



Victorian Aboriginal Legal Service Submission to the ALRC on Justice Responses to Sexual Violence

June 2024



Contents

Contents..... 2

EXECUTIVE SUMMARY 3

SUMMARY OF RECOMMENDATIONS..... 5

DETAILED SUBMISSIONS 7

Unsafe reporting experiences..... 7

Specialisation and training of judges and counsel..... 12

Cross-examination 15

Sentencing..... 16

Shift towards restorative justice for instances of sexual violence..... 17

Civil justice responses to sexual violence 20



EXECUTIVE SUMMARY

VALS welcomes the opportunity to make a submission to the Australian Law Reform Commission's Project, Improving the Response of the Justice System to Sexual Offences. With the wide scope of the Project, VALS has chosen to focus on key areas that are relevant to our practice and the community members we support. Our submission speaks to the following matters:

- Reporting experiences safely
- Criminal Justice Responses
- Specialisation and training of judges and counsel
- Cross-examination
- Sentencing
- Shift towards restorative justice for instances of sexual violence
- Civil justice responses to sexual violence

VALS is committed to addressing the profound injustices faced by Aboriginal communities, particularly the disproportionately high rates of sexual violence against Aboriginal women. According to the Queensland Sexual Assault Network, Aboriginal people are more than three times more likely to experience sexual violence than non-Indigenous Australians.¹ Furthermore, Aboriginal women are 45 times more likely to experience family violence and 25 times more likely to be killed or injured from family violence compared to non-Aboriginal women.² Family violence statistics are highly relevant to discussions on sexual violence, as family violence often encompasses sexual violence within its spectrum of harm, making these interconnected issues critical to address comprehensively and in a trauma informed approach.³

The intergenerational impacts of institutional child sexual abuse for the Stolen Generations are documented in the Bringing Them Home report⁴ and the Royal Commission into Institutional Responses to Child Sexual Abuse,⁵ which reveal that approximately one in ten children who were placed in children's institutions after being forcibly removed from their families, reported that they endured sexual abuse in those institutional settings. The high rates of sexual violence against Aboriginal women, coupled with the intergenerational impacts of childhood sexual abuse experienced by members of the Stolen Generations, highlight the pervasive and systemic nature of this issue.

The inadequacy of criminal legal responses in eradicating sexual violence and family violence highlights the necessity for a societal transformation in how we perceive and protect the rights of

¹ Queensland Sexual Assault Network, [Aboriginal and Torres Strait Islander People](#) (Webpage, 2024)

² State of Victoria, [Balit Murrip Aboriginal social and emotional wellbeing framework 2017-2027](#) (2017), p 21.

³ AIHW, [Family, domestic and sexual violence](#) (webpage, 2024)

⁴ Australian Human Rights Commission, [Bringing them home report](#) (1997), p 141.

⁵ Australian Government, [Royal Commission into institutional Responses to Child Sexual Abuse](#) (2017)



women and children. A victim-blaming culture is a manifestation of ongoing colonial violence, reflecting the deeply entrenched and systemic racism within Australian society. Systemic racism within law enforcement agencies and the judicial system exacerbates and perpetuates this cycle of violence and injustice.

The *Yoorrook for Justice Report* recommended that to address the injustices experienced by Aboriginal peoples there must be a self-determined approach involving the:

“Transfer of power, authority, and resources to First Peoples via the treaty process”⁶

Whilst the *Yoorrook for Justice Report* focuses on child protection and criminal legal systems, this transformative change must extend to all legal systems, including civil and family law, which also contend with sexual violence and family violence. Long-term sustainable funding and resources must be allocated to ACCOs to provide sexual violence and family violence support that is therapeutic, culturally safe, and trauma informed.

There is an urgent need for timely, culturally safe, and trauma-informed approaches to family violence and criminal legal issues. A holistic approach is crucial to dismantling the ongoing colonial violence and ensuring justice and healing for Aboriginal people whilst simultaneously upholding the rights of victim-survivors of violence.

⁶ Yoorrook Justice Commission (2023), *Yoorrook for Justice Report*, p6.



SUMMARY OF RECOMMENDATIONS

Recommendation 1. State and Territory Governments must undertake a comprehensive reform process to consult on, design, and implement an independent police and detention oversight system. This system must include mechanisms to address accountability and oversight, particularly focusing on systemic racism within State Police forces. The new oversight body must be complainant-centred, transparent, and equipped with adequate powers and resources to conduct independent investigations, with a specific focus on responding to the needs of Aboriginal complainants.

Recommendation 2. 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 and detention oversight body.

Recommendation 3. State and Territory Governments must invest in police training resources to ensure police are appropriately responding to circumstances of family violence and sexual violence in a culturally safe manner. Police must receive regular and ongoing training on the following areas:

Family violence, including the impact of misidentification on women and young people, especially within the Aboriginal community.

- Cultural awareness,
- Gender bias,
- Racism in all its forms, including systemic racism and unconscious bias,
- ACCOs and other specialist family violence services must be engaged to develop and deliver these training sessions.

Recommendation 4. There should be a broad ranging Royal Commission into the culture and misconduct of Victoria Police and the terms of reference should specifically refer to the impact of these policing practices for those impacted by family violence and sexual assault.

Recommendation 5. Police should work with family violence services, legal assistance providers and community members to fully implement Recommendation 41 of the Royal Commission into Family Violence and reduce the risk of misidentification.

Recommendation 6: The Victorian Government should significantly increase funding for VALS' Community Legal Education. Funding should be provided for both staffing and creation of resources, using a variety of media, to be disseminated on different platforms, to ensure the legal messages are accessible to and understandable for everyone in the Aboriginal community.

Recommendation 7: In order to improve justice responses to sexual violence, it is imperative that all services are adequately funded as per recommendation 22 in Dr Mundy's NLAP Review Final Report.

Recommendation 8. Comprehensive cultural awareness and anti-racism training and education for judicial officers are imperative to ensure that responses to sexual violence do not perpetuate racist approaches to the affected family member, the accused, or witnesses. This training should include a



concrete focus on creating a culturally appropriate judicial process for Aboriginal people, extending beyond mere cultural awareness.

Recommendation 9. Training delivered to members of specialist courts should be adapted for broader use to equip all parts of the criminal legal system with the ability to deliver culturally appropriate services for Aboriginal people with complex needs.

Recommendation 10. Alongside any criminal legal system reforms, it is imperative that government provides specific funding to improve cultural safety in court processes. This includes creating specific Aboriginal-identified court staff roles to provide holistic and culturally safe support for Aboriginal people who are engaged with the legal system.

Recommendation 11. Cross-examination is an important exercise in upholding the right to a fair trial. In recognising that cross-examination poses risks to witnesses and complainants wellbeing it is imperative that legal practitioners undertake relevant training to ensure their conduct during cross-examination is both culturally- and trauma-informed.

Recommendation 12. Cross-examination of witnesses and complainants in sexual violence matters should not be strictly prohibited, but rather the judicial officer should make a considered decision about whether cross-examination in the circumstance is appropriate.

Recommendation 13. VALS supports the recommendation of the Aboriginal Justice Caucus to the VLRC33 - 'There is evidence to support Restorative Justice processes can be effective in responding to sexual offending. However, design, development and implementation of these justice responses will take time, and must be community led. Responses must be aligned with Aboriginal Community values, victim-centred and responsive to the community in which it is developed.'

Recommendation 14. Governments must work with Aboriginal Community Controlled Organisations and Aboriginal communities, including victim-survivors, to deliver self-determined and culturally safe approaches to justice responses to sexual violence.



DETAILED SUBMISSIONS

Unsafe reporting experiences

Police racism and discrimination and failures of the police system

An unsafe and discriminatory reporting system routinely acts as a barrier for Aboriginal women seeking assistance from police particularly in cases of sexual violence, with estimates suggesting that around 90% of violence against Aboriginal women and most cases of sexual abuse of Aboriginal children go undisclosed.⁷ VALS submission to the *Senate Inquiry into Missing and Murdered First Nations Women and Children* highlights how 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, coupled with the consistent failures by police to protect Aboriginal women in circumstances of violence.⁸ 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".⁹ Racism in police services across Australia impacts Aboriginal communities on a daily basis and manifests itself in the way that Aboriginal people are over-policed, over-represented in police custody, and under-served when seeking assistance and protection through police. It is also evident in police officer's use of force and assaults against Aboriginal people and explicit racial abuse.¹⁰

In her book *Black and Blue – A Memoir of Racism and Resilience*, proud Gunai/Kurnai woman, former police officer and author Veronica Gorrie addresses the justified fear and distrust Aboriginal people have towards the police.¹¹ Drawing from her experiences as an Aboriginal police officer, she exposes the pervasive racism within the force towards Aboriginal communities. Her book *When Cops Are Criminals* further highlights the unchecked power of the police and their harm towards Aboriginal communities who they deem 'less than'.¹²

Professor Judy Atkinson discusses community distrust of police in her book *Trauma Trails – Recreating Song Lines*.¹³ During Professor Atkinson's 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

⁷ Australian Institute of Health and Welfare, [Aboriginal and Torres Strait Islander people](#) (Webpage, 2024)

⁸ VALS, [Victorian Aboriginal Legal Service Submission to the Senate Inquiry into missing and murdered First Nations women and children](#) (December 2022), P 6.


⁹ ANROWS [Australia's National Research Organisation for Women's Safety], [Accurately identifying the "person most in need of protection" in domestic and family violence law](#). (2021), p 101.

¹⁰ VALS, [Reforming Police Oversight in Victoria](#) (2022), p 17.

¹¹ Veronica Gorrie, *Black and Blue – A memoir of racism and resilience*. (2021).

¹² Veronica Gorrie and other contributors, *When Cops Are Criminals*. (2024).

¹³ Judy Atkinson, *Trauma Trails – Recreating Song Lines, The Transgenerational Effects of Trauma in Indigenous Australia*. (2002).



they can even be heard. Contact with the police system at all stages of the criminal legal system is unsafe for Aboriginal people and only fosters a distrust of police.¹⁴

Given the structurally violent relationship between the Victorian Police Service and Aboriginal people, reporting mechanisms of any form of violence, but especially sexual violence, are inherently unsafe and lead to a lack of reporting. To address this issue there needs to be a transformative shift towards monitoring and changing police behaviours, and this must occur within a self-determined justice system. This necessitates transformative change starting with reforming police oversight mechanisms to ensure accountability and justice for Aboriginal communities who are victims of violence, racism, and discrimination at the hands of the police.

VALS has spoken extensively on how Aboriginal communities do not have confidence in the current police complaints system because it lacks independence, is culturally unsafe and does not provide satisfactory outcomes. VALS refers the ALRC to our policy paper on Reforming Police Oversight in Victoria which details how the majority of police complaints are referred back to Victoria Police to investigate themselves,¹⁵ and how Independent Broad-based Anti-Corruption Commission's (IBAC) own investigations of complaints, in the rare cases they are conducted, are also frequently inadequate.¹⁶

The absence of a proper oversight mechanism allows police to continue to perpetuate racist, discriminatory, and violent behaviours and actions towards Aboriginal communities, which in turn fosters distrust and hinders reporting of violence and sexual violence. This exacerbates already inadequate responses to sexual violence against Aboriginal people, amplifying Aboriginal peoples fear of criminalisation and disbelief from a system that has historically failed to protect them.

In the meantime, until oversight mechanisms are addressed, an improvement in the quality of cultural awareness and anti-racism training for police that is designed and delivered in partnership with Aboriginal Community Controlled Organisations is essential to ensure the safety of Aboriginal people who need to report any kind of violence to police, especially, sexual violence.

Sexual Violence Intersection with Misidentification and Family Violence


The misidentification of Aboriginal women as a person using violence (**PUV**) instead of the affected family members (**AFM**) by the police further solidifies the barriers to reporting and compounds an already present distrust in police for Aboriginal women.¹⁷ This distrust profoundly affects Aboriginal women's ability to safely report incidents of sexual violence, particularly in cases of family violence, due to a police response that repeatedly fails them.

¹⁴ VALS, [*Victorian Aboriginal Legal Service Submission to the Senate Inquiry into missing and murdered First Nations women and children*](#) (2022), P 6.

¹⁵ Department of Justice and Community Safety, [*Systemic review of police oversight*](#)

¹⁶ VALS, [*Reforming Police Oversight in Victoria*](#) (2022).

¹⁷ Referring to instances of family violence, we will use the terms "affected family members (AFM)" and "persons using violence (PUV)" instead of "victim-survivor" and "perpetrator". This terminology aims to provide a more neutral and inclusive framework for discussing family violence, acknowledging the complex dynamics involved.



It is well documented that police and courts' failure to respond appropriately to family violence is particularly acute for Aboriginal women, who are subjected to biased views on account of their Aboriginality and because of related factors such as overcriminalisation or substance use problems. Victoria's *Royal Commission into Family Violence* heard evidence of these failings, including cases where a police officer told a victim of family violence that "He's just whacked you in the head this time. It's getting better. Last time it was worse", and that police had adopted "an attitude... that 'every Aboriginal woman is a victim', 'it's normal', 'this has happened all your life – deal with it'." ¹⁸

Veronica Gorrie describes how the violence "that we suffer at the hands of police when they turn up at a domestic violence incident is a whole other level. Aboriginal women are deemed to be the perpetrators, are locked up and our children are taken from us". ¹⁹ The prevalence of misidentification of Aboriginal women as perpetrators of family violence is rife. Police may often believe the account of a person who has committed abuse over that of the AFM, and a focus on isolated incidents can lead to arrests for minor defensive conduct while ignoring the very real pattern of abuse. ²⁰ Vulnerable AFM's intersecting factors including complex mental health needs, substance use, outstanding warrants or criminal records compound the risk of being misidentified as an aggressor. These risk factors all make Aboriginal women much more likely to be misidentified as a PUV by the police, as Aboriginal women may be less likely to cooperate with police due to previous experiences, and are also disproportionately affected by mental health issues, substance misuse and previous contact with the criminal legal system. ²¹

Over recent years there has been an increase in media reporting on misidentification, especially of extreme cases which highlight how deep-rooted the problem is. Tamica Mullaley was assaulted by her partner in 2013 in Broome; when police were called by a neighbour, they found Ms Mullaley outside wrapped in a bedsheet with serious visible injuries. Despite the clear violence Ms Mullaley was victim to, she was arrested for assaulting a police officer after refusing to give a witness statement, all whilst traumatised and in urgent need of medical attention. Her partner who had committed the abuse, was not taken into custody, and the following day tortured and killed Tamica's son. ²²

Misidentification can also lead to unnecessary involvement with the child protection system, resulting in children being removed from the care of the AFM and placed into state care, where they are exposed to a harmful, punitive, and racist child protection system which further traumatises both the children and parents. The risk of children being removed from their care further heightens the reluctance of AFM to report sexual and family violence for fear of unjust child removal knowing the life-long consequences of child protection involvement for many Aboriginal children. ²³

¹⁸ *Royal Commission into Family Violence* (2016), p 1362.


¹⁹ NITV, *Veronica Gorrie calls out 'upsetting' domestic violence report on Q&A*, (Webpage, 2022)

²⁰ VALS, *Addressing Coercive Control without Criminalisation* (2022) p 24.

²¹ VALS, *Addressing Coercive Control without Criminalisation* (2022) p 25-26.

²² Natassia Chrysanthos, Sydney Morning Herald (2019).

²³ VALS, *Victorian Aboriginal Legal Service Submission to the Senate Inquiry into missing and murdered First Nations women and children* (November, 2022) p 8-11.



VALS urges the ALRC to refer to the significant bodies of work on the impact of misidentification for Aboriginal women that illustrate how police misidentification often coerces an AFM to remain silent, fearing repercussions not only for themselves but also for their children.²⁴ This underscores how misidentification directly contributes to unsafe reporting mechanisms for any Aboriginal women who are victims of sexual violence.

Culturally Safe Community Legal Education

Culturally safe Community Legal Education (CLE) delivered by ACCOs empowers Aboriginal people to identify existing legal issues and improves access to culturally safe legal assistance. CLE also aids those already involved in legal systems to navigate with confidence, while contributing to prevention efforts and informing policy and law reform, ultimately facilitating greater participation of the Aboriginal community in decision-making processes affecting their rights.²⁵

Proper funding for CLE would enable VALS to deliver community legal education on respectful relationships, domestic and sexual violence, online safety, sexting, consent and the criminal process in a culturally appropriate, trauma informed, age-appropriate and gender-sensitive manner to adults and children. Substantial funding would also allow VALS to create culturally appropriate resources that can be shared with the wider community, services and schools. CLE could be delivered widely, including to children at schools, youth centres and youth detention facilities, to women at women's refuges, and to men and women on remand or serving sentences in custodial settings. Resources could be co-created with community members and used, in turn, in the delivery of CLE to other community members (see, for example, the North Australian Aboriginal Justice Agency and Indigenous Hip Hop Projects legal education music videos *Ripple Effect*²⁶ and *One Mob*²⁷).

VALS notes the recent release of the Independent Review of the National Legal Assistance Partnership (NLAP) Final Report, and note Dr Mundy's findings that "current funding levels are insufficient to meet the legal assistance needs of the Australian community".²⁸ VALS supports the Review's 39 recommendations and encourages the Victorian government to respond to the review and accept all relevant recommendations in full, and work with all jurisdictions to give full effect to the proposed reforms. Effective and sufficient funding of Aboriginal Legal Services will support culturally safe access to legal supports for community members. Access to culturally safe services is a key measure to


²⁴ VALS, *Addressing Coercive Control without Criminalisation* (2022); VALS, *Victorian Aboriginal Legal Service Submission to the Senate Inquiry into missing and murdered First Nations women and children* (November, 2022); VALS, *Nuther-mooyoop to the Yoorrook Justice Commission: Family Violence* (March, 2024); VALS, *Submission to the Inquiry into Victoria's Criminal Justice System* (September, 2021)

²⁵ VALS, *Building Back Better* (February, 2021), p 55-56.

²⁶ 'IHHP and NAAJA worked with both old and young people to explore legal themes such as respectful relationships and the ripple effect of domestic violence on the community, including people going to jail. Keeping families strong and safe is also explored, to support families to make right decisions in accordance with child protection laws. The concept of consent is also touched on briefly. Through the chorus, "Gurrutu Raypirri", the community is encouraged to embrace Law and Respect as the foundations on which to build a strong community.'

²⁷ 'IHHP and NAAJA worked with both old and young people to explore legal themes such as respectful relationships, interacting well with police, domestic violence, resisting peer pressure and joint criminal enterprise.'

²⁸ Dr Warren Mundy, Independent Review of the National Legal Assistance Partnership Final Report, (Attorney General's Department, 2024), iii.



enliven the rights expressed by several Articles of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and essential to overcoming the generational impacts of colonisation. Currently NLAP ‘impedes’ Aboriginal peoples access to justice, and in turn the ability to align and adhere to Priority Reforms and related National Agreement for Closing the Gap outcomes.²⁹ These issues must be addressed in anticipation of the next funding agreement as recommended by Dr Mundy in the Final Report, in particular that the Access to Justice Partnership must be in line with the right to self-determination and to address Closing the Gap Priority Reforms, as per recommendations 9, 11 and 12 as well as rebasing community legal sector with priority given to ATSILS as per recommendation 17.³⁰

RECOMMENDATIONS

Recommendation 1. State and Territory Governments must undertake a comprehensive reform process to consult on, design, and implement an independent police and detention oversight system. This system must include mechanisms to address accountability and oversight, particularly focusing on systemic racism within State Police forces. The new oversight body must be complainant-centred, transparent, and equipped with adequate powers and resources to conduct independent investigations, with a specific focus on responding to the needs of Aboriginal complainants.

Recommendation 2. 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 and detention oversight body.

Recommendation 3. State and Territory Governments must invest in police training resources to ensure police are appropriately responding to circumstances of family violence and sexual violence in a culturally safe manner. Police must receive regular and ongoing training on the following areas:


- Family violence, including the impact of misidentification on women and young people, especially within the Aboriginal community,
- Cultural awareness,
- Gender bias,
- Racism in all its forms, including systemic racism and unconscious bias.

ACCOs and other specialist family violence services must be engaged to develop and deliver these training sessions.

Recommendation 4. There should be a broad ranging Royal Commission into the culture and misconduct of Victoria Police and the terms of reference should specifically refer to the impact of these policing practices for those impacted by family violence and sexual assault.

²⁹ Productivity Commission, [National Agreement for Closing the Gap Outcomes](#) (2021)

³⁰ Ibid, see recommendations 9, 11, 12 and 17.



Recommendation 5. Police should work with family violence services, legal assistance providers and community members to fully implement Recommendation 41 of the *Royal Commission into Family Violence* and reduce the risk of misidentification.

Recommendation 6: The Victorian Government should significantly increase funding for VALS' Community Legal Education. Funding should be provided for both staffing and creation of resources, using a variety of media, to be disseminated on different platforms, to ensure the legal messages are accessible to and understandable for everyone in the Aboriginal community.

Recommendation 7: In order to improve justice responses to sexual violence, it is imperative that all services are adequately funded as per recommendation 22 in Dr Mundy's NLAP Review Final Report.

Specialisation and training of judges and counsel

Specialist courts

Specialist courts in Victoria have identified and implemented good practice in their areas of focus, many of which are also relevant to courts and judicial officers in other parts of the legal system.


VALS lawyers have indicated the benefits of specialist courts, emphasising their efficiency, quality, and uniformity of decision-making, along with streamlined case management. Our legal practices recognise the success of Specialist Family Violence Courts (**SFVCs**) in ensuring faster resolutions and providing specialised support tailored to the complexities of family violence matters. These specialist courts offer comprehensive support services, including non-legal advice, risk assessments, and safety plans, alongside a collaborative approach that involves specialist services and family violence-trained lawyers.³¹

VALS can therefore see the potential value to implement similar models for specialist sexual violence courts, envisioning their potential to provide comprehensive support through sexual violence-trained lawyers and a holistic collaborative approach involving specialist services to support both victim-survivors and perpetrators of sexual violence.

Building on this, the Koori Family Violence and Victims Support Program *Umalek Balit* stands as an exemplary model of culturally responsive support in family violence proceedings. By employing Koori Family Violence Practitioners with specialised cultural and family violence knowledge, *Umalek Balit* aims to prevent further instances of family violence and enhance the court's understanding of Koori people, histories, cultures, and the dynamics of family violence within these communities.³² Utilising

³¹ Magistrates Court of Victoria, [Specialist family violence courts](#) (Webpage, updated 2024)

³² Magistrates Court of Victoria, [Umalek Balit Information Sheet](#) (Webpage, 2020).



a similar model in other specialist courts, including those addressing sexual violence, would provide culturally safe support to Aboriginal people and enhance the effectiveness of these court systems.

Specialist lists

In considering alternative approaches within the criminal legal system to sexual violence, VALS lawyers have indicated that they do not necessarily see the value in sexual offence lists at the Magistrates' court, as it lacks the collaborative and holistic approach characteristic of specialist courts. While these lists may offer administrative benefits, they do not provide the necessary support for victim-survivors or perpetrators of sexual violence, rather act as space to hear similar offences, thereby reducing their rehabilitative potential.

Cultural Awareness Training & Anti-Racist Training in the courts


It is important that judicial officers who are involved in cases sexual violence have a specialised knowledge of the nuances of offending behaviours and trauma. It is important that judicial officers who hear sexual violence matters undertake specialist training in sexual violence and family violence. It is imperative that this training is complemented by cultural awareness training and anti-racist training for judicial officers.

Aboriginal people are overrepresented in the criminal legal system at disproportionate rates in all kinds of proceedings, across all parts of the nation. Cultural safety cannot be delivered only through specialist services, and their existence must not be an excuse for inadequate judicial training and education throughout the judicial system. In Victoria, training on Aboriginal cultural issues is compulsory only for judges sitting in Koori Court, however it would be beneficial for all Magistrates and Judges to undertake cultural training to ensure that all Aboriginal people feel their Aboriginality is respected at all points of contact with the legal system.³³

Good practice should go beyond this to ensure that training is ongoing, providing opportunities for judges and magistrates to reinforce, embed and enhance their understanding of culturally appropriate practice. The content of the training also needs to be robust, going beyond simple 'awareness' of Aboriginal culture. The essential first step is for the judiciary to understand that Aboriginal people arrive in the courtroom with a unique perspective on the law and policing, shaped by their individual, family's and their community's experiences, and the violent colonial history of this country on which today's legal systems and institutions are founded. At the highest level, courts and judges have been instrumental in dispossessing Aboriginal people and breaking up families since invasion, and the continuance of these practices occurs today in the criminal and child protection systems.

A real understanding of this background is essential to creating courtrooms free from both subtle and overt bias against Aboriginal people. This makes anti-racism training a particularly important element of tackling bias and unfairness in the criminal legal system, not only cultural awareness training. This kind of training needs to be focused on delivering this perspective and reinforcing it over time, with

³³ Cavanagh & Marchetti, *'Judicial indigenous cross-cultural training : What is available, how good is it and can it be improved?'* (2016)



the goal of helping judicial officers develop their cultural awareness through continuous learning. Courts that are free of cultural bias can only be realised when judges understand their own position, appreciate the effects of racism and colonialism, and positively involve Aboriginal people in creating a culturally appropriate judicial process.

VALS notes the Judicial College of Victoria's 2019 submission to the Australian Law Reform Commission's Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, which states that;

"Cultural awareness training for judicial officers should include material relating to the historical and ongoing impact of colonisation on Aboriginal and Torres Strait Islander people, identity, intergenerational trauma, in addition to education about contemporary issues such as the exposure to racism that many experience daily."


"In addition to building judicial officers' cultural awareness, education should contribute to judicial officers acquiring cultural competence regarding how to work with Aboriginal and Torres Strait Islander peoples. This would include training about modes of communication, body language, the need for and use of interpreters, and related issues. The development of this training must involve substantial consultation with Community, who must also lead its delivery."

"Educational programs [for members of the judiciary] should highlight culturally-appropriate programs and services that support Aboriginal and Torres Strait Islander people who are on bail, community-based sentences or parole."... and that "Education highlighting services available must be coupled with cultural awareness education. It is important that judicial officers are aware that not all Aboriginal and Torres Strait Islander people will necessarily benefit from a particular service, even one with high success rates. Each offender's suitability must be individually assessed to consider issues such as proximity to family and Country, or potential conflicts within the community where the service is located".³⁴

Judgements free from cultural bias are especially important in the context of sexual violence, as we recognise the overrepresentation of Aboriginal women as victim-survivors of sexual violence.³⁵ Whilst specialist services play a vital role, cultural safety should not rely solely on their existence, as comprehensive judicial training is imperative throughout the legal system. In Victoria, compulsory training on Aboriginal cultural issues is currently limited to judges presiding in Koori Court, yet best practice dictates ongoing, robust training programs that delve beyond mere cultural "awareness." Given the historical and systemic factors shaping Aboriginal individuals' perspectives, a comprehensive understanding of their experiences is essential for culturally safe outcomes in cases of sexual violence. Anti-racism training becomes paramount in combatting bias within the criminal legal

³⁴ Judicial College of Victoria, [ALRC submission inquiry into the incarceration Rate of Aboriginal and Torres Strait Islander peoples](#) (September, 2017), p 3 – 4.

³⁵ Victorian Equal Opportunity and Human Rights Commission, [Unfinished business: Koori women and the justice system](#) (2013)



system, aiming to create culturally unbiased courtrooms through continuous learning and engagement with Aboriginal perspectives.

RECOMMENDATIONS

Recommendation 8. Comprehensive cultural awareness and anti-racism training and education for judicial officers are imperative to ensure that responses to sexual violence do not perpetuate racist approaches to the affected family member, the accused, or witnesses. This training should include a concrete focus on creating a culturally appropriate judicial process for Aboriginal people, extending beyond mere cultural awareness.

Recommendation 9. Training delivered to members of specialist courts should be adapted for broader use to equip all parts of the criminal legal system with the ability to deliver culturally appropriate services for Aboriginal people with complex needs.


Recommendation 10. Alongside any criminal legal system reforms, it is imperative that government provides specific funding to improve cultural safety in court processes. This includes creating specific Aboriginal-identified court staff roles to provide holistic and culturally safe support for Aboriginal people who are engaged with the legal system.

Cross-examination

VALS acknowledges that cross-examination can be traumatic for victims and witnesses, particularly in cases of where sexual violence is a factor of the offending, and that certain restrictions are required to limit further trauma and ensure that all witnesses are treated with respect and dignity. However, preserving the right to cross-examine is crucial for procedural fairness. Cross-examination serves as a mechanism for testing evidence, thereby ensuring comprehensive disclosure. Any further restrictions other than those that currently exist in the *Criminal Procedure Act 2009* (Vic) would be at the expense of the right to a fair trial, which is a right that the accused is fundamentally entitled to as established at common law and in legislation.³⁶

While cross-examination can be traumatic, proper oversight by a Magistrate or Judge is an effective mechanism to contain and limit its impact. Limiting or eliminating cross-examination should not come at the expense of the right to a fair trial. In VALS lawyers experience ground rules hearings also act as a mechanism in place for an added layer of protection for vulnerable persons. Additionally, the conduct of the prosecution and defence barristers plays a significant role in reducing the trauma of cross-examination. Respectful and trauma informed cross-examination can and should occur while still ensuring justice for the accused. We recommend that rather than restricting the availability of cross-examine a witness on, it would be more appropriate to ensure that practitioners are poised to,

³⁶ *Criminal Procedure Act 2009* (Vic), s123 – s124.



and capable of, undertaking cross-examination in a manner that is trauma-informed and culturally safe.

Further, in cases involving children during committals, cross-examination is already prohibited, with such cases proceeding directly to the County Court. This ensures that the child is only subjected to cross-examination once. Additionally, intermediaries can be appointed to provide additional protection during cross-examination. Other support mechanisms, such as the presence of support dogs and the option to give evidence remotely in most instances, are also available. These measures underscore the existence of mechanisms designed to protect complainants during cross-examination.

While cross-examination can be traumatic, proper oversight by a Magistrate or Judge is an effective mechanism to contain and limit its impact. Limiting or eliminating cross-examination should not come at the expense of the right to a fair trial. The conduct of the prosecution and defence barristers plays a significant role in reducing the trauma of cross-examination. Respectful and trauma informed cross-examination can and should occur while still ensuring justice for the accused. We recommend that rather than restricting the availability of cross-examine a witness on, it would be more appropriate to ensure that practitioners are poised to, and capable of, undertaking cross-examination in a manner that is trauma-informed and culturally safe.

Materials such as witness statements that are relied upon in the trial processes are often drafted under the guidance of Victoria Police members who lack the legal skills, knowledge and detailed understanding of the rules of evidence. Cross-examination of witnesses allows defence lawyers to test the prosecution's case; the process is foundational to ensuring proper consideration of an accused persons right to a fair trial. Police informants often fail to comply with their obligations in providing disclosure materials to defence practitioners. Upholding the ability to cross-examine witnesses is an important tool as it directly relates to holding informant's evidence to account whilst simultaneously allowing defence to test the veracity of relevant witness evidence. It is our practice experience that the ability to cross-examine witnesses and complainants in certain circumstances has resulted in an early resolution of the matter resulting in negotiation of charges and an early plea. The outcome of this is ultimately beneficial to both the accused person and the complainant as it limits both parties contact with the trial process going forward.

RECOMMENDATIONS

Recommendation 11. Cross-examination is an important exercise in upholding the right to a fair trial. In recognising that cross-examination poses risks to witnesses and complaints wellbeing it is imperative that legal practitioners undertake relevant training to ensure their conduct during cross-examination is both culturally- and trauma-informed.

Recommendation 12. Cross-examination of witnesses and complainants in sexual violence matters should not be strictly prohibited, but rather the judicial officer should make a considered decision about whether cross-examination in the circumstance is appropriate.

Sentencing



Victim impact statements

The *Sentencing Act 1991* (Vic) highlights to the importance of imposing sentences that apply a considered balance of both the need to deter the specific type of offending both at an individual and societal level, but also the need to provide sentences that facilitate rehabilitation of offenders.³⁷ Further to this, a sentence imposed should also take into account the nature and gravity of offending, alongside the presence of any aggravating or mitigating factors that are relevant to the circumstances.³⁸

Victim Impact Statements (**VIS**) play an important role in sentencing as they allow a victim to speak to the impact that the conduct of the accused had on them. In VALS practice experience, VISs are given sufficient weight, often allowing for inclusion of content that may not be directly relevant to the sentencing exercise; highlighting the broad latitude in sentencing considerations tied to VIS. Some victims may perceive their VIS not being fully considered as dissatisfaction with standard sentencing outcomes. This perception may arise from a preference for more punitive sentences as supported by non-legal professionals, particularly in cases of sexual violence.

Although victim-survivors may feel that their VIS has not been given adequate weight in the sentencing exercise, it is important to note that the matter of sentencing is often described as an ‘instinctive synthesis’ where the judicial decision maker will take all matters into account in the consideration of determining an appropriate sentence.³⁹ The Judicial College of Victoria’s *Sentencing Manual* notes that due to the nature of the sentencing exercise means “reasonable minds may and do differ on appropriate sentence”.⁴⁰ This approach is given weight by the *Sentencing Act*, which provides that there are various factors to be considered when sentencing an accused person.⁴¹ Whilst this approach to sentencing may, to some, seem to be blind to the impact of the offending on the particular victim, it is an important process that gives appropriate weight to the broader context of both the offending conduct and the importance of denunciation and punishment.

It is the view of our legal practice’s that VIS’s are given adequate weight in the sentencing exercise, and that the Courts adherence to sentencing principles which are enshrined in the Victorian *Sentencing Act* and Australian case law are appropriate.

Shift towards restorative justice for instances of sexual violence

It is well known that experiences and instances of sexual violence can fall within the context of family violence. The Australian Institute of Health and Welfare found that nearly 1 in 2 (45%, or 78,100) women who had experienced physical and/or sexual violence from a current partner did not seek advice or support about the violence, and that 2 in 5 women (37% or 574,000) and 2 in 5 men (39% or 166,000) who had experienced physical and/or sexual violence from a previous partner did not seek


³⁷ *Sentencing Act 1991* (Vic), s1(d).

³⁸ *Sentencing Act 1991* (Vic), s1(d).

³⁹ See Judicial College of Victoria *Victorian Sentencing Manual*, pg. 4.

⁴⁰ Judicial College of Victoria *Victorian Sentencing Manual*, pg. 4.

⁴¹ *Sentencing Act 1991* (Vic), s5.



advice or support about the violence.⁴² This data highlights that victim-survivors of sexual violence within intimate partner relationships struggle to seek support.

As Domestic Violence Victoria and the Domestic Violence Resource Centre Victoria have noted, “[r]esearch demonstrates that the introduction of criminal sanctions in response to family violence may lead to victim-survivors being less willing to engage... due to a victim-survivor having had negative experiences with the criminal justice system in the past or not wanting the person using violence to get a criminal record”.⁴³ With colonisation continuing to be an extremely violent experience for Aboriginal people, with police on the frontline of that violence, this concern can be particularly acute for Aboriginal people who fear and mistrust the police and criminal legal system. Aboriginal people fear seeing their partner sent to prison, given the risk that prison poses to relationships, wellbeing and life, especially in the context of the increased risk of death in custody for Aboriginal people.⁴⁴

This underscores the benefit of moving towards restorative justice options for experiences of sexual violence, particularly for Aboriginal people who are cautions of the punitive and racist legal system. Restorative justice can provide a culturally safe and trauma-informed approach which empowers victim-survivors to seek support and justice without further harm.

VALS considers where children and young people are the victims of sexual violence that restorative justice is not the appropriate model. There are issues around informed consent, developmental capacity to understand the circumstances around their abuse, and the inherent power imbalance with abuse. There are significant protections available for children impacted by sexual violence in the criminal legal system,⁴⁵ these would have to be replicated at a bare minimum which would inherently hinder a restorative approach, and this is necessary given the abuse suffered.

VALS’ submission to the VLRC on *Improving the Response of the Justice System to Sexual Offences* highlighted the benefits of restorative justice processes for sexual offending, for both affected family members and people who have offended, as well as the community.⁴⁶ Our submission canvassed the risks involved in restorative justice and how these risks can be mitigated, taking into consideration best practices and lessons learned from other jurisdictions. A more detailed analysis can be found in the submission, but broadly, best practice for restorative justice for sexual offending includes the following:

- Both parties must freely and voluntarily consent,
- Both parties must have legal advice and representation, and support people,
- There must be a rigorous process for assessing suitability,
- The timing of the restorative justice process must be carefully considered,


⁴² AIHW, [Family, domestic and sexual violence](#) (Webpage, updated 2024)

⁴³ Domestic Violence Victoria & Domestic Violence Resource Centre Victoria, [Responding to coercive control in Victoria – broadening the conversation beyond criminalisation](#) (May, 2021), p 16.

⁴⁴ VALS, [Addressing Coercive Control without Criminalisation](#) (2022), p 25-26.

⁴⁵ *Criminal Procedure Act 2009* (Vic), s123 – s124.

⁴⁶ VALS, [Submission to the VLRC: Improving the response of the justice system to sexual offences](#) (March, 2021), p 15-28.

- 
- The motivation for participation in the process must be properly considered,
 - Power imbalances must be properly considered and addressed,
 - The person who has offended must accept responsibility for their actions,
 - The facts must be agreed,
 - Confidentiality must be maintained,
 - Doing no further harm,
 - Facilitators must have the requisite expertise and experience,
 - Compliance with the agreement reached at the restorative justice conference(s),
 - Participation must not be used as evidence of guilt,
 - Participation in an unsuccessful restorative justice process must not be used to justify a more severe sentence.

The safety and wellbeing of all participants must be a paramount consideration in restorative justice approaches; this includes ensuring cultural safety. The immediate safety needs of all family members must be met, and this must be continually assessed throughout the lead up to, during and following the session(s).

Prior to engaging in the proposed model, there needs to be specialist therapeutic intervention, referrals and supports available to address the issues present for the young people and adults involved to support opportunities for healing, rehabilitation and reconnection as the family unit where safe to.


Critically, restorative justice models must be culturally appropriate for Aboriginal people. There are certainly lessons to be learned from other jurisdictions, such as Canada, regarding the appropriation and homogenisation of Indigenous restorative justice processes, and the imposition of culturally inappropriate processes.⁴⁷

VALS also strongly emphasises the importance of any restorative justice programs for sexual violence being co-designed with Aboriginal communities, to ensure cultural safety and maximise reintegrative impact for Aboriginal people – for both people who have committed offences and victims of crime. This is in line with the submissions made by VALS, Djirra and the Aboriginal Justice Caucus to the Victorian Law Reform Commission.⁴⁸

VALS notes the significant work that was undertaken through the AJA4 Burra Lotjpa Dunguludija in developing the Lotjpadhan (Talking Together) A Restorative Justice Pilot Project for Connecting and Healing. This project was led by Dr Lois Peeler, in partnership with JSS in developing this model that is culturally responsive and meets the needs of Aboriginal children and young people in various contexts.

⁴⁷ BC Association of Specialized Victim Assistance and Counselling Programs, *Restorative Justice, Domestic Violence and Sexual Assault in Canada: A Summary of Critical Perspectives from British Columbia* (May, 2020).

⁴⁸ VALS, *Submission to the Victorian Law Reform Commission Project: Improving the Response of the Justice System to Sexual Offences* (March, 2021)



VALS encourages consideration of funding for model development and delivery for restorative justice relating to instances of sexual violence in a similar way.

RECOMMENDATIONS

Recommendation 13. VALS supports the recommendation of the Aboriginal Justice Caucus to the VLRC⁴⁹ - ‘There is evidence to support Restorative Justice processes can be effective in responding to sexual offending. However, design, development and implementation of these justice responses will take time, and must be community led. Responses must be aligned with Aboriginal Community values, victim-centred and responsive to the community in which it is developed.’

Civil justice responses to sexual violence

Civil justice responses to sexual violence must prioritise funding towards ACCO’s to provide culturally safe legal assistance and support to Aboriginal people. A barrier for victims seeking a remedy through civil litigation is the considerable expense and time required to bring a matter to the courts. To address this issue, it is crucial to increase government funding to support ACCOs to provide this specialist support and advice, thereby making civil litigation more accessible and feasible for victim-survivors of sexual violence.

VALS refers the ALRC to Victims Legal Service’s (VLS) joint submission into justice responses to sexual violence which focuses on the role of specialist legal services for victim-survivors of sexual violence, and recommends the need to work with ACCO’s to deliver self-determined and culturally safe approaches to justice responses to sexual violence.⁵⁰

RECOMMENDATIONS

Recommendation 14. Governments must work with Aboriginal Community Controlled Organisations and Aboriginal communities, including victim-survivors, to deliver self-determined and culturally safe approaches to justice responses to sexual violence.

⁴⁹ AJC, *Submission on Improving the Response of the Justice System to Sexual Offences to the VLRC* (February, 2021), p 2.

⁵⁰ Victims Legal Service, *A joint submission from partners in Victoria’s specialist Victims Legal Service to the 2024 ALRC inquiry into justice responses to sexual violence* (2024).



BACKGROUND TO THE VICTORIAN ABORIGINAL LEGAL SERVICE

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

Legal Services

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

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

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

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

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

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

Community Justice Programs

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

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

Policy, Research and Advocacy

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



Acknowledgement

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

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

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

Contributors

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

- Tasmin Sandford-Evans – Policy, Research and Data Officer
- Negar Panahi – Principal Managing Lawyer, Balit Ngulu
- Emily Yates – Managing Lawyer, Criminal Law Practicep
- Juergen Kaehne – Principal Managing Lawyer, Aboriginal Families Practice
- Siobhan Doyle – Principal Managing Lawyer, Civil Law and Human Rights Practice
- Emily Chauvel – Acting Head of Policy, Communications and Strategy
- Morgan O’Sullivan – Acting Deputy Head of Policy, Communications and Strategy

Note on Language

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

When referring to instances of family violence, we will use the terms "affected family members (AFM)" and "persons using violence (PUV)" instead of "victim-survivor" and "perpetrator". This terminology aims to provide a more neutral and inclusive framework for discussing family violence, acknowledging the complex dynamics involved.