



## Victorian Aboriginal Legal Service Nuther-mooyoop to the Yoorrook Justice Commission: Criminal Legal System

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

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


Our Civil and Human Rights Practice provides advice and casework to Aboriginal people in areas including infringements; tenancy; victims of crime; discrimination and human rights; Personal Safety Intervention Orders (**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<sup>1</sup>
- Community Legal Education
- Victoria Police Electronic Referral System (V-PeR)<sup>2</sup>
- Regional Client Service Officers
- Baggarrook Women's Transitional Housing program<sup>3</sup>
- Aboriginal Community Justice Reports<sup>4</sup>

## **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/or 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 nuther-mooyoop, we use the word 'Aboriginal' to refer to Aboriginal and/or 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:

- Isabel Robinson, Senior Policy, Research & Advocacy Officer
- Patrick Cook, Head of Policy, Communications and Strategy
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- Sarah Schwartz, Principal Managing Lawyer, Wirraway
- Morgan O'Sullivan, Policy, Research and Data Officer
- Natasha McGregor, Quality Control & Accreditation Manager

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> See <https://www.vals.org.au/aboriginal-community-justice-reports/>





## SUMMARY OF RECOMMENDATIONS

### Urgent reforms

**Recommendation 1.** The Victorian government should implement VALS' *Plan for Aboriginal Justice in Victoria*<sup>5</sup> immediately as a signal of intent that they are committed to the deep, transformational change that is needed.

### Yoorrook Timeframe and timelines

**Recommendation 2.** The Victorian Government should extend the deadline for the Yoorrook Justice Commission's final report to at least June 2026.

**Recommendation 3.** The Yoorrook Justice Commission should provide further opportunities for individuals and organisations to make written nuther-mooyoop, with longer timeframes and consultation periods.

**Recommendation 4:** The Yoorrook Justice Commission and the Victorian government should provide additional funding to Aboriginal organisations to enable better engagement with the Commission.

### Historical and contemporary injustices: the legacy of racism and violence

#### Denial of Aboriginal Self-determination

**Recommendation 5.** The Victorian government should negotiate a Justice Treaty with Aboriginal Communities and Aboriginal Community Controlled Organisations (**ACCOs**), which sets a new foundation to transform the criminal legal system, including through progressive transfer of power, resources, data and control to allow for Aboriginal justice models.

**Recommendation 6.** The right of Aboriginal peoples to self-determination must be enshrined in all relevant legislation, including the *Victorian Charter of Rights and Responsibilities*, the new *Youth Justice Act*, the *Sentencing Act 1991*, the *Corrections Act 1968* and the *Bail Act 1977*.


**Recommendation 7.** Relevant legislation - including the new *Youth Justice Act* and the *Corrections Act 1986* - should be amended to create "a positive duty on the Secretary of DJCS to develop strategic partnerships with Aboriginal Communities."<sup>6</sup>

**Recommendation 8.** Aboriginal Communities and ACCOs must be genuinely consulted at the earliest possible opportunity in the development of programs, policies and legislation that impact Aboriginal Communities. Genuine consultation means allowing adequate time for Aboriginal Communities to provide feedback, meaningful engagement with the responses provided, and explaining why or why not feedback is taken into account.

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<sup>5</sup> VALS, [A Plan for Aboriginal Justice in Victoria](#) (2022).

<sup>6</sup> See Commission for Children and Young People (CCYP), [Our Youth, Our Way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system](#) (2021), Recommendation 1(b).



**Recommendation 9.** The Free, Prior and Informed Consent (**FPIC**) of Aboriginal peoples must be enshrined in legislation and must be respected and meaningfully enacted in government processes, partnerships and actions. The Victorian government must put in place effective mechanisms to allow Aboriginal people to provide FPIC on issues that affect them, if they choose to.

**Recommendation 10.** In accordance with Aboriginal Data Sovereignty and Aboriginal Data Governance, legislation should be adopted in Victoria to enshrine the right of Aboriginal people and communities, individually and collectively, to:

- (a) Exercise control over the manner in which data concerning Aboriginal individuals and communities is gathered, managed, interpreted and utilised; and
- (b) Access and collect data obtained about Aboriginal individuals and communities.

**Recommendation 11.** Victorian government departments must develop data access and sharing agreements with and for ACCOs and Traditional Owners in their sector, as provided for under the Victorian Closing the Gap Implementation Plan.

**Recommendation 12.** The Victorian government must invest in ACCO data management and analytics as a core function of ACCOs and Traditional Owners, as provided by under the Victorian Closing the Gap Implementation Plan.

**Recommendation 13.** Funding arrangements must be reformed so that ACCOs and other Aboriginal organisations have access to adequate, sustainable, and autonomous financial resources.

## **Racism**

**Recommendation 14.** The Victorian government should take measures, including adopting new legislation, to increase collection of and access to data on racism in Victoria. All measures must comply with Aboriginal Data Sovereignty and Aboriginal Data Governance.

**Recommendation 15.** All oversight and accountability mechanisms, as well as ad hoc reviews/inquiries, must be explicitly mandated to consider systemic racism.

**Recommendation 16.** Victoria Police must immediately stop using predictive policing tools and approaches.

**Recommendation 17.** The Victorian government should adopt measures to increase awareness of racism, including reforms to the primary, secondary and tertiary education systems and public awareness campaigns.

**Recommendation 18.** Mandatory and regular training in systemic racism, unconscious bias and cultural awareness must be required for:

- (a) All public sector agencies and bodies involved in the criminal legal system, including Victoria Police, court staff, judiciary (including the Coroners Court), government departments, Parliament, Ministers, Corrections Victoria, prison staff, members of the Adult and Youth Parole Boards, legal counsel (including counsel in a coronial inquest) and prosecutors;
- (b) All lawyers working in the criminal legal system and coronial system (as part of admission to practice and Continuing Professional Development).



## Criminalisation over healing

**Recommendation 19.** The Victorian government should stop building new prisons and commit to moving towards a zero-prison population.

**Recommendation 20.** The Victorian government must invest in holistic, integrated and wrap around support and prevention, including culturally safe housing and social services, education, health, mental health, disability screening, support for parents and families.

**Recommendation 21.** Responses to offending behaviour must focus on healing, by prioritising diversion at every stage of the legal process and connecting people to integrated culturally safe services that will support them to heal and address underlying reasons for behaviour, including health, education, housing and other needs.

## Deficit versus cultural strengths-based approaches

**Recommendation 22.** Relevant legislation – including in relation to cautions, diversion, bail, sentencing and parole – should require decision makers to:

- (a) Take into account the unique systemic and background factors affecting Aboriginal peoples; and
- (b) Provide reasons and demonstrate the steps taken to discharge this obligation.

**Recommendation 23.** The Victorian government should provide long-term, sustainable and adequate funding for self-determined strengths-based approaches.

## Violence

**Recommendation 24.** The Victorian government must end Aboriginal Deaths in Custody by:

- (a) Implementing the recommendations from the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**);
- (b) Reducing incarceration of Aboriginal people, including through urgent reform of the *Bail Act 1977*, raising the age of criminal responsibility, decriminalising health issues, diversion at every stage of the criminal legal process and sentencing reform (see recommendations 41-64 below);
- (c) Prohibiting torture, cruel, inhuman or degrading treatment or punishment in custody, including by prohibiting solitary confinement and strip searching (see recommendation 70 below);
- (d) Providing access to adequate and culturally safe healthcare and cultural, social and emotional wellbeing for people in custody (see recommendations 65-69 below);
- (e) Reducing recidivism by supporting people to successfully transition out of custody (see recommendations 71-73);
- (f) Strengthening accountability and oversight, including through independent detention oversight, independent investigation of Aboriginal Deaths in Custody, and establishing independent, robust and culturally appropriate police and prison complaints systems (see recommendations 74-90 below).





## Lack of accountability

**Recommendation 25.** The Victorian government must establish a robust, independent and culturally appropriate police oversight system, including independent police complaints, independent investigation of police-contact deaths, independent monitoring and auditing of police powers and independent detention monitoring of police custody (see recommendations 74-81).

**Recommendation 26.** The Victorian government must strengthen the prison oversight and accountability system, including through an appropriately resourced independent oversight body and a culturally safe legal service for Aboriginal people who are incarcerated (see recommendations 88-89).

**Recommendation 27.** The Victorian government must urgently make progress on establishing independent detention oversight in Victoria, in compliance with the *Optional Protocol on the Convention Against Torture, Cruel, Inhuman or Degrading Treatment or Punishment* (see recommendations 90-99).

## Well-founded mistrust of laws, policies and government authorities

**Recommendation 28.** Every Aboriginal person in Victoria should have access to place-based culturally safe legal and other services provided by Aboriginal organisations.

**Recommendation 29.** VALS should have adequate, sustainable, and autonomous financial resources to provide place-based, holistic and culturally safe legal and justice services to Aboriginal people in Victoria, including both early intervention legal advice and education to prevent contact with the criminal legal system; as well as support for people to resolve their legal issues.

**Recommendation 30.** The Aboriginal Community Justice Panels (**ACJP**) should have adequate, sustainable, and autonomous financial resources to provide culturally safe support to Aboriginal people in police custody, including during police interviews and in relation to bail applications heard by police or bail justices.


**Recommendation 31.** The involvement of Victoria Police in the lives of Aboriginal people must be minimised. In particular, Victoria Police should not be First Responders in health responses, including in relation to public intoxication, mental health crises and drug use.

## Lack of acceptance and implementation of past recommendations

### Tough on crime narratives

**Recommendation 32.** Political parties and the media must stop manipulating “community safety” and “public safety” through law-and-order politics. Community safety and public safety must be determined by communities, and legal/policy responses to support safe and thriving communities must be informed by these definitions.

**Recommendation 33.** Media organisations should have greater civil liability for the impacts of their reporting, including in relation to:

- 
- (a) Harm and distress caused to individuals or peoples by reporting that could be reasonably considered to be racist;
  - (b) Inaccurate reporting on crime issues when it can be proven that such errors are systemic;
  - (c) The mental health of journalists who report on crime.

**Recommendation 34.** The Yoorrook Justice Commission should compel government witnesses identified in Annex B to provide evidence to the Commission, and subpoena government data/documents identified in Annex C.

### **Influence of Victoria Police and the Police Association**

**Recommendation 35.** Safeguards must be put in place to limit the influence of Victoria Police and The Police Association of Victoria (TPAV) on justice policy in Victoria, including:


- (a) Victoria Police should be required to document the number of meetings, phone calls, and emails with Ministers and their staff in their annual report;
- (b) The Public Accounts and Estimates Committee should be required to hold an annual inquiry, separate to the usual budget estimates, regarding government funding received by Victoria Police;
- (c) The TPAV should be required to register as a lobbyist organisation and be subject to the relevant disclosure requirements;
- (d) The influence of the TPAV on justice policy in Victoria should be examined by an independent inquiry. This should include any discussions TPAV officials have had with Ministers or their staff in relation to disciplinary proceedings.

### **Funding excuses and preferences**

**Recommendation 36.** Both the Victorian and Commonwealth governments should be required to report annually on the percentage of government funding going to Aboriginal specific investments. Reporting should be broken down into funding that goes to government departments and agencies, funding that goes to mainstream services, and funding that goes to Aboriginal organisations and individuals. Investments in Aboriginal Communities should be evaluated through Aboriginal-led evaluation, to analyse their impact and outcomes, and inform the design of future initiatives and investments.

### **Accountability and oversight for implementing recommendations**

**Recommendation 37.** In partnership with the Aboriginal Justice Caucus (AJC), the Victorian Government should establish an independent, statutory office of the Aboriginal Social Justice Commissioner (ASJC), to provide oversight for Aboriginal justice in Victoria, including implementation of coronial recommendations and recommendations from the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) and associated inquiries. This office should be properly funded, with appropriate powers (including powers to conduct own motion inquiries), and report directly to the Parliament.



**Recommendation 38.** The Coroners Court of Victoria and/or the Department of Justice and Community Safety (**DJCS**) should compile, and make public, all coronial recommendations arising from inquests into Aboriginal Deaths in Custody in Victoria since 1991, as well as information on the status of implementation of each of these recommendations.

**Recommendation 39.** The Department of Premier and Cabinet (**DPC**) should have overall responsibility for implementation of coronial recommendations by government departments and agencies. DPC should be required to report annually on the whole of government progress in implementing each coronial recommendation, and the report should be tabled in Parliament.

## Systemic injustices requiring urgent action

### Stop criminalising Aboriginal Communities

#### Reform the punitive bail system

**Recommendation 40.** The Victorian Government must urgently amend the *Bail Act 1977* to:

- (a) Create a presumption in favour of bail for all offences, with the onus on the prosecution to prove that bail should not be granted;
- (b) Strictly limit the circumstances in which bail should not be granted;
- (c) Prohibit detention if a custodial sentence is unlikely;
- (d) Repeal all bail offences (ss. 30, 30A and 30B);
- (e) Require bail decision makers to explain what information they have taken into account to understand why and how someone's Aboriginality is relevant, and provide the reasons for any refusal to grant an application for bail made by an Aboriginal person;
- (f) Require bail decision makers to make enquiries about Aboriginality in self-represented cases;
- (g) Require bail decision makers to consider the best interests of any dependent children in bail decisions.

**Recommendation 41.** The Victorian government should increase understanding and application of Section 3A of the *Bail Act 1977* by:


- (a) Funding VALS to work with Aboriginal Communities to develop resources and training for bail decision makers on s. 3A, cultural awareness, systemic racism and unconscious bias;
- (b) Requiring all bail decision makers (judges, magistrates, police and bail justices) to complete mandatory and regular training on s. 3A, cultural awareness, systemic racism and unconscious bias.

**Recommendation 42.** The Victorian government should increase access to culturally appropriate bail hearings by:

- (a) Expanding the jurisdiction of Koori Court to include bail hearings;
- (b) Creating identified roles for Koori officers at the Bail and Remand Court;
- (c) Funding VALS to provide a duty lawyer service at Bail and Remand Court;
- (d) Increasing and diversifying bail justices across Victoria.

**Recommendation 43.** The Victorian government should increase access to culturally safe support for individuals on bail by:



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- (a) Increasing the number of Koori case workers in the Court Integrated Services Program (**CISP**);
  - (b) Investing in culturally safe residential bail support and accommodation that is designed and delivered by Aboriginal organisations;
  - (c) Investing in culturally safe drug and alcohol rehabilitation services that are designed and delivered by Aboriginal organisations.

### Raise the Age

**Recommendation 44.** The Victorian government must raise the minimum age of criminal responsibility to at least 14 years, in the first 100 days of a new term of government.

**Recommendation 45.** The Victorian government must raise the minimum age for detention to at least 16 years.

**Recommendation 46.** The Victorian government should extend the presumption of *doli incapax* to children aged 14-17 years, and ensure that it is understood and applied effectively by:

- (a) Creating a legislative requirement for prosecutors to rebut the presumption;
- (b) Restricting the kinds of evidence that can be produced to rebut the presumption;
- (c) Increasing funding to the Children’s Court to improve the quality of clinical reports;
- (d) Requiring all police, Crown prosecutors and criminal defence lawyers to undergo mandatory and regular training on *doli incapax*.

### Decriminalise Public Intoxication

**Recommendation 47.** The Victorian Government must decriminalise public intoxication and replace it with a state-wide health response by November 2023. There must be no further delays.

**Recommendation 48.** No one should be detained in a police cell, police vehicle, police station or Protective Service Officer (**PSO**) “pods” at train stations, because they are intoxicated in public. This must be explicitly prohibited in legislation.


**Recommendation 49.** Victoria Police and PSOs must not be First Responders in a health response to public intoxication. They must not be given any new powers to respond to individuals who are intoxicated in public, including:

- (a) Power to detain for the purposes of making inquiries about a safe place for the person;
- (b) Power to detain for the purposes of transporting an individual to a safe place.

**Recommendation 50.** Health personnel must not be given any new powers in relation to a person who is intoxicated in public, including detention powers.

### Decriminalise Drug Possession for Personal Use

**Recommendation 51.** The Victorian government should decriminalise the possession of all drugs for personal use. The model of decriminalisation must meaningfully reduce the over-policing of people who use drugs in favour of a health response and must not merely eliminate criminal sanctions for drug possession.



**Recommendation 52.** In consultation with relevant stakeholders - including people with lived experience of drug use and the criminal legal system and ACCOs - the Victorian Government should invest in an expansion of health and social services, including alcohol and other drug treatment services, to fully meet the needs of people who use drugs.

### Stop Criminalising Mental Illness and Other Disabilities

**Recommendation 53.** The Victorian Government should amend the *Mental Health and Wellbeing Act 2022* to remove arrest, detention and search and seize powers for Victoria Police and PSOs in mental health crisis responses.

**Recommendation 54.** The Victorian Government should reform the *Summary Offences Act 1966* to repeal offences that disproportionality impact people with mental illness.<sup>7</sup>

**Recommendation 55.** The requirement for Independent Third Persons to attend police interviews with individuals who have a disability, must be embedded in legislation.

**Recommendation 56.** All police officers and prison staff should be required to complete mandatory and regular training on how to interact with people with disabilities, including mental illness.

**Recommendation 57.** Together with Aboriginal Health Organisations, the Victorian Government should develop and implement culturally appropriate screening for disabilities, for all individuals entering prison or youth justice detention centres.

### Diversion At Every Stage Of The Legal Process

**Recommendation 58.** The Victorian Government must work with Aboriginal Communities to increase access to pre-charge cautions in both the youth and criminal legal systems by:


- (a) Requiring Victoria Police to take into account an Aboriginal person's unique background and circumstances in relation to all decisions regarding cautioning, and demonstrate the steps taken to discharge this obligation;
- (b) Introducing legislated cautioning schemes that maximise opportunities for cautions,<sup>8</sup> including a legislative presumption in favour of alternative pre-charge measures (verbal warnings, written warnings, cautions, referral to cautioning programs, and family group conferencing) with no exceptions;
- (c) Funding Aboriginal Organisations to develop and implement culturally safe cautioning programs for Aboriginal children, young people and adults.

**Recommendation 59.** The Victorian Government must work with Aboriginal Communities to increase access to diversion in both the youth and criminal legal systems by:

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<sup>7</sup> This includes: begging (s. 49); obstruction of foot paths (s. 5), move on directions (s. 6) and obscene language (s. 17).

<sup>8</sup> This should include: no limits on the number of cautions that can be received; no requirement to admit guilt; a legislative requirement that no charges or proceedings can be commenced for the offence; no requirement to disclose information regarding the caution; no criminal record resulting from the caution; a legislative prohibition against adducing evidence about the caution, except with the permission of the person; a requirement to destroy any evidence relating to the caution.

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- (a) Requiring courts to take into account an Aboriginal person's unique background and circumstances in relation to all decisions regarding court-ordered diversion, and demonstrate the steps taken to discharge this obligation;
  - (b) Amending the statutory diversion schemes in the *Children, Youth, Families Act (CYFA)* 2005, the new *Youth Justice Act* and the *Criminal Procedure Act 2009*, to maximise opportunities for diversion,<sup>9</sup> including through a legislative presumption in favour of diversion at all stages of the legal process;
  - (c) Funding Aboriginal Organisations to develop and implement culturally safe diversion programs for Aboriginal children, young people and adults;
  - (d) Employing Koori Diversion Coordinators at the Children's Court Youth Diversion service and the Criminal Justice Diversion Program;
  - (e) Expanding the jurisdiction of the Koori Court to include court-ordered diversion.

## Reduce Incarceration Through Sentencing Reform

### Aboriginality in Sentencing

**Recommendation 60.** The Victorian Government should amend the *Sentencing Act 1991*, the *CYFA* and the new *Youth Justice Bill* so that for the purposes of all sentencing decisions, courts are required to:

- (a) Take into account the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples; and
- (b) Provide reasons and demonstrate the steps taken to discharge this obligation.

**Recommendation 61.** The Aboriginal Community Justice Reports (**ACJR**) project should be funded on a long-term basis and extended into all Courts as a mechanism to support a strengths-based approach in sentencing and ensure that judicial decision makers have access to relevant information regarding a person's Aboriginal background and Aboriginal-specific sentencing options. Options to extend ACJR's into other areas of the justice system should be explored.

### Strengthen Community-Based Sentencing Options


**Recommendation 62.** The Victorian Government should amend the *Sentencing Act 1991* to increase community-based sentencing options, including by introducing sentencing options between a Community Corrections Order and an adjourned undertaking.

**Recommendation 63.** The Victorian Government and Aboriginal Communities should jointly develop and implement integrated culturally appropriate programs and supervision for Aboriginal people on community-based sentences, including facilities and programs modelled off Wulgunggo Ngalu Learning Place.

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<sup>9</sup> This should include: removing police discretion as to which offences are suitable for diversion; a legislative requirement for police to explain why they have not recommended diversion for all police briefs; no limit on the number of times that diversion can be ordered; removing the requirement for the prosecutor to consent to diversion.





**Recommendation 64.** The Victorian Government should amend the *Sentencing Act 1991* to ensure that individuals with an acquired brain injury and/or with an intellectual disability that was not diagnosed before the age of 18 years, are eligible for a Justice Plan.

## End Violence for People Who Are Incarcerated

### Equivalency of Healthcare in Custody

**Recommendation 65.** The Victorian Government must provide people in custody with healthcare (including mental healthcare) that is the equivalent of that provided in the community. This means that their physical and mental health needs must be met to an equivalent standard; not just that there is an equivalence of services available.

**Recommendation 66.** Aboriginal people must be provided access to primary healthcare by Aboriginal Community Controlled Health Organisations (**ACCHOs**), as is available in the community.

**Recommendation 67.** Provision of healthcare in custody must be overseen by the Department of Health, not DJCS.

**Recommendation 68.** The Victorian Government should immediately terminate the contract with Correct Care Australasia, for provision of healthcare in Victoria's public prisons.

**Recommendation 69.** People in detention must have access to the Medicare Benefits Scheme (**MBS**), the Pharmaceutical Benefits Scheme (**PBS**), and the National Disability Insurance Scheme (**NDIS**). Everyone should be assessed for NDIS eligibility upon entry to a prison or youth justice detention centre.

### End Ill-Treatment In Custody

**Recommendation 70.** The Victorian Government should end torture and other cruel, inhuman or degrading treatment or punishment in Victorian prisons and youth justice detention centres by amending the *Corrections Act 1968*, the *CYFA 2005* and the new Youth Justice Act to:

- (a) Prohibit torture, cruel, inhuman or degrading treatment or punishment
- (b) Prohibit routine strip searching and provide that a strip search should only ever be permitted as a last resort after all other less intrusive search alternatives have been exhausted and there remains reasonable intelligence that the person is carrying dangerous contraband;<sup>10</sup>
- (c) Prohibit solitary confinement and clearly define the limited, narrow and exceptional circumstances in which a person may be lawfully separated from other people;<sup>11</sup>
- (d) Prohibit the use of restraints/force, with strict exceptions and robust safeguard;<sup>12</sup>
- (e) Prohibit certain restraints/use of force, without exception;<sup>13</sup>


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<sup>10</sup> VALS, HRLC, FlatOut and St Kilda Legal Service, [\*Ending human rights abuses in Victorian prisons: Submission to the Cultural Review of the Adult Custodial Corrections System\*](#) (2021), p. 7.

<sup>11</sup> Ibid.

<sup>12</sup> VALS, [\*Submission to the Inquiry into Victoria's Criminal Justice System\*](#) (2021), recommendations 212-213.

<sup>13</sup> Ibid., recommendation 211.

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- (f) Strictly limit urine testing, including that it should only be required upon reasonable grounds and in a manner consistent with the inherent dignity and right to privacy of the detainee involved to the greatest extent possible;<sup>14</sup>
  - (g) Require Youth Justice to notify VALS' Custody Notification Service (**CNS**) whenever an Aboriginal child or young person is put in isolation and provide additional funding to VALS to respond to these notifications.

## Support People To Transition Out Of Prison

### Reform The Parole System

**Recommendation 71.** The Victorian Government must amend the *Corrections Act 1968*, the *CYFA 2005*, the new *Youth Justice Act* and other relevant legislation to create a fair, transparent, culturally appropriate and equitable parole system, including by:

- (a) Requiring Parole Boards to take into account an Aboriginal person's unique background and circumstances in relation to all decisions regarding parole, and demonstrate the steps taken to discharge this obligation;
- (b) Introducing a system of automatic release for certain categories of sentences, whereby people are automatically granted parole once their non-parole period has been reached;<sup>15</sup>
- (c) For people not eligible for automatic release, introducing a legislative presumption that an application for parole automatically be made at the earliest eligibility date;<sup>16</sup>
- (d) Repealing the parole revocation schemes so that time spent on parole contributes to the head sentence, even if parole is cancelled;
- (e) Incorporating procedural fairness rights into parole processes, including the right to access legal advice and representation;
- (f) Removing the Youth and Adult Parole Boards' exemptions from the operation of the *Victorian Charter on Human Rights and Responsibilities 2006*;
- (g) Repealing the Youth and Adult Parole Boards' exemptions from the rules of natural justice;
- (h) Requiring that the Youth and Adult Parole Boards must comply with the principle that detention is a last resort;
- (i) Providing that when required programs have not been completed due to their unavailability or cultural inappropriateness, this cannot be a bar to parole.

**Recommendation 72.** In addition to legislation reform, the Victorian Government must increase access to parole for Aboriginal people by:


- (a) Investing in, and ensuring access to, culturally appropriate rehabilitation programs that are designed and delivered by Aboriginal organisations;
- (b) Funding VALS to provide culturally safe legal services to Aboriginal people who are incarcerated;
- (c) Ensuring that parole conditions are achievable and culturally appropriate;

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<sup>14</sup> Ibid., recommendation 220.

<sup>15</sup> VALS, HRLC, FlatOut and St Kilda Legal Service, [\*Ending human rights abuses in Victorian prisons: Submission to the Cultural Review of the Adult Custodial Corrections System\*](#) (2021), p. 8.

<sup>16</sup> Ibid.

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- (d) Investing in, and ensuring access to, culturally appropriate support for Aboriginal people on parole, including transitional housing and holistic support.

### Transitional Support For People Exiting Prison

**Recommendation 73.** The Victorian Government should provide long-term and stable funding to ACCOs to deliver pre-and post-release programs for all Aboriginal people transitioning out of prison and youth justice detention. This should include increased and long-term funding to expand Baggarook and VACCA's youth Throughcare program, as well as additional funding for Throughcare services for Aboriginal men.

### Accountability And Oversight

#### Police Accountability And Oversight

**Recommendation 74.** All police complaints must be investigated by a new independent police complaints body, that is complainant-centred, transparent, has adequate powers and resources to carry out independent investigations, and responds to the needs of Aboriginal complainants.

**Recommendation 75.** The new independent police complaints body must develop and implement a specific strategy for addressing racism within Victoria Police.

**Recommendation 76.** Victoria Police must be required by legislation to regularly publish data, in compliance with Aboriginal Data Sovereignty and Governance, about the use of police powers that disproportionately impact Aboriginal people.<sup>17</sup>

**Recommendation 77.** The Victorian Government must establish an independent monitoring body with powers to access and analyse data about the use of police powers, and issue public reports.

**Recommendation 78.** The Victorian Government should carry out an independent review of Victoria Police's disciplinary system. The Review must be open to submissions from the public and stakeholder organisations and the final report and recommendations from the review must be public.

**Recommendation 79.** Requirements relating to use of Body-Worn Cameras (**BWCs**) by Victoria Police must be enshrined in legislation, including sanctions for non-compliance. Individuals who do not comply must be held accountable.

**Recommendation 80.** Victoria Police must be required to disclose the total amount of money paid over a financial year due to misconduct complaints, including settlement payments and court judgements, in their annual report.


### Independent And Culturally Appropriate Investigation Of Aboriginal Deaths In Custody

**Recommendation 81.** Coronial investigations into Aboriginal Deaths in Custody must be carried out by a specialist civilian investigation team that is independent from police and developed by Aboriginal

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<sup>17</sup> This includes: stop and search, detention powers under the Mental Health Act, cautions, move-on powers, treatment in police custody including use of force, drug testing, strip searching, any new powers relating to public intoxication. See VALS, Policy Paper, [Reforming Police Oversight in Victoria](#) (2022), Recommendation 59.





Communities. This team must have the same coercive powers as the police for conducting these investigations.

**Recommendation 82.** Aboriginal families whose loved ones have died in custody or as a result of police contact, must be provided with:

- (a) Culturally safe counselling and support, including for family members in custody; and
- (b) Financial support to cover the costs associated with participating in coronial investigations and inquests.

**Recommendations 83.** The Victorian Government and the Coroners Court should increase funding to the Koori Engagement Unit at the Court (**KEU**) and ensure that the Unit has visibility over the coronial investigation and access to all information that is relevant to Aboriginal families in a timely manner.

**Recommendation 84.** In consultation with the KEU, the Coroners Court should continue to improve coronial processes so that they are culturally appropriate for Aboriginal families, including by:

- (a) Ensuring culturally safe notification to family members of the death of their loved one;
- (b) Providing adequate and appropriate spaces for bereaved families and their supporters during the inquest;
- (c) Requiring coroners to notify families of timelines throughout the coronial process, so that they know how long they will have to wait;
- (d) Require coroners to provide medical reports to families within one month of receiving them;
- (e) Requiring the coronial investigator to provide written reasons to the family and interested parties if the deadline for preparing the coronial brief is not met;
- (f) Examining new approaches to enhance the cultural competency of the court, for example: private sessions; yarning circles; restorative justice conferencing; the use of community panels consisting of Aboriginal Elders to assist the investigating coroner; family conferencing for matters that will not proceed to inquest; monthly call-over list for all matters being dealt with by the court when an Aboriginal person has passed away.


**Recommendation 85.** The *Coroners Court Act 2008* should be amended to include a legislative obligation on all interested parties to:

- (a) Make full disclosure of relevant documents, materials and facts; and
- (b) Set out their position on relevant matters at the outset of the investigation/inquest.

**Recommendation 86.** The Office of the Public Prosecutor (OPP) must be required by legislation to provide reasons if it decides not to prosecute in relation to a death in custody or serious injury, or police contact death or serious injury.

### **Prison Oversight and Accountability**

**Recommendation 87.** Prison complaints, including complaints against private prisons and contractors, should be handled by an appropriately resourced independent oversight body with sufficient powers to refer matters for criminal investigation. The body must be accessible to people in prison and that complainants have adequate protection against reprisals.



**Recommendation 88.** Requirements relating to use of BWCs by prison staff must be enshrined in legislation, including sanctions for non-compliance. Individuals who do not comply must be held accountable.

### Independent Detention Oversight

**Recommendation 89.** The Victorian Government must urgently commence robust, transparent and inclusive consultations with the Victorian Aboriginal Community on the implementation of the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)* in a culturally appropriate way.

**Recommendation 90.** The Victoria Government should work with other Australian Governments to ensure that:

- (a) the visit of the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (**SPT**) is resumed; and
- (b) any reports relating to the SPT visit are made public;
- (a) any future visits by United Nations bodies and mechanisms are adequately supported and all reports are made public.

**Recommendation 91.** The future mechanism for independent detention oversight in Victoria must:

- (a) Be established by legislation;
- (b) Have jurisdiction over all places where individuals are or may be deprived of their liberty, regardless of the length of time of detention (this includes police vehicles, police cells and PSO “pods” at train stations);
- (c) Have sufficient resources to carry out its mandate in a culturally appropriate way.



## DETAILED SUBMISSIONS

### 1. Introduction

VALS welcomes the opportunity to make a nuther-mooyoop to the Yoorrook Commission regarding injustices in the criminal legal system. Our nuther-mooyoop is based on nearly 50 years of expertise delivering culturally safe legal and justice services for Aboriginal people in Victoria, and fighting for change within a system defined by criminalisation, violence and racism.

Since invasion, Aboriginal leaders and communities have fought back against this violence and we continue to do so today. Yoorrook must tell the truth about this violence and its ongoing impact, but most importantly, it must empower Aboriginal Communities to redefine the narrative about the criminal legal system and the way that it impacts the lives of Aboriginal people, families and communities.

Yoorrook presents an opportunity for new levels of transparency about the system, but it also presents an opportunity to elevate and recognise the work and voices of people with lived experience, leaders and activists, who have been fighting for justice for decades. Yoorrook has acknowledged the need to build on this incredible work, and VALS reiterates this call.

Yoorrook and Treaty also present an opportunity to break away from the ongoing denial of self-determination and make concrete progress towards a self-determined system. To be free of the violence and racism that defines the current criminal legal system, we need to reimagine and rebuild the system in a way that is decided by Aboriginal Communities, for Aboriginal Communities.


We need a Justice Treaty that builds on the successes of past Aboriginal Justice Agreements, but sets a new foundation to achieve not just mitigation but transformation of the justice system, so that it is fair for all, not just a few. Along with other Aboriginal leaders and organisations, we look forward to sharing our proposal for a Justice Treaty with the Commission shortly.

A key part of our nuther-mooyoop is the need for Aboriginal data sovereignty and data governance. This is a critical component of Aboriginal self-determination and will support Aboriginal Communities to redefine the narrative about the criminal legal system and its impact on our mob. Access to, and control over data, will allow us to challenge and displace dominant narratives, advocate more effectively for reforms, access resources, and increase transparency and accountability. Implementing data sovereignty and governance – including through legislation – must be a priority for the Commission.

Additionally, Yoorrook can make a significant contribution to transparency and accountability by accessing and making public, information and data that is closely guarded by government authorities. Recent inquiries have exposed significant abuses, but we know that this is only a fraction of the truth. Yoorrook has significant powers to compel witnesses and subpoena documents and should use these powers to reveal the truths that Aboriginal Communities know and experience every day.

Achieving real and meaningful self-determination in the criminal legal system will be a long journey, so we also need to see immediate changes to end the harm and trauma that is perpetrated every day.





In the first 6 months following the election, the Victorian government must implement VALS' *Plan for Aboriginal Justice in Victoria*.<sup>18</sup> This includes:

- bail reform;
- raising the age of criminal responsibility;
- overhauling the police oversight system and establishing an independent police oversight body;
- implementing independent detention oversight; and
- ensuring that Aboriginal people in custody have access to culturally safe healthcare that is equivalent to that available in the community.

Language and terminology are important for Yoorrook. Language has the potential to stigmatise and dehumanise. Let's not talk about the "criminal justice system" as it is the opposite of "just." When we talk about "colonisation," let's be clear that it was invasion.

Our nuther-mooyoop is structured in three parts:

- Part 1 highlights the connections between historical and contemporary injustices in the criminal legal system, including the legacy of racism, violence and denial of Aboriginal self-determination;
- Part 2 examines key reasons why previous recommendations have not been accepted and outlines how and why Yoorrook must be different;
- Part 3 outlines priority reforms in the criminal legal system.

Annexes A and B contain detailed recommendations on witnesses that Yoorrook should invite/compel to give evidence, as well as documents and data that Yoorrook should subpoena.

## RECOMMENDATIONS

**Recommendation 1.** The Victorian Government should implement VALS' *Plan for Aboriginal Justice in Victoria*<sup>19</sup> immediately as a signal of intent that they are committed to the deep, transformational change that is needed.

### 1.1 Yoorrook timeframe and timelines

VALS strongly supports the Commission's request for an extension of its deadline.<sup>20</sup> 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."<sup>21</sup>

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<sup>18</sup> VALS, [A Plan for Aboriginal Justice in Victoria](#) (2022).

<sup>19</sup> Ibid.

<sup>20</sup> Yoorrook Justice Commission, [Yoorrook with Purpose: Interim Report](#), Recommendation 1 (June 2022).

<sup>21</sup> Victorian Government, [Letters Patent Yoorrook Justice Commission](#), p. 4.



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.<sup>22</sup> Even with this extended timeline, there was significant criticism of the efficacy of the Commission and its capacity to engage with all survivors.<sup>23</sup> Other similar process 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.”<sup>24</sup>

We have not provided extensive case studies in this submission due to our concerns that, in most instances, we could not adequately inform current or former clients about this nuther-mooyoop, and include their story in a way that is not exploitative or put them at risk of re-traumatisation. Where case studies are included in this submission, they are reproduced from previous work.

VALS has noted in previously that inappropriately short consultation deadlines, particularly for over-burdened and under-resourced Aboriginal Community Controlled Organisations (**ACCOS**), do not allow the development of meaningful responses and are an affront to self-determination.<sup>25</sup> Yoorrook needs more time to conduct its work properly, and the Aboriginal Community (including ACCO’s) need 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 reproduce the problematic approach of Government in 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 people for trauma-porn, the Victorian Government must allow Yoorrook to determine its own timeline and provide adequate resource to allow the Commission to fulfill the terms of reference.

The Victorian Government cannot use Yoorrook and Treaty negotiations to delay urgently needed reforms and respect for self-determination.<sup>26</sup> 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.<sup>27</sup>

An extension is also vital to address concerns about the operation of Yoorrook to date. There have been several senior staffing changes during the short existence of the Commission, including the resignation of a Commissioner.<sup>28</sup> Yoorrook has been set a huge task that requires a lot of hard work,

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<sup>22</sup> United States Institute for Peace, [Truth Commission: South Africa](#)

<sup>23</sup> Amnesty International, [South Africa: Truth and Justice: Unfinished Business in South Africa](#); International Center for Transitional Justice, [South Africa: Background: Facing Apartheid’s Legacy](#).


<sup>24</sup> M. Davis, “[The truth about truth-telling](#),” The Monthly (December 2021-January 2022 Issue).

<sup>25</sup> VALS, [Submission to the Inquiry into Victoria’s Criminal Justice System](#) (2021) p. 42; VALS, [Submission to the Senate Inquiry on the Implementation of United Nations Declaration of the Rights of Indigenous Peoples \(UNDRIP\) in Australia](#) (2022); VALS, [Submission on Victoria’s Anti-Racism Strategy](#) (2021), pp.46-47.

<sup>26</sup> VALS, Media Release, “[Self-Determination Will Decide the Success of the Yoo-rrook Justice Commission](#)” (10 March 2021).

<sup>27</sup> G. Coulthard, *Red skin white masks: Rejecting the colonial politics of recognition*, pp. 127-128.

<sup>28</sup> J. Latimore, “[Yoorrook commission beset by troubles ahead of interim report](#),” The Age (29 June 2022).



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.

We raise our concerns regarding engagement with Aboriginal people, resourcing, staffing, and difficulties faced by similar processes, only to mount the case for an extension for Yoorrook. 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.

### **RECOMMENDATIONS**

**Recommendation 2.** The Victorian Government should extend the deadline for the Yoorrook Justice Commission's final report to at least June 2026.

**Recommendation 3.** The Yoorrook Justice Commission should provide further opportunities for individuals and organisations to make written nuther-mooyoop, with longer timeframes and consultation periods.

**Recommendation 4:** The Yoorrook Justice Commission and the Victorian Government should provide additional funding to Aboriginal Organisations to enable better engagement with the Commission.

## **2. Historical and contemporary injustices: the legacy of racism and violence**

The current legal system, including the criminal legal system, is grounded in violence, racism, the lie of *terra nullius* and denial of justice and Aboriginal self-determination. It is a system that was designed to destroy the oldest continuous culture on earth, and which has not finished pursuing this goal.

We continue to see the legacies of historical injustices in the way that our clients are criminalised, marginalised, incarcerated and re-traumatised. Until this structural violence is acknowledged and addressed, the legal system will continue to discriminate against Aboriginal Communities and perpetuate the violence that has been perpetrated for the last 230 years.


Victoria has a long legacy of Aboriginal Elders who have fought to reform the legal system, including William Barak, Shadrach Livingstone James, William Cooper, Douglas Nicholls, Alf Bamblett, Aunty Geraldine Atkinson and many more. Their vision and work should serve as a beacon for Yoorrook.

VALS also encourages Yoorrook to engage with the work of current Aboriginal academics, activists and thinkers across Australia who are leading the way in transforming our understanding of the criminal legal system and other colonial systems that support it. Chelsea Watego, Megan Davis, Larissa Behrendt, Amy McGuire, Amanda Porter, Alison Whittaker, Nayuka Gorrie, Eddie Cubillo, Janine Mohamed, Ronnie Gorrie and Meriki Onus have all inspired VALS' advocacy.

### **2.1 Denial of Aboriginal self-determination**

Aboriginal self-determination in Victoria was denied through invasion and continues to be denied today. Governments, politicians and public servants frequently talk about self-determination; yet the





concept is almost meaningless when it is consistently undermined through hypocritical approaches and a lack of action.

The Aboriginal Justice Caucus (AJC) has made significant progress in identifying what self-determination means in the criminal legal system.<sup>29</sup> Some of this is reflected in *Burra Lotjpa Dunguludja*<sup>30</sup> and *Wirkara Kulpa*,<sup>31</sup> which are both underpinned by self-determination and acknowledge that progressing self-determination will require the transfer of decision-making power and resources to the Aboriginal community.

Yoorrook and Treaty are also important steps towards respect for self-determination. However, if the government seriously wants to talk about Aboriginal self-determination, including in the criminal legal system, incorporation of lore and transfer of decision-making power and resources must be at the centre of the discussion.

### ***Self-determination is a human right***

The right of Aboriginal peoples to self-determination is a collective right under international human rights law.<sup>32</sup> The government should stop referring to the “principle” of self-determination and ensure that this right<sup>33</sup> is enshrined in legislation, including the *Victorian Charter on Rights and Responsibilities 2006*,<sup>34</sup> as well as all new legislation and legislation being reviewed/amended.

The trends towards legislative Statements of Recognition<sup>35</sup> is positive, but for the most part, these statements are symbolic and do not enshrine the right of Aboriginal peoples to self-determination.

### ***Participation in decision-making and Free, Prior and Informed Consent***

Under international human rights law, Aboriginal peoples are guaranteed more than just the opportunity to provide feedback and voice opinions on matters that affect their rights. They have a right to participate in decision-making in matters that affect their rights<sup>36</sup> and the government has an obligation to obtain the free, prior and informed consent (FPIC) of Aboriginal peoples before adopting and implementing legislative or administrative measures that may affect them.<sup>37</sup> Self-determination

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<sup>29</sup> C. Cunneen, *Self-determination and the Aboriginal Youth Justice Strategy* (2019); L. Behrendt, A. Porter, A. Vivian (Jumbunna Institute), *Aboriginal Self-determination in the Victorian justice context... Towards an Aboriginal Community Controlled System* (2017); Jumbunna Institute for Indigenous Education & Research, University of Technology Sydney (UTS), *Aboriginal Justice Caucus Perspectives and Priorities for Self-Determination in Youth Justice: Summary of Priority Issues Resulting from Workshops on 10/12/18, 30/4/19 and 21/5/19*.

<sup>30</sup> [\*Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement Phase 4\*](#), p. 13.

<sup>31</sup> [\*Wirkara Kulpa: Aboriginal Youth Justice Strategy 2022–2032\*](#), p. 15.

<sup>32</sup> Article 3, *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).


<sup>33</sup> Most government policies and laws refer to the “principle of self-determination” and self-determination “principles.” An exception to this is *Wirkara Kulpa*, which states: “As a fundamental right of ‘peoples’, self-determination is based on the notion of Aboriginal people having control over their own destiny including their social, economic, and cultural needs, and to have that right respected by others.” See [\*Wirkara Kulpa\*](#), p. 11.

<sup>34</sup> See VALS, [\*Submission on Victoria’s Anti-Racism Strategy\*](#) (2021), pp. 44-45.

<sup>35</sup> See for example, *Mental Health and Wellbeing Act 2022* (s. 13); *Children and Health Legislation Amendment (Statement of Recognition and Other Matters) Bill 2022*.

<sup>36</sup> Article 18, [\*UNDRIP\*](#).

<sup>37</sup> Article 19, [\*UNDRIP\*](#). While the right to FPIC generally refers to a requirement to consult with representative institutions (i.e. elected bodies), examples of FPIC practice include other Indigenous governance structures and organisations such as ACCOs, as well as engagement with Aboriginal persons and groups at the community level.



is not a seat at the table or a negotiation. It is Aboriginal people having control over the issues that affect our communities.<sup>38</sup>

There are three elements to FPIC:

- **Free** – consent sought must be free from coercion, intimidation and manipulation.
- **Prior** – consent must be sought sufficiently in advance of any authorisation or commencement of the relevant activity. Respect must be shown to time requirements of Aboriginal consulting and consensus.
- **Informed** – the provision of information to Aboriginal Communities covers a range of aspects. This includes the nature and scope of any proposed project or activity, the purpose and duration of the project or activity, what will be affected by the project or activity, an assessment of the impacts and potential risks, and procedures the project or activity may entail.<sup>39</sup>

In VALS' experience, the participation of ACCOs in decision-making processes and consultations with ACCOs concerning administrative and legislative measures affecting Aboriginal peoples in Victoria are not consistent with Articles 18 and 19 of the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*. As noted above, VALS is routinely asked to provide feedback within short timeframes, making it extremely challenging to provide comprehensive feedback. Moreover, feedback provided by VALS is not typically reflected in the measures implemented by the Government and minimal feedback is provided on why our input is not incorporated. In many instances, the "consultation" process appears to be a tick-box exercise, rather than a genuine commitment to incorporate the views of ACCOs.

### ***Aboriginal Data Sovereignty<sup>40</sup> and Aboriginal Data Governance<sup>41</sup>***

The Victorian Government has explicitly acknowledged that "Aboriginal ownership and control of data is a key enabler of self-determination" and that "Aboriginal Communities and Organisations should have governance, choice and control over data collected from and about their communities."<sup>42</sup>

Yet at the same time, the government continues to control the narrative about Aboriginal people's involvement with the criminal legal system, by controlling access to and use of data. VALS and other ACCOS face consistent challenges in accessing (let alone controlling) data about our communities. If we are going to provide adequate services, access sufficient resources, advocate for change and redefine the narrative about the criminal legal system and its impact on Aboriginal people, we need access to data, and we need to be able to use this data as we choose.

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<sup>38</sup> VALS, Media Release, "[Our Children Deserve Better](#)," (17 February 2022).

<sup>39</sup> UN OHCHR, Factsheet, [Free, Prior and Informed Consent of Indigenous Peoples](#), (September 2013); Australian Human Rights Commission, [2010 Social Justice Report](#) (2011).

<sup>40</sup> Indigenous Data Sovereignty is defined as: "the right of Indigenous peoples to exercise ownership over Indigenous Data. Ownership of data can be expressed through the creation, collection, access, analysis, interpretation, management, dissemination and reuse of Indigenous Data." See Indigenous Data Sovereignty Summit, [Communique](#), 20 June 2018, p. 1.

<sup>41</sup> Indigenous Data Governance is "the right of Indigenous Peoples to autonomously decide what, how and why Indigenous Data are collected, accessed and used. It ensures that data on or about Indigenous peoples reflects our priorities, values, cultures, worldviews and diversity." See Indigenous Data Sovereignty Summit, [Communique](#), (20 June 2018), p. 1.

<sup>42</sup> Victorian State Government, [Victorian Closing the Gap Implementation Plan 2021-2023](#), p. 46.



We know that the rate of Aboriginal women in prison in Victoria on remand often exceeds 50% and has exceeded 70%. This data is damning and should be in the public domain; yet it is not reported publicly by the government. Instead, we are required to waste valuable resources to prepare Freedom of Information (FOI) applications, and then wait for months to receive a response.<sup>43</sup>

*Burra Lotjpa Dunguludja* seeks to increase Aboriginal Community ownership of and access to justice data,<sup>44</sup> including through improved collection and availability of Aboriginal justice data.<sup>45</sup> The AJA4 In Action website indicates that to date, this has included work by the Crime Statistics Agency to improve “the availability of high-quality data,” investment by Victoria Police in IT enhancements “to improve the recording and reporting of Standard Indigenous Question (SIQ) data,” and measures to improve police practice in relation to asking individuals whether they identify as Aboriginal.<sup>46</sup>

Similarly, the Victorian Closing the Gap Implementation Plan commits government departments to “develop sector-wide data access and data sharing agreements with and for ACCOs and Traditional Owners in their sector (local, state-wide and peak) with advice and input from the appropriate Aboriginal governance mechanism;” and “prioritise additional investment in ACCO data management and analytics as a core function of ACCOs and Traditional Owners and collaboratively develop options to properly resource this function through allocations from departmental funding programs and through the annual budget process.”<sup>47</sup> *Wirkara Kulpa* also commits to sharing of data and information.<sup>48</sup>

Aboriginal data sovereignty and governance must be progressed through Yoorrook and Treaty. It is critical that steps are taken immediately to support the rights of Aboriginal people and communities, individually and collectively, to:

1. Exercise control over the manner in which data concerning Aboriginal individuals and communities is gathered, managed, interpreted and utilised; and
2. Access and collect data obtained about Aboriginal individuals and communities.

Additionally, Yoorrook has an important opportunity to increase transparency, by accessing data and information from Government authorities that will empower Aboriginal Communities to redefine the narrative about the criminal legal system.

We strongly encourage the Commission to use its powers to obtain evidence and data from individuals and agencies/departments. Annex B includes a non-exhaustive list of individuals who we believe the commission should invite/compel to give evidence. Annex C includes a non-exhaustive list of documents/information that the Commission should subpoena. We strongly encourage the

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<sup>43</sup> On average, VALS waits 12 months to receive a response to an FOI request directed at Victoria Police.

<sup>44</sup> *Burra Lotjpa Dunguludja*, p. 50: Goal 4.1 (“Greater accountability for justice outcomes”), Outcome 4.1.2 (“Increased Aboriginal community ownership of and access to data”).


<sup>45</sup> Measures under *Burra Lotjpa Dunguludja* include: Develop minimum data set for AJA programs; reduce the rate of unknowns in Victoria Police Standard Indigenous Question response data; improve collection and reporting of diversions data; improve collection and reporting of Aboriginal family violence data; access relevant data sharing/linkage projects; Implement the Court Services Victoria Data Collection and Improvement Project. See *Burra Lotjpa Dunguludja*, p 51.

<sup>46</sup> See Aboriginal Justice Agreement In Action: *Improve Aboriginal Justice Data*, (website).

<sup>47</sup> Victorian State Government, *Victorian Closing the Gap Implementation Plan 2021-2023*, p. 27.

<sup>48</sup> *Wirkara Kulpa*, p. 50.





commission to access these documents and to ensure that they are made available to Aboriginal Communities and Organisations.

### ***Long-term and sustainable funding for ACCOs***

It is well-known that current short-term funding arrangements significantly undermine the capacity of Aboriginal Organisations to progress self-determined solutions.

Under UNDRIP, Indigenous peoples “have the right to autonomy of self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.”<sup>49</sup> Issues concerning the funding and resourcing of Aboriginal Organisations and institutions have been highlighted by United Nations human rights bodies in criticisms of the Commonwealth Government.<sup>50</sup>

The CCYP Inquiry, *Our Youth, Our Way* recommended that “ACCOs and other Aboriginal organisations must be empowered and resourced sustainably to enable genuine capacity building, and to ensure longevity, reliability and community trust in their programs.”<sup>51</sup> Similarly, the Inquiry into Victoria’s Criminal Justice System recommended “long-term funding arrangements which support the expansion of aboriginal community controlled organisations’ leadership and service provision with the justice and social services sectors and diversify and expand the social, health, forensic and legal services provided by these organisations to the Aboriginal community.”<sup>52</sup>

*Wirkara Kulpa* commits the government to “provide stable and sustainable funding and explore outcome-based funding models (minimum three-year cycle) for programs and services delivered by Aboriginal community organisations.”<sup>53</sup>

It is time for the government to facilitate sustainable, long-term funding for all Aboriginal organisations, to ensure that Aboriginal people can access culturally safe services and that Aboriginal organisations are sufficiently resourced to represent the interests, both individual and collective, of Aboriginal peoples in Victoria.

### ***Justice Treaty: Self-determined solutions for Aboriginal Communities***

Current approaches to self-determination in the criminal legal system usually adopt a narrow lens, by exploring ways in which the existing system can be “informed” by self-determination. If self-determination is going to be realised, there must be space for stand-alone, self-determined models,

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<sup>49</sup> Article 4, [UNDRIP](#).

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

<sup>51</sup> CCYP, [Our Youth Our Way](#), Recommendation 2, pp. 116-117.

<sup>52</sup> Parliament of Victoria, Legal and Social Issues Committee, [Inquiry into Victoria’s Criminal Justice System](#) (2022) Recommendation 14.

<sup>53</sup> [Wirkara Kulpa](#), p. 50.



accompanied by adequate, flexible and independent funding sources and progressive transfer of power and control to Aboriginal Communities.

In *Our Youth Our Way*, CCYP recommended that the new Youth Justice Act to:

- (a) enable the Secretary of DJCS to authorise Aboriginal Communities to design, administer and supervise elements of the youth justice system;<sup>54</sup> and
- (b) place a positive duty on the Secretary of DJCS to develop strategic partnerships with Aboriginal Communities, and report regularly on measures taken to improve outcomes for Aboriginal children and young people.<sup>55</sup>

According to CCYP, this could enable Aboriginal Communities to: “deliver cautions and alternatives to proceedings, including diversionary options; deliver family group conferencing; determine the location and delivery of hearings (including Koori Court hearings) – this could include developing practice directions on the engagement of Elders in the sentencing process and the inclusion of culturally strengthening case management; deliver restorative justice group conferencing; determine the conditions of community-based youth justice orders; design and administer community-based youth justice options, including alternatives to custody.”<sup>56</sup> The government says it supports this recommendation in principle,<sup>57</sup> but we are yet to see substantial change.<sup>58</sup>

The *Inquiry into Victoria’s Criminal Legal System* also recommended that the Victorian Government should partner with ACCOs to “identify opportunities for expanding these organisations’ decision-making authority and responsibilities in relation to Aboriginal people at risk of, or already engaged with the criminal justice system.”<sup>59</sup> The Government is yet to respond to this Inquiry, despite the 6-month timeframe elapsing in September 2022.

There are many examples from Australia and other countries, which demonstrate the success of self-determined solutions in the criminal legal system, including through incorporation of lore.<sup>60</sup> This includes: restorative justice processes, Aboriginal Courts, supervision of community-based orders for young people, alternative youth remand services, legislative obligations to develop strategic partnerships with First Nations peoples, diversion to Aboriginal Community Councils to develop and monitor completion of a diversion agreement.<sup>61</sup>

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<sup>54</sup> In particular, CCYP identified the following elements which could be designed, administered and supervised by Aboriginal Communities: delivering cautions and alternatives to proceedings; family group conferencing and restorative justice group conferencing; determining the location and delivery of hearings; determining conditions of community-based orders; designing and administering community-based orders. See CCYP, [Our Youth Our Way](#), Recommendation 1.

<sup>55</sup> CCYP, [Our Youth Our Way](#), Recommendation 1.

<sup>56</sup> CCYP, [Our Youth Our Way](#), Recommendation 1, p. 115.


<sup>57</sup> [Government Response to the Our Youth, Our Way Inquiry](#), Annex A.

<sup>58</sup> The new Youth Justice Act is expected to include some reforms including a legislated cautioning scheme. The Bill was due to be tabled in Parliament in 2022 but has been delayed.

<sup>59</sup> [Inquiry into Victoria’s Criminal Justice System](#) (2022), Recommendation 14.

<sup>60</sup> See CCYP, [Our Youth Our Way](#), pp. 112-114; C. Cuneen, *Self-Determination and the Aboriginal Youth Justice Strategy: Research Report* (2019).

<sup>61</sup> The Community Council at the Aboriginal Legal Service in Ontario, Toronto, is an example of a self-determined approach to court-ordered diversion. See VALS, [Submission to the Inquiry into Victoria’s Criminal Justice System](#) (2021), pp. 160-161.



VALS is currently working with Aboriginal leaders and organisations to develop a proposal for a Justice Treaty to share with the Commission. Areas that may be included in a Justice Treaty include:

- Involving Aboriginal Communities in decisions regarding cautioning, diversion, and supervision of diversion plans;
- Aboriginal supervision of community-based sentences, in particular for low-level offences;
- Aboriginal-led body for investigation of Aboriginal Deaths In Custody and police contact deaths;
- Expanding the Koori Court's jurisdiction to the pre-resolution stage,<sup>62</sup> including bail and diversion;
- Expanding the role of Elders and Respected Persons in Koori Courts;
- Aboriginal pre- and post-release support for Aboriginal people transitioning out of prison and youth justice centres.

For more information on our key concerns and recommendations relating to self-determination, please see:

- Webinar: [Invasion Day](#) (2022);
- [Submission to the Inquiry into Victoria's Criminal Justice System](#) (2021) (pp. 40-47);
- [Submission to the Senate Inquiry on the Implementation of United Nations Declaration of the Rights of Indigenous Peoples \(UNDRIP\) in Australia](#) (2022);
- [Submission on Victoria's Anti-Racism Strategy](#) (2021);
- [Letter to the National Race Discrimination Commissioner on the National Anti-Racism Framework](#) (2022).

## RECOMMENDATIONS

**Recommendation 5.** The Victorian government should negotiate a Justice Treaty with Aboriginal Communities and Aboriginal Community Controlled Organisations (ACCOs), which sets a new foundation to transform the criminal legal system, including through progressive transfer of power, resources, data and control to allow for Aboriginal justice models.


**Recommendation 6.** The right of Aboriginal peoples to self-determination must be enshrined in relevant legislation, including the *Victorian Charter of Rights and Responsibilities*, the new *Youth Justice Act*, the *Sentencing Act 1991*, the *Corrections Act 1968* and the *Bail Act 1977*.

**Recommendation 7.** Relevant legislation - including the new *Youth Justice Act* and the *Corrections Act 1986* - should be amended to create "a positive duty on the Secretary of DJCS to develop strategic partnerships with Aboriginal communities."<sup>63</sup>

<sup>62</sup> Currently, Koori Courts operate as sentencing courts, with limited jurisdiction.

<sup>63</sup> CCYP, [Our Youth, Our Way](#), Recommendation 1(b).





**Recommendation 8.** Aboriginal Communities and ACCOs must be genuinely consulted at the earliest possible opportunity in the development of programs, policies and legislation that impact Aboriginal Communities. Genuine consultation means allowing adequate time for Aboriginal Communities to provide feedback, meaningful engagement with the responses provided, and explaining why or why not feedback is taken into account.

**Recommendation 9.** The Free, Prior and Informed Consent (FPIC) of Aboriginal peoples must be enshrined in legislation and must be respected and meaningfully enacted in government processes, partnerships and actions. The Victorian Government must put in place effective mechanisms to allow Aboriginal people to provide FPIC on issues that affect them, if they choose to.

**Recommendation 10.** In accordance with Aboriginal Data Sovereignty and Aboriginal Data Governance, legislation should be adopted in Victoria to enshrine the right of Aboriginal people and communities, individually and collectively, to:

- (a) Exercise control over the manner in which data concerning Aboriginal individuals and communities is gathered, managed, interpreted and utilised; and
- (b) Access and collect data obtained about Aboriginal individuals and communities.

**Recommendation 11.** Victorian Government departments must develop data access and sharing agreements with and for ACCOs and Traditional Owners in their sector, as provided for under the Victorian Closing the Gap Implementation Plan.

**Recommendation 12.** The Victorian Government must invest in ACCO data management and analytics as a core function of ACCOs and Traditional Owners, as provided by under the Victorian Closing the Gap Implementation Plan.


**Recommendation 13.** Funding arrangements must be reformed so that ACCOs and other Aboriginal Organisations have access to adequate, sustainable, and autonomous financial resources.

## 2.2 Racism

Racism is pervasive across all aspects of the criminal legal system. It is inherent in the way that laws, policies and institutions within the system operate to produce discriminatory outcomes for Aboriginal people in Victoria.<sup>64</sup> It is seen and heard everyday by Aboriginal people and communities in their interactions with police, prison guards, judicial officers and other actors in the criminal legal system. Racism is as prevalent today as it has been in the past; yet Aboriginal Communities and families continue to survive and thrive.

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<sup>64</sup> According to submissions of the family of Aunty Tanya Day in the coronial inquiry into her death: ‘... “systemic racism” refers to a process that produces statistically discriminatory outcomes for particular racial or cultural groups. It may involve unconscious bias, or laws, policies and practices, that operate to produce such outcomes. The outcome may occur without conscious racist intent ... Critically, systemic racism can operate without any individual displaying expressly racist or discriminatory behaviour, and without institutional policies or practices that are openly racist’.



Racism is particularly prevalent in Victoria Police, manifesting in denial of Aboriginality,<sup>65</sup> over-policing of Aboriginal Communities,<sup>66</sup> over-representation of Aboriginal people in police custody,<sup>67</sup> arresting Aboriginal children and young people rather than issuing a summons,<sup>68</sup> use of force<sup>69</sup> and explicit racial abuse against Aboriginal people.<sup>70</sup> The attendance of uniformed police on the final day of the coronial inquest into the death of Raymond Noel Thomas is a clear example of the deeply entrenched racism within Victoria Police.<sup>71</sup>

Systemic racism is inherent in the criminal legal system and is a key factor contributing to the over-representation of Aboriginal people across all aspects of this system, including in custody. It also exists across all aspects of society and serves to further entrench systemic racism within the criminal legal system. High rates of Aboriginal homelessness, housing instability, unemployment, poverty and child removal are all manifestations of systemic racism, which serves to reinforce and entrench racism.

While public awareness of racism in all its forms is growing, there is still a long way to go. Systemic racism is particularly insidious and is not well understood. Increasing awareness and redefining the narrative around racism experienced by Aboriginal Communities is essential.

International guidance on implementation of the UNDRIP recommends collecting and analysing disaggregated data to determine and address inequalities and discrimination.<sup>72</sup> Disaggregated data is crucial for understanding racism in all its forms and developing evidence-based policies and initiatives. This must be a core focus of Victoria's new Anti-Racism Strategy (currently being developed).<sup>73</sup>

Internationally, other countries have taken concrete steps to better understand the scope and scale of systemic racism across their societies. In the UK, the government regularly publishes disaggregated data on the criminal legal system, including in relation to policing, prison and custody incidents.<sup>74</sup> In British Colombia, Canada, the [Anti-Racism Data Act 2022](#) provides a framework for collecting personal

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<sup>65</sup> Aboriginal people in Victoria are more likely to be apprehended and arrested by police, and they report higher rates of being hassled by police. See H. Blagg, N. Morgan, C. Cunneen, A. Ferrante (2005), *Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Criminal Justice System*; CCYP (2021), [Our Youth Our Way](#), p. 430; [Finding into Death with Inquest: Inquest into the Death of Tanya Louise Day](#), 9 April 2020, COR 2017 6424

<sup>66</sup> Data from Victorian police attendance registries in 2006 reveals that Aboriginal people are almost six times more likely to be held in a police station. See [Koori Complaints Project 2006-2008: Final Report](#), p. 17

<sup>67</sup> Data from Victorian police attendance registries in 2006 reveals that Aboriginal people are almost six times more likely to be held in a police station. See [Koori Complaints Project 2006-2008: Final Report](#), p. 17.

<sup>68</sup> The CYFA includes a presumption of proceedings by way of summons, rather than arrest; however, police regularly do not comply with this in relation to Aboriginal children and young people. See s. 345(1) *CYFA 2005* (Vic).

<sup>69</sup> For example, the CCYP Inquiry found that 5 children and young people reported sustaining broken bones and serious injuries as a consequence of assaults by police. CCYP (2021), [Our Youth Our Way](#), p. 433. The Koori Complaints Project found that the largest number of allegations made by Aboriginal people whose complaint data was reviewed as part of the project, related to assaults by police at arrest, followed by racist language or abuse and failure to provide medical assistance and harassment. See [Koori Complaints Project 2006-2008: Final Report](#), p. 18.


<sup>70</sup> See for example, CCYP, [Our Youth Our Way](#), pp. 432-433. See also, IBAC (2021), [Operation Turon: special report](#). In Operation Turon, IBAC found that the Assistant Commissioner for Professional Standards Command posted racist and homophobic material on the internet over a period of several years and faced civil litigation for using racist language in person, but concluded that this had no bearing on his decision-making about complaints investigations.

<sup>71</sup> VALS, Media Release, ["Uniformed Police Attend Coronial Inquest for "security" compounding the grief of the Thomas Family"](#) (1 July 2021).

<sup>72</sup> United Nations Department of Economic and Social Affairs, *The State of the World's Indigenous Peoples: Implementing the United Nations Declaration on the Rights of Indigenous Peoples*, 2019, ST/ESA/371.

<sup>73</sup> See [Anti-Racism Taskforce | Victorian Government \(www.vic.gov.au\)](#)

<sup>74</sup> See VALS, [Submission on Victoria's Anti-Racism Strategy](#) (2021), p. 35.



information for the purposes of identifying and eliminating systemic racism.<sup>75</sup> It does so in accordance with Indigenous Data Sovereignty (IDS) and Indigenous Data Governance (IDG) by establishing a process for the government to seek consent from Indigenous communities to use their data.<sup>76</sup>

For further information on our key concerns and recommendations relating to racism, please see:

- [Submission on Victoria's Anti-Racism Strategy](#) (2021);
- [Letter to the Anti-Racism Taskforce](#) (2 June 2022)
- [Policy Paper: Reforming Police Oversight in Victoria](#) (2022);
- [Submission to the Inquiry into Victoria's Criminal Justice System](#) (2021) (pp. 47-49).

## RECOMMENDATIONS

**Recommendation 14.** The Victorian Government should take measures, including adopting new legislation, to increase collection of and access to data on racism in Victoria. All measures must comply with Aboriginal Data Sovereignty and Aboriginal Data Governance.

**Recommendation 15.** All oversight and accountability mechanisms, as well as ad hoc reviews/inquiries, must be explicitly mandated to consider systemic racism.

**Recommendation 16.** Victoria Police must immediately stop using predictive policing tools and approaches.

**Recommendation 17.** The Government should adopt measures to increase awareness of racism, including reforms to the primary, secondary and tertiary education systems and public awareness campaigns.

**Recommendation 18.** Mandatory and regular training in systemic racism, unconscious bias and cultural awareness must be required for:

- (a) All public sector agencies and bodies involved in the criminal legal system, including Victoria Police, court staff, judiciary (including the coroners court), government departments, Parliament, Ministers, Corrections Victoria, prison staff, members of the Adult and Youth Parole Boards, legal counsel (including counsel in a coronial inquest) and prosecutors;
- (b) All lawyers working in the criminal legal system and coronial system (as part of admission to practice and Continuing Professional Development).

## 2.3 Criminalisation Over Healing

The colonial legal system has criminalised Aboriginal Communities in Australia since invasion. According to Ambēyan scholar Callum Clayton Dixon, “[c]asting Aboriginal people as criminals has

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<sup>75</sup> See VALS, [Letter to the Anti-Racism Taskforce](#) (2 June 2022).

<sup>76</sup> Sections 22-24, [Anti-Racism Data Act 2022](#).





been happening since the earliest days of colonisation when Aboriginal people were deemed outcasts on homelands.”<sup>77</sup>

Criminalisation was used to justify dispossession and the takeover of a sovereign people. Later on, it was used to justify the Stolen Generations, with criminal records given to stolen Aboriginal children because they were deemed to be “in need of care and protection.”<sup>78</sup>

In Victoria, the process of criminalisation, marginalisation, punishment and incarceration continues. Rather than investing in social housing, health, education, social security and support for families and parents; the government continues to invest in police and prisons.

At the front end, racist policing and regressive laws and policies continue to stigmatise and criminalise homelessness, disability and health issues (including public intoxication, mental illness and substance use and addiction), rather than providing holistic and wrap around support and health responses. Punitive bail and parole systems, and punitive approaches to community-based sentences have further contributed to the soaring prison population.

Victoria’s prisons are warehousing people with significant trauma and complex needs. Rather than supporting these individuals to heal through therapeutic approaches, they are punished and locked up in facilities that only serve to re-traumatise.

This ongoing cycle of criminalisation is epitomised by the alarming expansion of the carceral system in Victoria over the past decade. In 2018-19, the government launched a \$1.8 billion prison expansion project, which includes new prisons and youth justice centres in Chisolm Road<sup>79</sup> and Cherry Creek,<sup>80</sup> as well as new cells at Metropolitan Remand Centre (**MRC**), Margngoneet, Barwon, Middleton, Hopkins, Ravenhall,<sup>81</sup> and a 106-bed expansion at the Dame Phyllis Frost Centre (**DPFC**).<sup>82</sup>

While the government continues to celebrate its prison expansion, a 2021 IBAC report found that prison expansion and privatisation are contributing factors to corruption and shocking abuse within Victoria’s Corrections system.<sup>83</sup>

VALS condemns prison expansion in Victoria,<sup>84</sup> and instead calls on the government to commit to moving towards a zero-prison population.<sup>85</sup> More prison cells mean more Aboriginal people in prison

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<sup>77</sup> C. Clayton-Dixon, “[Our History of resistance involves revitalising our traditional languages](#),” (19 January 2018).

<sup>78</sup> NITv, “[Stolen, imprisoned, given a criminal record: Australia’s shameful treatment of the Stolen Generations revealed](#),” (22 March 2018)

<sup>79</sup> Premier of Victoria, Media Release, “[Chisholm Road Prison Exceeds Geelong Jobs Target](#),” (4 August 2021).

<sup>80</sup> See [Cherry Creek Youth Justice Centre | Community Safety Building Authority \(csba.vic.gov.au\)](#)


<sup>81</sup> D. Sadler, The Justice Map, “[The next phase of Victoria’s prison expansion program](#),” (29 April 2022).

<sup>82</sup> Ibid; VALS Media Release, “[The Victorian Government Must End Its Harmful Obsession with Expanding Victoria’s Prison System](#)” (19 March 2021).

<sup>83</sup> Independent Board-based Anti-corruption Commission (IBAC), [Special report on corrections: IBAC Operations Rous, Caparra, Nisidia and Molara Turon](#), (2021).

<sup>84</sup> VALS and Djirra, “[Joint Media Release from Djirra and Victorian Aboriginal Legal Service: No Justice, No Peace – It is time for a Victorian Aboriginal and Torres Strait Islander](#),” (26 March 2021)

<sup>85</sup> VALS, [A Plan for Aboriginal Justice in Victoria](#) (2022), p. 5.



and more Aboriginal deaths in custody.<sup>86</sup> We must move away from destructive cycles of criminalisation and incarceration.

## RECOMMENDATIONS

**Recommendation 19.** The Victorian Government should stop building new prisons and commit to moving towards a zero-prison population.<sup>87</sup>

**Recommendation 20.** The Victorian Government must invest in holistic, integrated and wrap around support, to prevent contact with the criminal legal system, including culturally safe housing and social services, education, health, mental health, disability screening, and support for parents and families.

**Recommendation 21.** Responses to offending behaviour must focus on healing, by prioritising diversion at every stage of the legal process and connecting people to integrated, culturally safe services, that will support them to heal and address underlying reasons for behaviour, including health, education, housing, and other needs.

## 2.4 Deficit Versus Cultural Strengths-Based Approaches

The deficit lens imbued across the criminal legal system is a direct legacy of the racist and deficit based colonial carceral system. It can be seen in risk-based assessments, that cut across the bail system, sentencing processes, custodial classifications and parole. The deficit lens must be replaced with approaches that are self-determined and grounded in the strength and resilience of Aboriginal culture, community and Country.

According to VALS' CEO, Nerita Waight, "Terrible things have been done to us throughout the last 230 years of colonisation – especially by the legal system. But we are still here. We have survived. We are the oldest continuous culture on earth because of our strength based on our connection to culture, community, and Country."<sup>88</sup>

There are exceptions to the deficit narrative, which are grounded in self-determination, and which are beginning to expand and take hold across Australia. According to the Aboriginal Justice Caucus, the principles that underpin self-determination in the criminal legal system must include "strengths-based" and "trauma-informed."<sup>89</sup>

One such exception is Aboriginal "storying" in sentencing processes: "Aboriginal storying in sentencing promotes the principles of truth-telling by placing power in the hands of the Aboriginal person and


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<sup>86</sup> VALS Media Release, "[The Victorian Government Must End Its Harmful Obsession with Expanding Victoria's Prison System](#)" (19 March 2021).

<sup>87</sup> VALS, [A Plan for Aboriginal Justice in Victoria](#) (2022), p. 5.

<sup>88</sup> Nerita Waight, [Keynote Speech: Law Institute of Victoria \(LIV\) Criminal Law Conference](#) (22 July 2022).

<sup>89</sup> [Burra Lotjpa Dunquludja](#), p. 28.



their community to tell their story. Through this, non-custodial pathways can be identified, drawing on the person's strengths and community avenues for healing.”<sup>90</sup>

Inspired by Gladue reports, Aboriginal Community Justice Reports (**ACJRs**) are currently being piloted by VALS as a way of supporting Aboriginal people to tell their life stories on their own terms, during the sentencing process: “Aboriginal community justice reports seek to provide a more complete picture of a person's life and circumstances. They endeavour to amplify the aspirations, interests, strengths, connections, culture, and supports of the individual, as well as the adverse impact of colonial and carceral systems on their life.”<sup>91</sup>

Strengths based approaches must be embedded across the criminal legal system through both legislative reforms, as well as policy and resourcing reforms. At the legislative level, relevant decision-makers must be required to take into account an Aboriginal person's unique background and experience across all aspects of the system, including access to cautions and diversion, bail, sentencing, and parole. As is the case with the ACJR project, these legislative reforms must be supported through Aboriginal-led solutions.

## RECOMMENDATIONS

**Recommendation 22.** Relevant legislation – including in relation to cautions, diversion, bail, sentencing and parole – should require decision makers to:

- (a) Take into account the unique systemic and background factors affecting Aboriginal peoples; and
- (b) Provide reasons and demonstrate the steps taken to discharge this obligation.

**Recommendation 23.** The Victorian government should provide long-term, sustainable and adequate funding for self-determined strengths-based approaches, such as the Aboriginal Community Justice Reports (**ACJR**) Project.

## 2.5 Violence

Colonial violence is ever-present in the system and continues to inflict harm and trauma. In 1842, two Aboriginal men, Tunnerminnerwait and Maulboyheenner, were the first people to be executed in Victoria.<sup>92</sup> In 2022, the criminal legal system is still killing Aboriginal people.

Contemporary forms of violence include the ongoing criminalisation of Aboriginal Communities, as discussed above, but also manifest in the way that people are treated in custody. In its most extreme form, the legacy of colonial violence is evident in the high number of Aboriginal Deaths in Custody in Victoria in recent years, and the enormous loss, grief and trauma resulting from these deaths.

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<sup>90</sup> T. Anthony, A. Lachsz and N. Waight, “[The role of ‘re-storying’ in addressing over-incarceration of Aboriginal and Torres Strait Islander Peoples](#),” (17 August 2021).

<sup>91</sup> Ibid.

<sup>92</sup> C. Land, [Tunnerminnerwait and Maulboyheenner: The involvement of Aboriginal people from Tasmania in key events of early Melbourne](#) (2014, City of Melbourne).



In the last 12 months, three Aboriginal people have died in custody in Victoria,<sup>93</sup> and coronial inquests into other Aboriginal deaths in custody have continued.<sup>94</sup> Each death was preventable and should not have happened. Each death has left a gaping hole in the families and communities of those who died, and contributed to the ever-building trauma of our people dying in custody.

#### **Extracts from VALS' Media releases**

*"Clinton was an artist, father, brother and son who had a big heart and a kind heart. People may know Clinton through his artwork, which he sold through the TORCH program. Clinton was a beautiful artist. Clinton was also close to and touched many people who were with him in prison and shared his artistic skills with them."*<sup>95</sup>

*"Ms Calgaret was a kind soul and mother to her four children and her whole family. She was a proud Yamatji, Noongar, Wongi and Pitjantjatjara woman. Ms Calgaret loved her culture and enjoyed painting and writing."*<sup>96</sup>

*"Veronica Marie Nelson was a proud Gunditjmara, Dja Dja Wurrung, Wiradjuri and Yorta Yorta woman. She belonged to a large family, with 6 siblings and 10 children that she loved and cared for as her own. She was a deeply spiritual woman, whose connection to her culture was incredibly important to her; this was a gift that she would regularly share with those around her. These teachings live on in those lucky enough to have learned from her, including her nephews who are dancing today."*<sup>97</sup>

Torture, inhuman, cruel or degrading treatment or punishment of Aboriginal people in custody is another form of contemporary violence in the criminal legal system. Access to data is limited, but we know that our people are disproportionality impacted by violent, traumatic and harmful practices in custody, including routine strip searches, solitary confinement and the use of force.

Finally, this violence is ever present in the way that abuses are concealed and covered up, leading to a lack of transparency and lack of accountability.

#### **RECOMMENDATIONS**

**Recommendation 24.** The Victorian government must end Aboriginal Deaths in Custody by:

<sup>93</sup> Gunditjmara and Wiradjuri man, Clinton Austin, passed away at Loddon Prison on 11 September 2022; Joshua Kerr passed away at Port Phillip Prison on 10 August 2022; Yamatji, Noongar, Wongi and Pitjantjatjara woman, Heather Calgaret, passed away at Sunshine Hospital after being transferred from the Dame Phyllis Frost Centre prison in November 2021. See VALS, Media Release: "[Death in custody of Gunditjmara and Wiradjuri beloved artist, father and brother, Clinton Austin](#)," (13 September 2022); C. Hall, "[Family grieve Josh Kerr, Aboriginal man who died in Port Phillip Prison, as coronial inquest begins](#)," VALS, Media Release: "[Ms Calgaret's story must be told](#)," (16 December 2021).


<sup>94</sup> Veronica Nelson passed away at Dame Phyllis Frost Centre on 2 January 2020. The Inquest into her death took place in April 2022. See VALS, Media Release, "[Veronica Marie Nelson: Inquest Begins Today](#)," (26 April 2022).

<sup>95</sup> See VALS, Media releases: "[Death in custody of Gunditjmara and Wiradjuri beloved artist, father and brother, Clinton Austin](#)," (13 September 2022).

<sup>96</sup> VALS, Media Release: "[Ms Calgaret's story must be told](#)," (16 December 2021).

<sup>97</sup> VALS, Media Release, "[Veronica Marie Nelson: Inquest Begins Today](#)," (26 April 2022).



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- (a) Implementing the recommendations from the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**);
  - (b) Reducing incarceration of Aboriginal people, including through urgent reform of the *Bail Act 1977*, raising the age of criminal responsibility, decriminalising health issues, diversion at every stage of the criminal legal process and sentencing reform (see recommendations 41-64 below);
  - (c) Prohibiting torture, cruel, inhuman or degrading treatment or punishment in custody, including by prohibiting solitary confinement and strip searching (see recommendation 70 below);
  - (d) Providing access to adequate and culturally safe healthcare and cultural, social and emotional wellbeing for people in custody (see recommendations 65-69 below);
  - (e) Reducing recidivism by supporting people to successfully transition out of custody and integrate into the community (see recommendations 71-73);
  - (f) Strengthening accountability and oversight, including through independent detention oversight, independent investigation of Aboriginal Deaths in Custody, and establishing independent, robust and culturally appropriate police and prison complaints systems (see recommendations 74-90 below).

## 2.6 Lack of accountability and oversight

Following invasion, Aboriginal Communities were massacred with impunity.<sup>98</sup> In contemporary Victoria, impunity continues. Aboriginal people are subjected to racism, violence and continue die in custody, yet there is limited oversight and accountability. Of the many Aboriginal Deaths in Custody in Victoria since 1989, no one has been held criminally liable.

One of the most high-profile perpetrators of violence in the criminal legal system is Victoria Police, which continues to operate with minimal oversight and accountability. Even when mechanisms are put in place to try and establish some level of oversight, the police and the police union have used their enormous power and influence to maintain their impunity.<sup>99</sup>

A lack of transparency and accountability is also pervasive in prisons in Victoria. While IBAC highlighted a raft of systemic issues in 2021,<sup>100</sup> many truths have not been told. The coronial inquest into the death of Veronica Nelson revealed serious concerns about the process for reviewing a death in Victorian prisons, which is currently carried out by the Justice Assurance and Review Office (**JARO**) (part of DJCS)<sup>101</sup> and has been criticised by the Coroners Court.<sup>102</sup> It is not until someone dies in custody that the scale of negligence, violence, racism and grossly deficient review processes is finally revealed. We hope that the Independent Cultural Review of the Adult Custodial Corrections System will finally provide some transparency and accountability.

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<sup>98</sup> Ryan, Lyndall; Debenham, Jennifer; Pascoe, Bill; Smith, Robyn; Owen, Chris; Richards, Jonathan; Gilbert, Stephanie; Anders, Robert J; Usher, Kaine; Price, Daniel; Newley, Jack; Brown, Mark; Le, Le Hoang; Fairbairn, Hedy *Colonial Frontier Massacres in Australia 1788-1930* Newcastle: University of Newcastle, 2017-2022, <http://hdl.handle.net/1959.13/1340762>

<sup>99</sup> See below at pp 40-41.

<sup>100</sup> IBAC, *Special report on corrections: IBAC Operations Rous, Caparra, Nisidia and Molara Turon*, (2021).

<sup>101</sup> See *Submissions on behalf of Uncle Percy Lovett* (2022)

<sup>102</sup> S. Schwartz, "[Indigenous Victorians pay a high price when prisons prioritise profit](#)," 4 November 2022.



## RECOMMENDATIONS

**Recommendation 25.** The Victorian Government must establish a robust, independent and culturally appropriate police oversight system, including independent police complaints, independent investigation of police-contact deaths, independent monitoring and auditing of police powers and independent detention monitoring of police custody (see recommendations 74-81).

**Recommendation 26.** The Victorian Government must strengthen the prison oversight and accountability system, including through an appropriately resourced independent oversight body and a culturally safe legal service for Aboriginal people who are incarcerated (see recommendations 88-89).

**Recommendation 27.** The Victorian Government must urgently make progress on establishing independent detention oversight in Victoria, in compliance with the *Optional Protocol on the Convention Against Torture, Cruel, Inhuman or Degrading Treatment or Punishment* (see recommendations 90-99).

## 2.7 Well-Founded Mistrust Of Laws, Policies And Government Authorities

Two hundred and thirty years of violence, racism and impunity has led to a well-founded and deep suspicion and distrust of the criminal legal system, including laws, policies, institutions and authorities. This is particularly true for authorities that were and continue to be responsible for implementing violent policies such as removal of children, and which continue to operate with limited oversight and accountability.<sup>103</sup>

In many instances, the mere presence of Victoria Police can escalate rather than de-escalate a situation. This means that police should never be First Responders in health responses, including in relation to public intoxication, mental health crises and drug use.


A foremost objective of any serious reform of the criminal legal system must be that Aboriginal people can trust the system and have confidence that it delivers just outcomes for Aboriginal people. Self-determination and culturally safe services provided by ACCOs are critical to build that trust.

## RECOMMENDATIONS

**Recommendation 28.** Every Aboriginal person across Victoria should have access to culturally safe legal and other services provided by Aboriginal Organisations.

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<sup>103</sup> The sound, historical basis for distrust by First Peoples towards Victoria Police, has been described as follows: 'Many [Aboriginal people] see police in a historic continuity where they started off as armed agents of invaders who in many areas sought to exterminate them, and everywhere to deprive them of their land and means of livelihood ... Police have always been called on to do the dirty work associated with government policies in relation to Aboriginals, including the dispersal of camps which offended local residents and even today the suppression of Aboriginal lifestyles that offend middle class propriety... The Hon JH Wootten QC, Commissioner, Deaths in custody, Paper delivered at a public seminar entitled 'Coronial Inquiries', convened by the Institute of Criminology at Sydney University Law School, 10 October 1990, p 59.



**Recommendation 29.** VALS should have adequate, sustainable, and autonomous financial resources to provide place-based, holistic and culturally safe legal and justice services to Aboriginal people in Victoria, including both early intervention legal advice and education to prevent contact with the criminal legal system; as well as support for people to resolve their legal issues.

**Recommendation 30.** The Aboriginal Community Justice Panels (ACJP) should have adequate, sustainable, and autonomous financial resources to provide culturally safe support to Aboriginal people in police custody, including during police interviews and in relation to bail applications heard by police or bail justices.

**Recommendation 31.** The involvement of Victoria Police in the lives of Aboriginal people must be minimised. In particular, Victoria Police should not be First Responders in health responses, including in relation to public intoxication, mental health crises and drug use.

### 3. Lack Of Acceptance And Implementation Of Past Recommendations

Yoorrook has asked for insights regarding the lack of acceptance and implementation of recommendations from previous inquiries, reviews and Royal Commissions.<sup>104</sup> One of the key reasons for the lack of acceptance and implementation of recommendations is the ongoing denial of Aboriginal self-determination, already discussed above. Additionally, we draw the Commission's attention to the following issues:

- "Tough on crime" narratives
- Influence of Victoria Police and the Police Union
- Excuses about a lack of funding
- Lack of accountability and oversight for implementing recommendations.

#### ***Failure to implement RCIADIC recommendations***


Failure to implement recommendations from the RCIADIC is a striking example of the failure of successive governments to implement key recommendations. Many Aboriginal people have died in custody in Victoria since the RCIADIC,<sup>105</sup> and many (if not all) of these deaths could have been prevented through concrete action.

The Aboriginal Justice Caucus (**AJC**) is currently reviewing the status of implementation of RCIADIC recommendations in Victoria. The experiences of VALS' clients and lawyers, indicates that the following recommendations have not been implemented:

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<sup>104</sup> Yoorrook Justice Commission, *Issues Paper 1: Call for Submissions on Systemic Injustice in the Criminal Justice System*, (2022), p. 4.

<sup>105</sup> As noted above, there is no consistent record of how many Aboriginal people have died in custody in Victoria since 1991.



**Recommendation 91(b):** That governments, in conjunction with Aboriginal Legal Services and Police Services, give consideration to amending bail legislation to revise any criteria which inappropriately restrict the granting of bail to Aboriginal people.

**Recommendation 92:** That governments which have not already done so should legislate to enforce the principle that imprisonment should be utilised only as a sanction of last resort.

**Recommendation 150:** That the health care available to persons in correctional institutions should be of an equivalent standard to that available to the general public. Services provided to inmates of correctional institutions should include medical, dental, mental health, drug and alcohol services provided either within the correctional institution or made available by ready access to community facilities and services. Health services provided within correctional institutions should be adequately resourced and be staffed by appropriately qualified and competent personnel. Such services should be both accessible and appropriate to Aboriginal prisoners. Correctional institutions should provide 24 hour a day access to medical practitioners and nursing staff who are either available on the premises, or on call.

**Recommendation 181:** That Corrective Services should recognise that it is undesirable in the highest degree that an Aboriginal prisoner should be placed in segregation or isolated detention.

**Recommendation 226(a):** That in all jurisdictions the processes for dealing with complaints against police need to be urgently reviewed. The Commission recommends that legislation should be based on the following principles: that complaints against police should be made to, be investigated by or on behalf of and adjudicated upon by a body or bodies totally independent of Police Services.<sup>106</sup>

### 3.1 “Tough on crime” Narratives

The narrative surrounding the criminal legal system too often centres on punishment, deterrence, “community safety” and the false dichotomy of victim vs “offender.”

In the lead up to the 2018 Victorian election, the Herald Sun and the Liberal Party confected a narrative about “African gangs”. The Herald Sun published articles with headings like “African gang crisis: Interstate thugs behind wild brawls”<sup>107</sup>, “Three more brutal crimes by African gangs”<sup>108</sup> and “Why Victoria Police needs to act on ‘gang violence’.”<sup>109</sup> Often these articles included errors.<sup>110</sup> The Liberal Party also engaged in this manufactured campaign with Peter Dutton, a Liberal MP in the Federal Parliament who is not from Victoria, saying that Victorians were “scared to go out to restaurants [because of] African gang violence”<sup>111</sup> and Matthew Guy, the Leader of the Victorian Liberal Party, continually made comments like claiming Melbourne could soon become “the Johannesburg of the South Pacific”.<sup>112</sup>

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<sup>106</sup> Royal Commission into Aboriginal Deaths in Custody (RCIADIC), National Volume 5, [Recommendations](#).

<sup>107</sup> “[African gang crisis: Interstate thugs behind wild brawls](#),” (14 January 2018).

<sup>108</sup> A. Bolt, “[Three more brutal crimes by African gangs](#),” (4 August 2018).

<sup>109</sup> R. Panahi, “[Why Victoria Police needs to act on gang violence](#),” (3 September 2018).

<sup>110</sup> L. Baj, “[The Herald Sun Used A Pic Of A UK Rap Group For A Story On Melbourne Gangs & It’s Not Okay](#),” (25 June 2020).

<sup>111</sup> P. Karp, “[Peter Dutton says Victorians scared to go out because of ‘African gang violence’](#),” (3 January 2018).

<sup>112</sup> L. Henriques-Gnomes, “[‘Nasty, bigoted’: Victorian Liberals condemned for gang warning leaflets](#),” (13 July 2018)





Premier Daniel Andrews has often bragged about implementing “the toughest bail laws in our nation” that meant “there are more people on remand today than there has been at any point in the state’s history.”<sup>113</sup> These bail laws were implemented in response to Bourke St tragedy.<sup>114</sup>

The “law and order” scare campaigns after the Bourke St tragedy and in the lead up to the 2018 election were driven by the rhetoric of politicians and the media. And while Aboriginal people were not the focus of those scare campaigns, they have paid a heavy price due to the increased policing and incarceration that resulted.<sup>115</sup> When Aboriginal people are the focus of public discourse, it is often framed around deficits, which leads to negative public perceptions of Aboriginal people.<sup>116</sup>

Politicians love to talk about “community safety”; but they regularly fail to acknowledge that the best way to strengthen our communities is through healing and support.

The reality is that many people who get caught up in the criminal justice system are victims themselves, many have direct experience of trauma, and many have slipped through the holes in our society’s safety net. Research shows that punishment and deterrence, including through incarceration, does not work; it only serves to reinforce past trauma and entrench cycles of marginalisation and criminalisation.

Media reporting does real harm to Aboriginal people and communities. In some case, outlets are so reckless and indifferent in their pursuit of sensationalist crime stories, courts have found them liable for traumatising their own journalists.<sup>117</sup> Media outlets that perpetrate this harm must be held accountable and they must be liable for that harm in certain circumstances.

Yoorrook must debunk these false narratives, by listening to and amplifying the voices of Aboriginal leaders and communities. As noted above, access to data is critical for advocacy, access to resources, and advocating for evidence-based policies. Yoorrook has a critical opportunity to empower Aboriginal Communities to displace the status quo through access to data and information.

## RECOMMENDATIONS

**Recommendation 32.** Political parties and the media must stop manipulating “community safety” and “public safety” through law-and-order politics. Community safety and public safety must be determined by communities, and legal/policy responses to support safe and thriving communities must be informed by these definitions.

**Recommendation 33.** Media organisations should have greater civil liability for the impacts of their reporting, including in relation to:

- (a) Harm and distress caused to individuals or peoples by reporting that could be reasonably considered to be racist.


<sup>113</sup> Parliament of Victoria, [Hansard](#), 19 September 2018, p. 3405.

<sup>114</sup> K. Gelb, “[Despite our fears, we should be wary of harsher bail laws](#),” (25 February 2018).

<sup>115</sup> National Indigenous Times, “[Victoria’s bail laws are harming Aboriginal women and Aboriginal families](#),” (1 October 2021).

<sup>116</sup> [Passing the Message Stick: A guide to changing the story on self-determination and justice](#), p. 49.

<sup>117</sup> M. Ricketson and A. Wake, “[Should news orgs be legally liable for the traumatic situations they put reporters in? A landmark court decision in Australia says yes](#),” (8 March 2019).

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- (b) Inaccurate reporting on crime issues when it can be proven that such errors are systemic.
  - (c) The mental health of journalists who report on crime.

**Recommendation 34.** The Yoorrook Justice Commission should compel government witnesses identified in Annex B to provide evidence to the Commission, and subpoena government data/documents identified in Annex C.

### 3.2 Influence of Victoria Police and the Police Union

Toxic tough-on-crime politics, played by both major parties and some minor parties, has created a situation where Victoria Police and The Police Association of Victoria (TPAV) wield an enormous amount of power over the Victorian Government and the Victorian Parliament.<sup>118</sup> Their opposition to independent and more robust police oversight, as well as other key reforms, has had a significant impact on the lack of acceptance and non-implementation of recommendations over many decades.

The influence of the TPAV is evident from its history of undermining and blocking independent police oversight mechanisms. In 1976, the Beach Inquiry was expected to make adverse findings against 55 police officers and recommend “beyond doubt the undesirability of police investigating complaints against police.”<sup>119</sup> The Association held a 4,200 person mass meeting and started work-to-rule action, before any findings of the report had been published.<sup>120</sup> The Government agreed that any reform to police oversight would result from a conference of the Government, Police Association and police command – not be made on the recommendation of the Inquiry.<sup>121</sup>

Since that time, the TPAV has continued to dedicate major efforts to preventing any strengthening of the disciplinary or complaints investigation systems. When the Police Complaints Authority was established in 1986, it was fiercely criticised by the Association<sup>122</sup> and abolished in 1988. The TPAV has also supported the abolition of the Office of Police Integrity,<sup>123</sup> and opposed any expansion of IBAC’s police oversight function.<sup>124</sup>

Information revealed by *The Age* in May 2021 also indicates that Victoria Police and the TPAV may be a key blocker for bail reform in Victoria. According to 2019-20 “confidential high-level government documents” obtained by *The Age*, most government departments supported bail reform to prevent the ongoing increase in the remand population, but the Secretary of the TPAV opposes any winding back of the bail laws.<sup>125</sup>

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<sup>118</sup> VALS, “[Victoria’s tough-on-crime politics has stolen billions of dollars from communities](#),” (2 September 2022).

<sup>119</sup> Office of Police Integrity (2007), [Past Patterns – Future Directions: Victoria Police and the problem of corruption and serious misconduct](#), p. 49.

<sup>120</sup> Ibid.


<sup>121</sup> Ibid.

<sup>122</sup> Ibid., pp. 105-106.

<sup>123</sup> K. Moor, ‘[Don’t point finger at us, says Police Association boss Greg Davies](#)’ (6 January 2010).

<sup>124</sup> The Police Association Victoria, [Submission to the IBAC Committee Inquiry into the external oversight and investigation of police corruption and misconduct](#) (2017).

<sup>125</sup> R. Millar, C. Vedelago & T. Mills, “[Keep tough bail laws, says police union, as Greens try to wind them back](#),” (17 May 2021).



VALS also has concerns about the role and influence of Victoria Police and the TPAV in relation to decriminalising public intoxication and replacing it with a health-based response.<sup>126</sup>

## RECOMMENDATIONS

**Recommendation 35.** Safeguards must be put in place to limit the influence of Victoria Police and The Police Association of Victoria (TPAV) on justice policy in Victoria, including:

- (a) Victoria Police should be required to document the number of meetings, phone calls, and emails with Ministers and their staff in their annual report;
- (b) The Public Accounts and Estimates Committee should be required to hold an annual inquiry, separate to the usual budget estimates, regarding government funding received by Victoria Police;
- (c) The Police Association of Victoria (TPAV) should be required to register as a lobbyist organisation and be subject to the relevant disclosure requirements;
- (d) The influence of the TPAV on justice policy in Victoria should be examined by an independent inquiry. This should include any discussions TPAV officials have had with Ministers or their staff in relation to disciplinary proceedings.

## 3.3 Funding Excuses And Preferences

Lack of funding is often put forward by the government as a reason for not implementing critical reforms that will prevent Aboriginal people from coming into contact with the criminal legal system, or support them to get out of it. The ongoing failure to adequately fund ACCOs is but one example.<sup>127</sup>

In reality, a lack of money is just an excuse. Instead of investing in ACCOs and services that will divert people from the criminal legal system, the government prefers to, and chooses to, invest in police and prisons.

As discussed above, the government has invested heavily in prison expansion in Victoria, including a \$1.8 billion prison expansion package announced in 2018-19.<sup>128</sup> Simultaneously, the government has funnelled billions of dollars of taxpayers money into Victoria Police, including \$200 million purchasing even more tasers.<sup>129</sup>

In September 2022, the Victorian Auditor-Generals Office published a report that found that Victoria Police received \$2 billion for new staff, without any proof that the funding was needed and without any evidence that the expenditure has delivered results.<sup>130</sup>

The \$26.5 million our proposal needed over 4 years (based on costs in 2021) was equivalent to what the Victorian Government spends to keep just 56 people incarcerated over the same period of time.

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<sup>126</sup> VALS Media Release, "[Decriminalisation of public intoxication must be done right](#)," (25 April 2022)

<sup>127</sup> VALS Media Release, "[Daniel Andrews and Jaclyn Symes have put the Governments legacy on Aboriginal justice at risk](#)," (24 May 2021); VALS Media Release, "[The Andrews Government fails to invest in essential Aboriginal legal services again](#)," (3 May 2022).

<sup>128</sup> D. Sadler, The Justice Map, "[The next phase of Victoria's prison expansion program](#)," (29 April 2022).

<sup>129</sup> VALS Media Release, "[The Andrews Government fails to invest in essential Aboriginal legal services again](#)," (3 May 2022)

<sup>130</sup> Victorian Auditor General's Officer (VAGO), "[The Effectiveness of Victoria Police's Staff Allocation](#)" (2022).



Forcing ACCOs to provide excessive documentation and beg for every dollar, when Victoria Police are given \$2 billion without an adequate business case, is direct evidence of systemic racism. The system is designed to put more barriers in front of Aboriginal organisations - rigging the process.

As noted by Aunty Muriel Bamblett in her evidence to the Inquiry into Victoria's Criminal Justice System, "[Mainstream services] underperform and then get rewarded and still get funding. So where is the accountability of mainstream to Aboriginal?"<sup>131</sup>

## RECOMMENDATIONS

**Recommendation 36.** Both the Victorian and Commonwealth governments should be required to report annually on the percentage of government funding going to Aboriginal specific investments. Reporting should be broken down into funding that goes to government departments and agencies, funding that goes to mainstream services, and funding that goes to Aboriginal organisations and individuals.

### 3.4 Accountability and Oversight for Implementing Recommendations

Lack of accountability and oversight for responding to and implementing recommendations is a key reason why many previous inquiries have had little impact.

RCIADIC investigated the deaths of three Aboriginal men who died in custody in Victoria between 1980 and 1989. In 2005, a Victorian review RCIADIC recommendations examined the deaths of eight Aboriginal people who died in custody between 1991 and 2005. Since then, there have been many more Aboriginal deaths in custody in Victoria, yet there is no centralised record of each of these deaths, including the cause and circumstances, as well as any recommendations made to prevent further deaths. How can there be accountability when there is such little disregard for loss of life.

Lack of oversight was identified by the 2005 Implementation Review of RCIADIC recommendations in Victoria, which recommended the creation of an Aboriginal Social Justice Commissioner (**ASJC**).<sup>132</sup> The Review proposed an independent Commissioner, with "appropriate powers" support by "an adequately resourced Monitoring Unit."<sup>133</sup>

For the past 17 years, the Aboriginal Justice Caucus (**AJC**) and its members have advocated for the creation of an ASJC to provide oversight for Aboriginal justice in Victoria.<sup>134</sup> According to the AJC, the ASJC should:

- Monitor implementation of the RCIADIC recommendations;

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<sup>131</sup> Parliament of Victoria, [Inquiry into Victoria's Criminal Justice System](#) (2022), p.161.

<sup>132</sup> Victorian Government, [Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody: Review Report](#), (2005), Recommendation 154: "That the Victorian Government appoint an independent Commissioner for Aboriginal Social Justice charged with reporting annually to both the Government and Indigenous people on the implementation of the criminal justice and more general Recommendations of the Royal Commission into Aboriginal Deaths in Custody," pp. 703-704.

<sup>133</sup> Ibid.

<sup>134</sup> VALS Media Release, ["It is time for a Victorian Aboriginal and Torres Strait Islander Social Justice Commissioner"](#) (26 March 2021).



- Improve justice services and outcomes for the Aboriginal community;
- Respond to justice services and outcomes for the Aboriginal community;
- Assess the potential impacts of existing and new justice legislation for Aboriginal people;
- Conduct systemic discrimination investigations and independent reviews to further equality and strengthen human rights protections for Aboriginal people;
- Prevent and address discrimination, unconscious bias, vilification toward Aboriginal people through education and engagement with communities, employers, government and the Victorian public;
- Advocate for greater respect for Aboriginal rights and equality;
- Support Aboriginal people and communities when things go wrong, or human rights are at risk by helping to resolve discrimination complaints and intervening in court cases.<sup>135</sup>

The 2018 ALP Election Platform included a commitment to the ASJC,<sup>136</sup> which is also identified under *Burra Lotjpa Dunguludja* as a future possibility.<sup>137</sup> Although some work has taken place under the framework of *Burra Lotjpa Dunguludja*, the ASJC has still not been established. Most recently, the creation of the Aboriginal Justice Commissioner was recommended by the Victorian Parliamentary Inquiry into Victoria's Criminal Justice System.<sup>138</sup>

Yoorook must break the cycle of non-implementation of recommendations, with no accountability. The AJC has been clear in its proposed solution. There must be no more delays in establishing an independent office of the ASJC.

## RECOMMENDATIONS

**Recommendation 37.** In partnership with the AJC, the Victorian Government should work establishing an independent, statutory office of the ASJC, to provide oversight for Aboriginal justice in Victoria, including implementation of coronial recommendations and recommendations from the RCIADIC and associated inquiries. This office should be properly funded, with appropriate powers (including powers to conduct own motion inquiries), and report directly to the Parliament.

**Recommendation 38.** The Coroners Court of Victoria and/or the DJCS should compile, and make public, all coronial recommendations arising from inquests into Aboriginal deaths in custody in Victoria since 1991, as well as information on the status of implementation of each of these recommendations.


**Recommendation 39.** The DPC should have overall responsibility for implementation of coronial recommendations by government departments and agencies. DPC should be required to report

<sup>135</sup> Aboriginal Justice Caucus (AJC), [\*Submission on the Legislative Council Legal and Social Issues Committee Inquiry into Victoria's Justice System\*](#) (2021), p. 12.

<sup>136</sup> The 2018 ALP Election Platform also included a commitment to report annually on implementation of RCIADIC recommendations. See Victorian Branch Australian Labor Party, [\*Platform 2018\*](#), p. 83.

<sup>137</sup> [\*Burra Lotjpa Dunguludja\*](#), p. 51.

<sup>138</sup> Victorian Parliament, [\*Inquiry into the Criminal Justice System\*](#) (2022), Recommendation 79.



annually on the whole of government progress in implementing each coronial recommendation, and the report should be tabled in Parliament.

## 4. Systemic Injustices Requiring Urgent Action

This section highlights immediate priorities across the criminal legal system. The systemic reforms highlighted in Parts 1 and 2 are also urgently required. However, these systemic reforms require a fundamental rethinking of the way the system currently operates and will require time.

Whilst further work is undertaken to reimagine the system, including through the Treaty process, the following reforms must be implemented immediately to reduce criminalisation and over-incarceration of Aboriginal people and to end Aboriginal Deaths in Custody:

- **Stop criminalising Aboriginal Communities:** reform the punitive bail system; raise the age of criminal legal responsibility; decriminalise public intoxication and drug possession for personal use; end the criminalisation of mental illness and disability; and divert Aboriginal people away from the system at every stage;
- **Reduce incarceration through sentencing reform:** require decision makers to consider Aboriginality in sentencing; and increase community-based sentencing options that are culturally safe and/or culturally appropriate;
- **End violence in custody:** ensure that people are treated with dignity and respect by providing culturally safe healthcare that is equivalent to that available in the community, addressing excessive use of force and prohibiting solitary confinement and strip searching;
- **Support people to transition out of prison:** reform the parole system and provide culturally appropriate support for people transitioning out of prison;
- **Strengthen accountability and oversight:** overhaul the police oversight system and establish an independent police complaints body; ensure a robust independent prison complaints system that is culturally appropriate and accessible; establish independent detention oversight and independent investigation of Aboriginal Deaths in Custody and police-contact deaths.


This section consolidates VALS key asks relating to the criminal legal system from other public and confidential documents. In relation to each issue, we have referenced relevant documents which include more detailed submissions and recommendations.

### 4.1 Stop Criminalising Aboriginal Communities

#### 4.1 (a) Reform The Punitive Bail System

Over 30 years ago, the RCIADIC recommended that governments should “revise any criteria which inappropriately restricts the granting of bail to Aboriginal people” and that prison must only be used “as a sanction of last resort.” The current Victorian bail system has done the opposite.

The majority of people in Victoria’s prisons have not been sentenced, and many are detained for offences that would not lead to a prison sentence, even if they are convicted. Aboriginal people are disproportionately impacted by this harmful regime that is destroying Aboriginal families and communities.



In January 2020, Veronica Marie Nelson, a proud and strong Gunditjmara, Dja Dja Wurrung, Wiradjuri and Yorta Yorta woman, died at the DPFC, only 3 days after being arrested and refused bail for shoplifting-related offences.<sup>139</sup> “Veronica was resilient and had a fighting spirit. Veronica had a big personality and a beautiful laugh. She made the world better for those around her and she was deeply loved.”<sup>140</sup> According to Veronica’s partner, Uncle Percy Lovett, “Veronica shouldn’t have been in prison. She shouldn’t have died. I want to know what happened. I want someone to be held accountable.”<sup>141</sup>

VALS represented Uncle Percy Lovett during the coronial inquest into Veronica’s death, which took place in April 2022. The Corners findings and recommendations have not yet been handed down. The Coroner’s draft recommendations (as noted in our [submission on behalf of Percy Lovett](#)) include that the Attorney-General should urgently review the Bail Act and:

- Repeal the “exceptional circumstances” test (s. 4A);
- Repeal all three bail offences (ss. 30, 30A and 30B);
- Amend the “unacceptable risk” test so that bail must not be refused if there is a risk that the applicant will commit an offence whilst on bail; only if there is a risk that they would commit a “violent offence” (s. 4E(1)(a)(ii));
- Amend the “new facts and circumstances” test (s. 18AA); and
- Require bail decision makers who are judicial officers to articulate the matters taken into account (with reference to ss. 3A and 3AAA of the Bail Act) and the reasons for any refusal to grant an application for bail made by an Aboriginal person.

In March 2022, the Inquiry into Victoria’s Criminal Justice System recommended that the Government review the Bail Act.<sup>142</sup> VALS and many other organisations do not support this recommendation.<sup>143</sup> We need urgent action, not another review.

VALS has outlined its concerns and recommendations relating to bail in the following resources, which we encourage Yoorrook to consider:

- [Petition: Fix Victoria’s Broken Bail Laws](#) (2,599 signatures as at November 2022);
- [Policy Brief: Fixing Victoria’s Broken Bail Laws](#) (2022);
- [Open letter to the Government](#) (55 signatory organisations) (2021);
- [Webinar: Fixing Victoria’s Broken Bail Laws](#) (2022).<sup>144</sup>

Yoorrook has noted the calls for urgent reform on bail.<sup>145</sup> The Commission must not be like the government, and continue to delay action on this critical reform; it must listen to Aboriginal leaders and recommend urgent action.

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<sup>139</sup> VALS Media Release: “[VALS Media Release, VALS outraged by death in custody of proud Yorta Yorta woman](#),” (13 January 2020); VALS, Media Release: “[Coronial Inquest into death of Veronica Marie Nelson to examine healthcare in Victorian prisons and bail laws](#),” (29 March 2021).

<sup>140</sup> VALS and Robinson Gill, Joint Media Release, “[Veronica Marie Nelson: Inquest Begins Today](#),” (26 April 2022)

<sup>141</sup> Ibid.

<sup>142</sup> [Inquiry into Victoria’s Criminal Justice System](#) (2022), Recommendation 52, p. 460.

<sup>143</sup> VALS Media Release, “[The Andrews government must not kick bail reform down the road](#),” (24 March 2022).

<sup>144</sup> The webinar took place on 7 November 2022. A recording of the webinar will be available shortly.

<sup>145</sup> Yoorrook Justice Commission, *Issues Paper 1*, (2022), p. 3.



## RECOMMENDATIONS

**Recommendation 40.** The Victorian government must urgently amend the *Bail Act 1977* to:

- (a) Create a presumption in favour of bail for all offences, with the onus on the prosecution to prove that bail should not be granted;
- (b) Strictly limit the circumstances in which bail should not be granted;
- (c) Prohibit detention if a custodial sentence is unlikely;
- (d) Repeal all bail offences (ss. 30, 30A and 30B);
- (e) Require bail decision makers to explain what information they have taken into account to understand why and how someone's Aboriginality is relevant, and provide the reasons for any refusal to grant an application for bail made by an Aboriginal person;
- (f) Require bail decision-makers to make enquiries about Aboriginality in self-represented cases;
- (g) Require bail decision-makers to consider the best interests of any dependent children in bail decisions.

**Recommendation 41.** The Victorian Government should increase understanding and application of Section 3A of the *Bail Act 1977* by:

- (a) Funding VALS to work with Aboriginal Communities to develop resources and training for bail decision makers on s. 3A, cultural awareness, systemic racism and unconscious bias;
- (b) Requiring all bail decision makers (judges, magistrates, police and bail justices) to complete mandatory and regular training on s. 3A, cultural awareness, systemic racism and unconscious bias.

**Recommendation 42.** The Victorian Government should increase access to culturally appropriate bail hearings by:

- (a) Expanding the jurisdiction of Koori Court to include bail hearings;
- (b) Creating identified roles for Koori officers at the Bail and Remand Court;
- (c) Funding VALS to provide a duty lawyer service at Bail and Remand Court;
- (d) Funding Aboriginal Community Justice Panels (ACJP) to provide support to Aboriginal people whose bail applications are heard by bail justice or police officer;
- (e) Increasing and diversifying bail justices across Victoria.


**Recommendation 43.** The Victorian Government should increase access to culturally safe support for individuals on bail by:

- (a) Increasing the number of Koori case workers in the CISP;
- (b) Investing in culturally safe residential bail support and accommodation that is designed and delivered by Aboriginal Organisations;
- (c) Investing in culturally safe drug and alcohol rehabilitation services that are designed and delivered by Aboriginal Organisations.

### 4.1 (b) Raise The Age

Every child should be free to go to school, have a safe home to live in and be supported to learn from their mistakes. But right now, politicians are sending children as young as 10 years old to be locked





away in prison. Governments must address this by raising the minimum age of criminal responsibility to at least 14 years, and the minimum age for detention to 16 years.

The evidence is clear, and the reform has widespread support. In August 2022, the National Raise the Age coalition delivered a petition to the Federal Attorney-General and Minister for Indigenous Affairs with over 211,670 signatures, including 65,799 Victorian residents.<sup>146</sup> Numerous inquiries have recommended raising the age, including Our Youth, Our Way<sup>147</sup> and the Inquiry into Victoria's Criminal Justice System.<sup>148</sup>

Yoorrook has acknowledged “the ongoing campaign spearheaded by First Peoples’ advocates to raise the age,” and lent “its voice and authority to these calls for the Victorian Government to raise the age of criminal responsibility without delay.”<sup>149</sup> We strongly encourage Yoorrook taking a strong stance on this issue. Raising the age must be on the Government’s agenda for the first 100 days after the election in November 2022.

For further information on our key concerns and recommendations relating to raising the age, see:

- [Submission to the COAG Age of Responsibility Working Group](#) (2020);
- [Policy Brief: Raising the Age of Criminal Responsibility](#) 2022);
- [Submission to the Inquiry into Victoria’s Criminal Justice System](#) (pp. 77-83)
- [Webinar: Raise the Age](#) (co-hosted by VALS and Amnesty International, September 2022).

## RECOMMENDATIONS

**Recommendation 44.** The Victorian Government must raise the minimum age of criminal responsibility to at least 14 years, in the first 100 days of a new term of government.

**Recommendation 45.** The Victorian Government must raise the minimum age for detention to at least 16 years.

**Recommendation 46.** The Victorian Government should extend the presumption of *doli incapax* to children aged 14-17 years, and ensure that it is understood and applied effectively by:

- (a) Creating a legislative requirement for prosecutors to rebut the presumption;
- (b) Restricting the kinds of evidence that can be produced to rebut the presumption;
- (c) Increasing funding to the Children’s Court to improve the quality of clinical reports;
- (d) Requiring all police, Crown prosecutors and criminal defence lawyers to undergo mandatory and regular training on *doli incapax*.

### 4.1 (c) Decriminalise Public Intoxication

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<sup>146</sup> VALS Media Release, “[More than 65,700 Victorians call on the Andrews government to raise the age,](#)” (16 August 2022).

<sup>147</sup> CCYP, *Our Youth, Our Way*, Recommendation 8.

<sup>148</sup> [Inquiry into Victoria’s Criminal Justice System](#) (2022), Recommendation 10.

<sup>149</sup> Yoorrook Justice Commission, [Yoorrook with Purpose: Interim Report](#) (June 2022) p. 68.



In December 2017, much-loved mother, grandmother, sister and proud Yorta Yorta woman, Tanya Day, passed away after falling and hitting her head in a police cell in Castlemaine, Victoria. Ms. Day was locked in the police cell for being intoxicated in a public place after falling asleep on a train.

After almost five years of courageous advocacy by Tanya Day's family, and over 30 years since the RCIADIC first recommended decriminalisation, the Government is yet to implement this critical reform. Decriminalisation was due to take place in November 2022 but has been delayed for 12 months. There must be no further delays.<sup>150</sup> VALS stands with the Day family in continuing to advocate for this reform.

The government must remain committed to a health-based response,<sup>151</sup> and must not introduce protective custody powers, as has been in the case in other States and Territories when public intoxication was decriminalised. Police cells are unsafe for people who are intoxicated and experiences in other jurisdictions have demonstrated this. Individuals have died in WA, NSW and NT whilst detained under protective custody powers for public intoxication.<sup>152</sup>

Police and Protective Service Officers (**PSOs**) are not adequately trained or suited to be First Responders in a health response to public intoxication. Under no circumstances, should police or PSOs be given the power to detain an individual who is intoxicated in public, in a police cell, police station, police vehicle, PSO "pod" or any other place.

Yoorrook has acknowledged the importance of the public intoxication reforms and echoed the calls of organisations such as VALS.<sup>153</sup> The Commission should continue to advocate for no further delays, and to ensure that police and PSOs are not given protective custody powers or any other detention powers.

For further information on our key concerns and recommendations relating to decriminalising public intoxication, see:

- [Submission to the Inquiry into Victoria's Criminal Justice System](#) (pp. 99-103)
- [Community Factsheet on Decriminalising Public Intoxication](#) (2022).

## RECOMMENDATIONS

**Recommendation 47.** The Victorian Government must decriminalise public intoxication and replace it with a state-wide health response by November 2023. There must be no further delays.


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<sup>150</sup> VALS Media Release, "[Decriminalisation of public intoxication must be done right](#)," (April 2022)

<sup>151</sup> Premier of Victoria, Media Release, "[Health-Based Response to Public Drunkenness](#)," (22 August 2019).

<sup>152</sup> In 2012, Maureen Mandijarra passed away in a police cell in Broome, after being arrested and detained in connection with street drinking – see [Coronial Inquest findings](#); In 2015, Kumanjayi Langdon passed away in a police cell in Darwin, after being detained for public drinking, pursuant to the "paperless arrest" scheme in the Northern Territory – see [Coronial Inquest findings](#). In 2016, Rebecca Maher passed away in a police cell in Maitland, NSW, after being detained under protective custody powers – see [Coronial Inquest findings](#).

<sup>153</sup> Yoorrook Justice Commission, [Yoorrook with Purpose: Interim Report](#), p. 67-68.



**Recommendation 48.** No one should be detained in a police cell, police vehicle, police station or PSO “pods” at train stations, because they are intoxicated in public. This must be explicitly prohibited in legislation.

**Recommendation 49.** Victoria Police and PSOs must not be First Responders in a health response to public intoxication. They must not be given any new powers to respond to individuals who are intoxicated in public, including:

- (a) Power to detain for the purposes of making inquiries about a safe place for the person;
- (b) Power to detain for the purposes of transporting an individual to a safe place.

**Recommendation 50.** Health personnel must not be given any new powers in relation to a person who is intoxicated in public, including detention powers.

#### 4.1 (d) Decriminalise Drug Possession For Personal Use

The Victorian Government’s current drug policy subjects people dealing with addiction to intrusive policing and excessive punishment, instead of giving them the support they need. The criminalisation of drugs interacts with Victoria’s draconian bail laws to leave hundreds of people in prison awaiting trial for drug charges that will not result in a prison sentence when they finally reach court. Aboriginal people in Victoria are disproportionately impacted by the criminalisation of drug use

Criminalisation of drug use as not succeeded in reducing the number of people who use drugs or mitigating any of the harms caused by addictive substances. It has only contributed to Victoria’s ballooning prison population, separated children from their parents, and denied people who use drugs the healthcare they need.

It is time for Victoria to adopt a different approach. A public health approach to drug use would be focused on harm reduction. That means respecting the rights of people who use drugs, and acknowledging that some level of drug use is inevitable.<sup>154</sup>

Working to minimise the negative effects of drug use is a far more realistic and important goal than trying to deter and punish that use. A harm reduction approach has a strong human rights orientation, with a focus on non-coercive measures that do not require people to stop using drugs in order to receive support.<sup>155</sup>

For more information on our key concerns and recommendations relating to decriminalising drug possession for personal use, see our Policy Paper, [Harm Reduction Not Harm Maximisation: An Alternative Approach to Drug Possession.](#)


#### RECOMMENDATIONS

**Recommendation 51.** The Victorian Government should decriminalise the possession of all drugs for personal use. The model of decriminalisation must meaningfully reduce the over-policing of

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<sup>154</sup> National Harm Reduction Coalition, [“Principles of Harm Reduction”](#).

<sup>155</sup> Harm Reduction International, [“What is Harm Reduction?”](#).



people who use drugs in favour of a health response and must not merely eliminate criminal sanctions for drug possession.

**Recommendation 52.** In consultation with relevant stakeholders - including people with lived experience of drug use and the criminal legal system and ACCOs - the Victorian Government should invest in an expansion of health and social services, including alcohol and other drug treatment services, to fully meet the needs of people who use drugs.

#### 4.1 (e) Stop Criminalising Mental Illness and Other Disabilities

The criminal legal system, and the entities that are part of this system, regularly criminalise individuals with a disability - including mental illness - leading to trauma, imprisonment and a heightened risk of violence, abuse, neglect and exploitation.<sup>156</sup>

This trend of criminalisation is clear from the high rates of disabilities and mental health issues amongst Aboriginal people in custody. Available information suggests that Aboriginal people with a disability are 14 times more likely to be imprisoned than the general population.<sup>157</sup> In Victoria, data indicates that 72% of incarcerated Aboriginal men and 92% of incarcerated Aboriginal women had received a lifetime diagnosis of mental illness.<sup>158</sup> Data from 2019 indicates that 66% of Aboriginal children and young people involved with youth justice in Victoria had mental health issues and 49% had a cognitive disability.<sup>159</sup>

The trend of criminalisation is also clear from the violence perpetrated by police against individuals experiencing a mental health crisis, with no accountability.<sup>160</sup>

The Royal Commission into Victoria's Mental Health System recommended that "wherever possible, emergency services' responses to people experiencing time-critical mental health crises are led by health professionals rather than police."<sup>161</sup> Yet the new *Mental Health and Wellbeing Act 2002* gives more power to police and PSOs in mental health crises responses,<sup>162</sup> and does not require Victoria Police to publicly report on the use of these powers.

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<sup>156</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Issues Paper – Criminal Justice System* (2020).

<sup>157</sup> According to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, the available information suggests that Aboriginal and/or Torres Strait Islander people with a disability are about 14 times more likely to be imprisoned than the general population. See *Issues Paper – Criminal Justice System* (2020) p. 1.

<sup>158</sup> J. Ogloff, J. Patterson, M. Cutajar, K. Adams, S. Thomas and C. Halacas, *Koori Prisoner Mental Health and Cognitive Function Study – Final Report* (2013) p. 13.


<sup>159</sup> *Wirkara Kulpa*, p. 20.

<sup>160</sup> In September 2020, Tim Atkins allegedly broke a glass window at Northern Hospital in Epping during a severe bipolar episode. The resulting police encounter included Atkins being struck by a police car, sprayed with pepper spray and having his head stomped on by a member of Victoria Police. IBAC determined the two officers acted lawfully and should not be criminally charged, despite Atkins' injuries being so severe that he was placed in a medically induced coma following the incident. See D. Tran, "[Watchdog finds Victoria Police acted lawfully when head-stomping mentally ill man during arrest](#)" (16 July 2021).

<sup>161</sup> Royal Commission into Victoria's Mental Health System, *Final Report: Summary and Recommendations*, Recommendation 10.

<sup>162</sup> *Mental Health and Wellbeing Act 2022*, (Vic) ss. 232 – 253.





The significant over-policing and criminalisation of people with a disability must be replaced with well-resourced and evidence-based health responses. The Royal Commission into Victoria's Mental Health System recommended expanding the Assessment and Referral Court (**ARC**) to all 12 headquarter Magistrates Courts,<sup>163</sup> but drastically failed to address the issue of over-policing. Yoorrook has an important opportunity to address this gap.

For more information on our key concerns and recommendations relating to criminalisation of disability and mental illness, see:

- [Submission to the Inquiry into Victoria's Criminal Justice System](#) (2021) pp. 110-112
- [Submission to the Royal Commission into Victoria's Mental Health System](#) (2019).

## RECOMMENDATIONS

**Recommendation 53.** The Victorian Government should amend the *Mental Health and Wellbeing Act 2022* to remove arrest, detention and search and seize powers for Victoria Police and PSOs in mental health crisis responses.

**Recommendation 54.** The Victorian Government should reform the *Summary Offences Act 1966* to repeal offences that disproportionality impact people with mental illness.<sup>164</sup>

**Recommendation 55.** The requirement for Independent Third Persons to attend police interviews with individuals who have a disability, must be embedded in legislation.

**Recommendation 56.** All police officers and prison staff should be required to complete mandatory and regular training on how to interact with people with disabilities, including mental illness.

**Recommendation 57.** Together with Aboriginal health organisations, the Victorian government should develop and implement culturally appropriate screening for disabilities, for all individuals entering prison or youth justice detention centres.

### 4.1 (f) Diversion At Every Stage Of The Legal Process

Diversion away from the criminal legal system must be prioritised at every stage of the legal process.<sup>165</sup> This includes pre-charge cautions,<sup>166</sup> as well as court-based diversion pursuant to the *Children, Youth and Families Act 2005 (CYFA)*<sup>167</sup> and *Criminal Procedure Act 2009*. The current mechanisms in place to facilitate cautioning and diversion must be strengthened, but more importantly, new approaches to cautioning and diversion must be developed and implemented by Aboriginal Communities.

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<sup>163</sup> Royal Commission into Victoria's Mental Health System, [Final Report: Summary and Recommendations](#), Recommendation 37(1).

<sup>164</sup> This includes: begging (s. 49); obstruction of foot paths (s. 5), move on directions (s. 6) and obscene language (s. 17).

<sup>165</sup> Under international human rights law, Australia is required to divert children and young people away from judicial proceedings, wherever appropriate and desirable. See [United Nations Convention on the Rights of the Child](#), Article 40(3)(b).

<sup>166</sup> Cautions in both the youth and criminal legal systems are regulated by the Victorian Police Manual (VPM).

<sup>167</sup> See ss. 356B – 356K, *Children, Youth and Families Act 2005*. See also, CCYP, [Our Youth Our Way](#), pp. 447.



Data on cautions and court-ordered diversion is limited;<sup>168</sup> however, available information indicates that both mechanisms are significantly under-utilised, and that Aboriginal people are less likely to receive a caution or diversion.<sup>169</sup>

- **Cautions:** between 2010-11 and 2019-20, child cautions and warnings by Victoria Police declined from 37% to 20%.<sup>170</sup> Between January 2018 and December 2019, Aboriginal children and young people aged 10 to 17 years were cautioned in 13% of incidents compared to 21% of incidents involving non-Aboriginal children and young people.<sup>171</sup>
- **Diversion:** In 2020-21, 6.6% of cases before the Magistrates' Court were adjourned for diversion.<sup>172</sup> In the same period, only 1.3% of VALS criminal law matters were adjourned for diversion.<sup>173</sup> Between 2017 and 2019, Aboriginal children and young people received approximately 13% of all diversion for children and young people, whilst representing 16% of the youth justice population.<sup>174</sup>

VALS has previously highlighted key challenges and barriers with the current approaches to cautioning and diversion in both the youth and adult criminal legal systems, including: inconsistent application, lack of transparency about Victoria Police's approach to cautioning and diversion, and the requirement for the prosecutor to consent to court-based diversion. Many of these are articulated in *Our Youth, Our Way*,<sup>175</sup> and the Final Report of the Inquiry into Victoria's Criminal Justice System.<sup>176</sup>

While the Aboriginal Youth Cautioning Pilot (**ACYC**)<sup>177</sup> and changes to the Victoria Police policy on cautions<sup>178</sup> are positive, the government must adopt a legislated cautioning scheme to ensure a consistent state-wide approach.

Some positive commitments are also made under *Wirkara Kulpa*, including expansion of the Community Based Aboriginal Youth Justice Worker program to provide gender sensitive and culturally based support and diversionary services for young people who come into contact or are at risk of

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<sup>168</sup> Victoria Police data on cautions is not publicly available. Some data on youth cautions is available in *Our Youth, Our Way*, research published by the Crime Statistics Agency in 2017, and the Final report of the Inquiry into Victoria's Criminal Justice System. See ["The Cautious Approach: Police cautions and the impact on youth offending,"](#) (25 September 2017).

<sup>169</sup> Finding 19 of the Inquiry into Victoria's Criminal Justice System included that young Aboriginal people are less likely to receive a caution than other Victorians. See [Inquiry into Victoria's Criminal Justice System](#) (2022), p. 217.

<sup>170</sup> [Inquiry into Victoria's Criminal Justice System](#) (2022), p. 213.

<sup>171</sup> CCYP, [Our Youth Our Way](#), p. 33.

<sup>172</sup> Sentencing Advisory Council, [Sentencing Outcomes in the Magistrates' Court](#).

<sup>173</sup> In 2019-20, VALS provided legal representation in relation to 1,648 criminal law matters and 41 of these resulted in diversion. In 2020-21, VALS provided legal representation in relation to 1,045 criminal law matters and 14 of these matters resulted in diversion.


<sup>174</sup> Data provided by Youth Justice to CCYP, [Our Youth Our Way](#), p. 447.

<sup>175</sup> CCYP, [Our Youth Our Way](#), pp. 446-460.

<sup>176</sup> [Inquiry into Victoria's Criminal Justice System](#) (2022), pp. 209-228.

<sup>177</sup> Under *Burra Lotjpa Dunguludja*, the Aboriginal Justice Forum has committed to implement this program in four sites over the next 5 years. See [Burra Lotjpa Dunguludja](#) (2018), p. 41. According to the Final Report of the Inquiry into Victoria's Criminal Justice System, Victoria Police intend to expand this pilot to a state-wide program. See [Inquiry into Victoria's Criminal Justice System](#) (2022), p. 213.

<sup>178</sup> In 2021, police amended their policy on cautioning for children and young people to implement the following changes: removing the requirement for the person to admit guilt; removing the limit on the number of cautions an individual could receive. See [Victorian Government Submission to the Inquiry into Victoria's Criminal Justice System](#), p. 53-54.



entering the Youth Justice system,<sup>179</sup> and expansion of Baroona Youth Healing Program to provide residential diversion for young Aboriginal males and females.<sup>180</sup>

In addition to changes to improve the existing system, cautions and diversion are one key area where there are opportunities for transfer of power, resources and authority to Aboriginal Communities to develop and implement Aboriginal self-determined solutions.

VALS has previously highlighted the approach to diversion in Gladue courts in Ontario, Canada, which operates as a plea and resolution court, with diversion being a possible resolution.<sup>181</sup> Whilst the process for accessing diversion still includes approval by the Crown Attorney, the decision is based on the recommendation of the Aboriginal court worker and legal counsel. Individuals are diverted to the “Community Council,” which is a restorative circle of Aboriginal volunteers, including Elders, based at the Aboriginal Legal Service. The role of the Council is to work with the individual to develop a list of tasks to which the client agrees, and to approve successful completion of the diversion.<sup>182</sup>

For more information on our concerns and recommendations regarding cautions and diversion, see:

- [\*Submission to Commission for Children and Young People Inquiry: Our Youth, Our Way\*](#) (2019)
- [\*Submission to the Inquiry into Victoria’s Criminal Justice System\*](#) (2021) (pp. 158-166).

## RECOMMENDATIONS

**Recommendation 58.** The Victorian Government must work with Aboriginal Communities to increase access to pre-charge cautions in both the youth and criminal legal systems by:

- (a) Requiring Victoria Police to take into account an Aboriginal person’s unique background and circumstances in relation to all decisions regarding cautioning, and demonstrate the steps taken to discharge this obligation;
- (b) Introducing legislated cautioning schemes that maximise opportunities for cautions,<sup>183</sup> including a legislative presumption in favour of alternative pre-charge measures (verbal warnings, written warnings, cautions, referral to cautioning programs, and family group conferencing) with no exceptions;
- (c) Funding Aboriginal Organisations to develop and implement culturally safe cautioning programs for Aboriginal children, young people and adults.

**Recommendation 59.** The Victorian Government must work with Aboriginal Communities to increase access to diversion in both the youth and criminal legal systems by:

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<sup>179</sup> [\*Wirkara Kulpa\*](#), p. 48.

<sup>180</sup> Victorian Government, [\*“Victorian Government Response to Our Youth Our Way Inquiry.”\*](#)

<sup>181</sup> Aboriginal Legal Services, [\*Evaluation of the Gladue Court Old City Hall, Toronto\*](#) (2016), 43-44.

<sup>182</sup> For more information, see VALS, [\*Submission to the Inquiry into Victoria’s Criminal Justice System\*](#) (2021), pp. 160-161.

<sup>183</sup> This should include: no limits on the number of cautions that can be received; no requirement to admit guilt; a legislative requirement that no charges or proceedings can be commenced for the offence; no requirement to disclose information regarding the caution; no criminal record resulting from the caution; a legislative prohibition against adducing evidence about the caution, except with the permission of the person; a requirement to destroy any evidence relating to the caution.

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- (a) Requiring courts to take into account an Aboriginal person's unique background and circumstances in relation to all decisions regarding court-ordered diversion, and demonstrate the steps taken to discharge this obligation;
  - (b) Amending the statutory diversion schemes in the *CYFA 2005*, the new *Youth Justice Act* and the *Criminal Procedure Act 2009*, to maximise opportunities for diversion,<sup>184</sup> including through a legislative presumption in favour of diversion at all stages of the legal process;
  - (c) Funding Aboriginal Organisations to develop and implement culturally safe diversion programs for Aboriginal children, young people and adults;
  - (d) Employing Koori Diversion Coordinators at the Children's Court Youth Diversion service and the Criminal Justice Diversion Program;
  - (e) Expanding the jurisdiction of the Koori Court to include court-ordered diversion.

## 4.2 Reduce Incarceration Through Sentencing Reform

### 4.2 (a) Aboriginality In Sentencing

Sentencing processes regularly fail to consider the unique systemic and background factors affecting Aboriginal people in the justice system. This is because they are often informed by pre-sentence reports, which do not adequately consider cultural identity or community circumstances of Aboriginal people.<sup>185</sup> As discussed above, they are informed by the language and measurements of "risk" and "use a deficit metric to influence decisions on sentencing."<sup>186</sup>

Sentencing processes must seek to better understand an Aboriginal person's life and circumstances, including their "aspirations, interests, strengths, connections, culture, and supports of the individual, as well as the adverse impact of colonial and carceral systems on their life."<sup>187</sup> To do this, sentencing laws should be amended to require judicial decision-makers to consider the circumstances related to the person's Aboriginal background and to demonstrate the steps taken to ascertain relevant information.

Whilst creating a statutory obligation is critical, Section 3A of the *Bail Act 1977*<sup>188</sup> has shown that statutory reform alone will not lead to systemic change; it must also be accompanied by practical reforms to ensure that judicial decision-makers have access to the necessary information to discharge their obligations.

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<sup>184</sup> This should include: removing police discretion as to which offences are suitable for diversion; a legislative requirement for police to explain why they have not recommended diversion for all police briefs; no limit on the number of times that diversion can be ordered; removing the requirement for the prosecutor to consent to diversion.

<sup>185</sup> S.M. Shepherd & T. Anthony (2018) Popping the cultural bubble of violence risk assessment tools, *The Journal of Forensic Psychiatry & Psychology*, 29:2, 211-220.

<sup>186</sup> T. Anthony, A. Lachsz and N. Waight, "[The role of 're-storying' in addressing over-incarceration of Aboriginal and Torres Strait Islander Peoples](#)," 17 August 2021.

<sup>187</sup> T. Anthony, A. Lachsz and N. Waight, "[The role of 're-storying' in addressing over-incarceration of Aboriginal and Torres Strait Islander Peoples](#)," 17 August 2021.

<sup>188</sup> Section 3A of the *Bail Act 1977* (Vic) provides that: "In making a determination...in relation to an Aboriginal person, a bail decision maker must take into account (in addition to any other requirements of this Act) any issues that arise due to the person's Aboriginality, including: (a) the person's cultural background, including the person's ties to extended family or place; and (b) any other relevant cultural issue or obligation.





To implement this change, VALS is piloting Aboriginal Community Justice Reports, which are modelled off Gladue Reports in Canada. The pilot is being implemented in the Koori County Court in partnership with the University of Technology Sydney, the Australasian Institute of Judicial Administration and Griffith University, pursuant to a grant from the Australian Research Council. It builds on research carried out by VALS since 2017.<sup>189</sup> Indigenous Experience Reports were also recommended by the Australian Law Reform in 2017.<sup>190</sup>

The pilot has completed several reports for Aboriginal people with matters in the Koori County Court. The reports have been well-received by the Court. For example, in *DPP v Tirris*, the court noted that the report “provides a much more detailed and in-depth level of information about your circumstances, your family and community, than is usually provided to a Court. The report also provides a greater opportunity for you and your loved ones to tell your story yourselves - rather than having it told by others.”<sup>191</sup> In *DPP v Rotumah*, the court noted that “the prosecution acknowledges the contents of the ACJR and accepts that structural and systemic racism and colonisation influenced ... personal circumstances and outcomes in life.”<sup>192</sup>

For more information on Aboriginal Community Justice Reports, see:

- [\*Aboriginal Community Justice Reports Addressing Over-Incarceration\*](#) (2017);
- [\*Submission to Sentencing Act Reform Project\*](#) (2020);
- [\*Submission to the Inquiry into Victoria’s Criminal Justice System\*](#) (2021);
- T. Anthony, A. Lachs and N. Waight, “[The role of ‘re-storying’ in addressing over-incarceration of Aboriginal and Torres Strait Islander Peoples](#),” (17 August 2021).

## RECOMMENDATIONS

**Recommendation 60.** The Victorian Government should amend the *Sentencing Act 1991*, the CYFA and the new *Youth Justice Bill* so that for the purposes of all sentencing decisions,<sup>193</sup> courts are required to:

- (a) Take into account the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples; and
- (b) Provide reasons and demonstrate the steps taken to discharge this obligation.

**Recommendation 61.** The ACJR project should be funded on a long-term basis as a mechanism to support a strengths-based approach in sentencing and ensure that judicial decision makers have access to relevant information regarding a person’s Aboriginal background and Aboriginal-specific sentencing options. Options to extend ACJR’s into other areas of the justice system should be explored.

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<sup>189</sup> VALS, [\*Aboriginal Community Justice Reports Addressing Over-Incarceration\*](#) (October 2017) 3-4.

<sup>190</sup> Australian Law Reform Commission (ALRC), [\*Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples\*](#) (2017) 214.

<sup>191</sup> *DPP v Tirris* [2022] VCC 1575 (16 Sep 2022).

<sup>192</sup> *DPP v Rotumah* [2022] VCC 1532 (7 Sep 2022).

<sup>193</sup> This includes decisions about any conditions attached to community-based sentencing options, as well as decisions about compliance with community-based sentencing options.



## 4.2 (b) Strengthen Community-Based Sentencing Options

Aboriginal people are less likely to receive a community-based sentence than non-Aboriginal people,<sup>194</sup> and are more likely to breach a community based sentence.<sup>195</sup> This is because community based orders in Victoria – particularly the Community Corrections Order (CCO) – is not appropriately tailored to Aboriginal people, and the mechanisms for supporting Aboriginal people to successfully complete their community-based orders continue to be grounded in punitive and paternalistic approaches.

There is a critical need to increase and strengthen community-based sentencing options, in order to reduce incarceration rates of Aboriginal people, including by:

- Introducing sentencing options between a CCO and adjourned undertaking;
- Ensuring that any conditions on community-based orders are culturally appropriate;
- Ensuring that individuals who have an acquired brain injury (ABI) or an intellectual disability that was not diagnosed before the age of 18 years, are eligible for a Justice Plan;
- Strengthening the role of Aboriginal Communities in relation to community-based sentences;
- Investing in and increasing access to culturally appropriate services/programs to support Aboriginal people on community-based orders.

### RECOMMENDATIONS

**Recommendation 62.** The Victorian Government should amend the *Sentencing Act 1991* to increase community-based sentencing options, including by introducing sentencing options between a Community Corrections Order and an adjourned undertaking.

**Recommendation 63.** The Victorian Government and Aboriginal Communities should jointly develop and implement integrated culturally appropriate programs and supervision for Aboriginal people on community-based sentences, including facilities and programs modelled off Wulgunggo Ngalu Learning Place.

**Recommendation 64.** The Victorian Government should amend the *Sentencing Act 1991* to ensure that individuals with an acquired brain injury and/or with an intellectual disability that was not diagnosed before the age of 18 years, are eligible for a Justice Plan.


## 4.3 End Violence In Custody

### 4.3 (a) Equivalency Of Healthcare In Custody

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<sup>194</sup> In 2018-2019 in Victoria, Aboriginal people made up 6.87% of the average daily community corrections offender population versus 9.5% of the average daily prisoner population. See Productivity Commission, *Report on Government Services 2020*. Part C, [Corrective Services Data Tables](#), Table 8A.8, Table 8A.6.

<sup>195</sup> ALRC, [Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples](#) (2018), pp. 234 and 254.



Healthcare in prisons is both inadequate and culturally unsafe, with significant detrimental effects for Aboriginal people who are incarcerated. Over thirty years ago, the RCIADIC recommended that healthcare in prisons must be equivalent to what is available in the community.<sup>196</sup> This means that Aboriginal peoples physical and mental health needs must be met to an equivalent standard, not just that there are an equivalence of services available.

RCIADIC Recommendation 150 simply states Victoria's legal obligations under international human rights law<sup>197</sup> and the Victorian Charter;<sup>198</sup> yet it has not been implemented.

Over the past 12 months in Victoria, there have been three Aboriginal Deaths in Custody,<sup>199</sup> and the coronial investigations/inquests into many of these deaths have revealed shocking evidence about the adequacy of healthcare provided in Victorian prisons.<sup>200</sup> This is reflective of a broader trend across Australia, with research from 2021 showing that Aboriginal people are three times more likely to not receive all required medical care before they die in custody.<sup>201</sup>

Equivalency of healthcare in prisons in Victoria is undermined by the following key challenges:

- Privatisation of prison health care, which is provided by Correct Care Australasia
- Oversight of the delivery of healthcare through the Department of Justice and Community Safety (DJCS), not the Department of Health
- Lack of independent oversight of prison health care
- People who are incarcerated cannot access the Medicare Benefits Scheme (**MBS**) and the Pharmaceutical Benefits Scheme (**PBS**)<sup>202</sup>
- Lack of culturally safe healthcare for Aboriginal people who are incarcerated

VACCHO, VALS and many other Aboriginal Community Controlled Health Organisations (**ACCHOs**) have been clear in their demands for culturally safe healthcare to be provided to Aboriginal people who are incarcerated, by ACCHOS.<sup>203</sup> If the government is going to translate its policy commitments to self-determination into concrete and meaningful change; facilitating culturally safe health care in custody, delivered by ACCHOs, is essential.

For more information on our key concerns and recommendations relating to equivalency of healthcare, see:

- [Submission to the Inquiry into Victoria's Criminal Justice System](#) (2021) (pp. 215-222).

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<sup>196</sup> RCIADIC, National Volume 5, [Recommendations](#), Recommendation 150.

<sup>197</sup> [International Covenant on Economic, Social and Cultural Rights](#), Article 12; [United Nations Standard Minimum Rules for the Treatment of Prisoners](#) (Mandela Rules), UN Doc A/RES/70/175 (17 December 2015).

<sup>198</sup> [Charter of Human Rights and Responsibilities Act 2006](#) (Vic), s. 22(1).

<sup>199</sup> See above at footnote 94.

<sup>200</sup> S. Schwartz, 'Indigenous Victorian pay a high price when prison prioritise profit,' (4 November 2022).

<sup>201</sup> Allam, L. et al., 'The facts about Australia's rising toll of Indigenous deaths in custody' (9 April 2021).

<sup>202</sup> Individuals who are incarcerated are excluded from accessing Medicare and PBS subsidies under s 19(2) of the [Health Insurance Act 1973](#) (Cth). In March 2021, the Inquiry into Victoria's Criminal Justice System recommended that the Victorian Government engage with the Commonwealth Government to explore the benefits, challenges, and feasibility of extending access to Medicare and the Pharmaceutical Benefits Scheme to incarcerated Victorians. See [Inquiry into Victoria's Criminal Justice System](#) (2022), Recommendation 74.

<sup>203</sup> VACCHO Media Release, '[VACCHO Demands Urgent Action To End Aboriginal Deaths In Custody](#),' (14 September 2022)

- HRLC, VALS, FlatOut and St Kilda Legal Service, [Ending human rights abuses in Victorian prisons: Submission to the Cultural Review of the Adult Custodial Corrections System](#) (2021)
- [Submissions on behalf of Uncle Percy Lovett](#) (17 June 2022)
- S. Schwartz, "[Indigenous Victorian pay a high price when prison prioritise profit](#)," (4 November 2022)

## RECOMMENDATIONS

**Recommendation 65.** The Victorian Government must provide people in custody with healthcare (including mental healthcare) that is the equivalent of that provided in the community. This means that their physical and mental health needs must be met to an equivalent standard; not just that there is an equivalence of services available.

**Recommendation 66.** Aboriginal people must be provided access to primary healthcare by ACCHOs, as is available in the community.

**Recommendation 67.** Provision of healthcare in custody must be overseen by the Department of Health, not DJCS.

**Recommendation 68.** The Victorian Government should immediately terminate the contract with Correct Care Australasia, for provision of healthcare in Victoria's public prisons.

**Recommendation 69.** People in detention must have access to the MBS, the PBS, and the NDIS. Everyone should be assessed for NDIS eligibility upon entry to a prison or youth justice detention centre.

## 4.3 (b) End Ill-Treatment In Custody

Recent inquiries into Victorian prisons and youth justice detention centres have highlighted serious abuses, including excessive use of force,<sup>204</sup> inappropriate strip searching,<sup>205</sup> interfering with camera recordings, trafficking contraband, excessive use of lockdowns, isolation and solitary confinement.<sup>206</sup> As a result of the abuses investigated by IBAC in 2021, the government has established an independent Review of the Adult Custodial Corrections System<sup>207</sup> which will deliver its report in 2023.


<sup>204</sup> In 2020-21, one prison guard every week was suspended for reasons including the excessive use of force, smuggling of contraband and sexual harassment. See Michael O'Brien MP, Media Release, '[One prison guard a week suspended in Andrews' chaotic corrections system](#),' (21 July 2021)

<sup>205</sup> IBAC reported that the General Manager of Port Phillip Prison told its investigators that strip searches were "one of the options available to assert control" over people in prison. IBAC, [Special report on corrections: IBAC Operations Rous, Caparra, Nisidia and Molara Turon](#), (2021), p. 53.

<sup>206</sup> Victorian Ombudsman, [Report on investigations into the use of force at the Metropolitan Remand Centre and the Melbourne Assessment Prison](#) (2022); IBAC, [Special report on corrections: IBAC Operations Rous, Caparra, Nisidia and Molara Turon](#), (2021); Victorian Ombudsman, [OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people](#) (2019); [Inquiry into Victoria's Criminal Justice System](#) (2022); CCYP, [Our Youth, Our Way](#); CCYP, [The same four walls: Inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system](#), p. 84.

<sup>207</sup> [Cultural Review of the Adult Custodial Corrections System - Cultural Review of the Adult Custodial Corrections System \(correctionsreview.vic.gov.au\)](#)





All of these practices are contemporary forms of violence that are rooted in the colonial carceral system and continue to be used disproportionately against Aboriginal people, exacerbating pre-existing trauma, triggering new trauma, and undermining mental health and social and emotional wellbeing.

Over thirty years ago, the RCIADIC recommended prohibiting “segregation or isolated detention” of Aboriginal people because of its harmful effects.<sup>208</sup> The significant harm caused by solitary confinement is recognised under international human rights law, which prohibits prolonged<sup>209</sup> or indefinite solitary confinement, as well as solitary confinement of people with mental or physical disabilities.<sup>210</sup> VALS’ [Webinar on the Harms of Solitary Confinement](#) includes testimonies from individuals with lived experience of solitary confinement, who have courageously shared their experiences of this violent practice.

In 2020, the Victorian Supreme Court found that routine strip searching, and urine testing was a violation of the rights to privacy, dignity and humane treatment under the *Victorian Charter*.<sup>211</sup> This decision was partly overturned on appeal,<sup>212</sup> however, the Court of Appeal maintained that that the practice of routinely strip searching people in prison who are undergoing a urine test is incompatible with human rights. Leave is now being sought to appeal the matter to the High Court.

The Inquiry into the Criminal Justice System recommended that the government should “review the use of solitary confinement, physical restraints and strip searching in Victorian prisons with a view to introducing policy to regulate the use of these practices.”<sup>213</sup> VALS does not support the recommendation, as recent inquiries have shown that prison policies are routinely breached with no accountability or transparency.<sup>214</sup>

The government must end torture, cruel, inhuman and degrading treatment and punishment in prisons through a legislative ban on the use of solitary confinement and routine strip searching in prisons.

For more information on our key concerns and recommendations relating to torture, cruel, inhuman and degrading treatment and punishment, see:

- [Submission to the Inquiry into Victoria’s Criminal Justice System](#) (2021) (pp. 209-215).

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<sup>208</sup> According to Recommendation 181 of the RCIADIC, it is “undesirable in the highest degree that an Aboriginal prisoner should be placed in segregation or isolated detention.” See RCIADIC, National Volume 5, [Recommendations](#).

<sup>209</sup> Prolonged solitary confinement is solitary confinement in excess of 15 consecutive days. See [Mandela Rules](#), Rule 44.

<sup>210</sup> [Mandela Rules](#), Rule 44. The Mandela Rules also provide that solitary confinement “shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority.” See Rule 45(1).

<sup>211</sup> *Minogue v. Thompson* [2021] VSC 56.

<sup>212</sup> See [Thompson v. Minogue](#) [2021] VSCA 358. The Victorian Court of Appeal found that: the appellants (the Governor of Barwon and the Secretary of DJCS) did give proper consideration to Dr Minogue’s human rights, namely his right to privacy and right of people deprived of liberty to be treated with humanity and respect for the inherent dignity of the human person; the decision to require Dr Minogue to undergo a random urine test was not incompatible with human rights; the decision to strip search Dr Minogue before undergoing a urine test was incompatible with human rights.

<sup>213</sup> [Inquiry into Victoria’s Criminal Justice System](#) (2022), Recommendation 82.

<sup>214</sup> IBAC, [Special report on corrections: IBAC Operations Rous, Caparra, Nisidia and Molara Turon](#), (2021); VALS Media Release, [‘IBAC report finds that prison expansion and privatization are contributing factors to corruption and abuse within Victoria’s Corrections system’](#), (23 January 2021).

- VALS, HRLC, FlatOut and St Kilda Legal Service, [Ending human rights abuses in Victorian prisons: Submission to the Cultural Review of the Adult Custodial Corrections System](#) (2021)
- [Webinar: The Harms of Solitary Confinement](#) (June 2021)
- Community Factsheet, [VALS Intervention in the Court of Appeal Strip Searching and Urine Testing Case](#) (2021)

## RECOMMENDATIONS

**Recommendation 70.** The Victorian Government should end torture and other cruel, inhuman or degrading treatment or punishment in Victorian prisons and youth justice detention centres by amending the *Corrections Act 1968*, the *CYFA 2005* and the new *Youth Justice Act* to:

- (a) Prohibit torture, cruel, inhuman or degrading treatment or punishment
- (b) Prohibit routine strip searching and provide that a strip search should only ever be permitted as a last resort after all other less intrusive search alternatives have been exhausted and there remains reasonable intelligence that the person is carrying dangerous contraband;<sup>215</sup>
- (c) Prohibit solitary confinement and clearly define the limited, narrow and exceptional circumstances in which a person may be lawfully separated from other people;<sup>216</sup>
- (d) Prohibit the use of restraints/force, with strict exceptions and robust safeguard;<sup>217</sup>
- (e) Prohibit certain restraints/use of force, without exception;<sup>218</sup>
- (f) Strictly limit urine testing, including that it should only be required upon reasonable grounds and in a manner consistent with the inherent dignity and right to privacy of the detainee involved to the greatest extent possible;<sup>219</sup>
- (g) Require Youth Justice to notify VALS' CNS whenever an Aboriginal child or young person is put in isolation and providing additional funding to VALS to respond to these notifications.

## 4.4 Support People To Transition Out Of Prison

### 4.4 (a) Reform The Parole System

In 2015, the parole system in Victoria was reformed, making it harder to access parole. The “tougher” parole system has had a disproportionate impact on Aboriginal people, who are less likely to apply for parole than non-Aboriginal people, and also less likely to be released on parole.<sup>220</sup>

Significant reform is required to reverse the changes made in 2015 and establish a fair, transparent and equitable parole system that is culturally appropriate and is genuinely committed to the rehabilitation and reintegration of incarcerated people. Central to these reforms is the need for

<sup>215</sup> VALS, HRLC, FlatOut and St Kilda Legal Service, [Ending human rights abuses in Victorian prisons: Submission to the Cultural Review of the Adult Custodial Corrections System](#) (2021), p. 7.


<sup>216</sup> Ibid.

<sup>217</sup> VALS, [Submission to the Inquiry into Victoria's Criminal Justice System](#) (2021), recommendations 212-213.

<sup>218</sup> Ibid., Recommendation 211.

<sup>219</sup> Ibid., Recommendation 220.

<sup>220</sup> Evaluation of AJA2 found that 67% of Aboriginal offenders released from prison were not released on parole. See Nous Group, [Evaluation of the Aboriginal Justice Agreement—Phase 2: Final Report](#) (2012) [10.2.5]; ALRC, [Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander People](#)s, (2019) pp.268-269.



procedural fairness and natural justice within the parole process and an overarching requirement for the Adult and Youth Parole Boards to comply with the principle that detention is a last resort.<sup>221</sup>

*Wirkara Kulpa* commits the government to explore options as part of the new Youth Justice Act to establish an Aboriginal division of the Youth Parole Board to promote self-determination and deliver more culturally appropriate parole responses.<sup>222</sup> A similar approach should be taken for the Adult Parole Board.

For more information on our key concerns and recommendations relating to parole, see:

- [Submission to the Inquiry into Victoria's Criminal Justice System](#) (2021) (pp. 174-191).
- VALS, HRLC, FlatOut and St Kilda Legal Service, [Ending human rights abuses in Victorian prisons: Submission to the Cultural Review of the Adult Custodial Corrections System](#) (2021).

## RECOMMENDATIONS

**Recommendation 71.** The Victorian Government must amend the *Corrections Act 1968*, the *CYFA 2005*, the new *Youth Justice Act* and other relevant legislation to create a fair, transparent, culturally appropriate and equitable parole system, including by:

- (a) Requiring Parole Boards to take into account an Aboriginal person's unique background and circumstances in relation to all decisions regarding parole, and demonstrate the steps taken to discharge this obligation;
- (b) Introducing a system of automatic release for certain categories of sentences, whereby people are automatically granted parole once their non-parole period has been reached;<sup>223</sup>
- (c) For people not eligible for automatic release, introducing a legislative presumption that an application for parole automatically be made at the earliest eligibility date;<sup>224</sup>
- (d) Repealing the parole revocation schemes so that time spent on parole contributes to the head sentence, even if parole is cancelled;
- (e) Incorporating procedural fairness rights into parole processes, including the right to access legal advice and representation;
- (f) Removing the Youth and Adult Parole Boards' exemptions from the operation of the *Victorian Charter on Human Rights and Responsibilities 2006*;
- (g) Repealing the Youth and Adult Parole Boards' exceptions for the rules of natural justice;<sup>225</sup>
- (h) Requiring that the Youth and Adult Parole Boards must comply with the principle that detention is a last resort;
- (i) Providing that when required programs have not been completed due to their unavailability or cultural inappropriateness, this cannot be a bar to parole.

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<sup>221</sup> Article 37(b) of the *Convention on the Rights of the Child*.

<sup>222</sup> *Wirkara Kulpa*, p. 50.

<sup>223</sup> VALS, HRLC, FlatOut and St Kilda Legal Service, [Ending human rights abuses in Victorian prisons: Submission to the Cultural Review of the Adult Custodial Corrections System](#) (2021), p. 8.

<sup>224</sup> *Ibid*.

<sup>225</sup> s. 69(2), *Corrections Act 1986* (Vic).



**Recommendation 72.** In addition to legislation reform, the Victorian government must increase access to parole for Aboriginal people by:

- (a) Investing in, and ensuring access to, culturally appropriate rehabilitation programs that are designed and delivered by Aboriginal organisations;
- (b) Funding VALS to provide culturally safe legal services to Aboriginal people who are incarcerated;
- (c) Ensuring that parole conditions are achievable and culturally appropriate;
- (d) Investing in, and ensuring access to, culturally appropriate support for Aboriginal people on parole, including transitional housing and holistic support.

#### 4.4 (b) Transitional Support For People Exiting Prison

Supporting people to transition out of prison is critical to health, mental health and wellbeing. Early and meaningful support can help individuals to participate in employment, community life and reconnecting with family, thereby reducing recidivism and also reducing the risk of self-harm and suicide, which is particularly high in the immediate weeks following release.<sup>226</sup>

Despite this, there is a significant lack of culturally safe support for Aboriginal people exiting custody in Victoria. Existing supports/programs include:

- [Baggarrook Women's Transitional Housing program](#): Baggarrook combines transitional housing and holistic support for six Aboriginal women to support their transition back to the community. Housing is provided by Aboriginal Housing Victoria and holistic support is provided by VALS and allied organisations, as well as DHHS and Corrections Victoria.
- [Through-care project for Aboriginal children and young people](#): the project was initially implemented by VACCA as a pilot for Aboriginal young people aged 10-17 years who had been detained for more than a week, and focuses on cultural strengthening and cultural mentoring. The program is no longer a pilot as VACCA has received three years of additional funding.

Examples of Aboriginal-led Throughcare programs also exist in other jurisdictions in Australia, including the Throughcare service run by the North Australian Aboriginal Justice Agency's (NAAJA), which begins working with people in prison and youth detention six months prior to their release.<sup>227</sup>

For more information on our key concerns and recommendations relating to transitional support, see:

- Submission to Inquiry on Victoria's Criminal Justice Inquiry (2021) pp. 246-249
- Submission on Victoria's Suicide Prevention and Response Strategy (2022).


## RECOMMENDATIONS

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<sup>226</sup> As noted in *Balit Marrup*, Aboriginal people released from prison are particularly at risk of suicide immediately after release. Department of Health and Human Services (DHHS), [Balit Marrup: Aboriginal social and emotional wellbeing framework 2017-2027](#) (2017), p. 17.

<sup>227</sup> NAAJA, Throughcare, accessed at <http://www.naaia.org.au/law-and-justice/throughcare/>





**Recommendation 73.** The Victorian Government should provide long-term and stable funding to ACCOs to deliver pre-and post-release programs for all Aboriginal people transitioning out of prison and youth justice detention in their communities.

## 4.5 Accountability and Oversight

### 4.5 (a) Police Accountability And Oversight

Racism is deeply entrenched within Victoria Police and impacts the lives of Aboriginal Communities daily. Addressing these deep-seated problems requires an effective system of police oversight, which prevents misconduct from occurring and holds police to account when it does take place. Victoria's police oversight system falls drastically short of achieving these goals.

While the government is currently carrying out a Systemic Review of Police Oversight in Victoria,<sup>228</sup> the scope of this review is limited, meaning that it will not address many of the key failings of the Victorian police oversight system and is unlikely to lead to strong accountability mechanisms to address systemic racism within Victoria Police.

An effective police oversight system has multiple elements, including:

- A police complaints system that provides thorough, culturally appropriate and independent investigation of all complaints, other than customer service matters;
- Independent and culturally appropriate investigation of police contact deaths, both for coronial processes and in determining if a criminal or disciplinary offence has been committed (discuss below);
- Independent monitoring and auditing of the exercise of police powers, supported by transparent record-keeping and reporting by Victoria Police;
- Independent oversight of police places of detention (discussed further below);
- A robust and independent oversight mechanism for implementation of recommendations relating to police (see Recommendations 38-40 above).

VALS and others have been calling for reform of the broken police complaints system for years. When 98% of complaints against police are investigated by police, it is clear why Aboriginal people do not trust the system.<sup>229</sup> The recent audit by the Independent Broad-based Anti-Corruption Commission (IBAC) of complaints made by Aboriginal people showed that over half of the investigations failed to collect or consider relevant evidence, and 84% of files involved conflicts of interests, half of which were not managed appropriately.<sup>230</sup>


In October 2022, VALS and other organisations sent a joint letter to Premier Andrews calling for the introduction of a Police Ombudsman. This is consistent with the Inquiry into Victoria's Criminal Legal System which recommended that the government consider the "establishment of a new independent

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<sup>228</sup> Premier of Victoria, '[Strengthening Police Oversight For A Fairer Victoria](#),' (3 December 2021).

<sup>229</sup> In 2020-2021, 94.3% of complaints against police were investigated by Victoria Police without meaningful involvement from IBAC, or not investigated. See IBAC, [Annual Report 2020/21](#), p. 26.

<sup>230</sup> IBAC, [Victoria Police handling of complaints made by Aboriginal people: Audit Report](#), (2022).



body to investigate allegations of police misconduct and increase the accountability of Victoria Police.”<sup>231</sup>

For more information on our key concerns and recommendations relating to police accountability and oversight, see:

- [Policy Brief: Reforming Police Oversight in Victoria](#) (2022)
- [Policy Paper: Reforming Police Oversight in Victoria](#) (2022)
- [Webinar: Who Polices the Police?](#) (2022);
- Police Accountability Project (PAP) and VALS, [Open Letter to the Premier regarding a Police Ombudsman for Victoria](#) (7 October 2022).

## RECOMMENDATIONS

**Recommendation 74.** All police complaints must be investigated by a new independent police complaints body, that is complainant-centred, transparent, has adequate powers and resources to carry out independent investigations, and responds to the needs of Aboriginal complainants.

**Recommendation 75.** The new independent police complaints body must develop and implement a specific strategy for addressing racism within Victoria Police.

**Recommendation 76.** Victoria Police must be required by legislation to regularly publish data, in compliance with Aboriginal Data Sovereignty and Governance, about the use of police powers that disproportionately impact Aboriginal people.<sup>232</sup>

**Recommendation 77.** The Victorian Government must establish an independent monitoring body with powers to access and analyse data about the use of police powers, and issue public reports.<sup>233</sup>

**Recommendation 78.** The Victorian Government should carry out an independent review of Victoria Police’s disciplinary system. The Review must be open to submissions from the public and stakeholder organisations and the final report and recommendations from the review must be public.<sup>234</sup>

**Recommendation 79.** Requirements relating to use of BWCs by Victoria Police must be enshrined in legislation, including sanctions for non-compliance. Individuals who do not comply must be held accountable.

**Recommendation 80.** Victoria Police must be required to disclose the total amount of money paid over a financial year due to misconduct complaints, including settlement payments and court judgements, in their annual report.

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<sup>231</sup> [Inquiry into Victoria’s Criminal Justice System](#) (2022), Recommendation 28, p. 256.

<sup>232</sup> This includes: stop and search, detention powers under the Mental Health Act, cautions, move-on powers, treatment in police custody including use of force, drug testing, strip searching, any new powers relating to public intoxication. See VALS, Policy Paper: [Reforming Police Oversight in Victoria](#) (2022), Recommendation 59.

<sup>233</sup> For more information, see VALS, Policy Paper: [Reforming Police Oversight in Victoria](#) (2022), Recommendations 55-61.

<sup>234</sup> See VALS, Policy Paper: [Reforming Police Oversight in Victoria](#) (2022), Recommendations 52-54.



#### 4.5 (b) Independent And Culturally Appropriate Investigation Of Aboriginal Deaths In Custody And Police-Contact Deaths

Aboriginal Deaths in Custody and police-contact deaths<sup>235</sup> continue to inflict widespread trauma and pain on Aboriginal Communities every day. To prevent further loss, and to ensure that bereaved Aboriginal families have access to answers, as well as civil and criminal accountability mechanisms, independent investigations are essential.

Under the current coronial system, all Aboriginal Deaths in Custody and police-contact deaths are investigated by police on behalf of the coroner.<sup>236</sup> If the person dies in custody, relevant authorities also carry out their own investigations, including the Justice Assurance and Review Office (JARO).<sup>237</sup>

From our experience providing assistance and representation to Aboriginal families who have lost a loved one in custody or as a result of a police operation, we have the following serious concerns about police investigation of these deaths:

- Lack of independence when police investigate a death in police custody or police-contact death.
- Deficient investigations, including a failure to preserve critical evidence, poor exercise of discretion regarding the investigation and “an alarming lack of rigour.”<sup>238</sup> This can impact the coronial process, but it also means that avenues for civil and criminal liability are significantly reduced.
- Racism, unconscious bias and lack of cultural competence within Victorian Police mean that family members are not always treated with respect and dignity.<sup>239</sup>
- Many Aboriginal people have a well-founded distrust in police (see above), meaning that it is entirely inappropriate for bereaved Aboriginal families to be required to engage with a police investigation, especially if the person has died as a result of police contact.

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<sup>235</sup> A police contact death is any death that occurs in police custody, as well as any death that follows contact with police, including any death that occurs: while a police officer is attempting to take the deceased person into custody; as a result of injuries sustained when the police officer attempted to take the deceased person into custody; where a police officer’s conduct immediately preceding the death requires further investigation by the coroner under the Act. See *Practice Direction 3 of 2021* ([‘Police Contact Deaths’](#)) [2.2].

<sup>236</sup> The Coroners Act is silent on the role of the Coronial Investigator and does not give the Coroner the authority to direct the police investigation. The role of the coronial investigator is detailed in *Practice Direction 7 of 2014* (Coronial briefs) and *Practice Direction 3 of 2021* ([‘Police Contact Deaths’](#)).

<sup>237</sup> JARO is part of DJCS and is tasked with conducting post-death investigations for any death that occurs in a prison or youth justice detention centre. See [“Justice Assurance and Review Officer \(JARO\)”](#) (website accessed 16 November 2022)

<sup>238</sup> [Inquest into the death of Raymond Noel Lindsay Thomas](#), COR 2017 003012, 20 September 2021, [148].

<sup>239</sup> Often, family members are required to give statements in the days immediately following the passing of their loved one, even when there are no clear reasons for the statement to be provided so quickly. Family members have also been required to wait in police stations for hours to give their statements and have received inappropriate direction from police officers on what they should include in their statement.



While previous inquiries have recommended that the investigating coroner be given authority under the *Coroners Act 2008* to direct the police investigation,<sup>240</sup> this is not enough to meet international requirements for an independent investigation.

The incredible work of the Koori Engagement Unit and the adoption of Practice Direction 6 of 2020 (“Indigenous Deaths in Custody”) have significantly improved the experiences of Aboriginal families involved in coronial processes in recent years, and have addressed some of the issues identified above.<sup>241</sup> However, there remains an overwhelming need for independent investigation of Aboriginal deaths in custody and police-contact deaths.

Approaches in other countries provide multiple models for independent coronial investigations, including a specialised investigation team at the Coroners Court,<sup>242</sup> or at an independent police complaints body.<sup>243</sup> Additionally, the Jumbunna Institute has proposed an independent Aboriginal-led body, that would carry out the investigations on behalf of the coroner.<sup>244</sup>

We strongly encourage Yoorrook to access any reporting on the experience of bereaved Aboriginal families involved in the coronial process from the Attorney-General.

For more information on our key concerns and recommendations relating to independent investigation of Aboriginal deaths in custody and police-contact deaths, as well as in relation to the experiences of Aboriginal families involved in coronial process, see:

- [\*Policy Paper: Reforming Police Oversight in Victoria\*](#) (2022)
- [\*Submission on the Victorian Suicide Prevention and Response Framework\*](#) (2022)
- [\*Submissions on behalf of Uncle Percy Lovett\*](#) (17 June 2022).

## RECOMMENDATIONS

**Recommendation 81.** Coronial investigations into Aboriginal Deaths in Custody must be carried out by a specialist civilian investigation team that is independent from police and developed by

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<sup>240</sup> RCIADIC, National Volume 5, [\*Recommendations\*](#), Recommendation 29; Parliament of Victoria, [\*Inquiry into the Review of the Coroners Act 1985\*](#) (2006), Recommendation 42; See [\*Finding into Death with Inquest: Inquest into the Death of Tanya Louise Day\*](#), 9 April 2020, COR 2017 6424, Recommendation 2, p. 107. In 2011, the OPI recommended: “That the Victorian Government consults with key stakeholders regarding an optimal legislative framework for the investigation and oversight of deaths associated with police contact in Victoria.” See Office of Police Integrity (2011), [\*Review of the investigative process following a death associated with police contact\*](#), Recommendation 3, p. 16.


<sup>241</sup> For example, Practice Direction 6 of 2020 provides that the investigating coroner will ensure that the coroner’s investigator is contacted at the earliest possible opportunity to determine appropriate arrangements for “obtaining statements (such as to facilitate witness interviews being held in a location other than a police station, or for the presence of support persons at interviews of family members where requested).” See [\*Practice Direction 6 of 2020\*](#), para 3.4.

<sup>242</sup> In British Columbia, Canada, the Independent Investigations Office (IIO) conducts investigations into all police-related incidents resulting in death or serious harm to determine whether any offences have been committed. See IIO, [\*‘What We Do’\*](#), (web page accessed 30 March 2022). The Special Investigations Unit (SIU) at the BC Coroners Service, which includes a Special Investigations Coroner, provides specialised knowledge and expertise for police-involved deaths. See BC Coroners Service, [\*‘Special Investigations Unit’\*](#), (web page accessed 30 March 2022).

<sup>243</sup> The Police Ombudsman of Northern Ireland (PONI) investigates all deaths where police appear to be involved or implicated, for the purposes of determining whether any criminal or disciplinary offences have occurred, as well as to prepare a brief for the coronial proceeding and make recommendations to this inquiry. See FLC (2011), [\*Effective, Transparent, Accountable: An independent system to investigate police-related deaths in Victoria\*](#), p. 8.

<sup>244</sup> Jumbunna Institute of Education and Research, [\*Submission to the Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody\*](#), 7 September 2020, para 144.





Aboriginal Communities. This team must have the same coercive powers as the police for conducting these investigations.

**Recommendation 82.** Aboriginal families whose loved ones have died in custody or as a result of police contact, must be provided with:

- (a) Culturally safe counselling and support, including for family members in custody; and
- (b) Financial support to cover the costs associated with participating in coronial investigations and inquests.

**Recommendations 83.** The Victorian Government and the Coroners Court should increase funding to the Koori Engagement Unit at the Court (KEU) and ensure that the Unit has visibility over the coronial investigation and access to all information that is relevant to Aboriginal families in a timely manner.

**Recommendation 84.** In consultation with the KEU, the Coroners Court should continue to improve coronial processes so that they are culturally appropriate for Aboriginal families, including by:

- (a) Ensuring culturally safe notification to family members of the death of their loved one;
- (b) Providing adequate and appropriate spaces for bereaved families and their supporters during the inquest;
- (c) Requiring coroners to notify families of timelines throughout the coronial process, so that they know how long they will have to wait;
- (d) Require coroners to provide medical reports to families within one month of receiving them;
- (e) Requiring the coronial investigator to provide written reasons to the family and interested parties if the deadline for preparing the coronial brief is not met;
- (f) Examining new approaches to enhance the cultural competency of the court, for example: private sessions; yarning circles; restorative justice conferencing; the use of community panels consisting of Aboriginal Elders to assist the investigating coroner; family conferencing for matters that will not proceed to inquest; monthly call-over list for all matters being dealt with by the court when an Aboriginal person has passed away.

**Recommendation 85.** The *Coroners Court Act 2008* should be amended to include a legislative obligation on all interested parties to:

- (a) Make full disclosure of relevant documents, materials and facts; and
- (b) Set out their position on relevant matters at the outset of the investigation/inquest.

**Recommendation 86.** The OPP must be required by legislation to provide reasons if it decides not to prosecute in relation to a death in custody or serious injury, or police contact death or serious injury.

#### 4.5 (c) Prison Oversight And Accountability



In addition to the extent of abuse in the prison system – including excessive use of force, solitary confinement, inappropriate strip searching, challenges with the disciplinary system and a limited understanding of human rights<sup>245</sup> – there is a significant gap in prison oversight and accountability.<sup>246</sup>

While individuals who are incarcerated can submit a complaint to the Victorian Ombudsman, the outcomes of the complaint may be limited by the lack of enforcement mechanism for the Ombudsman's recommendations, as well as the lack of government funding for a standalone legal service for people who are incarcerated. More robust safeguards against systemic abuses are urgently needed, including an independent complaints system, which is culturally appropriate and can be accessed by people who are incarcerated without fear of reprisals.

The closed nature of prisons, combined with longer periods of detention (versus police detention) mean that transparency and robust oversight is even more critical. This includes independent detention oversight (discussed further below). The power imbalance between people who are incarcerated and prison staff means that there is a high risk of reprisals, and many reasons why people may have concerned about making a complaint.

### RECOMMENDATIONS

**Recommendation 87.** Prison complaints, including complaints against private prisons and contractors, should be handled by an appropriately resourced independent oversight body with sufficient powers to refer matters for criminal investigation. The body must be accessible to people in prison and that complainants have adequate protection against reprisals.

**Recommendation 88.** Requirements relating to use of BWCs by prison staff must be enshrined in legislation, including sanctions for non-compliance. Individuals who do not comply must be held accountable.

### 4.5 (d) Independent Detention Oversight

In 2021 and 2022, there have been record numbers of Aboriginal Deaths in Custody in Victoria and countless other abuses as detailed above. Independent and culturally appropriate oversight of prisons, youth justice detention centres, police cells and vehicles is a critical way to improve conditions in these facilities and prevent Aboriginal deaths in custody.


Victoria has made limited progress to establish independent detention oversight in accordance with the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)* and is on track to miss the January 2023 deadline for OPCAT implementation. While the Victorian Government continues to delay, there is a significant risk that more Aboriginal people will die in custody.

The Victorian Government has argued that it needs funding from the federal government to meet its commitment to prevent torture. Yet at the same time, the government has spent billions of dollars on

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<sup>245</sup> Victorian Ombudsman, [\*Investigation into good practice when conducting prison disciplinary hearings\*](#) (2021).

<sup>246</sup> IBAC, [\*Special report on corrections: IBAC Operations Rous, Caparra, Nisidia and Molaru Turon\*](#), (2021).



prison and police in recent years. A small fraction of that spending could be used to establish independent detention oversight that meets Victoria's obligations under OPCAT.

Victoria must establish independent culturally appropriate detention oversight. Victoria cannot continue to fail its responsibility to prevent torture because the federal process is not working.

In October 2022, the United Nations Subcommittee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (**SPT**) visited Australia. The SPT visited several places of detention in Victoria, but suspended its visit part-way through following repeated obstructions and refusal to provide all relevant information and documentation in several jurisdictions.<sup>247</sup> Since 2007, the SPT has carried out 81 visits across the world and has only suspended its visit on four occasions,<sup>248</sup> including most recently in Australia. It is critical that the SPT visit is resumed and that any reports relating to the visit are made public.

For more information on our key concerns and recommendations relating to independent detention oversight, see:

- [Submission to the Inquiry into Victoria's Criminal Justice System](#) (2021) (pp. 223-225);
- [Community Factsheet: The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment](#) (OPCAT) (2022);
- [Submission to the UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment](#) (2022);
- [Shadow Report to the United Nations Committee Against Torture](#) (2022);
- VALS, AEC, AJC, KYC, Djirra, VACCA, VAHS and VACCHO, [Joint Letter to the Attorney-General regarding OPCAT and the recent SPT visit](#) (31 October 2022).

## RECOMMENDATIONS

**Recommendation 89.** The Victorian Government must urgently commence robust, transparent and inclusive consultations with the Victorian Aboriginal community on the implementation of OPCAT in a culturally appropriate way.

**Recommendation 90.** The Victoria Government should work with other Australian governments to ensure that:

- (a) The visit of the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) is resumed;
- (b) Any reports relating to the SPT visit are made public.
- (c) Any future visits by United Nations bodies and mechanisms are adequately supported and all reports are made public.

**Recommendation 91.** The future mechanism for independent detention oversight in Victoria must:

- (a) Be established by legislation;

<sup>247</sup> United Nations Subcommittee on Prevention of Torture (SPT), "[UN torture prevention body suspends visit to Australia citing lack of co-operation](#)," (23 October 2022).

<sup>248</sup> SPT, [SPT Visits](#) (website); The Law Report, [Interview with Judge Aisha Shuijune Muhammad, Head of the SPT Team leading the visit in Australia](#) (25 October 2022).



- (b) Have jurisdiction over all places where individuals are or may be deprived of their liberty, regardless of the length of time of detention (this includes police vehicles, police cells and PSO “pods” at train stations);
- (c) Have sufficient resources to carry out its mandate in a culturally appropriate way.





## 5. Annexes

### 5.1 Annex A: VALS relevant policy and research work

#### Submissions

- [A Plan for Aboriginal Justice in Victoria](#) (2022)
- [Submission to the Senate Inquiry on the Implementation of United Nations Declaration of the Rights of Indigenous Peoples \(UNDRIP\) in Australia](#) (2022)
- [Submission on Victoria's Anti-Racism Strategy](#) (2021)
- [Submission to Commission for Children and Young People Inquiry: Our Youth, Our Way](#) (2019)
- [Submission to Sentencing Act Reform Project](#) (2020)
- [Submission to the Council of Attorney Generals \(COAG\) Age of Responsibility Working Group](#) (2020)
- [Submission to the Inquiry into Victoria's Criminal Justice System](#) (2021)
- [Opening Comments to the Inquiry into Victoria's Criminal Justice System](#) (2021)
- [Submission on the Victorian Suicide Prevention and Response Framework](#) (2022)
- [Submission to the Commission for Children and Young People Inquiry: Our Youth, Our Way](#) (2020)
- [Submission to the Consultation on RACGP Standards for Health Services in Australian Prisons \(2<sup>nd</sup> Edition\)](#) (2022)
- [Submission to the UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment](#) (August 2022)
- [Shadow Report to the United Nations Committee Against Torture](#) (2022)
- [Submissions on behalf of Uncle Percy Lovett](#) (2022)
- [Submission to the Inquiry into Children with Imprisoned Parents](#) (2022)
- [Submission to the Cultural Review of the Adult Custodial Corrections System](#) (2021)
- [Submission to the Royal Commission into Victoria's Mental Health System](#) (2019)
- [Supplementary Submission to the to the Royal Commission into Victoria's Mental Health System](#) (2020)

#### Joint Submissions and Letters

- HRLC, VALS, FlatOut and St Kilda Legal Service, [Ending human rights abuses in Victorian prisons: Submission to the Cultural Review of the Adult Custodial Corrections System](#) (2021)
- Smart Justice for Young People, [Submission to the United Nations Subcommittee on the Prevention of Torture](#) (2022)
- Police Accountability Project (PAP) and VALS, [Open Letter to the Premier regarding a Police Ombudsman for Victoria](#) (7 October 2022)
- [Open letter](#) to the Government regarding bail reform (May 2021)
- [Joint Letter to the Attorney-General regarding OPCAT and the recent SPT visit](#) (31 October 2022)
- [Letter to the Anti-Racism Taskforce](#) (2 June 2022)
- [Letter to the National Race Discrimination Commissioner on the National Anti-Racism Framework](#) (February 2022)



## Policy Papers

- Policy Paper, [Aboriginal Community Justice Reports Addressing Over-Incarceration](#) (2017)
- Policy Brief, [Reforming Police Oversight in Victoria](#) (2022)
- Policy Paper, [Reforming Police Oversight in Victoria](#) (2022)
- Policy Brief, [Fixing Victoria's Broken Bail Laws](#) (2022)
- Policy Brief, [Raising the Age of Criminal Responsibility](#) (2022)
- Policy Paper, [Addressing Coercive Control without Criminalisation: Avoiding blunt tools that fail Victim-survivors](#) (2021)
- Policy Paper, [Harm Reduction Not Harm Maximisation: An Alternative Approach to Drug Possession](#) (2022)

## Webinars and Podcasts

- Podcast, [Justice Yarns podcast series to commemorate the 30<sup>th</sup> anniversary of the RCIADIC Final Report](#) (2021)
- Webinar, [The Harms of Solitary Confinement](#) (2021)
- Webinar, [Aboriginal Community Justice Reports Project: Improving Sentencing outcomes and reducing overincarceration of Aboriginal people](#) (2021)
- Webinar, [Invasion Day](#) (2022)
- Webinar, [Addressing Coercive Control Without Criminalisation](#) (2022)
- Webinar, [Who Polices the Police?](#) (2022)
- Webinar, [Raising the Age](#) (2022) (jointly with Amnesty International)
- Webinar, [Fixing Victoria's Broken Bail Laws](#) (2022)
- [My Dreaming, My Future - a chat on National Aboriginal and Torres Strait Islander Children's Day](#) (2022)

## Community Factsheets

- Community Factsheet, [The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment](#) (OPCAT) (2022)
- Community Factsheet, [Decriminalising Public Intoxication](#) (2022)
- Community Factsheet, [Aboriginal Self-determination](#) (2022)
- Community Factsheet, [Systemic Racism](#) (2022)
- Community Factsheet, [Ending Aboriginal Deaths in Custody](#) (2022)
- Community Factsheet, [VALS Intervention in the Court of Appeal Strip Searching and Urine Testing Case](#) (2021)

## Petitions

- [Petition: Fix Victoria's Broken Bail Laws](#) (2,599 signatures as at November 2022)
- [Expert Petition calling for Urgent Reform of Victoria's Bail Laws](#) (2021)

## 5.2 Annex B: witnesses that Yoorrook should invite/compel to give evidence

	Witnesses
Ministers	Premier
	Current and former Attorney Generals <sup>249</sup>
	Minister for Police
	Current and former Ministers for Corrections <sup>250</sup>
	Minister for Youth Justice
	Current and former Ministers for Aboriginal Affairs <sup>251</sup>
	Minister for Health
	Minister for Mental Health
Victoria Police	Current and former Chief Commissioners of Police
	Current and former Deputy Commissioners of Police
	Head of Professional Standards Command (PSC)
	Officer in Charge – Mildura and Geelong Police stations
TPAV	Current and former Secretaries
IBAC	Deputy Commissioner (responsible for police complaints)
Corrections Victoria	Current and former Commissioners of Corrections
	Director, Offender Services and Reintegration
	General Manager, Dame Phyllis Frost Centre (DPFC)
	General Manager, Melbourne Assessment Prison (MAP)
	General Manager, Corella Place (Hopkins Correctional Centre)
GEO Group Australia Pty Ltd (GEO) <sup>252</sup>	CEO
Correct Care Australasia (CCA) <sup>253</sup>	CEO
	Chief Medical Officer
G4S Correctional Services (Australia) <sup>254</sup>	CEO
	General Manager, Port Phillip prison
	CEO

<sup>249</sup> The Commission should invite/compel former Attorney-Generals, Jill Hennessey MP, Rob Hulls MP and others, to provide insight about Aboriginal Justice since the RCIADIC.

<sup>250</sup> The Commission should invite/compel former Minister Mikakos to explain the decision making around detention of children in Barwon prison.

<sup>251</sup> The Commission should invite/compel former Ministers for Aboriginal Affairs, including Gavin Jennings MP.

<sup>252</sup> GEO is a private company that operates Ravenhall Correctional Centre and Fulham Correctional Centre.

<sup>253</sup> CCA is a subcontractor of GEO Group Australia, which provides primary health services at all public prisons and the Judy Lazarus Transition Centre.

<sup>254</sup> G4S is a private company that operates Port Phillip Prison.

St Vincent's Correctional Health Services <sup>255</sup>	Chief Medical Officer
Forensicare <sup>256</sup>	CEO
	Chief Medical Officer
	Executive Director Prison Services
	Manager, Thomas Embling Hospital
DJCS	Secretary
	Deputy Secretary, Aboriginal Justice
	Deputy Secretary, Youth Justice
	Executive Director, Koori Justice Unit
	General Manager, Parkville Youth Detention Centre
	General Manager, Malmsbury Youth Detention Centre
	Manager, Justice Assurance and Review Office (JARO)
	Manager, Crime Statistics Agency
Adult Parole Board	Chairperson
Youth Parole Board	Chairperson
Judiciary	Chief Judge and Deputy Chief Judge of the Supreme Court
	Chief Judge and Deputy Chief Judge of the County Court
	Chief Magistrate and Deputy Chief Magistrate, Magistrates Court of Victoria
	Magistrates/Judges overseeing Koori Courts
	President, Children's Court of Victoria
	State Coroner
Court Services Victoria (CSV)	CEO
Office of the Victorian Ombudsman	Victorian Ombudsman
CCYP	Commissioner for Children and Young People
	Commissioner for Aboriginal Children and Young People

<sup>255</sup> St Vincent's Correctional Health Services provides: primary health services, outpatient mental health services and secondary residential mental health services (through St Paul's Psycho-Social Unit) at Port Phillip Prison. St Thomas's Unit provides outpatient consultation. St Vincent's Correctional Health Services also provides statewide secondary inpatient health services delivered through St John's at Port Phillip Prison and secondary and tertiary inpatient services from St Vincent's Hospital.

<sup>256</sup> Forensicare provides secondary mental health services at all public prisons, including the management and provision of services within the Acute Assessment Unit at the Melbourne Assessment Prison and the Marmak Unit at the Dame Phyllis Frost Centre; as well as mental health services for involuntary patients at Thomas Embling Hospital, including patients transferred from prison.





### 5.3 Annex C: information, documents and data that Yoorrook should subpoena

Agency/Authority	Documents/information	Data (disaggregated by age, sex, Aboriginality and LGA)
<b>Officer of the Premier</b>	Email, phone and calendar records indicating frequency of meetings between the Premier and Chiefs of staff, and Victoria Police and TPAV over the last 5 years	
<b>Officer of the Attorney-General</b>	Email, phone and calendar records indicating frequency of meetings between the Attorney-General and Chiefs of staff with Victoria Police and TPAV over the last 5 years	
<b>Officer of the Minister for Police</b>	Email, phone and calendar records indicating frequency of meetings between the Minister for Police and Chiefs of staff with Victoria Police and TPAV over the last 5 years	
<b>DPC</b>	Cabinet documents relating to the 2017 and 2018 bail reforms, including minutes from cabinet and cabinet subcommittee meetings where the reforms were discussed.	
	Cabinet documents relating to prison expansion over the past 10 years, including minutes from cabinet and cabinet subcommittee meetings where the reforms were discussed.	
<b>DJCS</b>	Advice prepared by DJCS (and consultants) for the Attorney-General, the Premier and the Victorian Government relating to the Bail Act, including remand rates, impact of the 2017/18 reforms and opportunities for reform	Remand rates (since 2017) disaggregated by Indigenous status, gender, age and charge type
	JARO Review of Aboriginal deaths in custody since 2014 (as requested by the Aboriginal Justice Forum at AJF 58 in March 2021)	Remand data (since 2017) by remand authority (that is, the police, bail justice or courts) (disaggregated by Indigenous status, gender, age and charge type)



	Comprehensive list of all Aboriginal deaths in custody in Victoria since the RCIADIC	Bail applications head by bail justices and outcomes
	All reports and advice relating to the experiences of bereaved Aboriginal families involved in coronial processes	Centre wide lockdowns (number, frequency, duration, reasons for, number of people affected)
	Youth Justice regular reports to the Aboriginal Justice Forum	Instances of individual isolation (number, frequency, duration, reasons for)
	All advice/briefings from DJCS to the Attorney-General and Premier on implementing OPCAT in Victoria	Children and young people in youth justice detention centres who identify as having a disability (disaggregated by disability and Indigenous status)
	All advice/briefings from DJCS to the Attorney-General, the Premier and the Minister for Corrections relating to prison health care and opportunities for reform	Children and young people on community-based youth justice orders who identify as having a disability (disaggregated by disability and Indigenous status)
	Complaints policy and process for complaints submitted by incarcerated peoples, their families or legal representatives	Children and young people in youth justice detention centres who identify as having a mental illness or mental health issue
	Any advice/reports relating to implementation of RCIADIC recommendations in Victoria	Children and young people on community-based youth justice orders who identify as having a mental illness or mental health issue
	Justice Health policies relating to provision of healthcare in prisons, including cultural safety	Number of strip searches and number of people subjected to strip searching (disaggregated by prison)
	Advice for the Attorney-General, Minister for Police and the Premier on the role and any new powers for Victoria Police in relation to public intoxication	Number of primary carers remanded since 2017 (disaggregated by age, gender and Indigenous status)
	Any advice briefings for the Attorney-General, Minister for Police and Premier relating to the Systemic Review of Police Oversight, including opportunities for reform	



Victoria Police	Report on the status of implementation of RCIADIC recommendations directed at Victoria Police	Youth cautions
	Curriculum for police training on cultural awareness, systemic racism, unconscious bias and s. 3A Bail Act	Adult Cautions
	Information about Victoria Police's past and current use of predictive policing tools and approaches across Victoria	Data from the Aboriginal Youth Cautioning Pilot (AYCP)
	Standard Operating Procedures for all police stations in Victoria	Arrests (disaggregated for warrant/non-warrant)
	Documents outlining the role of Victoria Police in the ongoing trials for the public intoxication reforms	Use of force (disaggregated into type of force used)
	Frequency of meetings between Commissioners and the Premier, Attorney-General, Minister for Police and their respective Chiefs of staff for the last 5 years	Stop and search (disaggregated into consensual and non-consensual, pat down, strip search etc)
		Vehicle stops
		Driver drug testing data during vehicle stops and planned breath testing sites
		Pedestrian stops
		Move on orders
		Bail applications heard by police and outcomes
		Charges for bail offences (disaggregated by type of offence)
		Charges for breach of bail conditions (relating to non-attendance at court)
		Comprehensive data relating to use of predictive policing tools
		Police officer training in cultural awareness, systemic racism and s. 3A of the Bail Act
		Number of police conduct complaints received by Victoria Police directly (disaggregated by how many are investigated or dismissed prior to investigation and how many are substantiated).



		<p>Police complaints where footage from Body-Worn Cameras was not available because the camera was not activated.</p> <p>Data on the total amount that Victoria Police has over a financial year (for the past 10 years) due to misconduct complaints, including settlement payments and court judgement</p> <p>Number of FOI requests processed by Victoria Police, including average time for completing request.</p> <p>Disciplinary proceedings against police officers, and outcomes</p>
<b>TPAV</b>	Email, phone and calendar records indicating frequency of meetings between the TPAV Secretary and the Premier, Attorney-General, Minister for Police and their respective Chiefs of staff for the last 5 years	Total amount spent on legal defence for members each financial year (for the past 10 years)
<b>IBAC</b>		Complaints submitted by Aboriginal complainants: total number, how many are referred to Victoria Police, how many are investigated by IBAC, how many are substantiated, how many are dismissed.
<b>Corrections Victoria</b>	Report on status of implementation of RCIADIC recommendations directed at Corrections Victoria	The Living with Mum program (including applications and outcomes)





	Information on prison labour including: List of corporations that purchase goods from the Prison Industry (DJCS); list of prisons that engage in prison labour (for goods or services, including prison maintenance); list of tasks/activities incarcerated people undertake that benefit the prison industry, including prison maintenance tasks; list of tasks/activities incarcerated people undertake that benefit external corporations, such as manufacturing tasks associated with creating goods sold to Prison Industry clients; date that each corporation commenced purchasing goods created by prison labour activities; annual cost of labour including overall cost to the prison/DJCS; hourly cost per individual; daily cost per individual (broken down by contribution from the prison and corporation towards wages and operational cost); list of labour related injuries endured by incarcerated people whilst undertaking prison labour work; information relating to the distribution and use of profits received by DJCS/Prison Industries from selling prison labour products; DJCS policies regarding to the reinvestment of profits into prison programs; training and employment pathways for incarcerated people following release from prison; employment law protections for incarcerated people engaged with the Prison Industry.	Incarcerated parents (number, visitation by children)
		People who are incarcerated and identify as having a disability (disaggregated by disability)
		People on community-based orders who identify as having a disability (disaggregated by disability)
		People who are incarcerated and identify as having a mental illness or mental health issue
		People on community-based orders who identify as having a mental illness or mental health issue
		Instances of separation and solitary confinement
		Number of strip searches and number of people subjected to strip searching (disaggregated by prison)
		Number of urine tests and number of people subjected to urine tests (disaggregated by prison)



		Complaints against prison staff where footage from Body-Worn Cameras was not available because the camera was not activated.
	Complaints policy and process for complaints submitted to prisons and Youth Justice Centres by incarcerated peoples, their families or legal representatives	Lock downs and isolation (number, frequency, duration, reasons for, number of people affected)
		Use of restraint (disaggregated by type of restraint)
		Use of force (disaggregated by type of force)
		Disciplinary hearings and outcomes
		Complaints submitted to Victorian prison or Corrections Victoria (disaggregated by type of complaint and prison)
		Disciplinary proceedings for staff and outcomes
		Prison labour (Number and names of corporations that purchase goods created by incarcerated people through Prison Industry labour programs; total number of incarcerated people engaged in prison labour tasks disaggregated by sex, prison and Aboriginality; total annual hours of labour across all Vic prisons; total annual value of labour across all Vic prisons (total output and DJCS/Prison Industry profit))
<b>GEO Group Australia Pty Ltd (GEO)<sup>257</sup></b>	Report on the status of implementation of coronial recommendations directed at GEO	Complaints submitted to GEO regarding custodial conditions (disaggregated by complaint), including access to healthcare
		Complaints submitted to GEO regarding employee behaviour or conduct (disaggregated by complaint)
	Complaints policy and process for complaints submitted by incarcerated peoples, their families or legal representatives	Complaints submitted to prisons operated by GEO, including Ravenhall Correctional Centre and Fulham Correctional Centre,

<sup>257</sup> GEO is a private company that operates Ravenhall Correctional Centre and Fulham Correctional Centre.



		relating to employee behaviour or conduct, and custodial conditions
<b>G4S Correctional Services (Australia)</b> <sup>258</sup>	Report on the status of implementation of coronial recommendations directed at G4S	Complaints submitted to G4S regarding custodial conditions (disaggregated by complaint), including access to healthcare
	Complaints policy and process for complaints submitted by incarcerated peoples, their families or legal representatives	Complaints submitted to G4S regarding employee behaviour or conduct (disaggregated by complaint)
		Complaints submitted to prisons operated by GEO, including Ravenhall Correctional Centre and Fulham Correctional Centre, relating to employee behaviour or conduct, and custodial conditions
<b>Correct Care Australasia (CCA)</b> <sup>259</sup>	Internal disciplinary policies and procedures	Complaints submitted to CCA regarding healthcare provided (or not provided) to a person whilst they were in custody
	Complaints policy and process for complaints submitted by incarcerated peoples, their families or legal representatives	Intended and actual waiting periods for medical treatment (disaggregated by medical condition or concern)
	Policy and procedure for assessing new arrivals for health concerns and conditions	Practitioner to prisoner ratio for generalist and mental health services
	Cultural Awareness policies and training	Data regarding how many incarcerated people are receiving alternate drug treatments
	Board reports relating to Aboriginal deaths in custody where CCA provides healthcare	
	Internal disciplinary policies and procedures	Complaints submitted to CCA regarding healthcare provided (or not provided) to a person whilst they were in custody
	Complaints policy and process for complaints submitted by incarcerated peoples, their families or legal representatives	Intended and actual waiting periods for medical treatment disaggregated by Indigenous status, age and medical condition or concern

<sup>258</sup> G4S is a private company that operates Port Phillip Prison.

<sup>259</sup> CCA is a subcontractor of GEO Group Australia, which provides primary health services at all public prisons and the Judy Lazarus Transition Centre.



<b>St Vincent's Correctional Health Services<sup>260</sup></b>	Policy and procedure for assessing new arrivals for health concerns and conditions	Practitioner to prisoner ratio for generalist and mental health services
	Cultural Awareness policies and training	Data regarding how many incarcerated people are receiving alternate drug treatments
<b>Victorian Ombudsman</b>		Complaints relating to treatment in prisons (disaggregated by prison, Aboriginality, type of complaint, including use of force and access to healthcare)
<b>Court Services Victoria (CSV)</b>	Resources/curriculum for judicial training on cultural awareness, systemic racism, unconscious bias and s. 3A Bail Act	Data (disaggregated by region and jurisdiction) on how many judicial decisions makers have completed initial and refresher training on cultural awareness, systemic racism, unconscious bias, and Section 3A Bail Act
	Resources/curriculum for court staff training on cultural awareness, systemic racism and unconscious bias	Diversion under the Children, Youth, Families Act (CYFA) (granted, refused, prosecutors veto)
	Policies and procedures for matters with unrepresented Aboriginal people (regarding adjournments and accessibility processes)	Diversion under <i>Criminal Procedure Act</i> 2009
		Bail applications heard by Children's Court and outcomes <sup>261</sup>
		Bail applications heard by Magistrates Court and outcomes <sup>262</sup>
		Bail applications heard by County and Supreme courts and outcomes <sup>263</sup>

<sup>260</sup> St Vincent's Correctional Health Services provide: primary health services, outpatient mental health services and secondary residential mental health services (through St Paul's Psycho-Social Unit) at Port Phillip Prison. St Thomas's Unit provides outpatient consultation. St Vincent's Correctional Health Services also provides statewide secondary inpatient health services delivered through St John's at Port Phillip Prison and secondary and tertiary inpatient services from St Vincent's Hospital.

<sup>261</sup> Depending on how the data is collected, Yoorrook should request data either from the court or Court Services Victoria (CSV).

<sup>262</sup> Depending on how the data is collected, Yoorrook should request data either from the court or Court Services Victoria (CSV).

<sup>263</sup> Depending on how the data is collected, Yoorrook should request data either from the court or Court Services Victoria (CSV).





<b>Judicial College of Victoria</b>	Resources/curriculum for judicial training on cultural awareness, systemic racism, unconscious bias and s. 3A Bail Act	
<b>Youth Parole Board</b>	Policies and processes for consideration of cultural factors (strengths and obligations) in considering parole for Aboriginal children and young people	Applications for parole (including outcome)
		Cancellation of parole (including reasons)
<b>Adult Parole Board</b>	Policies and processes for consideration of cultural factors (strengths and obligations) in considering parole for Aboriginal adults	Applications for parole (including outcome)
		Cancellation of parole (including reasons)