Victorian Aboriginal Legal Service Submission to the Inquiry into the operation of the Freedom of Information Act 1982

January 2024

Contents

Background to the Victorian Aboriginal Legal Service

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

In 2023, we're proud to launch the official logo of our 50th anniversary, 'Koori Woman of Justice'.

The artwork was designed by the deadly Natashia Corrigan, a Walabhul, Bundjalung, Dungidau/Dala and Jinibara artist born and living on Wurundjeri land.

In Natashia's words, the design is a representation of VALS' work over the past 50 years towards the Victorian Aboriginal Communities.

The colours used are a depiction of our Aboriginal flag. Aboriginal symbolisms are used to showcase the journeys made by community members and VALS representatives, these symbols tell the story of our journey from one place to another or symbolically from one situation to another. They represent each person, family and organisation that has been and continue to be supported by VALS.

Legal Services

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

Our **Criminal Law Practice** provides legal assistance and representation for Aboriginal people involved in court proceedings. This includes bail applications; representation for legal defence; and assisting clients with pleading to charges and sentencing. We aim to understand the underlying reasons that have led to the offending behaviour and ensure this informs the best outcome for our clients.

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

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

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

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

Community Justice Programs

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

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

Policy, Research and Advocacy

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

Acknowledgement

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

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

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

Contributors

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

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This research was completed with the support of pro bono research assistance from other legal professionals.

Note on Language

Throughout this document, we use the word 'Aboriginal' to refer to Aboriginal and/or Torres Strait Islander people, communities and organisations. VALS acknowledges that there are many Aboriginal people in Victoria who have Torres Strait Islander heritage, and many Torres Strait Islander people who now call Victoria home.

EXECUTIVE SUMMARY

VALS welcomes the opportunity to respond to the Victorian Integrity and Oversight Committee Inquiry into the Operation of the Freedom of Information Act 1982 (**FOI Act**). Our response and recommendations are responsive to the Committee's terms of reference[1].

Aboriginal knowledge systems are a core reason why Aboriginal people maintain the oldest continuous culture on earth. Aboriginal knowledge is encoded in stories, songs, art, land, sea and sky.[2] The knowledge built and maintained by Aboriginal people allowed them to thrive on this continent for tens of thousands of years, living with megafauna and living through an ice age and volcanoes.[3] Information has always been a strength of Aboriginal people and culture.

Over the last 236 years, colonial systems have controlled information in a way that has contributed to the way colonial Australia has controlled Aboriginal people. There is an epistemological contrast between colonial knowledge, which is segmented and prioritises objectivity and universality, and Aboriginal traditional knowledge, which is integrated, relational and localised.[4] The privileging of their own knowledge system was part of how colonisers dehumanised Aboriginal people and justified the theft of Aboriginal land and genocide of Aboriginal people.

In recent decades, as Aboriginal people have fought for reconciliation, Treaty, reparations and general fairness – the collection and control of information has been central to these fights for justice. The 1997 *Bringing Them Home Report*, has a chapter on the importance of Aboriginal people being able to access personal information held by the government.[5] The 1991 Royal Commission into Aboriginal Deaths in Custody (the Royal Commission) highlighted that the families of Aboriginal people who had died in custody had often been refused access to documents in the possession of the coroner, including statements by prison officers.[6] The Royal Commission also noted that government officials, notably police and prison officers, regularly failed to keep proper records that would allow incidents to be appropriately examined.[7]

VALS urges the Integrity and Oversight Committee (the Committee) to review the FOI Act in this context. The Act currently makes no reference to this context or the role that information and data can play in enabling and enforcing the right to Self-Determination, and there are no provisions specific to Aboriginal people that would enable their particular needs to access government information. The

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[1] OVIC, Victorian Integrity and Oversight Committee Inquiry into the operation of the Freedom of Information Act 1982 (FOI Act) webpage.
[2] Aboriginal Heritage Council, Traditional knowledge
[3] Australian Geographic, Aboriginal Australians co-existed with megafauna for at least 17,000 years and Australian Geographic, Ice Age struck indigenous Australians hard and Monash University, Connection to Country: Teaching science from an Indigenous perspective
[4] Fulvio Mazzocchi, Why "Integrating" Western Science and Indigenous Knowledge Is Not an Easy Task: What Lessons Could Be Learned for the Future of Knowledge? And Professor Martin Nakata, The Cultural Interface.
[5] National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, Bringing Them Home: Location of records
[6] Royal Commission into Aboriginal Deaths in Custody, National Report Volume 1 - Access to Documents
[7] Royal Commission into Aboriginal Deaths in Custody, National Report Volume 1 - 4.2 Police Investigations

lack of such references and provision means that the Act currently reinforces the systemic racism that was built into the colonial structures of modern Australia.

Despite the inherent systemic racism within it, the Act is an important mechanism for VALS in our work to support community members with legal issues. The Act is also a potential tool for improving Indigenous Data Sovereignty and Indigenous Data Governance standards in Victoria.

However, we find that the Act often fails to deliver the fair access that Aboriginal people should have to the information that government holds about them, both personal records and more generalised information and data. Many of the issues that were raised were based on the culture of individual agencies who either did not prioritise their obligations under the Act or were actively hostile towards fulfilling their obligations under the Act.[8]

One of the inherent limitations with the current FOI system are the challenges ordinary people face in engaging with and understanding how to frame the scope of their inquiry to get the best outcome. This results in applications being rejected, without alternative options, or clarification for the individual as to why. Poor document management processes and recordkeeping within agencies often make it hard for applicants to scope a request, and that can serve as an incentive for agencies with a poor culture to not improve the document management processes. This can be a cause of unnecessary immense frustration and distress.

The role of FOI officers should be expanded to provide a more assistive service to FOI applicants, so they can make an informed decision about the most effective and appropriate application to meet their needs. They could explain to scope and role of FOI applications, providing information about what type of information the agency keeps and how it is structured and give a preliminary indication of whether the application is likely to be considered, and what alternative options are available. This will have a two-fold impact, firstly on the individual so they receive a better outcome, but also for the agency, their resources are utilised in a time effective and efficient manner because the all the relevant and necessary information is provided at the outset of an application. The Inquiry should explore options to expand the function of FOI officers to have more assistive functions, as the basis of strengthening the government's responsibilities under the FOI Act. VALS would be open to assisting this review.

Of particular concern, VALS believes that the current legislative framework and the culture of many government agencies mean that the legislation and implementation inherently allow for delay and denial with no third-party review rights in relation to delays experienced. In the context of our work, this means our clients can face legal matters relating to child protection, criminal, health complaints, and personal injury matters without relevant information.

VALS believes that the legislation should put a duty on government to ensure that their recordkeeping enables the timely production of relevant documents when requested. Funding and resourcing are

[8] In collating this submission, all of the legal practices within VALS raised serious issues with how the Act functions in practice. Common themes were that government authorities regularly fail to adhere to the Act, that the culture of many government agencies is to make no effort to help an applicant craft a request to receive relevant documents, and the process is generally hostile for our clients which results in distress and a lack of trust.

often used as excuses by government to avoid providing information that is requested. Agencies that are hostile towards the Act are therefore incentivised to underfund or under-resource their document management and FOI processes.

Our lawyers did note that some agencies and authorities were generally good at producing all relevant documents in a timely fashion, notably hospitals and Ambulance Victoria. This indicates the need for stronger accountability mechanisms to be implemented to ensure consistency across agencies.

VALS believes that, in general, the Victorian Government proactively publishes far less data than it could. The Aboriginal Children's Forum is provided regular data relating to Aboriginal children and young people in out-of-home-care that is confidential and cannot be used outside of the forum, this data is critical to understanding the nature and rate of Aboriginal children in out-of-home-care across Victoria, with breakdowns across region, order, cultural support planning requirements and family reunifications. Again, this issue is exasperated when the extent of the data available is not transparent. Another example of this is VSIIDR – the whole of Victorian Government approach to integrating person level data, which collates integrated data sets across justice, education, human services and health[9], but VALS understands these data sets can only be released when asked for specifically, rather than proactively released by Government. The Office of the Victorian Information Commissioner (**OVIC**) states on its website that government should create documents with public access in mind.[10] However, our experience indicates that there are relatively few agencies who take this approach.

There is also room to reform the fees associated with FOI requests so that they do not unfairly restrict people from making requests and so that fees are not used to intimidate an applicant into withdrawing a request. This could include a means tested, fee waiver scheme, for Aboriginal community members and ACCOs, a refund mechanism where timelines are not met by the agency responsible, or removing the requirement altogether.

Legislative reform of the Act needs to drive cultural reform across government. This was part of the intention of the *Freedom Of Information Amendment (Office Of The Victorian Information Commissioner) Bill 2016* (the 2016 Bill).[11] The 2016 Bill empowered the Information Commissioner to set professional standards that are binding on agencies and principal officers, and empowered the Premier to do the same for Ministers. However, the impact of this reform is questionable given cultural problems remain pervasive throughout government and the Committee should consider further options for reforms that would enable this legislative intent.

Effective and practical reforms to the Act would play a role in helping Aboriginal people overcome the ongoing effects of colonisation and enabling Aboriginal communities to have a greater influence over government decision-making. VALS hopes that the Committee will use this opportunity to recommend reforms that will do exactly that.

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[9] Department of Health and Human Services, Centre for Victorian Data Linkage Presentation, 24 May 2019.
[10] Office of the Victorian Information Commissioner, Proactive Release of Information
[11] Martin Pakula, Hansard: Freedom Of Information Amendment (Office Of The Victorian Information Commissioner) Bill 2016, Second reading, 23 June 2016.

SUMMARY OF RECOMMENDATIONS

Recommendation 1. The *Office of the Victorian Information Commissioner* should work with Aboriginal people and Aboriginal Community Controlled Organisations to develop culturally appropriate services to help Aboriginal people access government data.

Recommendation 2. The *Freedom of Information Act 1982* should be amended to include specific rights for Aboriginal people. These rights should be developed in line with best practice self-determination, and data sovereignty principles[12] so there is greater access and control to data, and acknowledge the impact of colonisation, the role that control of data has played, and the ongoing discrimination faced by Aboriginal people trying to access data held by government.

Recommendation 3. The *Freedom of Information Act 1982* should incorporate all relevant articles, specifically Articles 3, 4, 5, 18, 20 and 31 of the United Nations Declaration on the Rights of Indigenous Peoples to better protect, promote and uphold the rights of Aboriginal and Torres Strait Islander Peoples.

Recommendation 4. The Victorian Government should appropriately fund and resource Aboriginal Community Controlled Organisations and other relevant bodies to develop Aboriginal leaders, practitioners and community members with the Indigenous data skills and infrastructure to advocate and participate across all sectors and jurisdictions.

Recommendation 5. The Victorian Government should commit more resources and funding to meet its obligations under the National Agreement on Closing the Gap and Victoria's Closing the Gap Implementation Plan, particularly in relation Priority Reform Four – Shared Access to Data and Information at a Regional Level.

Recommendation 6. The Office of the Information Commissioner should have their powers expanded so they are in a position to direct government agencies to release generalised data regularly.

Recommendation 7. The Office of the Information Commissioner should have their powers expanded to enable them to direct government agencies on how to interpret the Act and be able to take enforceable action against agencies that do not comply.

Recommendation 8. There should be consequences for government agencies that fail to meet the legislated timelines. These consequences should be designed to incentivise agencies to meet the deadlines rather than resort to delay tactics, including the refunding of application fees.

Recommendation 9. That Body Worn Camera Footage relating to an applicant, should be released by Victoria Police, pursuant to the *Freedom of Information Act 1982*.

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[12] The five Indigenous Data Sovereignty principles articulated by Maiam Nayri Wingara are; exercise control of the data ecosystem including creation, development, stewardship, analysis, dissemination and infrastructure; Data that are contextual and disaggregated (available and accessible at individual, community and First Nations levels); Data that are relevant and empowers sustainable self-determination and effective self-governance; Data structures that are accountable to Indigenous peoples and First Nations and Data that are protective and respects our individual and collective interests.

Recommendation 10. The Office of the Information Commissioner should develop professional standards and related practice notes requiring all agencies subject to the Act to implement IDS and IDG principles into their current policies and procedures relating to data and FOI.

Recommendation 11. The Victorian Government should require all agencies to modernise their information technology so that they are capable of meeting the requirements of the Act.

Recommendation 12. The Office of the Information Commissioner should conduct annual user-surveys of people and organisations that have used the Act and publish a report in Parliament separate to their annual report.

Recommendation 13. Each agency, that is subject to the Act, should publish specific line items in the Victorian Budget in relation to their investments in their Freedom of Information processes.

Recommendation 14. Each agency, that is subject to the Act, should publish performance targets regarding Freedom of Information by the Public Accounts and Estimates Committee the Victorian Budget.

Recommendation 15. The Victorian Government should conduct an audit of all agencies to identify generalised data sets that currently exist or could be created from information that is currently collected, and ensure that such data is publicly published on a regular basis.

Recommendation 16. The Victorian Government should fund the Office of the Information Commissioner to run a project to improve informal release processes across all government agencies.

Recommendation 17. Government agencies, through are more assistive function of their FOI staff, should be required to provide any useful information that would help an applicant re-scope a request so that they are able to access the information they want.

Recommendation 18. The Victorian Government should make a series of related reforms to improve public trust in government agencies, including creating an independent police oversight body.

Recommendation 19. The Committee should consider all options for narrowing exemptions as much as possible.

Recommendation 20. The cabinet documents exemption should be narrowed to only include documents that the dominant reason they were created was for the purpose of cabinet deliberations.

Recommendation 21. A public interest test should be included in the cabinet documents exemption to ensure that any claims made under this exemption can be properly reviewed.

Recommendation 22. The period with which a cabinet document exemption applies should be reduced from 10 years to 30 days.

Recommendation 23. Exemption for resourcing considerations should be dramatically constrained and there should be a duty on government agencies to ensure that their technology, especially given the opportunities presented with AI, processes can handle larger requests.

Recommendation 24. As in other jurisdictions, an agency seeking to rely on an exemption for resourcing considerations must first be required to take into account relevant factors in favour of release of the information.

Recommendation 25. The Committee should review the need for fees with a view to removing all fees, waiving fees for Aboriginal community members, or implementing a fee waiver mechanism.

Recommendation 26. The Committee should consider modernising the language of the Act to ensure it aligns with current standards and is inclusive.

DETAILED SUBMISSIONS

Indigenous Data Sovereignty and Indigenous Data Governance

As per the Terms of Reference the Inquiry is looking for opportunities to increase the disclosure of information relating to government services using technology. It is VALS contention that including provisions in the Act that align with the principles of Indigenous Data Sovereignty (**IDS**) and Indigenous Data Governance (**IDG**) would provide such a mechanism.

> Data is a cultural, strategic, and economic asset for Indigenous peoples. Indigenous Australians have always been active in what is now known as 'data'. Yet in modern times we have been isolated from the language, control and production of data at community, state, and national levels. This has resulted in data that are overly focused on Indigenous peoples as the program. Existing data and data infrastructure does not recognize or privilege our knowledges and worldviews nor meet our current and future needs.[13]

The concept of Aboriginal data sovereignty mandates that Aboriginal communities and Aboriginal Community Controlled Organisations (**ACCOs**) have a right to access and interpret information concerning Aboriginal individuals and communities, as well as the right to determine how the data is used and disseminated within mainstream society[14]. The authority and control over such data not only ensures that the information is understood in its appropriate context, but is also beneficial to ACCOs to ensure that the services and programs provided meet the demand and needs of Aboriginal communities.[15]

In practice, the concepts of IDS and IDG are a specific exercise of the right to self-determination as enshrined in Articles 3, 4, 5, 18 and 20 (alongside others) of the *United Nations Declaration on the Rights of Indigenous Peoples* (**UNDRIP**),[16] for which Australia has endorsed.[17] The following key concepts relating to Indigenous Data Sovereignty were defined by consensus by delegates of the Indigenous Data Sovereignty Summit:[18]

- 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.'

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[13] Lowitja Institute, We nurture our culture for our future, and our culture nurtures us, The Close the Gap Campaign Steering Committee
[14] VALS, Community fact sheet: Aboriginal Self-Determination
[15] VALS, Community fact sheet: Aboriginal Self-Determination
[16] VALS, Victorian Aboriginal Legal Service Submission to the Inquiry into Victoria's Criminal Justice System, September 2021
[17] Australian Human Rights Commission, Implementing UNDRIP, 2021.
[18] The Indigenous Data Sovereignty Summit was held in Canberra, ACT, on 20 June 2018.

- 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.'[19]

The nature of the relationship between data collected concerning Aboriginal peoples and IDS can be described as follows:

- The right of Aboriginal peoples, individually and collectively, to access and collect data obtained about Aboriginal individuals and communities.
- The right of Aboriginal peoples, individually and collectively, to exercise control over the manner in which data concerning Aboriginal individuals and communities is gathered, managed and utilised.

The relationship between IDG and data collected concerning Aboriginal individuals and communities, on the other hand, involves determining the specific circumstances under which data concerning Aboriginal peoples can be collected in the first place. It is important to note that both IDS and IDG require the meaningful and effective participation, in line with the right to free, prior and informed consent, of Aboriginal people before decisions are made in relation to policies and legislation concerning Indigenous data.

VALS is not aware of examples where Victorian government agencies have implemented IDS or IDG well, we do however refer to Yoorrook Truth and Justice Commissions' work around developing Indigenous Data Sovereignty and Data Governance guidelines[20]. We are aware of efforts in other jurisdictions in Australia to introduce IDG and IDS principles into government data collection. This is mainly being driven by the National Agreement on Closing the Gap (**CtG**) Agreement, although delays in progressing the Victorian Closing the Gap Implementation Plan means that we are well behind other jurisdictions. The lack of strong IDG and IDS models in Australia is also a result of Australia's historical and contemporary reluctance to embrace and embed UNDRIP domestically.

In Australia and across the world, IDG and IDS models are most progressed in the Intellectual Property space,[21] however there is research and policy development for broader implementation of IDG and IDS principles. VALS recommends that the Committee review the work of *Maiam Nayri Wingara* as a basis for understanding how IDG and IDS can be implemented.[22]

As ever, resourcing is essential to this endeavour. As outlined in the *Indigenous Data Governance Communique* of 2023:

> Enacting Indigenous Data Governance requires Indigenous leaders, practitioners and community members with the skills and infrastructure to advocate and participate across all sectors and jurisdictions. Indigenous communities retain the right to decide which sets of data require active

[19] *Indigenous Data Sovereignty, Communique*. Indigenous Data Sovereignty Summit. 20 June 2018, p. 1.
[20] Yoorrook Justice Commission, 'Indigenous Data Sovereignty and Data Governance' Information Sheet.
[21] Terri Janke, Our Culture : Our Future Report on Australian Indigenous Cultural and Intellectual Property Rights
[22] Maiam Nayri Wingara

governance and maintain the right to not participate in data processes inconsistent with the principles asserted in this Communique.[23]

The Victorian government and the Victorian Parliament are increasingly recognising the unique position of Aboriginal people in various pieces of legislation through the inclusion of statements of recognition. While VALS has often critiqued the manner in which such statements are written (given they often are not done through self-determined processes)[24] and critiqued the efficacy of the statements (the enforceability of provisions in the statements is often underwhelming), VALS does believe in the importance of establishing specific rights for Aboriginal people within legislation. VALS has regularly advocated for UNDRIP to be enshrined in Federal and State legislation – including the articles that relate to IDG and IDS.[25] The Act would be improved by the inclusion of specific rights for Aboriginal people.

RECOMMENDATIONS

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Recommendation 2. The *Freedom of Information Act 1982* should be amended to include specific rights for Aboriginal people. These rights should be developed in line with best practice self-determination, and data sovereignty principles[26] so there is greater access and control to data, and acknowledge the impact of colonisation, the role that control of data has played, and the ongoing discrimination faced by Aboriginal people trying to access data held by government.

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Recommendation 5. The Victorian Government should commit more resources and funding to meet its obligations under the National Agreement on Closing the Gap and Victoria's Closing the

[23] National Indigenous Data Sovereignty Summit, Indigenous Data Governance Communique, 13th June 2023, Cairns, QLD
[24] VALS, Minister Anthony Carbines refused to properly consult on legislation and VALS, VALS welcomes commitment to better consultation, despite ongoing concerns with proposed legislation
[25] VALS, Victorian Aboriginal Legal Service Submission to the Inquiry into Victoria's Criminal Justice System, September 2021
[26] The five Indigenous Data Sovereignty principles articulated by Maiam Nayri Wingara are; exercise control of the data ecosystem including creation, development, stewardship, analysis, dissemination and infrastructure; Data that are contextual and disaggregated (available and accessible at individual, community and First Nations levels); Data that are relevant and empowers sustainable self-determination and effective self-governance; Data structures that are accountable to Indigenous peoples and First Nations and Data that are protective and respects our individual and collective interests.

Gap Implementation Plan, particularly in relation Priority Reform Four – Shared Access to Data and Information at a Regional Level.

VALS' experience of FOI

VALS regularly makes applications under the Act for a range of legal matters for our clients, particularly in relation to child protection and criminal matters, health and mental health matters, and police complaints. The documents that we make requests for under the Act on behalf of our clients are often important to establishing facts in a matter and ensuring our clients receive fair treatment. We also utilise FOI to help inform our policy and advocacy work, which is particularly important because there is a fair amount of data that government collects in the justice portfolios that is not proactively published or openly disseminated.

Across VALS, staff experience is consistent with key themes being:

- Some agencies have a poor culture in relation to the Act and processes in these government agencies are difficult and slow
- There are sections of the Act that are not taken seriously by government agencies
- The duties placed on government agencies under the Act are not appropriately enforceable and there are not enough mechanisms, formal and informal, to resolve a request.

Attachment A to this submission is spreadsheet of FOI requests made by VALS' Wirraway Police and Prison Accountability Practice, which was established off the back of donations in the wake of the murder of George Floyd in the US. Wirraway has represented the next of kin in several Aboriginal death in custody Coronial matters, and has a growing practice in relation to police misconduct.

As you can see in Attachment A, the FOI requests made by Wirraway range from clients seeking body worn camera footage and other evidence in relation to arrests that resulted in injury or further charges, to a member of the Stolen Generations seeking records of investigations made in relation to historical sexual abuse allegations. Several of these requests include clients with mental health conditions or disabilities, and access to the documents requested are important in substantiating their version of events.

Wirraway have about 20 open FOI requests that are past 30 days from 2023 alone. Only 13 requests made in 2023 have been "completed" (either documents were produced, or a final response was received). Of those 13 completed requests from 2023, only two were completed in 2023. Of those 13 requests, the average length was 86.5 days. Some of the completed requests have resulted in an OVIC application or VCAT proceedings as we do not believe the response of the agency was sufficient.

One FOI request that Wirraway made to Victoria Police took 770 days to complete and has now progressed to an OVIC proceeding. An application to Monash Health took 642 days to complete.

VALS also notes that Body worn camera (**BWC**) footage is often a key piece of evidence for the Wirraway practice when assessing claims of police misconduct. Without access to BWC footage at

these initial stages of a claim there may simply be no other means of assessing whether police misconduct has occurred – meaning our client's claim would have to be abandoned. Therefore, early, and timely, access to BWC footage is clearly an integral aspect to improving justice outcomes for Aboriginal people within Victoria. The Government has itself, in various public statements, acknowledged the importance of BWC footage to facilitating access to justice (including in relation to potential misconduct by police, and other law enforcement officers). For instance, the Attorney-General is quoted as saying as follows on 21 December 2021, with respect to amendments to the the *Surveillance Devices Act 1999* (SD Act) *and Surveillance Devices Regulations 2016* which were specifically made to permit the use of BWC footage in civil matters (emphasis added):

> Body-worn camera footage can be a crucial piece of evidence to hold those who do the wrong thing to account and exonerate the innocent.
>
> We know the overwhelming majority of frontline workers do an amazing job every single day – keeping us safe and saving lives – but when things do go wrong, everybody should be able to access the evidence they need to get justice, regardless of what sort of legal action they are a party to.[27]

Our Wirraway practice also note that Victoria Police have taken the position that BWC Footage cannot be provided through FOI requests. VALS believes that this is legally incorrect, but there has been no mechanism to effectively clarify Victoria Police's position. We note that in a review of NSW's Surveillance Devices Act[28], submissions were made by Aboriginal Legal Services (NSW/ACT), Redfern Legal Centre and Legal Aid NSW arguing that the BWC footage relating to an applicant should be able to be released under FOI requests as it effectively contains their own personal information[29]. There is a need for legislative clarification as to the status of BWC Footage through the FOI Act.

Victoria Police is a key example where the culture of an organisation can undermine what strength the Act has. The FOI processes at Victoria Police is woefully under-resourced and the chronic delays in meeting their obligations under the Act have been well documented for years.[30] Victoria Police often blames old technology for being unable to produce data or information[31], even though it has annual revenue in excess of $4 billion and most of their data and information is collected in standardised digital forms.[32] It is hard not to think that the under-resourcing of the FOI process in an incredibly well-resourced organisation is convenient, and perhaps deliberate, in an organisation that has been reluctant to embrace external oversight.

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[27] The Age, 'Police body camera footage allowed in Victorian civil lawsuits', Tammy Mills and Cameron Houston (December 21 2021)

[28] NSW Government, Communities and Justice, Statutory Review, 'Provisions of the Surveillance Devices Act 2007 inserted by the Surveillance Devices Amendment (Police Body-Worn Video) Act 2014', 2020.

[29] Ibid, s5.3.

[30] The Age, 'Unacceptable situation': Victorians kept in the dark as police breach information laws and The Mandarin, FOI decision delays move commissioner to sound alarm and The Age, Your right to know: The battle to access your own personal information

[31] VALS has raised with Victoria Police the need to publicly publish more fulsome data about its activities in various forums and is regularly told that its IT cannot handle producing the data. This was a regular conversation in 2023 in relation to bail reforms and the Victorian Government's proposal to raise the age of criminal responsibility.

[32] IT News, Victoria Police extends life of 25-yr-old LEAP database and Delimiter, Victoria Police gives up trying to replace 25-year-old IT system

VALS supports the statements made by Information Commissioner Sven Bluemmel in 2023 in relation to Victoria Police failing to meet their obligations under the Act:

> "[It is an] unacceptable situation which deprives people who need information from Victoria Police of an important right… it is increasingly clear that transparency and accountability build community trust, which is essential for democratic governments to work effectively, efficiently, and with legitimacy. In any event, compliance with the laws passed by the Victorian Parliament is not optional."[33]

VALS believes that there are important and needed changes to the Act to improve the disclosure of information, but that organisations like Victoria Police need more specific reforms to improve their accountability. Particularly, VALS wants an independent police oversight body based on the Police Ombudsman for Northern Ireland to handle police complaints.[34] This body they should have oversight of Vic Pol approach to transparency/accountability in so far as the FOI Act is concerned. This reform would drive broader cultural reform and create the kind of culture that Information Commissioner Sven Bluemmel identified as being "essential" in the previous quote.

VALS contends that OVIC should develop professional standards and related practice notes requiring all agencies subject to the Act to implement IDS and IDG principles into their current policies and procedures relating to data and FOI.

Many of the lawyers at VALS noted that the delays and challenges in getting personal information through an FOI request left clients distressed and eroded their trust in government and the legal system. Moreover, in a number of cases, given statutory limitation periods, these delays also meant the client had insufficient time to obtain legal advice on the merits of potential civil claim.

In October 2022, VALS' Policy, Communications and Strategy team made an FOI request to the Department of Justice and Community Safety (**DJCS**) for information regarding monthly data on unsentenced and sentenced Aboriginal people in corrections custody. We are occasionally given such data confidentially through various working groups, but the data is not published publicly.[35] This data was particularly important given the ongoing discussion around bail reform in Victoria after the Coronial Inquest into the passing of Veronica Nelson.

We were provided with the data in mid-December (approximately two months after the request). The data was released outside of the FOI Act on the basis that "the department has determined that requests from your agency for simple or routine data do not need to be processed under FOI."[36] Given the data was "simple or routine", it leads to the question of why is the data not published publicly as part of Corrections Victoria's monthly statistics? VALS believes that there is a wide range of "simple or routine" data that is held by DJCS that would improve government accountability and public discourse. There should be greater power for OVIC, or other relevant authorities, to instruct

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[33] The Age, 'Unacceptable situation': Victorians kept in the dark as police breach information laws
[34] VALS Policy Brief, 'Reforming Police Oversight in Victoria' 2022;. O'Brien Butler, Sinead, 'Policing the Police: Independent Investigations for Victoria' (2018) 41(3) UNSW Law Journal 702.
[35] Corrections Victoria publishes monthly data, but it is not disaggregated by Aboriginality and sentenced or unsentenced.
[36] Quote is from the final decision letter 22 December 2022.

government agencies to publish data publicly on a regular basis if such data is “simple or routine” and is suitably de-identified.

VALS strongly believes in the informal release of personal information immediately once an appropriate authority is provided or established. This would greatly reduce the resource burden on FOI processes within agencies and reduce the distress of individuals trying to access their own personal information.

VALS has also found that there is too much opportunity for government agencies to delay requests before getting to the point of an OVIC or VCAT proceeding. VALS would like to see more mechanisms in the Act to allow applicants to resolve disagreements with agencies much faster so that options like VCAT are a last resort (noting that, in VALS' experience, VCAT is currently unable to process such disputes in a timely manner due to its own resourcing constraints). This could include a stricter approach to time limits, a duty on FOI officers to disclose what might be relevant to an applicant if they believe the scope of the original request is too large or otherwise not fulfillable, and greater transparency and responsiveness requirements around an agencies’ FOI processes. For example, if an agency failed to meet the current 30-day timeframe, they could be required to release the information within 14 days of the deadline passing with a much narrower range of exemptions (limited to things like personal information that might put a person affected by family violence at risk of harm).

We note, that since 2012 OVIC is responsible for both reviewing access decisions and handling and investigating FOI related complaints, whereas other jurisdictions, and prior to 2012 in Victoria, the complaints’ function is typically covered by the relevant ombudsman. This may exacerbate the resourcing issues at OVIC, which speaks to the need to better resource this critical function.

RECOMMENDATIONS

Recommendation 6. The Office of the Information Commissioner and should have greater powers to direct government agencies to release generalised data regularly.

Recommendation 7. The Office of the Information Commissioner and should have greater powers to direct government agencies on how to interpret the Act and be able to take enforceable action against agencies that do not comply.

Recommendation 8. There should be consequences for government agencies that fail to meet the legislated timelines. These consequences should be designed to incentivise agencies to meet the deadlines rather than resort to delay tactics.

Recommendation 9. That Body Worn Camera Footage relating to an applicant, should be released by Victoria Police, pursuant to the *Freedom of Information Act 1982*.

Recommendation 10. The Office of the Information Commissioner should develop professional standards and related practice notes requiring all agencies subject to the Act to implement IDS and IDG principles into their current policies and procedures relating to data and FOI.

Recommendation 11. The Victorian Government should require all agencies to modernise their information technology so that they are capable of meeting the requirements of the Act.

Recommendation 12. The Office of the Information Commissioner should conduct annual user-surveys of people and organisations that have used the Act and publish a report in Parliament separate to their annual report.

Recommendation 13. Each agency should publish specific line items in the Victorian Budget in relation to their investments in their Freedom of Information processes.

Recommendation 14. Each agency should publish performance targets regarding Freedom of Information in Public Accounts and Estimates Committee, or another relevant body.

Recommendation 15. The Victorian Government should conduct an audit of all agencies to identify generalised data sets that currently exist, or could be created from information that is currently collected, and ensure that such data is publicly published on a regular basis.

Recommendation 16. The Victorian Government should fund the Office of the Information Commissioner to run a project to improve informal release processes across all government agencies.

Recommendation 17. Government agencies should be required to provide any useful information that would help an applicant re-scope a request so that they are able to access the information they want.

Recommendation 18. The Victorian Government should make a series of related reforms to improve public trust in government agencies, including creating an independent police oversight body.

Other reform considerations

Fixing exemptions

VALS believes that there is significant scope to reduce exemptions within the Act to ensure that exemptions are not misused by agencies.

Exemptions are an important part of the Act, particularly where exemptions protect personal information that is sensitive, and the disclosure of such information may put an individual at risk of harm.

However, broad or vague exemptions provide government agencies with too much room to deny requests that are well within the spirit and intent of the Act, as well as public expectation.

The Committee should certainly take time to review the scope of the cabinet documents exemption. Section 28 is so broad, that documents that reference cabinet decisions or deliberations is exempt. Any document attached to a cabinet submission is also exempt under Section 28. This creates the

perverse incentive to attach all documents that the government wants to prevent from being published publicly to a cabinet submission. This is coupled with the proliferation of cabinet subcommittees and working groups to provide huge scope for exempting documents under Section 28. Where this exemption is employed outside of what is necessary, this results in denying access to justice.

Documents should only receive an exemption as a cabinet document if the dominant purpose for its production was for Cabinet deliberations.[37] There should also be a public interest test clause to specifically challenge a request being denied as having cabinet document exemption.[38] Without such a test, there is no capacity to challenge such a decision and ensure that the government agency is using the exemption correctly.

Further to this, cabinet exemptions currently last for ten years in Victoria. In Queensland, the government is currently implementing a policy to release cabinet documents after 30 days.[39] In Aotearoa New Zealand, "Cabinet papers and minutes must be proactively published within 30 business days of final decisions being taken by Cabinet, unless there's a good reason not to publish them (whether in part or in full), or to delay the release."[40] Reducing the period for cabinet documents exemptions would significantly reduce the capacity for agencies to misuse this exemption and increase public confidence.

The exemption provided by Section 25A(1), relating to refusing a request based on the view that processing the request would result in a substantial and unreasonable diversion of an agency's resources, is also too broad and, in VALS experience, is often being unnecessarily used to limit access to requested documents. For example, the exemption is often employed by the Victoria Police FOI department to encourage VALS to rescope its FOI requests to certain written documents only. However, in a recent matter that was reviewed by OVIC the Information Commissioner formed the view that Victoria Police was unable to rely on this exemption in the circumstances.

Given the improvement in technology since the Act was originally enacted, VALS believes it is appropriate for duties to be placed on government agencies to ensure their technology and processes limit the need for this exemption. This is particularly relevant with significant developments in AI, this technology poses opportunities for facilitating quicker identification or relevant material for FOI requests and supporting the work of FOI officers, this could in turn speed up FOI request processes. For this to be effective, there must also be appropriate guardrails established around the use of AI generally, and ensure adequate protections afforded. If the agency has not made a reasonable effort to modernise its technology and processes, OVIC should be able to instruct that the agency cannot use the exemption and that the agency should be responsible for the cost of producing the documents requested. This would incentivise government agencies to modernise their technology and processes.

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[37] Dr Mark Rodrigues, Cabinet confidentiality
[38] Ibid.
[39] The Guardian, Queensland cabinet papers to be released after 30 days instead of 30 years in wake of integrity report and The Courier Mail, The secret cabinet documents that won't be released despite reform
[40] Ministry of Justice, Cabinet and Related Material

VALS also believes that the exemption in section 25A(1) of the Act should be aligned with other jurisdictions. For example, in New South Wales, where an agency seeks to rely on an equivalent exemption, before they can do so, the agency must consider:

the general public interest in favour of the disclosure of government information, and

the demonstrable importance of the information to the applicant, including whether the information is personal information that relates to the applicant, or could assist the applicant in exercising any legal rights.[41]

RECOMMENDATIONS

Recommendation 19. The Committee should consider all options for narrowing exemptions as much as possible.

Recommendation 20. The cabinet documents exemption should be narrowed to only include documents that the dominant reason they were created was for the purpose of cabinet deliberations.

Recommendation 21. A public interest test should be included in the cabinet documents exemption to ensure that any claims made under this exemption can be properly reviewed.

Recommendation 22. The period with which a cabinet document exemption applies should be reduced from 10 years to 30 days.

Recommendation 23. Exemption for resourcing considerations should be dramatically constrained and there should be a duty on government agencies to ensure that their technology, especially given the opportunities presented with AI, and processes can handle larger requests.

Recommendation 24. As in other jurisdictions, an agency seeking to rely on an exemption for resourcing considerations must first be required to take into account relevant factors in favour of release of the information.

Fees

VALS believes that the Committee should review the need for fees.

If the Act is reformed to promote greater informal releases and more proactive publishing, this would greatly reduce the number of formal requests.

The purpose of fees seems to be more aimed at limiting the number of requests, rather than recovering costs. OVIC's 2022-23 Annual Report stated that "agencies reported application fee revenue of $1,066,239.80" and "agencies collected $1,007,977.82 in access charges."[42] These fees are

41 Government Information (Public Access) Act 2009 (NSW), s60(3B).

[42] Office of the Victorian Information Commissioner, OVIC 2022-23 Annual Report

a very small amount of money in comparison to the Victorian government's overall revenue and it cannot be argued that they are recovering a substantial amount of the cost of fulfilling FOI requests.

The purpose of the Act should be to ensure everyone has reasonable access to the information government holds about them and to encourage more open and accountable government, and that associated costs should not prohibit or provide a barrier to accessing this information due to financial circumstances. It is hard to understand what role fees play in delivering on these intents if the system is functioning well. Indeed, the governments obligations under the Act should be seen as a non-negotiable part of operation for government and costed into their business as usual.

In VALS' experience, most agencies waive fees in a large portion of our requests. Given how common practice it is to waive fees, it is unlikely that removing fees would have a significant impact on any agency. In particular we feel fees should be waived for Aboriginal community members, using a means-based assessment, and ACCOs more broadly, especially where an FOI is for an individual under the age of 18 years of age.

An alternative approach would be for the Act to be amended to include a refund mechanism, which could be a middle ground between disincentivising vexatious applications and avoiding discouraging genuine applications – for example, in Queensland, an application fee must be refunded if a deemed decision is made.[43]

RECOMMENDATIONS

Recommendation 25. The Committee should review the need for fees with a view to removing all fees, waiving fees for Aboriginal community members, or implementing a fee waiver mechanism.

Language update

The Committee should consider whether the language in the Act should be modernised, so it is inclusive. For instance, the Act uses binary gender terms like "his or her" which is out of step with other legislation in Victoria given non-binary sex descriptors can now be used on birth certificates, as well as Victoria's *Pride in our future: Victoria's LGBTIQA+ strategy 2022-2032* which relevantly addresses improving data collection[44].

RECOMMENDATIONS

Recommendation 26. The Committee should consider modernising the language of the Act to ensure it aligns with current standards and is inclusive.

[43] Office of the Information Commissioner, Queensland, Fees and Charges.
[44] State of Victoria, Department of Families, Fairness and Housing, *Pride in our future: Victoria's LGBTIQA+ strategy 2022-2032*, 21.