Victorian Aboriginal Legal Service Submission to the "Call for input: Deaths in custody" from the UN's Special Rapporteur on extrajudicial, summary or arbitrary executions

March 2023

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Background to the Victorian Aboriginal Legal Service

The Victorian Aboriginal Legal Service (VALS) is an Aboriginal Community Controlled Organisation (ACCO) with 50 years of experience providing culturally safe legal and community justice services to our people across Victoria.

Legal Services

Our legal practice serves Aboriginal people of all ages and genders. Our 24-hour criminal law service is backed up by the strong community-based role of our Client Service Officers (CSOs). CSOs help our clients navigate the legal system and connect them with the support services they need.

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 aim to understand the underlying reasons that have led to the offending behaviour and ensure this informs the best outcome for our clients.

Our **Civil and Human Rights Practice** supports clients with consumer issues, infringements, tenancy issues, coronial matters, discrimination issues, working with children checks, employment matters and Personal Safety Intervention Orders.

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 **Wirraway Police and Prison Accountability Practice** supports clients with civil litigation matters against government authorities. This includes for claims involving excessive force or unlawful detention, police complaints, and coronial inquests (including deaths in custody).

Balit Ngulu is our dedicated legal practice for Aboriginal children providing support in criminal matters. Balit Ngulu is designed to be trauma informed and provide holistic support for our clients.

Community Justice Programs

Our Community Justice Programs (CJP) team is staffed by Aboriginal and Torres Strait Islander people who provide culturally safe services to our clients and community.

This includes the Custody Notification System, Community Legal Education, Victoria Police Electronic Referral System (V-PeR), Regional Client Service Officers and the Baggarrook Women's Transitional Housing program.

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.

Acknowledgement

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

We pay our respects to all Aboriginal and Torres Strait Islander Elders who have maintained the struggle to achieve justice.

Across Australia, we live on unceded land. Sovereignty has never been ceded. It always was and always will be, Aboriginal land.

Contributors

Thanks to the following staff members who collaborated to prepare this submission:

- Patrick Cook, Head of Policy, Communications and Strategy
- Isabel Robinson, Senior Policy Officer

Note on Language

Throughout this document, 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.

ABORIGINAL DEATHS IN CUSTODY

Aboriginal deaths in custody is a crisis. 527 Aboriginal people have died in custody since the Royal Commission into Aboriginal Deaths in Custody (the Royal Commission) published 339 recommendations designed to end deaths in custody in April 1991.[1] That means that, on average, there is an Aboriginal death in custody every three weeks in Australia.

Victoria is often cited as a progressive jurisdiction by political commentators and the current Premier.[2] However, there has been a recent spike in Aboriginal deaths in custody, with 3 deaths happening in approximately 10 months over 2021 and 2022.[3] The Coroner stated that Aboriginal and Torres Strait Islander people now die in custody at a greater rate than before the 1991 RCADIC; with an average of 16.6 deaths per year since 1991 compared to 11 deaths per year between 1980 and 1989.[4]

VALS is currently representing the families of Aboriginal people who have died in custody in three separate tragedies and in January 2023 we received the findings of the Coroner into the passing of Veronica Nelson.

Each Aboriginal death in custody has a lasting impact on our people, our families, and our communities. These tragedies leave a legacy of generational trauma that our people carry every day.

VALS was proud to represent Uncle Percy Lovett, the partner of Veronica Nelson, through the Coronial Inquest into Veronica's passing. In a public statement after the Inquest, Uncle Percy described the impact of Veronica's death:

> "Veronica was the love of my life. We were together for more than 20 years and we did everything together. She was a kind and loving girl, who would always help people, no matter who they were. She taught me everything I know about Aboriginal culture.
>
> Every night, as soon as I shut my eyes, I can hear her crying out 'Daddy Daddy Daddy'. She's really hurting. I know every bit of pain she was feeling. When you've been with a person that long, you know how they bare pain."[5]

There are so many Aboriginal families that have had to bear this pain. So many Aboriginal families have to bare this pain while fighting for justice in a legal system that was designed to oppress them. Latoya Aroha Rule, sibling of Wayne Fella Morrison who died in custody, said

> "For me, the grieving process hasn't really started properly. I was pretty upset initially but then I had to go protest, because we have to enact some justice. I had to look at my brother as another Aboriginal man. You say sure, he was my brother, but he's also someone else's brother. This is not just about Wayne, it's about other people like Ms Dhu. It's systemic, it's oppression."[6]

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[1] Australian Institute of Criminology, *Deaths in custody in Australia*.
[2] The Age, *'We are a progressive state': What is Daniel Andrews planning for his third term in government?*.
[3] Victorian Aboriginal Legal Service, *Death in custody of Gunditjmara and Wiradjuri beloved artist, father and brother, Clinton Austin*.
[4] Coroners Court of Victoria, *Finding into death with Inquest: Inquest into the passing of Veronica Nelson*, paragraph 70, p22.
[5] Victorian Aboriginal Legal Service, *Statements from Veronica Nelson's family*.
[6] Vice, *Latoya Aroha Rule's Brother Died in Police Custody: Here's What She Did Next*.

VALS has a long history of advocating for a transformation on the legal system that will end Aboriginal death in custody. While the reforms we have recommended throughout our 50 years are broad ranging, we would like to highlight three key themes in this submission. To end Aboriginal deaths in custody, the following areas must be addressed:

- Reducing incarceration
- Conditions in custody
- Accountability and oversight

Aboriginal people are the most overincarcerated people on earth.[7] To end Aboriginal deaths in custody, the pipeline of Aboriginal people into prison must end. Bail reform, raising the age of criminal responsibility and summary offences reform are much needed in Victoria.

Aboriginal people are more likely to die in prison because they did not get the healthcare they need or because staff did not follow official procedures, than non-Indigenous people.[8] At the Coronial Inquest into the passing of Veronica Nelson, The Coroner found that "Veronica was culturally isolated and provided with no culturally competent or culturally specific care or support"[9] and that "the treatment of Veronica by Corrections Victoria was inhumane and degrading."[10] Improving conditions in custody, particularly ensuring that prison healthcare is equivalent to what is available in the community, is essential for ending Aboriginal deaths in custody in Victoria.

The Coronial Inquest into the passing of Veronica Nelson received significant media and community attention. Many people across Victoria were shocked at the conditions that Veronica was subjected too and the way she was treated. Unfortunately, this was not a surprise for Aboriginal communities and people involved in the criminal legal system. Victoria is sorely lacking a proper system of accountability and oversight. Internal reviews of Veronica Nelson's death praised the way prison staff had handled Veronica.[11] VALS wants Victoria to fully implement a National Preventative Mechanism (NPM), as required under its obligation to the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), establish and Aboriginal Justice Commissioner, pursue criminal prosecutions relating to deaths in custody and have fully independent coronial investigations.

It is also important to acknowledge that the circumstances of Aboriginal people have been caused by 235 of colonisation and subsequent attempts of governments to commit genocide against Aboriginal people, including massacres and the Stolen Generations (when Aboriginal children were forcibly removed from their families). For these reasons, Aboriginal self-determination is essential to ending Aboriginal deaths in custody.

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[7] The Conversation, *FactCheck: are first Australians the most imprisoned people on Earth?*.
[8] The Guardian, *The facts about Australia's rising toll of Indigenous deaths in custody*.
[9] Coroners Court of Victoria, *Finding into death with Inquest: Inquest into the passing of Veronica Nelson*, paragraph 26, p4.
[10] Ibid, paragraph 673, p 234.
[11] The Age, *Veronica Nelson treated inhumanely before jail death, prison officer concedes*.

Many of the reforms that are needed to end Aboriginal deaths in Custody are part of our Plan for Aboriginal Justice in Victoria. We have been asking for all politicians to commit to supporting our plan and Victoria will not be able to address the crisis of Aboriginal deaths in custody.

VALS hopes that the Special Rapporteur on extrajudicial, summary or arbitrary executions will make strong public recommendations to end Aboriginal deaths in custody.

SUMMARY OF RECOMMENDATIONS

Aboriginal led solutions

Recommendation 1. The Victorian Government must implement VALS' *Plan for Aboriginal Justice in Victoria*.

Recommendation 2. All interventions to address Aboriginal deaths in custody must be self-determined by Aboriginal communities.

Reducing Incarceration

Recommendation 31. Reduce the number of people in Victoria's prisons by reforming Victoria's bail laws based on VALS' policy brief, Fixing Victoria's Broken Bail Laws, by ensuring:

- remand is only used as a last resort
- bail hearings are fair
- a meaningful reduction in the overincarceration of Aboriginal people.

Recommendation 4. Victoria must reduce the number of children in prison by:

- raising the age of criminal responsibility to at least 14 years old
- raising the minimum age of detention to at least 16 years old
- extending the presumption of doli incapax to children aged 14-17 years, and ensure that it is understood and applied effectively.

Recommendation 5. The Victorian Government must ensure that decriminalisation of public intoxication in Victoria, achieves the underlying intention of the reforms, namely, to prevent detention of people who are intoxicated in public and ensure that they receive appropriate support from "localised and culturally safe health-based models."

Recommendation 6. The Victorian Government should urgently review the Summary Offences Act, including to identify indictable offences that could appropriately be reclassified as summary offences, and summary offences that should be decriminalised.

Recommendation 7. Victoria must implement a zero prison population target.

Conditions in custody

Recommendation 8. The Victorian Government must overhaul the prison healthcare system in Victoria, to ensure that healthcare available to people who are incarcerated is equivalent to that available in the community. In particular, they must:

- End privatisation of prison healthcare and transfer responsibility for prison healthcare from DJCS to the Department of Health.
- Work with ACCHOs to develop a sustainable model for culturally safe healthcare for Aboriginal people who are incarcerated.

- Prioritise the development, finalisation and implementation of standards for culturally safe, trauma informed health services in the criminal legal system.
- Ensure that every person involved with prison healthcare, is required to complete mandatory and regular cultural awareness and anti-racism training.
- Establish an independent oversight body for prison complaints, with sufficient powers to refer matters for criminal investigation.
- Adequately fund Aboriginal Legal Services to provide culturally safe legal advice and representation for people in prison.
- Urgently revise the system for auditing and scrutiny of custodial healthcare services.

Recommendation 9. The Federal Government of Australia must ensure that incarcerated people have access to the Pharmaceutical Benefits Scheme (PBS) and the Medicare Benefits Schedule (MBS). The Victorian Government should advocate with other States and Territories and the Commonwealth to enable this access.

Accountability and oversight

Recommendation 10. Victoria must urgently implement independent detention oversight in line with its obligations under OPCAT. This implementation should follow advice provided by VALS in its *OPCAT factsheet, Nuther-mooyoop to the Yoorrook Justice Commission: Criminal Legal System* and *Plan for Aboriginal Justice in Victoria*.

Recommendation 11. Victoria must establish an Aboriginal Justice Commissioner, as designed by the Aboriginal Justice Caucus, to improve accountability of the criminal legal system and government reform processes relating to the criminal legal system.

Recommendation 12. The Australian Federal Government, in partnership with State and Territory governments, should carry out an inquiry into Criminal accountability for Aboriginal Deaths in Custody and police-contact deaths, with a view to identifying and addressing key obstacles to criminal prosecutions.

Recommendation 13. Guidelines for the Office of Public Prosecutions (OPP) should be amended to:

- Require the Director of Public Prosecutions (DPP) to consult with Aboriginal families about decisions not to prosecute individuals involved in Aboriginal deaths, where there has been a referral from the Coroner;
- Require prosecutors to give written reasons to families where they decide not to prosecute someone involved in an Aboriginal Death in Custody, where there has been a referral from the Coroner.

Recommendation 14. Coronial Inquests must be mandatory for all Aboriginal deaths in custody.

Recommendation 15. Coronial investigations must be carried out by a specialist civilian investigation team that is independent from police and developed by Aboriginal communities. This team must have the same coercive powers as the police for conducting these investigations.

Recommendation 16. 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:

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

Recommendation 17. 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 18. The Victorian Government must work with Aboriginal communities to establish a dashboard of data that tracks statistics that play a role in Aboriginal deaths in custody and ensure that it is regularly published publicly.

DETAILED SUBMISSIONS

Reducing Incarceration

Deaths in custody are inextricably linked to the incarceration rate. A larger prison population will lead to higher numbers of deaths in custody. A larger prison population also causes a strain on resources and typically leads to a reduction in the quality of care and a worsening of the culture within a prison.

In Victoria, the annual cost of keeping an adult in prison is over $130,000, excluding capital costs.[12] That is about 8 times the cost of annual Newstart payments for an individual without children (Australia's unemployment benefit).[13] The Victorian Government is arguably underfunding prisons, based on the findings of the Coronial Inquest into Veronica Nelson and other public reporting on prison conditions.[14]

Prisons are, by their nature, incredibly expensive. This cost should be an incentive for governments to reduce incarcerations rates, particularly where prisons are filled with people on remand or for minor offending. However, it seems that governments are more inclined to deal with the expense of prisons by underfunding them and, based on the findings of the Coronial Inquest into the passing of Veronica Nelson, this leads to Aboriginal deaths in custody. The Coroner described the most recent bail law changes as a "complete and unmitigated disaster."[15]

RECOMMENDATIONS

Recommendation 1. The Victorian Government must implement VALS' *Plan for Aboriginal Justice in Victoria*.

Recommendation 2. All interventions to address Aboriginal deaths in custody must be self-determined by Aboriginal communities.

Bail Reform

In Victoria, the bail laws have been reformed several times in the last 10 years (*Bail Amendment Bill 2013*, *Bail Amendment (Stage One) Bill 2017, Bail Amendment (Stage Two) Bill 2017*). In each case, the intent and effect of these Bills was to make bail harder to access. In 2013, there was an average of 956 people held on remand each night in Victoria.[16] In 2021, there was 3,182 people held on remand each night in Victoria.[17] That is a 233% increase.

In 1991, the Royal Commission recommended that custody only be used as a last resort and that governments "revise any criteria which inappropriately restricts the granting of bail to Aboriginal

[12] Productivity Commission, *Report on Government Services 2022: C Justice: 8 Corrective services*.
[13] Services Australia, *How much you can get*.
[14] The Age, *Victoria's prisons a pressure cooker as staff recruitment falls short*.
[15] Coroners Court of Victoria, *Finding into death with Inquest: Inquest into the passing of Veronica Nelson*, paragraph 377, p132.
[16] Sentencing Advisory Council, *Victoria's Prison Population*.
[17] Ibid.

people."[18] The way in which these recommendations have been contradicted by successive Victorian Governments, particularly the current government, contributed to the death in Custody of Veronica Nelson and has done great harm to Aboriginal communities.

At times in 2022, up to 80% of Aboriginal women in prison were on remand.[19] In 2020-2021, 68.7% of Aboriginal children youth custody were on remand.[20] In 2010, there was 290 Aboriginal people in prison and just 59 of them were on remand, on an average night.[21] In January 2023, there was 872 Aboriginal people in prison.[22] Recent trends indicate about half of all Aboriginal people in prison at any time are on remand,[23] which would mean about 436 Aboriginal people were on remand in January 2023, which means that approximately two-thirds of the increase in the number of Aboriginal people in prison is due to the increase in remand. These numbers mean that in the last 13 years, the total number of Aboriginal people in prison increased 200%, while the number of Aboriginal people on remand increased 639%. These numbers far exceed the increase of Victoria's population over the same time period (about 22%).[24]

Since the Coronial Inquest into the passing of Veronica Nelson, the Victorian Government has indicated it will engage in bail reform with the intent of ensuring it is easier for people charged with non-violent offences to get bail.[25] We remain concerned that the Victorian Government will not enact enough reform to ensure a meaningful reduction in the incarceration rate, particularly for Aboriginal and Torres Strait Islander people.

We believe that bail reform must ensure that:

- remand is only used as a last resort
- bail hearings are fair
- a meaningful reduction in the overincarceration of Aboriginal people.

You can find our 14 recommendations for bail reform in our policy brief, Fixing Victoria's Broken Bail Laws, which is attached to this submission. Notably we want the removal of the presumption against bail, removal of the breach of bail offences, and strengthening of section 3A (which requires bail decision makers to consider Aboriginality in their decisions).

RECOMMENDATIONS

Recommendation 3. Reduce the number of people in Victoria's prisons by reforming Victoria's bail laws based on VALS' policy brief, Fixing Victoria's Broken Bail Laws, by ensuring:

- remand is only used as a last resort

[18] Royal Commission into Aboriginal Deaths in Custody, *Recommendations: Imprisonment as a Last Resort*.
[19] Victorian Aboriginal Legal Service, *Premier urged not to bungle bail reform*.
[20] Australian Institute of Health and Welfare, *Youth justice in Australia 2020–21*.
[21] Corrections Victoria, *Profile of Aboriginal People in Prison*.
[22] Corrections Victoria, *Monthly prisoner and offender statistics 2022-23*.
[23] Victorian Aboriginal Legal Service, *A Plan for Aboriginal Justice in Victoria*.
[24] Australian Bureau of Statistics, 3235.0 - Population by Age and Sex, Regions of Australia, 2010, and *ID Consulting, population forecast: Victoria*.
[25] National Indigenous Times, *Victorian government announces long-awaited bail reforms*.

- bail hearings are fair
- a meaningful reduction in the overincarceration of Aboriginal people.

Raise the Age of Criminal Responsibility

The overpolicing and overincarceration of Aboriginal people starts when they are children. In 2019-2020, 47% of children aged 10-13 years who were in contact with Youth Justice (in custody and in the community) on an average day in Victoria, where Aboriginal.[26] As detailed above, often a majority of Aboriginal children in Victoria's youth prisons are being held on remand.

We find that the majority of Aboriginal children held in youth prisons are there for low-level offences and the Attorney-General told Parliament that "serious offending by children under 15 is exceedingly rare…the rate at which children under 15 commit serious offences…is around one conviction per year."[27]

Australia currently has Doli Incapax, which is the legal presumption that a child is incapable of criminal intent, although the presumption can be rebutted by the prosecution.[28] Doli notionally applies to 10-13 year olds, although prosecutors and courts have a poor understanding of it and it is often misapplied and rarely effective.[29]

The best medical evidence shows that children under 14 years old do not have the capacity for criminal intent and VALS believes there is credible medical evidence to show that criminal intent cannot be formed until much older than 14 years old.[30] VALS also believes that youth prisons are not rehabilitative and only cause further harm.[31] No child benefits from incarceration. Society does not benefit from incarcerating children.

RECOMMENDATIONS

Recommendation 4. Victoria must reduce the number of children in prison by:

- raising the age of criminal responsibility to at least 14 years old
- raising the minimum age of detention to at least 16 years old
- extending the presumption of doli incapax to children aged 14-17 years, and ensure that it is understood and applied effectively.

Summary Offences Reform

[26] Victorian Aboriginal Legal Service, *Raising the Age of Criminal Responsibility*.
[27] Hansard, *Jaclyn Symes: Spent Convictions Bill 2020*.
[28] Victorian Aboriginal Legal Service, *Raising the Age of Criminal Responsibility*.
[29] Ibid.
[30] Ibid.
[31] Victorian Aboriginal Legal Service, *A Plan for Aboriginal Justice in Victoria*.

In 1991, RCIADIC highlighted that over-incarceration of Aboriginal people was one of the key reasons for high rates of Aboriginal Deaths in Custody. Of the 99 deaths that were investigated by the Commission, the majority of people who died in custody, were detained for minor offences, including public intoxication, and other offences against "good order" (e.g. vagrancy, offensive language, etc.).[32]

Over thirty years later, Aboriginal people continued to be disproportionality charged and detained for minor offences, many of which are related to socio-economic disadvantage and trauma, including lo-low-level shop theft, possession of drugs for personal use, offensive language, and public intoxication.

In 2019, following the death of proud Yorta Yorta woman, Aunty Tanya Day, the Victorian government committed to decriminalise the offence of public intoxication and replace it with a health-based response. Decriminalisation is expected to take place in November 2023, and the government has decided not to introduce protective custody powers for police, as is the case in all other Australian jurisdictions that have decriminalised public intoxication.

In 2021, the Parliamentary Inquiry into the Criminal Justice System recommended that the Victorian government should review the *Summary Offences Act 1966*, in relation to offences often linked to underlying forms of disadvantage.[33] In addition to the ongoing public intoxication reforms, the Victorian government should urgently review the Summary Offences Act, including to identify indictable offences that could appropriately be reclassified as summary offences, and summary offences that should be decriminalised.

RECOMMENDATIONS

Recommendation 5. The Victorian Government must ensure that decriminalisation of public intoxication in Victoria, achieves the underlying intention of the reforms, namely, to prevent detention of people who are intoxicated in public and ensure that they receive appropriate support from "localised and culturally safe health-based models."

Recommendation 6. The Victorian Government should urgently review the Summary Offences Act, including to identify indictable offences that could appropriately be reclassified as summary offences, and summary offences that should be decriminalised.

Zero Prison Population Target

VALS wants the Victorian Government to end prison expansions and commit to a legal system that seeks to reduce the prison population towards zero.

A legal system built on decarceration is best for everyone. Victoria's ambition must be a legal system built on the understanding that prison does not support healing and rehabilitation, and does not achieve community safety.

[32] RCIADIC, National Volume 1, NATIONAL REPORT VOLUME 1 - 2.4 REASON FOR LAST DETENTION (austlii.edu.au)
[33] Parliamentary Inquiry into Victoria's Criminal Justice System, Recommendation 60, p. 480. LCLSIC_59-10_Vic_criminal_justice_system.pdf (parliament.vic.gov.au)

Such targets are common in public policy. The Victorian Government implemented its "The Towards Zero 2016-2020 Road Safety Strategy plan" which aimed to reduce the annual road toll to zero.[34] The Reserve Bank of Australia has an inflation target of 2-3%.[35] Such targets help frame public discourse about an issue and can data tracking progress towards the target can push governments towards greater or alternative interventions.

In January 2023, there were 6,788 people held in prison in Victoria.[36] A decade ago, in 2013, their were 5,340 people held in prison in Victoria. The year 2000 was the first time there had been more than 3,000 people held in prison in Victoria on an average day, and before the 1990's there had rarely been more than 2,000 people in Victoria's prisons on an average day. This accelerating incarceration rate is far more than the general population growth and defies long term crime statistics that indicates decreasing crime rates.[37]

Media reporting and public discourse around crime rates and the cost and effectiveness of prisons has become completely detached from reality. In his first and second advice to Government on bail law changes in 2017, The Hon. Paul Coghlan QC, regularly remarked that the need for reform was mostly attributable to public perceptions of bail laws created by media's sensationalised reporting, rather than systemic issues in the bail system that were leading to large numbers of dangerous offenders being granted bail.[38] Despite this, the Victorian Government passed punitive bail laws that were far more aggressive than anything recommended in the Coughlan report and some changes were not based on advice in the Coghlan report or any evidence at all.

A zero prison population target has the potential to reduce Aboriginal deaths in custody by reducing the number of people incarcerated. Not only would fewer people be at risk of dying in custody merely by being in custody, but prison resources could be better allocated to ensure that human rights were not being infringed, that prison healthcare was equivalent to that available in the general community, and ensuring the culture of prison staff does not become toxic.

A zero prison population target would need to be backed by the publishing of better data to help inform better public discourse. Such a target would also take the pressure off individuals to campaign for reform. Too often people who have been abused in prison and the families of people who have died in prison are required to tell their story in public in order to create positive change. This is traumatising and often silencing, meaning that positive reforms are incredibly rare and only happen when the worst of abuses are exposed by victims who feel capable of speaking up and find an opportunity to do so.

RECOMMENDATIONS

Recommendation 7. Victoria must implement a zero prison population target.

[34] Transport Accident Commission, *Towards Zero 2016-2020 Road Safety Strategy*.
[35] Reserve Bank of Australia, *Inflation Target*.
[36] Corrections Victoria, *Monthly prisoner and offender statistics 2022-23*.
[37] Sydney Morning Herald, *It's time to salute the great crime decline*.
[38] The Hon. Paul Coghlan QC, *Bail Review: First advice to the Victorian Government* and *Bail Review: Second advice to the Victorian Government*.

Conditions in Custody

Prison Healthcare

Inadequate healthcare in prisons, including a lack of culturally safe healthcare provided by Aboriginal organisations, is one of the key contributors to Aboriginal Deaths in Custody. As noted above, three Aboriginal people passed away in Victorian prisons between 2021-2022,[39] and prison healthcare has been a major factor in the coronial investigations and inquests relating to these deaths.

In 2021, The Guardian analysed 474 Aboriginal Deaths in Custody in Australia since 1991, and found that Aboriginal people who died in custody were three times more likely not to receive all necessary medical care, compared to non-Aboriginal people.[40] In addition, less than half of the Aboriginal women who died in custody received all required medical care prior to death.[41]

In January 2020, Veronica Marie Nelson passed away in her cell at the Dame Phillis Frost Centre (DPFC), Victoria's main women's prison, after days of crying out for help. During the 36 hours that she spent at DPFC, she pressed the intercom buzzer in her cell at least 49 times to ask for help and tell staff about her symptoms. She died alone in her prison cell.

The Coronial Inquest into Veronica's passing revealed serious systemic issues with prison healthcare in Victoria. In particular, the Inquest highlighted that the prison healthcare system in Victoria is in breach of the fundamental principle that healthcare available in prisons must be equivalent to that available in the community.[42]

Over thirty years ago, the RCIAIDC recommended that prison health care "be of an equivalent standard to that available to the general public" and should be "accessible and appropriate to Aboriginal prisoners."[43] Over 30 years later, prison healthcare in Victorian is in violation of human rights law[44] and is not equivalent to that available in the community for the following key reasons:

- **Privatisation of prison healthcare:** in both public and private prisons in Victoria, prison healthcare is provided by private multinational companies, that are driven by profits and have a terrible track record for Deaths in Custody. One of the main providers in Victoria, Correct Care Australasia,[45] is a subsidiary of Wellpath,[46] the largest prison healthcare provider in the United States. Wellpath has allegedly been sued more than 140 times and is

[39] In March 2021, Michael Suckling, died in his cell at Ravenhall Correctional Centre, two days after a 'code black' was called in relation to this health. In November 2021, Ms Heather Calgaret died at Sunshine Hospital after she was transferred from the Dame Phyllis Frost Centre prison in a critical condition. On 11 September 2022, Clinton Austin, a 38-year-old Gunditjmara and Wiradjuri man, passed away in custody at Loddon Prison in Victoria.
[40] Allam, L. et al. (2021). The facts about Australia's rising toll of Indigenous deaths in custody. Available at https://www.theguardian.com/australia-news/2021/apr/09/the-facts-about-australias-rising-toll-of-indigenous-deaths-in-custody
[41] Ibid.
[42] United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), UN Doc A/RES/70/175 (17 December 2015).
[43] RCIADIC Rec 150, RCIADIC Report Findings and Recommendations, Vol 5
[44] International Covenant on Economic, Social and Cultural Rights, Article 12. Charter of Human Rights and Responsibilities Act 2006, s22(1). See also Coronial Inquest into the Death of Tanya Day, [533].
[45] From July 2023, the contract for prison healthcare in all public prisons in Victoria will be taken over by The GEO Group Australia. See About - The GEO Group Australia Pty Ltd.
[46] See About Wellpath Care | Wellpath

accused of contributing to more than 70 deaths in the US between 2014 and 2017.[47] In the US, a study of prisons has found that inmate death rates were higher in prisons where healthcare was privatised, than in prisons where healthcare was public.[48] In addition to serious concerns around the quality and safety of healthcare, privatisation has also led to fragmentation within the prison healthcare system, a lack of transparency arising from commercial-in-confidence clauses in contracts and no continuity of healthcare for people transitioning in and out of prisons.

- Lack of culturally safe healthcare: the healthcare provided by private companies in prisons is not culturally safe for Aboriginal people. In the community, Aboriginal Community Controlled Health Organisations (ACCHOs) provide culturally safe holistic and trauma-informed health services for Aboriginal people and their families, and are a manifestation of Aboriginal self-determination. In other states and territories in Australia,[49] ACCHOs are funded to provide in-reach primary healthcare for people who are incarcerated.
- No access to Medicare and the Pharmaceutical Benefits Fund (PBS): in Australia, people who are incarcerated do not have access to the national health schemes, which has a significant impact on access to culturally safe healthcare, and a number of services (including enhanced screenings, assessments and health promotion activities) that are particularly critical for Aboriginal communities.
- Inadequate oversight of the prison healthcare system: currently, prison healthcare is overseen by the Department of Justice and Community Safety (DJCS), rather than the Department of Health (as recommended by the World Health Organisation[50]).
- Prison healthcare complaints: although there are several independent bodies that receive complaints regarding prison healthcare, the complaints system is undermined by barriers in accessing the complaints system, lack of transparency arising from privatisation, and limited enforcement. There is a critical need for an independent prison complaints system, and adequate funding to ensure that Aboriginal people in prison can access legal advice and representation relating to complaints.

The Coronial Inquest into Veronica's passing handed down 36 recommendations, including 17 related to prison healthcare. Many of the issues highlighted above were examined in this Inquest.

It is critical that the Victorian government takes urgent steps to overhaul the prison healthcare system, including to end privatisation of prison healthcare, fund ACCHOS to provide culturally safe in-reach healthcare services, and reform the oversight and accountability systems for prison healthcare.

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[47] CNN investigation exposes preventable deaths and dangerous care in jails and prisons across the country - CNN.com This includes: an inmate who died after allegedly being misdiagnosed, and a 60-year old inmate who died from a perforated stomach ulcer, and a 15-year old boy who took his life in prison in October 2016. See Global group linked to jail deaths wins $50m youth justice contract (theage.com.au)

[48] Special Report: U.S. jails are outsourcing medical care — and the death toll is rising | Reuters

[49] For example, Danila Dilba, provides healthcare in the Done Dale Detention Centre in the Northern Territory. See Danila Dilba wins prestigious international justice award | Danila Dilba (ddhs.org.au). Winnunga Nimmityjah Aboriginal Health and Community Services, which provides healthcare for Aboriginal people at the Alexander Maconochie Centre in the Australian Capital Territory. See Winnunga_Prison_Health_Report_2007-2-pdf.pdf

[50] World Health Organisation Europe (2007). Health in Prisons: A WHO guide to the essentials in prison health, pp. 15-17. Available at https://www.euro.who.int/__data/assets/pdf_file/0009/99018/E90174.pdf.

RECOMMENDATIONS

Recommendation 8. The Victorian Government must overhaul the prison healthcare system in Victoria, to ensure that healthcare available to people who are incarcerated is equivalent to that available in the community. In particular, they must:

- End privatisation of prison healthcare and transfer responsibility for prison healthcare from DJCS to the Department of Health.
- Work with ACCHOs to develop a sustainable model for culturally safe healthcare for Aboriginal people who are incarcerated.
- Prioritise the development, finalisation and implementation of standards for culturally safe, trauma informed health services in the criminal legal system.
- Ensure that every person involved with prison healthcare, is required to complete mandatory and regular cultural awareness and anti-racism training.
- Establish an independent oversight body for prison complaints, with sufficient powers to refer matters for criminal investigation.
- Adequately fund Aboriginal Legal Services to provide culturally safe legal advice and representation for people in prison.
- Urgently revise the system for auditing and scrutiny of custodial healthcare services.

Recommendation 9. The Federal Government of Australia must ensure that incarcerated people have access to the Pharmaceutical Benefits Scheme (PBS) and the Medicare Benefits Schedule (MBS). The Victorian Government should advocate with other States and Territories and the Commonwealth to enable this access.

Protection of human rights

Victoria has a poor record of protecting human rights in prisons and many abuses go unnoticed by the public because of a dysfunctional oversight system.

Where the current oversight system has been able to expose abuses, it is often well after the fact and receives little public attention, diminishing the ability of such oversight to drive reform.

An Independent Broad-Based Anti Corruption Commission (IBAC), found that people in prison are being exposed to mistreatment and abuse that includes corrections staff engaging in excessive use of force, inappropriate strip searches, interfering with camera recordings, and trafficking contraband.[51] In one instance, a person with an intellectual disability was subjected to the excessive use of force. In another, a person was strip searched for seven minutes in violation of the prison's own policy, and assaulted by staff when he protested. The report found prison staff have limited understanding of human rights obligations and some have never received any training on safeguarding the rights of people in prison.

[51] Victorian Aboriginal Legal Service, *IBAC report finds that prison expansion and privatisation are contributing factors to corruption and abuse within Victoria's Corrections system*.

The Coronial Inquest into the passing of Veronica Nelson similarly found that Veronica's human rights had been infringed multiple times in the period leading to her death in custody.[52]

VALS also represents an Aboriginal child being held in an adult prison.[53] The child was regularly isolated, had little opportunity for phone calls or visits from family, had no access to schooling or rehabilitative programs, and was witness to a gruesome death in custody. These are abhorrent conditions and people in Victoria's prisons are often subjected to similarly traumatising conditions that impact both their mental and physical health, and reduce their life expectancy.

VALS intervened in a Court of Appeal hearing regarding routine strip-searching and urine testing in Victoria's prisons.[54] There is ample evidence that routine strip-searches and urine tests are ineffective at stopping drugs and other contraband making it into prisons, and that the practices are used to humiliate and control people in prison.[55]

Staffing and Staff culture

Staffing and staff culture play a significant role in the conditions in prison. As mentioned previously, the union for prison staff has reported that staff are unable to cope with the current prison population size and this is having adverse effects on their ability to do their job. Staff culture was also received significant commentary in the Coronial Inquest into the passing of Veronica Nelson. The coroner used phrases such as "inhumane", "degrading", "lazy", "discriminatory" and "cultural problems" to describe staff culture and behaviour.[56]

Accountability and Oversight

Independent Detention Oversight

Prisons should be held to a high standard of accountability given the absolute power imbalance between people detained in prison and prison staff. As discussed previously, the current oversight of Victoria's prisons is inadequate at driving reforms and improving the culture within prisons.

Victoria is required to implement independent detention oversight under its obligations to the UN's OPCAT treaty.[57] Victoria has missed multiple implementation deadlines and made little progress towards even designing what independent detention oversight (or NPM) looks like.[58]

The Victorian Government has claimed that it requires funding from the Australian Government to implement independent detention oversight. This claim does not stack up against the fact that the Victorian Government has spent several billions of dollars expanding prison capacity in recent years

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[52] Coroners Court of Victoria, *Finding into death with Inquest: Inquest into the passing of Veronica Nelson*.
[53] The Guardian, *'Dying is normal in this jail': teenager held in Port Phillip prison for four months*.
[54] Victorian Aboriginal Legal Service, *Community fact sheet: VALS intervention in Court of Appeal Strip Searching and Urine Testing Case*.
[55] Ibid.
[56] Coroners Court of Victoria, *Finding into death with Inquest: Inquest into the passing of Veronica Nelson*.
[57] Victorian Aboriginal Legal Service, *Joint letter to the Attorney-General regarding OPCAT and the recent SPT visit*.
[58] The Age, *Victoria misses deadline for UN's anti-torture protocols as prison pressure mounts*.

and IBAC linked that expenditure to an increase in corruption and abuse in Victoria's prisons.[59] Implementation of independent detention oversight would cost a fraction of the money that has been spent on prison expansion. The Victorian Government has built the prisons and made the laws that are filling them up, it has a moral obligation to implement the proper accountability mechanisms that will prevent abuse in those prisons.

VALS has written many times about how OPCAT should be implemented so that it is effective, particularly for Aboriginal people and communities.[60]

RECOMMENDATIONS

Recommendation 10. Victoria must urgently implement independent detention oversight in line with its obligations under OPCAT. This implementation should follow advice provided by VALS in its *OPCAT factsheet, Nuther-mooyoop to the Yoorrook Justice Commission: Criminal Legal System* and *Plan for Aboriginal Justice in Victoria*.

Aboriginal Justice Commissioner

The Aboriginal Justice Caucus (AJC) has been asking the Victorian Government to establish an Aboriginal Justice Commissioner in this state for over 15 years. An essential role of the Commissioner would be to measure the implementation of recommendations from the Royal Commission into Aboriginal Deaths in Custody and other relevant inquiries.

The AJC should design the role of an Aboriginal Justice Commissioner in Victoria. The AJC has suggested that the Commissioner could have similar powers of the Victorian Ombudsman so that it could investigate complaints by Aboriginal people in custody.[61]

RECOMMENDATIONS

Recommendation 11. Victoria must establish an Aboriginal Justice Commissioner, as designed by the Aboriginal Justice Caucus, to improve accountability of the criminal legal system and government reform processes relating to the criminal legal system.

Criminal Prosecutions

Criminal prosecutions for Aboriginal Deaths in Custody are notoriously challenging and therefore limited. For the vast majority of families who lose a loved one in custody, information about the cause

[59] Victorian Aboriginal Legal Service, *IBAC report finds that prison expansion and privatisation are contributing factors to corruption and abuse within Victoria's Corrections system*.
[60] Victorian Aboriginal Legal Service, *Fact Sheet: The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)* and *A Plan for Aboriginal Justice in Victoria* and *Nuther-mooyoop to the Yoorrook Justice Commission: Criminal Legal System*.
[61] Yoorrook Justice Commission, *tweet 3 March 2023 at 10:50am*. Note that Yoorrook was yet to post transcripts of this hearing, but they should be available at some point.

and circumstances of the death may become available through a coronial inquest (if one takes place) but there are very few examples of successful criminal prosecutions for Aboriginal Deaths in Custody.

In the recent Inquest into the passing of Veronica Nelson, the Coroner has referred the private prison healthcare provider, Correct Care Australasia, to the Director of Public Prosecutions (DPP) for investigation for a criminal offence under the Occupational Health and Safety Act. VALS and Uncle Percy Lovett strongly support this referral. Correct Care Australasia must be held criminally responsible for its failure to provide adequate healthcare to Veronica.

Previous coronial inquests have also recommended prosecution, for example, following the Coronial Inquest into the passing of Aunty Tanya Day, two police officers involved in Ms Day's arrest and detention were referred to the DPP for investigation for negligent manslaughter. Despite this referral, the DPP decided not to proceed with the prosecution, and did not consult with the family or provide any reasons for the decision.

In the Northern Territory, the high-profile prosecution of police officer Zachary Rolfe, has also demonstrated serious challenges in achieving justice for Aboriginal families who have lost a loved one in custody or as a result of a police operation.

In 2019, Kumanjayi Walker was killed at his home, after being shot three times at close range by police officer Zachary Rolfe. He was 19 years old at the time of his death. In 2022, Zachary Rolfe was acquitted of murder, manslaughter and engaging in a violent act causing death, after a jury found that he was acting in self-defence. The jury was directed that police officer Zachary Rolfe could not be found guilty if he had honestly believed the shooting was reasonably necessary to perform his police duties – even if that belief was based on an inaccurate perception of events.

RECOMMENDATIONS

Recommendation 12. The Australian Federal Government, in partnership with State and Territory governments, should carry out an inquiry into Criminal accountability for Aboriginal Deaths in Custody and police-contact deaths, with a view to identifying and addressing key obstacles to criminal prosecutions.

Recommendation 13. Guidelines for the Office of Public Prosecutions (OPP) should be amended to:

- Require the Director of Public Prosecutions (DPP) to consult with Aboriginal families about decisions not to prosecute individuals involved in Aboriginal deaths, where there has been a referral from the Coroner;
- Require prosecutors to give written reasons to families where they decide not to prosecute someone involved in an Aboriginal Death in Custody, where there has been a referral from the Coroner.

Independent Coronial Investigations

Coronial investigations have the potential to provide accountability for Aboriginal deaths in custody and drive reforms to end Aboriginal deaths in custody. However, this potential is rarely fulfilled. The

bar Coronial investigations is too high and the current process currently includes people who are part of the institutions whose systemic failings are driving deaths in custody.

Coronial investigations into Aboriginal deaths in custody are currently mandatory, but Coronial Inquests are not. Indeed, in cases where internal reviews list the cause of deaths as being from natural causes, there is currently no requirement for that to be tested, despite the fact that many deaths in custody are due to poor healthcare in prisons.[62] Indeed, for this reason, the Coronial Inquest into the passing of Veronica Nelson almost never happened.[63]

Coronial investigations are currently performed by police officers and the Coroners court has an abundance of faith in the police, Corrections Victoria and other institutional players. Given the self-interest of these institutions when it comes to investigations into Aboriginal deaths in custody, they cannot provide an appropriate level of accountability or oversight.

Coronial Inquests should be mandatory for all Aboriginal deaths in custody, regardless of the suspected circumstances, and investigations must be carried out by a specialist civilian investigation team that is independent from police and developed by Aboriginal communities. This team must have the same coercive powers as the police for conducting these investigations.

RECOMMENDATIONS

Recommendation 14. Coronial Inquests must be mandatory for all Aboriginal deaths in custody.

Recommendation 15. Coronial investigations must be carried out by a specialist civilian investigation team that is independent from police and developed by Aboriginal communities. This team must have the same coercive powers as the police for conducting these investigations.

Data Sovereignty

In practice, the concepts of Aboriginal Data Sovereignty and Aboriginal Data Governance are a specific exercise of the right to self-determination as enshrined in Article 3 (as well as numerous other Articles) of the *United Nations Declaration on the Rights of Indigenous Peoples*. If this right was properly enshrined in legislation and enabled in practice, this would improve Aboriginal self-determination throughout the criminal legal system.

Broadly, data collection in Australia is poor and publicly published data in relation to Aboriginal overpolicing and overincarceration is insufficient to drive positive reforms of the criminal legal system that would end Aboriginal Deaths in Custody.

The Australian Institute of Criminology provides quarterly updates on deaths in custody, including Aboriginal deaths in custody.[64] The quarterly reporting has only been happening for a short period of time so it is hard to analyse its effectiveness. It should be considered how things like cause of death

[62] Sarah Schwartz, *Veronica Nelson's death was cruel and disturbing. So too was the government cover-up*.
[63] Crystal McKinnon and Ali Besiroglu, *Cover-ups and justice failures in Veronica Nelson's death*.
[64] Australian Institute of Criminology, *Deaths in custody in Australia*.

are treated, particularly given Coronial Inquest regularly bring into question when cause of death is labelled as natural causes. There is likely to be other problems with the categorisation of deaths in custody that understate the problems.

Data relating to alleged offending and incarceration is not contemporary and incredibly limited. There should be better data relating to Aboriginal deaths in custody. For instance, it is not easy to find publicly published data about the number of Aboriginal people held on remand, the categories of offences they are accused of, the average time they spend on remand, or data relating to health and healthcare in prisons.

RECOMMENDATIONS

Recommendation 16. 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:

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

Recommendation 17. 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 18. The Victorian Government must work with Aboriginal communities to establish a dashboard of data that tracks statistics that play a role in Aboriginal deaths in custody and ensure that it is regularly published publicly.

Contact

Please send enquiries to Patrick Cook, Head of Policy, Communications and Strategy, at pcook@vals.org.au or 0417 003 910.

Attachment A

A PLAN FOR ABORIGINAL JUSTICE IN VICTORIA

EMPOWERMENT, IDENTITY, CULTURE

VALS

ACKNOWLEDGEMENT OF TRADITIONAL OWNERS

The Victorian Aboriginal Legal Services acknowledges all of the traditional owners in Australia and pay our respects to their Elders, past and present. Soveriegnty was never ceded. Always was, always will be, Aboriginal land.

CONTENTS

OUR PLAN

VALS was formed almost 50 years ago to ensure Aboriginal and/or Torres Strait Islander people had access to high-quality legal services that are culturally safe and holistic. We promote self-determination and social justice for our communities through their rights to empowerment, identity and culture.

We want our communities to be built on strong families. We want our people to be connected to community, culture, and Country. We want our communities to have the opportunity to make the choices in life that they believe are best. We believe our communities deserve secure housing, excellent healthcare and education, and secure work that pays the bills.

Aboriginal and/or Torres Strait Islander people maintain the oldest continuing culture on earth.

Our culture gives us strength. Our people thrived on our traditional lands for tens of thousands of years thanks to the strength we got from our culture.

Over 230 years ago, our lands were invaded by a colonial force that first tried to kill us and then tried to kill our culture. Our people and culture persist because we are strong, but the effects of colonisation continue to harm our people.

Our people are over-policed, overincarcerated and continue to die in custody. This is a crisis. The justice system has failed and needs to be rebuilt. This crisis demands strong political leadership. This crisis needs all Victorians to demand their political representatives to act.

Rebuilding the justice system will give Aboriginal and/or Torres Strait Islander communities a chance to breathe, and it will make the life of every Victorian better.

This is VALS' plan to rebuild the justice system so that it gives everyone a fair chance in life.

Our plan includes:

- funding for VALS to support all Aboriginal and/or Torres Strait Islander people who want to use our services
- bail and sentencing reform
- independent detention oversight
- raising the age of criminal responsibility
- ending Victoria's overreliance on prisons and police, and
- creating a better future for our children.

VALS is a not-for-profit legal service, one of the oldest community legal services in Australia. We have always required funding to help deliver our services, because our communities often cannot afford to pay for legal services. The current system was made by white men, for white men. It is a system that makes it harder for our people to get good housing, education, healthcare, and work. The actions of government have often directly led to our communities needing our legal services, and governments should recognise their responsibility to properly fund these services. The COVID-19 pandemic and Victoria's "tough on crime" agenda have dramatically increased demand for VALS' services. We need more resources to deliver our legal services in local communities.

CIVIL LAW & HUMAN RIGHTS

Many Aboriginal and/or Torres Strait Islander people have their basic rights denied because of the systemic discrimination they face every day. Our Civil Law and Human Rights Practice has helped our people with housing and employment issues, coronial inquests, discrimination and human rights matters, and debt issues. We have proudly helped our people engage with the Disability Royal Commission. We have also expanded our services to provide dedicated support for people with mental health issues. By ensuring our people can exercise their human rights, we are helping to empower them to live a good life and avoid contact with the legal system.

FAMILY VIOLENCE

Family violence continues to be an issue that all communities face. Eradicating family violence is not a quick fix, it requires generational work. Aboriginal and/or Torres Strait Islander people experience family violence in a unique way. Our people find it hard to access services, because there often aren't culturally safe or culturally aware services in their community. Our people are less likely to trust the police because of ongoing systemic racism within the police. Too often, when our people experience family violence, instead of receiving support, they are criminalised. The Victorian Government should invest more in self-determined responses, culturally safe supports, and community building.

OUT-OF-HOME-CARE

When Aboriginal and/or Torres Strait Islander people are given a fair chance, our strength shines through and we build strong families and communities. Too often, our people are not given a fair chance. Victoria has the highest rate of Aboriginal children in out-of-home-care and the highest rate of Aboriginal children on care and protection orders. The child protection system is harming our children and families, not helping them. Contact with the child protection system greatly increases the chances that a child will end up in the criminal legal system. At VALS, our Balit Ngulu and Aboriginal Families Practices work every day to reconnect our children to community, culture, and Country. The Victorian Government should give us the resources to expand our work to build strong families and communities that give our children the best chance in life.

IMPRISONMENT

The Victorian prison population has increased dramatically over the last decade. This is a failure.

Prisons do not rehabilitate people and they do not make communities safer. We want the Victorian Government to commit to moving towards a zero prison population. Getting people out of prison and keeping them out of prison by providing strong supports is the only way to make our communities safe. While we are moving towards a zero prison population, the Victorian Government must also commit to minimising the trauma and violence that prison inflicts on people.

PUNITIVE BAIL LAWS

The Victorian Government has created punitive bail laws that destroy lives, families, and communities. Aboriginal women are now the fastest growing group in Victoria's prisons and half of them are in prison because they were denied bail. They are in prison despite having not been found guilty and many of them are unlikely to receive a prison sentence if they are found guilty. They are often primary carers and when they are denied bail it has a damaging impact on their families and communities. It is the same for Aboriginal children, who make up a large portion of the children held in Victoria's youth prisons. At a time when they should be building their connections to culture, community and Country, they are put into a hostile and damaging environment that strips them of their future.

Victoria's bail laws are the complete opposite of what the Royal Commission into Aboriginal Deaths in Custody recommended - to increase access to bail.

The Royal Commission made it clear that custody should always be a last resort, but in Victoria it has been legislated as the default. The existence of mandatory sentences is also incredibly damaging and sends the message that the justice system is about retribution, not rehabilitation, healing, community safety or justice that fits the individual context. Victoria needs to reform bail and sentencing laws to focus on support, healing and reintegration.

RAISE THE AGE

In Australia, children as young as 10 years old are locked up in prison. Many of these children have allegedly committed only minor offences. Overwhelmingly, these children are Aboriginal and/or Torres Strait Islander. Expert health advice says that prison only traumatises children. Medical evidence says that the brain is still developing in children this young, and they do not have the capacity to have criminal intent. The Victorian Government agreed to the Closing the Gap target to reduce the rate of Aboriginal and/or Torres Strait Islander young people in detention by 30% and Victoria will need to raise the age to meet this target in a sustainable way. The UN Convention on the Rights of the Child states that incarceration of children should be a last resort and for the shortest period possible, but in Victoria children are often held in prison for months after being denied bail for minor offences. Many countries have raised the age of criminal responsibility to at least 14 years old. There is broad public support to raise the age. Victoria must raise the age urgently to at least 14 years.

CORRUPTION & ABUSE

In recent years, there have been many reports about corruption and abuse in prisons. The recent Coronial Inquest into the passing of Veronica Nelson heard evidence that Veronica did not receive appropriate healthcare and was not treated humanely by corrections staff. The Independent Broad-Based Anti-Corruption Commission (IBAC) linked billions of dollars of government spending on prison expansion to an increase in corruption within prisons and the abuse of people in prison. In Operation Rous, IBAC found that corrections officers had used excessive force and conducted strip-searches that breached official policy and were degrading in two incidents, including one that involved an incarcerated person with an intellectual disability. IBAC found that these incidents were not isolated. The Australian Government ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) in 2017. OPCAT requires governments to establish independent detention oversight bodies. VALS is of the firm view the Commonwealth and Victorian Governments must design independent detention oversight in Victoria in consultation with Aboriginal and/or Torres Strait Islander communities, to ensure that it is culturally appropriate.

Victoria has spent billions of dollars expanding and upgrading prisons. Even though crime rates are low, Victoria's prison population has dramatically increased in the last decade. Prisons have proven to be ineffective at achieving rehabilitation and healing. Despite these low crime rates, Victorian Government spending on police has grown at twice the rate of other states over the last decade and Victoria now has the largest police force in Australia. The Victorian Government committed $1.8 billion for prison expansions in the 2019/20 budget. This spending means that more Aboriginal and/or Torres Strait Islander people are locked up in prison. Aboriginal women are the fastest growing demographic in Victoria's prisons.

Spending on prisons, which harms Aboriginal families and destroys communities, is not the way forward.

VALS urges governments to spend their money on support services and programs that allow us to close prisons.

COMMUNITY BASED REFORM

Victoria should be rebuilding the legal system and making investments that empower stronger families and communities. Our Plan is based on our connection to our community and our almost half century of experience and expertise. We have the solutions – they have been researched and refined through countless inquiries like the Royal Commission into Aboriginal Deaths in Custody. We need the resources and authority to take real action to rebuild the justice system.

Many governments say they believe in Aboriginal self-determination. We need them to prove it. Governments need to properly fund VALS and adopt our proposed expert-informed, evidence-based reforms. Aboriginal and/or Torres Strait Islander people are strong. Aboriginal and/or Torres Strait Islander people are staunch. Aboriginal and/or Torres Strait Islander people have survived. Our people deserve the opportunity to heal our communities. When we are afforded that opportunity, Victoria will be a fairer place and all Victorians will benefit.

BUILDING THE ABORIGINAL LEGAL SERVICES OUR PEOPLE DESERVE

VALS is a community organisation.

We are at our best when we are connected to community and in community. We want to build our services so that we are more connected to community and delivering the Aboriginal legal services our people deserve.

Aboriginal and/or Torres Strait Islander people are the most incarcerated people on earth. There is an Aboriginal and/or Torres Strait Islander death in custody once every three weeks in Australia. VALS is on the front line of this crisis. Our Community Justice Programs supports community members in their most vulnerable moments, from when they are arrested by police, and our legal services help clients navigate their way through, and then out, of the justice system.

Both the Victorian and Commonwealth Governments must invest in stronger Aboriginal Legal Services by funding and supporting:

- Funding local, community-based Aboriginal Legal Services, so VALS is more accessible to community members
- Respecting the right of Aboriginal and Torres Strait Islander peoples to self-determination in legislative and other policy reform processes
- Early intervention services
- Implementing reforms that address the over-policing and overincarceration of Aboriginal and/or Torres Strait Islander people
- Culturally safe and responsive services
- Reducing recidivism

By strengthening our connection to community and implementing the reforms and services our communities need, we will be able to reduce the over-policing and overincarceration of our people.

Aboriginal Legal Services are the best investment a government can make. Spending on police, prisons, and courts is expensive and has failed on rehabilitation, healing and community safety. Investing in VALS helps get our people out of the justice system and to stay out of the justice system. That saves the government money by reducing demand on police, prisons, and courts. VALS also has almost half a century of experience in delivering high-quality services on limited resources. We know how to get the most out of our limited resources.

LOCAL ABORIGINAL LEGAL SERVICES

VALS is most effective when we are in community. Our people need connection to community, culture, and Country. When we have staff based in the communities where our people live, we have a stronger connection with them and are able to provide better services for them. When our people come into contact with the legal system, they face a lot of stigmatisation that can stop them from seeking help. When they do not receive high quality, culturally safe legal services, it can lead to further contact with the legal system.

Our children have disproportionate contact with the child protection system, are disproportionately expelled from school, and are disproportionately placed in residential care. This is often because they and their families have not received the services they need.

Contact with the child protection system and residential care means they are more likely to end up in youth prison. Being in youth prison drastically decreases their opportunities in life and makes it far more likely they will have ongoing contact with the criminal legal system. The trauma of ongoing contact with the legal system is shared by a person's family and community. It can often increase the likelihood of other people in the person's community coming into contact with the legal system.

The generational over-policing and overincarceration of our people continues to drive Aboriginal and/or Torres Strait Islander deaths in custody.

When VALS is part of a local community, we can help our people get out of the legal system and stay out.

We can do this through our services, and by connecting our people to other local services. When our people know they can trust us because we are part of their community, they are more willing to engage with us earlier and more willing to engage with other services to which we connect them.

That is why we are asking for government to invest in expanding our network of local offices. We want government to invest in 12 local offices which would be based in Mildura, Geelong, Latrobe Valley, Shepparton, Bendigo, Frankston, Bairnsdale, Ballarat, Melton, Warrnambool, Wodonga, and Horsham.

Over half of the Aboriginal people living in Victoria are based in regional and rural areas, but less than a quarter of VALS' current case work comes from outside of Melbourne. This points to a large unmet need in regional Victoria for VALS' services.

The outer suburbs of Melbourne are also home to growing Aboriginal communities, particularly in the north and west, but also along the bayside and Mornington Peninsula.

VALS' plan for local Aboriginal Legal Services is ultimately about Self-Determination. We know how to support our communities and make them strong. We know how to heal our families and raise our children. We are accountable to our people. Governments should give us the resources we need to help them as this will then reduce the costs of Victoria Police, Corrections Victoria and other system responses.

OFFICE LOCATIONS

VALS considered the following key factors when determining where our new office network should to be located:

- Where are there largest Aboriginal and/or Torres Strait Islander populations, and where will there be significant population growth?
- Where are Aboriginal and/or Torres Strait Islander people having disproportionately high rates of contact with the justice system?
- Where do our people need support connecting to other support services?
- With which services can we partner with to ensure our services are holistic and that we are able to prevent clients and community members having future contact with the justice system?
- Where are courts and prisons located?

Based on these criteria and relying on ABS census data, Crime Statistics agency data, Social Ventures Australia's 2019 report on Demand for services for Aboriginal and Torres Strait Island people in Victoria, key indicators from *Burra Lotjpa Dunguludja (Aboriginal Justice Agreement phase 4)*, and our own data of service demand, we believe that the following locations should be prioritised:

Hub Offices:

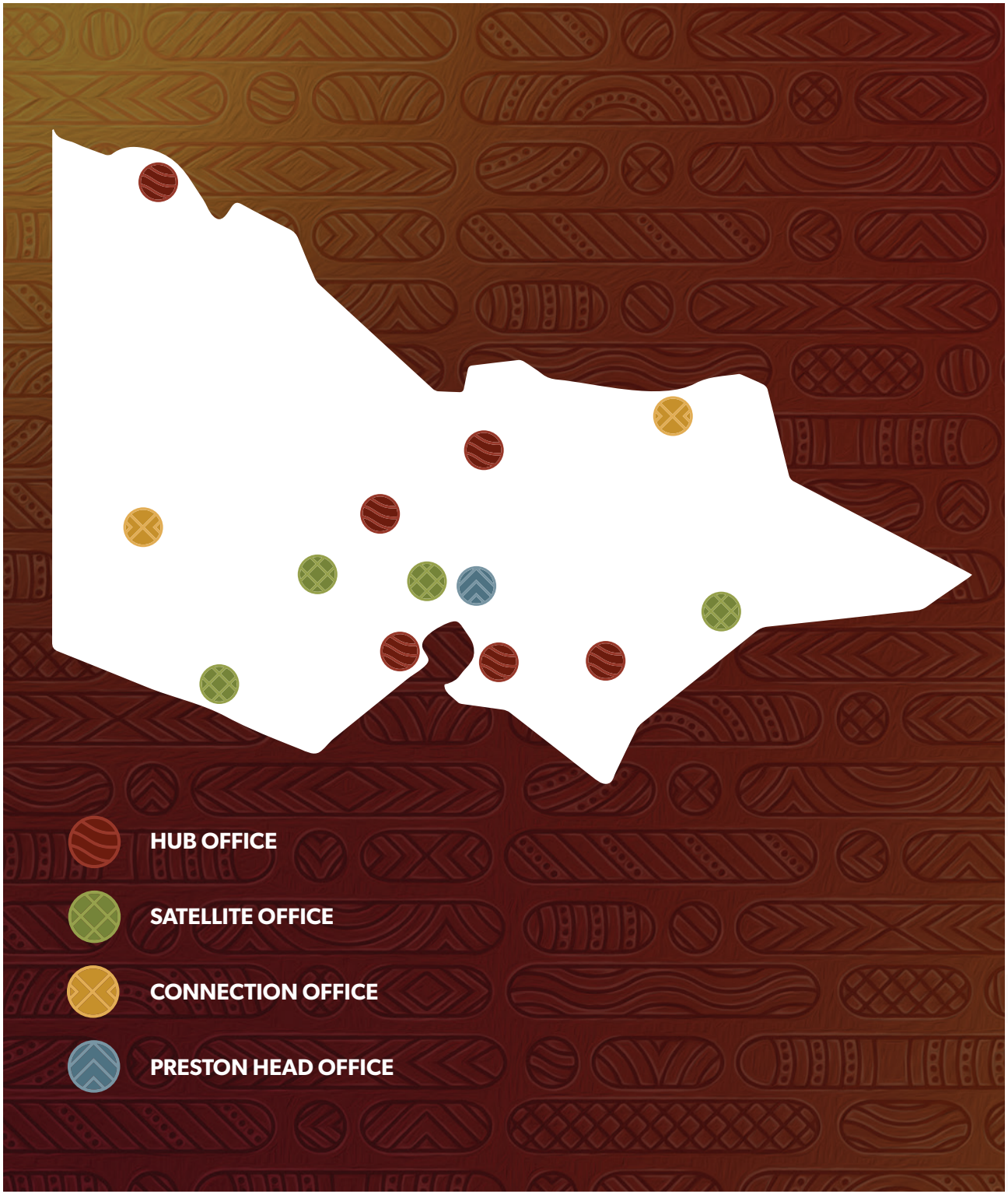
- Mildura - Latji Latji and Ngintait
- Geelong - Wathaurung
- Latrobe - Gunaikurnai
- Shepparton - Yorta Yorta
- Bendigo - Dja Dja Wurrung
- Frankston – Bunurong

Satellite Offices:

- Bairnsdale - Gunaikurnai
- Ballarat - Wadawurrung
- Melton - Wurundjeri
- Warrnambool – Eastern Maar and Gunditjmara

Connection Offices:

- Wodonga - Wiradjuri, Waveroo and Dhudhuroa
- Horsham – Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagalk



Expansion of Aboriginal legal services will need to include funding for renting office space located near other relevant service providers, staff costs that cannot be relocated from centralised services, furniture, IT, utilities, and transport.

Local offices would have the following staffing allocations:

- **Hub Office:** 1 Criminal Lawyer, 1 Civil Lawyer, 1 Family/Child Protection Lawyer, 1 Legal Secretary, 2 Client Service Officers. (6 FTE)
- **Satellite Office:** 1 Criminal Lawyer, 1 Family/Child Protection Lawyer, 1 Legal Secretary, 1 Client Service Officer. (4 FTE)
- **Connection Office:** 1 Client Service Officer. (1 FTE)
- **Preston Head Office:** 4 Administration Officers and 4 Filing Clerks primarily based in Preston but dedicated to servicing the local office network. (8 FTE)

In 2021, the Victorian Government provided funding for VALS to relaunch Balit Ngulu, our specialised practice for Aboriginal and Torres Strait Islander children, in Preston and Shepparton. Our local offices would also allow for future expansion of Balit Ngulu, which has already received praise from several courts for the quality of service it has provided for our young clients.

SERVICES TO WHICH WE CONNECT CLIENTS

An essential part of our holistic, culturally safe model is to connect clients with support services. This is not just a referral. Our staff will often help clients with transport and small costs to help them engage with those support services. Our staff help clients fill out application forms and other paperwork that may be required to access some services.

Examples of organisations that we refer clients to for support services are:

- **Statewide and metro organisations:**

  Victorian Aboriginal Health Service, Victorian Aboriginal Community Controlled Health Organisation, Ngwala Willumbong Co-Op, Mullum Mullum Indigenous Gathering Place, DirectLine, Drummond Street Services, Co-Health, IPC Health, Care Connect, Headspace, Yarns Heal, Strong Brother Strong Sister, Dardi Munwurro, Wulumperi Aboriginal and Torres Strait Islander Sexual Health Unit, Black Rainbow, First Nations Rainbow, Koori Pride Victoria, Rainbow Door, LGBTIQ+ Rural and Regional Program, Djirra, Yappera Children's Services, Elizabeth Morgan House, Mackillop Family Services, The Smith Family, Aboriginal Housing Victoria, VACSAL, Aboriginal Advancement League, Aboriginal Hostels, Vincent Care, Kara House, Women's Housing Ltd, iBobbly Phone App.

- **Victorian Co-Ops:**

  Goolum Goolum Aboriginal Co-Op, Gunditjmara Aboriginal Co-Op, Worn Gundidj Aboriginal Co-Op, Bendigo & District Aboriginal Co-Op, Budja Budja Aboriginal Co-Op, Dandenong & District Aborigines Co-Op, Murray Valley Aboriginal Co-Op, Wathaurong Aboriginal Co-Op, Willum Warrain Aboriginal Service, Maggolee.

- **Mildura:**

  Mallee District Aboriginal Service, Aboriginal Action Committee, Sunraysia Community Health Service, Dareton Home Care Service, Coomealla Health Aboriginal Corporation, Robinvale District Health Service, Haven Home Safe, Mallee Accommodation and Support Program, Sun Assist, Mallee Track Health and Community Service.

- **Shepparton:**

  Rumbalara, GV Health, Primary Care Connect, Beyond Housing, Housing Victoria, Salvocare Shepparton, The Bridge Youth Service, The Youth Foyer, Wintringham Housing, Mooroopna Life Church/Op Shop, Shepparton Red Cross, Shepparton Family and Financial Service, Vincent Care Shepparton.

These lists are not exhaustive, but represent the types of organisations to which we connect our clients, based on their need.

SUCCESSFUL IMPLEMENTATION OF REFORMS

A number of reforms have started over the last few years which have the potential to improve the lives of our people. These reforms target systemic racism and generational injustices. If these reforms are successful, they will help reduce the over-policing and overincarceration of our people. We believe that VALS has a role to ensure these reforms achieve their full potential, and that the Victorian Government should fund us to do that.

Support for Community to Engage with Yoo-rrook

Yoo-rrook is a significant Government commitment. It has the potential to empower our people and give them the power to drive systemic reform that improves their lives. Community Legal Education programs are required to raise awareness of Yoo-rrook and help our people be part of this important work. For those who choose to participate, many need legal advice and access to a support worker to prepare for their participation and help them cope with what could be a re-traumatising experience. During the Disability Royal Commission, VALS has found that many participants also have other legal issues with which they need help to resolve. In their first interim report, Yoo-rrook asked for the term of their work to be extended. VALS believes that the funding we have been provided to effectively contribute to and support the Yoo-rrook commission will also need to be extended.

Support Community Applying to the Stolen Generations Reparations Package

Members of the Stolen Generation disproportionately have greater needs. This includes more risk of contact with the justice system. Access to the Reparations Packages will help them address these needs.

Community Legal Education is needed to help Aboriginal and/or Torres Strait Islander people understand potential entitlements and how to apply for a package. Applicants require access to culturally safe legal services. These legal services require brokerage funding to enable support for applicants with small costs associated with the scheme. Applicants also need support workers to help them navigate the process and connect them to services, particularly when the process is traumatising.

Anti-Vilification Legislative Reforms

Our people regularly face vilification. This impacts their ability to get secure housing and employment, access education and health services, and live the life they choose to. In 2021, a Parliamentary Inquiry found that the current legal process makes it difficult for people who have been vilified to seek justice.

Recommendation 28 of the Inquiry into Anti-Vilification Protections is "[t]hat the Victorian Government fund organisations such as Victoria Legal Aid and the Victorian Aboriginal Legal Service to engage in strategic litigation on vilification matters to develop practice in this area."

VALS welcomes the Victorian Government commitment to stronger anti-vilification laws. It is hard to predict how many complaints might be brought under the new legislation. The VEOHRC Annual Report 2020-21 reports almost 500 enquiries and just under 200 complaints related to racism and racial vilification. VEOHRC also reported that they continue to have large annual increases in enquiries and complaints about racial vilification. There is clearly significant under-reporting of racial discrimination in the past. Successful litigation is likely to drive demand into the future.

VALS requires some targeted funding for a lawyer and social worker to deliver this recommendation.

Implementation of the Royal Commission into Victoria's Mental Health System Recommendations

Our people are more likely to have mental health issues and are more likely to face discrimination because of their mental health issues. The Royal Commission into Victoria's Mental Health System showed a link between mental health issues and contact with the criminal legal system. The Commission highlighted the need for culturally safe and trauma informed services.

Investment in VALS to restart and sustain the Disability Justice Support Program, piloted as part of the *Unfitness to Plead Project*, would support equal access to justice for people with disability. Key findings of the project included inaccessible court proceedings that rely on complex language, inconsistent availability of support throughout court proceedings and under-resourced legal services.

CULTURALLY SAFE AND RESPONSIVE SERVICES

Our people often do not trust government and generalist services because of a history of discrimination that continues today.

Culturally safe services are the best way to deliver services to our people.

Investing in culturally safe services is the only way Victoria will meet the targets of the Aboriginal Justice Agreement and the Closing the Gap Agreement.

WE BELIEVE THE VICTORIAN GOVERNMENT SHOULD INVEST IN THE FOLLOWING CULTURALLY SAFE AND RESPONSIVE SERVICES:

Expand Housing and Support Services for Aboriginal and/or Torres Strait Islander People Leaving Prison

The Victorian Government funded the establishment of Baggarrook, a program that provides housing and support to build independent living skills and reduce future offending of Aboriginal and/or Torres Strait Islander women transitioning out of prison. There is potential to expand this program and to offer a similar service to Aboriginal and/or Torres Strait Islander men.

Increased Community Legal Education for Aboriginal and/or Torres Strait Islander People

Community Legal Education helps keep people out of the legal system. It is crucial this is delivered in a culturally safe way, involving Aboriginal community members working alongside Elders, lawyers and other specialists. This education needs to be provided in many ways, including face-to-face and online sessions, and accessible resources in print and digital forms.

Social Workers to Support Our Clients

Most people who come into contact with the justice system have complex needs. These often involve mental health needs, trauma, disability, family violence and poverty. Social workers improve the quality of culturally safe legal services. They help clients address the underlying causes of offending and work through other parts of the legal system, such as child protection and civil law. They also help minimise the risks of vicarious trauma and build the skills and resilience of front-line staff.

Brokerage Funding for Frontline Services

Brokerage funding allows for culturally safe services to pay for small costs that help our people avoid contact with the legal system. For instance, the VALS Custody Notification Service would benefit from being able to help clients with small costs such as after-hours transport and short-term accommodation, particularly when clients are released from custody after-hours. VALS' recently relaunched Balit Ngulu would like brokerage funding to buy items such as sport uniforms, school books and medical supplies for clients to help them reconnect to education, support services and community. This supports effective diversion and prevention.

Aboriginal and Torres Strait Islander Cultural Awareness Training for the Legal System

Many organisations ask VALS to provide cultural awareness training, particularly organisations in the legal system. It is not surprising - we are the only dedicated, full service legal assistance service for Aboriginal and/or Torres Strait Islander people in Victoria, and have nearly 50 years of experience. We provide cultural awareness training and advice on an ad hoc basis, but we have no dedicated funding for this purpose. We welcome being able to improve cultural awareness across the legal system, but we should be funded to provide this training so that we are able to address some of these systemic issues while continuing to provide wrap-around support for our clients.

Improved Transport Access

The legal system is often viewed as inaccessible and hostile by Aboriginal and/or Torres Strait Islander communities. Transport often plays a decisive role in whether the legal system is accessible or not. Courts can be difficult to physically get to for our people in regional communities, or those from low-income communities. Our people often need access to transport to have their bail approved. Aboriginal and/or Torres Strait Islander people released from custody or prison, often cannot access transport due to the location or time of their release. This is distressing and increases the risk of them breaching the conditions of their release. Having the ability to provide transport for clients to get to court, or pick them up when they are released from custody, will help our people get out of the legal system and stay out.

Court Outreach Workers

Court is often an intimidating place and the process is foreign to many people. Court outreach workers for Aboriginal and/or Torres Strait Islander people have been successful in making court more accessible, but there is scope for much greater investment in this work.

Improved Office Accessibility and Capability

The Victorian Government has acknowledged that the COVID-19 pandemic has led to significant changes in the way courts operate and that some of those changes will become the new normal for Victoria's courts.

An increase in online court hearings has put a significant infrastructure burden on legal services like VALS. It means that there is need for PPE and air filtration, soundproofing, and high-quality audio-visual equipment to ensure that legal services can properly participate in online court hearings with their clients.

REDUCING RECIDIVISM

Reducing recidivism and getting people out of the quicksand of the legal system helps the individual and has significant community benefits. It is essential to achieving the justice targets in the new Closing the Gap Agreement.

Spent Convictions Legislation

When passing the spent convictions legislation, the Attorney-General noted that the legislation will provide an opportunity for rehabilitation. It is hard to quantify the number of people who will be eligible for the spent convictions scheme or how quickly they will engage with it.

To ensure the spent convictions legislation is effective, Community Legal Education is necessary. This equips the community with knowledge of available options and about the benefits to having convictions spent. People will also need legal advice and representation, and services will need brokerage to make the process accessible.

Aboriginal Community Justice Reports

The Aboriginal Community Justice Reports project is currently a pilot project that does not have ongoing funding. The Reports are modelled on Canada's Gladue Reports and adapted for the Victorian context. The reports support judges to make sentencing decisions that reflect the strengths and challenges in a person's life, and increase their chances of being rehabilitated. In Victoria, 20 Aboriginal Community Justice Reports will be produced. A case worker is made available to each person who participates to provide support and care.

It has received wide support from the courts, including a recommendation from the Supreme Court of Victoria which said "we note that a project has recently commenced to trial Aboriginal Community Justice Reports. As this case has demonstrated, the provision of such reports in appropriate cases will constitute an important step in ensuring the just sentencing of offenders in this State."

VALS believes that the Victorian Government should provide ongoing funding for the Aboriginal Community Justice Reports.

Parole Lawyer/Support Worker

There is the opportunity for a scoping project on the accessibility of parole for Aboriginal and/or Torres Strait Islander people and how Aboriginal legal services can develop services to increase access to parole in ways that support reduced recidivism. While Aboriginal and/or Torres Strait Islander people may be sentenced in a manner that envisages opportunities to be released on parole, and being provided additional supports in the community, many of our people end up serving their entire sentence. This contributes to the overincarceration of Aboriginal and/or Torres Strait Islander people.

Develop a Victorian Bugmy Bar Book

The development of a Victorian Bugmy Bar Book will be useful in improving access to bail and improving sentencing decisions for Aboriginal and/or Torres Strait Islander people.

Bugmy is a court decision that said the courts must consider the circumstances of someone's background and that this be given proper weight by sentencing judges. This project can bring relevant research together for lawyers and the court to ensure they are properly considering these circumstances. It needs to be ongoing to ensure the latest research is available, requiring a librarian.

It is essential that this project is led by Aboriginal and/or Torres Strait Islander people and the Victorian Government should fund VALS to lead this project.

EXPANDING SERVICES TO SUPPORT OUR CHILDREN

Balit Ngulu is a law practice dedicated to Aboriginal children and young people. It is a trauma-informed, holistic service. In 2021, The Victorian Government provided funding for the relaunch of Balit Ngulu in Preston and Shepparton. Balit Ngulu has hit the ground running and achieved great results for our clients and received praise in several courts for the extensive support that the service provides.

In an evaluation of Balit Ngulu, several justice sector stakeholders said that Balit Ngulu ensured Aboriginal and/or Torres Strait Islander children were better prepared for court, had better follow up, and received high quality, holistic support. When asked about their experience, a client said "it [the court proceedings] would have been really stressful, really hard to cope, I don't think I could have done it without them."

Balit Ngulu should be expanded so that it can support more of our children in more communities across Victoria.

BAIL REFORM

Victoria's bail laws are destroying our families and communities. In 2017, the Victorian Government introduced punitive bail laws and said they would make communities safer. In reality, these laws have led to a massive increase in the prison population, which has destroyed families and drained government resources away from communities.

In Victoria, the Aboriginal imprisonment rate has almost doubled in the last ten years, and about half of the prison population is on remand.

Aboriginal women are the fastest growing demographic in Victoria's prisons. Many of them have been denied bail on charges that would not lead to a prison sentence if they were convicted. Many of them are primary carers, and removing them from their families and communities has a devastating impact. Many of them are victim-survivors of family violence. They need support, not a prison cell.

About half of the Aboriginal children in youth prisons have been denied bail. They are charged with petty offending, and they are subjected to the same bail test as an adult. Youth prisons do not rehabilitate any child. Youth prisons steal a child's future and increase the likelihood that they will be trapped in the quicksand of the legal system for their whole life.

Which communities are safer because of the Victorian Governments punitive bail laws? Not our communities. Over-policed and denied support, our communities are battling to survive.

30 years ago, the Royal Commission into Aboriginal Deaths in Custody handed down its report, which included recommendations to increase access to bail and only use prison "as a sanction of last resort". Since then, they have been repeated in many reports, reviews, inquiries and forums, yet Victoria has failed to implement these recommendations and instead has gone backwards.

All Victorians are paying the price for these punitive bail laws. The rapidly increasing prison population has required the Government to spend billions of dollars on expanding prison capacity and lead to an unsustainable increase in the ongoing costs of prisons. IBAC has linked this spending to an increase in corruption within Victoria's prisons.

VALS Policy Brief, *Fixing Victoria's Broken Bail Laws*, makes recommendations on the crucial legislative and policy reforms that are needed to fix Victoria's failing bail regime, including:

- Repealing the reverse onus provisions;
- Create a presumption in favour of bail for all offences;
- Clarify that "flight risk" is a risk that the person will flee the jurisdiction;
- Bail hearings must take place in person;
- If someone is unrepresented in a bail hearing, the bail decision maker must be required to make inquiries as to whether the person is Aboriginal;
- All bail decision makers must be required to explain how they have discharged their obligation to consider Aboriginality in bail decisions.

It is important that these bail reforms are done properly and quickly. Every day, the lives of Aboriginal and/or Torres Strait Islander people and their communities are being destroyed by the current punitive bail laws. The Victorian Government and all our politicians must take responsibility for the damage that is being inflicted on our people by the punitive bail laws and fix them.

RAISE THE AGE

VALS wants the Victorian Government to stop putting children in prison. In Victoria, children as young as 10 years old can be put in prison. Aboriginal and/or Torres Strait Islander children are far more likely to be put in prison than non-Aboriginal children. Prisons do not rehabilitate our children.

According to Closing the Gap data, the incarceration rate of Aboriginal and/or Torres Strait Islander children is more than 6 times higher than the rate of non-Indigenous children. Putting our children into prison steals their future from them and traumatises their families and community.

Children who have contact with the legal system have been failed over and over again by society.

We should be investing in the support services that children and their families need, to give them a good chance in life. When we fail children, we have the responsibility to do the hard work to give them a second chance. Prison takes away a child's chances.

Every child should be free to go to school, have a safe home to live in and be supported to learn from their mistakes. Locking children away in prison can cause them lifelong harm, increases their risk of mental illness, disrupts their education, and even increases their chance of premature death.

VALS believes that the age of criminal responsibility should be raised to at least 14 years old and that the minimum age of imprisonment should be at least 16 years old. We say at least because we believe the evidence shows that no child benefits from imprisonment. Cut off from family, culture, friends, school, and proper healthcare, children in prison are being forced into a life trapped in the legal system.

Much of the world has raised the age of criminal responsibility. They have not experienced an explosion in youth crime. They have just stopped putting children in prison.

Almost all of the children in youth prisons are there for minor offending. Children committing serious crimes is not a problem that needs to be dealt with through prisons. The Attorney-General, Jaclyn Symes, said that *"serious offending by children under 15 is exceedingly rare…the rate at which children under 15 commit serious offences…is around one conviction per year."* We can rehabilitate this very small number of children in ways that give them a chance at living a good life.

Alternatives to prison already exist and they work, but services do not have enough resources to support all the children who need them. Governments can fund these programs if they choose to. It would not be a blow to their budget – it would actually save money because these children would not end up in contact with the legal system for their whole lives

VALS wants the Victorian Government to:

- Raise the age of criminal responsibility to at least 14 years old;
- Raise the age that children can be detained to at least 16 years old and;
- The presumption of doli incapax should be extended by legislation to young people aged 14 to 17, with further amendments to ensure its effective operation.

Australia has a long history of taking Aboriginal and/or Torres Strait Islander children away from their parents. It has even apologised for it at times. Yet that history is not the past, because it continues today. Putting our children in prison is destroying our families and it needs to stop.

POLICE OVERSIGHT AND ACCOUNTABILITY

VALS wants police to be accountable. Systemic racism in Victoria Police impacts our communities on a daily basis and manifests itself in the way that our people are over-policed, over-represented in police custody and under-served when they seek assistance from police. Our people are also more likely to be subjected to police use of force and explicit racial abuse. An independent oversight body that provides culturally aware services is needed to begin to change the entrenched culture of Victoria Police.

Abuse of police power has been rife, and inadequately investigated, for so many years that only a broad-ranging Royal Commission into Victoria Police could expose the full extent of police misconduct that has been allowed to happen unchecked. Root and branch reform is needed.

There can be no more delays. There can be no more police investigating police. It is time for accountability.

In our submission to the Inquiry into *Victoria's Criminal Justice System by the Legal and Social Issues* in 2021, our *Building Back Better: COVID-19 recovery plan*, and our policy brief *Reforming Police Oversight in Victoria*, we have made dozens of recommendations for systemic reform to policing in Victoria.

VALS believes that the Victorian Government must:

- Undertake a more comprehensive reform process to consult on, design and implement all the core components of an effective police oversight system;
- Establish a new independent police complaints body;
- Ensure all police complaints, except customer service matters, are dealt with by the independent police complaints body;
- Ensure the Office of Public Prosecutions must be required to provide a written justification to the complainant and the independent complaints body if it does not pursue charges following a recommendation from the independent police complaints body to prosecute;
- Require Victoria Police to publicly release data, broken down by key demographic characteristics, including Aboriginality and geography, on the use of key police powers that disproportionately affect marginalised people, including searches, move-on orders, and youth arrests;
- Establish an independent monitoring body with powers to access and analyse data about the use of police powers, and issue public reports;
- Ensure the new independent police complaints body and all bodies responsible for monitoring police places of detention, must be mandated to investigate systemic racism.

We must have a world class police oversight system. A legal system without police accountability can never deliver justice. It is clear that Victoria has no effective police oversight. Patching up the system will not work – we need a fully independent police oversight body.

INDEPENDENT DETENTION OVERSIGHT

VALS wants an independent detention oversight system in Victoria, that is culturally appropriate for Aboriginal and/or Torres Strait Islander people. Independent detention oversight has the potential to prevent Aboriginal deaths in custody if it is implemented properly. In December 2017, Australia ratified the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (**OPCAT**). This commitment required the Commonwealth Government and all State and Territory Governments to implement independent detention oversight. This would involve independent bodies having the right to enter places of detention unannounced and observe how they operate. These bodies would also be able to interview people in those places of detention and report their findings publicly.

Australia asked for a three-year extension to implement independent detention oversight but failed to meet that extended deadline. The UN then granted a further extension of a year to Australia, until January 2024. Governments continue to blame each other for these delays instead of working together to end torture in Australia.

Aboriginal and/or Torres Strait Islander deaths in custody are a crisis. Over 520 Aboriginal and/or Torres Strait Islander people have died in custody since the Royal Commission into Aboriginal Deaths in Custody. Analysis of these deaths in custody by government organisations and media outlets found that a large portion of them were preventable. A lack of access to healthcare and prison staff failing to follow procedures are two major factors in the crisis.

Independent detention oversight would allow for these failings to be identified and publicly reported on before people die.

Too often, the loved ones of Aboriginal and/or Torres Strait Islander people who have died in custody spend years in coronial processes, only for the findings to be ignored by government.

While recommended changes are ignored, the same mistakes are repeated over and over, and more of our people die too young.

Independent detention oversight bodies, or National Preventive Mechanisms, should not only investigate prisons. Oversight bodies must be able to investigate all places where individuals are or may be detained. This should include all police places of detention, secure residential care facilities, and forensic mental health hospitals. The Royal Commission into Mental Health in Victoria and the Disability Royal Commission have both highlighted shocking abuses in these facilities. Aboriginal and/or Torres Strait Islander people are subject to the worst of these abuses because we are more likely to be in these facilities due to the ongoing effects of colonialism and the gap in health outcomes compared to non-Indigenous people, as well as systemic racism in the mental health sector and disability sector.

During the COVID-19 pandemic we have seen people detained due to emergencies. The lockdown of public housing in Flemington was particularly concerning. The Victorian Ombudsman later said that the lockdown had breached human rights and that "the early days of the lockdown were chaotic: people found themselves without food, medication and other essential supports." An independent detention oversight body should have the right to be on the ground at such events.

To properly implement OPCAT, the Victorian Government must:

- Urgently undertake robust, transparent and inclusive consultations with the Victorian Aboriginal community on the implementation of OPCAT in a culturally appropriate way;
- Ensure the operations, policies, frameworks and governance of the designated detention oversight bodies are culturally appropriate for Aboriginal people;
- Legislate for the National Preventive Mechanism's mandate, structure, staffing, powers, privileges and immunities;
- Ensure that the National Preventive Mechanism is sufficiently funded to carry out its mandate effectively;
- The National Preventive Mechanism in Victoria must have jurisdiction over all places where individuals are or may be detained;
- Amend COVID-19 Emergency legislation to ensure that visits to correctional facilities and youth detention facilities by independent detention oversight bodies cannot be prohibited.

When a person is deprived of their liberty, they still have a right to be safe and treated humanely. Yet there are too many examples of torture and abuse when people are deprived of their liberty in Victoria. We need to shine a light on these places.

NO MORE PRISONS

VALS wants Victoria to end prison expansions and commit to a legal system that seeks to reduce the prison population towards zero.

Prisons do not work.

Prisons do not rehabilitate people.

Prisons are inherently violent and corrupt places.

Prisons are unaffordable and an irresponsible spend.

A legal system built on decarceration is best for everyone. Victoria's ambition must be a legal system built on the understanding that prison does not support healing and rehabilitation, and does not achieve community safety. Since 2010, Victoria's prison population has almost doubled. In recent years, the Victorian Government has spent billions of dollars expanding prison capacity across the state with a typical cost of $1 million per bed. That is just the construction cost. The annual cost of keeping a single person incarcerated for a year is over $100,000. That is more than the average fulltime wage in Australia and more than 6 times the annual Newstart allowance for a single person. This money would be far better spent supporting people and communities, to prevent the risk factors that lead to offending, including housing insecurity, unemployment, poor access to education and healthcare, family violence and systemic racism.

IBAC and the Victorian Ombudsman have published damning reports of Victoria's prison system. It is clear that a broken and rotten culture within Victoria's prison system has been exacerbated by the huge expansion of prison capacity in recent years. Our recommendations for bail reform, independent detention oversight, and raising the age of criminal responsibility to at least 14 would be an important first step towards decarceration and would progress Victoria towards a legal system that does not rely on incarceration. The Victorian Government needs to move towards addressing the inequality and discrimination that leads to contact with the legal system, and to focusing on community supports, prevention, early intervention, rehabilitation and healing.

People in prison do not have access to Medicare or the Pharmaceutical Benefit Scheme. Many Aboriginal and/or Torres Strait Islander deaths in custody are due to inadequate healthcare. Prison is traumatic and retraumatising. The use of isolation and solitary confinement has deep and long-lasting impacts on a person's health and can shorten their life expectancy. Strip-searches, the use of excessive force and restraints, and the systemic mistreatment of people in prison is incredibly damaging for a person's health and wellbeing. Far from being rehabilitated or healed, people in prison often leave with complex health issues which they must live with for the rest of their lives, and which impede on healing and reintegration.

***VALS has made many recommendations about decarceration.* Some of our key recommendations are that the Victorian Government must:**

- Move towards a zero prison population and minimise the trauma and violence that prison inflicts on people as we work towards that ambition;
- Increase the use and availability of diversion and cautions;
- Increase access to parole and bail;
- End the use of solitary confinement, strip-searches and other traumatising methods of control;
- Make prison disciplinary hearings fair and transparent;
- Ensure access to equivalent healthcare in prisons;
- Invest in restorative justice approaches.

Prisons do not make the community safer. Prisons create trauma. Prisons are an unsustainable expense. We should invest our money in the supports that make our communities stronger.

A PUBLIC HEALTH RESPONSE TO PUBLIC INTOXICATION

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

After almost two years of courageous advocacy by Aunty Tanya Day's family, and over 30 years since the Royal Commission into Aboriginal Deaths in Custody, the Government finally passed legislation to decriminalise public drunkenness and replace it with a public health response.

This reform was important because public intoxication is known to be used to over-police Aboriginal and/or Torres Strait Islander communities. The use of public intoxication laws was part of many of the cases investigated by the Royal Commission into Aboriginal Deaths in Custody and the discriminatory use of these laws has been highlighted in many reports since.

Whilst Aboriginal people make up 0.8% of the Victorian population, 6.5% of all public intoxication offences between 2014 and 2019 were recorded against Aboriginal people.

Recently, the Government announced that it would delay the decriminalisation of public intoxication by 12 months, because it has deprioritised this issue and has not done what was needed in time. This delay is deeply disappointing. As long as public intoxication remains a criminal offence, Aboriginal and/or Torres Strait Islander people will continue to be locked up for this archaic offence. A public health response to public intoxication must be prioritised and implemented properly, and Aboriginal self-determination must be at the forefront of the health response.

VALS supports the position of the Day family, that police should not be involved in the health response to individuals who are intoxicated in public. This is a health issue, not a justice issue; and the reforms require a fundamental shift in culture and systems reform.

If Victoria Police continue to play a role in relation to public intoxication, they should only be involved as a last resort and their role must be strictly limited, with appropriate safeguards and accountability mechanisms in place to prevent abuse of power. Under no circumstances should anyone be locked up in a police cell for being intoxicated in public.

A properly implemented public health model for public intoxication would also serve as a model for public health responses to other matters such as drug decriminalisation.

Along with limiting the involvement of police, VALS' key recommendations for the implementation of this reform are:

- There must be no further delays. The Victorian Government must properly resource the development and implementation of the public health model so that it is in place as soon as possible;
- The Day family and Aboriginal organisations should continue to lead the implementation of the reform.

VALS' detailed recommendations can be found in our *factsheet on public intoxication*.

Our people have been fighting for this reform for decades. A proper public health model would ensure so many of our people avoid ever having contact with the criminal legal system and it would help people heal instead. Many governments denied us this reform, now that it is happening it must be the best public health model possible.

ABORIGINAL SOCIAL JUSTICE COMMISSIONER

Over 500 of our people have died since the Royal Commission into Aboriginal Deaths in Custody. Many of the Commission's recommendations have never been implemented. The recommendations of many inquiries into the treatment of our people in custody have never been implemented.

The Aboriginal Justice Caucus has been asking the Victorian Government to establish an Aboriginal and Torres Strait Islander Social Justice Commissioner in this state for over 15 years. An essential role of the Commissioner would be to measure the implementation of recommendations from the Royal Commission into Aboriginal Deaths in Custody and other relevant inquiries.

VALS believes that Victoria should establish an Aboriginal and Torres Strait Islander Social Justice Commissioner, with the final design of the Commissioner's office to be determined by the Aboriginal Justice Caucus. It has been promised by politicians previously, but those promises were broken. It is time to deliver.

We need accountability and transparency to drive reform of Victoria's legal system. Often when our people are victims of abuse by the justice system, they don't have the ability to tell their story. When our stories are told at inquests and inquiries, often the findings are ignored. We need an Aboriginal Social Justice Commissioner so that we can tell more of our stories and hold government to account for the way our people are treated by the legal system.

A FUTURE FOR OUR CHILDREN

Our children deserve to be safe and have the support they need to live a good life, connected to culture, community, and Country. The impact of over-policing and overincarceration of Aboriginal and/or Torres Strait Islander children, along with their overrepresentation in the child protection system is a modern-day Stolen Generation. In schools, in residential care and the child protection system, and in courts and prisons, Aboriginal and/or Torres Strait Islander children are forced to survive hostile environments.

Most of our children never come into contact with the legal system, but we know that there are common themes in the stories of those that do. Children who come into contact with the legal system are likely to have been referred to child protection by the time they are 3 years old. They are also more likely to have a health issues, mental health issues, or learning difficulties, and not receive appropriate treatment. They are also more likely to have been expelled from school. Children who are detained in youth prisons have almost certainly spent time in residential care. This common path shows that children in youth prisons have been failed for many years. Time and time again, society not only fails to help these children, society inflicts harm and trauma on them.

Every child Victoria puts in prison is a failure.

Victoria must fix the child protection system so that it is helping our children, not creating more harm. We need an Aboriginal self-determined model for child and family services where our families and communities actively participate in the decision-making process, and possess the right to free, prior and informed consent over administrative and legislative measures that affect them. We must also invest in the prevention and early intervention services for Aboriginal families.

We also know that youth prisons cause tremendous harm and trauma to our children. Victoria must invest far more in using cautions and diversions to keep children out of prison. While Victoria continues to use youth prisons, it has a responsibility to reduce the harm they inflict. And the Government must invest in more support services while children are in prison and after they leave them.

There has been a lot of work done in recent years to engage Aboriginal children and young people to find out what changes they want. The *Ngaga-dji* report, published by the Koori Youth Council, and the *Our Youth, Our Way* report, published by the Commission for Children and Young People, are two important pieces of work that have given voice to our children. The Victorian Government should be committed to ensuring this work leads to the change our children asked for.

We believe the Victorian Government should:

- Support children and young people to be strong in their culture;
- Establish an Aboriginal self-determined model for child and family services;
- Invest in prevention and early intervention services for Aboriginal families;
- Reduce the criminalisation of children and young people in residential care;
- Make significant investment into residential care, to improve cultural appropriateness, and make them a more supportive environment so that they are not driving children into contact with the justice system
- Ensure compliance with the Aboriginal Child Placement Principle;
- Invest in more Koori Children's Courts so that they are accessible across the state;
- Prioritise and strengthen youth diversion options;
- Eliminate harmful practices, like solitary confinement, in youth prisons;
- Expand the Dual Track system to 25 years old so that Aboriginal and/or Torres Strait Islander young people charged in adult courts can receive a young justice centre order, meaning that they are sentenced to spend time in a specialised youth justice centre;
- Invest in better supports for young people leaving custody.

You can find more detail on VALS' recommendations to create a better future for our children at our *Submission to the Commission for Children And Young People Inquiry: Our Youth, Our Way* and our *Submission to the Inquiry into Victoria's Criminal Justice System*.

Our children deserve a fair chance in life. Our children deserve to grow up knowing their culture and being supported by a strong community. The government has a responsibility to ensure that our children get the support they need to have those things. And government must stop criminalising our children when the government fails to give them that support.

ABOUT THE ARTWORK

Come Yarn with Us

The artwork features message sticks, which are passed between different peoples, language groups and even within clans to establish information and transmit messages. They were often used to invite neighboring groups to corroborees, marriages, burials, declarations of war and ball games.

Our ways of communication inform and reform social, moral and human values of our societies.

In this instance, our community is extending the message stick as a symbolic gesture to communicate our distress within the justice system. We invite the Government and representatives to sit with us and hear our pleas for support, resources and understanding of their role in the systems failures and also its successes.

The art is also indicative of 'morse code' which is used in emergency situations. The rate of our people being imprisoned, deaths in custody and lack of cultural safety or awareness should be seen and treated as an urgent societal and governmental priority.

Artwork by Bitja (Dixon Patten Jnr)
Gunnai, Yorta Yorta, Gunditjmara, Dhudhuroa

VALS

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Attachment B

Community fact sheet: Ending Aboriginal Deaths in Custody

What was the Royal Commission into Aboriginal Deaths in Custody?

The Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**) was an inquiry called by the Australian Government in 1987, after growing public attention on the deaths of Aboriginal people in prisons and police stations. Over four years, it investigated 99 individual deaths across Australia and systemic problems which had helped cause them. The Commission's final report in April 1991 found major failures by governments, police and prison authorities, and made 339 recommendations to address these problems and end Aboriginal deaths in custody.

What has the Government done since the Royal Commission into Aboriginal Deaths in Custody?

Recommendations from the RCIADIC included changes to prison conditions and procedures, reforms to how police worked, and changes in the law to keep Aboriginal people out of prison. Governments have not done enough to implement these recommendations, and in many cases they have gone backwards. For example, the Victorian Government is only now decriminalising public drunkenness – more than 30 years after the RCIADIC's report – and has made it harder to access bail, when the RCIADIC recommended it should be easier.

The Commonwealth Government's own review found that only 64% of the RCIADIC's recommendations have been fully recommended – and an independent report by Aboriginal scholars found that number is much lower. Many recommendations have been implemented then reversed, or implemented on paper without leading to the intended outcomes.

Community fact sheet: Ending Aboriginal Deaths in Custody

Has the number of Aboriginal deaths in custody decreased?

No. The Royal Commission was established after public outcry about 99 Aboriginal deaths in custody between 1980 and 1989 – about one every month. Since the RCIADIC published its final report, at least 500 Aboriginal people have died in custody – about one every 22 days.

One of the key findings of the Royal Commission was that Aboriginal deaths in custody occur at such a high rate primarily because so many Aboriginal people are arrested and imprisoned. This problem also has not been addressed. In 1991, the incarceration rate of Aboriginal people in Victoria was 767.9 per 100,000 people. In 2019, it had risen to 2,219.9 per 100,000.

How can we end Aboriginal deaths in custody?

Reduce the number of Aboriginal people who are incarcerated

Aboriginal people now make up more than 10% of the people held in prison in Victoria, compared to less than 1% of the Victorian population. Reducing incarceration rates will require changes in housing, health and social support, not just the legal system. However, several simple changes would immediately make a difference.

Public drunkenness

Criminal charges of public drunkenness are disproportionately used by police against Aboriginal people. The tragic case of Tanya Day, who died in custody in December 2017 after being arrested for being drunk in public, shows how Aboriginal people are brought to police stations when they pose no danger to anyone.

After extensive advocacy by the Day family, Victoria passed a law to decriminalise public drunkenness. There will now be a health-based response to people who are drunk in public, but the details are still being worked out by the Government. It is crucial that the Government does not involve police in responding to people who are drunk in public, and that nobody is ever held in a police cell because they are drunk.

Victorian Aboriginal Legal Service

Community fact sheet: Ending Aboriginal Deaths in Custody

Reform Victoria's punitive bail laws

Over thirty years ago, the RCIADIC recommended that all governments should "revise any criteria which inappropriately restrict the granting of bail to Aboriginal people". Instead, Victoria has consistently tightened its bail laws. Changes in 2013, 2017 and 2018 have made it harder to access bail, especially for people without stable housing. As a result, the number of unsentenced Aboriginal people held in Victorian prisons quadrupled from June 2015 to June 2019.

More than half of the Aboriginal people who have died in custody since the Royal Commission had not been sentenced to jail time – they died while being held by police or on remand, after they were refused bail. The Victorian Government's punitive bail laws are putting more and more Aboriginal people in custody and at risk. It must urgently reform the Bail Act, invest in culturally appropriate bail accommodation and support, and allow Koori Courts to hear bail applications.

Raise the age of criminal responsibility

The minimum age for being charged with a criminal offence should be 14, and the minimum age for incarceration should be 16. Currently, children as young as 10 can be imprisoned. Aboriginal children are detained at nearly seven times the rate of non-Aboriginal children in Victoria. The Productivity Commission has found that, nationally, raising the age to 14 would reduce the number of Aboriginal children in prison by 15%.

Improve prison conditions through independent inspections and higher standards

Conditions in prisons and police cells can have devastating effects on the mental and physical health of Aboriginal people. While some lessons have been learned from the Royal Commission's report, many have not. The use of solitary confinement needs to be ended, and healthcare should be equivalent to what is available in the community – both recommended by the RCIADIC in 1991. An independent report highlighted repeated abuses in Victorian prisons, and found that prison staff do not understand their duty to care for the human rights of people in prison.

Victorian Aboriginal Legal Service

Community fact sheet: Ending Aboriginal Deaths in Custody

Improving conditions in prisons and police cells will only happen with independent oversight. Under an international treaty, the Optional Protocol to the Convention Against Torture (**OPCAT**), Australian governments have to establish an independent agency to inspect prisons and make recommendations for how conditions need to be improved.

Victoria will has missed the deadline for implementing OPCAT by January 2022. The Victorian Government needs to consult on how to make sure detention inspections are culturally appropriate for Aboriginal people, and implement OPCAT as a matter of urgency. You can read VALS' fact sheet on OPCAT here.

Create an Aboriginal and Torres Strait Islander Social Justice Commissioner

The RCIADIC made 339 recommendations, and in the thirty years since there have been countless recommendations from coronial inquests, parliamentary inquiries and other Royal Commissions. There is no transparency or accountability on the Government to put these recommendations into action and end Aboriginal deaths in custody. VALS and the Aboriginal Justice Caucus have consistently called for an independent Aboriginal Social Justice Commissioner to monitor the Government's progress in making the recommended changes. As long as the Government is not accountable for making change happen, the number of Aboriginal deaths in custody will continue to grow.

Where can I learn more about ending Aboriginal deaths in custody?

- Submission to the Parliamentary Inquiry on Victoria's Criminal Justice System
- VALS' Aboriginal deaths in custody information page
- Community fact sheet: the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)

Victorian Aboriginal Legal Service

Attachment C

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

An opportunity to prevent the ill-treatment, torture and death of Aboriginal and Torres Strait Islander people in custody.

What is OPCAT?

In 2017, Australia made a commitment to implement the United Nations *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (**OPCAT**) by January 2022. The Australian Government then sought a further one year extension, until January 2023. The objective of OPCAT is 'to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.'

OPCAT, ratified by Australia, requires States to 'set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment.' These bodies are called National Preventive Mechanisms (**NPM**s). NPMs can mitigate the risks of torture and ill-treatment of people who are detained in police vehicles and cells, prisons and youth detention facilities and other places where people may be deprived of their liberty.

Accountability and prevention are two sides of the same coin, but the only jurisdictions that have designated NPMs at this stage are the Commonwealth and Western Australia.

Australia's obligations also extend to facilitating visits by the UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (**SPT**), which has announced that it will be visiting Australia in the second half of 2022, inspecting places of deprivation of liberty and torture prevention measures in Australia.

Victorian Aboriginal Legal Service

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

Does OPCAT need to be culturally appropriate for Aboriginal and Torres Strait Islander People?

Yes. Effective prevention of the torture and ill-treatment of Aboriginal people in custody requires culturally appropriate OPCAT implementation.

Aboriginal and Torres Strait Islander people are grossly overrepresented in the criminal legal system. OPCAT is an opportunity to prevent torture and ill-treatment, but it will only achieve real outcomes for Aboriginal people if the operations, policies, frameworks and governance of the designated detention oversight bodies are always culturally appropriate and safe for our people.

Should the Government be consulting with Aboriginal communities and organisations about OPCAT implementation?

Culturally appropriate implementation of OPCAT simply cannot be realised without our participation, respecting the existing governance structures under the Aboriginal Justice Agreement and the expertise of Aboriginal Community Controlled Organisations such as VALS. VALS has been advocating for the Government to urgently undertake robust, transparent and inclusive consultations with the Victorian Aboriginal community, its representatives and Aboriginal Community Controlled Organisations (such as VALS) on the implementation of OPCAT in a culturally appropriate way.

What are some key features of a culturally appropriate NPM (OPCAT detention oversight body)?

The Victorian NPM must be culturally competent for Aboriginal and/or Torres Strait Islander people.

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The NPM should appreciate

- the legacy and ongoing impacts of colonisation;
- that Aboriginal perspectives of what constitutes torture, or cruel, inhuman or degrading treatment or punishment may diverge from that of non-Aboriginal people; and
- that the long-term impact of torture and ill-treatment can be shaped by the survivors' culture and the historic-political context of the ill-treatment (including the history of colonisation).

It should also take into account systemic racism in its work.

You can find further information on culturally appropriate OPCAT implementation in the Churchill Fellowship report of our Head of Policy, Communications and Strategy, Andreea Lachsz, here.

How can the Victorian and Commonwealth Governments properly implement OPCAT in Victoria?

VALS has made a number of recommendations for proper implementation of OPCAT in Victoria, in accordance with an accurate interpretation of OPCAT and established best practice:

- The Victorian NPM's mandate should (in compliance with Article 4 of OPCAT and Recommendation 10 of the Australian Human Rights Commission's report), include any place under the Government's jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence.
- Places of detention should include both public and private custodial settings, which that person is not permitted to leave at will, by order of any judicial, administrative or other authority.
- The NPM's mandate should include (but not be limited to) forensic mental health hospitals, closed forensic disability facilities or units, correctional facilities, youth detention facilities, police custody, court custody, and residential secure facilities for children. It should also include circumstances such as the Victorian public housing towers that were subjected to hard lockdown during the pandemic.

Victorian Aboriginal Legal Service

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

- The Australian Human Rights Commission's expansive understanding of 'place of detention', including that temporal limits should not be erroneously imposed, is an accurate interpretation of OPCAT that should be adopted by the Victorian Government. The Commonwealth Government has suggested excluding from an NPMs' mandate places of detention where people are held for less than 24 hours. This is not only an inaccurate legal interpretation, it also fails to acknowledge research that has shown that the risk of torture is higher in police custody than in correctional facilities.
- The Victorian Government should legislate for the NPM's mandate, structure, staffing, powers, privileges and immunities.
- The Victorian Government must ensure that the NPM is sufficiently funded to carry out its mandate effectively and independently (recognising that this may include funding from the Commonwealth Government).

Victorian Aboriginal Legal Service

Published July 2022. Go to vals.org.au/publications to check for updates.

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

Where can I learn more about OPCAT?

You can watch the recording of our first webinar from our Unlocking Victorian Justice series: OPCAT - An opportunity to prevent the ill-treatment, torture and death of Aboriginal and Torres Strait Islander people in custody here.

Senator Lidia Thorpe gave the opening address for the OPCAT panel.

The panellists were:

- Dr Elina Steinerte, Vice-Chair United Nations Working Group on Arbitrary Detention
- Professor Sir Malcolm D Evans, Former Chair of the UN Subcommittee for Prevention of Torture
- Dr Matthew Pringle, Founder of the Canada OPCAT Project
- Ben Buckland, Senior Advisor at Association for the Prevention of Torture

You can find out more about the panellists here.

You can read more about OPCAT, and the prevention of and accountability for Aboriginal deaths in custody in the below VALS documents:

- Building Back Better – VALS COVID-19 Recovery Plan
- Submission to the Public Accounts and Estimates Committee – Inquiry into the Victorian Government's Response to COVID-19
- Supplementary submission to the Royal Commission into Victoria's Mental Health System
- Submission to the Inquiry into Victoria's Criminal Justice System
- Submission to the Cultural Review of the Adult Custodial Corrections System
- Submission to the Consultation on RACGP Standards for Health Services in Australian Prisons (2nd edition)

Victorian Aboriginal Legal Service

Published July 2022. Go to vals.org.au/publications to check for updates.

Attachment D

VALS Policy Brief

Raising the Age of Criminal Responsibility

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.

Recommendations

1. The Victorian Government must raise the minimum age of criminal responsibility to at least 14 years. To do this, it should:
   (a) Commit to raising the age of criminal responsibility to 14 years, with no exceptions or 'carve outs' for any type of behaviour or conduct.
   (b) Initiate a process to map out the family and service system response to ensure that children under 14 years who exhibit behaviours previously considered offending (and their families) get the necessary familial, therapeutic, restorative and rehabilitative assistance.
   (c) Properly fund existing support services for children and their families, to ensure coverage of all of Victoria, as well as ongoing, sustainable funding.
   (d) Pass legislation for children under 14 years as a matter of urgency, and no later than in the first 100 days of a new term of government.
2. The Victorian Government should raise the minimum age for detention to at least 16 years.
3. 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 training on doli incapax.

What is the age of criminal responsibility?

The age of criminal responsibility is the age at which someone can be charged, convicted and sentenced for a criminal offence. In all States and Territories in Australia, the age of criminal responsibility is 10 years. This means that children who are still losing their baby teeth and are not old enough to sign up to Facebook, can be removed from their family and locked up in a prison.

How does the low age of criminal responsibility impact Aboriginal people?

Aboriginal children are disproportionality impacted by the low age of criminal responsibility, as they are more likely than non-Aboriginal children to have contact with the youth justice system at an early age, less likely than non-Aboriginal children to receive a caution from police, and more likely to be charged with a criminal offence.

In 2019-2020, 47% of children aged 10-13 years who were in contact with Youth Justice (in custody and in the community) on an average day in Victoria, where Aboriginal.

Throughout 2019-2020:

- 13% of children aged 10-13 years who had contact with police were Aboriginal;
- 46.6% of Aboriginal children aged 10-13 years who had contact with police were charged, compared to 38.6% of non-Aboriginal children aged 10-13 years;
- 32.5% of children aged 10-13 years who were under supervision by Youth Justice (either in custody or in the community) were Aboriginal. This included, 27% of 10-13 year olds who were on remand, and 44% of 10-13 year olds who were on statutory youth justice supervision in the community.

Why should the Victorian Government raise the age of criminal responsibility?

Raising the age of criminal responsibility to at least 14 years will have a significant impact on Aboriginal children, who are disproportionality impacted by the low age of criminal responsibility. By 2031, the Victorian Government has committed to Close the Gap in the rate of Aboriginal and non-Aboriginal people under youth justice supervision. This is an unambitious target and

could be significantly improved. However, even to achieve this target, raising the age to at least 14 years is a critical step.

There is a substantial body of medical, sociological and criminological evidence in favour of raising the age, including:

- **Lack of culpability**: Medical science shows that children below the age of 14 years lack the maturity to fully comprehend the impact of their actions and meet legal standards of culpability.
- **International law**: According to the United Nations Committee on the Rights of the Child (**UNCRC**), the minimum age of criminal responsibility should be at least 14 years, with no exceptions for any offences. In many other countries around the world, the age is 14 years, and in some countries, the minimum age of criminal responsibility is 16 years. Australia has binding legal obligations under the Convention on the Rights of the Child and has been repeatedly criticised by the UNCRC, the UN Special Rapporteur on the Rights of Indigenous Peoples, and the UN Human Rights Council for failing to comply with international standards. In 2021, when Australia appeared before the Human Rights Council, it was condemned by over 30 other countries for its low age of criminal responsibility.
- **Addressing complex needs**: Children in the youth justice system often have complex needs, including mental health concerns, cognitive and/or physical disabilities, lack of secure housing, behavioural difficulties, drug or alcohol use, involvement with Child Protection, experiences of trauma and/or violence and social isolation. They may also come from families that need additional support and/or have family members who also have complex needs. Criminalising these children will not address their needs and is more likely to lead to further offending.
- **Reducing recidivism**: Early involvement with the youth justice system significantly increases the likelihood of reoffending, including reoffending as an adult; the younger someone is when they are first sentenced, the higher their chance of reoffending.
- **Existing protections are ineffective**: Current Victorian practice tries to protect children through a rebuttable presumption of *doli incapax*, but this presumption is frequently overlooked or incorrectly applied in practice.
- **Punitive bail laws**: Due to the punitive bail system in Victoria, children aged 10-13 years are detained on remand, even when they are unlikely to receive a custodial sentence for the offence. In 2019, 107 remand orders were made in respect of children aged 10 to 13 years, but no custodial sentencing orders were made in respect of this age group.
- **Community safety**: It is often argued that criminal justice responses to youth offending are necessary to keep the community safe. This is simply not true. The best way to create safer communities is keep young people out of the youth justice system, including by supporting them, and their families and communities, to address their needs.

- **Detention is harmful**: Conditions in youth detention re-traumatise children, compound mental illness, further disrupt their development and make reoffending more likely. For Aboriginal children, detention also removes them from their families, communities, Country and culture. Detention is harmful for all children, but particularly children as young as 10 years old.

Should there be any exceptions for serious offending?

There should be no exceptions to the minimum age of criminal responsibility. In rare cases that a child commits a serious offence, the focus should be rehabilitation, community safety and supporting the victims of the offending. This should include:

- Supporting victims through restorative justice processes (which have the added benefit of supporting the child to take responsibility for their actions) if the victim consents, and providing proper support for victims.
- A focus on rehabilitation, as no child should be categorised as being beyond rehabilitation or community support, no matter what their harmful behaviour is. We should be dedicating more resources to the children most at risk of further offending and serious offending, not less.
- Tailored and intensive supports for the child and their family, while the child is in the community, not a facility. The focus should be on providing a wrap-around service, addressing the underlying causes of offending, assisting the family and child to navigate systems from which they have been excluded or unable to navigate on their own (e.g. housing support, Centrelink, education), building a solid, extensive support network in the community (where the child will ultimately always return) to ensure that the chances of reoffending are reduced.

There are existing services and models that should be provided greater funding and increased capacity to more effectively work together (rather than in silos), to achieve this intensive, tailored, community-based, ongoing support.

What should be done instead of criminalising our children?

Children in the youth justice system often have complex needs, and have invariably been let down by the adults and systems in their lives. We should not be punishing our children for the failures of others. Children must be given a chance to learn from their mistakes and grow up to

be healthy, safe, contributing members of our communities.

Rather than criminalising children and reinforcing inequalities, governments should be providing wrap around support and care at the earliest possible stage, to prevent contact with the youth justice system in the first place. This means that risk factors must be identified and addressed as early as possible, including early diagnosis of health issues and/or disabilities, providing safe and secure housing, ensuring that children remain engaged with school, and reducing the risk of child protection intervention by supporting families to take care of their children.

It is also critical to ensure that children below the age of 14 years who are exhibiting behaviours currently considered to be offending, are connected to wrap around support and services, where needed. This will require a fundamental shift in police culture, supported by clear processes to ensure that police connect children to relevant supports and services where needed. In addition, we will need strong oversight mechanisms – including an independent police complaints body – to ensure that Victoria Police are accountable and support the implementation of this reform.

The Government must recognise that the Aboriginal community and Aboriginal Community Controlled Organisations (**ACCOs**) are experts in how to best support Aboriginal children and families. They are best placed to ensure that protective factors – such as connection to culture, Country, family and community – are nurtured and that children have the opportunity to thrive. Respecting Aboriginal self-determination would lead to improved outcomes for not only Aboriginal children, but more broadly for community safety.

Who supports raising the age of criminal responsibility?

This critical reform has widespread support in Victoria and across Australia, including from medical and legal experts, such as the Victorian Commission for Children and Young People (**CCYP**), the National Aboriginal and Torres Strait Islander Legal Services (**NATSILS**), the Law Council of Australia, the Australian Medical Association, National Legal Aid, Public Health Association Australia, the Royal Australasian College of Physicians (**RACP**), Human Rights Law Centre (**HRLC**), Amnesty International and the Victorian Smart Justice for Young People Coalition (**SJ4YP**).

What is the Victorian Government's position on raising the age of criminal responsibility?

The Victorian Government has persistently maintained that it will work with other States and Territories in Australia to develop a national approach to this issue.

In November 2018, governments across Australia established a national Working Group on the Age of Criminal Responsibility. In November 2021, the Meeting of Attorneys-General – comprised of the Federal Attorney-General and Attorneys-General from each State and Territory in Australia – "supported development of a proposal to increase the minimum age of criminal responsibility from 10 to 12 years." After 3 years, the group has not still made any concrete commitments. At the August 2022 Meeting of Attorneys-General, "[p]articipants agreed the Age of Criminal Responsibility Working Group would continue to develop a proposal to increase the minimum age of criminal responsibility, paying particular attention to eliminating the overrepresentation of First Nations' children in the criminal justice system." VALS strongly condemns the lack of action and leadership by Governments across the country on this issue.

In June 2021, the CCYP completed its *Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system* and recommended that the minimum age of criminal responsibility should be increased to 14 years, with no exceptions. The Government has formally responded to this report, but failed to respond to this recommendation.

In 2022, the Government launched *Wirkara Kulpa*, Victoria's first Aboriginal Youth Justice Strategy. The Strategy was developed jointly with the Aboriginal Justice Caucus (**AJC**), who have advocated fiercely for the Victorian Government to raise the age of criminal responsibility to at least 14 years. While the AJC, the Koorie Youth Council and the Commissioner for Aboriginal Children and Young People have all recommended raising the age of criminal responsibility to 14 years, the new Aboriginal Youth Justice Strategy fails to include this critical reform.

What does the path to raising the age look like in Victoria?

The Victorian Government must raise the minimum age of criminal responsibility to at least 14 years. To do this, it should:

- Commit to raising the age of criminal responsibility to 14 years, with no exceptions or 'carve outs' for any type of behaviour or conduct.

- Initiate a process to map out the family and service system response to ensure that children under 14 years who exhibit behaviours previously considered offending (and their families) get the necessary familial, therapeutic, restorative and rehabilitative assistance.
- Properly fund existing support services for children and their families, to ensure coverage of all of Victoria, as well as ongoing, sustainable funding.
- Pass legislation for children under 14 years as a matter of urgency, and no later than in the first 100 days of a new term of government.

Why should the Victorian Government prohibit detention of children and young people below the age of 16 years?

In addition to raising the age of criminal responsibility to at least 14 years, the Victorian Government must prohibit detention of children and young people below the age of 16 years. While harm arises from any contact with police and the criminal legal system, detention is invariably and acutely harmful, and the Government must progress towards having no children in detention. Key reasons for this reform include:

- **Detention is harmful**: As discussed above, conditions in youth detention re-traumatise children, compound mental illnesses (including triggering incidents of self-harm and suicide), further disrupt their development, education and employment opportunities, and make reoffending more likely. 67% of children and young people in Victoria's youth detention centres are victims of abuse, trauma or neglect. Instead of receiving support and care, they are subjected to widespread lockdowns, strip searching and violence, including use of force by staff against children and young people.
- **International Law**: The UN Committee on the Rights of the Child recommends that "no child be deprived of liberty, unless there are genuine public safety or public health concerns, and encourages State parties to fix an age limit below which children may not legally be deprived of their liberty, such as 16 years of age." Many countries comply with these standards, including Scotland and Slovenia.
- **Aboriginal children are disproportionality affected**: As noted above, Aboriginal children and young people are over-represented in youth justice detention centres and are disproportionality impacted by the harmful effects of detention in Victoria.
- **Experts agree**: In 2021, CCYP recommended that detention of children under the age of 16 years (either on remand or sentence) should be prohibited by law.

Why should the Victorian Government retain and strengthen the presumption of *doli incapax*?

Although the minimum age of criminal responsibility is 10 years, there is a rebuttable presumption in the law that 10-13 year olds do not have the capacity to understand the implications of their actions. This means that 10-13 years olds are presumed not to have committed a criminal offence, unless it is proven otherwise.

In practice, this presumption is inconsistently applied and routinely fails to protect our children. It is not well understood and there are often delays, meaning that a child and their family can be forced to attend court multiple times over several months, only to have the charges withdrawn. This not only disruptive to the child's education, family and cultural life, it also increases the child's exposure to the youth justice system.

If the age of criminal responsibility is raised to at least 14 years, *doli incapax* will no longer be relevant for children aged 10-13 years. However, evidence shows that child and adolescent brains are not fully mature until their early twenties, and that children develop at different ages. Moreover, the high rates of cognitive and intellectual disabilities amongst young people involved with the youth justice system means that many young people aged 14-17 years may also lack the emotional, mental and intellectual maturity to fully understand the impact of their actions.

The presumption of *doli incapax* should be strengthened and retained for children and young people aged 14-17 years. In particular, the Government should:

- Create a legislative requirement for prosecutors to rebut the presumption;
- Restrict the kinds of evidence that can be produced to rebut the presumption;
- Increase funding to the Children's Court to improve the quality of clinical reports;
- Require all police, Crown prosecutors and criminal defence lawyers to undergo mandatory training on *doli incapax*.

Where can I learn more?

- VALS Submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group
- VALS Submission to the Victorian Parliamentary Inquiry on Victoria's Criminal Justice System
- The national Raise the Age Campaign website, including the national petition

Appendix A: The age of criminal responsibility in other countries around the world

In many other countries around the world, the minimum age of criminal responsibility is between 14 and 16 years. The following table is based on research by the Child Rights International Network (**CRIN**), and shows countries where the minimum age of criminal responsibility is 14, 15 and 16 years.

14 years	15 years	16 years
Spain	Norway	Argentina
Paraguay	Sweden	Angola
Peru	Finland	Mozambique
Chile	Iceland	
Colombia	Denmark	
Democratic Republic of Congo	Czech Republic	
China	Poland	
Romania	The Philippines	
Bulgaria	Laos	
Vietnam		
Cambodia		
Kazakhstan		
Turkmenistan		
Ukraine		
Serbia		
Albania		
Macedonia		
Mongolia		
Georgia		
Armenia		
Azerbaijan		

Acknowledgement of Traditional Owners

The Victorian Aboriginal Legal Services acknowledges all of the traditional owners in Australia and pay our respects to their Elders, past and present. Soveriegnty was never ceded. Always was, always will be, Aboriginal land.

Artwork

The artwork used in this document was originally designed by Gary Saunders for the Victorian Aboriginal Legal Service.

Contact

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Attachment E

Community fact sheet: Aboriginal Self-Determination

What is the right to self-determination?

While the right to self-determination remains undefined under international law. It can best be described as the right of a 'people' to collectively exercise control over, and make decisions regarding, matters that affect them. It is the right of a people to determine their destiny.

The right to self-determination is different to other traditional human rights. Most human rights are concerned with rights of individuals or 'persons' within a society. Self-determination is a collective right of 'peoples' under international law.

What is a 'people'?

No universal definition of 'people' exists under international law. The common features of 'peoples' include distinct communities composed of individuals with:

- common tradition and culture
- ethnicity
- historical ties and heritage
- language
- religion
- sense of identity or kinship
- the will to constitute a people
- common suffering

Indigenous peoples were recognised as 'peoples' under international law by the United Nations General Assembly and bearers of the right to self-determination in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) in 2007.

Why is the right to self-determination important to Aboriginal communities in Victoria?

The right to self-determination can serve as a means by which Aboriginal communities can restore Aboriginal authority over Aboriginal affairs through Aboriginal-determined institutions.

Contemporary Victorian government practices treat Aboriginal people as minorities

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– a group or category of individuals making up a small portion of Victorian society and in a non-dominant position – that have suffered violations of human rights and dignity as a result of their status. Minority rights traditionally require the government to determine the means by which to protect the rights of minorities. While representatives of minority groups are allowed to participate in discussions concerning how issues affecting the group are addressed, there is no requirement for a government to reflect the opinions and decisions voiced by a minority group in legislation, policy or practice.

As 'peoples', Victorian Aboriginal communities are legally entitled to more than a seat at the table. The right to self-determination of Aboriginal peoples in Victoria mandates that Aboriginal communities and their self-determined institutions:

- Actively participate in decision-making processes that affect them; and
- Possess the right to free, prior and informed consent over administrative and legislative measures that affect them.

What are the current issues relating to the Aboriginal right to self-determination in the Victorian legal system?

The following themes have consistently emerged in the advocacy undertaken by VALS.

Systemic discrimination against Aboriginal peoples

Victorian Government practices that fail to recognise, respect and reflect the collective rights of Aboriginal communities as 'peoples' in Victorian Government practices and processes that denies Aboriginal peoples the enjoyment and exercise of their rights in political, economic, social cultural and other fields of public life, constitutes 'racial discrimination' under Article 1(1) of the *International Convention on the Elimination of All Forms of Racial Discrimination*.

Legal distinctiveness of Aboriginal communities

Aboriginal communities are distinct communities within Victoria and their status should

be reflected in legislative practice. Specific and dedicated legislative guidelines and frameworks should be created for matters that affect the individual and collective rights and interests of Aboriginal communities.

Legislative recognition of the right to self-determination of Aboriginal peoples in Victoria

To date, Victorian legislation has not recognised the right to self-determination of Aboriginal communities in Victoria. Victorian legislation, particularly the *Charter of Human Rights and Responsibilities 2006,* should be amended to explicitly recognise Aboriginal self-determination as a right of Aboriginal communities in Victoria.

Free, prior and informed consent

The Victorian Government current consultation processes often leave Aboriginal Community Controlled Organisations (**ACCO**s) with little time to provide feedback and regualrly do not incorporate feedback from ACCOs in final outcomes.

The right to free, prior and informed consent mandates that governments consult with the Aboriginal community and ACCOs prior to designing legislative and administrative measures and reach consensus with Aboriginal communities and ACCOs on the scope and content of measures affecting Aboriginal communities prior to being implemented.

Cultural rights

The Victorian Government generally determines that legislation does not contradict Aboriginal cultural rights despite submissions from Aboriginal communities and ACCOs stating that conflicts with Aboriginal culture and tradition exist. By virtue of self-determination, Aboriginal communities should make such determinations rather than the Victorian Government.

Aboriginal deaths in custody

In 1991, Recommendation 188 of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) stated that governments should negotiate with Aboriginal communities to determine guidelines, procedures and processes to be followed in the

modification, design and implementation of policies and programs affecting Aboriginal communities. The Recommendation was premised upon self-determination and has yet to be consistently and meaningfully reflected in practice.

Aboriginal data sovereignty

The concept of Aboriginal data sovereignty mandates that Aboriginal communities and ACCO have have a right to access and interpret information concerning Aboriginal individuals and communities, as well as the right to determine how the data is used and disseminated within mainstream society. The authority and control over such data not only ensures that the information is understood in its appropriate context, but is also beneficial to ACCOs to ensure that the services and programs provided meet the demand and needs of Aboriginal communities.

Funding for ACCOs

Article 39 of the UNDRIP and Recommendation 190 of RCIADIC emphasise the importance of funding ACCOs to ensure that such organisations are able to effectively perform their respective functions. However, ACCOs frequently lack sufficient funding and resources to implement and maintain needed programs and services for the benefit of Aboriginal communities.

Where can I learn more about Aboriginal self-determination in Victoria?

You can learn more about self-determination and its impacts for Victorian Aboriginal communities in the following VALS documents:

- Submission to the Parliamentary Inquiry on Victoria's Criminal Justice System
- Submission on the Anti-Racism Strategy

Community fact sheet: VALS intervention in Court of Appeal Strip Searching and Urine Testing Case

On 21-22 October 2021, the Court of Appeal is hearing an appeal in the matter *Thompson v Minogue.* That case is about whether strip searching and urine testing practices in Victorian prisons comply with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**). VALS has been granted leave to intervene in the matter, so that we can advocate for the rights of Aboriginal and Torres Strait Islander people in prison in Victoria.

What is this case about?

Everyone deserves the right to privacy and to be treated with dignity and respect. This case is about the right of people in prison to be treated with dignity and humanity.

Strip searches and Urine Testing

People in prison are far more likely to have a history of trauma than the general population. Upwards of three quarters of imprisoned women in Australia are victim-survivors of domestic abuse and sexual violence. These issues disproportionately affect Aboriginal and Torres Strait Islander people, who are 13.9 times more likely to be imprisoned in Victoria than non-Aboriginal people.

Both strip searches and urine testing, requiring a person to take off their clothing and urinate into a container in full view of prison officers, are inherently harmful. Being subjected to intrusive searches can compound trauma, seriously undermine trust in the system, and impede a person's ability to recover and heal. Not only are strip searches harmful and degrading, but evidence shows they are often over-used, ineffective in uncovering contraband, and unnecessary. There is also evidence that strip searching practices and powers are prone to abuses of power by prison guards. Some data shows that Aboriginal people in prison are subjected to disproportionate rates of strip searching compared to non-Aboriginal people.

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What the Supreme Court said

Last year, Craig Minogue, who is detained in Barwon Prison, successfully challenged an order by a prison officer that he submit to a urine test and a strip search before that urine test. Dr Minogue successfully argued that this direction was in breach of his rights under sections 13 and 22 of the Charter to privacy and dignity and humane treatment.

In the Supreme Court, Justice Richards held that the order that Dr Minogue submit to urine testing and strip searches before urine testing breached his rights to privacy and dignity and humane treatment under the Charter. Her Honour held that government authorities had failed to properly consider relevant human rights under s 38(1) of the Charter when making policies regarding urine testing and strip searching.

Her Honour said that there was no evidence demonstrating that the practice of random urine testing was effective in minimising drug or alcohol use in prison. Her Honour noted that urine testing was applied regardless of a person's history with drugs or alcohol. There was also no explanation why urine tests were used instead of less invasive tests, such as breath tests used on motorists. Similarly, her Honour held that the Manager of Barwon prison did not provide reasonable grounds for his belief that strip searches before urine tests were necessary for security and welfare. There was no evidence that alternatives, such as x-ray scanners, used in other prisons, were considered, or that strip searches were necessary. On that basis, her Honour held that these infringements on human rights were not proportionate or justified under s 7(2) of the Charter.

The State of Victoria has appealed the decision and the matter will be heard in the Court of Appeal on 21-22 October 2021.

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What rights do people in prison have to privacy and dignity under the Victorian Charter of Human Rights?

People in prison are entitled to the same human rights as other people. This is enshrined in the Preamble to the Charter, which states that "human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community."

The Preamble also states that "human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters".

Under international law, people in prison retain all of their human rights and fundamental freedoms, apart from those unavoidably lost by virtue of their imprisonment.

Under section 38(1) of the Charter, public authorities cannot act incompatibly with human rights. Public authorities must also properly consider human rights when making decisions.

Under section 13(a) of the Charter, all people have the right not to have their privacy arbitrarily interfered with. This right protects a person against invasions into their physical, social or psychological sphere. It protects a person's individual identity, bodily and psychological autonomy and inherent dignity.

Under section 22(1) of the Charter, all people deprived of their liberty have the right to be treated with humanity and respect for the inherent dignity of the human person. Section 22(1) recognises the importance of upholding human rights for persons imprisoned.

Under section 7(2) of the Charter, human rights can only be limited in strict circumstances, when these limits are reasonable and demonstrably justified.

All of these aspects of the Charter are relevant to the current case.

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Why this case is important for VALS and Aboriginal and Torres Strait Islander people in Victoria?

The Court of Appeal's decision in this case will impact the human rights of every adult in prison in Victoria. If the case is successful, the decision may mean that current strip searching and urine testing practices in prisons in Victoria will be deemed unlawful.

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

There are alternatives, such as x-ray scanners, which are more effective at locating contraband and are less likely to be used as a form of re-traumatisation, abuse and control.

Given what we know about the harm caused by strip searching and urine testing, VALS considered it important to provide the Court with information on the impact of strip searching and urine testing on Aboriginal and Torres Strait Islander people in prison, and the importance of upholding the human rights of Aboriginal and Torres Strait Islander people in prison.

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What is VALS arguing?

We have been granted leave to intervene in the appeal, and VALS is arguing that:

1. People in prison are entitled to equal protection of their human rights;
2. Courts should stringently scrutinise human rights decisions affecting people in prison under sections 38(1) and 7(2) of the Charter, given the vulnerability of persons in prison to decisions affecting their human rights, systemic racism, and the potential for abuses of power in the prison context;
3. People in prison are entitled to equal protection of their right to privacy under section 13 of the Charter as people outside of prison, and strip searches and urine testing practices breach the right to privacy;
4. People in prison are entitled to dignity and humane treatment under section 22 of the Charter, and strip searches and urine testing clearly breach this right.

Read VALS' Submissions Seeking Leave to Intervene here.

Read VALS' Submissions on the Appeal here.

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