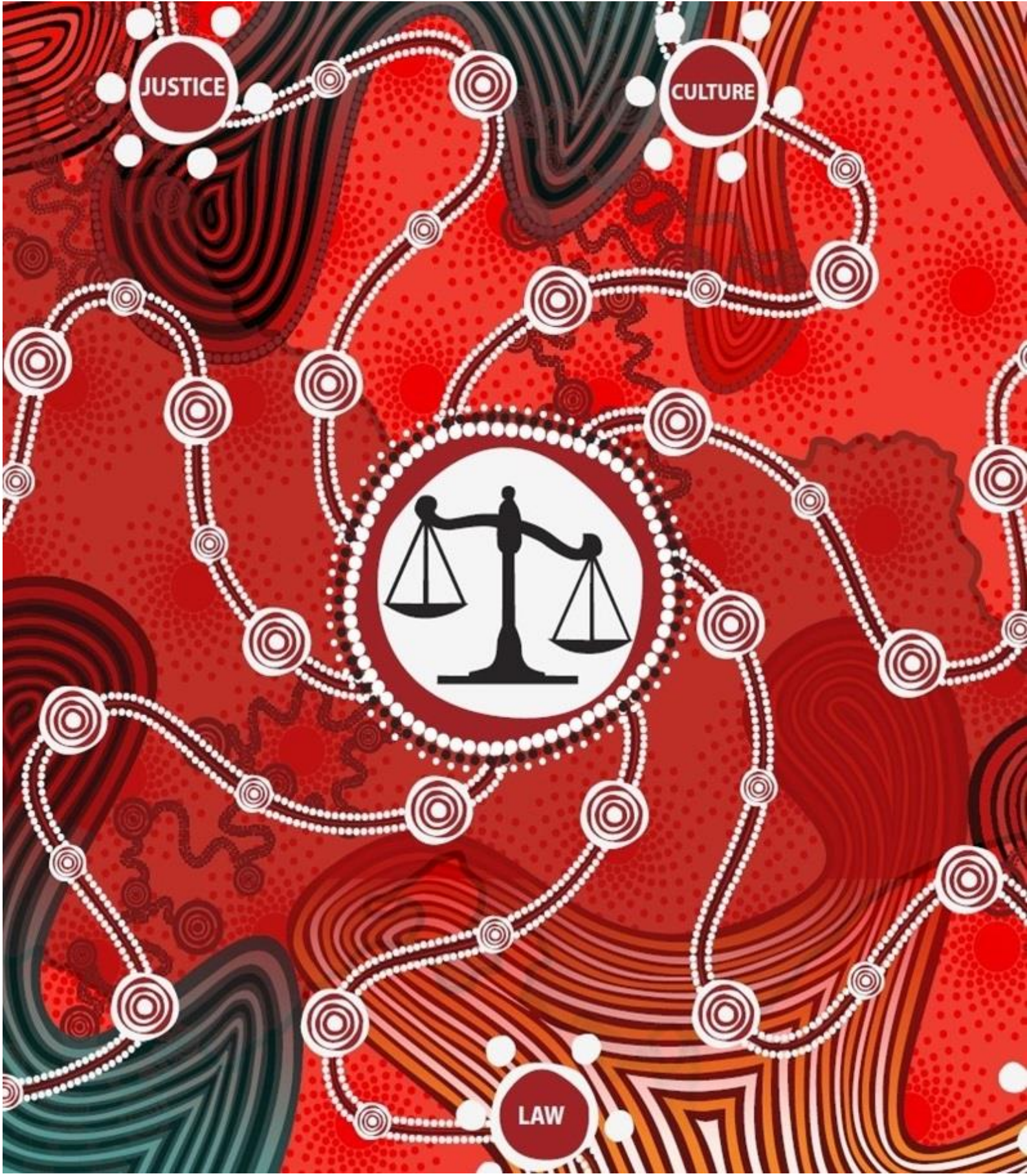

Victorian Aboriginal Legal Service Nuther-mooyoop to the Yoorrook Justice Commission: Child Protection

November 2022

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

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

Our Civil and Human Rights Practice provides advice and casework to Aboriginal people in areas including infringements; tenancy; victims of crime; discrimination and human rights; Personal Safety Intervention Orders (**PSIO**) 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 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]
- Aboriginal Community Justice Reports[4]

Policy, Research and Advocacy

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

Acknowledgements

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

Throughout this submission, we use the word 'Aboriginal' to refer to both Aboriginal and Torres Strait Islander people, communities and organisations. VALS acknowledges that there are many Aboriginal people in Victoria who have Torres Strait Islander heritage, and many Torres Strait Islander people who now call Victoria home.

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

- Anna Gibson (Principal Managing Lawyer, Balit Ngulu)
- Negar Panahi (Senior Solicitor, Balit Ngulu)
- Patrick Cook (Head of Policy, Communications & Strategy)
- Fergus Peace (Policy, Research & Advocacy Officer)
- Kin Leong (Principal Managing Lawyer, Criminal Law)

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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.

[4] See https://www.vals.org.au/aboriginal-community-justice-reports/.

- Grace Donohoe (Managing Lawyer, Criminal Law)
- Sarah Schwartz (Principal Managing Lawyer, Wirraway Specialist Litigation Practice)

SUMMARY OF RECOMMENDATIONS

1. Introduction

Recommendation 1. The Victorian Government should extend the deadline for the Yoorrook Justice Commission's final report to at least June 2026.

Recommendation 2. The Yoorrook Justice Commission should provide further opportunities for individuals and organisations to make written submissions, with longer submission deadlines and consultation periods.

Recommendation 3. Yoorrook should summons key witnesses from the generalist child protection system and related organisations, as well as hearing evidence from Aboriginal people and organisations.

Recommendation 4. Yoorrook should compel the production of key documents and information from the Victorian Government and other relevant stakeholders.

2. Child protection, community and culture

2.1 Rates of First Peoples child removal

Recommendation 5. The Victorian Government must commence publicly reporting, on a regular basis, data and information relating to the impact of incarcerating parents (and other primary carers), on children. Particularly, this information should identify when children come into contact with the Child Protection system and/or are removed from their families subsequent to their carers' incarceration. The way this data is reported should be consistent and presented in a manner that will enable comparisons across different regions of Victoria and include information on whether parents/carers and children are Aboriginal and/or Torres Strait Islander. It should enable the identification of gaps in programs and services, and systemic racism.

Recommendation 6. The Victorian Government should implement the Council of Europe's recommendations that "before a judicial order or a sentence is imposed on a parent, account shall be taken of the rights and needs of their children and the potential impact on them. The judiciary should examine the possibility of a reasonable suspension of pre-trial detention or the execution of a prison sentence and their possible replacement with community sanctions or measures… Where a custodial sentence is being contemplated, the rights and best interests of any affected children should be taken into consideration and alternatives to detention be used as far as possible and appropriate, especially in the case of a parent who is a primary caregiver."

Recommendation 7. The Victorian Government should require training for child protection staff to ensure they can provide a culturally appropriate and supportive service to Aboriginal children and families.

Recommendation 8. Child Protection should establish an alternative intake and referral pathway that could be conducted in partnership with ACCOs, and establish a clearer differentiation between the investigation and support functions of child protection.

Recommendation 9. The Victorian Government should expand the financial support and services available to parents and kinship carers, to reduce the disparity with the resources made available to foster carers.

2.2 Court proceedings in child protection matters

Recommendation 10. Marram-Ngala Ganbu should be expanded to all locations of the Children's Court. Consideration should be given to how Marram-Ngala Ganbu could operate in Magistrates' Courts in locations where there is no Children's Court.

Recommendation 11. The Victorian Government should consider allocating funding that would enable ACSASS advice to be received directly by the Court, not only recounted by Child Protection.

Recommendation 12. The Children's Court should appoint a best-interests lawyer from an Aboriginal Legal Service to represent any Aboriginal child in a child protection proceeding, unless the child is already represented.

Recommendation 13. Aboriginal Legal Services should be funded to develop and provide legal training to ACSASS practitioners in other Aboriginal Community Controlled Organisations.

2.3 The Aboriginal Child Placement Principle

Recommendation 14. Yoorrook should gather the data and evidence necessary to assess the disparity in funding between support for family preservation, compared to funding and support for out-of-home placements.

Recommendation 15. The Victorian Government should improve its compliance with the intent and letter of the Aboriginal Child Placement Principle, including by:

- Developing a 'presumptive provision' in legislation which requires the Court to recognise the inherent harm to an Aboriginal child of being removed from their parents
- Giving greater priority to keeping sibling groups together, in both decision-making about placements and in the allocation of resources
- Committing to continuous implementation of the ACPP, including ongoing monitoring of whether it is possible to achieve reunion with parents or a move to a placement higher in the ACPP hierarchy, instead of prioritising placement stability

2.4 Culture, stability and the best interests of the child

Recommendation 16. The Department of Families, Fairness and Housing should not prioritise placement stability over the inherent interests of Aboriginal children in remaining connected to their family and culture.

Recommendation 17. Legislation should be amended to replace Family Reunification Orders, Care by Secretary Orders and Long-term Care Orders for Aboriginal children with a new Care and Protection Order. The Care and Protection Order should be legislated as follows:

Care and Protection Order

(1) A care and protection order—

(a) confers parental responsibility for the child on the Principal Officer to the exclusion of all other persons; and

(b) must provide that if, while the order is in force, the Principal Officer is satisfied that it is in the child's best interests, the Principal Officer may in writing direct that a parent of the child is to resume parental responsibility for the child.

(2) A care and protection order remains in force for the period specified in the order which must either be a period—

(a) not exceeding 12 months; or

(b) exceeding 12 months but not exceeding 2 years, if the Court is satisfied that there are special circumstances which warrant the making of an order for such a period.

(3) A care and protection order may be made on the application of the Principal Officer

(4) A family preservation order applying to a child at the date of an application for a care and protection order in relation to the child continues in force until the application is determined.

(5) If the Court decides not to make a care and protection order, it may, if satisfied that the grounds for the finding under section 274 still exist, make—

(a) an order requiring a person to give an undertaking under this Part; or

(b) a family preservation order in respect of the child; or

(c) an order extending a family preservation order that is in force in respect of the child.

Conditions on a Care and Protection Order

(1) A care and protection order may include conditions to be observed by—

(a) the child in respect of whom it is made; or

(b) a parent of the child.

(2) Conditions that may be included under subsection (2) are conditions that the Court considers—

(a) to be in the best interests of the child; and

(b) are reasonably capable of being carried out by each person who will be subject to the condition

(3) The conditions that may be included in accordance with subsection (3)(a) must include a condition or conditions concerning contact between the child and a parent of the child or another person of significance to the child unless contact would place the child at an unacceptable risk of harm

(4) In assessing whether contact would place a child at an unacceptable risk of harm any views expressed by the child must be considered taking into account the child's age and stage of development.

(5) The conditions that may be included in accordance with subsection (2)(a) may include a condition that the child must live with a specified person or persons for the duration of the order;

(6) A condition cannot be included in accordance with paragraph (6) unless the specified person or persons referred to in paragraph (6) consent to the making of the order;

Application for extension of a Care and Protection Order

(1) The Principal Officer may apply to the Court for an extension or additional extension of the period of a care and protection order;

(2) An extension application may be made at any time while the order is in force.

(3) If an extension application is made in respect of an order, the order continues in force until the application is determined.

(4) The Court must not extend a care and protection order unless the Court is satisfied that—

(a) firstly, a family preservation order is not appropriate in the circumstances; and

(b) secondly, a permanent care order is not appropriate in the circumstances having regard to the criteria in s.323 that must be satisfied before a permanent care order can be made in respect of an Aboriginal child.

(5) Subject to sub-section (4), the Court may extend a care and protection order if it is satisfied that this is in the best interests of the child.

Change to nature of order

(1) If under a care and protection order the Principal Officer directs that a parent or parents of the child are to resume parental responsibility for the child, then on and from the date of the direction—

(a) the Principal Officer ceases to have parental responsibility for the child; and

(b) the parent resumes parental responsibility for the child as specified in the direction; and

(c) the care and protection order is taken to be a family preservation order giving the Principal Officer responsibility for the supervision of the child and placing the child in the day-to-day care of the parent or parents who have parental responsibility for the child; and

(d) Division 3 applies to the order; and

(e) the order ceases to be a care and protection order for the purposes of this Act.

(2) The Principal Officer must give a copy of a direction under this section to—

(a) the Court; and

(b) the child; and

(c) the parent of the child.

(3) The Principal Officer may apply to the Court to determine that the order is to include conditions.

(4) The Court may determine that the order is to include conditions of a kind referred to in section 281, without requiring the parties to attend, or be represented at, the proceeding.

(5) If the Court makes a determination under subsection (4), the order is taken to include those conditions as if they were included in the order under section 281.

2.5 Promoting kinship care

Recommendation 18. The Working With Children Check system should be reformed so that any person can apply to VCAT for a review if they are barred from applying for a Check due to past offending.

2.6 Compliance with other special measures for Aboriginal children

Recommendation 19. The Department for Families, Fairness and Housing should improve its compliance with cultural support planning requirements.

Recommendation 20. The Children's Court should have greater powers to require cultural support plans to be developed and implemented.

Recommendation 21. Legislation should be reformed so that Aboriginal children and parents have right to choose or agree to the selection of an Aboriginal person to contribute their views under section 12(1)(a) of the CYFA.

Recommendation 22. The Department for Families, Fairness and Housing should fully comply with its obligation to convene an Aboriginal Family-Led Decision-Making meeting before making any significant decision about an Aboriginal child.

Recommendation 23. The Department for Families, Fairness and Housing should fully comply with its obligations to seek advice from ACSASS, and should ensure that full information is provided to enable the ACSASS practitioner to provide informed and effective advice.

Recommendation 24. The Victorian Government should deliver adequate resources to ACCOs to significantly increase the capacity of ACSASS, to enable the timely delivery of expert advice.

3. Self-determination and governance of the child protection system

3.1 Consultation on legislative changes

Recommendation 25. The Victorian Government should consult with all relevant Aboriginal Community Controlled Organisations when developing reform proposals for the child protection system.

3.2 Delegation to Aboriginal agencies

Recommendation 26. The Victorian Government should develop standalone child protection legislation for Aboriginal children and their families, to enable the transfer of the complete set of child protection functions to ACCOs and address the systemic failings of existing legislation, policy and practice.

4. Child protection and the criminalisation of Aboriginal children

Recommendation 27. Staff in residential care and the child protection system should have the requisite qualifications and experience to work with vulnerable children, with complex needs, in residential care.

Recommendation 28. Comprehensive de-escalation training and guidelines should be developed and implemented for residential care staff and Victoria Police.

Recommendation 29. Cultural awareness training for residential care workers should be accompanied by specific anti-racism training and training on systemic racism.

Recommendation 30. Complaints and disciplinary procedures for Victoria Police and child protection staff should be improved to provide accountability for compliance with the *Framework* by reducing police callouts and reducing criminalisation of children in residential care.

Recommendation 31. The Victorian Government should include residential care units and secure care in the mandate of oversight mechanisms, National Preventive Mechanisms (NPMs), which are to be established in compliance with Victoria's OPCAT obligations.

Recommendation 32. Community Legal Education (CLE) for children in the child protection system, including specific CLE for Aboriginal children, should be properly funded.

Recommendation 33. Resourcing of Youth Specialist Officers in Victoria Police should be increased so that these officers can fulfil their specialist functions.

Recommendation 34. Children who go missing from residential care should not spend extended periods of time in police custody when they are found. There is a responsibility on Residential Care staff and Victoria Police to avoid or reduce time spent in custody.

Recommendation 35. The Victorian Government should establish a review and escalation mechanism to ensure that the *Framework to reduce criminalisation of young people in residential care* is applied in individual cases.

DETAILED SUBMISSIONS

1. Introduction

VALS witnesses the impacts of the child protection system in all parts of our work. Lawyers in our family practice take on child protection matters, acting for both children and parents. Our criminal practice and specialist youth practice, Balit Ngulu, frequently act for 'crossover kids' who are criminalised while in the child protection system. Our specialist litigation practice, Wirraway, supports police complaints and litigation emerging from the mistreatment of Aboriginal children in the child protection system. Our Wirraway and civil lawyers appear at coronial inquests into the deaths of children known to Child Protection. Many of the adult clients of our criminal practice have a history of involvement with, and neglect by, the child protection system during their youth. Our Community Justice Programs frequently support families and children who are struggling to be fairly treated by Child Protection.

From all these parts of our work, it is clear that the child protection system – far from rectifying the genocidal policies of its history – continues to inflict severe injustices on Aboriginal children and families, and is also at the root of profound injustices in other parts of society. VALS welcomes Yoorrook's decision to prioritise examination of the child protection system, and the opportunity to make submissions to this vital inquiry.

1.1 Historic and contemporary injustices

The Issues Paper published by Yoorrook states that the current focus of investigation is on "issues requiring urgent action." Given this specific focus, the limited time available and our expertise, VALS' submission is focused on issues in Victoria's current child protection legislation, policy and practice.

It is essential, however, that these issues are understood in the context of the historic practices that the current child protection system emerged from.

In 1877, the Parliament of Victoria established the Royal Commission into the Aborigines to "advise as to the best means of caring for, and dealing with them."[5] As part of the hearings, Reverend Friedrich August Hagenauer, Manager of the Ramahyuck Aboriginal Station, provided evidence, including the below statement arguing that Aboriginal children needed to be raised on the missions:

> Several cases have shown that the children do not prosper away from the stations. Colonel Anderson had a little boy, who for a little while **was a pet in the house; but he grew disobedient**, and after a time they could do nothing with him. **He was a very wild child. His parents, had been shot in Queensland**, where he was rescued. I was asked to receive the boy, and he is now getting on very nicely in every respect; and the arrangement is that **after he has passed the standard he is to be given back again**; and no doubt he will go on very well after that. Now, if such a child as that were to be boarded out, **I do not think you would find many people take sufficient interest in the child**; it is almost unnatural. In this case the greatest attention was paid to him, but **he was like a fish out of water**, and needed influence such as is to be met with only on the station.

[5] Royal Commission on the Aborigines (1877), *Report of the Commissioners*.

> I know several cases of girls. Captain Phillips, a squatter in the western district, had one. The child was prospering very well; got a good education, and was in every way looked upon as a child of the family, but when she came to a certain age - thirteen or fourteen - **the black nature got so strong in her that her mistress was glad to get her to my place out of temptation**, away from the men on their station. I could give many other similar instances.
>
> Another reason is that if the stations are to be kept up, we must have a boarding-house for the children, and it would not be more expensive to keep them there than anywhere else. – Reverend F. A Hagenauer, 23 May 1877 [6]

In this short statement, we can witness many of the attitudes and prejudices that have been held by colonial powers in Victoria. The boy referred to by Hagenauer was kept as a "pet" – a common way of referring to Aboriginal children who had been taken into white households. Hagenauer refers to the boy variously as disobedient, wild, and a fish out of water, reflecting attitudes of colonialists that Aboriginal children were less than human and unable to control themselves. Hagenauer does not attribute any supposed bad behaviour to the boy's parents being killed, or even display empathy or sympathy to the boy in relation to his parent's death. When referring to the girl, Hagenauer blames her for tempting the men on the station because "the black nature got so strong in her" and thereby implying that something innate in her undid all the "prospering" and "good education" that the "white family" had supposedly provided her. Hagenauer also suggests keeping Aboriginal children on the stations is the cheapest way to manage them, reflecting an ongoing attitude that sees governments underfund child protection services, particularly for Aboriginal children.

The attitudes of Hagenauer persisted through the Stolen Generations and continue today. The Stolen Generations are one of the more widely known aspects of Australia's colonial history. But there is a perception among many non-Aboriginal people that these shameful practices belong to a different era, and can be clearly distinguished from the well-intentioned, if not always effective, operation of the modern child protection system.

For Aboriginal people, there is no such bright line to be drawn. As can be seen above, Hagenauer presented himself as well intentioned, as did many architects of the policies that created the Stolen Generations. And there was no sharp transition away from this era. The *Bringing Them Home* report found that forcible removals in Victoria were increasing in the 1970s – towards the end of the period commonly included in the Stolen Generations – not decreasing:

> "Despite the apparent recognition in government reports that the interests of Indigenous children were best served by keeping them in their own communities, the number of Aboriginal children forcibly removed continued to increase, rising from 220 in 1973 to 350 in 1976."[7]

[6] Ibid, p35. Emphasis added.
[7] Human Rights and Equal Opportunity Commission (1997), *Bringing them home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, p58.

In 2020-21, 10.9% of Aboriginal children under 1 in Victoria were removed from their parents and placed in out-of-home care.[8] 10.3% of all Aboriginal children were in out-of-home care.[9]

Removals today are somewhat less likely to involve outright deception by the state or total isolation from family and culture. That does not change the reality that many Aboriginal people know members of the community who have experienced removal in their own generation, their parents' generation and their grandparents' generation. Every injustice perpetrated on Aboriginal people by today's child protection system is experienced as part of an unbroken line, through the Stolen Generations and back to Victoria's colonial origins.

1.2 Submission timeframes

VALS strongly supports the Commission's request for an extension of the deadline for it to complete its work. Most concerningly, the Terms of Reference for Yoorrook specifically state that the Commission should be conducted in a way that:

> "Provide[s] a safe, supportive and culturally appropriate forum for First Peoples to exercise their rights to truth and justice… [and receive] testimony from First People who are victims, witnesses or survivors."[10]

The current timeline for Yoorrook is not conducive to providing a safe and culturally appropriate forum for our people. The Truth and Reconciliation Commission in South Africa was originally scheduled to take 3 years, but was ultimately extended and lasted for 7 years.[11] Even with this extended timeline, there was significant criticism of the efficacy of the Commission and its capacity to engage with all survivors.[12,13] Other similar processes across the world have regularly been criticised for "requiring a victim to remain a victim" and for "Indigenous peoples' trauma and healing [being] co-opted by the state and detached from broader Indigenous political goals for self-determination."[14]

We have not provided extensive case studies in this nuther-mooyoop due to our concerns that, in most instances, we could not adequately inform current or former clients about this submission and include their story in a way that was not exploitative or put them at risk of retraumatisation.

VALS has noted in previous submissions to the Victorian Government and Parliament that inappropriately short consultation deadlines, particularly for over-burdened and under-resourced Aboriginal Community Controlled Organisations, do not allow the development of meaningful responses and are an affront to self-determination. Yoorrook needs more time to conduct its work properly, and the Aboriginal Community (including Community Controlled Organisations) needs more time to prepare thorough analysis of the questions raised by the Commission. Unfortunately, the submission deadlines put in place for the current Issues Papers are extremely short, and in many ways

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[8] Australian Institute of Health and Welfare (2022), *Child protection Australia 2020-21*, Supplementary Table 5.1.
[9] Australian Institute of Health and Welfare (2022), *Child protection Australia 2020-21*, Supplementary Table 5.10.
[10] Victorian Government, Letters Patent Yoo-Rrook Justice Commission, p4.
[11] United States Institute for Peace, Truth Commission: South Africa
[12] Amnesty International, South Africa: Truth and Justice: Unfinished Business in South Africa.
[13] International Center for Transitional Justice, South Africa: Background: Facing Apartheid's Legacy.
[14] Professor Megan Davis, The truth about truth-telling, The Monthly.

reproduce the problematic approach of Government to consulting with Aboriginal organisations. Yoorrook and the Victorian Government should consider providing a greater level of resourcing to enable better engagement with the Commission.

In order to ensure that it is not simply exploiting Aboriginal and/or Torres Strait Islander people for trauma-porn, the Victorian Government must allow Yoorrook to determine its own timeline and resource it in a manner that allows it to fulfill the terms of reference.

As VALS has stated previously, the Victorian Government cannot utilise Yoorrook and Treaty negotiations to delay needed reforms and the enabling of self-determination.[15] VALS believes that the Victorian Government should urgently raise the age of criminal responsibility, reform bail laws to make bail more accessible, implement independent detention oversight and independent police oversight, and properly fund Aboriginal Community Controlled Organisations to implement self-determined solutions for our communities. The delay of such reforms, and the implementation of reforms that cause harm to Indigenous peoples, has undermined the legitimacy of similar processes to Yoorrook, such as the Truth and Reconciliation Commission of Canada.[16]

We also believe an extension is vital to address concerns about the operation of Yoorrook to date. It has been reported in the media that there have been several senior staffing changes during the short existence of the Commission, including the resignation of a Commissioner.[17] Yoorrook has been set a huge task that requires a lot of hard work, and it must be assumed that the turnover of staff has created delays that contribute to the need for an extension of Yoorrook's deadline.

VALS raise the issues of engagement with Aboriginal and/or Torres Strait Islander people, resourcing, staffing, and difficulties faced by similar processes only to mount the case for an extension. We want the Yoorrook Justice Commission to be successful and complement a reform process that is desperately needed. In the future, Yoorrook should provide adequate timelines for Aboriginal organisations and community to make meaningful contributions, regardless of its own deadlines.

The child protection system has perpetrated injustices on Aboriginal Communities since its foundation. These injustices are not a matter of isolated problems or shocking historical incidents. They are deeply embedded in the operation of the system, and rectifying them requires a close examination of every part of that system. The Yoorrook Justice Commission has a unique opportunity to use its extensive powers to conduct this kind of examination. VALS has provided suggestions for key witnesses, documents and evidence that Yoorrook may wish to consider in Annexes A and B.

[15] Victorian Aboriginal Legal Service, Self-Determination Will Decide the Success of the Yoo-rrook Justice Commission.
[16] Coulthard, Glen, *Red skin white masks: Rejecting the colonial politics of recognition*, pp127-128.
[17] Latimore, Jack, Yoorrook commission beset by troubles ahead of interim report, The Age.

RECOMMENDATIONS

Recommendation 1. The Victorian Government should extend the deadline for the Yoorrook Justice Commission's final report to at least June 2026.

Recommendation 2. The Yoorrook Justice Commission should provide further opportunities for individuals and organisations to make written submissions, with longer submission deadlines and consultation periods.

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Recommendation 4. Yoorrook should compel the production of key documents and information from the Victorian Government and other relevant stakeholders.

2. Child protection, community and culture

2.1 Rates of First Peoples child removal

The intergenerational trauma inflicted by colonisation, continued through generations of unjust government action, has meant that severe social problems – such as family violence, mental illness, disability, homelessness, substance use and educational disadvantage – disproportionately affect Aboriginal people. The failure to properly respect the right to self-determination means that Aboriginal people in Victoria also continue to be actively harmed by the state through over-policing, systemic racism in policing, and a lack of cultural competence in social services. Child Protection perpetuates its own involvement: Aboriginal people can find their families embroiled in the system because they had little opportunity to experience positive parenting in their own childhoods, when their only experience of parenting was that of a neglectful State as their guardian.

All of these issues are major risk factors for involvement with Child Protection and removal to out-of-home care. Identifying the drivers of Child Protection involvement in Aboriginal families, therefore, goes hand-in-hand with truth-telling about all aspects of the impacts of colonisation on Aboriginal people in Victoria.

VALS notes that a clearer understanding of why Aboriginal children are removed from their parents is obstructed by the lack of publicly available data on the child protection system. This is a serious obstacle to oversight and accountability in the child protection system. With respect to Aboriginal children, it is at odds with the principles of Indigenous Data Sovereignty and Indigenous Data Governance. These issues are discussed further below, in section 3.5.

Our nuther-mooyoop does not reproduce the significant amount of research that has previously been done on the drivers of Aboriginal child removals. We recommend to Yoorrook the Commission for Children and Young People's (**CCYP**) 2016 report, *Always was, always will be Koori children: Systemic inquiry into services provided to Aboriginal children and young people in out-of-home care in Victoria*

Instead, VALS wishes to highlight failures of the child protection system itself, which lead to children being placed in out-of-home care when their removal might have been avoided. This section discusses parental incarceration, and the failure of early intervention to avoid removal. Section 2.2 discusses the conduct of Children's Court matters, and sections 2.3 and 2.4 focus on the Aboriginal Child Placement Principle and the impact of prioritising placement stability over connection to family and culture; these issues are also highly relevant to the number of Aboriginal children being removed from their parents' care.

2.1 (a) Parental incarceration

VALS is particularly concerned about the role of the criminal legal system and incarceration as drivers of child removal. The impact of parental incarceration was recently considered by a Victorian

Parliamentary inquiry, to which VALS made submissions; we refer Yoorrook to that submission.[18] The impact of parental imprisonment ought to be central to decisions regarding criminal charging, bail, sentencing practices, and parole. The Parliamentary Inquiry recommended that the Victorian Government make changes to court procedures to achieve this,[19] though it has fallen short of VALS' recommendation to require courts to consider the best interests of any affected children and use alternatives to detention as far as possible.[20]

At present, nearly two in five people incarcerated in Australia are parents.[21] A further 38% of people imprisoned are responsible for caring for one or more children in their communities.[22] The disproportionate rate of Aboriginal incarceration means that nearly 20% of all Aboriginal children experience paternal incarceration,[23] and 17% experience maternal incarceration.[24] This is a driver of child removals – both directly, when children are removed due to parental incarceration, and indirectly, because parental incarceration damages parent-child bonds, childhood attachments and educational outcomes,[25] raising the risk of involvement with Child Protection. While data is limited, an academic study of 'crossover children' (involved with both Child Protection and the youth justice system) found that 62% of Aboriginal crossover children had been exposed to household contact with the criminal legal system, compared to 35% of non-Aboriginal children.[26] These challenges become a vicious intergenerational cycle: 46% of Aboriginal men incarcerated in New South Wales had been placed in out-of-home care as children, with 30.8% having one or more parents incarcerated for a period when they were a child.[27] Parental incarceration clearly contributes to the separation of families and associated trauma for many children.[28]

VALS particularly urges Yoorrook to direct its attention to the serious lack of data about how parental incarceration affects Child Protection. VALS has not been able to obtain data about how many children come into the child protection system, or are the subject of care orders, because of a parent being incarcerated. This makes it impossible to properly understand this driver of Aboriginal child removals. This is one part of a set of broader failures around data transparency in the child protection system, discussed in section 3.5.

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[18] VALS (2022), *Submission to the Inquiry into Children of Imprisoned Parents*. Material in the next two paragraphs is based on this submission and on VALS (2022), *Harm Reduction Not Harm Maximisation*.
[19] Victorian Parliament (2022), *Inquiry into children affected by parental incarceration*, Recommendation 7.
[20] Victorian Aboriginal Legal Service (2022), Submission to the Inquiry into Children of Imprisoned Parents, Recommendation 3. As would be consistent with the human rights approach taken by the High Court of Australia in *Minister of State for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20, (1995) 183 CLR 273 (7 April 1995).
[21] Victorian Association for the Care and Resettlement of Offenders, Families and Prisons in Victoria (Report, February 2018).
[22] Australian Institute of Health and Welfare, The Health of Australia's Prisoners (Report, 2018), p14.
[23] Indigenous Justice Clearinghouse, Indigenous people in Australia and New Zealand, and the intergenerational effects of incarceration (Research Brief, December 2019), p1.
[24] Ibid.
[25] Ibid.
[26] Baidawi & Sheehan (2019), ''Crossover kids': Offending by child protection-involved youth', Australian Institute of Criminology Trends and issues paper, p6.
[27] Chris Rossiter et al., '"Learning to become a better man": Insights from a fathering program for incarcerated Indigenous men' (2017), The Australian Journal of Social Issues 52(1), pp13-14.
[28] Peggy C. Giordano & Jennifer E. Copp, '"Packages of Risk"; Implications for determining the effect of maternal incarceration on child wellbeing' (2015), Criminology & Public Policy 14(1), pp157-158.

RECOMMENDATIONS

Recommendation 5. The Victorian Government must commence publicly reporting on a regular basis, data and information relating to the impact of incarcerating parents (and other primary carers), on children. Particularly, this information should identify when children encounter the Child Protection system and/or are removed from their families subsequent to their carers' incarceration. The way this data is reported should be consistent and presented in a manner which will enable comparisons across different regions of Victoria, and include information on whether parents/carers and children are Aboriginal and/or Torres Strait Islander. It should enable identification of gaps in programs and services, and systemic racism.

Recommendation 6. The Government should implement the Council of Europe's recommendations that "before a judicial order or a sentence is imposed on a parent, account shall be taken of the rights and needs of their children and the potential impact on them. The judiciary should examine the possibility of a reasonable suspension of pre-trial detention or the execution of a prison sentence and their possible replacement with community sanctions or measures… Where a custodial sentence is being contemplated, the rights and best interests of any affected children should be taken into consideration and alternatives to detention be used as far as possible and appropriate, especially in the case of a parent who is a primary caregiver."

2.1 (b) Early intervention to avoid removal

The first priority of child protection services – especially for Aboriginal children, in light of the historical context – should be to support children to remain connected with their parents and family wherever possible. Unfortunately, the reality is that many Aboriginal children end up being removed from their parents' care because of a failure to provide effective early intervention.

When Aboriginal children first become known to Child Protection, there is an opportunity to provide support and assistance that would help families care for their children at home. This opportunity is too often missed because Child Protection practitioners are not adequately trained in doing their work in a culturally appropriate manner. VALS clients have reported feeling judged by Child Protection practitioners, making them uncomfortable and less willing to interact and positively engage. Without a positive relationship with Child Protection practitioners, it is more likely that protective concerns will escalate to the point of Child Protection seeking a protection order. It is essential that Child Protection practitioners are properly trained to work in a culturally safe and supportive manner with Aboriginal children and their families, to enable positive engagement and better outcomes for Aboriginal children.

There is also uncertainty and reluctance among Aboriginal families about how to access services and whether they can do so safely. Some families are unsure of what services are available to them. Many Aboriginal parents are concerned that seeking assistance will be used as evidence of their failures as a parent, in either child protection or family law proceedings. This too often leads to families being unsupported, which can lead to the escalation of contact with the child protection system. VALS recommends an alternative intake and referral pathway that could be conducted in partnership with

ACCOs, accompanied by stronger efforts to differentiate between the staff who provide support services and those who conduct investigations. These measures would give Aboriginal families greater confidence to engage with support services and help ensure early interventions are in place to avoid removals wherever possible.

VALS is also concerned about major disparities in the funding and services for children in out-of-home care compared to those on family preservation orders at home. This concern was identified by the national peak body for Aboriginal children's issues, SNAICC (the Secretariat of National Aboriginal and Islander Child Care) in its policy statement about permanency amendments in 2016:

> "A lack of adequate focus on family support services and on reunification across jurisdictions is another major concern in the context of permanency planning. Service system responses remain reactive rather than preventative, with only $719 million (or just 16.6 per cent of total child protection expenditure) invested in supporting families, compared to $3.62 billion in child protection and out-of-home care, in the 2014-15 financial year."[29]

Residential care services are extremely expensive: the Victorian Ombudsman reported in 2017 an average cost of $279,808 per child per year.[30] Foster carers receive a 'care allowance' to care for a child of between $11,141 and $45,382 per year.[31] Many additional support packages are also available.

Parents do not receive tens of thousands of dollars from Child Protection to support their children's safety and allow families to stay together, despite the fact that economic marginalisation is often a key underlying factor that leads to Child Protection involvement. Many support packages are available only to children who have been removed; even those which are theoretically available to children at home rarely are in practice. For example, Targeted Care Packages are an additional package of funding intended to help avoid placing a child in residential care, by providing individualised support to the child.[32] While the guidelines for these packages mention the possibility of packages for children living at home, they also clearly state that children already in out-of-home care will be prioritised[33] and almost all the examples given in the document relate to supporting children living with a foster carer or other family member, not with their parents.

Even kinship carers tend to receive substantially less financial support than unrelated foster carers. While kinship care does involve the removal of a child from their parents, it is typically far less disruptive. A well-supported kinship placement can be an effective intervention to prevent removal to residential care or a foster carer. However, kinship carers typically receive substantially lower care allowances than foster carers, because Child Protection does not properly support them to request a

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[29] SNAICC (2016), *Achieving Stability for Aboriginal and Torres Strait Islander Children in out-of-home care,* p10.
[30] Victorian Ombudsman (2017), *Investigation into the financial support provided to kinship carers*, p7.
[31] Department of Families, Fairness & Housing, 'Support for home based carers in Victoria', web page accessed 18 November 2022.
[32] Department of Health and Human Services (2018), *Targeted Care Packages Guidelines January 2018*, p7.
[33] Ibid, p8.

higher allowance.[34] Foster carers can also receive support from funded service providers and other funds such as Placement Support Brokerage, which kinship carers are not eligible for.[35]

These differences in availability of funding and support are also inconsistent with the intent of the Aboriginal Child Placement Principle, discussed further in section 2.3 below.

RECOMMENDATIONS

Recommendation 7. The Government should require training for child protection staff to ensure they can provide a culturally appropriate and supportive service to Aboriginal children and families.

Recommendation 8. Child protection should establish an alternative intake and referral pathway that could be conducted in partnership with ACCOs and establish a clearer differentiation between the investigation and support functions of child protection.

Recommendation 9. The Government should expand the financial support and services available to parents and kinship carers, to reduce the disparity with the resources made available to foster carers.

2.2 Court proceedings in child protection matters

There are several issues with the way child protection matters are handled in court, and the powers of courts in these matters, which harm the interests of Aboriginal children and families.

2.2 (a) Marram-Ngala Ganbu

In addition to appropriate powers, courts hearing child protection matters should use non-adversarial proceedings which enable fairer participation, a clearer understanding of the child's situation, and a constructive approach to identifying solutions. Marram-Ngala Ganbu is a program which provides such an approach in Children's Court family division matters, launched at Broadmeadows Children's Court in 2016 and expanded to Shepparton in 2021. The Marram-Ngala Ganbu program involves 'Koori Family Hearing Days', and "seeks to provide a more effective, culturally appropriate and just response for Koori families through a culturally appropriate court process, that enables greater participation by family members and culturally-informed decision-making."[36] An evaluation of the initial program at Broadmeadows found positive results including:[37]

- Aboriginal families being "more likely to follow court orders … in part due to the encouragement from the Magistrate and the support" of other supporting staff

[34] Victorian Ombudsman (2017), *Investigation into the financial support provided to kinship carers*, p8.
[35] Ibid.
[36] Arabena et al. (2019), *Evaluation of Marram-Ngala Ganbu, prepared for the Children's Court of Victoria*, p3.
[37] Ibid, p4.

- Positive reports from Aboriginal young people and families, leading to "greater engagement with court processes and services, and more satisfaction with decisions"
- Early indicators of increased cultural connections, more families staying together, and more children being placed in Aboriginal kinship care
- Greater accountability of Child Protection practitioners to the court
- Greater compliance with the Aboriginal Child Placement Principle
- Improved cultural competency among magistrates and lawyers, which can be beneficial in other proceedings in generalist courts

These are highly significant findings: they demonstrate that Koori Family Hearing Days directly tackle many of the gravest failings of the child protection system, including the failure to hear Aboriginal family's voices, the alienation of family members from the system and its processes, and the lack of court oversight for Child Protection. Marram-Ngala Ganbu is a highly effective program, which should be expanded more broadly. It currently operates once per week at Broadmeadows, and once per fortnight at Shepparton. Koori Family Hearing Days should be run regularly in every Children's Court – and, where necessary, Magistrates' Courts which hear many child protection matters – so that they are accessible to every Aboriginal family.

2.2 (b) ACSASS advice in the Children's Court

A major problem with the hearing of child protection matters in the Children's Court is the way that advice from the Aboriginal Child Specialist Advice and Support Service (**ACSASS**) is provided in the legal process. ACSASS is discussed in detail below in section 2.6(e). In short, Child Protection requests advice from ACSASS to fulfil its legal obligation to consider the advice of a 'relevant Aboriginal agency', and this advice is part of the evidence before the Court. While the advice of ACSASS is a positive measure to support Aboriginal children receiving culturally appropriate care from the child protection system, its implementation is often problematic.

One issue with the role of ACSASS advice in Children's Court proceedings is the way that this advice is presented. Many Magistrates presiding in child protection proceedings have expressed their frustrations about not having direct access to the ACSASS practitioner, instead having to rely on the child protection practitioner's account of the advice provided from ACSASS. It should be noted that the relevant Department of Families Fairness and Housing (**DFFH**) program requirements provide that ACSASS should be consulted on how their advice is presented to the Children's Court.[38] Child Protection retaining control over the presentation of ACSASS advice is inconsistent with self-determination and limits the Court's ability to obtain the information it needs.

A further concern is that decisions which Child Protection are required to consult ACSASS about have complex legal implications, and ACSASS practitioners often do not have the legal expertise to give effective or informed advice. This lack of awareness or expertise can then be exploited by Child

[38] Department of Health and Human Services (2019), *Program requirements for the Aboriginal Child Specialist Advice and Support Service*, p43.

Protection practitioners seeking for the ACSASS practitioner to endorse their decision. For example, where DFFH is seeking a family reunification order as the recommended disposition in a protection application proceeding, ACSASS may provide its endorsement of this disposition based solely on a mistaken belief that reunification to a parent will occur upon the making of that order. In reality, reunification to a parent would instead be achieved by a family preservation order, an undertaking or no order at all. If the ACSASS practitioner does not have the requisite legal expertise to recognise this – and particularly if they have been given misleading or partial information by Child Protection – their advice will have the opposite of the effect they intended.

Where this occurs, the Aboriginal child and family would arguably be in a better position without any input from ACSASS at all. However, ACSASS advice, in general, remains a critical measure, and the preferable solution to this difficulty would be for all Aboriginal children to have a best-interests lawyer from an Aboriginal Legal Service appointed to represent them, unless already represented on a direct instructions basis. This would help achieve the intended objective of s.12 of the *Children, Youth and Families Act* (**CYFA**) and overcome to a large extent the problem of ACSASS practitioners without adequate legal expertise. An Aboriginal Legal Service appointed to perform the role of best-interests lawyer would consult directly with ACSASS to ensure the views of the relevant Aboriginal agency form part of its assessment of the best interest of the child.

At present, the Court can determine that a child should be represented on a best-interests basis if the child is under 10, or over 10 if the Court decides the child is not mature enough to give instructions.[39] A lawyer appointed on a best-interests basis is required to:

(a) act in accordance with what he or she believes to be in the best interests of the child; and
(b) communicate to the Court, to the extent to which it is practicable to do so, the instructions given or wishes expressed by the child. [40]

This best-interests role gives the legal representative a broad remit, which can extend to "interviewing the child and/or relevant adults",[41] and would enable a best-interests lawyer to consult with ACSASS.

The decision to appoint a best-interests lawyer is at the Court's discretion. Victoria Legal Aid has previously recommended an expansion of best-interests lawyers for Aboriginal children at risk of being placed in out-of-home care. [42] VALS recommends that a best-interests lawyer should be appointed for all Aboriginal children under 10, and any Aboriginal child over 10 who is not otherwise represented. This could be achieved through legislation or through Children's Court protocols.

In addition to the appointment of best interest lawyers for all Aboriginal children, VALS also recommends that it be funded to develop and provide legal training tailored to the role ACSASS providers are funded to deliver. This will ensure that each Aboriginal agency performing the ACSASS

[39] *Children, Youth and Families Act 2005*, s524(4).
[40] *Children, Youth and Families Act 2005*, s524(11).
[41] Children's Court of Victoria (2022), *Research Materials, Chapter 4: Family – General*, p35.
[42] Victoria Legal Aid (2017), *Child Protection Legal Aid Services Review – Final Report*, p20.

role is equipped with consistent legal knowledge and necessary skills to provide advice to Child Protection on significant decisions that have direct legal consequences.

2.2 (c) Conduct of Child Protection

As noted above, applications to remove a child from their family are generally heard in an adversarial process in either the specialist Children's Courts, or the Magistrates' Court sitting as Children's Courts in regional areas. Formal, adversarial legal processes are frequently inappropriate for Aboriginal people: they can be intimidating and confusing, and can prevent productive interventions from family members, Elders and Respected Persons, or the parties themselves.

These issues are particularly concerning in child protection matters because of the conduct of Child Protection practitioners. Court reports from Child Protection practitioners to the Court are drafted in a way to maximise the "prosecution" of the DFFH case against the parent, using deficit language and including unnecessary details whilst also omitting relevant context. This reporting is also stigmatising and can further discourage Aboriginal parents from engaging with child protection services. It also has no regard for the interests of the child – who also receives the report, and whose life is sensationalised by it.

RECOMMENDATIONS

Recommendation 10. Marram-Ngala Ganbu should be expanded to all locations of the Children's Court. Consideration should be given to how Marram-Ngala Ganbu could operate in Magistrates' Courts in locations where there is no Children's Court.

Recommendation 11. The Victorian Government should consider allocating funding that would enable ACSASS advice to be received directly by the Court, not only recounted by Child Protection.

Recommendation 12. The Children's Court should appoint a best-interests lawyer from an Aboriginal Legal Service to represent any Aboriginal child in a child protection proceeding, unless the child is already represented.

Recommendation 13. Aboriginal Legal Services should be funded to develop and provide legal training to ACSASS practitioners in other Aboriginal Community Controlled Organisations.

2.3 The Aboriginal Child Placement Principle

The Aboriginal Child Placement Principle (**ACPP**), known as the Aboriginal and Torres Strait Islander Child Placement Principle (**ATSICPP**) in some jurisdictions, is a principle for child protection work which has been widely accepted in Australia since the early 1980s.[43] It "aims to ensure government intervention into family life does not disconnect children from their family and culture".[44]

[43] SNAICC (2013), *Aboriginal and Torres Strait Islander Child Placement Principle: Aims and Core Elements*, p5.
[44] Ibid, p2.

As articulated by the national peak body for Aboriginal children's issues, SNAICC, the principle has five elements: prevention, partnership, placement, participation and connection.

In Victoria, the ACPP is the basis of sections 13 and 14 of the *Children, Youth and Families Act*. However, the principle stated by SNAICC is significantly broader than the placement hierarchy provided for in s.13(2) and the requirement to consult in s.13(1)(a) and (2)(b). The SNAICC principle includes five critical elements: prevention, partnership, placement, participation and connection and each is explained in a guide produced to support implementation.

Victoria has implemented the ACPP in a manner which does not respect its intention of helping prevent the removal of Aboriginal children and maintain their connections to family. It is VALS' experience that the implementation of s.13 and s.14 of the CYFA in practice is not consistent with the SNAICC guide to implementation of the ACPP,[45] in three key respects.

a) A placement high on the ACPP hierarchy should not trump a child remaining in or returning to parental care

b) The requirement to prioritise placements with Aboriginal family should include placements with siblings

c) The obligation to apply the ACPP is continuous and ongoing and should not be trumped by achieving stability in a placement

2.3 (a) A placement high on the ACPP hierarchy should not trump a child remaining in or returning to parental care

The SNAICC implementation guide makes clear that proper implementation of the ACPP involves actively supporting reunification to parental care. The SNAICC guide describes reunification as "a process that involves assessment, the provision of appropriate services to support families to address protective concerns, and engagement and collaboration with the child, parents and extended family to ensure the child's safe and timely return within the family."[46]

The CYFA is also clear that a child is only to be removed from the care of his or her parent if there is an unacceptable risk of harm to the child.[47] The unacceptable risk threshold applies to *all* children, however in practice where an Aboriginal child is assessed to be at risk in the care of their parent/s, the implementation of the ACPP seems to take priority over conducting a complete and thorough assessment of whether the risk to the child is unacceptable. Where a stable and safe placement is identified with an Aboriginal family member, the requirement to continuously assess and apply the unacceptable risk test to return the child to parental care is in VALS' experience applied less rigorously than it is for non-Aboriginal children.

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[45] SNAICC (2019), *The Aboriginal and Torres Strait Islander Child Placement Principle: A Guide to Support Implementation*.
[46] Ibid, p72.
[47] *Children, Youth and Families Act 2005,* s.10(3)(g).

Case law makes clear that the assessment of risk must take into account factors that would mitigate risk, and thereby reduce an otherwise unacceptable risk to an acceptable risk.[48] However, as discussed above in section 2.1(b), it is VALS' understanding that DFFH expenditure to support out of home care placements especially for children with complex needs through the use of tailored or targeted care packages is significantly greater than the expenditure to support children with complex needs to remain in parental care. VALS recommends that Yoorrook gathers the data necessary to assess this disparity in funding, and to consider how it could be reallocated to reduce the ever-increasing number of Aboriginal children living out of parental care.

Case law also makes clear that the necessary assessment of risk involves balancing any perceived risk to the child remaining in parental care against the risk of harm caused by removal.[49] The majority of protection applications are based on a likelihood of future harm rather than on the grounds that the child has suffered 'actual harm'. Anecdotally former Children's Court Magistrate Power "believes that at least 80% fall into this category. Of these, the overriding concern in the majority is the risk of significant emotional or psychological harm as defined in s.162(1)(e) of the CYFA."[50] This is an important consideration when assessing whether there is an unacceptable risk to an Aboriginal child remaining in parental care, given the abundance of research that shows the removal of an Aboriginal child will cause actual harm.[51]

A legislative change that has been proposed in New South Wales would go some way to mitigating this problem. A 'presumptive provision' for Aboriginal children would recognise the inherent harm caused by removal and would help ensure that the application of the ACPP does not override the proper application of the unacceptable risk test. The proposed New South Wales provision also aimed to "force a reallocation of funding towards prevention by 'mandating the provision of support services to prevent entries into care' and allow courts to dismiss applications for care orders in circumstances where Child Protection cannot show it had considered 'alternatives'". [52]

Whilst placement with Aboriginal family may reduce *some* of the harm caused by removal from parental care, it does not eliminate harm altogether. Parents are the first and primary source of a child's connection to their culture as well as their primary figure of attachment. An Aboriginal child's right to a meaningful relationship and connection with their parents should not become subordinate to their rights to connection to their extended Aboriginal family or the broader Aboriginal Community. Applying the ACPP in this way is an example of the continuing paternalism that still exists within the way government agencies draft, interpret and apply legislation "for the benefit of" Aboriginal children.

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[48] *Secretary to DHHS v Children's Court of Victoria, Rosa Darcy (A Pseudonym) & Walter Ronny (A Pseudonym)* [2018] VSC 183 [46] (Zammit J); *Robinson v The Queen* (2015) VR 226, 240 [49] (Maxwell P and Redlich JA); see also *MacBain v DPP* [2002] VSC 321 [17] (Nettle J).

[49] See for example: *Secretary DHHS v Children's Court of Victoria & Emily Powell (a pseudonym)* [2020] VSC 144 [36] (Dixon J).

[50] Children's Court of Victoria (2022), *Research Materials, Chapter 5.1: Family Division – Child Protection*, p50.

[51] See for example the many case studies in the Bringing them Home report.

[52] The Guardian, 14 March 2022, ''People think it's all in the past': push to reform system taking Aboriginal kids from families'.

2.3 (b) The requirement to prioritise placements with Aboriginal family should include placements with siblings

The SNAICC implementation guide states: "When decisions pertaining to placement are made, precedence must be given to placing siblings together. For children in out-of-home care, sibling co-placement provides a sense of stability and is essential not only for the maintenance of familial connection but also the connection to community and culture."[53]

Section 13(2)(a) of the CYFA is expressed in mandatory terms: a child "must be placed" with relatives, a term which is defined in the legislation to include siblings.[54] This mandatory requirement should be a major focus of Child Protection decision-making and funding prioritisation. In VALS' experience, Child Protection does not prioritise making funding available to help keep siblings together, particularly large sibling groups. For example, where funding could be allocated to provide live-in support services or tenancy arrangements to keep a large sibling group together, Child Protection has instead opted to separate siblings into multiple placements to avoid this expenditure.

2.3 (c) The obligation to apply the ACPP is continuous and ongoing and should not be trumped by achieving stability in a placement

The SNAICC guide to implementation makes clear that "there is an enduring responsibility for practitioners to actively seek out placements within the child's family and community throughout their time in out-of-home care"[55] and that "a thorough process of family mapping and searching for and finding family carers should be integrated into child protection practice to inform initial placements, placement changes and regular placement review."[56]

A leading Children's Court case on the application of the ACPP is *DOHS and K siblings* [2013] VChC 1, where Wallington M stated:

> **"**The Aboriginal Child Placement Principle is not just a simple hierarchy of placement options. Its underlying premise is that of "cultural safety" i.e. that the best interests of an Aboriginal child are fostered by developing and maintaining his/her relationships with their family in ways consistent with their emotional and physical safety."[57]

In considering the children's cultural safety, Wallington M referred to the Full Court of the Family Court in *B and R and the Separate Representative (1995) FamCA 104* and its discussion at paragraph 38 regarding the admissibility of evidence as to the experiences of Aboriginal children in mainstream culture:

> "A. In Australia a child whose ancestry is wholly or partly indigenous is treated by the dominant white society as 'black', a circumstance which carries with it widely accepted connotations of an inferior social position. Racism still remains a marked aspect of Australian society. Daily references in the

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[53] SNAICC (2019), *The Aboriginal and Torres Strait Islander Child Placement Principle: A Guide to Support Implementation*, p47.
[54] S.3(1) CYFA.
[55] SNAICC (2019), *The Aboriginal and Torres Strait Islander Child Placement Principle: A Guide to Support Implementation*, p45.
[56] Ibid.
[57] DOHS and K siblings [2013] VChC 1, p12.

media demonstrate this. Aboriginal people are often treated as inferior members of the Australian society and regularly face discriminatory conduct and behaviour as part of their daily life. This is likely to permeate their existence from the time they commence direct exposure to the outside community and continues through experiences such as commencing school, reaching adolescence, forming relationships, and seeking employment and housing.

B. The removal of an Aboriginal child from his/her environment to a white environment is likely to have a devastating effect upon that child, particularly if it is coupled with a long term upbringing in that environment, and especially if it results in exclusion from contact with his/her family and culture.

C. Generally an Aboriginal child is better able to cope with that discrimination from within the Aboriginal community because usually that community actively reinforces identity, self-esteem and appropriate responses. Racism is a factor which Aboriginal children may confront every day. Because non-Aboriginals are largely oblivious of that, they are less able to deal with it or prepare Aboriginal children for it.

D. Aboriginal children often suffer acutely from an identity crisis in adolescence, especially if brought up in ignorance of or in circumstances which deny or belittle their Aboriginality. This is likely to have a significant impact upon their self-esteem and self-identity into adult life."[58]

Wallington M concluded the following in relation to evidence from the Children's Court Clinic in the matter:

> "Ms AM's assessment was thorough and well-meaning but in determining what weight to place on it I also take into account that she did not address the issue of cultural safety. Ms AM premised her assessment on the **misunderstanding that the Aboriginal Child Placement Principle only applies when children are first removed from their parent's care rather than laying down principles for Aboriginal children's long -term care.**"[59] (emphasis added).

Whilst the decision in *DOHS and K siblings* was made in 2013, it has unfortunately not influenced Child Protection practice.

The SNAICC guide to implementation notes that "regular reviews of a child's placement are a key practice component of the ATSICPP. There must be regular and comprehensive reviews of lower-level placements with a goal to reconnect with a prioritised placement – these reviews should be recorded."[60]

Beyond these three specific issues, there is widespread noncompliance with many of the requirements of the ACPP as articulated by SNAICC. A review by the Commission for Children and Young People in 2015 "could not find a single case where agencies complied with all the requirements to meet the intent of the principle"[61] and concluded that while there is strong compliance with the ACPP at the level of policy and program design, there is minimal compliance in practice.[62]

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[58] B and R and the Separate Representative (1995] FamCA 104, [38].
[59] DOHS and K siblings [2013] VChC 1, p13.
[60] SNAICC (2019), *The Aboriginal and Torres Strait Islander Child Placement Principle: A Guide to Support Implementation*, p50.
[61] Commission for Children and Young People (2015), 'In the child's best interests – About the inquiry', web page.
[62] Commission for Children and Young People (2015), *In the child's best interests: Inquiry into compliance with the intent of the Aboriginal Child Placement Principle in Victoria*, p15.

It is VALS' experience that this remains the same today. VALS strongly commends the CCYP's review to Yoorrook as many of the issues it identified have not been resolved. Problems with ACPP implementation observed by VALS include:

- Serious lack of cultural awareness and competence among Child Protection caseworkers, leading to Aboriginal families feeling 'judged' by caseworkers and being less willing to engage with services
- Aboriginal parents being denied visits, or allowed only supervised visits, because of vulnerabilities such as cognitive impairment, mental health issues or addiction
- Failure to require that a child is raised with a connection to their Aboriginal identity when they are placed with a non-Aboriginal parent or other relatives
- Applications for kinship placements being rejected on arbitrary or inadequate grounds, such as very old criminal records or the size of the carer's family, without consideration of the bias against Aboriginal people that may be embodied in this reasoning
- Child Protection practitioners do not properly identify a child's extended family and do not contact family members to gain an understanding of family and community connections available to support the child, instead using inadequate research (including internet searches)

These problems persist because of a serious lack of accountability and oversight when the ACPP is not properly implemented. The CCYP has made a number of recommendations to improve accountability. These included requiring all staff responsible for placement decisions to record evidence of why the placement was not made at each higher level of the ACPP placement hierarchy;[63] public reporting on compliance with the requirements of the ACPP;[64] independent monitoring of how the ACPP is implemented; and placing a greater level of accountability on CP staff when a kinship placement is made that is not at the highest level of the ACPP placement hierarchy.[65] Many of these recommendations have not been implemented. For example, Child Protection has still not developed or implemented a mechanism to accurately measure "regular reporting or external review of the system's compliance with the intent of the ACPP."[66]

SNAICC has reported a number of other problems with Victoria's implementation of the placement principle.[67] In addition to some of the issues identified above, SNAICC's review found problems with child protection practitioners' understanding of Aboriginal kinship relations, placement decisions being made too quickly in a way that favours placement with the first person to volunteer, and a failure

[63] Ibid, Recommendation 33.
[64] Commission for Children and Young People (2016), *Always was, always will be Koori children: Systemic inquiry into services provided to Aboriginal children and young people in out-of-home care in Victoria*, Recommendation 6.7.
[65] Commission for Children and Young People (2015), *In the child's best interests: Inquiry into compliance with the intent of the Aboriginal Child Placement Principle in Victoria*,, Recommendation 36.
[66] Commission for Children & Young People (2019), *In our own words: Systemic inquiry into the lived experience of children and young people in the Victorian out-of-home care system*, p. 97.
[67] SNAICC (2021), *Reviewing Implementation of the Aboriginal and Torres Strait Islander Child Placement Principle: Victoria*, pp16-19.

to consider how socioeconomic inequity affects Aboriginal families' willingness and ability to volunteer to care for a child.[68]

RECOMMENDATIONS

Recommendation 14. Yoorrook should gather the data and evidence necessary to assess the disparity in funding between support for family preservation, compared to funding and support for out-of-home placements.

Recommendation 15. The Victorian Government should improve its compliance with the intent and letter of the Aboriginal Child Placement Principle, including by:

- Developing a 'presumptive provision' in legislation which requires the Court to recognise the inherent harm to an Aboriginal child of being removed from their parents
- Giving greater priority to keeping sibling groups together, in both decision-making about placements and in the allocation of resources
- Committing to continuous implementation of the ACPP, including ongoing monitoring of whether it is possible to achieve reunion with parents or a move to a placement higher in the ACPP hierarchy, instead of prioritising placement stability

2.4 Culture, stability and the best interests of the child

Breaking Aboriginal children's connection with their culture and community is at the heart of the systemic injustice perpetrated by the child protection system since Victoria's colonial founding. The pain inflicted by separating a child from their parents is profound. This pain is compounded when separation from Aboriginal culture disrupts a child's ability to form a positive relationship to their identity and their community.

Unfortunately, the Victorian child protection system has adopted a fundamentally misguided approach to protecting Aboriginal children's connection with their culture. Child Protection has come to view the promotion of cultural connection as an *alternative* to keeping children with their parents and families, when the reality is that family connection is the foundation of meaningful cultural connection.

[68] Ibid, p18.

2.4 (a) Child Protection's prioritisation of 'stability'

Section 10 of the CYFA provides that the best interest of the child must always be the paramount consideration in child protection decision-making. Sub-section 10(3)(c) stipulates that one matter to be considered in determining the child's best interests is "the need, in relation to an Aboriginal child, to protect and promote his or her Aboriginal cultural and spiritual identity and development by, wherever possible, maintaining and building their connections to their Aboriginal family and community".

Sub-section 10(3)(c) is just one of 18 considerations and is secondary to the considerations in s10(2), which must *always* be considered. These include: "the need to protect the child from harm, to protect his or her rights and to promote his or her development (taking into account his or her age and stage of development)."

In practice, sub-section 10(2) has been re-interpreted in at least one presentation delivered by Child Protection policymakers, as the need to protect the child from harm, to protect his or her 'right to stability' and to promote his or her development (taking into account his or her age and stage of development).

The effect of this interpretation is to prioritise the stability of placement over the need to protect and promote a child's Aboriginal identity. Whilst VALS recognises that children benefit from stability, and that stability, in most cases, promotes a child's healthy development, it is not recognised as a human right and should be viewed as one of many factors relevant to decisions affecting a child. By contrast, a child's right to enjoy their culture is a human right expressly recognised and protected in the UN Convention on the Rights of the Child[69] and the Victorian Charter of Human Rights and Responsibilities.[70] In VALS' view, stability should never trump a child's right to maintain their culture or their connection to their parents, siblings and extended family and community. On the contrary, stability for Aboriginal children is dependent on maintaining the continuity of this connection as it is fundamental to their identity.

However, achieving stability has been used by Child Protection to justify limiting or eliminating a child's connection to their parents once the threshold for removal under s.10(3)(g) of the CYFA has been satisfied.[71] Where achieving stability eliminates the need for transport and/or supervision of a child's contact with their parents, there is an obvious incentive for an overburdened Child Protection workforce to take this approach, even if it is contrary to the principle that a child's best interests must always be the paramount consideration in decision-making. Issues with Child Protection workloads, and their inappropriate influence on Child Protection policy regarding 'stability', are discussed further in section 5.1.

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[69] *Convention on the Rights of the Child*, Article 30; opened for signature 20 November 1989, 1577 UNTS 3, (entered into force 2 September 1990) ('CRC'). Australia ratified the CRC in December 1990.
[70] Victorian Charter of Human Rights and Responsibilities, Article 19.
[71] Section 10(3)(g) provides that a child is only to be removed from the care of his or her parent if there is an unacceptable risk of harm to the child.

The introduction of CYFA commencing in 2007 heralded the start of an increased focus on achieving stability for children living in out-of-home care. For Aboriginal children, this increased focus on stability has become synonymous with increased disconnection from community and culture, notwithstanding special measures to mitigate against this.

Issues of attachment and stability for Aboriginal children were considered by the Children's Court in *DOHS and K siblings* [2013] VChC 1, in the context of a permanent care application. In finding that a Permanent Care Order would not be in the child's best interest, Wallington M placed weight on the evidence of "Dr Y" a specialist in cross-cultural children's issues stating at 14:

> [Dr Y's presentation] highlights "the importance of linking the development of a lifespan of positive social emotional development to the protective factor of having a strong Aboriginal identity and argues that removing securely attached Aboriginal children to the non-indigenous carers may not have the same implications as the attachment theory indicated." Dr Y said in evidence that research showed cultural connectiveness to be a protective factor that would reduce adolescent distress. The CYFA acknowledges this by its placement of cultural connections in the "best interests" provisions of section 10.
>
> When the CYFA replaced the Children and Young Persons Act (1989) in 2007, it incorporated the "fast tracking" of permanency timelines. Whereas under the previous legislation a Permanent Care Order was subject to a pre-condition that a child is out of its parent's care for a minimum of two years, the timeline in the CYFA was expressed to be 6 months. However, the incorporation of the Aboriginal Child Placement Principle into the legislation, and the power of veto over a Permanent Care Order given to VACCA in section 323(b) of the CYFA, reflects the recommendation of the Kirby report in relation to permanency planning for Aboriginal children that, all other things being equal, the child's current bonding and attachment should not be an impediment to a reunification to the child's Aboriginal family."[72]

In determining whether the children should be transferred from a placement with a non-Aboriginal carer to an "untested" placement with an Aboriginal family, Wallington M acknowledged that "proper recognition of an Aboriginal child's right to cultural safety means that an assessment of the children's current bonding and attachment cannot and should not be the be all and end all in determining an Aboriginal child's best interests which must take into account his/her long-term needs in a whole of life assessment."[73]

The SNAICC guide to implementation of the ACPP similarly makes the following observations in relation to achieving stability for Aboriginal children:

> While placements should provide a sense of permanency and stability for children, decisions relating to permanency of care should not cause harm by failing to guarantee family and cultural connections for Aboriginal and Torres Strait Islander children. For Aboriginal and Torres Strait Islander children, stability is grounded in the permanence of their identity in connection with family, kin, culture, and country; it does not rely exclusively on developing particular bonds with a single set of parents or carers, or on living in one house. There are differences in family life across nations, groups and families, but many long-practiced Aboriginal and Torres Strait Islander models of child rearing hold

[72] *DOHS and K siblings [2013] VChC 1*, p14.
[73] Ibid.

that children are cared for by various members of extended families, often moving between the homes of these family members.

Thus, programs and practices should endeavour to have no permanent care orders (or similar) made in relation to children in placements disconnected from family, community, culture and country. It is crucial to avoid permanency planning that would remove a child from their culture and family. As such, where permanency planning does take place, plans should prioritise the maintenance of relationships with family and cultural networks, and be developed by ACCOs.[74]

Unfortunately, stability has continued to be prioritised in Child Protection decision-making. In our view, this is partly due to the overburdened and under-resourced state of the Child Protection workforce, which is driving harmful policy decisions, as discussed in Section 5.1 below. The focus on stability has become even greater with more recent legislative changes.

2.4 (b) The permanency amendments

The most significant shift towards prioritising stability came in 2016 with far-reaching legislative amendments commonly referred to as the "permanency amendments".[75]

In summary these amendments introduced the following:

- The requirement for cultural support plans for Aboriginal children that are discussed below
- The restrictions on making permanent care orders for Aboriginal children that are discussed below
- Significant restrictions on both the length of a family reunification order and the extension of such order
- Changes to the length of a care by Secretary order from a maximum of 2 years to a non-variable 2 years (unless child turns 18 in meantime)
- Substantial amendments to the provisions governing permanent care orders, in particular placing significant limits on conditions involving contact between the child and the child's parent;
- The requirement for leave of the Court as a pre-requisite to a parent applying to vary or revoke a PCO;
- Repealed provisions involving a "stability plan" and included instead a requirement of one of five types of "permanency objectives" in a child's case plan;

An early review of the impacts of these amendments was conducted by the Commission for Children and Young People in 2017. It found that the number of permanent orders and applications for

[74] SNAICC (2019), *The Aboriginal and Torres Strait Islander Child Placement Principle: A Guide to Support Implementation*, p68.
[75] *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014* [No.61 of 2014] came into operation on 01/03/2016; See also *Children Legislation Amendment Act 2016* [No.8 of 2016] designed to correct errors and fill gaps.

permanent orders increased, as intended.[76] However, the number of children reunited with their families decreased.[77] There were significant increases in the number of orders where the government assumed exclusive parental responsibility, and Aboriginal children were significantly over-represented in this group.[78] These figures clearly show that greater permanency and stability are being achieved at the cost of disrupting more and more Aboriginal children's connections to their family.

Arguably it is the permanency objectives and restricted timeframes for reunification that pose the greatest harm to Aboriginal children as these provisions are in direct conflict with the ACPP and the best interest principle for Aboriginal children in s.10(3)(c) discussed above. The permanency objectives and restricted timeframes for reunification arguably also conflict with the unacceptable risk test in s.10(3)(g), also discussed above, given that this test is routinely applied in the Children's Court not only when a child is removed from parental care but also regarding decisions to return children to parental care.

Under the permanency objective provisions, a child's case plan must include one of five prescribed "permanency objectives".[79] The objective of ensuring that a child who has been removed from the care of their parent is returned to the care of their parent (known as a "family reunification" case plan objective) is only considered appropriate in circumstances where the child "has been in out of home care for a cumulative period of less than 12 months and the safe reunification of the child with a parent is likely to be achieved".[80]

Where a child "has been in out of home care for a cumulative period of 12 months or more and there is no real likelihood for the safe reunification of the child with a parent in the next 12 months" the appropriate permanency objective as required by the CYFA, in order of priority is first: adoption, second: permanent care and third: long-term out of home care.[81]

This position is in complete opposition to the position of ACCOs across Australia, summarised by SNAICC as follows:

> "Traditional adoption that severs the connection for children to their families and communities of origin is never an appropriate care option for Aboriginal and Torres Strait Islander children, except as it relates to traditional Torres Strait Islander adoption practices."[82]

Australia's position as reflected above is mirrored by other first nations peoples internationally as reflected in the following passage from the First Nations Child and Family Caring Society of Canada:

> Anglo European frames of reference, when applied to Aboriginal children, often fail in their efforts at predicting successful outcomes. Bonding, that tie between an individual care giver and her child that implies an in depth and deeply attached emotional relationship, has increasingly been a primary

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[76] Commission for Children and Young People (2017), *'…safe and wanted…': Inquiry into the implementation of the* Children Youth and Families Amendment (Permanent Care and Other Matters) Act 2014, p4.
[77] Ibid.
[78] Ibid, pp17-18.
[79] s.167(1) CYFA
[80] S.167(3) CYFA
[81] S.167(4)(a) CYFA
[82] SNAICC, "Achieving stability for Aboriginal and Torres Strait Islander children in out-of-home care: SNAICC Policy Position statement", July 2016, p14.

consideration guiding both practitioners and the courts in their efforts to make appropriate decisions in the best interests of a child. This, not surprisingly, is also more consistent with the individualistic ideology of Anglo European culture. It is also reinforced by a generic knowledge base informed almost exclusively through the study of non Aboriginal children and families.

While on the surface this consideration seems valid and appropriate, the fact remains that an Aboriginal child bonded to her non Aboriginal care giver is not (and many cases will attest to this) necessarily going to maintain the bonded relationship over time. Often the well bonded four year old becomes the raging adolescent bent on both personal and familial self destruction. While bonding is believed by many to be an accurate predictor of adoption success, no studies carried out with Aboriginal children in adoptive homes can be referenced to substantiate this belief. Again practical experience in the field leads me to conclude that bonding as an accurate predictor of success in adoptions is clearly challenged by reality, at least in reference to the experience of Aboriginal children.[83]

The restrictive timeframes not only apply to a child's case plan but also to the orders that are available to the Court to make. For example, if a child has been in out of home care for less than 12 months, the Court can only make a family reunification order for the remaining period of time up to a total cumulative period in out of home care of 12 months.[84] However, if the child has been in out of home care for 12 months or more but less than 24 months the court can similarly make a family reunification order for the remaining period of time up to a total cumulative period in out of home care of 24 months.[85] The CYFA is silent on the court's power to make a family reunification order in respect of a child who has been in out of home care for a cumulative period of 24 months or more.[86] There are also significant restrictions on the court's power to extend a family reunification order including being satisfied that—

(a) there is compelling evidence that it is likely that a parent of the child will permanently resume care of the child during the period of the extension;[87] and

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[83] Richard K; "A Commentary Against Aboriginal to non-Aboriginal Adoption" First Peoples Child & Family Review; Vol 1 Number 1 2004 pp101-109; 104.

[84] S.287A(2) CYFA

[85] S.287A(3) CYFA. Former Children's Court Magistrate Power provides the following commentary on the operation of these provisions: "The formulations in ss.287A(2) & 287A(3) – and ss.296(3) & 296(4) – appear to lead to a strange anomaly. If a child has been in out of home care under one or more of the relevant orders for a period totalling 330 days it would appear that under s.287A(2) the maximum period of a family reunification order is 35 days. However if the child has been in out of home care for a period totalling 390 days it would appear that under s.287A(3) the maximum period of a family reunification order is 340 days. The writer does not understand the rationale for this seemingly anomalous result. In *DHHS v Brown* [2018] VSC 775… the circumstances under which a judicial officer could appropriately adjourn a case so that the length of a subsequent family reunification order could be governed by s.287A(3) rather than s.287A(2) was a central issue…. [on appeal] Beach JA disapproved [of the] decision. However, his Honour fell short of holding that an adjournment for the purpose of circumventing ss.287A(2) & 294A(1)(a) could never be appropriate." Children's Court of Victoria (2022), *Research Materials, Chapter 5.1: Family Division – Child Protection*, p92.

[86] Former Children's Court Magistrate Power provides the following commentary on this issue: "There is no provision in s.287A which specifically applies if a child has been in out of home care for a total period that is 24 months or longer. Does the Court have power to make a family reunification order of up to 12 months duration in such a case pursuant to s.287(1)(c) or can a family reunification order not be made at all? There appears to be no authority on this issue which the writer discussed – without formally deciding – in *The K Children* [unreported, Children's Court of Victoria-Power M, 21/06/2016] and in… *The C & K Siblings* [unreported, Children's Court of Victoria-Power M, 23/04/2018, pp.38-39]": Children's Court of Victoria (2022), *Research Materials, Chapter 5.1: Family Division – Child Protection*, p92.

[87] S.294A(1)(a)

(b) the extension will not have the effect that a child will be placed in out of home care for a cumulative period that exceeds 24 months.[88]

Furthermore, the duration of an extension to a family reunification order must comply with the timeframes specified above for making the order.[89]

In addition to these restrictive timeframes the CYFA directs the court to have regard to the following matters under s.276A in making *any* protection order:

(1) In determining whether to make a protection order, the Court must have regard to advice from the Secretary as to—
  (a) if a case plan has been prepared in relation to the child, the objectives of the case plan; and
  (b) if the child has one or more siblings under the age of 18 years, the arrangements in place for the care of those siblings; and
  (c) the age of the child and the period of time that the child has spent in out of home care during the child's lifetime (whether or not as a consequence of a court order).

(2) In determining whether to make a protection order that has the effect of conferring parental responsibility for a child on the Secretary, the Court must have regard to advice from the Secretary as to—
  (a) the likelihood of a parent of the child permanently resuming care of the child during the term of the protection order; and
  (b) the outcome of any previous attempts to reunify any child with the parent of the child; and
  (c) if a parent of the child has previously had another child permanently removed from the parent's care, the desirability of making an early decision about the future permanent care arrangements for the child the subject of the proposed order; and
  (d) the benefits to the child of making a care by Secretary order to facilitate alternate arrangements for the permanent care of the child if—
    (i) the child is in out of home care as a result of an order under this Part and has been in out of home care under such an order for a cumulative period of 12 months; and
    (ii) there appears to be no realistic prospect of the child being able to safely return permanently to the care of the child's parent within a further period of 12 months; and
    (iii) there are no permanent care arrangements already available for the child; and

[88] S.294A(1)(b) CYFA

[89] For example, under s.296 CYFA, if a child has been in out of home care for less than 12 months, the Court can only extend the family reunification order for the remaining period of time up to a total cumulative period in out of home care of 12 months. However, if the child has been in out of home care for 12 months or more but less than 24 months the court can similarly only extend the family reunification order for the remaining period of time up to a total cumulative period in out of home care of 24 months.

(e) the desirability of making a permanent care order, if the child is placed with a person who is intended to have permanent care of the child.

(3) Section 287A(4) applies to the determination of a cumulative period under this section (except subsection (1)(c)).

Whilst these mandatory considerations and the strict timeframes were intended to encourage intensive efforts to find a solution within the first twelve months of a child being removed, this has not occurred in practice due to under-resourcing. Instead, the timeframes mean that "some children may be placed permanently outside of their birth family when this is not in their best interests."[90] This issue particularly affects Aboriginal families, because challenges of intergenerational trauma, mental health issues or family violence – which can make reunification hard to achieve within 12 or 24 months – disproportionately affect Aboriginal people in Victoria. The reunification timeframes also make it extremely difficult for parents serving longer prison sentences to be reunified with their children, as they are necessarily separated for too long a period, including in cases where there were no serious child protection concerns with the parent previously.

The problems with the family reunification timeframe would be compounded by reforms to interim accommodation orders proposed in the *Children, Youth and Families Amendment (Child Protection) Bill 2021*, which would likely lead to the reunification timeframe being triggered earlier for many children. In 2020, VLA reviewed the impact of the permanency amendments on its clients, and found that the intention of the amendments was not being achieved.[91] In particular, VLA found that the rigid timeframes placed on parents to address protective concerns are not achieving the intention of minimising the time that the child is in OOHC, and "may be unfairly penalising parents for circumstances outside of their control."[92] Additionally, the report raised concern that the reduced level of court oversight arising from the amendments, may lead to "outcomes that are not always in the best interests of the child and inadvertently prolonging court proceedings."[93] VLA recommended that reunification timeframes be amended, to allow the Children's Court to make decisions in the best interests of the child;[94] and that court oversight be increased, including to allow the court to make conditions on any protection orders and name a placement on an order.[95] These powers are discussed in section 2.2 above.

2.4 (c) New protection orders to protect connection to family

It is VALS position that as the existing suite of protection orders are designed to sever a child's connection with their family as early as possible, they cannot coexist with the ACPP and best interest principle for Aboriginal children in s.10(3)(c). Of particular concern is that once the legislative

[90] Commission for Children and Young People (2017), *'…safe and wanted…': Inquiry into the implementation of the* Children Youth and Families Amendment (Permanent Care and Other Matters) Act 2014, p18.
[91] VLA, *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* (2020).
[92] Ibid., p. 2.
[93] Ibid., p. 3.
[94] Ibid., Recommendation 1, p. 26.
[95] Ibid., Recommendation 2, p. 26.

timeframe has lapsed there is no protection order available to the Court that provides for a child to have contact with their parents, siblings or extended family.

To combat the impact of these orders on Aboriginal children, VALS recommends maintaining and strengthening the existing interim accommodation order and family preservation order and replacing the suite of protection orders that confer parental responsibility on the Secretary[96] with a single protection order for Aboriginal children living in out of home (referred to below as a "care and protection order"). The features of the proposed "care and protection order" are designed to maximise flexibility so that all court orders for Aboriginal children can be tailored to their best interests at any given time, taking into account their unique and individual circumstances.

Whilst replacing the existing family reunification order with VALS' proposed "care and protection order" would mean eliminating the existing option of a protection order that confers *shared* (rather than sole) parental responsibility on the DFFH, VALS is of the view that children should remain on interim accommodation orders with parents maintaining parental responsibility until such time as the matter can be resolved in one of three ways:

(i) DFFH withdrawing involvement with no court order in circumstances where the protective concerns have been adequately addressed; or

(ii) granting a family preservation order in circumstances where the child is safe in the care of their parent, but the parent requires support in place to keep the child safe; or

(iii) granting the proposed 'care and protection order' in circumstances where it is not safe for the child to return to parental care, and it is determined by the court that it is in the child's best interest for parental responsibility to be transferred to Child Protection or an authorised ACCO.

Where it is not in a child's best interest to transfer sole parental responsibility for a child to Child Protection (or an ACCO authorised under s.18, as discussed below in section 3.2) then the child should remain on an interim accommodation order with the oversight of the court and advocacy from the child and parents' legal representatives.

The proposed "Care and Protection Order" for Aboriginal children would increase the power of the Court to attach appropriate conditions to an order, facilitate contact between a child and their parents, and make decisions in the best interests of Aboriginal children without arbitrary time limits. The details of the proposal are contained in the recommendation below.

RECOMMENDATIONS

Recommendation 16. The Department of Families, Fairness and Housing should not prioritise placement stability over the inherent interests of Aboriginal children in remaining connected to their family and culture.

[96] Family Reunification Orders, Care by Secretary Orders and Long-term Care Orders.

Recommendation 17. Legislation should be amended to replace Family Reunification Orders, Care by Secretary Orders and Long-term Care Orders for Aboriginal children with a new Care and Protection Order. The Care and Protection Order should be legislated as follows:

Care and Protection Order

(1) A care and protection order—

(a) confers parental responsibility for the child on the Principal Officer to the exclusion of all other persons; and

(b) must provide that if, while the order is in force, the Principal Officer is satisfied that it is in the child's best interests, the Principal Officer may in writing direct that a parent of the child is to resume parental responsibility for the child.

(2) A care and protection order remains in force for the period specified in the order which must either be a period—

(a) not exceeding 12 months; or

(b) exceeding 12 months but not exceeding 2 years, if the Court is satisfied that there are special circumstances which warrant the making of an order for such a period.

(3) A care and protection order may be made on the application of the Principal Officer

(4) A family preservation order applying to a child at the date of an application for a care and protection order in relation to the child continues in force until the application is determined.

(5) If the Court decides not to make a care and protection order, it may, if satisfied that the grounds for the finding under section 274 still exist, make—

(a) an order requiring a person to give an undertaking under this Part; or

(b) a family preservation order in respect of the child; or

(c) an order extending a family preservation order that is in force in respect of the child.

Conditions on a Care and Protection Order

(1) A care and protection order may include conditions to be observed by—

(a) the child in respect of whom it is made; or

(b) a parent of the child.

(2) Conditions that may be included under subsection (2) are conditions that the Court considers—

(a) to be in the best interests of the child; and

(b) are reasonably capable of being carried out by each person who will be subject to the condition

(3) The conditions that may be included in accordance with subsection (2)(a) must include a condition or conditions concerning contact between the child and a parent of the child or another person of significance to the child unless contact would place the child at an unacceptable risk of harm

(4) In assessing whether contact would place a child at an unacceptable risk of harm any views expressed by the child must be considered taking into account the child's age and stage of development.

(5) The conditions that may be included in accordance with subsection (2)(a) may include a condition that the child must live with a specified person or persons for the duration of the order;

(6) A condition cannot be included in accordance with paragraph (5) unless the specified person or persons referred to in paragraph (5) consent to the making of the order;

Application for extension of a Care and Protection Order

(1) The Principal Officer may apply to the Court for an extension or additional extension of the period of a care and protection order;

(2) An extension application may be made at any time while the order is in force.

(3) If an extension application is made in respect of an order, the order continues in force until the application is determined.

(4) The Court must not extend a care and protection order unless the Court is satisfied that—

(a) firstly, a family preservation order is not appropriate in the circumstances; and

(b) secondly, a permanent care order is not appropriate in the circumstances having regard to the criteria in s.323 that must be satisfied before a permanent care order can be made in respect of an Aboriginal child.

(5) Subject to sub-section (4), the Court may extend a care and protection order if it is satisfied that this is in the best interests of the child.

Change to nature of order

(1) If under a care and protection order the Principal Officer directs that a parent or parents of the child are to resume parental responsibility for the child, then on and from the date of the direction—

(a) the Principal Officer ceases to have parental responsibility for the child; and

(b) the parent resumes parental responsibility for the child as specified in the direction; and

(c) the care and protection order is taken to be a family preservation order giving the Principal Officer responsibility for the supervision of the child and placing the child in the day to day care of the parent or parents who have parental responsibility for the child; and

(d) Division 3 applies to the order; and

(e) the order ceases to be a care and protection order for the purposes of this Act.

(2) The Principal Officer must give a copy of a direction under this section to—

(a) the Court; and

(b) the child; and

(c) the parent of the child.

(3) The Principal Officer may apply to the Court to determine that the order is to include conditions.

(4) The Court may determine that the order is to include conditions of a kind referred to in section 281, without requiring the parties to attend, or be represented at, the proceeding.

(5) If the Court makes a determination under subsection (4), the order is taken to include those conditions as if they were included in the order under section 281.

2.5 Promoting kinship care

When children do need to be removed from their parents, kinship care is the most effective way of ensuring that Aboriginal children stay connected to their family, community and culture. Where kinship placements are possible, the child protection system should take every step to ensure they are used.

Unfortunately, the Victorian Government has obstructed the use of kinship care – by failing to properly implement the Aboriginal Child Placement Principle, and by placing other barriers in the way of potential kinship carers. After a few years of increases, the percentage of Aboriginal children in out-of-home care placed with Aboriginal or Torres Strait Islander carers has been declining since 2017, and is below the national average.[97] However, Victoria has still seen consistent increases in the percentage of Aboriginal children placed with *either* family members (including non-Aboriginal family members) or Aboriginal carers.[98] Together these two data points indicate significant increases in the number of children being placed with non-Aboriginal family members. These placements, while they can be less disruptive than placements outside a child's family, may not effectively protect a child's connection to their community and culture – particularly because Child Protection frequently does not provide support to maintain this connection, or even opposes it, on the grounds of promoting 'stability'.

Beyond failure to implement the ACPP, discussed above, there are other obstacles to the wider use of kinship care arrangements. One barrier which has recently developed relates to Working With Children (**WWC**) Checks. Since 2017, a WWC Check has been required before a person can become a kinship carer. Since 2019, a person convicted or found guilty of a 'Category A' criminal offence committed as an adult is automatically denied a WWC Check and cannot appeal to the Victorian Civil and Administrative Tribunal (**VCAT**). Previously, people were able to apply for VCAT review, which meant that VCAT could take into account all of the person's individual circumstances.

This reform was introduced without any evidence that the existing system was posing any risk to children's best interests. Between 2015 and 2019, before the VCAT review route was eliminated, 51 people were issued a WWC Check by VCAT after being automatically denied due to Category A offending.[99] There were no cases in which the Checks were subsequently withdrawn because safety

[97] SNAICC (2021), *Reviewing Implementation of the Aboriginal and Torres Strait Islander Child Placement Principle: Victoria*, p17.
[98] Ibid.
[99] Information released by the Department of Justice and Community Safety under the Freedom of Information Act.

issues arose after the Check had been granted.[100] VCAT review provided for individual circumstances to be taken into account without creating any unjustifiable risk for children, and the system was clearly functioning effectively.

The current inflexible regime has prevented children from being placed in what would otherwise be the best care arrangement for their needs, often due to historic offending. There is no scope for the DFFH, VCAT or a court to consider an individual case holistically for proportionality. Since 2019, nine people have applied for WWC Checks solely for the purpose of kinship care and been automatically rejected due to historic offending. However, this figure significantly understates the scale of the issue, since in our experience people affected become aware of the restrictions and do not submit an application which will be subject to automatic rejection. In some cases, this has the potential to force Aboriginal children into non-Aboriginal care arrangements.

Another serious obstacle to the more widespread use of kinship care is the failure to provide adequate financial support to kinship carers. Kinship carers receive significantly less financial support, both in the direct care allowance and in support from other funded services, than foster carers. This issue is discussed above in section 2.1(b).

RECOMMENDATIONS

Recommendation 18. The Working With Children Check system should be reformed so that any person can apply to VCAT for a review if they are barred from applying for a Check due to past offending.

2.6 Compliance with other special measures for Aboriginal children

The CYFA contains a number of provisions relating specifically to Aboriginal children. These provisions are intended to improve outcomes for Aboriginal children in the child protection system, by maintaining their connections to family, community and culture. However, as these provisions expressly provide for differential treatment based on race, they arguably breach a number of laws prohibiting discrimination based on race under international law as well as in Australia and Victoria, unless they can be accurately characterised as "special measures".[101]

"Special measures" are defined in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),[102] as follows:

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[100] Ibid.

[101] The human right to equality before the law and freedom from all forms of discrimination is recognised in each of the international human rights instruments to which Australia is a party including the *International Convention on the Elimination of all forms of Racial Discrimination (ICERD)* which Australia ratified on 30 September 1975 and expressly incorporated it 'into Australian domestic law on 30 October 1975 with the commencement of the operation of the *Racial Discrimination Act* 1975 (Cth). In particular, ss 9 and 10 were enacted to implement arts 2 and 5 of the CERD': *Hagan v Australia*, CERD, 62nd sess, Communication No 26/2002, [4.13], UN Doc CERD/C/62/D/26/2002 (2003). See also s. 8 and s.19 of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic).

[102] *International Convention on the Elimination of all forms of Racial Discrimination,* opened for signature 21 September 1965, 660 UNTS 195 (*entered into force* 4 January 1969).

> "Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination…"[103]

The United Nations Committee on the Elimination of Racial Discrimination, expands upon the meaning of "special measures" as follows:

> "Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary ... States should ensure that special measures are designed and implemented on the basis of *prior consultation* with affected communities and the active participation of such communities"[104]

Special measures in the CYFA should promote the human rights of Aboriginal children and parents, as provided for by the Victorian Charter of Human Rights and the Convention on the Rights of the Child.

In VALS' view, the special measures under the CYFA have both advanced but also in some circumstances impeded the enjoyment of certain human rights by Aboriginal children and parents, provided for under the CRC and Victorian Charter.

Several special measures are discussed in their own sections, notably the Aboriginal Child Placement Principle (discussed in section 2.3 above) and the transfer of powers under section 18 (discussed in section 3.2 below). The other special measures are discussed in this section.

2.6 (a) Cultural support planning

A key measure intended to protect Aboriginal children's connections to culture is the development of cultural support plans. Section 176 of the *Children, Youth and Families Act* requires Child Protection to develop cultural plans for Aboriginal children in care. These plans are meant to ensure that Child Protection are bearing in mind an Aboriginal child's human right to remain connected to their culture and taking steps to ensure this connection is maintained.

Cultural support planning for *all* Aboriginal children in out of home care was a key measure introduced with the permanency amendments in 2016. Prior to 2016, cultural support plans were required only for a subset of Aboriginal children, those on particular types of protection order. This change was intended as a mitigation measure: as discussed above, the permanency amendments strongly prioritised stability over maintaining connection with family and expanded cultural support planning was intended to help maintain connection with culture when the connection to family is disrupted. This approach is inherently flawed as all the evidence points to family as the source of culture for Aboriginal children. There is even some evidence that suggests that where an Indigenous child is disconnected to their Indigenous family and community, attempts to connect that child with their Indigenous culture in the absence of family can do more harm than good:

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[103] ICERD art. 1(4), also incorporated into the *Racial Discrimination Act* 1975 (Cth) s.8(1).
[104] Committee on the Elimination of Racial Discrimination, *General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*(2009) [16], [18].

> Culture is complex but its transmission is simple. Put a child within a certain cultural milieu and an organic process of acculturation occurs. It is through everyday living that the values beliefs and culturally prescribed behaviours are learned … Exposing an Aboriginal child who has been brought up outside her birth culture to Aboriginal life can exacerbate identity formation problems further if the child has identity confusion or is otherwise conflicted then exposure to Aboriginal culture may trigger chronic anxiety and all its consequences. She is reminded of her estranged status and is told sometimes subtly, sometimes not, that she is not really an Aboriginal person. If she also feels that she is not legitimately part of her adoptive family's cultural heritage, which many do, then she is in real danger of being stuck with an insurmountable task regarding her identity formation.[105]

Historically, compliance with cultural planning requirements has been very poor – despite the fact that, prior to 2016, only a smaller group of Aboriginal children were required to have cultural support plans. In 2009, the Victorian Ombudsman found that a plan had been developed for only 20% of these children.[106] In 2014, the Victorian Auditor-General found that compliance was at 19% and that Child Protection did not monitor its compliance with the cultural plan requirement.[107] The Commission for Children and Young People reviewed the cases of almost 1000 Aboriginal children in care; its 2016 report found roughly 75% of children who should have had a cultural plan did.[108] This apparent increase in compliance still meant Child Protection was failing to provide any cultural plan to one-quarter of the relatively small cohort it was obliged to plan for at that time. The report also documented many disturbing cases where cultural plans had not been developed until five to eight years after an Aboriginal child was first placed in out-of-home care.[109]

There were also widespread problems with the quality of cultural support plans. The CCYP's 2016 report was consistent with VALS' experience at the time, finding that:

> "the quality of the plans was overwhelmingly poor. Many plans were rudimentary and could be considered tokenistic. They had not been updated or reviewed and had minimal input from the child's parents, extended family or Aboriginal community, nor did they consider the child's views. Involvement and engagement with ACCOs in completing the plans did not occur consistently.
>
> Often the attempts to consider suitable cultural activities were cursory. For example, in one child's cultural plan, attending NAIDOC week was the sole activity cited. A lack of sophistication and cultural competence was evident in many other plans. One documented a visit to the Northern Territory as a means of understanding Aboriginal culture; however, the Yorta Yorta child had no affiliation with the Aboriginal communities of the Northern Territory. The Commission also heard of simplistic attempts to acknowledge culture, such as displaying Aboriginal flags, artefacts and books in the home, without any deeper inclusion or participation in culture."[110]

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[105] Richard K; "A Commentary Against Aboriginal to non-Aboriginal Adoption" First Peoples Child & Family Review; Vol 1 Number 1 2004 pp101-109.
[106] Commission for Children and Young People (2016), *Always was, always will be Koori children: Systemic inquiry into services provided to Aboriginal children and young people in out-of-home care in Victoria*, p71.
[107] Ibid, p72.
[108] Ibid, p72.
[109] Ibid, p52, 62.
[110] Commission for Children and Young People (2016), *Always was, always will be Koori children: Systemic inquiry into services provided to Aboriginal children and young people in out-of-home care in Victoria*, p74.

The CCYP made a number of recommendations to improve cultural planning. These included detailed recommendations about the required content of cultural plans, as well as recommendations to improve monitoring, oversight and accountability so that the cultural plan obligations are actually complied with.[111]

In March 2016, the obligation to develop a cultural support plan was expanded to all Aboriginal children in out-of-home care. A subsequent CCYP report found in 2017 that "the early evidence clearly showed that the permanency amendments have failed to strengthen cultural support planning for Aboriginal children" and that a large majority of Aboriginal children did not have a cultural support plan.[112] Data provided by the government to SNAICC indicated that only 44% of Aboriginal children had a cultural support plan by April 2020, showing limited improvement in cultural planning after several years.[113] VALS understands that more recent data (not publicly available) may show an improvement in compliance, but that over 40% of Aboriginal children in out-of-home care had no cultural support plan in 2021.

While there is no legislative provision that expressly states that the Court must not make a protection order for an Aboriginal child without a cultural support plan in place[114], a cultural support plan is arguably required before a protection order can be made, but not necessarily before other orders are made (for example, orders extending protection orders.)

Whether a cultural support plan is required before an order is made is tied to the requirement for (i) a case plan (ii) a disposition report and (iii) whether the court is required to consider the disposition report before it can make an order. These requirements differ slightly depending on the application and order:

- Section 276 provides that the court must not make a protection order unless it has received and considered a disposition report, however there is no equivalent provision in relation to *extending* a protection order.[115]
- Section 557 outlines which court applications require a disposition report. It includes when the court becomes satisfied that a child is in need of protection (s.557(1)(a)(i)) and almost all other applications, including applications to extend protection orders.
- Section 558 provides "a disposition report must include (a) the case plan, *if any* prepared for the child" (emphasis added)
- Section 168 provides that a case plan must be prepared "if a protective intervener is satisfied that a child is in need of protection" which occurs before a protection order is made. By contrast once a protection order is in force the requirement is to "review" the

[111] Ibid, pp15-16, 18.
[112] Commission for Children and Young People (2017), *'…safe and wanted…': Inquiry into the implementation of the Children Youth and Families Amendment (Permanent Care and Other Matters) Act 2014*, p15
[113] SNAICC (2021), *Reviewing Implementation of the Aboriginal and Torres Strait Islander Child Placement Principle: Victoria*, p6.
[114] Compare with s.323(2)(b) which prohibits the granting of a permanent care order with a recommendation from an Aboriginal agency.
[115] This requirement also applies to making a new Care by Secretary Order: see s.289(1A) and to a new Long term Care Order: see s.290(1A))

existing case plan at particular points in time and not necessarily prior to a court application being made.[116]

- Section 166 provides that a case plan must include any planning for cultural support that is required for the child under s.176.
- Section 169(3)(b) provides that a review of a case plan must include review of "the cultural support needs of the child".

Given that cultural support plans were introduced as a measure to mitigate the harm of separation from family caused by the permanency amendments, they are arguably most critical once the legislated timeframe for reunification has lapsed and there are no orders available that include conditions for contact with family. However, as highlighted above, this approach to connecting a child to their culture is fundamentally flawed. Furthermore, as identified, there is no express court oversight of the obligation to provide a child with a cultural support plan when secondary applications are made such as to extend orders, only an implied mechanism for oversight at the time the court becomes satisfied that a child is in need of protection.

2.6 (b) Consultation with members of the Aboriginal Community

Sub-section 12(1)(a) of the CYFA provides that "an opportunity should be given, where relevant, to members of the Aboriginal community to which the child belongs and other respected Aboriginal persons to contribute their views" about an action or decision relating to an Aboriginal child.

The requirement in s.12(1)(a) is relied upon by Child Protection to consult with and include Aboriginal persons in care team meetings and decision-making for Aboriginal children. VALS' experience is that the involvement by Child Protection of Aboriginal persons to contribute their views, in the absence of parental consent, can be counter-productive at best and discriminatory at worst.

Community members cannot be involved in decision-making meetings without consent of the child or parent for families of any other cultural background. Section 11(i) allows "a member of the appropriate cultural community" to attend meetings, but only when the person is "chosen or agreed to by the child or by his or her parent". It is only in relation to Aboriginal children that Child Protection can bring a community member's views into the process without consent from the family.

When Aboriginal persons that DFFH regards as "respected persons" or "cultural elders" provide a view in relation to the care and protection of Aboriginal children for whom they have little or no cultural authority, and with whom they had very little involvement, Child Protection can become paralysed. It can find itself unable to apply the law as it would to a non-Aboriginal child in the same circumstances, placing greater weight on the views of the unrelated Aboriginal person than on those of the child's Aboriginal family.

Aboriginal children and parents should be afforded the same opportunity and agency to determine matters that affect them as non-Aboriginal children and parents. Having agency, is after all the essence

[116] See s. 169.

of the "principle of Aboriginal self-management and self-determination" referred to in s.12(1). Not allowing Aboriginal children and parents this choice can also compromise the effectiveness and independence of the advice given. SNAICC has noted the problematic practice of "government workers selecting Aboriginal and Torres Strait Islander people to consult who may not have adequate knowledge, may not understand child protection processes, may not be appropriately representative of the community, and may not be respectful of confidentiality for a family."[117]

Applying the "principle of Aboriginal self-management and self-determination" should never be relied upon by administrative decision-makers to override the cultural authority of the child's own Aboriginal parent. Aboriginal parents should be regarded as the primary source of a child's connection to their culture, not subordinate to extended family members or the broader Aboriginal Community. Taking such an approach is an unfortunate, unintended, misguided and ultimately discriminatory application by Child Protection of this provision that was intended as a "special measure" or positive discrimination aimed at rectifying discriminatory policies of the past.

2.6 (c) Aboriginal Family-Led Decision Making

Sub-section 12(1)(b) of the *Children, Youth and Families Act* requires that any "significant decision in relation to an Aboriginal child" should involve "a meeting convened by an Aboriginal convener". These meetings are known as 'Aboriginal Family-Led Decision Making' (**AFLDM**) meetings. AFLDM meetings have been observed by magistrates to be "extremely successful in linking children with their extended families and connecting them to culture."[118]

Despite the effectiveness of AFLDM meetings, and the fact that they are required by legislation and Child Protection practice guidelines, in reality these meetings are frequently not held. Judicial officers have observed "many occasions when an AFLDM has not occurred when it should have" and that "it is essential for AFLDMs to be conducted in a timely manner".[119] The Commission for Children and Young People conducted a reviewed of almost 1000 children's cases between 2014 and 2016, and found that 57% had never had an AFLDM meeting.[120] Child Protection instituted changes in response to these findings which were intended to strengthen compliance with AFLDM meeting requirements. However, improvement has been very gradual: at the end of 2018, 47% of Aboriginal children who had been in out-of-home care for more than a year had never had an AFLDM meeting.[121] Given that legislation and Child Protection policy arguably require a meeting to be involved in a decision to place a child in out-of-home care in the first place, every child who has been in care for a year should have had at least one AFLDM conference held. A rate of just over 50% compliance with this legal requirement amounts to a disgraceful failure to promote family-led decision-making.

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[117] SNAICC (2016), *Whose Voice Counts? Aboriginal and Torres Strait Islander participation in child protection decision-making*, p27.
[118] Children's Court of Victoria (2022), *Research Materials, Chapter 5.1: Family Division – Child Protection*, p163.
[119] Children's Court of Victoria (2022), *Research Materials, Chapter 5.1: Family Division – Child Protection*, p163.
[120] Commission for Children and Young People (2016), *Always was, always will be Koori children: Systemic inquiry into services provided to Aboriginal children and young people in out-of-home care in Victoria*, p65.
[121] Commission for Children and Young People (2019), *In our own words: Systemic inquiry into the lived experience of children and young people in the Victorian out-of-home care system*, p97.

More recent data on whether AFLDMs are being convened is not publicly available, because the Government has not adopted the CCYP's recommendation that this information be included in the DFFH's annual report.[122]

Failure to convene AFLDMs means that the family's views cannot be properly understood, and their resources for providing care – such as extended family members who may be able to provide support – are never identified.[123] This contributes directly to the removal of Aboriginal children from their families, and to their placement with inappropriate carers.

2.6 (d) Delays achieving permanency for Aboriginal children

Section 323 of the CYFA establishes several restrictions on the making of a permanent care order for an Aboriginal child. These restrictions can in some cases lead to significant delays in permanency being achieved.

Whilst an application for a Permanent Care Order (PCO) can only be made by the DFFH, the Court and/or the parties in a proceeding can apply significant pressure to the DFFH to apply for a PCO in proceedings to extend a Care by Secretary Order, due to the requirement in s. 294A that:

> (2) The Court must not extend a care by Secretary order unless the Court is satisfied that—
>
> (a) firstly, a permanent care order is not appropriate in the circumstances; and
>
> (b) secondly, a long-term care order is not appropriate in the circumstances.
>
> (3) Despite subsection (2), the Court may extend a care by Secretary order if the Court is satisfied that there are exceptional circumstances which justify the making of a further care by Secretary order.

Where this arises in proceedings to extend a Care by Secretary Order in relation to an Aboriginal child, it becomes problematic because an application for PCO can only be made for an Aboriginal child after multiple statutory requirements have first been satisfied. This is in recognition of the legacy of the stolen generation and the continuing harm caused by past polices of forced removal of Aboriginal children from their families and culture.

Each statutory requirement is performed by separate and discreet funded programs delivered by Aboriginal agencies each with their own separate DFFH program requirements. Inadequate funding of these programs and non-compliance by Child Protection of referral requirements to these programs can add considerable length to the time to finalise a PCO for an Aboriginal child when compared with a non-Aboriginal child.

In some instances, this delay has resulted in proceedings becoming unduly adversarial and/or the child in the proceedings identifying as non-Aboriginal, notwithstanding having been recorded by the DFFH

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[122] Commission for Children and Young People (2016), *Always was, always will be Koori children: Systemic inquiry into services provided to Aboriginal children and young people in out-of-home care in Victoria*, p67.
[123] Ibid, pp66-7.

as an Aboriginal child due to one or both of the child's parents having identified themselves as Aboriginal.[124] The statutory requirements for applying for and granting a PCO are detailed below.

Statutory requirements at the Case Planning stage

Section 320(1) requires Child Protection to assess whether the proposed permanent carer/s are "suitable" for permanent care having regard to considerations in s.320(1A) and s.321(1)(ca)[125] which apply to *all* children, but for Aboriginal children will also require Child Protection to consult with ACSASS.[126] Once assessed as suitable, Child Protection must then change the "permanency objective" of the child's case plan to "permanent care" as required by s.167(1)(d).[127]

Statutory requirements at the filing application stage

Where the proposed PCO would place an Aboriginal child with non-Aboriginal carer/s, Child Protection must satisfy a number of additional requirements before filing an application for a PCO, these requirements include:

Under s.323(1)(c) the Secretary must be satisfied that the placement is consistent with the ACPP. However, in circumstances where the ACPP has not been considered since the initial protection application by emergency care this can present a problem because culturally appropriate placement options that did not exist at the time of the protection application may be available at a later point in time or where adequate enquiries and investigations have been made (that were not made in the rush of an emergency care application). Whether paternity was known at the time of the protection application may also be a factor.

As s.323(2)(a) requires a report from an Aboriginal agency recommending the order, Child Protection must make a referral to the Victorian Aboriginal Child Care Agency's (**VACCA**) Permanent Care Program (different and distinct from VACCA's ACSASS program) requesting VACCA to make an assessment and recommendation for a permanent care order. VACCA's Permanent Care Program will not accept the referral unless it comes with an up-to-date CSP,[128] AFLDM[129] and statement re-

[124] This brings into question whether the "self-identification" limb of the "Aboriginal person" definition in s.3(1) and whether this definition applies to "Aboriginal children" (cf: "Aboriginal persons") See discussion above.

[125] Section 320(1A) provides: "The Secretary must not approve a person as suitable to have parental responsibility for a child under a permanent care order unless the Secretary is satisfied that the person will comply with the condition to be included in the permanent care order under section 321(1)(ca)." Section 321(1)(ca) "A permanent care order— must include a condition that the person caring for the child must, in the best interests of the child and unless the Court otherwise provides, preserve—(i) the child's identity and connection to the child's culture of origin; and (ii) the child's relationships with the child's birth family;"

[126] As required by s.12 and s.16(1)(j) of the CYFA and the relevant DFFH Program Requirements for ACSASS that requires Child Protection to consult with an Aboriginal agency about all significant decisions in relation to Aboriginal children, including making an application for a permanent care order, which requires assessing the suitability of the proposed permanent carers based on criteria in s.321(1)(ca).

[127] This is also identified in the relevant program requirements as a "significant decision" that Child Protection must consult with ACSASS about.

[128] s.323(2)(b).

[129] s.12(1)(b).

compliance with the ACPP[130]. However routinely these statutory requirements have not been complied with by Child Protection, so Child Protection is delayed in making its referral to VACCA.

Statutory requirements at the Court proceeding stage

Where the proposed PCO would place an Aboriginal child with non-Aboriginal carer/s, the order cannot be made without VACCA's Permanent Care Program first conducting an assessment and providing the Court with a report recommending the making of the order.[131] It should be noted that as VACCA has only been funded for 1.6 staff to conduct every PCO assessment and court report state-wide, there can be significant delays at this stage as well. However, where court proceedings become heated due to delays in satisfying the statutory requirements for Aboriginal children, Child Protection has also been known to attribute the delay to VACCA taking too long to conduct its assessment, in circumstances where Child Protection has only made its referral to VACCA the same day and VACCA is not present at court to rebuke the claim.

Limited statutory alternatives where PCO cannot be made

Where a DFFH application for a PCO cannot be granted because the mandatory statutory requirements cannot be met either because the pre-conditions cannot be satisfied (eg: ACPP required under s.323(1)(a) and(c) and CSP required under s 323(2)(b)) or because VACCA does not recommend the order as required by 323(2) there are limited alternative options available to the court and child unless another more suitable placement has been identified.

s.290(2) provides that the Court must not make a long-term care order unless the Court is satisfied that—

> (a) there is a person or persons available with whom the child will continue to live for the duration of the order; and
>
> (b) the person or persons referred to in paragraph (a) will not consent to the making of a permanent care order;

In circumstances where a PCO cannot be made for the reasons identified above, a Long-term Care Order may also be ruled out because the carers in these circumstances would not satisfy the criteria in s.290(2)(b) – because not only will the carers consent to a PCO, but they are in most instances actively pursuing such an order (for example, by applying to join as a party to the proceedings and engaging a legal representative.)

However, where an alternative placement has been identified that is higher on the ACPP hierarchy, not only can the PCO not be granted but the DFFH must change the child's placement subject to the overriding paramountcy principle. These were the circumstances In *DOHS and K siblings* [2013] VChC 1, where Wallington M at pp.12-13 stated:

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[130] s.323(1)(c).
[131] s.323(2)(a)

> "It is vital that decisions made now in relation to the children in these proceedings do not sacrifice their long –term welfare. Lakidjeka is the Aboriginal Child Specialist Advice Support Service (ACSASS) responsible for providing consultation and advice to Child Protection under the DHS/VACCA protocol. Child Protection must consult with Lakidjeka on all significant decisions including placement.
>
> Both the previous and current Lakidjeka case managers, Mr GK and Ms LA, advocated for the children to be returned to family (i.e. Aunty B). This was the reason for their reluctance to sign off on a Permanent Care Order for the three youngest K siblings despite their current bonding and attachment to Mr & Mrs M. The Victorian Children, Youth and Families Act 2005 does not contain the legislative equivalent of section 13(6) of the New South Wales Children and Young Persons (Care and Protection) Act 1998 which expressly states that if a child is placed with a non- Aboriginal carer the fundamental objective is to reunite them with their Aboriginal or Torres Strait Islander family or community. Nevertheless, it is implicit in the Aboriginal Child Placement Principle and acknowledged in the DHS Aboriginal Child Principle Placement Guide. It is consistent with the life histories of Aboriginal children in nonindigenous care who often find their own way "home" as adolescents.
>
> In a sense Aboriginal children in the care of non-indigenous families can only be "borrowed" if they are to grow up as strong Aboriginal children. The days of assimilation are over."

Many of the issues identified above would be resolved by the introduction of the "care and protection order" VALS has proposed above, along with some changes to the existing restrictions on contact conditions on PCOs.

2.6 (e) Consultation with ACSASS

The Aboriginal Child Specialist Advice and Support Service is an initiative under section 13(1)(a) and section 12(1)(c) of the CYFA, which requires consideration of "the advice of the relevant Aboriginal agency" when placing an Aboriginal child in out-of-home care. This requirement is to be met through consultation with ACSASS, which is provided by Aboriginal Community Controlled Organisations around the state.[132] (VACCA is the primary provider of ACSASS in most of the state, under the name Lakidjeka.)

In addition to the legislative requirement to consider advice for an out-of-home placement, Child Protection are required to consider advice for any significant decision about an Aboriginal child,[133] under the terms of a protocol signed between the then-Department of Human Services and VACCA in 2002.[134] The Department's program requirements for ACSASS list more than thirty types of decisions that must always be considered 'significant', about which child protection practitioners should seek ACSASS advice.[135] They include decisions to open an investigation, conducting an investigation, determining an investigation outcome, convening AFLDM meetings, planning for changes of placement, applying for a court order, managing critical incidents, and removing a child from their parents.

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[132] Commission for Children and Young People (2015), *In the child's best interests: Inquiry into compliance with the intent of the Aboriginal Child Placement Principle in Victoria*, p13.
[133] Ibid, p17.
[134] This protocol is made effective by section 16(1)(j), which obliges the Secretary to implement a protocol between the Department and an Aboriginal agency.
[135] Department of Health and Human Services (2019), *Program requirements for the Aboriginal Child Specialist Advice and Support Service*, pp42-3.

The protocol also established the broad responsibilities of Child Protection and ACSASS providers to ensure culturally attuned input into risk assessments and cultural information is incorporated into Child Protection decision making for Aboriginal children and young people. Importantly, the protocol establishes referral and consultation mechanisms for the ACSASS program. In 2017, the protocol was refreshed and modernised, including creating an option for new signatories to be added if ACCOs other than VACCA were to deliver ACSASS in future.

The ACSASS obligations are comprehensive, and VALS fully supports the principle that decisions about the care and protection of Aboriginal children should be made by Aboriginal people. However, we have significant concerns about the application of ACSASS in practice – including both cases where the ACSASS obligations are not complied with, and cases where they are implemented in harmful ways.

One major concern with ACSASS advice is that ACSASS practitioners are not always equipped with the legal expertise or information to understand the ramifications of their advice. This issue is discussed above, in section 2.2(b) regarding the conduct of Children's Court matters.

In addition to this issue, VALS is aware of many instances where the requirement of Child Protection to consult with an Aboriginal agency has not occurred, has occurred after the decision has been made, or has occurred only for advice to be disregarded without any reasons being given. VALS is similarly aware of instances where Child Protection has attempted to consult with ACSASS, but the Aboriginal agency has either not responded or has been unable to facilitate the consultation.

In some cases, the ability of ACSASS to provide effective advice is compromised by problematic Child Protection requests. Child Protection may leave out critical contextual information necessary for ACSASS to make an informed decision based on the child's best interests. Even more concerningly, some advice requests contain false or misleading information intended elicit a response from ACSASS consistent with the child protection practitioner's view.

VALS' experiences with ACSASS are consistent with recorded evidence on Child Protection's compliance with its obligations. The Commission for Children and Young People found in 2015 that Child Protection "do not make contact with ACSASS for every Aboriginal child, and certainly not at every significant decision point."[136] In particular:[137]

- "only about 50 per cent of Aboriginal children have the benefit of ACSASS involvement at any point during intake, during the investigation or during the protective intervention."
- ACSASS attended first home visits for Aboriginal children in only 31% of cases, mostly because CP had not advised ACSASS of the visit.
- "only 29 per cent of Aboriginal children had evidence of ACSASS's views being recorded in their case plans or case notes."

[136] Commission for Children and Young People (2015), *In the child's best interests: Inquiry into compliance with the intent of the Aboriginal Child Placement Principle in Victoria*, p19.
[137] Ibid.

The CCYP noted a number of factors which lead to Child Protection not seeking ACSASS advice, and ACSASS not being able to respond to requests. Within Child Protection, CCYP identified a lack of understanding about how and when to involve ACSASS, as well as a "lack of accountability when ACSASS is not contacted" and reluctance to consult with ACSASS due to "previous negative experiences".[138] At the same time, responses from ACSASS are frequently not timely or meaningful, generally due to late notice from Child Protection or problems with resourcing and staffing – VACCA informed the CCYP in 2015 that there had been no increase in ACSASS staff since 2003, compared to an increase in child protection practitioners and reports to Child Protection.[139]

RECOMMENDATIONS

Recommendation 19. The Department for Families, Fairness and Housing should improve its compliance with cultural support planning requirements.

Recommendation 20. The Children's Court should have greater powers to require cultural support plans to be developed and implemented.

Recommendation 21. Legislation should be reformed so that Aboriginal children and parents have right to choose or agree to the selection of an Aboriginal person to contribute their views under section 12(1)(a) of the CYFA.

Recommendation 22. The Department for Families, Fairness and Housing should fully comply with its obligation to convene an Aboriginal Family-Led Decision Making meeting before making any significant decision about an Aboriginal child.

Recommendation 23. The Department for Families, Fairness and Housing should fully comply with its obligations to seek advice from ACSASS, and should ensure that full information is provided to enable the ACSASS practitioner to provide informed and effective advice.

Recommendation 24. The Victorian Government should deliver adequate resources to ACCOs to significantly increase the capacity of ACSASS, to enable the timely delivery of expert advice.

[138] Ibid.
[139] Ibid.

3. Self-determination and governance of the child protection system

Self-determination is crucial to improving outcomes for Aboriginal and/or Torres Strait Islander children. Self-determination is a term that is often used by government in relation to Aboriginal and/or Torres Strait Islander peoples, but rarely practiced by governments.[140] As noted by Meriki Onus, governments use self-determination as "a buzzword that can be stretched and used for whoever's agenda".[141] Articles 3 and 4 of the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) refer specifically to the right of self-determination.[142] The right is described as the ability to "freely determine their political status and freely pursue their economic, social and cultural development" and "autonomy or self-government in matters relating to their internal and local affairs."[143] In this way, we can understand self-determination as the ability of Aboriginal and/or Torres Strait Islander peoples to make decisions over issues that affect their lives. Crucially, this independence is underpinned by having the economic capacity to make these decisions. It is also important to note that the right to self-determination is the right of 'peoples.'[144] That means that this right should be exercised by Aboriginal Communities.

Self-determination has not been realised in Victoria's child protection system. The Victorian Government says it is "supporting the vision to increase Aboriginal self-determination" in the child protection system, suggesting that it sees self-determination as some sort of spectrum.[145] In practice, Aboriginal Community Controlled Organisations that support Aboriginal and/or Torres Strait Islander children are poorly funded and often not properly consulted, let alone given decision making powers.[146,147] Djab Wurrung woman and kinship carer, Sissy Austin, wrote an article for IndigenousX describing how layers of bureaucracy mean that ACCOs do not have real self-determination powers.[148] Notably, they state:

> "The key facts here are that ACCOs are not making the life altering decisions for our families, the Children's Court is. The children are not mandated to be in Aboriginal Care, they're being case managed by an ACCO, where they might not even get an Aboriginal worker and this case management must be in-line with what has already been ordered by the courts."[149]

While changes like section 18 of the *Children, Youth and Families Act* gesture in the direction of self-determination in the child protection system, they fall far short of what is needed to genuinely empower the Aboriginal Community to take responsibility for the care of Aboriginal children. Proper recognition of the right to self-determination would be transformative, but it would require a

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[140] Victorian Aboriginal Legal Service, 'VALS Invasion Day Webinar 2022', from 6min 43seconds.
[141] Ibid, from 9min 2seconds.
[142] United Nations, United Nations Declaration on the Rights of Indigenous Peoples, pp4-5.
[143] Ibid.
[144] Victorian Aboriginal Legal Service, Victorian Aboriginal Legal Service Submission to the Inquiry into Victoria's Criminal Justice System, pp40-41.
[145] Department of Families, Fairness and Housing, Aboriginal self-determination
[146] Victorian Aboriginal Legal Service, Lack Of Funding Forces Aboriginal Children's Legal Service To Close
[147] Victorian Aboriginal Legal Service, Minister Anthony Carbines refused to properly consult on legislation
[148] Austin, Sissy, "Our Kids Belong With Family": a look into institutional child removal, IndigenousX.
[149] Ibid.

reckoning with the way that the Victorian Government's past attempts at enabling self-determination have been inadequate.

3.1 Consultation on legislative changes

The Victorian Government's approach to introducing major reforms to the child protection system, with significant effects on Aboriginal people and communities, has been highly problematic and not consistent with real respect for self-determination.

Major changes to the child protection system were proposed in the *Children, Youth and Families Amendment (Child Protection) Bill 2021* and the *Children and Health Legislation Amendment (Statement of Recognition and Other Matters) Bill 2022*. Neither of these bills was passed before the Parliament was dissolved. The process of consultation on both bills was entirely inadequate.

The *Children, Youth and Families Amendment (Child Protection) Bill 2021* proposed a number of changes, including changes to interim accommodation orders and the timeframes for emergency care application hearings, which would be detrimental to Aboriginal children and families. Government consulted on this bill primarily with the Aboriginal Children's Forum (**ACF**), but consultations with organisations who do not sit on the ACF, including VALS, were almost non-existent. Although VALS wrote to the Minister for Child Protection in December 2021, requesting a meeting to discuss the bill, we have still not been able to meet with the Minister.

Consultation on the *Children and Health Legislation Amendment (Statement of Recognition and Other Matters) Bill 2022* was similarly limited. This bill proposed a new Statement of Recognition for insertion into the CYFA. The Statement was developed in discussion with a Working Group which excluded key Aboriginal organisations, including both of Victoria's Aboriginal legal services, VALS and Djirra.

Whilst VALS considers consultation with ACCO members of the ACF to be critical, this should be regarded as the minimum threshold in terms of consultation. ACCOs outside the ACF should also be a crucial source of advice, given that we bring both a different perspective and a different set of expertise.

The difference of perspective is crucial because ACF members are funded to deliver services for which the DFFH has legislative responsibility. The purpose of the ACF "to ensure that Aboriginal Elders, leaders and communities, are equal partners with government and the sector in determining the future of child and family services."[150] This by its very nature requires compromise from both sides and therefore the positions and voices of the Aboriginal Community which these ACCOs represented is also necessarily compromised. Organisations that are not members of the ACF are sometimes better placed to provide frank and direct feedback on proposed legislative reforms that impact Aboriginal children and parents, as well as the broader Aboriginal Community.

[150] *Wungurilwil Gapgapduir: Aboriginal Children and Families Agreement*.

Specialist expertise that is not found on the ACF is also crucial for proper consideration of any proposed reforms. As legal services, VALS and Djirra are the only Aboriginal organisations in Victoria with the necessary legal expertise to provide, not only an Aboriginal perspective, but also an analysis of the practical application and possible consequences of the DFFH proposals in practice. Both the practical changes and the new Statement of Recognition are highly significant legislative reforms, which will affect how child protection practitioners, the Children's Court and Aboriginal organisations operate. They have complex legal implications which require legal expertise to consider.

The Government's failure to seek – or even allow – this feedback demonstrates the shallowness of their commitment to self-determination. Preventing frank, direct, expert and informed feedback from Aboriginal Community Controlled Organisations is the conduct of a government department which has decided on its reforms and does not wish to consider any serious changes to them – the opposite of a self-determined approach to reforming the child protection system.

RECOMMENDATIONS

Recommendation 25. The Victorian Government should consult with all relevant Aboriginal Community Controlled Organisations when developing reform proposals for the child protection system.

3.2 Transfer of powers to Aboriginal agencies

Perhaps the most urgent form of self-determination in the child protection system is transferring responsibility for the care of Aboriginal children to the Aboriginal Community. Section 18 of the *Children, Youth and Families Act* purports to achieve this by transferring the functions and powers traditionally reserved for the State to Aboriginal Community Controlled Organisations. Whilst this power appears on its face to be a bold advancement of self-determination for Aboriginal people involved in the child protection system, there are significant limitations in both its form and application in practice.

The current suite of legislative provisions that ACCOs have been authorised to exercise, does not encompass the full range of functions and powers the Secretary has in performing the same role. The functions and powers that have not been transferred to ACCOs falls into three broad categories:

(i) functions and powers that the current legislative framework arguably enables to be transferred to ACCOs but the Secretary has not exercised the relevant discretion under s.18 to transfer

(ii) functions and powers that the current legislative framework arguably does not enable to be transferred to ACCOs because the relevant provisions do not "confer on the Secretary" "specified functions" or "specified powers" as is required by s.18

(iii) functions and powers that the current legislative framework arguably does not enable to be transferred to ACCOs because the relevant provisions are not "in relation to a protection order" as is required by s.18.

3.2 (a) Further powers that could be transferred under s.18

There are a number of provisions of the CYFA that confer express functions and powers on the Secretary that have not been transferred to ACCOs. For example, those under part 4.8 division 3 relating to therapeutic treatment orders.

Whilst it is acknowledged that therapeutic treatment orders are not defined as protection orders under the CYFA, this should not prevent the relevant functions and powers under part 4.8 division 3, from being regarded as 'in relation to a protection order' or prevent ACCOs from being authorised to exercise these functions and powers to the extent that they relate to a child on a protection order.

It is noted that ACCOs have been authorised with functions and powers in relation to interim accommodation orders and in relation to permanent care orders neither of which are defined as "protection orders" under the CYFA. Similarly, ACCOs have been authorised with some "protective intervener" powers where these apply to circumstances when a protection order is in force.

However, ACCOs have not been authorised with other protective intervention powers in parts 4.4, 4.5 and 4.6, notwithstanding the relevant powers applying in circumstances that occur both prior to a protection order being made and also to when a protection order is in force. For example, s.187 and s.188 apply in circumstances where a new allegation is received in respect of a child on a family preservation order (discussed further below).

It is arguable that the exercise of some provisions in these parts (such as s.192 in part 4.5) extend beyond the protective intervention phases and are also exercised at other times during the administration of a protection order when there is no 'protective intervention' occurring (such as a breach of a family preservation order) and therefore it is difficult to understand why such provisions would not be regarded as 'in relation to a protection order' and ACCOs authorised with these powers pursuant to s.18.

Section 192 is relied upon by Child Protection as the legislative basis for sharing information in relation to children, both prior to a protection order being made and after a protection order has been made in respect of a child. This is evident in DFFH documents such as Practice Advice on High-Risk Panels and the Information Sharing Protocol with the Magistrates and Children's Courts.

Section 192 provides a broad power for Child Protection to voluntarily share and request information from a range of people and organisations where that is necessary for the exercise of functions or powers under the Act. Section 193, which applies to agencies such as authorised ACCOs, is much narrower in its scope, including the purpose for which information can be shared. In these circumstances, an authorised ACCO may not be able to share information without the consent of the person involved, which could place the authorised ACCO, and therefore, the child who is the subject of an authorisation made pursuant to s.18, at a significant disadvantage in terms of service delivery to that child.

The necessity for Child Protection to share information about children in need of protection does not cease once a protection order has been made. The lack of authorisation in relation to s.192, effectively creates a two-tiered system of child protection service delivery. There are many circumstances where

an authorised ACCO would want to share and request information in relation to a child subject of an authorisation made pursuant to s.18 but cannot do so because the ACCO has not been authorised with s.192 and s.193 does not apply. In the same circumstances, Child Protection would be able to share and request information, in relation to a child whose order is managed by Child Protection.

As already discussed above, the construction of s.18 does not exclude ACCOs from being authorised with functions and powers that are exercised in relation to orders that are not defined as "protection orders" for example, interim accommodation orders. It is further argued that nor does the construction of s.18 limit the exercise of power to children on protection orders rather, the functions and powers must be "in relation to" a protection order. Therefore, it is arguable that an ACCO could be also authorised with functions and powers that relate to an unborn and/or newborn offspring of a child on a protection order or a parent of a child on a protection order managed by an ACCO pursuant to s.18.

This construction is supported by the construction of s.333 and s.168. When read together, these provisions indicate a clear legislative intent, that the Secretary's power to authorise pursuant to s.18 is not limited to functions and powers that can only be exercised *after* a protection order has been made but extends to also include functions and powers that are exercised *prior* to a protection order being made such as s.168.[151]

The current suite of authorised provisions has created a two-tiered service system. This is particularly evident in respect of:

- authorised Aboriginal agencies being unable to exercise necessary functions and powers when a child who is the subject of an authorisation made pursuant to section 18 is in need of therapeutic treatment; and
- the restricted access of authorised Aboriginal agencies to information regarding children who are not the subject of an authorisation pursuant to section 18, and the impact this has on the assessment of risk to children subject to an authorisation made pursuant to section 18;
- authorised Aboriginal agencies being unable to intervene in respect of unborn or newborn children in the same family as a child who is the subject of an authorisation made pursuant to section 18.

This means in many instances Aboriginal families under the authority of an authorised ACCO will receive a lesser service (eg: one without access to information sharing and therapeutic treatment options) and be subjected to intervention and oversight by two separate service providers (eg – both

[151] Section 333(1) provides: "A child or a child's parent may apply to VCAT for review of… (b) without limiting paragraph (a), a decision contained in a case plan prepared in respect of the child under section 168 by the principal officer of an Aboriginal agency or any other decision made by the principal officer concerning the child under an authorisation under section 18." Section 168(1) provides "The Secretary must ensure that a case plan is prepared in respect of a child if a protective intervener is satisfied on reasonable grounds that the child is in need of protection." Section 168(1) can only be exercised before a protection order is made. The power to make a case plan, post the making of a protection order is provided for under s. 169(2)(b).

the authorised ACCO and the DFFH as well) with the real potential to inflict 'systems abuse' on already vulnerable Aboriginal families.[152]

It also means that the administration of a protection order by an ACCO, is subject to restrictions that do not apply to the administration of the same protection order by the DFFH. This is a form of direct discrimination, that whilst intended to be a form of lawful discrimination or 'special measure', fails to satisfy the relevant test that requires the differential treatment (in this instance the restricted authorisation) to be necessary for the benefit of Aboriginal children, to be classified as a 'special measure' and regarded as lawful discrimination. If differential treatment does not benefit Aboriginal children, then it is unlawful discrimination.

3.2 (b) Provisions which do not confer a power on the Secretary

Section 18 allows for the transfer of powers that are conferred on the Secretary. There are many provisions of the CYFA which do not expressly confer a power on the Secretary but may instead (i) create an obligation with respect to a third party that involves the Secretary[153] or (ii) provide relevant context for provisions that do confer powers on the Secretary.[154]

Whilst Section 18(5) provides that 'on an authorisation being given, the Act applies in relation to the performance of the specified functions and the exercise of the specified powers as if the principal officer were the Secretary', there is significant lack of clarity about how these other provisions, which ACCOs have not been authorised to exercise, apply in circumstances where ACCOs are exercising the functions and powers that they have been authorised to exercise.

Some of these provisions are currently included in the pro forma instrument of authorisation used by the Secretary when transferring powers to ACCOs[155] but others are not.[156] Whilst it might be desirable that *all* relevant provisions be included to provide certainty, provisions that do not contain a function or power conferred on the Secretary arguably fall outside the scope of the Secretary's power to

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[152] 'Systems abuse' describes the traumatic effect on children that may result from their involvement with systems (including child protection and legal systems) intended to help them. In the child protection context, systems abuse may occur when a child is subject to extensive and/or repeated questioning about personal matters, especially those of a traumatic or distressing nature. It may also result where a child referred for multiple assessments or support services, without appropriate coordination, or where a child's needs or wishes are not adequately taken into account in planning interventions that affect them.' (Victorian Legal Aid, *Representing children in child protection proceedings: A guide for direct instructions and best interests lawyers*, p.14).

[153] For example, s.184(1) requires "mandatory reporters" to report to the Secretary a reasonable belief that a child is in need of protection on specified grounds.

[154] For example, s.269(2) provides a requirement to serve parents with a relevant notice and related provision s.594 describes the methods by which service may be effected.

[155] See for example: sections 241(2); 262(1); 263(1),(5) and (8); 269(6) and (7); 270(7); 280(1)(a); 287(1),(2) and (3); 289(1); 290(1)(a); 315; 326(1D),(1E),(1F) and (2); 534(1)(c); 561(4b) and (5).

[156] See for example sections 162 (referenced in authorised sections 310(3),(5) and (6), 318(3), 289(1C) and 290(1C)); 163; 241 and 242 (referenced in authorised sections 269(6) and 270(7)); 216; 216A; 217; 218; 220; 221; 222(2); 223; 224; 225; 226; 242(2) and (3); 262(1)(i); 263(3) and (7); 264(1),(2) and (3); 265; 267(2),(3), and (5); 268(1) and (5)(b); 269(3)(b), (7) and (8); 270(1), (5)(b), (9), (9A) and (10); 271(2) and (3); 274; 275; 276; 276A; 277; 278 and 279 (referenced in authorised sections 289(1C)(a) and 290(1C)(a)); 280(1)(b) and (c); and 280(2); 281; 288(1)(b) and (2); 288A(4) and (5); 289(7); 289A(4) and (5); 532; 594; 595; and 596.

authorise under s.18, and therefore their inclusion on the pro forma instrument is arguably ultra vires and of no legal effect.

For example, s.184(1) requires 'mandatory reporters' under the CYFA, to report concerns regarding a child's safety to the Secretary. Whilst s.184(1) (and other provisions like it) do not confer a power on the Secretary, but rather provide for an action to be undertaken by a third party, the action provided for cannot be executed in the absence of either a protective intervener or the Secretary. Where the action required relates to a child who is subject to an authorisation pursuant to s.18, the relevant 'protective intervener' or 'Secretary' should be the principal officer of the authorised ACCO, as it is the ACCO and not Child Protection who has the requisite knowledge of the child's present circumstances and authority pursuant to the instrument of authorisation and under the child's court order to take the necessary steps to keep that child safe.

However, under the existing framework this is not the case. Whilst a mandatory reporter, such as a schoolteacher might believe they are discharging their obligation under section 184(1) by reporting their concerns to an ACCO with authority for the child pursuant to a court order, the CYFA requires them to report their concerns to the DFFH and a penalty attaches if they fail to do so.

Likewise in these circumstances it is the DFFH (and not the ACCO) who has the power and responsibility to make a relevant determination about the report received[157] and keep a written record of the report[158] as ACCOs have not been authorised to exercise these powers. This is notwithstanding that ACCOs have been authorised to exercise powers in part 4.8 divisions 2 and 5 that relate to placing children in emergency care and interim accommodation orders following receipt of such a report (or in other circumstances).[159]

3.2 (c) Powers that cannot be transferred because they do not relate to protection orders

As s.18 only currently enables the transfer of powers "in relation to a protection order", the transfer of state powers under s.18 to date has only occurred in respect of children on protection orders. Therefore, this purported exercise of self-determination has not included any real power to prevent Aboriginal children going into care. Whilst the DFFH introduced a bill in October 2021 which would enable ACCOs to be authorised with pre-protection order powers in respect of Aboriginal children, this bill has not passed and therefore is not yet part of current Victorian law.

VALS is concerned that even if this bill passed, it would not resolve the concerns identified above whereby ACCOs would still only be authorised with a limited suite of powers (in the absence of related functions) designed and drafted by the DFFH. The appropriate solution that would address these

[157] S.187
[158] S.188
[159] These include: s.262(1)(a); s.262(2)(b); s.262(5)(b); s.267; s.268(2), (3)(a) and (5)(a); s.269(1)(a), (3)(a) and (4); s.270(2), (3), (5)(a) and (6); s.271(1)(c).

issues in a more fulsome way and in the true spirit of self-determination would be through the enactment of separate and distinct legislation designed by and for the Aboriginal Community.

Standalone child protection legislation for Aboriginal children and their families would not only enable the transfer of a complete set of functions and powers to ACCOs but also afford the opportunity to address the issues identified above in relation to other special measures in the CYFA as well as the impact of the permanency amendments (discussed in section 2.4) through the introduction of a new suite of protection orders that align with the human rights of Aboriginal children.

RECOMMENDATIONS

Recommendation 26. The Victorian Government should develop standalone child protection legislation for Aboriginal children and their families, to enable the transfer of the complete set of child protection functions to ACCOs and address the systemic failings of existing legislation, policy and practice.

3.3 Separation of Department functions

The colonial context of the child protection system and the paternalism that has been a strong feature of it, mean that many Aboriginal and/or Torres Strait Islander people are rightfully sceptical and fearful of the child protection system. Poor governance structures feed into those concerns.

For child protection in Victoria, the Department for Families, Fairness and Housing is responsible for developing legislation, operationalising it, and litigating it. The contrast with the criminal legal system is striking. While the operation of different parts of the criminal legal system is far from a gold standard of well-separated functions – Victoria Police have significant influence on the development of justice legislation, and on prosecution decisions – there is at least a recognition that these functions are separate. The Department of Justice and Community Safety prepares the legislation which governs the operations of police; police operate under and implement these laws, including making arrests and preparing briefs to lay charges; and an independent Director of Public Prosecutions determines whether to act on police briefs. In the child protection system, all of these roles are played by a single agency.

There are clear conflicts of interest in this arrangement and VALS believes that there have been occasions where Child Protection has drafted legislation that was solely in its own interest.[160] These arrangements might also impinge on rights to natural justice. Regardless of whether such conflicts of interest do result in poor or self-interested decision-making, the arrangement probably contributes to negative perceptions of the system amongst the community, and that perception alone can impact the effectiveness of the system.

In Queensland, the litigation functions of the child protection system have been separated out into a new body, the Office of the Director of Child Protection Litigation, and a NSW review recommended

[160] Topsfield, Jewel, Children removed from families face longer wait before court hearings, The Age.

that the NSW Government follow this example.[161] While the Queensland body is still relatively new, its establishment reflects that housing so many functions within a department does not represent a good governance model.

VALS makes no recommendation as to whether Victoria should establish a similar model to Queensland's Office of the Director of Child Protection Litigation. However, we do believe that Yoorrook should closely investigate how the various functions of the child protection system have become inappropriately intertwined. In our view, housing all of these functions together has led Child Protection to become a sprawling and self-interested bureaucracy, contributing to bad policy decisions, a lack of trust in the system and bad decision-making in individual cases. The monolithic structure of Child Protection is a very poor governance arrangement, and it undermines self-determination when the primary consideration in so much Child Protection decision-making is an inward-looking assessment of what will benefit the bureaucracy itself. This issue is discussed further in section 5.1.

3.4 Ineffective governance

Beyond its monolithic structure, Victoria's child protection system has several other systemic issues with governance, oversight and accountability.

These problems disproportionately impact Aboriginal and/or Torres Strait Islander families. The annual reports of the Commission for Children and Young People consistently highlight "shocking over-representation of Aboriginal children and young people in Victoria's child protection and youth justice systems, and unusually high numbers of Aboriginal children dying in scope for a child death inquiry."[162]

The Victorian Government has recently spent billions of dollars on the child protection scheme in recent years, yet this investment has had little impact on improving the performance of Child Protection.[163] The poor governance of the child protection system might go some way to explaining why these massive investments are not making an impact.

In addition to the problem of legislation that appears to be drafted by Child Protection for their own convenience,[164] VALS have also been frustrated with the lack of consultation on some bills that directly relate to the treatment of Aboriginal children in the child protection system.[165]

Instability is also a factor in governance issues. There have been at least five Ministers responsible for child protection in the last eight years, and two significant machinery of government changes, as the Department of Human Services became the Department of Health and Human Services and subsequently the Department of Families, Fairness and Housing.

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[161] Independent Review of Aboriginal Children And Young People In OOHC, Family Is Culture: Review Report, 2019.
[162] Commission for Children and Young People, 'Giving back power to Aboriginal children and community key to ending over-representation'.
[163] Victoria Legal Aid, 'Child protection reforms needed to put children and families first.'
[164] Topsfield, Jewel, 'Children removed from families face longer wait before court hearings', The Age.
[165] Victorian Aboriginal Legal Service, 'Minister Anthony Carbines refused to properly consult on legislation'.

Governance standards are so low within the department, and exacerbated by poor resourcing, that basic record keeping standards are not followed. Child Protection's Critical Relationship Information System (CRIS), has been in place since 2005, and there have now been at least 6 independent reports criticising the adequacy of CRIS, including reports published by the Victorian Ombudsman, the Royal Commission into Family Violence, and the Victorian Auditor-General.[166] The Auditor-General's report found that 462 children did not have a primary address recorded and 171 children were recorded as having an 'unknown address'.[167] There have also been many reviews commissioned by the Department overseeing Child Protection which have identified the same problems with record keeping, including a 2016 report that found that in a sample of 60 incident reports, "40 involved information becoming available to third parties that could have been expected to place children and or their caregivers at direct risk of harm".[168]

3.5 Data and accountability

Publicly available data is a key way of ensuring that governments can be held accountable by the community they serve. It is particularly crucial for Aboriginal Communities: data transparency is essential to uncovering systemic injustices against Aboriginal people, and control of data is an essential element of meaningful self-determination, as recognised by the rights to Indigenous Data Sovereignty and Indigenous Data Governance.

Very little data on the child protection system is made publicly available. Victoria's Crime Statistics Agency publishes data provided to it by the DFFH which consists of a total of nine small data tables, with almost no demographic breakdown or detail provided.[169] Other data is available only through the Australian Institute of Health and Welfare's annual report, which is published with a year-long lag.[170]

As noted above (see section 2.6(c)), the Commission for Children and Young People has made multiple recommendations for additional data points to be included in the Department's public reporting on the child protection system; these recommendations have not been implemented.

VALS has made recommendations for data that Yoorrook could require access to using its Royal Commission powers. Most of the data covered by these recommendations is not sensitive or one-off information that should require a special investigation to be made public: it is data which should be regularly published, to promote transparency and enable the Aboriginal Community and civil society organisations to hold the Government to account for the operation of the child protection system.

The rights to Indigenous Data Sovereignty and Indigenous Data Governance are discussed in VALS' nuther-mooyoop to Yoorrook regarding the criminal legal system. The recommendations made there are equally important to the operation of the child protection system, and to Aboriginal Communities' ability to exercise their right to self-determination and hold the Government to account.

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[166] Victorian Auditor-General's Office (2022), *Quality of Child Protection Data*, p17.
[167] Ibid, p21.
[168] Leatherland, John, Review of child protection privacy incidents and carer and client safety, pp25-26.
[169] Crime Statistics Agency, 'Victorian Child Protection: Child Protection Data Tables'.
[170] Australian Institute of Health and Welfare (2022), Child protection Australia 2020–21.

3.6 Oversight

Current oversight measures of the child protection system in Victoria have been ineffective at driving improvements. The child protection system in Victoria is regularly investigated, often after crises, and yet Victoria has the highest rate of Aboriginal and/or Torres Strait Islander children in out-of-home care in Australia.[171]

The Commissioner for Aboriginal Children and Young People has published several important reports regarding, in full or in part, the child protection system in Victoria.[172] CCYP currently undertake a number of proactive monitoring tasks in relation to out-of-home-care, such as "monitoring serious incidents in out-of-home care" and "conducting onsite or online inspections of residential care services."[173] Greater proactive powers to investigate the child protection system could be given to appropriate representatives of Aboriginal and/or Torres Strait Islander communities.

Oversight of the child protection system could also be improved by increased public reporting requirements on the performance of the child protection system, mechanisms to ensure more effective implementation of report recommendations, and greater scrutiny of Child Protection by reforming the Public Accounts and Estimates Committee to be more like the Senate Estimates hearings in the Australian Parliament.

Parts of the out-of-home care system, particularly secure welfare but potentially also other forms of residential care, should also be in the jurisdiction of an independent detention inspector, which Victoria is obliged to establish under the Optional Protocol to the Convention Against Torture (**OPCAT**). OPCAT is discussed in detail in VALS' nuther-mooyoop to Yoorrook regarding the criminal legal system, and in the other VALS work referenced in that submission. Victoria has made very limited progress towards meeting its OPCAT obligations, and is on track to miss the January 2023 deadline for implementation.

[171] Australian Institute of Health and Welfare (2022), Child protection Australia 2020–21.
[172] Commission for Children and Young People, 'Systemic Inquiries'.
[173] Commission for Children and Young People, 'Monitoring out-of-home care and child protection'.

4. Child protection and the criminalisation of Aboriginal children

As Yoorrook has noted in its Issues Paper, there is significant interaction between the child protection system and Victoria's criminal legal system. A number of issues relating to the youth justice system and the treatment of Aboriginal children by police are discussed in our separate response to the Commission's Criminal Justice System Issues Paper.

This nuther-mooyoop focuses on the contributions of the child protection system to the criminalisation of Aboriginal people. Too many 'crossover children', who are simultaneously in contact with the child protection and youth justice systems, are poorly served by the child protection system which is supposed to be responsible for their care. Many Aboriginal children also end up in the criminal legal system, as children or adults, because the child protection system allows risk factors like substance use or mental health issues to go unaddressed. These problems are addressed in turn in the next two sections.

4.1 Crossover children

VALS has long had major concerns about the treatment of so-called 'crossover children' – children who are involved in both the child protection and youth justice systems.[174] This is arguably the most vulnerable group of children in Victoria, and the interaction of these two systems should be carefully tailored to provide individualised support to protect children's development and improve their life chances. At present, this is not the case in Victoria, and children in need of protection are treated inappropriately by both child protection and youth justice actors (including police).

Aboriginal children are disproportionately likely to be 'crossover children' and to be exposed to the harmful effects of a system which does not do enough to protect vulnerable young people. In fact, more than half of Aboriginal children in the youth justice system have current or previous child protection orders, compared to around 38% of the overall population in the youth justice system.[175] VALS recommends to Yoorrook existing reports on crossover children in the child protection system; even where these are not solely focused on Aboriginal children, the overrepresentation of Aboriginal children in the crossover cohort means that their findings and recommendations are particularly relevant to Yoorrook's work. Key reports include:

- Research by Susan Baidawi and Rosemary Sheehan, contained in an Australian Institute of Criminology 'Trends & issues' paper (2019) and a full report to the Criminology Research Advisory Council (2019)
- Three Sentencing Advisory Council reports: *Crossover Kids: Vulnerable Children in the Youth Justice System Report 1* (2019), *Crossover Kids: Vulnerable Children in the Youth Justice System Report 2* (2020), and *Crossover Kids: Vulnerable Children in the Youth Justice System Report 3* (2020)

[174] Much of the material in this section is drawn from VALS' *Submission to the Inquiry into Victoria's Criminal Justice System*, p86.
[175] Commission for Children & Young People (2021), *Our youth, our way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system*, p294.

- The Commission for Children and Young People's report, *Our youth, our way: Inquiry into the overrepresentation of Aboriginal children and young people in the Victorian youth justice system* (2021)

Contact with the child protection system almost always precedes contact with youth justice.[176] 98% of crossover children who experienced residential care had been known to the Child Protection service before offending, and 74% had only committed their first offence after being placed in residential care.[177] Younger children in the youth justice system were more likely to be crossover children than older children, and this is particularly the case for Aboriginal children: "[o]f crossover children first sentenced or diverted aged 10-13, one in four were Aboriginal."[178] This overrepresentation is particularly concerning, because earlier contact with the youth justice system is more likely to lead to subsequent reoffending and further contact with the criminal legal system, as discussed below. Aboriginal children are removed into out-of-home care at a young age far more often than non-Aboriginal children: the removal rate for children aged 9 or younger is around 18 times higher for Aboriginal children.[179]

Some degree of crossover between these two systems is to be expected, since the traumatic circumstances which bring children to the attention of Child Protection are often also risk factors for offending. However, it is also clear that the child protection system itself is creating the conditions for offending in many cases. Residential care is the most common placement type for crossover children; as discussed further in section 4.2, this is indicative of how the failures in the residential care system contribute to criminalisation.

Even more concerningly, when a child does become involved with the youth justice system, the response of Child Protection is very often to 'step back' from providing care and support.[180] VALS would highlight to Yoorrook the findings about Child Protection made by the CCYP in its landmark report on Aboriginal children in the youth justice system by, *Our Youth, Our Way*. They included:

- "Child Protection case managers not attending court when their client had a criminal matter"[181]
- Child Protection case workers not planning for the scheduled release of a child from youth justice custody[182]
- The Child Protection manual "appear[ing] to encourage case managers to relinquish and abdicate their responsibilities" by only participating in planning or providing information to Youth Justice if requested[183]

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[176] Sentencing Advisory Council (2020), *Crossover Kids: Vulnerable Children in the Youth Justice System Report 2*, p.xvi.
[177] Ibid.
[178] Ibid, p.xvii.
[179] Australian Institute of Health and Welfare (2022), *Child protection Australia 2020-21*, Table S5.1.
[180] Commission for Children & Young People (2021), *Our youth, our way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system*, p312.
[181] Ibid, p312.
[182] Ibid.
[183] Ibid, p313.

- Child Protection "work[ing] more actively to prevent a child or young person receiving bail", including by arguing in court that custody was the safest place for the child[184]

As a result of these findings, the CCYP reached the overall conclusion that the child protection system "too often abdicates its responsibilities to children and young people when they come into contact with the youth justice system" and "often fails to provide a caring home for Aboriginal children and young people, instead placing them at an unacceptable risk of harm".[185]

Child Protection is meant to provide children with care as a parent would. This standard is clearly not met when Child Protection's response to involvement with youth justice is effectively to give up responsibility for the child.

Appropriate support for crossover children requires their issues to be dealt with in a unified and coordinated manner. The current protocols for cooperation between Child Protection and Youth Justice clearly do not achieve this.

Early contact with the criminal legal system significantly increases the chances of repeat contact into adulthood. Being 'known to police' from a young age increases the likelihood of being stopped, questioned and searched by police on more occasions. Aboriginal children are over-policed and police frequently fail to use de-escalation techniques which they have committed to employing. Violent and harmful interactions with police as a child, and over-policing as a child, can create trauma and negatively influence future police interactions throughout Aboriginal people's lives. The experience of being arrested, suffering police use of force, and being held in police custody or youth detention is deeply traumatising for children. A cycle of traumatisation and re-traumatisation can occur when children are repeatedly detained for short periods in police custody, or on brief periods of remand in youth detention. This trauma is a risk factor for later offending as an adult. Research conducted by the Australian Law Reform Commission indicates 90% of Aboriginal youths who appeared in a children's court across Australia appeared in adult court within 8 years, with 36% receiving a prison sentence later in life.[186] Earlier contact is even more harmful: the Sentencing Advisory Council has found that "[t]he younger children were at their first sentence, the more likely they were to reoffend generally … continue offending into the adult criminal jurisdiction, and be sentenced to an adult sentence of imprisonment before their 22nd birthday."[187] This makes it essential that the child protection system supports children to avoid contact with the youth justice system, and continues to provide that support to crossover children when early contact does occur – rather than effectively abandoning them to police and the youth justice system.

There are particularly acute issues with the criminalisation of children in residential care.

4.2 Criminalisation in residential care

[184] Ibid, p315.
[185] Ibid, p303.
[186] Australian Law Reform Commission (2018). Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, at 15.6.
[187] Sentencing Advisory Council (2016), *Reoffending by children and young people in Victoria*, p. xiii.

The problem of the criminalisation of children in residential care has been extensively documented. We recommend to Yoorrook the *Care Not Custody* report published by Victoria Legal Aid in 2016,[188] as well as relevant parts of the CCYP's *Our Youth, Our Way* report. [189]

Young people in residential care, and particularly young Aboriginal people, are too often brought into contact with the criminal legal system because care providers do not act as they would if they were parents. VALS has dealt with, and the Commission for Children and Young People has documented, cases in which residential care staff have called the police over minor behavioural issues like breaking plates or furniture.[190]

The Sentencing Advisory Council noted that police were called far more often than they would be by parents, often not because the "behaviour was severe but because of its frequency"[191] – indicating that many staff do not have the skills, training or temperament to care for highly vulnerable children, whose behaviour patterns cannot be easily changed after one or two incidents.

Working with vulnerable and traumatised children with complex needs requires extensive training and qualifications, and on-the-job training cannot be adequate to prepare staff for this type of work. At present, staff are underqualified and can struggle to deal with persistently challenging behaviour from children with complex needs. Related to this, the remuneration and work conditions for residential care staff currently cannot attract qualified professionals, and the workforce instead is subject to a high level of turnover and reliance on agency contract staff. This limits the chance for children to build trusting relationships with staff, and the capacity for staff to consistently implement tailored support plans. Effective de-escalation of difficult situations requires these kinds of relationships and individualised supports, and when they are lacking, staff are far more likely to feel that they cannot handle a situation and have no option but to call police. Staff lack confidence to decide that police are not involved, or to tell attending police that charges do not need to be laid once a situation has de-escalated.

While inappropriate calls to police by care providers are a major part of the problem, it is also clear that police respond to these calls in deeply problematic ways. Call-outs to residential care units are handled by local police stations, and their competence in handling these calls is extremely variable. Section 345 of the *Children, Youth and Families Act* establishes a presumption that police should proceed by summons rather than arrest when dealing with children, but at some stations this presumption is not appropriately applied. Youth Specialist Officers frequently have no knowledge of children's cases or engagement with charges laid against them. The Sentencing Advisory Council has previously reported stakeholders' view that frontline police's "responses to increased contact with a given child sometimes led to decreased tolerance upon further involvement with that child" – the

[188] Victoria Legal Aid (2016), *Care Not Custody: A new approach to keep kids in residential care out of the criminal justice system*.
[189] Commission for Children & Young People (2021), *Our youth, our way: Systemic inquiry into the over-representation of Aboriginal children and young people in Victoria's youth justice system*, Chapter 8.
[190] Ibid, p298.
[191] Sentencing Advisory Council (2020), *Crossover Kids: Vulnerable Children in the Youth Justice System Report 2*, p25.

opposite of an evidence-based approach – because of a failure to understand children's responses to trauma.[192]

As a result, police involvement with children in residential care often escalates the situation rather than helping to manage it. Police efforts at de-escalation are frequently very limited, and officers will rapidly move from a brief attempt at de-escalation to making an arrest. Officers sometimes proceed to arrest a child even when a situation has been de-escalated. The experiences of Aboriginal children served by VALS lawyers include:

- Police attending a residential care unit several hours after a call, by which time the situation had de-escalated and there was no ongoing risk, but police nonetheless make arrests
- Police making arrests solely for charges that are precipitated by policing, such as resisting arrest or assaulting a police officer
- Use of extreme and excessive force when making arrests, including placing children in chokeholds and taking them to ground
- Attending police officers using degrading language towards children

The experience of VALS' lawyers is that charges relating to the underlying behaviour (such as property damage) which led to police being called are almost always dropped. The only charges which proceeds are those, such as assaulting police or resisting arrest, which are instigated by the policing itself. Many of these charges could be avoided by more appropriate police conduct when called to residential care.

In the worst cases, local police officers appear to pursue a vendetta against Aboriginal children in residential care once they become known to police. Clients of VALS have been told by police that they will be stopped for a warrant check every time police see them. Police attending a residential unit for an unrelated incident have taken the opportunity to wake a child in the middle of the night, causing escalation of the situation and ultimately leading to an arrest, when the original call-out had not involved him at all.

For example, members at Ringwood Police Station have a particularly egregious track record with Aboriginal children in residential care, including creating confrontations with children, using excessive force against children, failing to attempt de-escalation and making unnecessary arrests. This kind of traumatising contact with police and the criminal legal system early in life is profoundly damaging for Aboriginal children, and can be a source of ongoing trauma throughout their lives.

Case study: M

M is an Aboriginal child who was placed in residential care at age 11 and has been placed in at least twelve different care facilities since that time. During their time in residential care, their behaviour has indicated serious mental health and/or disability issues, including self-harm and suicidal tendencies. Despite this, M has not received consistent mental health support. M has also not received consistent schooling or cultural support.

[192] Sentencing Advisory Council (2019), *'Crossover Kids': Vulnerable Children in the Youth Justice System Report 1*, p74.

M's contact with police has escalated throughout their time in residential care. M's carers often contact police for behavioural management matters. When M's residential carers contact police, police have often proceeded immediately with arrest, rather than summons or de-escalation. As a result, M has been repeatedly detained in police stations and at Parkville. M has spent months on remand, despite never being sentenced to a term of imprisonment.

M's carers have contacted police for behaviour including stealing household items, throwing items around their residential care unit, and assaulting carers. Police have also attended M's residential unit in the middle of the night to conduct checks on them.

When police attend, instead of engaging in de-escalation, M is violently arrested and is subsequently charged with assault police and resist arrest. In most instances, charges relating to the original behaviour are dropped. The only charges which remain are the police offences of resist arrest and assault police.

M is also targeted by police and has been violently arrested in public for reasons including to check whether they have warrants and public transport offences.

M's arrests are often highly violent and have led to them sustaining serious physical and mental injuries and being hospitalised. Police officers have used abusive and humiliating language to M. M now has significant trauma surrounding police, which impacts their interactions with police.

4.2 (a) The *Framework to reduce criminalisation of young people in residential care*

In February 2020, the Victorian Government acknowledged this issue and published its *Framework to reduce criminalisation of young people in residential care*.[193] The Framework is a positive document which establishes principles for avoiding criminalisation of children in care. Its implementation, however, is severely lacking. VALS continues to see children being policed and charged because their behaviour in residential care is criminalised. In our view, this is occurring because the Framework is treated as a long-term planning document, rather than as establishing standards that police and care providers must meet.

At present, the Framework has a State-wide Implementation Group which is responsible for an Action Plan. VALS' view is that the Implementation Group and Action Plan are focused on systems reform to achieve the Framework's goals over time. For example, actions in the Action Plan include the development of training programs and the review of practice guidelines. These are important steps in a long-term response, but the Framework is also a document with immediate applicability to specific cases. It includes a decision-making guide for residential care workers, which provides that a police response "must only ever be considered after other de-escalation strategies have been attempted"[194] and that "a police response is appropriate […] when the behaviour will lead to immediate and

[193] Department of Health and Human Services (2020), *Framework to reduce criminalisation of young people in residential care*.
[194] Ibid, p20.

substantial risk of harm".[195] The Framework also provides that "[c]riminal charges will not be pursued if there's a viable alternative" and that police will promote the use of discretion as an alternative.[196]

These parts of the Framework establish clear standards for the conduct of residential care workers and police. VALS' experience is that these standards are not being applied. Residential care staff continue to call police in relation to minor property damage, and police continue to arrest Aboriginal children in these circumstances. Our lawyers are forced to extensively negotiate with police over criminal charges which are clearly inappropriate under the Framework.

There is a clear need for a mechanism to ensure the Framework's standards are applied in individual cases, as a complement to the systems work being undertaken by the State-wide Implementation Group. VALS supports the development of a specific procedure for lawyers to escalate cases relating to the Framework, to a panel which can consider whether the police call-out was appropriate and whether criminal charges should proceed, and develop a plan for preventing further criminalisation of the young person and ensuring future compliance with the Framework. Such a panel would need to include representatives of police as well as Child Protection and any involved care provider. VALS has provided a brief proposal for a model of such a panel, attached as Annex C.

Case study: R

R is an Aboriginal child living in residential care. R was born with a substance dependence, and has been diagnosed with number of neurodevelopmental disorders and mental health issues. They have experienced a significant increase in poor mental health as a teenager, culminating in numerous attempts at self-harm and suicidal ideation, including while in secure care, and has been sectioned under the *Mental Health Act* on many occasions.

R's traumatic experiences have led to behaviour that has brought them into contact with the police. R currently has a number of pending criminal matters, almost all relating to alleged offending in their residential care unit. The routine police response has been to proceed with arrest, charge and bail without a thorough investigation of whether the complainant wishes to proceed, or of whether proceeding with a criminal charge is justified, particularly in light of the *Framework*. Police have threatened to make applications to remand R, despite the immeasurable harm which could be caused by this to a highly vulnerable Aboriginal young person who makes repeated attempts to commit suicide whilst in Department care.

Members of R's care team have made comments that calling police to remove R from the residential unit serves as a 'circuit breaker', and gives R's carers a break and is beneficial to R. This is not only contrary to the *Framework* and R's health and wellbeing, but indicates a culture of criminalisation within the child protection system.

[195] Ibid, p24.
[196] Ibid, p19.

RECOMMENDATIONS

Recommendation 27. Staff in residential care and the child protection system should have the requisite qualifications and experience to work with vulnerable children, with complex needs, in residential care.

Recommendation 28. Comprehensive de-escalation training and guidelines should be developed and implemented for residential care staff and Victoria Police.

Recommendation 29. Cultural awareness training for residential care workers should be accompanied by specific anti-racism training and training on systemic racism.

Recommendation 30. Complaints and disciplinary procedures for Victoria Police and child protection staff should be improved to provide accountability for compliance with the *Framework* by reducing police callouts and reducing criminalisation of children in residential care.

Recommendation 31. The Victorian Government should include residential care units and secure care in the mandate of oversight mechanisms, National Preventive Mechanisms (NPMs), which are to be established in compliance with Victoria's OPCAT obligations.

Recommendation 32. Community Legal Education (**CLE**) for children in the child protection system, including specific CLE for Aboriginal children, should be properly funded.

Recommendation 33. Resourcing of Youth Specialist Officers in Victoria Police should be increased so that these officers can fulfil their specialist functions.

Recommendation 34. Children who go missing from residential care should not spend extended periods of time in police custody when they are found. There is a responsibility on Residential Care staff and Victoria Police to avoid or reduce time spent in custody.

Recommendation 35. The Victorian Government should establish a review and escalation mechanism to ensure that the *Framework to reduce criminalisation of young people in residential care* is applied in individual cases.

4.3 Missed opportunities in the child protection system

The child protection system contributes to the criminalisation of Aboriginal people even for those who do not come into contact with the youth justice system. Failures of Child Protection can contribute to the ongoing criminalisation of Aboriginal people throughout their lives.

The risk factors for criminal offending are well known. They include issues such as criminal offending, such as risk factors for criminal offending such as mental health issues, intergenerational trauma, substance use, educational disengagement and homelessness. As discussed in VALS' separate nuther-mooyoop on the criminal legal system, the overrepresentation of Aboriginal people in the criminal legal system occurs because government does not provide the services and supports Aboriginal people need to address these risk factors.

It is shameful that the government continually fails to provide these services, even to Aboriginal children who have been specifically identified by Child Protection as in need of more support. In many cases, as outlined throughout this nuther-mooyoop, the child protection system is inadequate in a way that contributes to trauma – heightening risk factors instead of addressing them. In more cases, the system misses crucial opportunities to support children to address issues that may lead to contact with police and the criminal legal system.

Far too often, VALS serves clients – both children and adults – who were known to the child protection system or in care for lengthy periods, but who have never received adequate support to reduce their risk of criminalisation. For example, many of our clients do not have mental health issues assessed or diagnosed until this happens as part of a criminal proceeding. That demonstrates a fundamental failure to provide mental health supports for Aboriginal children in the child protection system. It means less effective support – both because intervention comes later, and because clients may engage differently with services that are related to a criminal matter than they could have with services proactively trying to help them address their issues in the community. There is an urgent need for the child protection system to provide culturally safe, consistent services to children to ensure they can remain engaged with education, get support for mental health issues or other challenges, and avoid becoming entangled in the criminal legal system.

Case Study: CH

CH is a VALS client who was known to Child Protection from his infancy, and was removed from his parents twice in the first 18 months of his life.[197] In 2019 he was sentenced to 36 years in prison.[198] Tragically, despite the Government having oversight of CH's upbringing for his entire childhood, CH lived in an environment of emotional abuse, physical neglect and domestic violence for the first three years of his life.[199] He was permanently removed from his parents aged 3, and while in foster care subsequently had almost no contact with his father and only sporadic and neglectful contact with his mother.[200]

CH's experience of the child protection system was not itself a major source of trauma. He lived with one foster carer from his removal aged 3 until adulthood.[201] However, he clearly continued to suffer from the effects of his traumatic childhood. At school he was "emotionally fragile, with anger and self-esteem issues … often rough or aggressive with other children, and had difficulty controlling [his] behaviour".[202] He ran away from his foster home on several occasions, once for around a month, and slept rough. He began using alcohol and drugs around age 13, when his mother died.[203] His substance use steadily became more problematic, leading to drug-induced psychotic episodes and intrusive

[197] DPP v Herrmann [2019] VSC 694, [36-37].
[198] DPP v Herrmann [2019] VSC 694, [119].
[199] DPP v Herrmann [2019] VSC 694, [35-39].
[200] DPP v Herrmann [2019] VSC 694, [41].
[201] DPP v Herrmann [2019] VSC 694, [39].
[202] DPP v Herrmann [2019] VSC 694, [42].
[203] DPP v Herrmann [2019] VSC 694, [43-44].

paranoid thoughts.[204] He left his foster home for the last time aged around 19 and became homeless.[205]

CH told VALS that while other children had a 'worse run' in the foster care system, his care had largely amounted to being fed and housed. He never received the active guidance of a good parent. Certain behaviour was forbidden without the kind of explanation that allows a child to develop towards independent living. He found himself exiting care without knowing how to cook or shop for food, or how to find and hold a job. A worker who was meant to submit an application for housing for CH never did so. By the time he left care, CH said he had no idea what services were available to him and would likely have struggled to engage with them given his previous experiences.

CH's severe personality disorder was only diagnosed by expert witnesses for his sentencing hearing, even though their evidence was that it had developed in his early childhood.[206] He had previously been admitted to hospital in relation to drug-induced psychotic episodes, but even this did not occur until he was aged 17 or 18.[207] At his sentencing hearing, "counsel informed the court that [he was] finding a safe place to sleep, three meals a day, a hot shower, and the prospect of being able to undertake courses" better than his previous living situation.[208]

CH's offending was extremely serious and it is impossible to say if it might have been avoided by earlier intervention. It is clear, however, that the child protection system did not do enough to address the issues in his life which were clearly risk factors for criminal offending. **After 18 years in the child protection system, CH exited it into homelessness with an undiagnosed severe personality disorder, unaddressed substance use issues, and significant unresolved trauma from his childhood.**

[204] DPP v Herrmann [2019] VSC 694, [45-46].
[205] DPP v Herrmann [2019] VSC 694, [48].
[206] DPP v Herrmann [2019] VSC 694, [56].
[207] DPP v Herrmann [2019] VSC 694, [45].
[208] DPP v Herrmann [2019] VSC 694, [87].

5. Workforce and resourcing

5.1 Workload issues in the child protection system

Victoria's child protection system is chronically under-resourced and under-staffed. This has been extensively documented by reports and investigations over several years. The Victorian Ombudsman conducted an investigation in 2009 which found workload pressures to be at the root of a large number of compliance problems.[209] The Commission for Children and Young People reported in 2017 on a system that "despite recent investment" sees "practitioners burdened with unsustainable workloads".[210]

In 2018, the Victorian Auditor-General conducted an audit on the mental health of child protection practitioners. Its central conclusion was that "[u]nreasonable workloads are the primary risk to [child protection practitioners'] good mental health".[211] It found that while measures could be taken to manage the mental health risks of practitioners, the pressure could not be alleviated "without more [child protection practitioners] to reduce workloads and meet the constantly growing demand".[212] The Department's own assessment at the time was that the child protection workforce "need[ed] to be about double its current size in order to return workloads to sustainable levels." In a 2022 follow-up report, the Auditor-General concluded that the "workforce remains under-resourced, under-supervised and under pressure."[213] The number of funded child protection practitioner positions grew by 28% between the two reports – far short of the doubling Child Protection had said was necessary – and the actual workforce grew by only 12.8%, as many positions remained unfilled.[214]

VALS' view is that Child Protection is so under-resourced and under-staffed that the best-interests principle is systematically disregarded – because the paramount consideration in decision-making is, unavoidably, the need to allocate very scarce resources and prioritise work accordingly. Previous investigations have reported a practice of focusing on compliance with statutory or court-ordered deadlines, "even where cases without court requirements may actually involve greater risk of harm to a child."[215]

In our view, unreasonable workloads have become a major driver of Child Protection policy and practice. At the level of policy, Child Protection's increasing focus on stability is in part driven by the need to reduce workloads, since reducing supervised contact with parents or achieving permanency (even if inappropriately or prematurely) eases the burden on the Child Protection workforce. Proposed changes to interim accommodation orders, which would have accelerated the family

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[209] Victorian Ombudsman (2009), *Own motion investigation into the Department of Human Services Child Protection Program*, throughout – see eg. paragraphs 58, 163, 216, 494, 560, 571, 612.
[210] Commission for Children and Young People (2017), *'…safe and wanted…': Inquiry into the implementation of the Children Youth and Families Amendment (Permanent Care and Other Matters) Act 2014*, p4.
[211] Victorian Auditor-General's Office (2018), *Maintaining the Mental Health of Child Protection Practitioners*, p8.
[212] Ibid, p7.
[213] Victorian Auditor-General's Office (2022), *Follow-up of Maintaining the Mental Health of Child Protection Practitioners*, p1.
[214] Ibid, p8.
[215] Victorian Auditor-General's Office (2018), *Maintaining the Mental Health of Child Protection Practitioners*, pp33-4.

reunification timeframes and so sped up the process of eliminating parents from involvement with a child, are part of this renewed focus on stability. An even clearer example is the proposed changes to emergency care applications. These amendments would significantly extend the time after an emergency removal before Child Protection must bring an application to the Court, and it is clear that there is no policy rationale for this change except to ease the burden on an overstretched workforce. VALS is concerned that, with DFFH remaining responsible for drafting its own legislation, we will continue to see future amendments aimed at reducing court-related work – thereby reducing the critical role the court plays in providing independent oversight and protecting the best interests of children.

At the level of practice, child protection practitioners do not make any reference to workload issues in records of decision-making or before the Court – because doing so would clearly contravene the CYFA requirement for the child's best interests to be the paramount consideration in all decision-making. Instead, proposals or decisions by Child Protection – such as to oppose supervised contact with a child's parent – are presented as being due to failures of the parent.

While Child Protection denies that workload issues drive its policy or affect decision-making about issues like supervised contact, VALS' view is that they clearly do. For example, regarding supervised contact:

- In 2016, Child Protection commissioned a review of supervised contact visits, quantifying the cost of delivering these visits[216]
- Subsequently Child Protection attempted to pilot a program to use non-specialist staff for transporting children and supervising visits with family[217]
- Child Protection staff frequently highlight workload pressures in general settings – for example, referring to the disparity in caseloads when contrasting the positive results of VACCA's Nugel program to the outcomes achieved by Child Protection

It is clear that Child Protection is aware of the burden of supervised contact visits and looking for ways to alleviate it. At the same time, child protection practitioners often obstruct supervised contact: for example, by routinely requiring parents to confirm contact by 9.00am and cancelling contact if confirmation is not received, or in some cases by opposing supervised contact conditions on orders. In our view, it is implausible that these are unrelated.

We would urge Yoorrook to investigate, including through questioning of witnesses, the extent to which workload issues are driving child protection policy and practice, even if this is denied by Child Protection.

5.2 Culturally unsafe care

The impact of inadequate investment in self-determination and culturally appropriate services for Aboriginal families is that standards of care in the child protection system are frequently very poor.

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[216] Victorian Auditor-General's Office (2018), *Maintaining the Mental Health of Child Protection Practitioners*, pp32-3.
[217] Ibid.

While the child protection system is supposed to stand in the place of a parent and act "as a good parent would",[218] the level of care provided in the system falls far short of this standard.

In many cases, children do not receive appropriate services while on protection orders and in out-of-home care. In our experience, the provision of culturally appropriate counselling, trauma services or mental health support for Aboriginal children in care is practically non-existent. Schooling is also not appropriately supported: while children in out-of-home care may be disengaged from education and resist being sent to school, but a good parent in this scenario would take every step to re-engage them. Child protection practitioners and residential care staff very rarely do so.

These problems are exacerbated when Aboriginal children are moved through several care placements. It can be challenging for a carer or child protection practitioner who is newly introduced to a child to connect them with appropriate services, and the disruption of placement changes may make a child less willing to engage even if the services are more necessary than ever. Failure to engage children with appropriate services is a fundamental failure of the state's parental responsibility. It can have lifelong impacts, including a greater likelihood of unemployment and economic marginalisation, alcohol and substance use, and ongoing mental health problems. A failure to provide necessary services also creates risk factors for engagement with the criminal legal system, as discussed further below.

Child protection practitioners' inadequate training on delivering culturally appropriate service is also deeply problematic. Without staff who can work in a culturally safe and supportive manner with Aboriginal children and their families, it is very difficult to positively engage children with services and deliver appropriate standards of care. SNAICC has produced a table of common misconceptions which can lead child protection practitioners to assess Aboriginal parents as failing to care for their children, and lead to Child Protection involvement which is avoidable and fundamentally premised on a lack of cultural awareness and understanding.[219]

VALS' concerns about standards of care are particularly acute with respect to residential care. Children in out-of-home care (which includes residential care as well as foster care and kinship care placements) are the most vulnerable of those in the child protection system, and remain affected after leaving the care system – being, for example, three times more likely than average to receive income support.[220] Aboriginal children comprise nearly a quarter of the residential care population in Victoria, compared to 1.7% of the total Victorian population aged 19 or younger.[221]

Care for Aboriginal children in residential care is manifestly inadequate; the Commission for Children and Young People has found that care makes too many vulnerable young people "feel unsafe or

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[218] Children, Youth and Families Act 2005, s174.
[219] SNAICC (2019), *The Aboriginal and Torres Strait Islander Child Placement Principle: A Guide to Support Implementation*, p18.
[220] Australian Institute of Health and Welfare (2021), *Income support receipt for young people transitioning from out-of-home care*, p. vii.
[221] Commission for Children & Young People (2019), *In our own words: Systemic inquiry into the lived experience of children and young people in the Victorian out-of-home care system*.
Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians, June 2016*.

threatened".[222] Some of the issues relating to residential care, relating to the criminalisation of children in care, are discussed in section 4.2 below. The child protection system's failure to meet the legislated standard of 'acting as a good parent would' is most stark in residential care settings. A shocking number of young people go missing from residential care homes on a regular basis. In stark contrast to the way a parent would react to their child going missing, residential care units respond inconsistently and often with a lack of urgency, despite the fact that these children are especially vulnerable to exploitation and mistreatment while missing. The response can also be a source of further trauma when it involves police investigation and children being held in custody by police when they are found. This is particularly of concern when police end up bringing criminal charges – for example for drug use or assaulting an emergency worker – against children who they had been tasked with finding and returning home safely.[223] Children who go missing from residential care are clearly deeply vulnerable and traumatised, and holding them in police custody for extended periods – with or without charging them with any offence – only deepens that trauma. The fact that children go missing in the first place, and that residential care staff frequently do little to respond when this happens, is also indicative of the unsupportive environment created by the residential care system. Although Aboriginal children are a small proportion of those who go missing from residential care, their overrepresentation in residential units in the first place means these are still issues which disproportionately affect Aboriginal children relative to the overall population.[224]

5.3 Resourcing of related services

As noted elsewhere in this nuther-mooyoop, Aboriginal people bear the brunt of the systemic failures of the government in many different parts of society. These injustices lead to marginalisation of Aboriginal people and communities, which can become self-perpetuating when faced with systemically racist government institutions and an absence of Aboriginal self-determination. Just as this marginalisation drives Aboriginal people's overrepresentation in the criminal legal system, it also exacerbates overrepresentation in the child protection system and compounds the suffering faced by families involved in it.

For example, a parent who does not have stable housing may find it very difficult to secure contact with a child who has been removed from their care. Stable housing can be hard to access for Aboriginal people who are already marginalised socioeconomically, have mental health issues, or have been in contact with the criminal legal system. But the inability to have contact with children can itself cause instability in a parent's life, creating a cycle that is damaging for both the child and the parent. VALS' Baggarrook transitional housing project has been very successful in supporting the reunification of mothers with their children, because services that address the specific needs of Aboriginal women can effectively disrupt these damaging cycles. However, Baggarrook is limited to housing six clients at any

[222] Commission for Children & Young People (2021), *Out of sight: Systemic inquiry into children and young people who are absent or missing from residential care*, p3.
[223] Ibid, p19.
[224] Ibid, p16.

given time. Far greater investment in transitional housing, public housing and social housing is needed to help tackle the conditions which lead to and prolong Child Protection involvement.

There is also a substantial need for better services, and improved coordination, to support the transition of children out of the care system. While the recent increase to the maximum age for children to stay in the care system can be beneficial to some children, it does not avoid the need for transitional support when children eventually do leave the system. The case study in section 4.3 above illustrates, among other failings of the system, the need for better coordinated transitions out of care. It is not sufficient that services exist, if the onus is left on children leaving care to research, identify and seek out support from these services.

We also urge Yoorrook to consider the effects of the child protection system on adults, including kinship carers, who come into contact with it. Aboriginal kinship carers typically take on responsibility for children not because they have abundant time and resources, but because they feel a deep obligation to help Aboriginal families avoid the harms of removal and the residential care system. Taking on these responsibilities can come at a significant cost: carers can lose opportunities for education and employment, with consequences for the stability of their own lives. These burdens are only partly compensated by the inadequate financial support given to kinship carers. And in many cases, even this support is not present – because many Aboriginal carers take on responsibilities informally, in order to avoid the disruptive involvement of Child Protection, rather than through an official placement. VALS lawyers frequently encounter clients whose legal issues have arisen in large part because they are struggling with caring responsibilities on top of other challenges. In addition to improving the quality and capacity of services within the child protection system, it is also crucial that Victoria makes all kinds of other services – including mental health support, substance use treatment, legal aid, and disability support – more accessible and culturally safe for Aboriginal people, to help support the many people who are affected indirectly by the child protection system.

Annex A: Witnesses that Yoorrook should invite/compel to give evidence

	Witnesses
Government	Minister for Child Protection
	Secretary, Department for Families, Fairness and Housing
	Deputy Secretary with responsibility for Child Protection, Department for Families, Fairness and Housing
Police	Deputy Commissioner of Victoria Police, with responsibility for implementation of the *Framework to reduce criminalisation of young people in residential care*
	Officer-in-charge, Ringwood Police Station
Community and Public Sector Union	Officials with representative responsibility for child protection practitioners

Annex B: Information, documents and data that Yoorrook should subpoena

Agency/Organisation	Documents/information	Data
Department of Families, Fairness and Housing	Final report of the longitudinal study of the effects of amendments to permanency arrangements	
		Disaggregated data on child protection notifications, child protection involvement and child removal following the incarceration of a parent
		Annual data on key performance targets, including: • Detailed data on compliance with the placement hierarchy • Data on compliance with other elements of the Aboriginal Child Placement Principle • Data on compliance with legislative requirements including consultation with ACSASS, convening of AFLDM meetings, and development of cultural support plans
		Data on the amount of Government expenditure on programs and support to prevent Aboriginal children from being removed from their parents
		Data on Government expenditure to support out-of-home placements for Aboriginal children
	Annual staff survey results	

Annex C: Review and Oversight Mechanisms for the Framework to Reduce Criminalisation of Children in Care

Background

Following a meeting between Youth Justice, the Commissioner for Children & Young People and VALS on 22 August, VALS is developing a proposal for an oversight system to ensure consistent application of the Framework to Reduce Criminalisation of Young People in Residential Care (**the Framework**). VALS' proposals are to create mechanisms for oversight of how the Framework is being applied in individual cases, as a complement to the background/systems work being undertaken by the SIG.

Oversight Mechanisms: Monitoring & Review

Two distinct forms of oversight are needed to ensure that the Framework is being properly applied at the local level in individual cases. These are:

- ***Independent monitoring mechanism***: An overarching system to assess whether the Framework is being applied consistently, identify systemic issues that are arising repeatedly, and provide advice to agencies on how they can improve their practice.
- ***Review/escalation pathway***: A procedure for review of decision-making in specific cases, to determine whether the Framework was appropriately applied, and alter decisions and/or develop an approach to avoid further criminalisation.

Both of these forms of oversight are important. The first priority should be establishing a review/escalation pathway, as this would deliver outcomes for individual clients, and involves less complex questions than those relating to the appropriate scope and mandate of a monitoring body.

The next section provides a proposed model for the more immediate establishment of a review/escalation pathway. The subsequent section identifies key considerations for a monitoring mechanism, which VALS does not have a specific proposal for at this time.

Review Mechanism: Proposal for a Review Pathway

Scope

The review/escalation pathway would be accessed through a legal representative. VALS' view is that there are substantial risks associated with a review mechanism that considers the cases of children without legal representation. These risks include ensuring the child can give informed consent to escalation and to sharing of confidential information, and providing safeguards for information-sharing between agencies.

Any child who has been charged with an offence should have legal representation and be able to access review. If necessary, expanded funding for services could be considered so that children without legal representation can be provided with a lawyer specifically to access this review pathway.

Review Panel Process

Panel Composition

The review process would be conducted by a single statewide panel. The panel would be constituted as follows:

- A representative of DFFH, DJCS, VACCA, and any involved residential care providers; the representatives should not have had direct involvement with the child or their care
- A Victoria Police representative, who is not the informant in any relevant matter, with authority to direct local police/prosecuting authorities to withdraw charges must attend
- An independent representative of the Commissioner for Children and Young People; this person would not represent the child, but would provide independent advice to the panel about the Framework and its correct application. The precise scope of this role should be determined in further consultation.
- One agency would have Secretariat responsibilities, including receiving referrals, compiling agendas, preparing files for consideration, and reporting back to legal practitioners

The panel will meet monthly to consider incidents referred to it.

Referrals

The process would be initiated by a child's legal representative. A legal practitioner could seek a review by the panel when:

- Police arrest or use force against a young person in residential care
- DFFH or care provider staff call police regarding a young person in residential care
- Police issue a caution to a young person in residential care
- Police lay charges against a young person in residential care (for offending at any location, including outside of the residential care unit)

The referral from the legal practitioner would be made by email, and include: name, date of birth, address, Aboriginality, vulnerabilities (including disability), a short summary of the referred incident(s), and any other information relevant to application of the Framework.

Preparation for Panel Meeting

Following a referral, agencies will prepare for a meeting of the review panel:

- The Secretariat will notify each panel member and provide basic details of the referral.
- The representative of each agency will gather information from agency records and from front-line staff who have direct involvement with the young person and the incident/s the subject of the referral
- Victoria Police must prepare a briefing pack in relation to each incident referred. This briefing would include LEAP records, police notes, police statements (if made) and use of force reports. This briefing would be provided to all members of the panel at least 24 hours before the meeting.

- The secretariat will compile agendas or other materials (subject to confidentiality) for the panel's consideration. This might include additional information from the young person's legal representative with the consent of the young person.

Panel Meeting Procedure

A meeting of the panel will be convened to consider material relevant to the matter referred and discuss compliance with the framework. The procedure for meetings of the panel needs to be carefully designed to avoid confidential and sensitive information being shared without consent and authorisation.

Each representative on the panel will provide an assessment of their agency's compliance with the Framework, based on information in their own possession.

If a legal representative (with the consent of the young person) shares information or authorises information to be shared with the entire panel, this information can be considered further by the panel as a whole. Representatives may revise or add to their agency assessment based on this further information.

Information shared in panel meetings, by a child's legal representative or by any participant in the panel, must be treated confidentially. MOUs must be in place to ensure that this information is not used for other purposes, such as police charging decisions. The agreement currently in place for Victoria Police notes from Care Team Meetings may be an appropriate model.

Representatives on the panel will consider services, supports and therapeutic responses that the child may need to help avoid further criminalisation, as well as considering ways to reduce police call-outs and charges.

Following discussion, the panel will produce, in response to each referred incident:

- **Statement by Victoria Police regarding criminal charges**: this statement will be prepared by the panel member with authority to withdraw charges and will state whether the charges will be proceeded with and how the Framework has been considered in making this decision.
- **Individual Panel Member's Report:** this is a report prepared by each individual panel member including an assessment of their own agency's compliance with the framework. The report will identify specific examples of compliance or non-compliance, any obstacles to compliance and how practice could be improved to ensure future compliance.
- **Whole Panel Action Plan Report:** this report will be developed collaboratively by the panel as a whole and include an action plan agreed to with the consensus of all panel members. The actions will aim to ensure compliance with the Framework for the specific incident/s the subject of the referral and to prevent further criminalisation of the young person, with specific commitments and timeframes for actions by each agency

Post-Panel Meeting Procedure

The Secretariat will provide the child's legal practitioner with all of the reports prepared by the panel within two weeks.

Each agency should, while respecting the confidentiality requirements of the panel, relay the decisions and any issues raised in the panel meeting with relevant front-line staff, to support improved practice.

Monitoring Mechanism

Principles for Monitoring

We have not developed a detailed model for the monitoring function, which would require extensive further work. Key principles for effective monitoring include:

- **Independence:** The monitor needs to be genuinely independent of all the implementing agencies of the Framework.
- **Information firewalls:** The independent monitor needs a strict information firewall from any agency/team that receives complaints or makes decisions on individual reviews. The independent monitor would also need to establish information management protocols to manage the information obtained from each individual agency responsible for the Framework and ensure the privacy of personal information disclosed.
- **Transparency:** Monitoring should be accompanied by regular public release of reports, including data, analysis and recommendations.
- **Engagement with civil society:** The monitor's work should facilitate the accountability work of community organisations, and the monitor should respond to concerns and issues raised by civil society.

The independent monitor would also need to be sustainably resourced, and given a flexible mandate to respond to different issues as they arise. This would mean that the monitor's mandate should not be limited to the Framework specifically – which may be amended, replaced or discarded.

Key Considerations for Developing a Monitoring Model

Role of the Commission for Children and Young People: The monitoring role would most naturally be filled by the Commission for Children and Young People, which already monitors residential care, child protection and youth justice. However, this may require changes to the statutory mandate of CCYP, as well as additional resources to fulfil any new function.

Relationship to the Statewide Implementation Group: The existing Statewide Implementation Group is not an independent monitor, given it is made up of representatives from the implementing agencies, and is not examining individual cases/incidents. However, the SIG is developing an evaluation framework to measure outcomes as part of its implementation work. Delineating the functions of the SIG from the independent monitor, and identifying how the work of the two would complement each other, is a crucial step.