Victorian Aboriginal Legal Service Submission to the Legislative Review of the Serious Offenders Act 2018

April 2023

Contents

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:

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

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.

EXECUTIVE SUMMARY

VALS welcomes the opportunity to provide feedback to the *Legislative Review of the Serious Offenders Act 2018* (**the Act**). The Act as it currently functions is incompatible with the *Charter of Human Rights and Responsibilities Act 2006.* VALS has serious concerns about the misalignment of the Act in practice and its purported purpose. The functions of the Act are culturally unsafe for Aboriginal peoples and do not take measures to protect the right to engage with and enjoy culture. The restrictions imposed on people who are subject to a Supervision or Detention Order fail to take into account the importance of engaging with culture, kin and community. The Act as it currently stands only works to further harm Aboriginal people after the completion of their sentence.

SUMMARY OF RECOMMENDATIONS

Recommendation 1. The Victorian Government should conduct a review as to whether the *Serious Offenders Act 2018* complies with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**) and other international human rights instruments.

Recommendation 2. Following the review, the Victorian Government should amend the Serious Offenders Act to comply with the Charter and other international human rights instruments.

Recommendation 3. The Victorian Government should review the effectiveness and suitability of the rehabilitative programs that are delivered in Victorian prisons.

Recommendation 4. The Victorian Government should implement culturally safe rehabilitative programs in Victorian prisons.

Recommendation 5. The Victorian Government should fund Aboriginal Community Controlled Organisations to provide culturally safe rehabilitation programs in prison.

Recommendation 6. The Department of Justice and Community Safety should regularly publish disaggregated data regarding demographic information of people who are placed on Detention or Supervision Orders under the *Serious Offenders Act*.

Recommendation 7. The Department of Justice and Community Safety should make the aforementioned data available to all organisations who work and advocate in the space.

Recommendation 8. The Department of Justice and Community Safety should make the aforementioned data available publicly on an annual basis.

Recommendation 9. The Department of Justice and Community Safety should provide the aforementioned data to all relevant Aboriginal government-community partnerships. This includes the Aboriginal Justice Caucus, the Commonwealth and State Justice Policy Partnerships (once established), and any other collaborative Aboriginal forum.

Recommendation 10. The Victorian Government must invest in the development of risk assessment tools that are both culturally safe during the assessment phase, as well as tools that are validated for use across diverse ethnic and cultural groups.

Recommendation 11. The Victorian Government must ensure that accused and convicted people from diverse ethnic and cultural backgrounds are not disadvantaged by and discriminated against due to the lack of cultural competency of risk assessment tools.

Recommendation 12. The Victorian Government should engage an external expert panel to review all Orders enforced under the *Serious Offenders Act* since its ratification to determine whether the high proportion of Aboriginal people who are on Orders under the Act were disproportionately disadvantaged by the use of risk assessment tools that were not validated for use in Aboriginal communities.

Recommendation 13. The Victorian Government should amend the *Serious Offenders Act* to allow a convicted person or their legal representative to contest the cultural appropriateness of risk assessment tools and allow the person and their counsel to opt for a culturally competent assessor who is versed in appropriate risk assessment tools for use with Aboriginal peoples.

Recommendation 14. The Victorian Government should provide additional funding to ensure aid funding available to defence practitioners is sufficient to engage highly regarded experts to conduct risk assessments that are culturally safe and appropriate.

Recommendation 15. The development of risk assessment tools that are appropriate for use in Aboriginal communities must be done by experts who are regarded by the Aboriginal community as 'culturally safe' and responsive to the needs of Aboriginal people.

Recommendation 16. The new risk assessment tools must be developed in consultation with Aboriginal communities in Victoria and expert Aboriginal Community Controlled Organisations.

Recommendation 17. Corrections Victoria must develop and implement rehabilitation strategies for people subject to an Order under the Serious Offenders Act.

Recommendation 18. Corrections Victoria must ensure that alternate culturally safe rehabilitative programs are offered to Aboriginal people who are subject to an Order, in lieu of the generalist rehabilitative services offered.

Recommendation 19. Corrections Victoria must ensure that Aboriginal people who are subject to an Order under the Act have freedom to choose between a generalist rehabilitative service and a culturally safe rehabilitative service delivered by Aboriginal Community Controlled Organisations.

Recommendation 20. Corrections Victoria must employ a full time Aboriginal Liaison or Aboriginal Wellbeing Officer at all custodial and quasi-custodial facilities that are utilised for residential housing of people subject to an Order under the Act.

Recommendation 21. Section 99(1)(a) of the Serious Offenders Act should be amended to require periodic reviews of Supervision Orders no later than a period of 18 months.

Recommendation 22. Section 100(1)(a) of the Serious Offenders Act should be amended to require periodic reviews of Detention Orders no later than a period of 6 months.

Recommendation 23. When it is deemed that it is not suitable to lift an Order, the Court must ensure that a rehabilitation plan and goals are set to ensure the person has a program to work towards for their next review.

Recommendation 24. Culturally informed and strength-based reports should be required at the time of the application of the Order.

Recommendation 25. Culturally informed and strength-based reports should be required at each review to ensure the Court hears a balanced perspective of the persons progress under the Order.

Recommendation 26. The Victorian Government should amend the Serious Offenders Act to remove minimum sentencing provisions for criminal offences and breaches of the Order.

Recommendation 27. Where a person on an order identifies the need for drug and alcohol counselling, they should not be charged with breach offences or criminal charges in relation to their addiction.

Recommendation 28. Breaches of Orders by conduct that stems from a medical condition, such as drug addiction, should not attract criminal charges but rather trigger a medical and social response to support the person.

Recommendation 29. Corrections Victoria should endeavour to provide all people on an Order under the Act with culturally safe drug and alcohol rehabilitation supports.

Recommendation 30. The Victorian Government should ensure that all consultations and inquiries incorporate sufficient consultation timeframes that allow generalist and Aboriginal Community Controlled Organisations to provide comprehensive feedback.

DETAILED SUBMISSIONS

Infringements on human rights

Detention and Supervision Orders operate in a way that infringe upon a person's right to be free from arbitrary detention and the right to not be tried twice for the same crime. Although the primary purpose of the *Serious Offenders Act* (**the Act**) is to protect the community from 'high risk offenders', the scheme fails to recognise the rights of people to live without interference from the State following the completion of the sentence imposed for the crime they were convicted of.

During the Second Reading of the *Serious Offenders Bill* in the Victorian Parliament, Ms Sue Pennicuik of the Greens raised serious concerns about the Bills infringement upon the human rights of convicted persons who would be subject to an Order under the Act.[1] Her concerns were in relation to the ongoing detention and supervision of convicted peoples who have completed their sentence. Ms Pennicuik's concerns remain valid and relevant today and are aligned with the concerns that many services in the legal sector hold in relation to the rights of convicted peoples who are subject to Orders under the Act.

It is generally considered that the task of sentencing convicted peoples is an exercise of balancing the need for deterrence of future behaviour by others in the community, denunciation of the offenders conduct and the rehabilitation of the offender.[2] When a person is convicted of a serious violent or serious sex offence the purpose of sentencing the person to prison is to punish them for the crime they are convicted of but also to provide the person with a chance of rehabilitation and an opportunity to re-enter the community after serving their sentence.[3] The *Sentencing Act* sets out minimum and maximum sentences for convictions and acts as a guide for sentencing officials.[4] The purpose of the Sentencing Act is to set standards for sentencing officials and to ensure consistent sentencing practices for all matters across the State of Victoria.[5] A further purpose of the Act is to "ensur[e] that offenders are only punished to the extent justified by…" the gravity of their offence, the degree of culpability and the presence of aggravating and mitigating factors in consideration.[6] The *Sentencing Act* sets out considerations for each category of offence and determines appropriate sentencing guidelines for each offence. The use of ongoing detention and supervision of serious offenders indicates that the Government does not have faith in its own sentencing and rehabilitation schemes that are delivered in Victorian prisons. It also reflects a culture within Victoria's politics and criminal legal system which tends to be obsessed with the punishment of crime and far less concerned with rehabilitating people who have engaged in offending behaviour. VALS believes that this cultural skew

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[1] Victoria, *Parliamentary Debates,* Legislative Council, 7 June 2018, (Ms. Sue Pennicuik) <https://hansard.parliament.vic.gov.au/?IW_INDEX=Hansard-2018-1&IW_FIELD_TEXT=SpeechIdKey%20CONTAINS%20(7-06-2018_council_34)%20AND%20OrderId%20CONTAINS%20(2)&LDMS=Y>.

[2] Veen (No 2) [1988] HCA 14; 164 CLR 465.

[3] Justice Michael Murray, 'Sentencing and Dealing with Mentally Impaired Offenders' (Speech, Supreme and Federal Court Judges' Conference, 22 January 2011).

[4] *Sentencing Act 1991* (Vic).

[5] *Sentencing Act 1991* (Vic), s1.

[6] *Sentencing Act 1991* (Vic), s1 (d).

towards punishment ultimately undermines community safety and is a significant factor in the ongoing overrepresentation of marginalised groups in the criminal legal system, particularly Aboriginal people.

Lord Justice Dawson stated in a 1975 case that the "*Courts are not dustbins to which social services can sweep difficult members of the public*".[7] The Victorian criminal legal system cannot simply place 'difficult to manage' convicted people on Detention and Supervision Orders that allow them to be held in custody or at a residential facility like Corella Place or Rivergum Residential Treatment Centre without any real opportunity to progress towards the lifting of the Order. The Victorian Government and the Department of Justice and Community Safety have adopted an 'out of sight, out of mind' approach to managing people who are convicted of serious violent and serious sex offenders. People who are subject to Detention and Supervision Orders have reported that they feel there is no clear pathway to having their Orders lifted. Their lawyers also report that there appears to be no rehabilitative or therapeutic aspect to the Order despite the Act's purpose being to "facilitate the treatment and rehabilitation of those offenders".[8] It is an infringement upon peoples human rights to be subjected to an ongoing Detention or Supervision Order simply because the Victorian criminal legal system has failed to provide the convicted person with adequate supports and rehabilitative tools and programs needed to address underlying risk behaviours whilst they serve their custodial sentence.

People convicted of serious violent or sex offences should not be subject to ongoing Orders that infringe upon their right to not be subject to ongoing punishment upon the completion of their sentence. Corrections Victoria is responsible for providing rehabilitative programs and services to people who are serving a custodial sentence.[9] The large amount of people on Supervision and Detention Orders suggests that the Victorian Government is content with the fact that they continuously fail to provide satisfactory rehabilitative programs or services to convicted people that would have a meaningful impact on their behaviours.

Rather than subjecting people to ongoing monitoring and detention, Corrections Victoria should instead invest in custodial rehabilitative programs and services that are culturally safe and appropriate for all people with varying diagnosis.

RECOMMENDATIONS

Recommendation 1. The Victorian Government should conduct a review as to whether the *Serious Offenders Act 2018* complies with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**) and other international human rights instruments.

Recommendation 2. Following the review, the Victorian Government should amend the Serious Offenders Act to comply with the Charter and other international human rights instruments.

[7] *Clarke* (1975) 61 Cr App R 320.
[8] Serious Offenders Act 2018 (Vic), s1(b).
[9] Corrections Victoria, *Corrections Victoria* (Webpage, 5 April 2023) <https://www.corrections.vic.gov.au/corrections-victoria>.

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Data

VALS regularly collaborates with other organisations in the legal and ACCO sectors in relation to our advocacy efforts. A concern that was consistently raised across the legal sector is the massive overrepresentation of Aboriginal people who are subject to Supervision or Detention Orders.

Victoria Legal Aid (**VLA**) provides legal services to the wider Victorian community, including Aboriginal people. VLA provides legal information to all Victorian's and legal assistance or representation to people who are eligible for a grant of legal assistance.[10] VLA shared data with VALS that indicated a majority of clients who are subject to an Order under the Act are Aboriginal. Whilst VALS suspected this would be the case given the overarching systemic issues Aboriginal people face in the criminal legal system, we were unable to confirm this without speaking with external organisations. VALS provides services to Aboriginal people only, thus we were unable to determine the extent to which Aboriginal people are over-represented in the *Serious Offenders Act* scheme.

Although the Sentencing Advisory Council (**SAC**) has published data regarding sentencing outcomes for breach offences of the *Serious Offenders Act*,[11] the data published does not disaggregate the data further than age, gender and charges per case.[12] There is no publicly available data in relation to demographic characteristics for people who have breached an order, nor is there available data regarding the alleged conduct that led to the breach proceedings.

Further, there is no data available regarding people who are placed on Detention or Supervision Orders upon the completion of their sentence. The lack of available data regarding the implementation and management of Orders under the Act means that public organisations, such as VALS and VLA, cannot track or analyse data for use in our advocacy efforts. Data about the successful applications of Supervision and Detention Orders and the consequent implementation and lifecycle of the Orders should be readily and publicly available to the public. This data is critical to assessing the operation of the system and to enable early identification of any systemic problems.

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[10] Victoria Legal Aid, *Who is eligible for legal help* (Webpage, 19 May 2022) <https://www.legalaid.vic.gov.au/who-eligible-help>.

[11] That is, SAC has published data regarding further sentencing outcomes for breach convictions for people who are already subject to a Supervision Order following a breach of the Order.

[12] Sentencing Advisory Council, *SACStat Higher Courts - Contravene a supervision or interim supervision order* (Webpage, 5 July 2022) https://www.sentencingcouncil.vic.gov.au/sacstat/higher_courts/HC_18_27_169_1.html.

The suspected massive overrepresentation of Aboriginal people on Supervision and Detention Orders infers that the processes of identifying or analysing a person's 'risk' after release from prison is entirely discriminatory and flawed. This will be discussed further in the next section.

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Suitability of risk assessment tools

Given the overrepresentation of Aboriginal people on Detention and Supervision Orders, it can only be assumed that the risk assessment tools utilised at the point of an application for an Order are not accurately capturing potential 'risks' of serious violent or sex behaviours for Aboriginal people. This is because the 'risk assessment' tools used are not validated for use in Aboriginal communities.

It is well documented that the predictive assessment tools utilised to determine whether a person convicted of a serious offence is likely to engage in serious reoffending can, in many cases, provide uncertain results.[13] The risk assessment tools that are currently utilised by the State in a Serious Offender matters are not validated for use in certain communities, including for use for Aboriginal communities. The tools currently utilised in these matters are modelled off the risk behaviours of Caucasian men with European ancestry and were rarely validated for use with other ethnic groups.[14] Further, when the tools were tested for use with people from non-European ethnic and cultural backgrounds, the predictive validity of the tools was found to be less accurate than it was when used for men with European ancestry.[15] Forensic experts have emphasized their concerns about the use of risk assessment tools that are not validated for use in Aboriginal communities, and that where these

[13] DPP v CS [2021] VSC 686.
[14] Stephane Shepherd, 'Violence Risk Instruments may be Culturally Unsafe for use with Indigenous Patients' (2016) 24(6) *Australian Psychiatry* 565.
[15] Stephane Shepherd, 'Violence Risk Instruments may be Culturally Unsafe for use with Indigenous Patients' (2016) 24(6) *Australian Psychiatry* 565.

risk assessment tools are used in matters where the accused person is that the outcome of the assessment should be treated with caution.[16]

The suitability of risk assessment tools for use in Aboriginal communities has received attention in sentencing remarks, but there is yet to be any definitive commentary made by the Australian or Victorian judiciary in relation to the suitability of these tools for use in matters where the accused person is Aboriginal. Canadian courts have, however, discussed the appropriateness of such tools in matters where the accused person is Indigenous. The Canadian Supreme Court matter of *Ewert v Canada* found that the risk assessment tools used to assess the accused person had "no evidence of predictive validity" when used to assess Indigenous people.[17] The court found that utilisation of these tools in that particular matter were in fact contrary to the objective of accurately predicting the risk of the accused person to engage in further violent or sex offending behaviours.[18]

Because of the massive overrepresentation of Aboriginal people in the criminal legal system alone, it is imperative that all risk assessment tools are validated for use in Aboriginal communities in addition to being culturally safe. It is irrelevant at what stage of the life of the matter the tools are being used in – be it at sentencing or under the Serious Offenders Act – all risk assessment tools in criminal matters must be validated and safe for use with Aboriginal people.

The development of risk assessment tools that are appropriate for use in Aboriginal communities should be informed by forensic psychology experts and the Aboriginal community, including Aboriginal Community Controlled Organisations. The importance of working with Aboriginal communities in developing these risk assessment tools is highlighted across the literature.[19] The Australian Law Reform Commission echoed the need for new tools to be developed as an active method to reduce the overrepresentation of Aboriginal people serving custodial sentences.[20]

Following to the development of risk assessment tools that are appropriate for use in Aboriginal communities, these tools must be delivered in a manner that creates a culturally safe space for the person being assessed. Even when there are tools developed that are tested and validated for use in Aboriginal communities, we must also ensure that the assessments are being carried out in a way that promotes cultural safety.

People who are being assessed for an Order are likely to feel anxious and unsure about the process. In order to ensure the tools are properly utilised it is imperative that the person being assessed feels they are culturally safe and able to share their experiences and thoughts without undue consequences.

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[16] James Ogloff and Michael Davis, 'Assessing Risk for Violence in the Australian Context' in Duncan Chappell and Paul Wilson (ed), *Issues in Crime and Criminal Justice* (Lexis Nexus Butterworths, 2005).
[17] *Ewert v Canada* [2015] FC 1093.
[18] *Ewert v Canada* [2015] FC 1093.
[19] Stephanie Shepherd et al., 'Violence Risk Assessment in Australian Aboriginal Offender Populations: A Review of the Literature' (2014), 20(3), *Psychology, Public Policy, and Law* 281; and Australia's National Research Organization for Women's Safety, *National Risk Assessment Principles for domestic and family violence* (Report, July 2018).
[20] Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, December 2017).

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Recommendation 16. The new risk assessment tools must be developed in consultation with Aboriginal communities in Victoria and expert Aboriginal Community Controlled Organisations.

Management of people subject to an Order under the Serious Offenders Act

When discussing the management of people who are subject to an Order under the Serious Offenders Act with VALS solicitors it was clear that appropriate management of the convicted person by Corrections Victoria is lacking.

The primary purpose of the Act is to "provide enhanced protection of the community" and the secondary purpose of the Act is to "facilitate the treatment and rehabilitation" of people who the Act applies to.[21] Rehabilitation should be the primary object of the Act given the restrictions on the rights and freedom of people on Orders. If rehabilitation of people on an Order was the primary objective

[21] *Serious Offenders Act 2018* (Vic), s1 (a) and (b).

of the Act, the activities undertaken to achieve this objective would undoubtably work towards a secondary purpose of enhancing community safety.

Although the secondary purpose of the Act is rehabilitation, it is clear to our organisation that this is not a consideration in practice. Management of people who are subject to an Order is restrictive and there is little opportunity to engage with rehabilitative programs.

Our lawyers have recounted stories[22] of clients who were deemed unsuitable to have the Order lifted at the time of review because they hadn't sufficiently proven a reduction in the 'risk' they would pose to community safety if they were to be taken off the Order, or the court had deemed they are not yet ready to reintegrate back into the general community without supervision.

The Orders are incredibly onerous and, in most circumstances, require the person to be entirely reliant on Corrections to facilitate rehabilitative services. In the context of a person being entirely reliant on Corrections to provide the services they need to engage with to progress towards having the Order lifted, it is entirely inappropriate for the decision makers to allow an order to continue without ensuring the responsible agency (Corrections) has a documented rehabilitation action plan with tangible goals for the person to achieve and progress towards.

Many people on Detention and Supervision Orders report that their Orders are so long that if feels as though there is no end in sight. When a person is subject to ongoing supervision without any tangible progress achievements to aspire to, there is no incentive to engage in activities that would be viewed favourably by the review panel. Many people report that they feel the Order is so long and the supports provided are so poor that there does not seem to be a scenario in which they believe they could progress towards having the Order lifted.

The facilitation of rehabilitation and support services is entirely the responsibility of Corrections Victoria. Corrections Victoria must ensure that every person who is subject to an Order under the Act has a rehabilitation plan that sets out goals and achievements the person can aim for by the next scheduled review of their matter. These 'rehabilitation plans' should be individually developed with the convicted person and a member of Corrections Victoria who has the relevant skills and experience in developing such a program.

VALS is also concerned about the lack of culturally specific supports for Aboriginal people. Aboriginal people must be afforded culturally safe supports when they are under the supervision of Corrections Victoria. The nature of a Supervision or Detention Order is that it disconnects Aboriginal people from their strongest support systems – their community, their Country, their kin and their culture. Disconnecting Aboriginal people from their support systems creates further harm and disconnection and inhibit rehabilitation. Community, Country and culture are incredibly powerful strengthening factors for Aboriginal people.

[22] Both from their practice experience at VALS and previous practice experience in other organisations.

If the Act, and Orders created under the Act, enshrined the importance of connection with all of the aforementioned factors there is no doubt that Aboriginal people would experience better outcomes and progress towards the lifting of the Order.

Case Study – James (a pseudonym)

James' Supervision Order has a condition that he must reside at a residential treatment facility run by Corrections Victoria. James' has lived in various facilities across the state and his experience of all facilities has been similar.

James has reported that there is a complete lack of culturally safe supports and services available in all facilities he has resided in. He has reported feeling culturally unsafe in the way he is treated and managed, but also in regard to the support and rehabilitative services that are provided through Corrections.

James and his lawyers are concerned that the failure of Corrections Victoria to provide culturally safe supportive services has limited his ability to make adequate 'progress' in the eyes of the court to move towards lifting the Order.

If Corrections Victoria had ensured James had access to culturally appropriate support services he feels he would have been able to heal and progress his 'rehabilitation' faster than he was able to without the supports. The lack of culturally safe supports retraumatises many people and is entirely inappropriate in the context of overrepresentation of Aboriginal people on these Orders.

RECOMMENDATIONS

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Reviews of Detention and Supervision Orders

Under the Act, a periodic review of Detention and Supervision Orders is required at set intervals.[23] These intervals can either be the legislated intervals or intervals set by the Court at the time of imposing the Order.[24] The purpose of the review is to determine whether the Order should remain operative or be revoked, and whether there is a more suitable Order that should be in place.[25] For example, where it is deemed that a Detention Order shall be revoked, the Court may also make a subsequent determination that a Supervision Order should be enforced in lieu of the Detention Order.

During a review, the Court will consider;[26]

1) Progress reports relating to the person,
2) Any other reports authored by medical experts,
3) Reports made by a Government party,
4) Any other submissions made by both parties.

The applicant, being an agent of the State, provides the court with expert reports, disclosure, quarterly progress reports and all incident reports. In most circumstances the materials provided to the court are entirely deficit based and do not provide context or examples of a person's positive progress.

As discussed above, Corrections Victoria regularly fails to provide appropriate rehabilitative services to people who are subject to an Order. Additionally, there is a lack of culturally safe services and supports available to people and thus we can expect that Aboriginal people on these Orders may disproportionately struggle to comply with the requirements of the Order.

At the time of review the court is provided with all incident reports and examples of times when the person was not behaving in a manner that was compliant with the Order. The lack of strengths-based materials that are presented to the court during the review means the decision maker is presented with a skewed version of the persons progress and rehabilitation and determinations made may be entirely biased.

In order to ensure that reviews encompass perspectives of both the applicant and the respondent the reviews must include reports that are tested for use in Aboriginal communities. The deficit lens imbued across the criminal legal system is a direct legacy of the racist and deficit based colonial carceral system. The deficit lens must be replaced with approaches that are self-determined and grounded in the strength and resilience of Aboriginal culture, community and Country.

There are exceptions to the deficit narrative, which are grounded in self-determination, and which are beginning to expand and take hold across Australia. According to the Aboriginal Justice Caucus, the

[23] *Serious Offenders Act 2018* (Vic), s99 and s100.
[24] Intervals set at the time of imposition of the Order would be specified in the Order.
[25] *Serious Offenders Act 2018* (Vic), s104.
[26] *Serious Offenders Act 2018* (Vic), s105.

principles that underpin self-determination in the criminal legal system must include "strengths based" and "trauma-informed" considerations.[27]

Inspired by Gladue reports, Aboriginal Community Justice Reports (**ACJR**s) are currently being piloted by VALS as a way of supporting Aboriginal people to tell their life stories on their own terms, during the sentencing process: "Aboriginal community justice reports seek to provide a more complete picture of a person's life and circumstances. They endeavour to amplify the aspirations, interests, strengths, connections, culture, and supports of the individual, as well as the adverse impact of colonial and carceral systems on their life".[28]

The ACJR project has received positive feedback from the judiciary, practitioners and clients about the reports created through the program. The reports created by the project officers provide a cultural context for the persons behaviour and also highlight the persons strengths that are inherently linked to their Aboriginality. If ACJRs, or a similar report style, were required to be included during the review it would undoubtedly be beneficial for the person.

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Recommendation 23. When it is deemed that it is not suitable to lift an Order, the Court must ensure that a rehabilitation plan and goals are set to ensure the person has a program to work towards for their next review.

Recommendation 24. Culturally informed and strength-based reports should be required at the time of the application of the Order.

Recommendation 25. Culturally informed and strength-based reports should be required at each review to ensure the Court hears a balanced perspective of the persons progress under the Order.

Breaches and sentencing

There are certain offences that should not attract breach charge or further sentencing. An example of a charge that should not attract further punishment is drug use and possession offences. Drug

[27] Victorian Aboriginal Justice Agreement, Burra Lotjpa Dunguludja.
[28] T. Anthony, A. Lachsz and N. Waight, "The role of 're-storying' in addressing over-incarceration of Aboriginal and Torres Strait Islander Peoples," (17 August 2021).

addiction is a recognised medical disorder,[29] and medical experts are advocating for interventions to drug addiction to be founded in medical treatments and behavioural therapy.[30]

The colonial context of Australia's criminal legal institutions means that trying to tackle health issues through police and prisons, while harmful for everyone, has disproportionate effects on Aboriginal people. Regardless of whether personal drug offences are decriminalised, people who are subject to an adjourned undertaking should not have their undertaking breached by drug possession or drug use charges. Instead, a personal drug offence should trigger a health and wellbeing response, rather than a breach of the undertaking and further criminalisation of the person. A person should be offered intervention supports to assist in addressing their addiction.

Case Study – Frank (a pseudonym)

Frank is subject to a Supervision Order that requires him to reside at a residential facility. Amongst other conditions on his Order, Frank is banned from using drugs and alcohol for the duration of his order.

Frank has experienced drug and alcohol addiction throughout his lifetime and has experienced periods of relapse during his time at the residential treatment facilities. Frank is able to identify when he feels he will relapse and times that he requires additional supports to prevent the relapse, but due to the prohibition of drug and alcohol use as conditions of his Order he is unable to safely seek support and assistance through the workers at the treatment facilities.

Frank becomes further isolated in periods that he requires increased supports due to the punitive nature of the Order he is on.

Because Frank is unable to access culturally appropriate drug and alcohol support services whilst he is at the residential facilities, the risk of relapse, recidivism and recriminalisation of his drug use grows. It is entirely inappropriate that a person who is seeking drug and alcohol supports is denied access and then criminalised for the States failure to provide said supports.

Frank's drug and alcohol use are exacerbated by the disconnection he experiences from his family, Country and community due to the conditions of his Order. This disconnection from his strongest supports only further pushes him towards other coping mechanisms such as drug and alcohol use. When Frank does use drugs or alcohol to help deal with his grief and isolation Corrections Victoria will initiate a breach process that only further criminalises Frank for the medical disorder that is drug and alcohol addiction.[31]

[29] National Institute on Drug Abuse, Drug Misuse and Addiction (Website, July 2020) <https://nida.nih.gov/publications/drugs-brains-behavior-science-addiction/drug-misuse-addiction#ref>.
[30] National Institute on Drug Abuse, Treatment and Recovery (Website, July 2020) <https://nida.nih.gov/publications/drugs-brains-behavior-science-addiction/treatment-recovery>.
[31] National Institute on Drug Abuse, Drug Misuse and Addiction (Website, July 2020) <https://nida.nih.gov/publications/drugs-brains-behavior-science-addiction/drug-misuse-addiction#ref>.

When a person is criminalised for breaching a condition of the Order it only increases the risk of recidivism for minor offences, rather than improving a person's capacity to continue engaging in positive behaviours.

Sentences for contravening a Supervision Order are more severe than the standard sentencing limits for the same conduct under the relevant Act. That is, sentence limits for using a drug of dependence under the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) is Level 8 imprisonment (maximum of 1 year) for drugs that are not marijuana or THC,[32] but the sentence for contravening a Supervision Order under the *Serious Offenders Act* attracts a sentence of Level 6 imprisonment (maximum of 5 years) for the same possession or drug use offence.[33] It is counterproductive to rehabilitation when a person on a Supervision or Detention Order is subjected to extremely limiting conditions that, when breached, lead to excessively severe punishment.

Minimum sentencing provisions for breach offences under the Act removes judicial discretion and requires judicial decision-makers to impose prison sentences for particular offences, without taking into account the circumstances of the individual and the that gave rise to the offence.

VALS continues to oppose minimum sentencing provisions of the Serious Offenders Act for the following reasons:

- They erode the fundamental principle of an independent judiciary and discretion in sentencing,
- They increase incarceration rates, and are therefore more costly,
- They contradict the principle of proportionality and imprisonment as a last resort,
- Excessive punishment for breach offences can lead to the over-incarceration of Aboriginal and Torres Strait Islander people. In this regard, minimum sentencing provisions in the Act contradict the Victorian Government's commitment to addressing over-incarceration of Aboriginal people.[34]

RECOMMENDATIONS

Recommendation 26. The Victorian Government should amend the Serious Offenders Act to remove minimum sentencing provisions for criminal offences and breaches of the Order.

Recommendation 27. Where a person on an order identifies the need for drug and alcohol counselling, they should not be charged with breach offences or criminal charges in relation to their addiction.

Recommendation 28. Breaches of Orders by conduct that stems from a medical condition, such as drug addiction, should not attract criminal charges but rather trigger a medical and social response to support the person.

[32] *Drugs, Poisons and Controlled Substances Act 1981* (Vic), s75.
[33] *Serious Offenders Act 2018* (Vic), s169.
[34] Victorian Aboriginal Justice Agreement, Burra Lotjpa Dunguludja.

Recommendation 29. Corrections Victoria should endeavour to provide all people on an Order under the Act with culturally safe drug and alcohol rehabilitation supports.

Consultation limitations

In order to adequately highlight the impact of the shortcomings of the Act it would have been beneficial to include several case studies in our submission. However, the short deadline for submissions following the publication of the consultation paper was not conducive to obtaining proper consent and approval from members of the Community to include their stories in this submission.

We have not provided extensive case studies in this submission due to our concerns that, in most instances, we could not adequately inform current or former clients about the review and its purpose and include their story in a way that is not exploitative or that puts them at risk of re-traumatisation.

Inadequate consultation periods not only limit the ability of organisations to engage and empower members of the communities that they represent to tell their stories and speak their truths in a forum that they would not usually have access to, but it also limits the organisations' ability to produce a response that adequately addresses all questions posed. VALS has noted in previous submissions that inappropriately short consultation deadlines, particularly for overburdened and under-resourced ACCOs, do not allow the development of meaningful responses and are an affront to self-determination.[35] Frequently, VALS and other ACCOs are consulted at the last available opportunity and provided with very restrictive timeframes to respond with comprehensive feedback on issues that directly and significantly impact on the communities that we serve.

VALS and other ACCOs are already underfunded and overworked, meaning that it is incredibly difficult to provide comprehensive feedback on proposed matters. Our policy department needs sufficient time to engage with our legal and community justice programs services, in order to prepare comprehensive responses that are grounded in our clients' experiences, and incorporate the legal, technical and experiential expertise of our staff. The impacts of current Government processes are not limited to the short-term – our responses to particular pieces of work or consultations – but also the medium-to-long-term, with pressures on staff leading to challenges in staff retention across all areas (with high staff turnover leading, in turn, to loss of critical institutional knowledge and important relationships).

We appreciate that we were given an extension to provide this submission. However, it should be Government's responsibility to enable experts and impacted communities to inform Government legislation and policy. We do not believe that the timeframes we are regularly asked to work towards enable proper engagement with Government policy making and that this means that Government policy is greatly diminished.

[35] VALS, Submission to the Inquiry into Victoria's Criminal Justice System (2021) p. 42; VALS, Submission to the Senate Inquiry on the Implementation of United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP) in Australia (2022 p 13); VALS, Submission on Victoria's Anti-Racism Strategy (2021), pp.46-47.

RECOMMENDATIONS

Recommendation 30. The Victorian Government should ensure that all consultations and inquiries incorporate sufficient consultation timeframes that allow generalist and Aboriginal Community Controlled Organisations to provide comprehensive feedback.