 38.

principle instrument, supporting materials or subsequent materials published in relation to UNDRIP. VALS makes clear that the terms Indigenous and Aboriginal and/or Torres Strait Islander should always be capitalised in all circumstances, when being used in relation to First Nations people of Australia and its adjacent lands under the Commonwealth.[5]

Self-determination

Aboriginal self-determination is explicitly recognised in UNDRIP and is a core right underpinning the Declaration. Article 3 recognises the right to self-determination and the right to freely determine political status in addition to pursuing social, economic and cultural development; Article 4 creates the right to autonomy or self-governance in matters relating to internal and local affairs in addition to way and means of financing autonomous functions; and Article 5 creates the right to maintain and strengthen distinct political, legal, economic and social institutions whist retaining the right to participate in the life of the State.

Aboriginal and Torres Strait Islander people and communities have a right to self-determination in all matters that relate to and impact their rights and lives. The international community has not settled on a definition of self-determination. The right to self-determination is different to other individual human rights. Most human rights are concerned with rights of individuals or 'persons' within a society.[6] The right of self-determination is a collective right.

Many experts, in Australia and internationally, agree that there are three key elements of self-determination;

- **Choice** – Indigenous peoples have a choice regarding how their lives are governed and what their development paths are.
- **Participation** – Indigenous peoples have a right to participate in decision making and the development of instruments and programs that relate to them and impact upon their lives.
- **Control** – Indigenous peoples have control over their lives and futures, including a right to control economic, social and cultural development. [7]

Self-determination in the context of the implementation of UNDRIP means that Aboriginal and/or Torres Strait Islander communities and ACCOs must be consulted prior to, and during the development

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[5] The importance of capitalising the terms Aboriginal, Torres Strait Islander, First Nations and Indigenous is well known. Key Aboriginal Organisations have also published guides on appropriate language and grammar when using these terms. Australian Institute of Aboriginal and Torres Strait Islander Studies, *Indigenous Australians: Aboriginal and Torres Strait Islander People* (webpage, 8 December 2020) < https://aiatsis.gov.au/explore/indigenous-australians-aboriginal-and-torres-strait-islander-people>; Narragunnawali: Reconciliation in Education, *Terminology Guide* (webpage) < https://www.narragunnawali.org.au/about/terminology-guide>; Reconciliation Australia, *Reconciliation Action Plan Drafting Resource; Demonstrating Including and Respectful Language* (online resource, 2021) <https://www.reconciliation.org.au/wp-content/uploads/2021/10/inclusive-and-respectful-language.pdf>

[6] Victorian Aboriginal Legal Service, *Community Fact Sheet: Aboriginal Self-Determination* (factsheet, 2022) <https://www.vals.org.au/wp-content/uploads/2022/01/Community-fact-sheet-Aboriginal-Self-Determination.pdf>

[7] M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *The Community Guide to the UN Declaration on the Rights of Indigenous Peoples*, Australian Human Rights Commission (2010), p 24.

of, any programs or plans relating to them. This includes robust consultation with community,[8] experts (including specialised ACCOs) and ACCOs in the development of an action plan for the implementation of UNDRIP in Australia, as is required under the current proposed *United Nations Declaration on the Rights of Indigenous Peoples Bill 2022* (**the Bill**).[9] It is imperative that this Bill and subsequent Act be implemented in a way that supports and reflects self-determination. The Act should, and must, include a clear definition of self-determination as informed by international instruments[10] and Aboriginal and/or Torres Strait Islander academic literature.

Aboriginal and/or Torres Strait Islander peoples are guaranteed more than just the opportunity to provide feedback and voice opinions on matters that affect their rights individually and collectively: they have the right to meaningful and effective consultation and a role in decision-making in relation to matters that affect their rights and interests.[11] In essence, they have more than a mere right to a seat at the table, but a say in the outcomes.[12]

The State and Federal Governments have a history of disregarding the importance of self-determination and engagement of Aboriginal and/or Torres Strait Islander peoples in the drafting and development of key legislative frameworks and programs that directly relate to them. An example of this is the Victorian Government's failure to include a clause in the Victorian *Charter of Human Rights and Responsibilities 2006,* recognising self-determination of Aboriginal peoples as a right. Despite calls for the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* to include specific reference self-determination, there is still no reference to self-determination in the Act.[13] VALS continues to advocate for an amendment to this legislation. VALS supports Liberty Victoria's recommendation that the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) should be amended to ensure that the statement of compatibility for all Bills should expressly address the rights of Aboriginal and Torres Strait Islander peoples and self-determination.

Further, Recommendation 188 of the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**) stated that Governments ought to negotiate with Aboriginal and/or Torres Strait Islander communities and ACCOs to determine guidelines for the processes and procedures that should be followed in order to ensure that self-determination is considered and applied at the point of designing and implementing any programs or policy that affects Aboriginal and/or Torres Strait Islander peoples. This report was handed down over 30 years ago, and there is yet to be any statutory recognition of Aboriginal self-determination in Victoria.

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[8] The use of the word *community* in this submission refers to the strong kinship connections of Aboriginal communities across Australia and specifically means relevant groups of peoples who would be impacted by the matter in question.
[9] *United Nations Declaration on the Rights of Indigenous Peoples Bill 2022* (Cth).
[10] *International Covenant on Civil and Political Rights* art 1; *International Covenant on Economic, Social and Cultural Rights* art 1.
[11] *United Nations Declaration on the Rights of Indigenous Peoples* art 18.
[12] Victorian Aboriginal Legal Service, *Inquiry Into Victoria's Justice System Inquiry* (Submission, 2021) https://www.vals.org.au/wp-Content/uploads/2022/02/139._VALS_Eastern_Australian_Aboriginal_Justice_Services_Ltd_Redacted.pdf
[13] M Young, *2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Report, 2015).

Australia continues to be criticised on an international level for its lack of recognition of Aboriginal and/or Torres Strait Islander self-determination. In 2010, the Special Rapporteur on the rights of Indigenous peoples, Professor James Anaya, recommended that the 'the Commonwealth and state governments should review all legislation, policies, and programmes that affect Aboriginal and Torres Strait Islander [people], in light of the Declaration'.[14] In her visit to Australia in 2017, the Special Rapporteur, Victoria Tauli-Corpuz, noted that 'the policies of the Government do not duly respect the right to self-determination and effective participation…'[15]

Even when the Government has attempted to employ self-determination in legislation, the right has been misunderstood and consequently misapplied. An example of this is section 18 of the *Children Youth and Families Act* (**CYFA**),[16] that confers specific powers on ACCOs to work within the framework of the colonial Act and exercise specific mandates in line with the Act. It cannot be said that empowering an ACCO to perform under the Act and within a framework that never intended to address and enshrine self-determination satisfies the elements of *choice* and *control*. This is not self-determination, this is employing an ACCO to enforce colonial frameworks, within the colonial justice system, without affording Aboriginal peoples, their representatives and ACCOs agency to develop and implement improved systems, that are grounded in Aboriginal culture, customs, law and lore. Inserting one-off sections into legislation devolving statutory authority to ACCOs, such as section 18 of the CYFA, is a step in the right direction, but is still not a manifestation of self-determination.

There is an ongoing lack of respect and acknowledgement of the importance of self-determination in the wider context. It is imperative that an Act such as the *United Nations Declaration on the Rights of Indigenous Peoples Bill 2022* (**the Bill**) is enacted to begin the process of statutory recognition of self-determination as an *inherent right* that Aboriginal and/or Torres Strait Islander peoples have. Should the Bill be enacted, ACCOs and community groups *must* be consulted in the development of the 'action plan' per section 9 of the Bill.[17] Additionally, a newly established, Aboriginal community controlled organisation, should also be afforded an opportunity to review and report on the Prime Minister's Progress Report in line with section 10 of the Bill.[18]

The right to self-determination is enshrined throughout all articles of UNDRIP, with many articles making specific reference to it.

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[14] UN Human Rights Council, *Promotion and Protection of All human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya; The Situation of Indigenous Peoples in Australia,* 4 March 2010, A/HRC/15.

[15] UN Human Rights Council, *Report of the Special Rapporteur on the Rights of Indigenous Peoples on Her Visit to Australia*, 8 August 2017, A/HRC/36/46/Add.2.

[16] *Children, Youth and Families Act* (Vic) s 18.

[17] *United Nations Declaration on the Rights of Indigenous Peoples Bill 2022* (Cth).

[18] Ibid.

Article 4 – Indigenous peoples, in exercising their right to self-determination, have the right to autonomy of self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

The role and function of ACCOs is imperative to the realisation of self-determination. The Government must adequately fund all ACCOs to ensure that all ACCOs can achieve their purpose to the highest standard. It is well-known by Government and Aboriginal communities that our services are underfunded, understaffed, under resourced and unable to achieve their purposes on a state-wide scale. Issues concerning the funding and resourcing of Aboriginal organisations and institutions have been highlighted by United Nations human rights bodies in criticisms of the Commonwealth Government,[19] and the issue has also been repeatedly identified by VALS in numerous submissions to the Victorian Government.[20]

The ability of ACCOs to effectively advocate for the interests of Aboriginal and/or Torres Strait Islander communities in Victoria is considerably impeded by the lack of adequate funding and resources to fulfil their respective mandates.[21] This means that Aboriginal and/or Torres Strait Islander communities in Victoria continue to be denied culturally safe legal services across the State, and ACCOs' ability to address systemic injustices across the legal and other systems is significantly undermined.

Article 5 – Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

There are some examples of progress towards Article 38 ("States in consultation and cooperation with Indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration." But Victoria still has a long way to go before self-determination is realised.

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[19] United Nations Committee on the Elimination of Racial Discrimination. 'Concluding observations on the eighteenth to twentieth periodic reports of Australia' (2017). UN Doc. CERD/C/AUS/CO/18-20, at 17-18; United Nations Committee on the Elimination of Racial Discrimination. 'Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia' (2010). UN Doc. CERD/C/AUS/CO/15-17 at 15; United Nations Committee on Economic, Social and Cultural Rights. 'Concluding Observations on the fifth periodic report of Australia' (2017). UN Doc. E/C.12/AUS/CO/5, at 15-16; United Nations Human Rights Committee. 'Concluding observations on the sixth periodic report of Australia.' (2017) UN Doc. CCPR/C/AUS/CO/6, at 39-40 and 49-50, United Nations Human Rights Committee. 'Concluding observations of the Human Rights Committee: Australia. (2009) UN Doc. CCPR/C/AUS/CO/5, at 13 and 25.

[20] See, for example Recommendations 7- 10 of VALS. 'Submission to the Royal Commission into Victoria's Mental Health System (July2019); Recommendations 1 and 3 of VALS. 'Submission to the Victorian Law Reform Commission Project: Improving the Response of the Justice System to Sexual Offences.' (March 2021); Recommendations 1 and 5-11 of VALS. 'Building Back Better: Victorian Aboriginal Legal Service COVID-19 Recovery Plan.' (February 2021).

[21] VALS (n 12).

For example, Aboriginal people in Victoria have the right to have their criminal matters heard in Koori Court,[22] albeit with certain types of offending being excluded.[23] Koori Court provides an incredibly important service and space for Victorian Aboriginal people engaging with the criminal legal system. Koori Court can be a healing space that encourages individuals to draw on the strength of their Aboriginality[24] and can improve a person's engagement with the sentencing process.

However, Article 5 is not fully recognised in the Koori Court system. Firstly, there is a limitation on what types of matters can be heard in Koori Court.[25] The limitation on certain offences being unable to be heard in the Koori Court system means that Aboriginal people charged with such offences do not have a choice between having their matter heard in Koori Court or the generalist courts. Aboriginal people should enjoy a right to decide if they want their matters to be finalised in Koori Court or the generalist alternative. Secondly, the Elder's role in the proceeding is limited to an advisory role, rather than a decision-making role.[26]

Koori Court should be empowered to hear bail applications, hear unresolved contested matters, make Drug and Alcohol Treatment Orders where appropriate, and divert participants from the court system through the utilisation of culturally appropriate diversion plans.[27] Additionally, access to Koori Court must be improved through the establishment of Koori Courts in all regional Magistrates and Children's Courts.

The judicial officer[28] may be advised by the Elders and the Koori Court Officer in the process of determining a sentence, but the decision-maker holds the utmost power in the sentencing process. Whilst judicial decision makers who sit in Koori Court undertake specialised cultural awareness training to ensure that their practice is culturally informed, this does not equate to the full realisation of self-determination. Most relevant is the fact that Koori Courts continue to operate within the colonial system, and Aboriginal peoples' ability to shape the response to alleged offending is fettered by Victoria's criminal laws, bail and sentencing laws and criminal procedure laws, as well as established processes and practices of police, prosecution and courts.

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[22] *Cemino v Cannan and Ors* [2018] VSC 535.
[23] *Magistrates Court Act 1989* (Vic), s 4F.
[24] As is done in Aboriginal Community Justice Reports that are provided at sentencing. Read more about ACJR's at https://www.vals.org.au/aboriginal-community-justice-reports/.
[25] *Magistrates Court Act* (n 21).
[26] *Magistrates Court Act,* s4G.
[27] VALS, *Submission to the Anti-Racism Strategy* (Submission, 2021) <https://www.vals.org.au/wp-content/uploads/2022/01/VALS-submission-Anti-Racism-Strategy.pdf>.
[28] A Magistrate or Judge, depending on whether the matter is heard summarily in the Magistrates Court or by indictment in the County Court.

Article 18 – 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, as well as to maintain and develop their own Indigenous decision-making institutions.

The Victorian Government consistently fails to engage with the Aboriginal communities and ACCOs in the drafting of legislation and development of programs/projects that affect the Aboriginal community. While Treaty negotiations proceed, the Victorian Government cannot continue the current state of inertia with regards to properly implementing the rights enshrined in UNDRIP.

For example, in the past, the Government has sought to audit their own proposals by declaring there were no conflicts with Aboriginal cultural rights under section 15(2) of the *Charter of Human Rights and Responsibilities Act.* In accordance with Article 18 of UNDRIP, it is impossible for the Government to respect Aboriginal self-determination whilst unilaterally declaring that consultation with communities and their representatives and Aboriginal Community Controlled Organisations, such as the Land Councils and Traditional Owners, the Aboriginal Justice Caucus and VALS, is not required because the Government themselves has deemed the proposal compliant with Aboriginal cultural rights. The Government cannot make this decision on behalf of Aboriginal people, it must be the representative bodies created by, and accountable to, Aboriginal people that make these determinations. The Government's failures in this respect are especially egregious in light of the fact that Aboriginal and/or Torres Strait Islander people are not a monolithic group, and diversity of culture, language, lore and law among nations and peoples must be recognised, respected and celebrated. The Government's past and current failures to consult ACCOs in this process undermines its own ability to effectively reduce inequalities and improve outcomes for Aboriginal and/or Torres Strait Islander people.[29]

When the Government does engage with ACCOs and community, it is regularly not done in a way that is appropriate or comprehensive. Frequently, VALS and other ACCOs are consulted at the last available opportunity and provided with very restrictive timeframes to respond with comprehensive feedback on issues that directly and significantly impact on the communities that we serve. VALS and other ACCOs are already underfunded and overworked, meaning that it is incredibly difficult to provide comprehensive feedback on proposed matters. Our policy team needs sufficient time to engage with our legal and community justice programs services, in order to prepare comprehensive responses that are grounded in our clients' experiences, and incorporate the legal, technical and experiential expertise of our staff. The impacts of current Government processes are not limited to the short-term – our responses to particular pieces of work/consultations – but also the medium-to-long-term, with pressures on staff leading to challenges in staff retention across all areas (with high staff turnover leading, in turn, to loss of critical institutional knowledge and important relationships).

[29] VALS (n 12).

Moreover, feedback from VALS is not typically reflected in the measures implemented by the Government, and little or no feedback is provided on why the feedback has not been taken into account.[30] The opportunities for more extensive, fruitful dialogue are very limited. And at times, there is not even an attempt to engage in genuine consultation with VALS on critical pieces of legislation that directly impact on Aboriginal communities. This is evidenced in the Victorian Government's recent, deliberate decision to exclude VALS from the consultation on the Aboriginal Statement of Recognition in the newly developed *Children Youth and Families Act*, despite our repeated requests to be consulted, given our expertise in representing families and children in contact with the Child Protection system.[31]

For further information regarding self-determination please see our key publications that address self-determination; VALS' Community Fact Sheet on Self-Determination, VALS' submission to the Inquiry into the Criminal Justice System, VALS' submission to the Inquiry into Children of Imprisoned Parents, and VALS' Submission to the Consultation on RACGP Standards for Health Services in Australian Prisons. In everything VALS does, we are guided by Aboriginal peoples' right to self-determination.

RECOMMENDATIONS

Recommendation 1. The Federal Government should pass legislation to implement UNDRIP in Australia. Legislation implementing UNDRIP must:

a) Enshrine the right of Aboriginal and Torres Strait Islander peoples and communities to self-determination, as defined under UNDRIP;
b) Establish a clear pathway for implementing UNDRIP in Australia, including through a National Action Plan that is developed with Aboriginal communities and Aboriginal Community Controlled Organisations (**ACCO**s).

Recommendation 2. The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) should be amended to require that statements of compatibility address the rights of Aboriginal and/or Torres Strait Islander peoples and self-determination.

Recommendation 3. Aboriginal and Torres Strait Islander peoples should have the opportunity to review and report on the Prime Minister's Progress Report annually. This will require dedicated funding, and may also involve the creation of a new Aboriginal organisation to perform this function.

Recommendation 4. Aboriginal communities and ACCOs must be able to function and make decisions without interference from non-Aboriginal entities.

[30] Ibid.
[31] Minister Anthony Carbines refused to properly consult on legislation (8 June 2022), available at https://www.vals.org.au/minister-anthony-carbines-refused-to-properly-consult-on-legislation/

Recommendation 5. ACCOs must receive adequate, long-term and sustainable funding to allow them to achieve their purpose.

Free Prior and Informed Consent

Article 19 UNDRIP provides that "States shall consult and cooperate in good faith with the [I]ndigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."

There are three elements of FPIC:

Free – consent sought must be free from coercion, intimidation and manipulation.

Prior – consent must be sought sufficiently in advance of any authorisation or commencement of the relevant activity. Respect must be shown to time requirements of Indigenous consulting and consensus.

Informed – the provision of information to Indigenous communities covers a range of aspects. This includes the nature and scope of any proposed project or activity, the purpose and duration of the project or activity, what will be affected by the project or activity, an assessment of the impacts and potential risks, and procedures the project or activity may entail.[32]

As discussed under the self-determination section of this submission, the current standard of consultation with Aboriginal communities and ACCOs in Victoria, in relation to the development and implementation of programs and legislative and policy reform is poor. VALS is regularly engaged late in the piece, to provide a response or recommendations. Moreover, we are rarely provided with explanations as to why our feedback has not been taken into account.

ACCOs must be engaged at an early stage in the consultation process, in order to allow them to meaningfully engage with their communities and other expert organisations, as well as consulting internally, to provide considered and robust responses and recommendations. When ACCOs and Aboriginal communities are consulted at latest stage of the process, it is abundantly evident that the consultation is a tokenistic 'tick-box' activity. The continuous late engagement of ACCOs is a manifestation of systemic racism and demonstrates the Government's lack of genuine commitment to the implementation of UNDRIP.

[32] UN OHCHR, *Free, Prior and Informed Consent of Indigenous Peoples,* (Factsheet, September 2013); Australian Human Rights Commission, *2010 Social Justice Report* (Report, 2011).

RECOMMENDATIONS

Recommendation 6. Aboriginal and/or Torres Strait Islander communities and ACCOs must be genuinely consulted at the earliest possible opportunity in the development of programs, policies and legislation that impact Aboriginal and Torres Strait Islander communities. Genuine consultation means allowing adequate time for Aboriginal and/or Torres Strait Islander communities to provide feedback and explaining why or why not, their feedback is taken into account.

Recommendation 7. The Free, Prior and Informed Consent (**FPIC**) of Aboriginal and/or Torres Strait Islander peoples must be respected by all Australian Governments. Governments must put in place effective mechanisms to allow Aboriginal and/or Torres Strait Islander people to provide FPIC on issues that affect them, if they choose to.

Indigenous Data Sovereignty (IDS) and Indigenous Data Governance (IDG)

The 2018 Indigenous Data Sovereignty Summit in Australia developed the following definitions for key concepts relating to IDS and IDG:

- Indigenous data is "information or knowledge, in any format or medium, which is about and may affect Indigenous peoples both collectively and individually."[33]
- IDS refers to "the right of Indigenous peoples to exercise ownership over Indigenous Data. Ownership of data can be expressed through the creation, collection, access, analysis, interpretation, management, dissemination and reuse of Indigenous Data."[34]
- IDG refers to "the right of Indigenous Peoples to autonomously decide what, how and why Indigenous Data are collected, accessed and used. It ensures that data on or about Indigenous peoples reflects our priorities, values, cultures, worldviews and diversity."[35]

The nature of the relationship between data concerning Aboriginal peoples and IDS/IDG can be described as follows:

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

It is also important to note that both IDS and IDG require the meaningful and effective participation of Aboriginal peoples before decisions are made in relation to policies and legislation concerning Indigenous data.

[33] Indigenous Data Sovereignty, Communique. Indigenous Data Sovereignty Summit, 20 June 2018, p. 1.
[34] Ibid.
[35] Ibid.

Although progress towards Indigenous Data Sovereignty in Victoria has been limited, the Victorian Government has explicitly acknowledged that:

- "Aboriginal ownership and control of data is a key enabler of self-determination";
- "Aboriginal communities and organisations should have governance, choice and control over data collected from and about their communities";
- "Ensuring data sovereignty means Aboriginal community-controlled organisations have the information they need to make decision about the communities they serve… In working towards a partnership approach, Victoria recognises that ACCOs are best placed to hold control of data that relates to their own communities."[36]

Aboriginal and/or Torres Strait Islander communities and ACCOs must have access to and control over the way data that relates to Aboriginal and Torres Strait Islander communities is collected, managed and used. The realisation of IDG and IDS is fundamental to empowering Aboriginal and Torres Strait Islander communities and their representatives and expert organisations to advocate for change.

Currently, IDG and IDS are not recognised in Australia. Many international human rights instruments recommend collecting and analysing disaggregated data to determine and address inequalities and discrimination.[37] Disaggregated data is crucial for understanding racism in all its forms and developing evidence-based policies and initiatives. Currently, there are significant gaps in the data that is available regarding Aboriginal and/or Torres Strait Islander people and racism in Victoria, including in relation to experiences of racism by Aboriginal and/or Torres Strait Islander people.[38] Under Article 1 and 2 of UNDRIP, Indigenous peoples have a right to be free from any form of discrimination. This includes systemic racism. In failing to collect such data, the Government cannot analyse and develop an appropriate framework to address the inequalities that Aboriginal and/or Torres Strait Islander people experience.

VALS has faced many challenges in accessing relevant data relating to Aboriginal and/or Torres Strait Islander communities and their experiences. This includes: data not being collected or disaggregated so as to identify Aboriginal and/or Torres Strait Islander people, data being held by multiple data custodians with no mechanism for consolidation or sharing this data with Aboriginal and/or Torres Strait Islander communities, and refusal to provide data. Even when data is provided to VALS, it is often provided on the basis that it cannot be used publicly. These obstacles to accessing data about Aboriginal people are contrary to the principles of IDG, IDS and the right to self-determination. ACCOs should be able to access any data relating to Aboriginal and/or Torres Strait Islander people and have a right to disseminate or use the data as they see fit.

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[36] Victorian State Government, *Victorian Closing the Gap Implementation Plan 2021-2023*, p. 46.
[37] United Nations Department of Economic and Social Affairs, *The State of the World's Indigenous Peoples: Implementing the United Nations Declaration on the Rights of Indigenous Peoples,* 2019, ST/ESA/371.
[38] VALS, *Submission on Victoria's Anti-Racism Strategy* (Submission, 2021) <https://www.vals.org.au/wp-content/uploads/2022/01/VALS-submission-Anti-Racism-Strategy.pdf>.

Other jurisdictions have made significant progress in implementing IDS and IDG, which can help to inform Australia's approach on this issue, including British Colombia, Canada. In the Parliament of British Colombia, legislation that provides a crucial framework for addressing the inequalities of data access and availability in relation to Indigenous peoples is currently being considered. The *Anti-Racism Data Act* provides a framework that addresses the systemic racism experienced by Indigenous and other racialised communities in accessing Government programs and services. It also provides a framework for the collection and use of data in relation to Indigenous peoples.

The current state of data regarding Aboriginal and Torres Strait Islander people in Australia is discriminatory. The system must be reformed in order to encourage positive change and allow for full realisation of IDG, IDS and self-determination.

Anti-Racism Data Bill (British Colombia, Canada) 2022

In May 2022, British Colombia became the first government in North America to introduce an Anti-Racism Data Bill. The Act aims to "dismantle systemic racism and discrimination" by helping to "identify gaps in programs and services, and allow government to better meet the needs of Indigenous, Black and racialized British Colombians." It will also help advance Indigenous data sovereignty (IDS) and Indigenous Data Governance (IDG), by establishing a process for government to seek consent from Indigenous communities to use their data.

The Act follows a major report by the BC Office of the Human Rights Commissioner in 2020, which recommended that the Government legislate the collection, use and disclosure of demographic data for social change. According to the report:

> *By making systemic inequalities in our society visible, data can lead to positive change. The same data, used or collected poorly, can reinforce stigmatization of communities, leading to individual and community harm.*

The Act has been co-developed with Indigenous leadership under the *Declaration on the Rights of Indigenous Peoples Act 2021*, which provides a road map for implementing the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Canada.

The Act provides a framework for collecting personal information for the purposes of identifying and eliminating systemic racism and advancing racial equity. In particular, it provides for:

- Public bodies can be required to collect and disclose information, including personal information, for the purpose of identifying and eliminating systemic racism and advancing racial equity;
- Development of data standards and directives, including to support culturally safe collection, use and disclosure of personal information;
- Annual publication of statistics or other information respecting systemic racism and racial equality, in consultation and cooperation with Indigenous peoples whose rights or interests could be affected;

- Annual identification of research priorities relating to the identification and elimination of systemic racism and advancement of racial equality, in consultation and cooperation with Indigenous peoples whose rights or interests may be affected by the research;
- Creation of an anti-racism data committee - composed of a majority of individuals who are racialised - to collaborate with the government on how data is collected and used;
- An enforcement mechanism to ensure that public bodies are complying with the Act.

RECOMMENDATIONS

Recommendation 9. Indigenous Data Sovereignty and Indigenous Data Governance should be enshrined in all legislation that relates to and impacts upon Aboriginal and/or Torres Strait Islander people. In particular, relevant legislation should enshrine the rights of Aboriginal and/or Torres Strait Islander people individually and Aboriginal peoples collectively:

a) To access and collect data obtained about Aboriginal and/or Torres Strait Islander individuals and communities;
b) To exercise control over the manner in which data concerning Aboriginal and/or Torres Strait Islander individuals and communities is gathered, managed and utilised.

Recommendation 10. State, Territory and Federal Governments should make disaggregated data available to Aboriginal and/or Torres Strait Islander communities and ACCOs.

Recommendation 11. Data about Aboriginal and/or Torres Strait Islander people should be owned and controlled by Aboriginal and/or Torres Strait Islander people and their representatives.

Recommendation 12. Data about Aboriginal and/or Torres Strait Islander people must be readily available to ACCOs for the use in advocacy work and the development of programs.

Recommendation 13. Data about Aboriginal and/or Torres Strait Islander people should not be provided to ACCOs with the caveat that they cannot use or disseminate the data (with the exception of legislative requirements under privacy laws).

Strengthening Legal Protection of Human Rights

Removal of Aboriginal and/or Torres Strait Islander children from their families, communities, culture and Country

Article 7(2) of UNDRIP provides that "Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group."

Further, article 8(1) provides that "Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture."

Incorporating both of these articles into Federal and State/Territory legislation in Australia is a critical way of providing protection to Aboriginal and/or Torres Strait Islander families, who continue to have their children removed at devastatingly high rates. Rates of Aboriginal and Torres Strait Islander children in care in Victoria are the highest in Australia and the state continues to report the highest overrepresentation of Aboriginal and Torres Strait Islander children in out-of-home care in the country.

Although significant progress has been made in Victoria in transferring the case management of Aboriginal children in out of home care to Aboriginal Community Controlled Organisations (rather than the government),[39] the child protection system continues to be characterised by systemic racism and punitive approaches that fail to provide early intervention and support that many families need.

In particular, the following key issues in the child protection system have a significant impact on Aboriginal and/or Torres Strait Islander families:

- Permanency arrangements: In 2014, the Children, Families and Youth Act *2005* was amended to impose a 12-month timeframe for parent(s) to address protective concerns and achieve reunification with their children.[40] In certain circumstances, the court may extend the timeframe for an additional 12 months, if reunification is likely to be achieved or a permanent alternative sought.[41] The rigid timeframes have had a significant impact on Aboriginal and/or Torres Strait Islander families, as they fail to take into account the stress and trauma resulting from Child Protection intervention and child removal from parent(s), which is destabilising for children (particularly Aboriginal and/or Torres Strait Islander children). Additionally, there has been limited access to programs and services during the COVID-19 pandemic.
- Failure to comply with the Aboriginal Child Placement Principle (**ACPP**), and lack of accountability for this non- compliance. This includes failure to place children in accordance with the ACPP placement hierarchy, and failure to ensure that Aboriginal children in out-of-home-care have meaningful Cultural Support Plans, developed in a timely manner. Concerns about non-compliance and the lack of transparency and accountability have been raised consistently, including by VALS,[42] the Commission for Children and Young People[43] and Victoria Legal Aid.[44]

[39] As of June 2021, 50% of Aboriginal and Torres Strait Islander children in out-of-home care have now been transitioned to be case managed by ACCOs, which represents a minimal increase of 1% over the previous year.
[40] Section 287A(2), *Children, Youth and Families Act 2005* (Vic).
[41] Section 287A(3), *Children, Youth and Families Act 2005* (Vic).
[42] VALS, Submission to Anti-Racism Strategy, December 2021.
[43] CCYP, *In the Child's Best Interests*, above note **Error! Bookmark not defined.**; CCYP, *Always Was, Always Will Be Aboriginal Children*, above note **Error! Bookmark not defined.**.
[44] VLA, *Achieving Safe and Certain Homes for Children*, above note **Error! Bookmark not defined.**.

Gatekeeping of Aboriginality by Victoria Police

Article 33 of UNDRIP provides that "Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of [I]ndigenous individuals to obtain citizenship of the States in which they live."

Practices continue to take place in Victoria which undermine the right of Aboriginal and/or Torres Strait Islander persons and communities to determine their Aboriginality. For example, we are aware through our Custody Notification Service (**CNS**) that Victoria Police continue to dispute or question the claims of people detained in police custody that they are Aboriginal and/or Torres Strait Islander.[45]

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.

Additionally, practices such as these have a significant impact on access to support and services, such as the CNS, which provides a critical safeguard against deaths in custody, but its efficacy is undermined when police question the Aboriginality of someone they have detained.

Equivalency of healthcare in prisons

Article 24(2) of UNDRIP provides that "Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right."

Article 24 reinforces article 12 of the *International Covenant on Economic, Social and Cultural Rights* which has been ratified by Australia, with the effect of creating legally binding obligations.

Although Victoria has a *Charter of Human Rights and Responsibilities*, the Charter does not include the right to health. However, in the inquest into the death of Yorta Yorta woman, Aunty Tanya Day, the Victorian Coroners Court has found that in custodial settings, Section 22[46] requires police and prison staff to ensure access to medical care, given that people detained are completely dependent on the state to provide for their health.

[45] Ibid.

[46] Section 22 provides that all persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.

Additionally, the United Nations Standard Minimum Rules for the Treatment of Prisoners (**the Mandela Rules**) make clear that "prisoners should enjoy the same standards of health care that are available in the community, and should have access to necessary healthcare services free of charge, without discrimination on the grounds of their legal status."

Despite this, access to culturally safe health care for Aboriginal and/or Torres Strait Islander people in custody continues to be undermined by:

- Provision of health care in Victorian prisons by private contractors, through the Department of Justice and Community Safety rather than the Department of Health, resulting in deficient healthcare services and lack of scrutiny and transparency;
- Systemic and individual racism within the custodial healthcare system;
- Lack of access to Medicare and Pharmaceutical Benefits Scheme (**PBS**) for people in prisons;[47]
- Inability for Aboriginal Community Controlled Health Organisations (**ACCHO**s) to provide in-reach culturally safe healthcare services, because of exclusion of Medicare and the PBS;
- Lack of sustainably resourced, culturally appropriate health services and programs to meet the mental health and social and emotional wellbeing needs of Aboriginal and/or Torres Strait Islander people in prison.

A Guardian analysis of 474 Aboriginal and/or Torres Strait Islander Deaths in Custody since 1991, published in April last year, for the 30th anniversary of the Royal Commission into Aboriginal Deaths in Custody,, found that:

> For both Aboriginal and Torres Strait Islander people and non-Indigenous people, the most common cause of death was medical problems, followed by self-harm. However, Indigenous people who died in custody were three times more likely not to receive all necessary medical care, compared to non-Indigenous people. For Indigenous women, the result was even worse – less than half received all required medical care prior to death.
>
> Aboriginal and Torres Strait Islander women were less likely to have received all appropriate medical care before death (54%) compared to men (36%). Agencies such as police watch houses, prisons, and hospitals did not follow all of their own procedures in 43% of the cases in which Aboriginal and Torres Strait Islander people died, compared to 19% of the cases of non-Indigenous people.

[47] For further details, see VALS Submission to the Inquiry into Victorian's Criminal Justice System pp. 220, available at: https://www.vals.org.au/wp-content/uploads/2022/02/139._VALS_Eastern_Australian_Aboriginal_Justice_Services_Ltd_Redacted.pdf

Coronial Inquest into the death of Veronica Marie Nelson

Inadequate healthcare in prisons in Victoria was recently examined during the Coronial Inquest into the death of Veronica Marie Nelson, a proud Gunditjmara, Dja Dja Wurrung, Wiradjuri and Yorta Yorta woman, who died at Dame Phyllis Frost Centre on 2 January 2020.

VALS represented Veronica's partner, Percy Lovett during the inquest. The following extracts are from Percy's written submissions to the Coroner:

> *The total neglect of Veronica and the denial of her basic humanity and dignity by numerous individuals and by the private and Victorian government organisations with responsibility for her treatment and care, was more than merely 'inadequate' or 'deficient'. It was deliberate. It was grossly negligent. It was inhumane. It was brutal. It was torturous. It killed her.*[48]
>
> *Had the Victorian Government listened to the advocacy of Aboriginal and Torres Strait Islander peoples and organisations, and enacted the genuine systemic reforms demanded by RCIADIC and by Aboriginal organisations since RCIADIC, Veronica would be alive. She would not have died alone, in pain, calling for her father and screaming out for help. More than mere words are required.*[49]
>
> *No one should die while suffering the cruelty of "physical pain and psychological pain", powerless, denied medical treatment, uncared for and ignored by those who held her life and welfare in their hands.*[50]

The importance of equivalence of care to Aboriginal and/or Torres Strait Islander people in prison was recognised by the Royal Commission into Aboriginal Deaths in Custody more than thirty years ago. Recommendation 150 of the Royal Commission was that "health care available to persons in correctional institutions should be of an equivalent standard to that available to the general public," and specifically identified access to mental health and AOD services and the importance of culturally safe care. Equivalence of care is also the underlying goal of other RCIADIC recommendations regarding healthcare in prisons and police custody, including Recommendations 127, 252, 152, 154, 133, 265 and 283.

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[48] Submissions on behalf of Uncle Percy Lovett, [7], available at: 2022.06.17-Submissions-of-Uncle-Percy-Lovett-Veronica-Nelson-Inquest.pdf (vals.org.au)
[49] Submissions on behalf of Uncle Percy Lovett, [5], available at: 2022.06.17-Submissions-of-Uncle-Percy-Lovett-Veronica-Nelson-Inquest.pdf (vals.org.au)
[50] Submissions on behalf of Uncle Percy Lovett, [16], available at: 2022.06.17-Submissions-of-Uncle-Percy-Lovett-Veronica-Nelson-Inquest.pdf (vals.org.au) [16]

Incorporating UNDRIP into domestic legislation will provide important legal protection for the right to health of Aboriginal and/or Torres Strait Islander people, including Aboriginal and/or Torres Strait Islander people in detention in Victoria. It will help to ensure that more Aboriginal and/or Torres Strait Islander people do not die in custody due to negligent and inadequate healthcare and treatment.

Harmful practices in prisons

Article 7(1) of UNDRIP provides that "Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person." Implementing article 7(1) into domestic law will provide much needed protection for Aboriginal people currently detained in Victorian prisons, who are subjected to harmful and degrading practices such as strip searching and solitary confinement.

Solitary confinement

The UN Mandela Rules define solitary confinement as the "'confinement of prisoners for 22 hours or more a day without meaningful human contact," and define prolonged solitary confinement as solitary confinement for a time period in excess of 15 consecutive days.[51] They state that solitary confinement "shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority."[52] They prohibit the use of solitary confinement for people "with mental or physical disabilities when their conditions would be exacerbated by such measures."[53]

The UN Havana Rules, which focus on children, state that "all disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned."[54] The Committee on The Rights of the Child has reiterated that solitary confinement should not be used on children.[55]

Solitary confinement is a fundamentally harmful practice. As Lachsz and Hurley have noted:

> Solitary confinement is 'strikingly toxic to mental functioning' and can cause long-term, irreversible harm (Grassian, 2006, p. 354). As documented by Walsh et al. (2020), the cruel impact of the practice has been recognised in case law from Australia and across the world.
>
> Solitary confinement has a particularly detrimental impact on Aboriginal and Torres Strait Islander people, with the Royal Commission into Aboriginal Deaths in Custody noting the 'extreme anxiety

[51] Rule 44 of the Mandela Rules.
[52] Rule 45(1), ibid.
[53] Rule 45(2), ibid.
[54] Rule 6.7 of the Havana Rules.
[55] United Nations Committee on the Rights of the Child (2019). General Comment No. 24 on children's rights in the child justice system, at (95(h).

suffered by Aboriginal prisoners committed to solitary confinement' and that it is 'undesirable in the highest degree that an Aboriginal prisoner should be placed in segregation or isolated detention'.[56]

In August 2021, VALS hosted a webinar on the harms of solitary as part of its *Unlocking Victorian Justice* webinar series. The recording of the webinar can be viewed here. VALS encourages Committee members to view this webinar, which outlines the medical evidence in relation to the harms of solitary confinement (both during and after incarceration) and includes the stories of people with lived experience of this archaic and barbaric practice.

Solitary confinement has a particularly detrimental impact on Aboriginal and/or Torres Strait Islander people, with the Royal Commission into Aboriginal Deaths in Custody noting that it is "undesirable in the highest degree that an Aboriginal person in prison should be placed in segregation or isolated detention."[57] Protective and Transfer Quarantine in prisons to limit the spread of COVID-19 has amounted to solitary confinement in Victoria, as these regimes were not accompanied by extensive safeguards for the wellbeing of detained people. VALS is aware of include people being permitted only 12 minutes out of their cell per day, with no opportunity to exercise.

Strip searching

The law in Victoria allows incarcerated people to be strip searched when there is a belief based on reasonable grounds that the search is necessary for the security or good order of the prison, or the safety or welfare of any incarcerated person, or that the incarcerated person being searched is hiding something that may pose a risk.[58] The standards for strip searching in Victoria are lower than those in other Australian jurisdictions.[59]

Through our work with Aboriginal and/or Torres Strait Islander people who have been imprisoned, we know the inherently harmful and devastating impacts of practices such as strip searching and urine testing. These practices can often be used as a tool of power and control by police and prison officers. They can also re-traumatise people in prison and can be used discriminatorily against Aboriginal and/or Torres Strait Islander people. Harmful practices in prison can impact a person's ability to heal even once they are back in the community.

People in prison are far more likely to have a history of trauma than the general population. Upwards of three quarters of imprisoned women in Australia are victim-survivors of domestic abuse and sexual

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[56] Lachsz and Hurley, 'Why practices that could be torture or cruel, inhuman and degrading treatment should never have formed part of the public health response to the COVID-19 pandemic in prisons' (2021)

[57] Human Rights Law Centre et al. (2021), *Joint open letter on ongoing and arbitrary use of 14 day quarantine in prisons*. Available at https://www.hrlc.org.au/s/Open-letter-29-March-2021.pdf.

[58] S. 45 of the *Corrections Act 1986*.

[59] In adult prisons in New South Wales, strip searches can only be performed when absolutely necessary[59] and never involve body cavity searches. See Inspector of Custodial Services, New South Wales (2020). Inspection standards: For adult custodial services in New South Wales, at 40.9 and 40.13. In the ACT, strip searching is only performed on reasonable grounds and in the least restrictive manner possible, while respecting the dignity of the detainee. [See] Inspector for Custodial Services, ACT (2019). ACT Standards for Adult Correctional Services, Standard 28.

violence. These issues disproportionately affect Aboriginal and Torres Strait Islander people, who are 13.9 times more likely to be imprisoned in Victoria than non-Aboriginal people.

Evidence shows that strips searching is often over-used, ineffective in uncovering contraband, and unnecessary. There is also evidence that strip searching practices and powers are prone to abuses of power by prison guards. Some data shows that Aboriginal and/or Torres Strait Islander people in prison are subjected to disproportionate rates of strip searching compared to non- Aboriginal and/or Torres Strait Islander people.

- In the ACT women's prison between October 2020 and April 2021, 58% of strip searches were of Aboriginal women, who made up only 44% of the prison population.[60]
- In 2017, the Victorian Ombudsman identified "a significant number of routine and unnecessary strip searches", including searches of detained people before and after receiving visits, in violation of the Victorian Charter, the Mandela Rules, and prison policy. The Ombudsman recommended this practice should immediately cease; that recommendation was not accepted by the Government.[61]
- In 2021, IBAC exposed serious misconduct in the way that strip searches are managed and conducted. Several specific incidents of inappropriate searches were investigated by IBAC, which found that staff were unfamiliar with the human rights standards supposed to govern their behaviour and that prison management did not properly investigate complaints about inappropriate searches.[62] Most concerningly, IBAC reported that the General Manager of Port Phillip Prison told its investigators that strip searches were "one of the options available to assert control" over people in prison.[63]

Thompson v Minogue

The issue of routine strip searching in prisons in Victoria has been considered by both the Supreme Court and the Victorian Court of Appeal in a case brought by Dr. Craig Minogue.

In 2021, the Supreme Court held that the order that Dr Minogue submit to urine testing and strip searches before urine testing breached his rights to privacy and dignity and humane treatment under Sections 13 and 22 of the Victorian Charter.

[60] Dani Larkin (2021), 'Excessive strip-searching shines light on discrimination of Aboriginal women in the criminal justice system', *The Conversation*. Accessed at https://theconversation.com/excessive-strip-searching-shines-light-on-discrimination-of-aboriginal-women-in-the-criminal-justice-system-163969.
[61] IBAC (2021), *Special report on corrections*, p54. Accessed at https://www.ibac.vic.gov.au/docs/default-source/special-reports/special-report-on-corrections---june-2021.pdf?sfvrsn=ee450c8c_2.
[62] IBAC (2021), *Special report on corrections*, p54, 62.
[63] Ibid, p53.

In 2022, the Victorian Government appealed the decision to the Court of Appeal, and VALS intervened in the matter on the basis that the practices of strip searching have a significant detrimental impact on Aboriginal people who are incarcerated in Victorian prisons.

The Court of Appeal found that the government did not back up its claims that routine strip searches prior to urine tests were necessary or effective. The Government did not sufficiently explain why pre-existing and less harmful alternatives, such as x-ray body scanners, were not used. However, the Court of Appeal reversed the Supreme Court's decision on urine testing and found this procedure did not breach Dr Minogue's human rights.

Leave is being sought to appeal the case to the High Court.

It is clear that strip searching is being used for general discipline and order in Victorian prisons. The legislative threshold for strip searching is too low, and training on human rights standards is wholly inadequate. Legislation needs to raise the bar so that strip searching is only to be used as a last resort, not as a routine tool for corrections staff.

Impact of incarceration on education and access to culture

Article 14(2) UNDRIP provides that "Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination." Furthermore, article 11 provides that "Indigenous peoples have the right to practise and revitalize their cultural traditions and customs."

VALS continues to be concerned about the harmful impacts of detaining children, including in relation to their health and wellbeing, as well as access to education and connection to culture and Country. In Australia, the minimum age of criminal responsibility is 10 years, meaning that Aboriginal children as young as 10 years old can be removed from their families and detained in a youth prison. Aboriginal and/or Torres Strait Islander children are disproportionality impacted by the low age of criminal responsibility, as they are more likely than non- Aboriginal and/or Torres Strait Islander children to have contact with the youth justice system at an early age, less likely than non- Aboriginal and/or Torres Strait Islander l children to receive a caution from police, and more likely to be charged with a criminal offence.

Detaining children is harmful for many reasons, but has significant detrimental impacts on access to education and culture. Children in the youth justice system often have complex needs, and have invariably been let down by the adults and systems in their lives. We should not be punishing our children for the failures of others. Children must be given a chance to learn from their mistakes and grow up to contribute to our communities.

In addition to the harmful effects of incarcerating children, connection to culture and Country is also undermined when parents are incarcerated and children are left at a higher risk of contact with child protection and youth justice. In particular, over-incarceration of Aboriginal and/or Torres Strait Islander women in Victoria has significant and widespread impacts for dependent children, including disconnection from culture and Country.

85% of women in prison in Australia have been pregnant at some point in their lives, and more than half have a dependent child at the time of their imprisonment.[64] Research indicates that approximately 5% of all children in Australia will have an imprisoned parent, while approximately 20% of Aboriginal and/or Torres Strait Islander children will experience the incarceration of a parent.[65]

Although Aboriginal cultural rights are explicitly recognised under Section 19 of the Victorian *Charter on Human Rights and Responsibilities*, implementing UNDRIP in Australia will provide additional legal protection for these rights.

Police presence in schools

VALS is also concerned about proposals by Victoria Police to establish a police presence in classrooms as a way of rebuilding their relationships with communities. Proposals such as this run the risk of increasing Aboriginal and/or Torres Strait Islander children's contact with the youth justice system and undermining access to education without discrimination.

In May 2021, VALS called on the Victorian Government to block Victoria Police's plans to re-establish a police presence in schools. We need to limit contact of children, especially Aboriginal and/or Torres Strait Islander children, with police and the criminal legal system, to safeguard their education and wellbeing.[66]

Victoria has not had a state-wide police-in-schools scheme since the Police Schools Involvement Program was scrapped in 2006. At the time, Victoria Police acknowledged that there was no clear evidence that police in schools were having any positive impact.[67] Youth offending has continued to drop since that time, and Victoria remains the state with the lowest 'youth offender' rate in Australia, apart from the ACT.[68] It is still the case that putting police in schools is a policy proposal with no evidence to support it.

To the contrary, international evidence clearly shows that the presence of police in schools leads to more contact with the criminal legal system for children. Schools with an embedded police officers

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[64] Australian Institute of Health and Welfare, *The Health of Australian Prisoners,* 2018, pp. 14 and 72.
[65] Quilty, S. (2011). The Magnitude of Experience of Parental Incarceration in Australia. 12(1) Psychiatry, Psychology and Law 256-257.
[66] STATEMENT: Victoria must abandon proposal to put police in classrooms – Victorian Aboriginal Legal Service (vals.org.au)
[67] Fears over police-in-schools program (theage.com.au)
[68] Why police in schools won't reduce youth crime in Victoria (theconversation.com)

are more likely to refer students to law enforcement for minor behavioural issues. This disproportionately affects minority youth, and has led to criminalisation of, and police violence against, African-American children in the United States.

The Victorian Government has committed in the Aboriginal Justice Agreement Phase 4 to reduce young Aboriginal and/or Torres Strait Islander people's interactions with the criminal legal system by improving access to diversion programs and other community initiatives.[69] Putting police in classrooms would have the opposite effect and increase the over-policing of Aboriginal youth.

Education and engagement with schooling is a crucial protective factor for children at risk of coming into the criminal legal system. The presence of police officers would mean schools are no longer a safe space for many Aboriginal and/or Torres Strait Islander children, and would perversely increase the likelihood of disengagement.

Accountability for Implementing UNDRIP

Since endorsing UNDRIP in 2009, the Australian Government has done very little to implement UNDRIP in Australia. Article 38 of UNDRIP requires that the Australian Government make all reasonable efforts to incorporate the Declaration into domestic legislation and policy. In addition to the responsibility to incorporate UNDRIP in Australia, the Government must also consult with Aboriginal and/or Torres Strait Islander people and seek guidance as to how UNDRIP should be implemented in law. Beyond references to self-determination throughout Victorian policy materials, there has been no attempts to incorporate UNDRIP in legislation. The enactment of the Bill is the starting point for the Government to adhere to its responsibility to implement UNDRIP in Australia.

Incorporating UNDRIP in Federal and State and Territory legislation creates a binding responsibility on Governments to comply with the Articles of UNDRIP. Article 40 of UNDRIP gives rise to a remedial cause of action for infringements upon the individual and collective rights of Aboriginal and Torres Strait people. It is important that Aboriginal and Torres Strait Islander communities are afforded this opportunity, by ensuring UNDRIP is incorporated into law. While reference to self-determination in policy materials is an important step towards the recognition of the importance of self-determination, failure to implement legislation that is informed by self-determination and other Articles of UNDRIP leaves Aboriginal communities without access to appropriate legal remedies where their collective and individual rights are infringed upon.

Currently, when legislation or policy is not compliant with UNDRIP ,there is no mechanism available to ensure the non-compliant instrument is amended. Aboriginal and/or Torres Strait Islander Communities and ACCOs can raise concerns with the relevant Government agency but cannot access

[69] Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement Phase 4 – A partnership between the Victorian Government and Aboriginal community. Available at https://files.aboriginaljustice.vic.gov.au/2021-02/Victorian%20Aboriginal%20Justice%20Agreement%20Phase%204.pdf.

any remedial processes to ensure the relevant instrument in amended to comply with UNDRIP. The Government's lack of compliance with UNDRIP, including, amongst other things, the failure to appropriately consult ACCOs and Aboriginal and/or Torres Strait Islander Communities in the development of legislation and policy that impacts Aboriginal people[70] and failure to enact UNDRIP in Australian legislation,[71] does not afford Aboriginal and Torres Strait Islander communities the opportunity to bring an action before the courts to ensure compliance with their rights under UNDRIP. Implementation of UNDRIP not only creates proactive protection of rights by ensuring legislation is consistent with the principles of UNDRIP, but Article 40 also creates a reactive right to bring an action where there has been a lack of compliance with UNDRIP.

The Bill states that the Prime Minister's office must provide a report each financial year on the measures taken during that year in line with UNDRIP, specifically in relation to engaging with Aboriginal communities and ACCOs to ensure that all laws of the Commonwealth are consistent with UNDRIP, and the preparation and implementation of the Action Plan required under section 8 of the same Bill. It is proposed that the report will then be reviewed by the Australian Human Rights Commission and the Productivity Commission, who will undertake a review of the report. However, Aboriginal and Torres Strait Islander communities must be central to the review process. The Bill must be amended to reflect this.

UNDRIP has been successfully implemented in other nations around the world. Whether the recognition of UNDRIP was through the enactment or amendment of relevant legislation, or findings and orders of the judiciary, the recognition of UNDRIP is incredibly important to Indigenous peoples around the world. Nations such as Bolivia, Ecuador, Chile, El Salvador, Congo, Central African Republic, Nepal, Cambodia, and Myanmar have all enacted legislative and constitutional amendments that recognise and uphold the rights of Indigenous peoples as a separate set of rights and responsibility of law makers.[72] Canada recently enacted the *United Nations Declaration on the Rights of Indigenous Peoples Act* (the **Canadian Act**). The Canadian Act is largely reflected in Senator Thorpe's Bill, and should be used by the Australian Government as a reference.

Enshrining UNDRIP in Commonwealth legislation, such as the *United Nations Declaration on the Rights of Indigenous Peoples Bill 2022,* is the starting point to ensuring the rights of Aboriginal and Torres Strait Islander peoples are upheld and respected in all laws and practices of this country. The Bill upholds the important principles enshrined within UNDRIP, as discussed in detail in this submission and other VALS materials and publications linked within this submission. There is a plethora of materials available and examples of other nations implementing UNDRIP that provides a framework for the effective and appropriate implementation of UNDRIP in Australia.[73] It is imperative that

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[70] *United Nations Declaration on the Rights of Indigenous People* Art 18.
[71] Ibid, Art 38.
[72] United Nations Department of Economic and Social Affairs, *The State of the World's Indigenous Peoples: Implementing the United Nations Declaration on the Rights of Indigenous Peoples,* 2019, ST/ESA/371.
[73] For example, the OHCHR, UNDP, IFAD, IPU, SPFII and DESA joint publication; *Implementing the UN Declaration on the Rights of Indigenous Peoples; Handbook for Parliamentarians No. 23,* 2014.

Aboriginal and/or Torres Strait Islander communities and ACCOs be involved in the development of any frameworks that impact upon Aboriginal and Torres Strait Islander peoples.

There must be genuine consultation with Aboriginal and/or Torres Strait Islander communities on the way that UNDRIP is implemented in Australia, in line with self-determination. The Bill provides a critical framework for implementing UNDRIP and it acts as a starting point for Federal and State legislative amendments going forward. Implementation of UNDRIP would not simply end with the enactment of a Bill and amendments of relevant legislation. The flow-on effects of enacting the Bill in reform to practices, policies and legislative reform will be ongoing, and, in fact, will require extensive changes across systems of regulation and service provision. The Bill also creates a framework for holding the Government accountable for the ongoing implementation of the proposed Act and would ensure that the current practice of tokenistic application and incorrect interpretations of self-determination throughout Australian legislation would be addressed.

RECOMMENDATIONS

Recommendation 14. All Australian governments must genuinely consult with Aboriginal and/or Torres Strait Islander communities on the way in which UNDRIP is implemented in Australia.

Recommendation 15. The Victorian Parliament should amend the *Charter of Human Rights and Responsibilities 2006* (Vic) to explicitly include the right of Aboriginal and/or Torres Strait Islander peoples to self-determination, and to ensure that it is consistent with UNDRIP.

Recommendation 16. Any State or Territory legislation that conflicts with UNDRIP, or the Bill, should be amended to remedy the contradiction.