



## Victorian Aboriginal Legal Service Submission on the Disability Inclusion Bill Exposure Draft

October 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
- Baggarook 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 Torres Strait Islander people in Victoria and pay respect to the knowledge, cultures and continued history of all Aboriginal and Torres Strait Islander Nations.

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

- Isabel Robinson, Senior Policy Officer
- Morgan O’Sullivan, Policy Officer
- Patrick Cook, Head of Policy, Communications and Strategy
- Anna Potter, Senior Lawyer, Civil and Human Rights Practice
- Siobhan Doyle, Acting Principal Managing Lawyer, Civil and Human Rights Practice

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

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



## SUMMARY OF RECOMMENDATIONS

**Recommendation 1.** Amend Section 8(l) and any other reference to the right to self-determination, so that it refers to the collective right of “Aboriginal peoples in Victoria to self-determination.”

**Recommendation 2.** Amend the Bill to include a Statement of Recognition, which is co-designed with Aboriginal communities and people across Victoria, including Aboriginal people with disabilities.

**Recommendation 3.** Amend Section 7 to include an additional objective of the Act as follows: “to ensure that Aboriginal people with disabilities are able to access culturally safe programs and services that are free of racism, and support and strengthen connection to culture, family, community and Country.”

**Recommendation 4.** Amend Section 7(h) of the Bill, to include the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*.

**Recommendation 5.** Amend Section 9 (Disability Impact Assessments), Section 11 (State Disability Plan) and Section 15 (Disability Action Plans) to include substantive provisions that:

- Explicitly recognise the importance of connection to culture, family, community and Country for Aboriginal people with a disability;
- Explicitly recognise the importance of culturally safe programs and services that are free of racism; and
- Ensure that the rights to self-determination and cultural safety are prioritised.

**Recommendation 6.** Guidelines on compliance with the inclusion principles and objectives of the Act – including on the right to self-determination and cultural safety – must be developed with Aboriginal communities.

**Recommendation 7.** Guidelines on data collection must include guidance on Indigenous Data Sovereignty (IDS) and Indigenous Data Governance (IDG) and must be co-designed with Aboriginal organisations and communities.

**Recommendation 8.** Amend sections 7(3) so that one of the objectives of the bill is “to recognise and remove barriers to disability inclusion that may be compounded by intersectionality”

**Recommendation 9.** Amend section 8(j) so that one of the inclusion principles of the bill is “to recognise and remove barriers to disability inclusion that may be compounded by intersectionality.”

**Recommendation 10.** Amend section 7(h) to include the *Victorian Charter of Human Rights and Responsibilities* and the *Optional Protocol on the Prevention of Torture, Cruel, Inhuman and Degrading Treatment or Punishment (OPCAT)*.

**Recommendation 11.** The duty on defined entities to promote disability inclusion must extend to policies, programs and services, that are developed and delivered by private sector organisations on behalf of public service bodies and public entities.



**Recommendation 12.** The definition of defined entities should be expanded to include private sector organisations, including private prisons and private health contractors that deliver health services in public and private prisons.

**Recommendation 13.** Amend Section 9 (Duty to promote disability inclusion) and Section 11 (Disability Impact Assessments) so that they apply to:

- All policies, programs and services developed and implemented by defined entities, including for example, programs and services provided to people in custody.
- All policies, programs and services developed and implemented by private sector organisations on behalf of public service bodies and public entities (including private contractors providing health services in prisons).

**Recommendation 14.** Accompany the positive duty in the Bill by an enforcement framework, with enforcement powers conferred on the Disability Inclusion Commissioner and meaningful sanctions for non-compliance.

**Recommendation 15.** Provide VEOHRC powers to enforce section 15 of the Equal Opportunity Act, including powers to inquire into compliance, issue compliance notices, enter into undertakings and seek enforcement of compliance notices and undertakings at the Victorian Civil and Administrative Tribunal.

**Recommendation 16.** VEOHRC and the Disability Inclusion Commissioner should work closely to promote compliance with the positive duty not to discriminate on the grounds of disability, including by sharing information about trends and issues of concern.



## DETAILED SUBMISSIONS

### Introduction

VALS welcomes the opportunity to provide feedback on the exposure draft of the new *Disability Inclusion Bill 2022* (“**the Bill**”). We strongly support the creation of a new principal Act and measures to enhance disability inclusion in Victoria, including through a positive duty on public sector departments, entities and agencies, to promote disability inclusion.

VALS provides legal and community justice support and assistance to many clients with one or more disabilities.<sup>5</sup> Between January and June 2022, 51% of new matters across all of our practice areas, involved a client with a disability.<sup>6</sup> Of these, 13% involved clients who identified as having more than one disability.<sup>7</sup>

More often than not, our client’s experiences with public entities – including Corrections Victoria, Victoria Police, Child Protection and Court Services Victoria – is far from inclusive. In particular, the criminal legal system, and the entities that are part of this system, regularly criminalise individuals with a disability, leading to exclusion – and a heightened risk of violence, abuse, neglect and exploitation<sup>8</sup> – rather than inclusion. This trend of criminalisation is clear when 29% of the national prison population identify as having a chronic condition or disability.<sup>9</sup>

Criminalisation of Aboriginal people with a disability is even more pronounced, due to intersectional forms of criminalisation on the basis of both disability and Aboriginality. Although data is limited, information that is available 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.<sup>10</sup> Yet despite the over-representation of Aboriginal people with a disability in the criminal and youth justice systems, there is a significant lack of culturally safe and inclusive support and services.

While we strongly support the commitment in the bill (and Victoria’s State Disability Plan<sup>11</sup>) to Aboriginal self-determination and intersectional approaches, there is a clear need to go beyond intentions and enact concrete change. Too often, we see high-level ideas without enforcement and

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<sup>5</sup> Section 3 of the bill defines disability as “Any impairment (including physical, mental, intellectual, cognitive, learning, communication or sensory impairment) or functional limitation (whether or not the impairment or limitation is permanent, temporary, episodic in nature or evident) that, in interaction with a barrier, hinders a person’s full and equal participation in society.”

<sup>6</sup> Between January and June 2022, VALS opened 1,567 new matters. 800 of these matters involved clients who identified as having one or more disabilities.

<sup>7</sup> We anticipate that this data does not reflect the extent and scope of disabilities experienced by our clients, as they may be varying reasons for a client choosing not to identify a disability.

<sup>8</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, Issues Paper

<sup>9</sup> Australian Institute for Health and Welfare (AIHW), *The health of Australia’s prisoners 2018* (2019), p. 78.

<sup>10</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, p. 1, citing Australian Civil Society CRPD Shadow Report Working Group,

<sup>11</sup> Aboriginal self-determination and intersectional approaches are two of the six systemic reforms under the State Disability Plan. See *Inclusive Victoria: State Disability Plan 2022-2026*, pp. 7, 24, 28,



accountability. Disability inclusion in Victoria must reverse the current trend of criminalisation, penalisation and exclusion, and ensure an inclusive and supportive society for everyone.

Our recommendations outline several areas where the underlying intention in the bill to promote self-determination and intersectionality, can and must be strengthened. We take this opportunity to highlight the Government's commitment in Victoria's State Disability Plan 2022-2026, to "make sure we listen and that Aboriginal people lead the change they want to see to the system."<sup>12</sup>

## Self-determination and Cultural Safety

***This section responds to the following consultation questions:***

Q5: What do you think of the proposed objectives? Do any need to be changed or removed? Would you add any other objectives?

Q6: Are these the right principles to promote and advance disability inclusion in Victoria? Do any need to be changed or removed? Would you add any other principles?

Q8: Are there any implementation issues that need to be considered to help defined entities promote disability inclusion?

Q9: What do you think about what defined entities need to do when conducting disability impact assessments? Is there anything else defined entities should do?

Q10: Are there any implementation issues that should be considered around defined entities conducting disability impact assessments?

Q11: Do you think the requirements on defined entities are appropriate or need any change?

Q12: What do you think of the proposed focus and requirements for preparing, consulting and reporting on a state disability plan?

Q13: What do you think of the proposed focus and requirements for disability action plans? Are there any practical implementation issues that should be considered?

Aboriginal self-determination is embedded in Victoria's State Disability Plan 2022-2026, which commits the government to "work in partnership with Aboriginal communities to make changes and improve the lives of Aboriginal people with disability,"<sup>13</sup> including "to improve outcomes for Aboriginal people with disability in the justice system."<sup>14</sup>

Similarly, the new *Disability Inclusion Bill* contains multiple references to the right to self-determination of Aboriginal peoples, as follows:

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<sup>12</sup> *Inclusive Victoria*, p. 27.

<sup>13</sup> *Inclusive Victoria*, p. 27.

<sup>14</sup> *Inclusive Victoria*, p. 61.

- One of the **inclusion principles** is: “the right of Aboriginal people with disability in Victoria to self-determination and cultural safety should be recognised and supported, including by upholding social, economic and cultural rights and sustaining connections with family, community, culture and Country.”<sup>15</sup>
- In preparing a **Disability Action Plan**, defined entities<sup>16</sup> must have regard to the inclusion principles, including the rights to self-determination and cultural safety.<sup>17</sup>
- In preparing the **State Disability Plan**, the Minister must have regard to the objectives and inclusion principles, including the rights to self-determination and cultural safety.
- The membership of the **Victorian Disability Advisory Council** – which provides advice to the Minister on disability inclusion in Victoria – must “reflect the cultural and Aboriginal backgrounds of persons with disability.”<sup>18</sup>

We strongly support the inclusion of the rights to self-determination and cultural safety in the Bill, and the recognition that “upholding social, economic and cultural rights and sustaining connections with family, community, culture and Country,” are critical ways of respecting the right to self-determination.<sup>19</sup>

To strengthen the commitment to self-determination in the bill, and address the barriers faced by Aboriginal people with a disability, we recommend that the bill should be strengthened in the following ways:

### **Collective versus individual rights**

Under international law, the right to self-determination is a collective right of “peoples” rather than an individual right.<sup>20</sup> As such, Section 8(l) and any other reference to self-determination in the bill should refer to the right of “Aboriginal peoples.”

### **Statement of Recognition**

In line with recent legislation - including the *Mental Health and Wellbeing Act 2022* and the *Children, Youth and Families (Statement of Recognition) Bill 2022* – both the Bill and the *Disability Act 2006* (Vic) should include a Statement of Recognition. The Statement of Recognition should be co-designed with Aboriginal people and communities across Victoria, including Aboriginal people with a disability.

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<sup>15</sup> Section 8(l).

<sup>16</sup> Defined entity is set out under Section 5 and includes entities that have 50 or more employees and are: a public service body; a public entity; a special body; a Council; Court Services Victoria; a university; and a prescribed entity.

<sup>17</sup> Section 15(4)(a)(ii).

<sup>18</sup> Section 50(2)(b).

<sup>19</sup> Section 8(l).

<sup>20</sup> See Section 1, *International Covenant of Civil and Political Rights* (ICCPR); Article 1, *International Covenant of Economic, Social and Cultural Rights* (ICESCR); Article 3, *United Nations Declaration on the Rights of Indigenous Peoples*.



## Objectives

Aboriginal self-determination and cultural safety should be embedded in the objectives of the Bill.<sup>21</sup> We propose the following wording: “to ensure that Aboriginal people with disabilities are able to access culturally safe programs and services that are free of racism, and support and strengthen connection to culture, family, community and Country.”

Currently, the objectives of the Act include supporting and furthering the purposes and principles of the key international human rights instruments, including: the Convention on the Rights of Persons with Disabilities (**CERD**);<sup>22</sup> the International Covenant on Civil and Political Rights (**ICCPR**); the International Covenant on Economic, Social and Cultural Rights (**ICESCR**); the International Convention on the Elimination of All Forms of Racial Discrimination (**CERD**); the Convention on the Elimination of All Forms of Discrimination against Women (**CEDAW**); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**); and the Convention on the Rights of the Child (**CRC**).<sup>23</sup>

The human rights framework embedded in the objectives of the bill should be strengthened, by including the *United Nations Declaration on the Rights of Indigenous Peoples* (**UNDRIP**), which is a significant international framework protecting the right to self-determination,<sup>24</sup> as well as the rights of Aboriginal peoples with disabilities.<sup>25</sup>

### Disability Impact Assessments, Disability Action Plans and the State Disability Plan

As noted above, defined entities are required to take into account the Inclusion Principles – including the rights to self-determination and cultural safety – when developing and implementing their Disability Action Plans. Similarly, the Minister must take into account the objectives of the Bill and the Inclusion Principles when developing and implementing the State Disability Action Plan.

In contrast, defined entities are not explicitly required to take into account the objectives of the Bill or the Inclusion Principles, when conducting Disability Impact Assessments.<sup>26</sup>

To ensure that the commitment to Aboriginal self-determination and cultural safety translates into concrete change, we strongly recommend that the provisions relating to Disability Impact

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<sup>21</sup> See for example, the *Mental Health and Wellbeing Act 2022* which includes the following objective: “to provide for comprehensive, compassionate, safe and high-quality mental health and wellbeing services that promote the health and wellbeing of people living with mental illness or psychological distress and that— provide culturally safe and responsive services to Aboriginal and Torres Strait Islander people in order to support and strengthen connection to culture, family, community and Country.”

<sup>22</sup> Section 7(b).

<sup>23</sup> Section 7(h).

<sup>24</sup> Article 3, UNDRIP.

<sup>25</sup> See Article 21(2): States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities; and article 22(1): Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration. UNDRIP reference.

<sup>26</sup> Section 11(1).



Assessments (s.9), the State Disability Plan (s.11) and Disability Action Plans (s.15) include substantive provisions that:

- Explicitly recognise the importance of connection to culture, family, community and Country for Aboriginal people with a disability;
- Explicitly recognise that importance of culturally safe programs and services that are free of racism; and
- Ensure that the rights to self-determination and cultural safety are prioritised.

#### **Guidelines for defined entities**

Pursuant to Section 52(1) and (2) of the Bill, guidelines should be developed for defined entities on compliance with the Inclusion Principles and objectives of the Act, including the right to self-determination and cultural safety. Guidelines must be developed with Aboriginal communities.

Pursuant to Section 52(2)(c) of the Bill, guidelines should be developed on “collecting data about the participation of persons with disability in universal services and supports.” In line with the Victorian Governments commitment to Indigenous Data Sovereignty (**IDS**) and Indigenous Data Governance (**IDG**),<sup>27</sup> guidelines on data collection must include guidance on IDS and IDG and must be co-designed with Aboriginal organisations and communities.

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<sup>27</sup> In the Victorian Closing the Gap Implementation Plan 2021-2023, the Government acknowledges 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.” Accordingly, the 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.” See Victorian State Government, *Victorian Closing the Gap Implementation Plan 2021-2023*, pp. 27 and 46.



## RECOMMENDATIONS

**Recommendation 1.** Amend Section 8(l) and any other reference to the right to self-determination, so that it refers to the collective right of “Aboriginal peoples in Victoria to self-determination.”

**Recommendation 2.** Amend the Bill to include a Statement of Recognition, which is co-designed with Aboriginal communities and people across Victoria, including Aboriginal people with disabilities.

**Recommendation 3.** Amend Section 7 to include an additional objective of the Act as follows: “to ensure that Aboriginal people with disabilities are able to access culturally safe programs and services that are free of racism, and support and strengthen connection to culture, family, community and Country.”

**Recommendation 4.** Amend Section 7(h) of the Bill, to include the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*.

**Recommendation 5.** Amend Section 9 (Disability Impact Assessments), Section 11 (State Disability Plan) and Section 15 (Disability Action Plans) to include substantive provisions that:

- Explicitly recognise the importance of connection to culture, family, community and Country for Aboriginal people with a disability;
- Explicitly recognise that importance of culturally safe programs and services that are free of racism; and
- Ensure that the rights to self-determination and cultural safety are prioritised.

**Recommendation 6.** Guidelines on compliance with the inclusion principles and objectives of the Act – including on the right to self-determination and cultural safety – must be developed with Aboriginal communities.

**Recommendation 7.** Guidelines on data collection must include guidance on Indigenous Data Sovereignty (**IDS**) and Indigenous Data Governance (**IDG**) and must be co-designed with Aboriginal organisations and communities.

## Objectives and Inclusion Principles

***This section responds to the following consultation questions:***

Q5: What do you think of the proposed objectives? Do any need to be changed or removed? Would you add any other objectives?

Q6: Are these the right principles to promote and advance disability inclusion in Victoria? Do any need to be changed or removed? Would you add any other principles?



VALS' strongly support the intersectional approach to disability inclusion that is adopted in the Bill, including in the objectives and Inclusion Principles.<sup>28</sup> We believe that this approach can be strengthened by not only recognising that “barriers to disability inclusion may be compounded by intersectionality,” but also embedding a strong commitment to remove those barriers.

In addition, we recommend that the objective in section 7(h) be expanded to include the *Victorian Charter of Human Rights and Responsibilities*, and the *Optional Protocol on the Prevention of Torture, Cruel, Inhuman and Degrading Treatment or Punishment (OPCAT)*.

### RECOMMENDATIONS

**Recommendation 8.** Amend sections 7(3) so that one of the objectives of the bill is “to recognise and remove barriers to disability inclusion that may be compounded by intersectionality”

**Recommendation 9.** Amend section 8(j) so that one of the inclusion principles of the bill is “to recognise and remove barriers to disability inclusion that may be compounded by intersectionality.”

**Recommendation 10.** Amend section 7(h) to include the *Victorian Charter of Human Rights and Responsibilities* and the *Optional Protocol on the Prevention of Torture, Cruel, Inhuman and Degrading Treatment or Punishment (OPCAT)*.

## Duty on defined entities to promote disability inclusion

VALS strongly supports the creation of a new positive duty on defined entities to promote disability inclusion. However, we believe that the duty, and the potential impact of the Bill can be significantly strengthened by extending the definition of defined entities, expanding the scope of the duty, and strengthening the enforcement framework.

### Defined entities

***This section responds to the following consultation questions:***

Q2: What are your thoughts on the purposes of the Bill and its focus on government and defined entities?

Q3: Should any entities be included or excluded from the current scope? What should be added, changed or removed?

Defined entities include entities that have 50 or more employees and are: a public service body; a public entity; a special body; a Council; Court Services Victoria; a university; and a prescribed entity.<sup>29</sup>

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<sup>28</sup> See ss. 3, 7(3), 8(j), 11(2)(c), 15(4)(a) and 12(4)(a).

<sup>29</sup> Section 5.



We strongly support the creation of a positive duty on defined entities, including courts and tribunals, Court Services Victoria, Corrections Victoria, Youth Justice, Victoria Police, public prisons, the Department of Justice and Community Safety (DJCS), and the Department of Families, Fairness and Housing (DFFH), including Child Protection.

We recommend that the duty on defined entities must extend to policies, programs and services that are developed and delivered by private sector organisations on behalf of public service bodies and public entities. In addition, the definition of defined entities should be expanded to include private sector organisations, including private prisons and private health contractors that deliver health services in public and private prisons.

### RECOMMENDATIONS

**Recommendation 11.** The duty on defined entities to promote disability inclusion must extend to policies, programs and services, that are developed and delivered by private sector organisations on behalf of public service bodies and public entities.

**Recommendation 12.** The definition of defined entities should be expanded to include private sector organisations, including private prisons and private health contractors that deliver health services in public and private prisons.

## The positive duty to promote disability inclusion

*This section responds to the following consultation questions:*

Q7: What do you think of the proposed duty for government and defined entities to promote disability inclusion? Do you think the requirements for defined entities are appropriate or do they need any changes?

Question 9: What do you think about what defined entities need to do when conducting disability impact assessments? Is there anything else defined entities should do?

Question 10: Are there any implementation issues that should be considered around defined entities conducting disability impact assessments?

In developing policies and programs and in delivering services that are provided to the public, or have direct and significant impact on the public, defined entities must:

- (a) Consider and promote disability inclusion
- (b) Consult with persons with disability
- (c) Foster good relations between persons with disability and other members of the Victorian community; and



(d) Take necessary and proportionate action to advance disability inclusion.<sup>30</sup>

To support compliance with this duty, the bill requires defined entities to: conduct Disability Impact Assessments; develop/implement a Disability Action Plan; ensure that adequate resources are allocated to implement a Disability Action Plan;<sup>31</sup> and “make reasonable and material progress” in implementing the Disability Action Plan.<sup>32</sup> The Bill also includes several reporting requirements for defined entities.<sup>33</sup>

VALS strongly supports the creation of a positive duty to promote disability, and the mechanisms that support compliance with this duty. We believe that the Bill has significant potential to ensure culturally safe support and services for Aboriginal people with a disability, including Aboriginal people with a disability who are in contact with the youth justice or criminal legal system, particularly those who are in custody.

However, it is critical that the duty to promote disability inclusion is as broad as possible and is not limited in scope to policies, programs and services “that are provided to the public, or have a direct and significant impact on the public.”<sup>34</sup>

We strongly recommend that the duty to promote disability inclusion and the corresponding requirement to conduct Disability Impact Assessments<sup>35</sup> must apply to all policies, programs and services developed and implemented by defined entities. For example, programs and services provided to people who are in custody may not commonly be understood as being “provided to the public” or having a “direct and significant impact on the public.” However, it is essential that these programs and services are encompassed within the scope of the duty.

## RECOMMENDATIONS

**Recommendation 13.** Amend Section 9 (Duty to promote disability inclusion) and Section 11 (Disability Impact Assessments) so that they apply to:

- All policies, programs and services developed and implemented by defined entities, including for example, programs and services provided to people in custody.
- All policies, programs and services developed and implemented by private sector organisations on behalf of public service bodies and public entities (including private contractors providing health services in prisons).

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<sup>30</sup> Section 9(1).

<sup>31</sup> Section 15(5).

<sup>32</sup> Section 21.

<sup>33</sup> Defined entities are required to: report annually on any Disability Impact Assessments carried out in the previous 12 months, including any actions taken as a result of the assessment (s. 22(2)(a)); publish their Disability Action Plan and submit the Plan to the commissioner for Disability Inclusion (s. 19); report annually on implementation of the strategies, measures and actions identified under the Disability Action Plan (ss. 22 and 23) and submit the Disability Action Plan Progress Report to the Commissioner for Disability Inclusion (s. 24).

<sup>34</sup> Section 9(1).

<sup>35</sup> Section 11(1).

## Enforcement of the positive duty to promote disability inclusion

*This section responds to the following consultation questions:*

Q14: What do you think about the proposed monitoring and compliance mechanisms?

Q15: Do the proposed monitoring and compliance mechanisms strike the right balance between transparency, accountability and minimising regulatory burden?

Q16: Is there anything you would change about the proposed monitoring and compliance mechanisms?

Q18: What do you think of the proposed functions and powers of the Commissioner? What would you change?

To ensure that the positive duty to promote disability inclusion leads to significant and meaningful change, it is critical to ensure that there is a strong enforcement mechanism. We are concerned that the enforcement framework is not adequate, including that the duty does not give rise to any enforceable legal rights.<sup>36</sup>

Currently, the enforcement framework in the bill consists primarily of compliance notices and enforcement orders from VCAT:

- **Compliance notices** can be issued by the Commissioner for Disability Inclusion to a defined entity, if it fails to prepare a Disability Action Plan or submit their Plan the Commissioner, or fails to make reasonable and material progress in implementing a Disability Action Plan.<sup>37</sup>
- **Enforcement orders:** the Commissioner for Disability Inclusion can apply to VCAT for an order directing the entity to comply with the compliance notice,<sup>38</sup> or to enforce a written undertaking made by the defined entity in relation to compliance.<sup>39</sup>

Additionally, the Commissioner for Disability Inclusion can recommend that the Minister take action to ensure the entity's compliance,<sup>40</sup> and can also publish the name of the entity and the requirement that the entity has failed to comply with on the Commissioner's website.<sup>41</sup>

As it currently stands, the enforcement framework relates to the requirement to develop and implement a Disability Action Plan, and does not directly relate to the positive duty to promote disability inclusion. We believe that the enforcement framework should be significantly strengthened, and endorse the following recommendations from VLA:

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<sup>36</sup> Section 10.

<sup>37</sup> Section 26.

<sup>38</sup> Section 30.

<sup>39</sup> Section 31(4).

<sup>40</sup> Section 30(b).

<sup>41</sup> Section 30(c).



- The positive duty in the Bill should be accompanied by an enforcement framework, with enforcement powers conferred on the Disability Inclusion Commissioner and meaningful sanctions for non-compliance.
- VEOHRC should be provided with powers to enforce section 15 of the Equal Opportunity Act, including powers to inquire into compliance, issue compliance notices, enter into undertakings and seek enforcement of compliance notices and undertakings at the Victorian Civil and Administrative Tribunal.
- VEOHRC and the Disability Inclusion Commissioner should work closely to promote compliance with the positive duty not to discriminate on the grounds of disability, including by sharing information about trends and issues of concern.<sup>42</sup>

## RECOMMENDATIONS

**Recommendation 14.** Accompany the positive duty in the Bill by an enforcement framework, with enforcement powers conferred on the Disability Inclusion Commissioner and meaningful sanctions for non-compliance.

**Recommendation 15.** Provide VEOHRC powers to enforce section 15 of the Equal Opportunity Act, including powers to inquire into compliance, issue compliance notices, enter into undertakings and seek enforcement of compliance notices and undertakings at the Victorian Civil and Administrative Tribunal.

**Recommendation 16.** VEOHRC and the Disability Inclusion Commissioner should work closely to promote compliance with the positive duty not to discriminate on the grounds of disability, including by sharing information about trends and issues of concern.

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<sup>42</sup> VLA, *Submission in response to the Exposure Draft: Disability Inclusion Bill 2022 (Vic)*, October 2022, pp. 14-5.