



Victorian Aboriginal Legal Service Submission to the  
Senate Inquiry into missing and murdered First Nations  
women and children

December 2022



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## Background to the Victorian Aboriginal Legal Service

The Victorian Aboriginal Legal Service (**VALS**) is an Aboriginal Community Controlled Organisation (**ACCO**). VALS was established in 1973 to provide culturally safe legal and community justice services to Aboriginal and/or Torres Strait Islander people across Victoria. VALS' vision is to ensure that Aboriginal people in Victoria are treated equally before the law; our human rights are respected; and we have the choice to live a life of the quality we wish.

### Legal Services

Our legal practice serves Aboriginal people of all ages and genders in the areas of criminal, family and civil law. We have also relaunched a dedicated youth justice service, Balit Ngulu. Our 24-hour criminal law service is backed up by the strong community-based role of our Client Service Officers (**CSOs**). CSOs are the first point of contact when an Aboriginal person is taken into custody, through to the finalisation of legal proceedings.

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


Our Civil and Human Rights Practice provides advice and casework to Aboriginal people in areas including infringements; tenancy; victims of crime; discrimination and human rights; Personal Safety Intervention Orders (**PSIO**) matters; coronial inquests; consumer law issues; and Working With Children Check suspension or cancellation.

Our Aboriginal Families Practice provides legal advice and representation to clients in family law and child protection matters. We aim to ensure that families can remain together and children are kept safe. We are consistent advocates for compliance with the Aboriginal Child Placement Principle in situations where children are removed from their parents' care.

Our Specialist Legal and Litigation Practice (Wirraway) provides legal advice and representation in civil litigation matters against government authorities. This includes for claims involving excessive force or unlawful detention; police complaints; prisoners' rights issues; and coronial inquests (including deaths in custody).

### Community Justice Programs

VALS operates a Custody Notification System (**CNS**). The *Crimes Act 1958* requires that Victoria Police notify VALS within 1 hour of an Aboriginal person being taken into police custody in Victoria. Once a notification is received, VALS contacts the relevant police station to conduct a welfare check and facilitate access to legal advice if required.



The Community Justice Team also run the following programs:

- Family Violence Client Support Program<sup>1</sup>
- Community Legal Education
- Victoria Police Electronic Referral System (**V-PeR**)<sup>2</sup>
- Regional Client Service Officers
- Baggarook Women’s Transitional Housing program<sup>3</sup>
- Aboriginal Community Justice Reports<sup>4</sup>

## **Policy, Research and Advocacy**

VALS informs and drives system change initiatives to improve justice outcomes for Aboriginal people in Victoria. VALS works closely with fellow members of the Aboriginal Justice Caucus and ACCOs in Victoria, as well as other key stakeholders within the justice and human rights sectors.

## **Acknowledgements**

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

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

- Morgan O’Sullivan – Policy, Research and Data Officer
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- Isabel Robinson – Senior Policy, Research and Advocacy Officer
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- Alex Walters – Principal Managing Lawyer, Civil and Human Rights

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<sup>1</sup> VALS has three Family Violence Client Support Officers (FVCSOs) who support clients throughout their family law or civil law matter, providing holistic support to limit re-traumatisation to the client and provide appropriate referrals to access local community support programs and emergency relief monies.

<sup>2</sup> The Victoria Police Electronic Referral (V-PeR) program involves a partnership between VALS and Victoria Police to support Aboriginal people across Victoria to access culturally appropriate services. Individuals are referred to VALS once they are in contact with police, and VALS provides support to that person to access appropriate services, including in relation to drug and alcohol, housing and homelessness, disability support, mental health support.

<sup>3</sup> The Baggarook Women’s Transitional Housing program provides post-release support and culturally safe housing for six Aboriginal women to support their transition back to the community. The program is a partnership between VALS, Aboriginal Housing Victoria and Corrections Victoria.

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



## SUMMARY OF RECOMMENDATIONS

**Recommendation 1.** The Government must undertake a comprehensive reform process to consult on, design and implement all the core pillars of a police oversight system.

**Recommendation 2.** The reform process must examine accountability and oversight mechanisms for addressing systemic racism within Victoria Police.

**Recommendation 3.** The reform process must prioritise the voices of people and communities who are disproportionately affected by systemic racism and the lack of police accountability

**Recommendation 4.** The Government must establish a new independent police complaints body that is complainant-centred, transparent, has adequate powers and resources to carry out independent investigations, and responds to the needs of First Nations complainants.

**Recommendation 5.** Police must not be responsible for investigating and handling police complaints, except minor customer service matters. All police complaints other than minor customer service matters must be investigated and managed by the independent police complaints body.

**Recommendation 6.** The Government should provide funding to VALS to develop and implement targeted community legal education on police powers, interacting with police and police complaints.

**Recommendation 7.** Police must receive regular cultural awareness training.

**Recommendation 8.** Police must receive regular gender bias awareness training.

**Recommendation 9.** Police must receive regular training on racism in all forms, including systemic racism and unconscious bias training.

**Recommendation 10.** Police must receive regular family violence training, including training on coercive control.

**Recommendation 11.** The Government must invest resources into alternatives to child removal for First Nations children.

**Recommendation 12.** The Government must invest in programs that support First Nations families to remain together.

**Recommendation 13.** The Government must provide adequate funding to Aboriginal Community Controlled Organisations who assist families and young people who are known to the child protection system.

**Recommendation 14.** Youth who abscond from out-of-home-care arrangements should not be located and taken into custody by police.

**Recommendation 15.** Children who abscond from out-of-home-care arrangements should be returned to their residential facility and never held at a police station.



**Recommendation 16.** The process for locating a young person who is missing from out-of-home-care should never involve police. If the process must involve police for safety reasons, the police must not have the authority to arrest and detain a child in a manner that is similar to criminal arrest.

**Recommendation 17.** Personal Safety Intervention Orders (PSIVOs) must not be used as a behaviour management tool for children in the out-of-home-care system.

**Recommendation 18.** The Commission for Children and Young People must promptly conduct an investigation after the death of every child who is known to child protection, including when a police or coronial investigation is ongoing.

**Recommendation 19.** The Commission's findings and recommendations must be binding.

**Recommendation 20.** The Commission should monitor the implementation of recommendations from its child death inquiries

**Recommendation 21.** Police should work with family violence services, legal organisations and community members to fully implement Recommendation 41 of the Royal Commission into Family Violence, and reduce the risk of misidentification.

**Recommendation 22.** The Government should fund Aboriginal Community Controlled Organisations to deliver culturally appropriate community legal education, to increase knowledge about coercive control and the options available.

**Recommendation 23.** The Government should improve training for police, service providers and courts to ensure that a proper understanding of coercive control becomes fully and consistently embedded in the practice of responses to domestic abuse.

**Recommendation 24.** The Government should provide funding to First Nations organisations that assist victims of family and domestic violence to ensure the victims have access to culturally safe services. This includes legal and support services.

**Recommendation 25.** The Government must invest in culturally safe domestic violence programs to address the high rates of injury and death experienced by First Nations women as a result of domestic and family violence.

**Recommendation 26.** The Government must invest in culturally safe respect campaigns to build public awareness of the importance of respect for women in general and in intimate relationship circumstances.

**Recommendation 27.** The Government must invest in culturally safe mens behavioural change programs like Dardi Munwurro.

**Recommendation 28.** The Government must invest in culturally safe support services for First Nations women and children who are victim-survivors of family and domestic violence.



**Recommendation 29.** The Government should invest in Aboriginal organisations to provide regular cultural awareness training to other non-Aboriginal family violence services, as well as all other professionals who typically come into contact with victims of family and domestic violence. This includes police, courts, case workers, legal services, the judiciary, and support services.

**Recommendation 30.** Families of missing First Nations people should be provided with culturally appropriate support and counselling services free of charge.

**Recommendation 31.** The Government must invest in police training resources to ensure police are appropriately responding to circumstances of family violence in a culturally safe manner.

**Recommendation 32.** The Inquiry should recommend the establishment of a system of record keeping and data collating that will accurately represent the rates of which First Nations women and children go missing and are murdered.

**Recommendation 33.** The abovementioned database should comply with the principles of Indigenous Data Sovereignty (IDS) and Indigenous Data Governance (IDG).

**Recommendation 34.** The abovementioned database must be available to Aboriginal Community Controlled Organisations.

**Recommendation 35.** Any commemoration program or scheme must be self-determined in nature.

**Recommendation 36.** Any commemoration scheme must be drafted in a way that allows the deceased persons family and loved ones to opt in or withdraw consent at any stage.

**Recommendation 37.** The commemoration scheme must not have limitation periods for opting in.

**Recommendation 38.** The Government must make significant investment in education and training tools for professionals to address systemic racism in police and departmental agencies.



## DETAILED SUBMISSIONS

### Systemic racism

*“As it was when the British arrived, it is to this day, a tale of survival. Of violence. Of senseless killings.” – Zak Kirkup<sup>5</sup>*

Systemic racism permeates all facets of the Australian society. When an Aboriginal person is reported as missing or murdered, the police and media somehow manage to place a portion of the blame on the Aboriginal person. The blatant victim-blaming that occurs when First Nations people are missing and murdered is demonstrative of the ongoing, systemic and deeply rooted racism that is so prevalent in Australian culture.

Young Noongar Yamatji teenager Cassius Turvey was murdered earlier this year in Perth. Cassius was the victim of a senseless and brutal attack that left him hospitalised. Cassius died days after his initial hospitalisation due to a brain injury.<sup>6</sup> During the media reporting following Cassius’ death, the Western Australia Police Commissioner made comments about Cassius being “in the wrong place at the wrong time” and that the brutal and random attack on Cassius was a “case of mistaken identity”.<sup>7</sup> The Police Commissioner’s minimisation of this racially motivated crime shows the lack of care and respect police have for First Nations peoples who are victims of a crime.

The Commissioner’s comments about being in the “wrong place at the wrong time” have undertones of blame. It implies that Cassius shouldn’t have been walking home from school with his friends, that Aboriginal children can be ‘mistaken’ for criminals,<sup>8</sup> and that even when it is abundantly clear that this was a racially motivated and senseless attack Cassius still has some responsibility for his own death by simply existing in the “wrong place at the wrong time”. There is never a wrong place or time for Aboriginal children to exist in this country. Activist Lizzie Jarrett spoke at a vigil for Cassius and stated that “no black child is ever, ever, ever in the wrong place at the wrong time on their own land.”<sup>9</sup>

This attitude of victim blaming has been a feature of the Australian media for a very long time. In 1975, twenty-eight-year-old Wakka Wakka woman Queenie Hart was murdered in violent circumstances in Rockhampton.<sup>10</sup> Queenie’s death was initially reported alongside the road toll of the same weekend. As the investigations into Queenie’s death progressed the media began reporting that Queenie was a sex worker in an attempt to minimise the responsibility of the person who murdered her, whilst

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<sup>5</sup> Zak Kirkup, [WA Police Commissioner's 'wrong place, wrong time' comment denies reality of Cassius' death](#) (News article, 28 October 2022).

<sup>6</sup> Nine News, [Man charged with murder after Perth teen dies days after 'bashing'](#) (News article, 24 October 2022).

<sup>7</sup> Abbey Richards, [WA Police Commissioner alleges Indigenous teen Cassius Turvey was an 'innocent victim of a violent attack'](#) (News Article, 26 October 2022).

<sup>8</sup> The Commissioner’s comments about ‘mistaken identity’ are in relation to an allegation that the attack on Cassius and his friends was a retaliation from the accused because another group of young people had been breaking car windows in the area.

<sup>9</sup> Jared Cross, ['No such thing as wrong place, wrong time for Aboriginal children on Country': Sydney stands in solidarity with Cassius Turvey](#) (News article, 3 November 2022).

<sup>10</sup> Paula Doneman, [Queensland police close cold case investigation into Queenie Hart's murder as new details emerge](#) (News article, 15 October 2021)





simultaneously placing blame on Queenie.<sup>11</sup> Ultimately, no one was ever found guilty of Queenie's murder despite a substantial amount of evidence, and the trial for her murder was vacated after the presiding Judge unilaterally decided that on the evidence available the man accused of her murder could not be found guilty.<sup>12</sup>

The murders of three Gumbaynggirr children on the Bowraville mission in 1990 and 1991 also remain unsolved. Family members of the three children who were murdered continue to seek justice for their loved ones. The murders were initially poorly investigated, and evidence was "pursued with no great urgency".<sup>13</sup> Again, the police took a stance that the children's families were somehow in part responsible for the children going missing. The police began investigating the families' circumstances, with a view that the families themselves were in part responsible for the murder of the children.<sup>14</sup> The families of the children continue to seek justice for their babies and continue to advocate for the investigation to be properly conducted. The ongoing effects of systemic racism are evident in the police's failure to properly investigate all possible circumstances of the crime. These failures by police make it clear to First Nations people that in the eyes of the police Aboriginal children are less important than non-Indigenous children. The families of the murdered Bowraville children discussed their pain of losing their children and how it was exacerbated by the disregard police have for First Nations children, and that the police investigation highlights "racism at its finest" and the failures of police prove that "no one cares about our little Black kids."<sup>15</sup>

*"You gotta walk beside us, because racism is killing us and it's killing our babies relentlessly" –  
Lynda- June Coe*

When First Nations women and children are reported missing the police lack a sense of urgency that is usually present when non-Indigenous people are reported as missing. Ex-police officer Senator Dorinda Cox discussed how police attitudes and responses to missing Indigenous women were often "casual" in comparison to reports of other missing peoples. She stated that police believe Indigenous women lead inherently transient lives and that because of this it is most likely that missing Indigenous women had simply moved locality. This casual approach to missing Indigenous women often results in critical timeframes for investigation being missed, thus lowering the chances of discovering evidence about their whereabouts. Senator Cox aptly noted that "the view that First Nations women's lives don't matter in this country is a hangover from colonisation".<sup>16</sup> This attitude towards Indigenous women was also discussed in Amy McQuire's article about Queenie Hart. Ms McQuire noted that

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<sup>11</sup> Amy McQuire, [Forty years in an unmarked grave: family of murdered woman Queenie Hart fight to bring her home](#) (News article, 3 July 2021).

<sup>12</sup> Paula Doneman, [Queensland police close cold case investigation into Queenie Hart's murder as new details emerge](#) (News article, 15 October 2021)

<sup>13</sup> Jim Poe, [Not forgotten: the ongoing fight to solve the Bowraville murders](#) (News article, 24 September 2021)

<sup>14</sup> Jim Poe, [Not forgotten: the ongoing fight to solve the Bowraville murders](#) (News article, 24 September 2021)

<sup>15</sup> Jim Poe, [Not forgotten: the ongoing fight to solve the Bowraville murders](#) (News article, 24 September 2021)

<sup>16</sup> Brooke Fryer, [Vanished: The unsolved cases of First Nations women](#) (News article, 28 June 2022).



family members of missing and murdered Indigenous women are “cruelly denied [justice] by a legal system that viewed Aboriginal women as disposable and their deaths not worthy of grief.”<sup>17</sup>

The recent Four Corners report shone a light on the 500 First Nations women who have gone missing or died under suspicious circumstances since 2000. The report highlighted that although this number is shockingly high, it is not the full picture because there is no single agency that records the rates at which First Nations women are reported missing or murdered.<sup>18</sup> The report discussed the cases of several women who have been murdered and a key theme throughout the cases was the failure of the police systems to protect these women. In many cases the women were victims of domestic and family violence and the police failed to protect them. In other cases, the police failed to give proper urgency to investigations, and as such key evidence may have been lost or missed because police did not conduct searches within key timeframes.

### Failures of the police system

Aboriginal women are far less likely to seek assistance from police in circumstances of violence or report cases of abuse because of a mistrust of police. This justified mistrust stems from the deeply racist system that police operate within and the consistent failures by police to protect Aboriginal women. A 2020 Queensland study found that women’s reluctance to engage with police stemmed from “prior experience of an inappropriate response, feeling intimidated, experiences of racism and mistrust of the police in general”.<sup>19</sup> The justified mistrust of police who consistently fail to assist vulnerable cohorts when they are victims of crime is well documented. Professor Judy Atkinson made reference to community distrust of police in her book *Trauma Trails – Recreating Song Lines*.<sup>20</sup> During her research, Elders of Aboriginal Communities shared their pain and distress of being under-served by the protections of the police system and stories of women being laughed at when seeking help from police after being assaulted by their partners. It is impossible to trust a system when the police don’t take complaints seriously and where victims are silenced before they can even be heard. Contact with police system on either end of the criminal process, either as a suspect or a victim, is unsafe for Aboriginal people and only fosters a distrust of police.

Our service received 74 formal police complaint inquiries to date in 2022.<sup>21</sup> This number does not take into account the people who have legitimate police complaints but do not want to pursue a formal complaint. The Victorian Aboriginal community is aware that even the most egregious police misconduct that involves physical harm may not be considered ‘worthy’ of an investigation by an independent body. The Independent Broad-based Anti-corruption Commission (IBAC) investigates only 1% of complaints made regarding police. The remainder of complaints made to the body are

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<sup>17</sup> Amy McQuire, [Forty years in an unmarked grave: family of murdered woman Queenie Hart fight to bring her home](#) (News article, 3 July 2021).

<sup>18</sup> Bridget Brennan, Suzanne Dredge, Brooke Fryer and Stephanie Zillman, [‘How many more?’](#) (News article, 24 October 2022).

<sup>19</sup> ANROWS [Australia’s National Research Organisation for Women’s Safety] (2019), [Accurately identifying the “person most in need of protection” in domestic and family violence law](#) (Report, November 2020) 101.

<sup>20</sup> Judy Atkinson, *Trauma Trails – Recreating Song Lines, The Transgenerational Effects of Trauma in Indigenous Australia* (Spinifex Press Pty Ltd, 2002).

<sup>21</sup> This number is correct as of 4 December 2022.



referred back to Victoria Police for internal investigation, with IBAC only reviewing 4-5% of investigations conducted by Victoria Police. A majority of the complaints investigated by Victoria Police are not handled by the dedicated Professional Standards Command, but rather referred down to local or regional commands, where they are often investigated by officers who know the officer subject to the complaint. The absence of oversight for police misconduct complaints only fuels the communities lack of confidence that police will be held accountable for their actions.

The ongoing Kumanjyi Walker inquest in the Northern Territory has drawn the curtain back on the culture within policing agencies in Australia. The inquest has heard of the horrific accounts of racist practices within the Northern Territory policing agencies that so clearly manifests in the mistreatment and death of First Nations people across Australia. The horrific commentary made by members of the Northern Territory police force are not unique. It cannot be said that the members whose behaviour has been examined in the inquest is rare or a singular occurrence. Officers feeling comfortable to share such horrific views and comments indicates an organisational culture that encourages and fosters such repulsive opinions.

Although the function of police in missing people and murder cases is to investigate and locate the missing person safely, for many people interaction with police to report a missing person is unsafe. Despite the fact that going missing is not a crime,<sup>22</sup> in circumstances where the missing person or their family members have an active warrant or whereabouts, their ability to contact police safely for the purpose of locating the missing person is almost non-existent.

Twenty-two-year-old Yamatji woman Ms Dhu passed away in police custody in 2014 due to a medical condition that was negligently managed by the police and hospital. Police attended Ms Dhu's house due to reports that her partner had violated their apprehended violence order and subsequently arrested Ms Dhu for a small amount of outstanding fines.<sup>23</sup> During her time in police custody Ms Dhu was subjected to an absolute lack of care by police and doctors. The police's attitude and treatment of Ms Dhu was founded in racism and misogyny. The root cause of the disrespect the police showed Ms Dhu in the final hours of her life, and the failures of the doctors to protect her life was the result of the intersection of the 'colonial patriarchy' that works to disregard the lives and experiences of Blak people and women.<sup>24</sup> Police and doctors told Ms Dhu that she was faking and minimised her pain, and did nothing to assist her when she was gravely ill.

VALS acts for families in inquest matters and is currently acting for an Aboriginal mother in an inquest into the death of her daughter who passed away whilst in her father's custody. The inquest has revealed concerns about the inadequacy of police investigation into injuries sustained by the child whilst in her father's care. During a home visit in 2018, child protection workers and police failed to have the child examined by a forensic medical examiner because they found the father's explanation of the child's injuries plausible, despite the father's explanations being inconsistent with the bruises observed by the childcare workers who reported the injuries. The child passed away from hypoxic

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<sup>22</sup> Australian Federal Police, [Missing persons – Myths and facts](#) (Webpage, 2022)

<sup>23</sup> Deathscapes, [At a lethal intersect: the Killing o Ms Dhu \(Australia\)](#) (Webpage, 2017).

<sup>24</sup> Pauline Klippmark and Karen Crawley, [Justice for Ms Dhu: Accounting for Indigenous Deaths in Custody in Australia](#) ([Social and Legal Studies Journal](#), 2018 [27(6)]).



brain injuries a month after child protection began investigating her circumstances. The subsequent police investigation did not adequately inquire into the origin of those bruises. This matter again highlights the disregard police have for the lives of First Nations children. Fundamentally, Aboriginal people cannot trust police will properly investigate their deaths.

### **RECOMMENDATIONS**

**Recommendation 1.** The Government must undertake a comprehensive reform process to consult on, design and implement all the core pillars of a police oversight system.

**Recommendation 2.** The reform process must examine accountability and oversight mechanisms for addressing systemic racism within Victoria Police.

**Recommendation 3.** The reform process must prioritise the voices of people and communities who are disproportionately affected by systemic racism and the lack of police accountability

**Recommendation 4.** The Government must establish a new independent police complaints body that is complainant-centred, transparent, has adequate powers and resources to carry out independent investigations, and responds to the needs of First Nations complainants.

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**Recommendation 8.** Police must receive regular gender bias awareness training.

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**Recommendation 10.** Police must receive regular family violence training, including training on coercive control.

### **Failures of the child protection system**

Children in the child protection system are inherently vulnerable because they are likely to have experienced traumas, often exacerbated by a flawed child protection system. Children who are in contact with the child protection system have generally experienced some form of trauma that may have resulted in them being involved with the child protection system. The children who are removed



from their families without having experienced any trauma before departmental involvement are then traumatised by the system that removed them from their families. Children who are involved in the out of home care system are far more likely to have experienced some form of childhood trauma prior to entering the system.<sup>25</sup>

Aboriginal and Torres Strait Islander babies are removed from their families at double the rate of non-Indigenous babies.<sup>26</sup> One in nine Aboriginal children under the age of one are removed from their families in Victoria.<sup>27</sup> The ongoing systemic removal of First Nations children from their families, communities and culture is creating a second Stolen Generation.

Aboriginal children are also more likely to be exposed to additional stressors in the care system than non-Indigenous children. Aboriginal children are likely to experience systemic racism in care settings and are more likely to experience failures of the system than non-Indigenous children who are engaged with the same system.<sup>28</sup>

Approximately 1% of children in Australia are living in the out-of-home-care system. First Nations children are overrepresented in the out-of-home-care system with approximately one in every 18 Indigenous youths living in out-of-home-care. Children living in the out-of-home-care system were markedly overrepresented in reports of missing children. These children make up 53% of missing children reports. Aboriginal and Torres Strait Islander children represented 18% of the population of missing children overall, and 34% of the population of children who live in out-of-home-care.<sup>29</sup>

Aboriginal and Torres Strait Islander peoples are consistently overpoliced and regularly experience negative police attitudes when dealing with police. Contact with police is stressful for any person, let alone children who are already incredibly vulnerable. When a child under the care of the Department of Families, Fairness and Housing in Victoria is reported as missing, a Safe Custody Warrant is issued that allows the police to enter any place they believe the child may be for the purpose of taking the child into police custody.<sup>30</sup> Once a child is located, they are held in police custody until they can either be brought before a court, returned to their care facility or placed in a new care facility. The use of police searches, warrants and criminal charges to locate and detain a young person who has absconded from their care arrangement is entirely inappropriate and only further criminalises children in care and encourages attitudes of distrust towards police. The distress children experience when held in police custody cannot be overlooked when developing alternate methods of locating children who have absconded from out-of-home-care.

VALS' Custody Notification System (**CNS**) receives notifications for children who are brought into police custody after absconding from their care facility. Regularly, children who are held in custody on

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<sup>25</sup> Dr Kath McFarlane, [\*Children and youth reported missing from out-of-home-care in Australia: a review of the literature and an analysis of Australian police data\*](#) (Report, 2021).

<sup>26</sup> Commission for Children and Young People, [\*Annual report 2020-21\*](#) (Report, October 2021).

<sup>27</sup> Matthew Bach, [\*One in nine Indigenous babies are taken from their parents in Victoria. The system is failing\*](#) (News article, 8 November 2022).

<sup>28</sup> Commission for Children and Young People, [\*Annual report 2020-21\*](#) (Report, October 2021), 16.

<sup>29</sup> Dr Kath McFarlane, [\*Children and youth reported missing from out-of-home-care in Australia: a review of the literature and an analysis of Australian police data\*](#) (Report, 2021).

<sup>30</sup> Department of Health and Human Services, [\*Child Protection Manual – Warrants\*](#).



a Safe Custody Warrant are held in close proximity to the other people who have been arrested for criminal matters. Holding children in police custody only creates a sense for the child that they are being punished and should be held to the same account as a person who has committed a crime.

The process for locating a child who is missing from out-of-home-care is similar to the process of locating a person with a criminal warrant. When police use quasi-criminal practices to locate children who are missing from out-of-home-care the children will undoubtedly feel criminalised and stigmatised. The use of police members to locate children who have absconded from their care facility is entirely inappropriate and only antagonises any mistrust of police a child may have. The criminalisation of absconding children does not assist in creating a sense of safety for the child in their living arrangements and only acts as an inflammatory factor for misbehaviour in the future. When children are forced through a quasi-criminal legal process during their formative developmental stages they can suffer lifelong harm to their health, wellbeing and future.<sup>31</sup>

It is well known that criminalisation of children is only detrimental and leads towards further criminalisation and contact with the criminal legal system in the future. Treating children like criminals for absconding from their care arrangements will only act to further alienate the child.

The use of Personal Safety Intervention Orders (**PSIVO**) as a mechanism to control the behaviour of children whose behaviour is deemed 'problematic' only leads to the further criminalisation of the children. It is accepted at common law that children below the age of 14 have not reached the required moral and intellectual developmental milestones required to form the relevant criminal intent to commit a crime. As such, children are considered *doli incapax* until the age of 14. The use of PSIVOs as a tool for behaviour control in the residential care system is entirely inappropriate in light of the common law principle of *doli incapax*. When children in these circumstances are listed as respondents to PSIVOs it cannot be assumed that the same child who is *doli incapax* in the criminal stream could be capable of understanding the reasons for and conditions of a PSIVO.

Placing children on PSIVOs in these circumstances is setting them up for failure. The paradoxical nature of placing children on PSIVOs and then encouraging criminal charges and police involvement when the child breaches the order that they likely do not understand, only creates an environment when the child feels unsafe. This cyclical and ineffective practice that is regularly utilised by the out-of-home-care system in Victoria only encourages interaction with police and criminalisation of young people.

VALS' lawyers regularly find that PSIVOs are used prematurely and often as a first step to manage children's behaviour. Our lawyers have reported that they frequently see PSIVO applications against our young clients based on a singular incident that was isolated and did not escalate. This immediate legal escalation only acts to further withdraw the child from the positive influences in their lives, like schooling. When a child is required to miss school to attend Court for the PSIVO hearing they become further withdrawn from the education system.

Aboriginal children are far more likely to die whilst in the care of the State than non-Indigenous children. In the period of 2020-2021 there were 45 deaths of children who were known to child

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<sup>31</sup> Raise the Age, [About the Campaign](#) (Webpage, 2022).



protection. 13 of the deaths during this period were Aboriginal children.<sup>32</sup> When a child who is known to child protection dies, the Commission for Children and Young People must conduct an inquiry into the services provided to the child prior to their death.<sup>33</sup> The Commission completed 41 inquiries into child deaths in 2020-21, and six of the inquiries conducted were in relation to Aboriginal children.<sup>34</sup> At present, the Commission does not conduct its inquiry when police are involved in a criminal or coronial investigation into the death,<sup>35</sup> but there is no logical reason why a police investigation should stop the Commission investigating child protection services.

## RECOMMENDATIONS

**Recommendation 11.** The Government must invest resources into alternatives to child removal for First Nations children.

**Recommendation 12.** The Government must invest in programs that support First Nations families to remain together.

**Recommendation 13.** The Government must provide adequate funding to Aboriginal Community Controlled Organisations who assist families and young people who are known to the child protection system.

**Recommendation 14.** Youth who abscond from out-of-home-care arrangements should not be located and taken into custody by police.

**Recommendation 15.** Children who abscond from out-of-home-care arrangements should be returned to their residential facility and never held at a police station.

**Recommendation 16.** The process for locating a young person who is missing from out-of-home-care should never involve police. If the process must involve police for safety reasons, the police must not have the authority to arrest and detain a child in a manner that is similar to criminal arrest.

**Recommendation 17.** Personal Safety Intervention Orders (PSIVOs) must not be used as a behaviour management tool for children in the out-of-home-care system.

**Recommendation 18.** The Commission for Children and Young People must promptly conduct an investigation after the death of every child who is known to child protection, including when a police or coronial investigation is ongoing.

**Recommendation 19.** The Commission's findings and recommendations must be binding.

**Recommendation 20.** The Commission should monitor the implementation of recommendations from its child death inquiries

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<sup>32</sup> Commission for Children and Young People, *Annual report 2020-21* (Report, October 2021), 36.

<sup>33</sup> *Commission for Children and Young People Act 2012* (Vic), s34.

<sup>34</sup> Commission for Children and Young People, *Annual report 2020-21* (Report, October 2021), 37.

<sup>35</sup> *Ibid*, see fn10 at page 37.



## Family violence

Globally, 1 in 3 women have experienced violence in their lives.<sup>36</sup> For Aboriginal and Torres Strait Islander women the likelihood of experiencing violence in their lifetimes is markedly higher than non-Indigenous Australians. First Nations women are 11 times more likely to die from injuries associated with assault<sup>37</sup> and 32 times more likely to be hospitalised in circumstances of family or domestic violence than non-Indigenous Australians.<sup>38</sup>

Family violence matters are attended to by police which raises the same issues previously identified in relation to police conduct in dealing with First Nations people. Research has established that Aboriginal people are disproportionately likely to be named on intervention orders, charged with breaches of intervention orders, and sentenced to prison for those charges.<sup>39</sup> This overrepresentation is particularly acute for Aboriginal women, indicating that in many cases, these orders may involve misidentification of the perpetrator, discussed below. Given the ongoing impacts of colonisation on First Nations people, any additional entanglement with the criminal legal system caused by a misguided approach to family violence has severe consequences.

### Misidentification of family violence perpetrators

With alarming frequency, police and courts take action against victim-survivors of abuse instead of perpetrators.<sup>40</sup> There has been increasing media reporting on extreme cases of misidentification. These include the case of Tamica Mullaley, who was assaulted by her partner in 2013. When police were called by a neighbour, they arrested her despite her serious injuries and left her partner at liberty; he tortured and killed Tamica's son the next day.<sup>41</sup>

Misidentification is a very serious problem with multiple causes. Research has identified a consistent set of risk factors which raise the likelihood of misidentification. Broadly, they relate to whether police perceive a victim-survivor as fitting the stereotype of an 'ideal victim' – with the effect that already marginalised women are much more likely to be subjected to misidentification.

Factors that increase the risk of misidentification include:

- Willingness of the victim-survivor to cooperate with police<sup>42</sup>

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<sup>36</sup> United Nations Human Rights Office of the High Commissioner, [Call for inputs – Custody cases, violence against women and violence against children](#) (Webpage).

<sup>37</sup> Amy McQuire, [The Silence Everyone Talks About: Media Representations of violence against Aboriginal Women](#), (media report, October 2022).

<sup>38</sup> Australian Institute of Health and Welfare, [Family, domestic and sexual violence in Australia: continuing the national story 2019](#) (Report, June 2019) ix.

<sup>39</sup> Douglas H and Fitzgerald R (2018) *The domestic violence protection order system as entry to the criminal justice system for Aboriginal and Torres Strait Islander people*. International Journal for Crime, Justice and Social Democracy 7(3): 41-57.

<sup>40</sup> Some of the material in this section is drawn from VALS (2022), [Addressing Coercive Control Without Criminalisation: Avoiding Blunt Tools That Fail Victim-Survivors](#).

<sup>41</sup> Belinda Jepsen, [Family violence doesn't discriminate. But for Indigenous women, the support systems often do](#). (News article, 2021).

<sup>42</sup> Belinda Jepsen, [Family violence doesn't discriminate. But for Indigenous women, the support systems often do](#). (News article, 2021).



- The emotional state of the victim-survivor, with police officers often regarding someone 'carrying on' in their presence as more likely to be an aggressor, and the calmer person more likely to be the victim-survivor; domestic violence specialists recognise that the opposite is true<sup>43</sup>
- Mental health and addiction issues
- Existing criminal records, which make police much less willing to think of someone as a victim.

These risk factors all make Aboriginal women much more liable to be misidentified as perpetrators by police. Aboriginal women are less likely to want to cooperate with police and are disproportionately affected by mental health issues and previous contact with the criminal legal system. As Australia's National Research Organisation for Women's Safety found:

*Aboriginal and Torres Strait Islander women very often do not fit the ideal victim stereotype. They are more likely than other women to use weapons and to be uncooperative when police intervene (Blagg, 2008; Cunneen, 2009; Nancarrow, 2010, 2016, 2019). They are also more likely to have a fraught relationship with police, due to the neo-colonial context in which violence and policing of violence plays out.*<sup>44</sup>

Aboriginality is also a risk factor in its own right because of racism and bias on the part of police. Police stereotypes about Aboriginal women and men, and the prevalence of family violence in their relationships, lead to a bias towards thinking an Aboriginal person has been violent. This raises the risk of misidentification, particular for Aboriginal people in a relationship with a non-Aboriginal person.

Criminalisation of victim-survivors replicates the trauma and abuse they have already suffered. If held in police custody or imprisoned, of course, the risks for Aboriginal people are well known, and the denial of autonomy and the violence of incarceration mirror the dynamics of coercive control in personal relationships.<sup>45</sup>

## Coercive control

Coercive control has gained currency through academic and clinical work as a key concept for understanding the nature of domestic abuse.<sup>46</sup> It can be understood as:

*"a form of domestic abuse involving repeated patterns of abusive behaviour – which can include physical, sexual, psychological, emotional or financial abuse – the cumulative effect of which is to rob victim-survivors of their autonomy and independence."*<sup>47</sup>

<sup>43</sup> Belinda Jepsen, [Family violence doesn't discriminate. But for Indigenous women, the support systems often do.](#) (News article, 2021).

<sup>44</sup> Belinda Jepsen, [Family violence doesn't discriminate. But for Indigenous women, the support systems often do.](#) (News article, 2021).

<sup>45</sup> Sisters Inside & Institute for Collaborative Race Research (2021), ['In no uncertain terms' the violence of criminalising coercive control.](#)

<sup>46</sup> Some of the material in this section is drawn from VALS (2022), [Addressing Coercive Control Without Criminalisation: Avoiding Blunt Tools That Fail Victim-Survivors.](#)

<sup>47</sup> NSW Government (2020), *Coercive control: Discussion paper*, p2.



Coercive control is an especially grave type of domestic abuse. As well as being deeply harmful in its own right, it is a major predictor of intimate partner homicide. New South Wales' Domestic Violence Death Review Team found that in 111 out of 112 domestic violence homicides between 2008 and 2016, coercive and controlling behaviour was a major feature of the relationship.<sup>48</sup>

Jurisdictions across Australia have taken steps towards the criminalisation of coercive control. Criminalisation of coercive control has been adopted in jurisdictions such as England and Wales, where there was no previous recognition of coercive control in the law and no understanding of family violence as rooted in patterns of behaviour, not individual incidents.<sup>49</sup> In New South Wales, a victim-survivor of domestic abuse can only benefit from a civil intervention order if they fear a criminal offence.<sup>50</sup> As a result, intervention orders and other civil remedies are not able to be used in direct response to coercive control because it does not constitute a standalone criminal offence.

In Victoria, coercive control is already recognised as a form of family violence in the law and in key family violence response strategies.<sup>51</sup> Courts can make intervention orders specifically in response to coercive control and include conditions designed to target this behaviour. Beyond the legislative framework, coercive control is a major focus of service providers, practitioners and policymakers working in the area. This means that criminalisation is likely to provide minimal additional value in protecting victim-survivors. Aboriginal women, in particular, will not be better protected by increasing the role of the criminal legal system in responses to family violence, including coercive control.

Misidentification, discussed above, would also become a greater risk. Given that misidentification occurs even in clear-cut cases of extreme physical abuse, there is reason for grave concern about how police would implement a coercive control offence. The complexity of coercive control means there is a high potential for police to misinterpret self-defensive actions or coping mechanisms as forms of abuse. Refusing to talk to someone who persistently emotionally degrades you, or verbally abusing someone in reaction to that abuse, could be misidentified by police as tactics of coercive control. Aboriginal women are significantly more likely to be misidentified and raising the risk of misidentification in general will inevitably have disproportionate impacts on Aboriginal victim-survivors.

## RECOMMENDATIONS

**Recommendation 21.** Police should work with family violence services, legal organisations and community members to fully implement Recommendation 41 of the Royal Commission into Family Violence, and reduce the risk of misidentification.


**Recommendation 22.** The Government should fund Aboriginal Community Controlled Organisations to deliver culturally appropriate community legal education, to increase knowledge about coercive control and the options available.

<sup>48</sup> NSW Government (2020), *Coercive control: Discussion paper*, p2.

<sup>49</sup> Stark, Evan & Hester, Marianne (2019), *'Coercive Control: Update and Review'*, *Violence Against Women* 25(1), pp81-104.

<sup>50</sup> *NSW Crimes (Domestic and Personal Violence) Act 2007*, s16.

<sup>51</sup> *Family Violence Protection Act 2008 (Vic)*, s5.



**Recommendation 23.** The Government should improve training for police, service providers and courts to ensure that a proper understanding of coercive control becomes fully and consistently embedded in the practice of responses to domestic abuse.

**Recommendation 24.** The Government should provide funding to First Nations organisations that assist victims of family and domestic violence to ensure the victims have access to culturally safe services. This includes legal and support services.

## Funding

In order to address the horrifically high rates of injury and murder First Nations women experience in circumstances of family and domestic violence, the government must invest in domestic violence programs and respect campaigns that are culturally safe for First Nations people. The only way to ensure said programs and campaigns are culturally safe is to fund Aboriginal organisations to deliver these projects.

Specialist Aboriginal organisations like Djirra are imperative for delivering services that assist victims of family violence. Organisations like Dardi Munwurro that support Aboriginal men with behavioural change and healing programs are also imperative for addressing underlying behaviours that lead to family violence and equipping men with conflict resolution tools. Without appropriate funding, programs delivered by organisations such as the above two cannot continue to service the large cohorts of people that want to access the service. Aboriginal organisations are consistently underfunded in contrast to generalist organisations.


The government must make a commitment to ensure services run by the Aboriginal community are adequately funded so they can continue to deliver high quality culturally safe services to First Nations people. Where Aboriginal services identify the need for further funding the government should make all reasonable efforts to assist in providing the requested funding. Aboriginal organisations know their clients and communities needs and must be given the agency to identify their funding requirements.

The government should also fund Aboriginal organisations to provide regular cultural awareness training to other non-Aboriginal family violence services, as well as all other professionals who typically come into contact with victims of family and domestic violence. This includes police, courts, case workers, legal services, the judiciary, and support services.

When an Aboriginal person is reported as missing the police should provide supports to the family of the missing person. These supports must include emotional supports and counselling by a culturally safe service.

### RECOMMENDATIONS

**Recommendation 25.** The Government must invest in culturally safe domestic violence programs to address the high rates of injury and death experienced by First Nations women as a result of domestic and family violence.



**Recommendation 26.** The Government must invest in culturally safe respect campaigns to build public awareness of the importance of respect for women in general and in intimate relationship circumstances.

**Recommendation 27.** The Government must invest in culturally safe mens behavioural change programs like Dardi Munwurro.

**Recommendation 28.** The Government must invest in culturally safe support services for First Nations women and children who are victim-survivors of family and domestic violence.

**Recommendation 29.** The Government should invest in Aboriginal organisations to provide regular cultural awareness training to other non-Aboriginal family violence services, as well as all other professionals who typically come into contact with victims of family and domestic violence. This includes police, courts, case workers, legal services, the judiciary, and support services.

**Recommendation 30.** Families of missing First Nations people should be provided with culturally appropriate support and counselling services free of charge.

**Recommendation 31.** The Government must invest in police training resources to ensure police are appropriately responding to circumstances of family violence in a culturally safe manner.

## Data

Data records about missing and murdered First Nations people are lacking across the nation. There is no one single data source that maintains updated records of missing and murdered First Nations people. Further, accuracy of data in relation to missing First Nations people is not consistent because of the discrepancy between jurisdictional definitions of ‘missing’ for the purposes of data recording.

Data across the jurisdictions is inconsistent. Rates of missing peoples differ across states and territories and there is no singular qualified source of data available that provides a true representation of the number of First Nations women and children who are missing or murdered. Further, only some jurisdictions record whether a missing person is Indigenous.<sup>52</sup> In Victoria, 71% of people missing are listed as ‘unknown Indigenous status’.<sup>53</sup> There are also no consistent data records on First Nations children who go missing from out-of-home care.<sup>54</sup>

The Inquiry should recommend the establishment of a system of record keeping and data collating that will accurately represent the rates of which First Nations women and children go missing and are murdered. The database must comply with the principles of Indigenous Data Sovereignty (**IDS**) and Indigenous Data Governance (**IDG**).

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<sup>52</sup> Australian Institute of Criminology, [Statistical bulletin 01: Missing persons in Australia, 2008-2015](#) (Report, November 2016).

<sup>53</sup> Brooke Fryer, [Vanished: The unsolved cases of First Nations women](#) (News article, 28 June 2022).

<sup>54</sup> Dr Kath McFarlane, [Children and youth reported missing from out-of-home-care in Australia: a review of the literature and an analysis of Australian police data](#) (Report, 2021).



In practice, the concepts of IDS and IDG are a specific exercise of the right to self-determination as enshrined in Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples. The following key concepts relating to Indigenous Data Sovereignty were defined by consensus by delegates of the Indigenous Data Sovereignty Summit:<sup>55</sup>

- Indigenous Data: ‘In Australia... refers to information or knowledge, in any format or medium, which is about and may affect Indigenous peoples both collectively and individually.’
- Indigenous Data Sovereignty: ‘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.’
- Indigenous Data Governance: ‘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.’<sup>56</sup>

The proposed database must be available to all Aboriginal Community Controlled Organisations (**ACCOs**) to ensure their advocacy on themes relevant to the data held within the database is accurate, timely and well informed. Ensuring all ACCOs across Australia have access to the database will also allow the organisations to identify and qualify advocacy areas they wish to address.

Data represented throughout this submission was drawn from a multitude of academic reports. The lack of consistency across the data sources highlights the need for a centralised recording system for missing persons, especially in relation to First Nations people.

## RECOMMENDATIONS

**Recommendation 32.** The Inquiry should recommend the establishment of a system of record keeping and data collating that will accurately represent the rates of which First Nations women and children go missing and are murdered.

**Recommendation 33.** The abovementioned database should comply with the principles of Indigenous Data Sovereignty (**IDS**) and Indigenous Data Governance (**IDG**).

**Recommendation 34.** The abovementioned database must be available to Aboriginal Community Controlled Organisations.

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<sup>55</sup> The Indigenous Data Sovereignty Summit was held in Canberra, ACT, on 20 June 2018.

<sup>56</sup> Indigenous Data Sovereignty, Communique. Indigenous Data Sovereignty Summit. 20 June 2018.



## Honouring and commemorating missing and murdered First Nations women and children

Any practice to honour or commemorate missing and murdered First Nations people should be founded in self-determination. The right to commemorate a person is held by the family and community of which the person belonged to. It is the family who should be making determinations as to whether they want their loved one to be publicly commemorated and how they wish for this to happen.

If the Government were to establish a mechanism by which missing and murdered Aboriginal and Torres Strait Islander people are to be commemorated, engagement with any formal process of commemoration should not be time-limited. Where time limits are placed on a person's ability to officially commemorate their loved one it places a pressure on the family to decide how they want to honour their loved one whilst they are still processing their loss and moving through their grief. The process of grieving a deceased or missing loved one should not be more stressful with a time constraint on deciding whether a public commemoration is something the family want.

Aboriginal communities conduct Sorry Business in different ways.<sup>57</sup> There is no one specific way a person or community will conduct Sorry Business, just as there is no set timeframe for Sorry Business activities. As such, it is important that any commemoration scheme for missing and murdered First Nations women and children does not have limitations on when a person's family can elect to have their loved one commemorated. Any commemoration activities must not limit a family's ability to engage with cultural activities and grieve at their own pace or on their own terms.

Further, families must be afforded the opportunity to change their minds about a public commemoration of their loved one. Any commemoration scheme must be founded in self-determination. There must be an ingrained understanding of the nuances of grief and how a person's cultural identity may impact the way they wish to grieve the loss of a loved one. The right to control how a person is commemorated sits solely with the family of the person. This should include allowances for grieving families to change certain aspects of the commemoration or to withdraw consent entirely for their loved one to be commemorated.

Whilst it is important that First Nations women and children who are murdered and missing are honoured and commemorated, we must not focus efforts on honouring those who are victims to the colony's apathy for change without also investing considerable resources into eradicating any form of violence against women and children. The Government cannot diminish their responsibility to protect the safety and lives of Aboriginal women and children by simply investing in a commemoration platform for those who are missing and murdered. The Government must invest in services that provide assistance to Aboriginal women and children who are at risk of family violence, as well as reforming the child protection system to protect the rights of Aboriginal children and families. The

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<sup>57</sup> Rona Glynn-McDonald for Common Ground, [Death and Sorry Business](#) (Article, 25 October 2022).



Government must make significant investment in education and training that works to eliminate systemic racism in policing and child protection agencies across the nation.

### **RECOMMENDATIONS**

**Recommendation 35.** Any commemoration program or scheme must be self-determined in nature.

**Recommendation 36.** Any commemoration scheme must be drafted in a way that allows the deceased persons family and loved ones to opt in or withdraw consent at any stage.

**Recommendation 37.** The commemoration scheme must not have limitation periods for opting in.

**Recommendation 38.** The Government must make significant investment in education and training tools for professionals to address systemic racism in police and departmental agencies.