Victorian Aboriginal Legal Service

Submission to the Independent Review of Compulsory Assessment and Treatment Criteria and Alignment of Decision-Making Laws

June 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. We also represent clients at the Mental Health Tribunal, and provide legal assistance to people who would like to engage with the Yoorook Justice Commission.

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:

- Isabel Robinson, Senior Policy Officer
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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.

SUMMARY OF RECOMMENDATIONS

Eliminate Compulsory Treatment

Recommendation 1. Work with relevant stakeholders – including Aboriginal people with lived and living experience of compulsory treatment – to develop a strategy to eliminate compulsory mental health treatment.

Recommendation 2. Invest adequate resources to support the end goal of eliminating compulsory treatment, including by addressing social determinants of poor mental health, and building a mental health system that is rights based, accessible, culturally safe and where supported decision-making - rather than substituted decision-making - is used when consumers do not have capacity to make their own decisions.

Protect the rights, will and preferences of individuals

Recommendation 3. Reform the compulsory mental health assessment and treatment system to respect and protect the will and preferences of individuals. As recommended by Victoria Legal Aid (**VLA**), provide that that decision makers must give all practical and appropriate effect to a person's will and preferences, and can only override them if it is necessary to prevent serious and imminent harm. Where it is necessary to override a person's will and preferences to prevent serious and imminent harm, the least restrictive means should be adopted to achieve this purpose.[1]

Strengthen supported decision-making

Recommendation 4. Advance statements reflecting the will and preferences of individuals should be binding and enforceable. Further work should be carried out with people with lived experience to design a robust and accessible process for developing an Advance Statement.

Recommendation 5. Supported decision-making must be a requirement before resorting to compulsory treatment. As recommended by VLA, supported decision-making should be strengthened by:

(a) Requiring, as part of the compulsory assessment and treatment criteria, that supported decision-making and adherence with consumer will and preference – including that other treatment and support options to prevent serious and imminent harm have been considered, trialled and excluded - is demonstrated, before compulsory treatment can be ordered.[2]

(b) Requiring clinicians to document supported decision-making efforts including documenting how and why these attempts did not succeed, and providing these to the consumer, non-legal advocate and/or lawyer, the Mental Health Tribunal and anyone else the consumer requests to have access to the documentation.[3]

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[1] Victoria Legal Aid, Submission to Independent Review of Compulsory Assessment and Treatment Criteria and Alignment of Decision-Making Laws ("Submission to Independent Review"), Recommendation 12.
[2] VLA, Submission to Independent Review, Recommendation 8.
[3] VLA, Submission to Independent Review, Recommendation 9.

(c) Requiring all mental health staff to complete mandatory and regular training on supported decision-making mechanisms.[4]

(d) Requiring all mental health and wellbeing service providers to report on what they have done to embed supported decision-making into their practice.[5]

Recommendation 6. In fulfilling the requirements for supported decision-making, clinicians should be required to respect and protect Aboriginal cultural rights and prioritise connection to Country, Community, culture and kin as a protective factor for good mental health and wellbeing. This should include a right for Aboriginal consumers to be supported by Aboriginal people in supported decision-making (including Mental Health Aboriginal Liaison Officers or Aboriginal non-legal mental health advocates), in an environment where they feel comfortable, and with a reasonable amount of time to reach their decision without undue pressure, and where information is provided in an accessible, culturally safe and trauma informed way.

Recommendation 7. Improve the cultural competency of mental health and wellbeing service providers by adequately funding and supporting Mental Health Aboriginal Liaison Officers at all treating hospitals and requiring all mental health staff to complete mandatory cultural awareness training.

Overhaul compulsory assessment and treatment criteria

Recommendation 8. As recommended by VLA, the compulsory assessment and treatment criteria should be overhauled to:

- Create a presumption of voluntary treatment, with compulsory treatment only permitted in exceptional circumstances to prevent serious and imminent harm.[6]
- Create a presumption of decision-making capacity,[7] and codify a strict test to rebut this presumption based on the capacity principles set out in *PBU & NJE v Mental Health Tribunal.*[8]
- Require that compulsory treatment be ordered in the narrowest and least restrictive way possible.[9]

Recommendation 9. Further consultation is required with Aboriginal Communities regarding the exceptional circumstances in which compulsory assessment and treatment may be permitted.

Recommendation 10. Compulsory assessment and treatment criteria should require decision-makers to consider Aboriginal cultural rights and strengths-based approaches to Aboriginality, including connection to culture, Country, Community and kin as protective factors for mental health and social and emotional wellbeing.

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[4] VLA, Submission to Independent Review, Recommendation 3.
[5] VLA, Submission to Independent Review, Recommendation 5.
[6] VLA, Submission to Independent Review, Recommendation 10.
[7] VLA, Submission to Independent Review, Recommendation 10.
[8] *PBU & NJE v Mental Health Tribunal* [2018] VSC 564 [206].
[9] VLA, Submission to Independent Review, Recommendation 10.

Strengthen safeguards for Assessment Orders, Temporary Treatment Orders and Community Treatment Orders

Recommendation 11. Strengthen the safeguards for temporary treatment orders by:

- Changing the authorisation process to require multiple, independent and diverse views and expertise, and ensuring that cultural expertise is incorporated into decisions about temporary treatment orders for Aboriginal people.
- Limiting the maximum duration of temporary treatment orders to 14 days.
- Requiring applications for revocation of a temporary treatment order to be heard and determined within 5 days.

Recommendation 12. Enhance procedural fairness at the MHT by requiring the Tribunal to provide parties with all relevant documents at least 3 days prior to a hearing date.

Recommendation 13. As recommended by VLA, require practitioners to provide early detailed reasoning on why compulsory assessment and treatment criteria apply, why assessment orders and temporary treatment orders are justified, how supported decision-making has been tried and why it has not succeeded. This reasoning must be translated in a language the consumer can understand.[10]

Recommendation 14. Where subsequent Community Treatment Orders are sought, treating teams should be required to work with the consumer to develop a Recovery Plan which sets out a pathway to end compulsory treatment.

Improve cultural competency at the Mental Health Tribunal

Recommendation 15. Improve cultural competency at the Mental Health Tribunal (**MHT**) by:

- Creating a Koori Engagement Team;
- Establishing a Koori List;
- Create more identified positions for Aboriginal Community Panel Members;
- Ensuring that hearings for Aboriginal people include an Aboriginal Community Panel Member.

Recommendation 16. Consider approaches similar to Aboriginal Community Justice Reports, as a way of: (i) empowering Aboriginal people to tell their story on their own terms; and (ii) providing relevant cultural information to the Tribunal, including the way in which connection to culture, Community, kin and Country can support good mental health and wellbeing.

Recommendation 17. Increase funding to VALS' Mental Health Legal Service so that all Aboriginal people appearing before the MHT are able to access legal representation from VALS if they would like.

Recommendation 18. Adequately fund the implementation of the codesign model for legal services currently being developed by VLA, MHLC and VALS.

[10] VLA, Submission to Independent Review, Recommendation 16.

Establish robust oversight mechanisms

Recommendation 19. The MHT and mental health and wellbeing service providers must be required by legislation to collect and publicly report data relating to compulsory assessment and treatment, in accordance with Indigenous Data Sovereignty (**IDS**) and Indigenous Data Governance (**IDG**). Data must be disaggregated by Aboriginality and detailed enough to inform a nuanced understanding of Aboriginal overrepresentation in compulsory mental health treatment (e.g. number/duration/frequency of orders, location, legal representation at MHT).

Recommendation 20. In accordance with IDS and IDG, government departments and entities – including the Department of Health and the Mental Health Tribunal – should enter into data access and data sharing agreements with ACCOs (including VALS) to ensure governance, choice and control over data about Aboriginal communities, including data relating to compulsory assessment and treatment.

Recommendation 21. Complaints against police relating to exercise of powers under the MHWA must not be investigated by police; they must be investigated by a new independent police complaints body that has adequate powers and resources to provide robust oversight.

Recommendation 22. As recommended by VLA, the MHT should be granted powers to make findings and make orders in relation to non-compliance by mental health services and treating teams of their obligations. [11]

Recommendation 23. The Victorian National Preventative Mechanism (**NPM**) must have jurisdiction over all places where people are or may be deprived of their liberty, regardless of the length of time of detention. This includes all places where persons are or may be detained pursuant to a compulsory assessment or treatment order, as well as any place where are or may be detained pursuant to powers under the MHWB Act to respond to a mental health crisis, including police vehicles.

[11] VLA, Submission to Independent Review, Recommendation 24.

DETAILED SUBMISSIONS

Introduction

VALS welcomes the opportunity to provide feedback to the Independent Review of Compulsory Assessment and Treatment Criteria and Alignment of Decision-Making Laws ("the Review").

Our submission is based on the experience of our Mental Health Legal Service (**MHLS**), which was established in July 2022, from funding flowing from Recommendation 56(3) of the Royal Commission into Victoria's Mental Health System ("the Royal Commission"). Over the past 12 months, we have developed valuable expertise and experience in relation to compulsory assessment and treatment under the *Mental Health and Wellbeing Act 2022* (**MHWA**), and the experience of Aboriginal people at the Mental Health Tribunal (**MHT**).

Additionally, our submission is informed by:

- Our work representing Aboriginal families in relation to coronial investigations/inquest into deaths connected with mental health and experiences within the mental health system, including involuntary treatment.
- Comparative experience representing clients in numerous other courts and tribunals in Victoria, and ongoing advocacy to increase cultural competency within these forums.
- Our extensive experience advocating for the rights of Aboriginal people and communities across all aspects of the legal system, including Aboriginal cultrual rights.

We strongly support a rights-based approach to mental health, that empowers individuals and communities and is grounded on the ultimate goal of eliminating compulsory assessment and treatment. To achieve this, the Victorian Government must invest significant resources to address the social determinants of poor mental health (housing, poverty, health, education, family violence, employment) and increase access to voluntary and culturally safe mental health support and services. In this regard, we refer the Review to the submission and recommendations of the Victorian Aboriginal Community Controlled Health Organisation (**VACCHO**).

We strongly support reforms that will improve respect for Aboriginal cultural rights, and elevate recognition of Aboriginal culture as a protective factor for good mental health and social and emotional wellbeing.

Our submission focuses on reforms to compulsory assessment and treatment, including:

- Strengthening supported decision making for Aboriginal people;
- Incorporating Aboriginal culture as a protective factor into assessment and treatment criteria;
- Enhancing safeguards in the process for assessment and temporary treatment orders;
- Improving cultural competency at the MHT;
- Improving oversight of compulsory assessment and treatment.

VALS Mental Health Legal Service

The MHLS is state-wide and includes one dedicated Senior Lawyer and Paralegal who are situated within the Civil and Human Rights Practice at VALS. The Senior Lawyer is also training other lawyers in the Civil team to be able to increase the capacity of the service, although the ability of other lawyers to assist is limited by their own caseloads.

The key area of practice is representing clients at the MHT, who are subject to compulsory treatment orders, including both inpatient and community orders. The model provides a culturally safe, trauma-informed and accessible service that is flexible and responsive to client needs. Face to face service is offered where possible, and a phone service or video service as alternative modes. Wrap around assistance is provided to ensure clients are referred to any other relevant support services and all other unmet legal needs are addressed. There is no limit on the amount of assistance that can be provided outside of capacity and resource constraints and the general VALS eligibility criteria.

We provide a culturally safe service by working closely with Aboriginal Liaison Officers, other Aboriginal organisations, our own Community Justice Team and a client's family and other supports to the extent that our clients would like us to.

To date, we have assisted with 18 MHT matters. With legal representation, clients who have MHT hearings are generally able to obtain less restrictive treatment than their treating team are seeking. In some cases where the maximum 6-month inpatient order has been sought by a client's treating team, we have supported them to instead obtain a community treatment order or voluntary treatment.

Other key areas of the MHLS include representing families at Coronial Inquests relating to deaths connected with mental health, Guardianship and Administration Orders, Discrimination and Health Complaints.

Eliminate Compulsory Treatment

Relevant Consultation Questions

- Question 1: There are many different perspectives on compulsory treatment. One of these is that compulsory treatment should be abolished/eliminated entirely. Do you agree with this?
- Question 2: Are there any exceptional circumstances where compulsory treatment might be appropriate? If so, what are they?

Compulsory mental health assessment and treatment undermines human rights, is discriminatory and disempowering, and often leads to trauma which can undermine mental health. This was acknowledged by the Royal Commission and is now acknowledged in the MHWA.[12]

For Aboriginal people, compulsory treatment also compounds historical and intergenerational trauma. It can be viewed as an ongoing form of colonial oppression, and an abrogation of rights that disempowers and obstructs self-determination and healing. Such treatment is often viewed by our clients as another form of state violence, comparable to other forms of historical and contemporary violence, such as police mistreatment and removal of children.

The structural violence perpetrated through compulsory assessment and treatment is accentuated for Aboriginal people given the ongoing central role of Victoria Police to respond to mental health crises under the MHWA. Although the new Act seeks to implement a health-led response to mental health crises, Victoria Police continue to wield significant power under the Act,[13] and there are delays in implementing the shift to a health-led response.[14] Given historical and contemporary violence perpetrated by police against Aboriginal communities, Aboriginal people often have a well-founded distrust in police, which can lead to further escalation if police are present and involved in responding to mental health crises.

Since 2014, the legislative framework in Victoria has required that compulsory mental health treatment should only be used as a last resort, when there are "no less restrictive means reasonably available" to enable the person to be assessed and/or receive immediate treatment.[15] Despite this, compulsory assessment and treatment in Victoria continues to increase.[16]

As highlighted by the Royal Commission, under resourcing and limited access to voluntary mental health care and support contributes to the use of compulsory treatment as a default response. For Aboriginal communities, ongoing racism within the mental health system and a lack of culturally safe mental health care and support is also a key factor contributing to high rates of compulsory treatment.

VALS strongly supports the vision of the Royal Commission for a new mental health and wellbeing system that respects human rights, and responds to people's needs and preferences.[17]

This requires significant investment in the front end of the mental health system, to increase access to voluntary, culturally safe and trauma-informed treatment, care and support. It also requires

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[12] See Section 80, *MHWA 2022* (Vic). The use of compulsory assessment and treatment or restrictive interventions significantly limits a person's human rights and may cause possible harm including: (a) serious distress experienced by the person; and (b) the disruption of the relationships, living arrangements, education or employment of the person.
[13] See Chapter 5, *MHWA 2022* (ss. 228-253).
[14] S. Ilanbey, Paramedics put on hold as mental health triple 0 overhaul delayed, 30 May 2023.
[15] *Mental Health Act 2014* (Vic) ss. 5(d) and 29(d); *MHWA 2022* (Vic), ss. 142(d), 143(d).
[16] See Royal Commission, *Final Report: Volume 4* (2021), p. 377-378: "Since 2015–16, the number of compulsory Assessment, Temporary Treatment and Treatment Orders made in Victoria continues to increase on average by approximately 2–3 per cent per year for each type of order across all ages…In 2019–20, 0.20 per cent of the Victorian population aged 26–64 years were subject to compulsory treatment orders, which has increased from 0.17 per cent of the population in 2010–11."
[17] Royal Commission, *Final Report: Volume 4* (2021), p. 363.

significant investment to address the social determinants of mental health (poverty, housing instability, and adequate access to culturally safe physical healthcare services).[18]

Additionally, we support calls made by other organisations – including VMIAC[19] and VLA[20] – for the Government to work with relevant stakeholders to develop a strategy to eliminate compulsory mental health treatment, and to adequately fund and support implementation of this strategy. In doing so, it will be essential to ensure that the reduction and elimination of compulsory treatment correlates with an increase in voluntary treatment, and does not lead to further criminalisation of mental illness.

RECOMMENDATIONS

Recommendation 1. Work with relevant stakeholders – including Aboriginal people with lived and living experience of compulsory treatment – to develop a strategy to eliminate compulsory mental health treatment.

Recommendation 2. Invest adequate resources to support the end goal of eliminating compulsory treatment, including by addressing social determinants of poor mental health, and building a mental health system that is rights based, accessible, culturally safe and where supported decision-making - rather than substituted decision-making - is used when consumers do not have capacity to make their own decisions.

Protect the rights, will and preferences of individuals

Relevant Consultation Questions

- Question 3: What do you think the purpose of compulsory treatment should be?
- Question 4: What do you think the purpose of compulsory assessment should be?

Purpose of compulsory assessment and treatment

Currently, compulsory treatment is permitted to prevent (i) serious deterioration in the persons mental or physical health; or (ii) serious harm to the person or to another person.[21] Compulsory assessment is permitted for the purposes of determining if compulsory treatment is required.[22] We do not support these current purposes for compulsory assessment and treatment, which are underpinned by cautious risk aversion and paternalism.

To dramatically reduce and ultimately eliminate compulsory treatment, the underlying purposes of non-voluntary treatment must be radically reformed. VALS supports a will and preferences framework

[18] Royal Commission, Final Report: Volume 4, p. 375.
[19] VMIAC, *Position Paper #1: Compulsory Treatment*
[20] VLA, Submission to Independent Review, Recommendation 1.
[21] Section 143, *MHWA 2022* (Vic).
[22] Section 142 *MHWA 2022* (Vic).

as a more appropriate way of protecting rights, giving effect to the principle of dignity of risk, and reducing deficit and risk-based approaches.

A requirement to respect and protect a person's will and preferences must be incorporated across the entirety of the compulsory assessment and treatment system. This would include a requirement in the compulsory assessment and treatment criteria to respect an individual's will and preferences, with limited exceptions. It would also require positive action to strengthen and facilitate supported decision-making as way of giving effect to a person's will and preferences. Finally, it would require clinicians to give effect to a person's will and preferences in relation to any treatment decisions for individuals on a compulsory assessment or treatment order.[23]

Under a will and preferences framework, individuals with decision-making capacity have the right to refuse treatment, unless treatment is necessary to prevent serious and imminent harm. Further consultation is required with Aboriginal communities relating to the scope of this exception and whether harm it should include harm to self, as well as harm to others. Additionally, further consultation is required in relation to the exceptional circumstances in which compulsory assessment or treatment may be permitted for someone who does not have decision-making capacity.

RECOMMENDATIONS

Recommendation 3. Reform the compulsory mental health assessment and treatment system to respect and protect the will and preferences of individuals. As recommended by Victoria Legal Aid (**VLA**) provide that that decision makers must give all practical and appropriate effect to a person's will and preferences, and can only override them if it is necessary to prevent serious and imminent harm. Where it is necessary to override a person's will and preferences to prevent serious and imminent harm, the least restrictive means should be adopted to achieve this purpose.[24]

Strengthen supported decision-making

Relevant Consultation Questions

- Question 5: What should supported decision-making in mental health treatment look like?
- Question 6: Why do so few compulsory patients have a nominated support person in place?
- Question 7: What information should a support person receive?
- Question 8: If people had the right to choose a substitute decision-maker for compulsory mental health treatment, what would need to be considered?
- Question 9: If a compulsory patient has not chosen a substitute decision-maker, should it be possible to assign a substitute decision-maker other than the authorised psychiatrist?
- Question 10: What would be the best process to identify and assign a substitute decision-maker for a compulsory patient who has not identified a specific person?

[23] Currently, when someone is on a compulsory treatment order, decisions about treatment are made by a clinician without the person's consent, and there is no legal obligation to give effect to the persons will and preferences if the clinician thinks it is not clinically appropriate to do so.

[24] Victoria Legal Aid, Submission to Independent Review of Compulsory Assessment and Treatment Criteria and Alignment of Decision-Making Laws ("Submission to Independent Review"), Recommendation 12.

- Question 11: What changes could strengthen advance statements? Are there alternatives that could work better than advance statements?
- Question 12: What are the implications of having a values statement as an additional option for consumers?
- Question 13: Do you think any changes should be made to the process of making a mental health advance statement?
- Question 14: Are there any circumstances where it might be appropriate to override an advance statement? If so, what are they?

We strongly support reforms to strengthen supported decision-making as a key way of protecting human rights, empowering individuals, enhancing respect for individual preferences, and reducing compulsory treatment rates.

Although mechanisms currently exist to support decision making - including Advance Statement of Preferences, Nominated Support Persons and mental health advocates - there is still a significant power imbalance in the system, which undermines the effectiveness of these mechanisms.

The lack of cultural competency and cultural safety in existing mechanisms for supported decision making create an additional barrier for Aboriginal people.

Advance Statement of Preferences

In our practice experience, many clients do not see the value in an Advance Statement, as they are non-binding and can be easily disregarded by clinicians.

We believe that Advance Statements can be a useful tool for supported decision-making, if they are binding. This may mean that the process for developing Advance Statements may need to be strengthened. Further work will be required to ensure that the process for developing an Advance Statement is adequately robust, but also accessible.

Requirement to demonstrate supported decision-making

We support VLA's recommendations to require supported decision-making before resorting to substituted decision-making. This would involve:

- A requirement in the compulsory assessment and treatment criteria that supported decision-making and adherence with consumer will and preference is demonstrated, before compulsory treatment can be ordered.[25]
- A requirement for clinicians to document supported decision-making efforts including documenting how and why these attempts did not succeed, before resorting to treat someone compulsorily.[26]

[25] VLA, Submission to Independent Review, Recommendation 8.
[26] VLA, Submission to Independent Review, Recommendation 4.

- Mandatory training for all mental health staff on supported decision-making mechanisms.[27]
- A requirement for all mental health and wellbeing legal services to report on what they have done to embed supported decision-making into their practice.[28]

Supported decision-making that is culturally competent

In addition to the proposals above, specific changes are required to increase access to supported decision-making for Aboriginal people.

There is a need to ensure that approaches to supported decision-making prioritise connection to culture, Country, kin and Community as protective factors for good mental health and wellbeing. This should include a right for Aboriginal consumers to be supported by Aboriginal people in supported decision-making, in an environment where they feel comfortable, and with a reasonable amount of time to reach their decision without undue pressure, and where information is provided in an accessible, culturally safe and trauma informed way.

We understand that there is planning in place to recruit Aboriginal mental health advocates at Independent Mental Health Advocacy (**IMHA**) which will assist in this regard. Additionally, we strongly recommend that the Victorian Government adequately fund and support Mental Health Aboriginal Liaison Officers at all treating hospitals and require mental health staff to complete mandatory cultural awareness training.

Cultural Safety Principle

The MHWA includes a Cultural Safety Principle, which requires that in relation to a person's treatment and care:

- Regard is to be given to Aboriginal and Torres Strait Islander people's unique culture and identity, including connections to family and kinship, community, Country and waters; and
- To the extent that it is practicable and appropriate to do so, give regard to the views of elders, traditional healers and Aboriginal and Torres Strait Islander mental health workers.[29]

Both Mental Health and Wellbeing Providers and the MHT are required to "give proper consideration to" the mental health and wellbeing principles,[30] and mental health and wellbeing providers are also required to "make all reasonable efforts to comply with the mental health and wellbeing principles."[31]

Previously, VALS has raised significant concerns about the lack of enforceability of the Cultural Safety Principle, and the need for stronger legislative mechanisms to ensure that Aboriginal cultural rights are promoted, respected and protected in the context of mental health care and treatment.

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[27] VLA, Submission to Independent Review, Recommendation 3.
[28] VLA, Submission to Independent Review, Recommendation 3.
[29] Section 27, MHWA 2022 (Vic).
[30] Section 29(b) and 333(a) MHWA 2022 (Vic).
[31] Section 29(a), MHWA 2022 (Vic).

We are concerned that the Cultural Safety Principle does not provide a robust legislative safeguard for prioritising strengths-based approaches to Aboriginality, and adequately recognising connection to culture (including Community, County and kin) as protective factors in mental health treatment and care.

Below we propose that the compulsory treatment criteria should be amended to require clinicians and the MHT to consider connection to culture, Country, kin and Community as protective factors for good mental health and wellbeing. As above, we believe that the reforms relating to supported decision-making should incorporate a similar approach.

RECOMMENDATIONS

Recommendation 4. Advance statements reflecting the will and preferences of individuals should be binding and enforceable. Further work should be carried out with people with lived experience to design a robust and accessible process for developing an Advance Statement.

Recommendation 5. Supported decision-making must be a requirement before resorting to compulsory treatment. As recommended by VLA, supported decision-making should be strengthened by:

(a) Requiring, as part of the compulsory assessment and treatment criteria, that supported decision-making and adherence with consumer will and preference – including that other treatment and support options to prevent serious and imminent harm have been considered, trialled and excluded - is demonstrated, before compulsory treatment can be ordered.[32]

(b) Requiring clinicians to document supported decision-making efforts including documenting how and why these attempts did not succeed, and providing these to the consumer, non-legal advocate and/or lawyer, the Mental Health Tribunal and anyone else the consumer requests to have access to the documentation.[33]

(c) Requiring all mental health staff to complete mandatory and regular training on supported decision-making mechanisms.[34]

(d) Requiring all mental health and wellbeing service providers to report on what they have done to embed supported decision-making into their practice.[35]

Recommendation 6. In fulfilling the requirements for supported decision-making, clinicians should be required to respect and protect Aboriginal cultural rights and prioritise connection to Country, Community, culture and kin as a protective factor for good mental health and wellbeing. This should include a right for Aboriginal consumers to be supported by Aboriginal people in supported decision-making (including Mental Health Aboriginal Liaison Officers or Aboriginal non-legal mental health advocates), in an environment where they feel comfortable, and with a reasonable amount

[32] VLA, Submission to Independent Review, Recommendation 8.
[33] VLA, Submission to Independent Review, Recommendation 9.
[34] VLA, Submission to Independent Review, Recommendation 3.
[35] VLA, Submission to Independent Review, Recommendation 5.

of time to reach their decision without undue pressure, and where information is provided in an accessible, culturally safe and trauma informed way.

Recommendation 7. Improve the cultural competency of mental health and wellbeing service providers by adequately funding and supporting Mental Health Aboriginal Liaison Officers at all treating hospitals and requiring all mental health staff to complete mandatory cultural awareness training.

Overhaul compulsory assessment and treatment criteria

Relevant Consultation Questions

- Question 15: Are there any criteria that are particularly problematic?
- Question 16: What changes could be made to the assessment and/or treatment criteria?
- Question 17: Should the compulsory assessment and treatment criteria include a decision-making capacity criterion? What are the considerations?
- Question 19: How could the criteria for compulsory assessment, temporary treatment, and treatment orders be different to each other?

The current compulsory assessment and treatment criteria must be overhauled. They are not operating effectively to ensure that compulsory treatment is only ever used as a last resort, and they do not adequately take into account the importance of connection to culture, Community, kin and Country as protective factors for mental health and social and emotional wellbeing.

Decisions to grant compulsory treatment are often made using the narrow lens of pharmacological therapy, which fails to take into consideration broader factors imperative to social and emotional wellbeing including connection to culture, language, Community, family and Country.

The approach taken is also one of cautious risk aversion and paternalism. The compulsory treatment and assessment criteria should be amended to ensure that self-determination and broader determinants of wellbeing are properly considered in decision making.

To properly align with the goal of eliminating compulsory treatment, we strongly support the following changes recommended by VLA, to the compulsory assessment and treatment criteria:

- Create a legislative presumption in favour of voluntary treatment, with compulsory treatment only permitted in exceptional circumstances to prevent serious and imminent harm.

  Currently, both the assessment and treatment criteria are permissive, which makes it easier for the criteria to be met. The only restriction in the current criteria is that “there are no less restrictive means reasonably available.” Embedding a presumption of voluntary treatment will reverse the permissive nature of the current criteria and support the longer-term goal of eliminating compulsory treatment.

  Further consultation with Aboriginal Communities is required regarding the exceptional circumstances in which compulsory assessment and treatment may be permitted.

- Create a presumption of decision-making capacity, and codify a strict test to rebut this presumption based on the capacity principles set out in *PBU & NJE v Mental Health Tribunal.*[36]
- Require that supported decision-making and adherence to an individual's will and preferences - including that other treatment and support options to prevent serious and imminent harm have been considered, trialled and excluded - before compulsory treatment can be ordered.

Aboriginal cultural rights and connection to culture as a protective factor

Additionally, we strongly recommend that new criteria for assessment and treatment must incorporate and prioritise connection to Aboriginal culture as a protective factor for good mental health and social and emotional wellbeing, including connection to Country, Community, kin and culture.

Under the current criteria, compulsory treatment is only permitted if there is "no less restrictive way to enable the person to receive the treatment." Criteria four provides some limited opportunity to adopt a strengthens based approach to Aboriginal, and highlight connection to family, community, Culture and kin as protective mechanisms, which may mean that there is a less restrictive type of treatment available. Sometimes support persons are able to speak within tribunal hearings. However, this is usually limited and not given the appropriate value and weight that they deserve.

Cultural Safety Principle

The MHWA includes a Cultural Safety Principle, which requires that in relation to a person's treatment and care:

- Regard is to be given to Aboriginal and Torres Strait Islander people's unique culture and identity, including connections to family and kinship, community, Country and waters; and
- To the extent that it is practicable and appropriate to do so, give regard to the views of elders, traditional healers and Aboriginal and Torres Strait Islander mental health workers.[37]

Both Mental Health and Wellbeing Providers and the Mental Health Tribunal are required to "give proper consideration to" the mental health and wellbeing principles,[38] and mental health and wellbeing providers are also required to "make all reasonable efforts to comply with the mental health and wellbeing principles."[39]

Previously, VALS has raised significant concerns about the lack of enforceability of the Cultural Safety Principle, and the need for stronger legislative mechanisms to ensure that Aboriginal cultural rights are promoted, respected and protected in the context of mental health care and treatment.

We are concerned that the Cultural Safety Principle will not provide a robust legislative safeguard for prioritising strengths-based approaches to Aboriginality, and adequately recognising connection to

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[36] *PBU & NJE v Mental Health Tribunal* [2018] VSC 564 [206].
[37] Section 27, MHWA 2022 (Vic).
[38] Section 29(b) and 333(a) MHWA 2022 (Vic).
[39] Section 29(a), MHWA 2022 (Vic).

culture (including Community, County and kin) as protective factors in compulsory treatment decisions.

Section 3A Bail Act and sentencing laws

In the criminal legal system, changes have been made in both bail and sentencing processes in Victoria, to increase the extent to which Aboriginality is taken into account by judicial officers. The overarching aim of these changes is to reduce the over-representation of Aboriginal people in the criminal legal system.

Under Section 3A of the Bail Act, bail decision makers are required to take into account a person's Aboriginality, including the person's cultural background (including the person's ties to extended family or place) as well as any other relevant cultural issue or obligation.[40] VALS and the Aboriginal Justice Caucus are also advocating for changes to the Sentencing Act, to ensure that Aboriginality is take into account for the purposes of sentencing.

As discussed further below, whilst legal requirements such as Section 3A of the Bail Act are an important step, they must be accompanied by guidance, training and other mechanisms to support their implementation, as well as robust oversight mechanisms (to ensure accountability).

Compulsory Assessment and Treatment

In relation to compulsory assessment and treatment, we strongly recommend that both assessment and treatment criteria must incorporate a legal requirement to consider and prioritise Aboriginal cultural rights and connection to culture, Community, Country and kin as protective factors for Aboriginal mental health and social and emotional wellbeing.

A legal requirement to consider connection to culture as a protective factor, would need to be co-designed with Aboriginal communities, including Aboriginal people with lived and living experience of the compulsory treatment system.

Importantly, it would also need to be accompanied by significant reforms at the MHT (discussed further below), to improve cultural competency at the Tribunal, and also provide opportunities for Aboriginal people at the tribunal to be empowered to tell their story on their own terms.

RECOMMENDATIONS

Recommendation 8. As recommended by VLA, compulsory assessment and treatment criteria should be overhauled to:

- Create a presumption of voluntary treatment, with compulsory treatment only permitted in exceptional circumstances to prevent serious and imminent harm.[41]

[40] Section 3A, *Bail Act 1977* (Vic).
[41] VLA, Submission to Independent Review, Recommendation 10.

- Create a presumption of decision-making capacity,[42] and codify a strict test to rebut this presumption based on the capacity principles set out in *PBU & NJE v Mental Health Tribunal.*[43]
- Require that compulsory treatment be ordered in the narrowest and least restrictive way possible.[44]

Recommendation 9. Further consultation is required with Aboriginal Communities regarding the exceptional circumstances in which compulsory assessment and treatment may be permitted.

Recommendation 10. Compulsory assessment and treatment criteria should require decision-makers to consider Aboriginal cultural rights and strengths-based approaches to Aboriginality, including connection to culture, Country, Community and kin as protective factors for mental health and social and emotional wellbeing.

Strengthen safeguards for Assessment Orders, Temporary Treatment Orders and Community Treatment Orders

Relevant Consultation Questions

- Question 18: Who should be able to sign off on an: assessment order; temporary treatment order; treatment order?
- Question 20: Are there exceptional circumstances in which community treatment orders are appropriate?
- Question 22: How soon after a person is placed on a compulsory assessment and/or temporary treatment order should there be some form of independent review?

Assessment and Temporary Treatment Orders

VALS has significant concerns regarding the existing processes for Assessment and Temporary Treatment Orders, which made be made by the authorised psychiatrist. This includes:

- **Conflict of interest and lack of independence**: as noted in the Consultation Paper, both Assessment Orders and Temporary treatment orders are made by the authorised psychiatrist, who may also make decisions about treatment.
- **Concentration of power**: the existing authorisation process concentrates immense power with one individual. As noted in the consultation paper, the current system allows for an individual to be detained for up to 31 days, based off the decision of one individual.
- **Lack of cultural safety**: not only is there limited cultural competency amongst authorised psychiatrists, there is also limited no mechanism for cultural expertise to be considered as part of the decision.

[42] VLA, Submission to Independent Review, Recommendation 10.
[43] *PBU & NJE v Mental Health Tribunal* [2018] VSC 564 [206].
[44] VLA, Submission to Independent Review, Recommendation 10.

- **Ineffective safeguards**: safeguards such as the option to seek a second psychiatric assessment are not effective, as they are informed by the first assessment and lack independence.

To address these concerns, there is a critical need to strengthen the authorisation process for Assessment and Temporary Treatment Orders, reduce the length of the orders and strengthen appeal mechanisms. In particular, VALS strongly recommends the following changes:

- Reduce the maximum duration of a Temporary Treatment Order from 28 days to 14 days. This would still allow time to prepare an application for a Treatment Order, but would ensure independent oversight by the MHT within a maximum period of 15-17 days.
- Strengthen the process for making a Temporary Treatment Order by requiring that decisions must incorporate multiple, independent and diverse views and expertise.
- Ensure that cultural expertise is incorporated into decisions about Temporary Treatment Orders for Aboriginal people. This would require legislative backing, enhancing the cultural competency of Mental Health and Wellbeing Service Providers, and creating mechanisms for incorporating this expertise.
- Strengthen rights to appeal Temporary Treatment Orders, including by requiring applications for revocation of a Temporary Treatment Orders to be heard and determined within 5 days.

Procedural fairness at the MHT

Currently there is no mechanism for parties to receive all relevant documents prior to an MHT hearing. Although these documents are provided to the MHT, the Tribunal Registry does not share these documents with consumers or legal representatives in the same way that other court registries function.

To ensure procedural fairness at the MHT, all parties should have access to all relevant documents. We strongly support an enhanced role for the MHT registry, including to ensure that all parties involved in proceedings have access to the same information and documentation.

Community Treatment Orders

We are concerned about the use of rolling CTOs. We would like to see stronger legislative safeguards to limit the power of the Tribunal to approve rolling CTOs, including a requirement for treating teams to work with the consumer to develop a Recovery Plan which sets out a pathway to end compulsory treatment.

RECOMMENDATIONS

Recommendation 11. Strengthen the safeguards for temporary treatment orders by:

- Changing the authorisation process to require multiple, independent and diverse views and expertise, and ensuring that cultural expertise is incorporated into decisions about temporary treatment orders for Aboriginal people.
- Limiting the maximum duration of temporary treatment orders to 14 days.

- Requiring applications for revocation of a temporary treatment order to be heard and determined within 5 days.

Recommendation 12. Enhance procedural fairness at the MHT by requiring the Tribunal to provide parties with all relevant documents at least 3 days prior to a hearing date.

Recommendation 13. As recommended by VLA, require practitioners to provide early detailed reasoning on why compulsory assessment and treatment criteria apply, why assessment orders and temporary treatment orders are justified, how supported decision-making has been tried and why it has not succeeded. This reasoning must be translated in a language the consumer can understand.[45]

Recommendation 14. Where subsequent Community Treatment Orders are sought, treating teams should be required to work with the consumer to develop a Recovery Plan which sets out a pathway to end compulsory treatment.

Improve Cultural Competency at the Mental Health Tribunal

The MHT is not a culturally safe space for Aboriginal people. This is in part because of the historical and contemporary role that courts and tribunals have played, and continue to play in dispossessing, disempowering, and destroying Aboriginal Communities. It is also because of the inherent power imbalances, systemic racism, and limitations in the legislation, process, composition and approach of the tribunal.

Ultimately, all of these factors make it very hard Aboriginal people to feel spiritually, socially, emotionally and physically safe; to feel that there is "no assault, challenge or denial of their identity, of who they are and what they need."[46] Too often in generalist courts, there is a lack of "shared respect, shared meaning, shared knowledge and experience," and an inability to learn together with dignity and truly listen.

Specialised support and court processes for Aboriginal people

Across other jurisdictions, efforts have been made to improve the cultural competency of courts and tribunals. Although courts and tribunals are unlikely to ever be culturally safe, there are a number of reforms that have been implemented in other courts and tribunals in Victoria which should be considered at MHT, including:

- **Koori Courts:** in response to the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**), Koori Courts have been established across the Magistrates Court, Children's Court and County

[45] VLA, Submission to Independent Review, Recommendation 16.

[46] Williams defines cultural safety an "environment which is spiritually, socially and emotionally safe, as well as physically safe for people; where there is no assault, challenge or denial of their identity, of who they are and what they need. It is about shared respect, shared meaning, shared knowledge and experience, of learning together with dignity and truly listening." See Williams, R. (1999). Cultural safety – What does it mean for our work practice? Australian and New Zealand Journal of Public Health. 23. 213 – 214. See also VACCHO's definition of cultrual safety: the provision of "quality service that fits within the cultural values and norms of the person accessing the service that may differ from your own and/or the dominant culture."

Courts jurisdictions in both metro and rural courts. Koori Courts involve Elders and Respected Persons (**ERP**s) who advise the judicial officer, as well as Koori Support Officers, who provide support to the accused person and their family. The court environment is physically different to generalist court, to help break down power imbalances and make the court less intimidating for the accused. There is more opportunity for the accused person to speak. Judicial officers are usually required to complete mandatory and regular cultural awareness training.

- **Koori Lists:** in the Federal Circuit and Family Court of Australia[47] and the Children's Court of Victoria,[48] Koori Lists have been established in some locations. Koori Lists are often more informal than the generalist list, usually involve Koori Liaison Officers who can provide support and help connect the person/family to culturally appropriate support services and are run by judicial officers with a higher level of cultrual competency. In some cases, they also involve changes to the physical environment, for example at Marram-Ngala Ganbu everyone sits around a table.
- **Koori Engagement Units**: At the Coroners Court of Victoria, the Koori Engagement Unit plays a critical role providing support to Aboriginal families engaged with coronial processes. The unit also provides advice to the court and judicial officers, and has been instrumental in improving the cultural competency of the court.

We acknowledge that several changes have been implemented recently at the MHT, which seek to improve the cultural competency of Tribunal, including development and implementation of a Reconciliation Action Plan, and providing for longer hearings for Aboriginal people if requested. We support these reforms, noting that there is still a significant need for further change.

Additionally, there has previously been an Aboriginal Community Panel Member at the Tribunal, although this position is not established under legislation or policy, and there is no requirement for an Aboriginal Community Panel Member to be part of the Panel for Aboriginal consumers.

Consideration of Aboriginality

As noted above, the compulsory assessment and treatment criteria and the current court process mean that it is challenging for Aboriginal people and their legal representatives, to ensure that Aboriginality is given adequate consideration during Tribunal hearings.

As above, both the compulsory assessment and treatment criteria should incorporate a legal requirement to consider and prioritise Aboriginal cultural rights and connection to culture, Community, Country and kin as protective factors for Aboriginal mental health and social and emotional wellbeing.

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[47] The Federal Circuit and Faily Court of Australia runs a specialized list for Aboriginal and/or Torres Strait Islander Peoples in Melbourne, Adeliade, Brisbane, Darwin, Sydney, Alice Springs, Cairns, Coffs Harbour, Lismore and Townsville: https://www.fcfcoa.gov.au/fl/indigenous-list

[48] In the Children's Court at Broadmeadows and Shepparton, Marram-Ngala Ganbu is a Koori Family Hearing day which "seeks to provide a more effective, culturally appropriate and just response for Koori families through a court process that enables greater participation by family members and culturally-informed decision-making. https://www.childrenscourt.vic.gov.au/family-division/marram-ngala-ganbu-koori-family-hearing-day

However, Section 3A of the Bail Act has demonstrated that legislative requirements are not enough to effect systemic change; additionally, training and operational guidance is essential, and other mechanisms may also be required to ensure that the decision maker is provided with adequate cultural information.

Aboriginal Community Justice Reports

In relation to sentencing, VALS is currently piloting Aboriginal Community Justice Reports (**ACJR**s),[49] as a mechanism to support Aboriginal people to tell their life stories on their own terms during the sentencing process.

According to Anthony et al., "Aboriginal storying in sentencing promotes the principles of truth-telling by placing power in the hands of the Aboriginal person and their community to tell their story. Through this, non-custodial pathways can be identified, drawing on the person's strengths and community avenues for healing." [50] ACJRs "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."[51]

ACJRs are modelled off Gladue Reports, which evolved in Canada in 2001 in response to the landmark case of *R v. Gladue*[52] and the establishment of Gladue Courts.[53] Indigenous Experience Reports are also evolving in other Australian jurisdictions and were recommended by the Australian Law Reform Commission in its 2017 *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*.[54]

The ACJR pilot includes both Aboriginal men and women with matters in the Koori County Court. The reports are prepared by Aboriginal report writers who work with the defendant, their family and support people. Report writers conduct research on the person's community and culture, and identify relevant services and supports. The report can only be requested by the defendant and their lawyer (it cannot be ordered by the court); and the defendant's lawyer does not have control over the report, which is submitted to the court, prosecution and defence simultaneously. ACJRs take approximately 3 months to prepare, as they involve multiple meetings with the client as well as other family members and/or friends.

The AJCR pilot has completed several reports to date, which have been well-received by the court. For example, in *DPP v Tirris*, the court noted that the report "provides a much more detailed and in-depth level of information about your circumstances, your family and community, than is usually provided

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[49] ACJRs are currently being piloted by VALS as part of a joint project with the University of Technology, the Australasian Institute of Judicial Administration and Griffith University.
[50] 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).
[51] Ibid.
[52] *R v Gladue* [1999] 1 SCR 688.
[53] As noted in *R. v. Ipeelee*, "A Gladue report is an indispensable sentencing tool to be provided at a sentencing hearing for an Aboriginal offender." See *R. v. Ipeelee* 2012 SCC 13, [2012] 1 S.C.R. 433 [60].
[54] ALRC, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (2017), p. 214.

to a Court. The report also provides a greater opportunity for you and your loved ones to tell your story yourselves - rather than having it told by others."[55] In *DPP v Rotumah*, the court noted that "the prosecution acknowledges the contents of the ACJR and accepts that structural and systemic racism and colonisation influenced … personal circumstances and outcomes in life."[56] Additionally, preliminary findings from the ACJR project have indicated that the ACJR process itself can have significant healing and therapeutic value for the client.

Alongside piloting ACJRs, VALS continues to advocate for changes to the Sentencing Act 1991 (Vic), so that judicial officers are required to take into account someone's Aboriginality for the purposes of sentencing.

Aboriginality at the MHT

While Section 3A of the Bail Act, and Aboriginal Community Justice Reports are specific to criminal legal system, we believe that there is a need for equivalent reforms in relation to compulsory assessment and treatment under the Mental Health and Wellbeing Act.

A mechanism similar to Aboriginal Community Justice Reports may be relevant for individuals on compulsory treatment orders (particularly CTOs), as a way of empowering Aboriginal people to tell their story on their own terms. The report would also provide information to the MHT about the person's culture and the importance of culture, Country, kin and Community as protective factors for mental health. Approaches such as this would be more relevant for consumers who are placed on orders for longer than 6 months, given the time required to develop this kind of report.

Culturally safe legal representation

In addition to changes at the MHT, increasing access to culturally safe legal representation is critical. The Royal Commission found that in 2018-2019, individuals appearing before the Tribunal only had legal representation in 13% of MHT hearings.[57] In contrast, data for the same year indicates that legal representation was provided in 83% of hearings at the NSW Mental Health Tribunal.[58] Data is not publicly available on legal representation for Aboriginal people appearing before the Tribunal.

Pursuant to Recommendation 56(3) of the Royal Commission, there has been some investment in legal representation, including funding to VALS to establish our Mental Health Legal Practice and the codesign of a new mental health legal service. We hope that the Victorian Government will adequately fund the implementation of the codesign model for mental health legal services, currently being developed by VLA, Mental Health Legal Centre (**MHLC**) and VALS.

Investment in culturally safe legal services must continue, to ensure that every Aboriginal person appearing before the Tribunal who would like to access culturally safe legal services, is able to do so.

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[55] *DPP v Tirris* [2022] VCC 1575 (16 Sep 2022).
[56] *DPP v Rotumah* [2022] VCC 1532 (7 Sep 2022)
[57] Royal Commission, Final Report: Volume 4, p. 397.
[58] Royal Commission, Final Report: Volume 4, p. 397.

RECOMMENDATIONS

Recommendation 15. Improve cultural competency at the Mental Health Tribunal (**MHT**) by:

- Creating a Koori Engagement Team;
- Establishing a Koori List;
- Create more identified positions for Aboriginal Community Panel Members;
- Ensuring that hearings for Aboriginal people include an Aboriginal Community Panel Member.

Recommendation 16. Consider approaches similar to Aboriginal Community Justice Reports, as a way of: (i) empowering Aboriginal people to tell their story on their own terms; and (ii) providing relevant cultural information to the Tribunal, including the way in which connection to culture, Community, kin and Country can support good mental health and wellbeing.

Recommendation 17. Increase funding to VALS' Mental Health Legal Service so that all Aboriginal people appearing before the MHT are able to access legal representation from VALS if they would like.

Recommendation 18. Adequately fund the implementation of the codesign model for legal services currently being developed by VLA, MHLC and VALS.

Establish robust oversight mechanisms

Relevant Consultation Questions

- Question 21: What changes to existing or planned oversight mechanisms are required to better protect the rights of compulsory patients?

Publicly available data

Although some data is available publicly relating to Compulsory Assessment and Treatment and legal representation for people appearing before the MHT, the data is not disaggregated by Aboriginality and does not accurately reflect the scope of Aboriginal over-representation in the compulsory treatment system.[59]

Increasing access to data is critical to develop a meaningful strategy to eliminate compulsory treatment, but it is also necessary to enhance transparency and improve accountability. In this regard, we support the Royal Commission's recommendation to gather and publish service-level and system-wide data indicating the level of progress against yearly targets to reduce compulsory treatment.[60]

Aboriginal ownership and control of data is a key enabler of self-determination. We strongly support legislative changes to ensure that information about Aboriginal people and communities – including

[59] The MHT publishes state-wide data on the number/duration of Treatment Orders and ECT Orders, and the Department of Health publishes annual data on compulsory treatment rates. See Royal Commission, Final Report: Volume 4, p. 410.
[60] Royal Commission, Final Report, Recommendation 55(2).

data from the Mental Health Tribunal and mental health service providers – is treated (i.e., handled, used and disseminated) and governed by the principles of Indigenous Data Sovereignty (**IDS**)[61] and Indigenous Data Governance (**IDG**).[62]

As noted by the Victorian Government in Victoria's Closing the Gap (**CTG**) Implementation Plan, "Aboriginal communities and organisations should have governance, choice and control over data collected from and about their communities."[63] Accordingly, the Implementation Plan commits Government departments "to develop sector wide data access and data sharing agreements with and for ACCOs and Traditional Owners in their sector (local, state wide and peak) with advice and input from the appropriate Aboriginal governance mechanism."[64]

We strongly support the Government's commitments under the CTG Implementation Plan. However, there has been limited progress in developing data access and sharing agreements.

We strongly recommend that key entities should be required by legislation to collect data relating to Aboriginal people This data should be collected, used and managed in accordance with IDS and IDG, which should be enshrined in legislation.

Independent Police oversight

As noted above, Victoria Police are frequently involved in apprehending individuals for the purposes of compulsory assessment.[65] Although the MHWB Act seeks to shift towards health-led responses to mental health crises, police and Protective Services Officers will retain significant power under the new Act to apprehend, detain, transport, search and seize in relation to someone experiencing a mental health crisis.[66]

We continue to have concerns about police powers under the MHWB Act, and take this opportunity to reiterate our position regarding the role, powers and oversight of police in relation to mental health crises and compulsory assessment.

Under a health response to mental health crises, involvement of Victoria Police must be a last resort, once all other options have been exhausted. Inadequate funding of the health response is not an adequate justification for empowering Victoria Police within a health response. If Victoria Police do exercise powers under the Act as a last resort, they should only be exercise on the advice of an authorised person who is a health professional.

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[61] Indigenous Data Sovereignty (IDS): 'refers to the right of Indigenous peoples to exercise ownership over Indigenous Data. Ownership of data can be expressed through the creation, collection, access, analysis, interpretation, management, dissemination and reuse of Indigenous Data.' See The Indigenous Data Sovereignty Summit was held in Canberra, ACT, on 20 June 2018.

[62] Indigenous Data Governance (IDG): 'refers to the right of Indigenous Peoples to autonomously decide what, how and why Indigenous Data are collected, accessed and used. It ensures that data on or about Indigenous peoples reflects our priorities, values, cultures, worldviews and diversity." Ibid.

[63] Victorian State Government, *Victorian Closing the Gap Implementation Plan 2021-2023*, p. 26.

[64] Victorian State Government, *Victorian Closing the Gap Implementation Plan 2021-2023*, p. 27.

[65] Section 351, Mental Health Act 2014.

[66] ss. 232, 241, 246, 247, 250, MHWA 2022.

Under no circumstances should Protective Service Officers (**PSO**s) be involved in the health response to mental health crises. The expansion of PSO powers in the draft Bill is fundamentally at odds with the intention of the Royal Commission to ensure that health professionals are central to mental health responses.

As it currently stands, the "health professional led response principle" does not provide an adequate framework to support the shift towards a health response to mental health crises. It should be significantly strengthened and embedded in the Act as statutory obligations on both Victoria Police and relevant health professionals.

To ensure that the powers under the MHWB Act to apprehend, detain and transport someone who is experiencing a mental health crisis are not abused, robust safeguards should be embedded in the Act, including public reporting requirements, review of any criminal offences arising from an emergency response to a mental health crisis, a strict prohibition on strip searches and body cavity searches and strict limitations on the use of restrictive interventions.

Additionally, there must be clear oversight and accountability mechanisms. Complaints against police relating to exercise of powers under the MHWB Act must not be investigated by police; they must be investigated by a new independent police complaints body.[67]

Non-compliance by mental health and wellbeing service providers

As noted above, we support VLA's recommendation for standardised requirements on the contents of reports by Treating Teams including how and when the report must be provided, and implications for non-compliance with requirements.

Additionally, we support a stronger role for the MHT in providing oversight for mental health and wellbeing service providers. We strongly support VLA's recommendation that the MHT should be granted powers to make findings and make orders in relation to non-compliance by mental health services and treating teams of their obligations.[68]

Independent oversight of involuntary inpatient facilities

In December 2017, Australia ratified the *Optional Protocol on the Convention Against Torture, Cruel, Inhuman and Degrading Treatment and Punishment* (**OPCAT**), which requires the establishment of a National Preventive Mechanism (**NPM**) to carry out independent visits to "to any place under its jurisdiction and control where persons are or may be deprived of their liberty...."

In Australia, OPCAT will be implemented through a national network of bodies fulfilling the functions of an NPM.[69] The Victorian Government has responsibility for designating and maintaining a body or group of bodies to fulfil the functions of the NPM in Victoria.

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[67] VALS, Reforming Police Oversight (2022), p. 29.
[68] VLA, Submission to Independent Review, Recommendation 24.
[69] Commonwealth Ombudsman, *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT),* September 2019, p. 7.

According to the Commonwealth Government, NPMs in each state and territory will have jurisdiction over primary places of detention, which includes closed facilities or units where people may be involuntarily detained by law for mental health assessment or treatment (where people are held for equal to, or greater than, 24hrs).[70]

To date, Australia has failed to meet its OPCAT obligations, despite an extended timeframe for establishing an NPM, which expired in January 2023. Although some jurisdictions have designated their NPMs,[71] Victoria has made limited progress.

Although there is significant work ahead to establish a functioning NPM in Victoria, we take this opportunity to reiterate our recommendation that the Victorian NPM must have jurisdiction over any place where a person is or may be deprived of their liberty pursuant to a Compulsory Assessment or Treatment Order,[72] including mental health mental health facilities. Additionally, the NPM must have jurisdiction over all places where a person is or may be deprived of their liberty by Victoria Police, pursuant to the powers under the MHWB Act, including police vehicles.

We do not support the temporal limitation imposed on the jurisdiction of the future NPM by the Commonwealth government. The Victorian NPM must have jurisdiction over all places where individuals are or may be deprived of their liberty, regardless of the length of time of detention.[73]

Additionally, we take this opportunity to note that the Community Visitors Program will not meet the requirements for an NPM under OPCAT. The focus of the Community Visitors Program is to identify and report issues and problems from the perspective of the individual resident and refer these for resolution within the service system.[74]

In contrast, the aim of the NPM is to establish a system of regular independent visits to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment. At a minimum, NPMs must have adequate powers and resourcing to:

(a) Regularly examine the treatment of the persons deprived of their liberty in places of detention, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment;
(b) Make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations;

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[70] Commonwealth Ombudsman, 'Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)' (Report, September 2019), 8.
[71] The following jurisdictions have designated their NPMs: Commonwealth, Western Australia, Northern Territory, Australian Capital Territory, Tasmania and South Australia. See Commonwealth Ombudsman, *Monitoring Places of Detention – OPCAT* (website).
[72] See VALS (2021). Submission on Current Proposals for the new Mental Health and Wellbeing Act, p. 25. Available at https://www.vals.org.au/wp-content/uploads/2022/02/Mental-Health-and-Wellbeing-Act-Consultation-VALS-Submission-August-2021.pdf.
[73] See also, Australian Human Rights Commission, Road Map to OPCAT Compliance (2022) p. 11.
[74] Office of the Public Advocate (OPA), 'Community Visitors,' (website). Available at: https://www.publicadvocate.vic.gov.au/opa-volunteers/community-visitors

(c) Submit proposals and observations concerning existing or draft legislation.

RECOMMENDATIONS

Recommendation 19. The Mental Health Tribunal and mental health and wellbeing service providers must be required by legislation to collect and publicly report data relating to compulsory assessment and treatment, in accordance with Indigenous Data Sovereignty and Indigenous Data Governance. Data must be disaggregated by Aboriginality and detailed enough to inform a nuanced understanding of Aboriginal overrepresentation in compulsory mental health treatment (e.g. number/duration/frequency of orders, location, legal representation at MHT).

Recommendation 20. In accordance with Indigenous Data Sovereignty and Indigenous Data Governance, Government Departments and entities – including the Department of Health and the Mental Health Tribunal – should enter into data access and data sharing agreements with ACCOs, to ensure governance, choice and control over data about Aboriginal communities, including data relating to compulsory assessment and treatment.

Recommendation 21. Complaints against police relating to exercise of powers under the MHWB Act must not be investigated by police; they must be investigated by a new independent police complaints body, that has adequate powers and resources to provide robust oversight.

Recommendation 22. As recommended by VLA, the MHT should be granted powers to make findings and make orders in relation to non-compliance by mental health services and treating teams of their obligations. [75]

Recommendation 23. The Victorian National Preventative Mechanism (NPM) must have jurisdiction over all places where people are or may be deprived of their liberty, regardless of the length of time of detention. This includes all places where persons are or may be detained pursuant to a compulsory assessment or treatment order, as well as any place where are or may be detained pursuant to powers under the MHWB Act to respond to a mental health crisis, including police vehicles.

[75] VLA, Submission to Independent Review, Recommendation 24.