Victorian Aboriginal Legal Service Submission to the Senate Inquiry into Youth Justice

October 2024

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EXECUTIVE SUMMARY

VALS provides this submission to the Federal Senate Inquiry into Youth Justice in Australia.

Aboriginal children have been targeted by the state in an unbroken chain of harmful interventions since early colonisation that have removed them from their families, imprisoned them, repeatedly subjected them to state-santioned violations, and denied their humanity, culture and freedom.[1] The current criminal legal system is grounded in violence, racism, the lie of terra nullius and denial of justice and Aboriginal self-determination. It was established and developed with the purpose of criminalising and controlling Aboriginal children and their families in order to destroy the oldest continuous culture on earth.

It has not finished pursuing this goal.

Aboriginal children are the most incarcerated children in Australia, and Aboriginal people are the most incarcerated people in the world.

The harms caused to children by youth prisons, police cells and other places of detention have long been established. From the age of 10, our children are spit hooded, assaulted, strip-searched routinely and inappropriately, subject to solitary confinement, denied healthcare and, as has been documented nationally, subjected to sexual abuse. Prison traumatises children, compounds mental illness, disrupts their development, and leaves our children more likely to die earlier and from preventable causes.

We know, unequivocally, that imprisoning children only harms them. They do not make our communities better or safer.

This is consistant with international best practice and internationally recognised standards. Australia's appalling treatment of Aboriginal children contravenes its own international obligations and has been repeatedly criticised by the United Nations, its Treaty Bodies and member states.

VALS considers that the Federal government has the power to make National Minimum Standards in the form of legislation for youth justice applicable to all states and territories, to ensure Australia's compliance with international obligations. As it is the Federal government that negotiates and ratifies international standards concerning the treatment of Aboriginal children and young people, the Federal government is also answerable on their dire level of non-compliance with those laws and standards.

However National Minimum Standards must be consistant with international best-practice and not with any current domestic practice. They must include arrest being a measure of last resort; raising the age of criminal responsibility to 14 years without exceptions and age of detention to 16 years; ensure children have access to culturally appropriate education, diversion and early intervention pathways; ban solitary confinement and isolation practices; ban routine strip-searching; outlaw the use of spit hoods; and ensure access to culturally safe and prompt healthcare in prison

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[1] Commission for Children and Young People, *Our youth, our way: inquiry into the overrepresentation of Aboriginal children and young people in the Victorian youth justice system, Summary and recommendations*, (2021).

However, VALS are wary of throwing our support behind yet another set of standards that may not be practically enforceable, which state and territory governments may not agree to, and which government agencies may ignore as much they currently disregard their own legislated standards for youth justice.

This inquiry should consider how, or whether it is even practically possible, to have effective mechanisms to enforce Federal laws around youth justice by state and territory government agencies.

Whole-of-government and bipartisan frameworks, like the Closing the Gap Agreement, have been in place for decades due to the sustained advocacy of Aboriginal communities and organisations fighting for justice. Despite this, the Federal and Victorian Governments continually fail to implement evidence-based policy that would improve our children's lives; fail to follow their own youth justice standards in prison; continue to contradict publicly stated commitments they have made; fail to meet targets they have agreed to; fail to implement hundreds of recommendations from inquiries they have initiated; and fail to adequately fund Aboriginal led early intervention and diversion services.

ACCOs such as VALS should be provided with detail about what the proposed National Minimum Standards would be, and whether or not they are capable of practically holding governments accountable to them, before we agree to support them.

Governments already know exactly what they need to do – we and countless inquiries have been telling them for decades.

SUMMARY OF RECOMMENDATIONS

Recommendation 1. Federal government should support states to raise the minimum age of criminal responsibility to 14 years without exceptions across all jurisdictions, including all relevant Federal legislation.

Recommendation 2. Commit to not giving police any new powers, including to arrest, search and detain, over children under the age of criminal responsibility.

Recommendation 3. Raise the minimum age of detention to 16 years without exceptions.

Recommendation 4. Federal government should support states to implement Poccum's Law across all jurisdictions, including by removing reverse onus bail provisions and ensuring that children always have a presumption in favour of bail.

Recommendation 5. Federal government should support jurisdictions to properly resource ACCOs to develop decarceration models and implement place-based programs based on decarceration principles.

Recommendation 6. The Federal and Victorian governments should properly resource Aboriginal Legal Services to run and expand best practice youth specific legal services, like Balit Ngulu, to meet the legal needs of Aboriginal children and young people.

Recommendation 7. Aboriginal Legal Services should be adequately funded to provided legal services to every Aboriginal and Torres Strait Islander child and young person who wants to use a culturally safe service.

Recommendation 8. Prohibit solitary confinement in law in all settings, including in youth prisons, police cells and watch houses. This should include prohibiting routine isolations and isolations due to staff shortages in youth prisons.

Recommendation 9. Require Youth Justice to notify VALS' Custody Notification Service (**CNS**) whenever an Aboriginal child or young person is put in isolation and provide additional funding to VALS to respond to these notifications

Recommendation 10. Prohibit the transfer of children and young people to adult prisons for any reason.

Recommendation 11. Prohibit routine strip searching and provide that a strip search should only ever be permitted as a last resort after all other less intrusive search alternatives have been exhausted and there remains reasonable intelligence that the person is carrying dangerous contraband.

Recommendation 12. Prohibit the use of spit hoods on children in all settings including youth detention centres, adult prisons and police stations.

Recommendation 13. The Federal government should support all states to ensure that children in custody with healthcare (including mental healthcare) that is the equivalent of that provided in the community. This means that their physical and mental health needs must be met to an equivalent standard; not just that there is an equivalence of services available.

Recommendation 14. Aboriginal children and young people in youth detention must be provided access to primary healthcare by Aboriginal Community Controlled Health Organisations (**ACCHOs**), as is available in the community.

Recommendation 15. Provision of healthcare in youth detention must be overseen by the Departments of Health, not Departments of Justice and Community Services.

Recommendation 16. The Federal government must ensure children and young people in detention must have access to the Medicare Benefits Scheme (**MBS**), the Pharmaceutical Benefits Scheme (**PBS**), and the National Disability Insurance Scheme (**NDIS**). Children and young people should be assessed for NDIS eligibility upon entry to a youth justice detention centre.

Recommendation 17. The Victorian Government must urgently commence robust, transparent and inclusive consultations with the Aboriginal Community in Victoria on the implementation of the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (**OPCAT**) in a culturally appropriate way.

Recommendation 18. The future mechanism for independent detention oversight in Victoria must:

(a) Be established by legislation;
(b) Have jurisdiction over all places where individuals are or may be deprived of their liberty, regardless of the length of time of detention (this includes police vehicles, police cells and PSO "pods" at train stations); and
(c) Have sufficient resources to carry out its mandate in a culturally appropriate way.

Recommendation 19. The Federal Government should pass legislation to implement UNDRIP in Australia. Legislation implementing UNDRIP must:

(a) Enshrine the right of Aboriginal and Torres Strait Islander peoples and communities to self-determination, as defined under UNDRIP; and
(b) Establish a clear pathway for implementing UNDRIP in Australia, including through a National Action Plan that is developed with Aboriginal communities and Aboriginal Community Controlled Organisations (**ACCOs**).

Recommendation 20. National Minimum Standards around youth justice should be consistant with international best-practice and not with any current domestic practice, including the *UNCRC*, *CAT*, *OPCAT* and *UNDRIP*.

Recommendation 21. National Minimum Standards should improve the standards of all jurisdictions and not allow scope for the reduction of standards in any state or territory.

Recommendation 22. At a minimum, National Minimum Standards around youth justice must include:

(a) arrest being a measure of last resort for children;
(b) raising the minimum age of criminal responsibility to 14 years without exceptions;
(c) raising the minium age of detention to 16 years;
(d) children having access to culturally appropriate education, diversion and early intervention pathways;

(e) Prohibiting torture and cruel and degrading treatment agianst childten in prison, including solitary confinement and isolation practices; routine strip-searching; and the use of spit hoods; and
(f) access to culturally safe and prompt healthcare in prison, including MBS and PBS access.

Recommendation 23. The Inquiry should recommend a firm basis upon which the Federal government could make National Minimum Standards in the form of legislation to ensure compliance with international obligations.

Recommendation 24. The Inquiry should consider effective mechanisms to enforce Federal laws around youth justice by state and territory government agencies to hold them accountable to National Minimum Standards.

Recommendation 25. Political parties and the media must stop manipulating "community safety" and "public safety" through law-and-order politics. Community safety and public safety must be determined by communities, and legal and policy responses to support safe and thriving communities must be informed by these definitions.

Recommendation 26. Media organisations should have greater civil liability for the impacts of their reporting, including in relation to:

(a) Harm and distress caused to individuals or peoples by reporting that could be reasonably considered to be racist;
(b) Inaccurate reporting on crime issues when it can be proven that such errors are systemic; and
(c) The mental health of journalists who report on crime.

Recommendation 27. Both the Victorian and Federal governments should be required to report annually on the percentage of government funding going to Aboriginal specific investments. Reporting should be broken down into funding that goes to government departments and agencies, funding that goes to mainstream services, and funding that goes to Aboriginal organisations and individuals.

Recommendation 28. In partnership with the Aboriginal Justice Caucus (**AJC**), the Victorian government should establish an independent, statutory office of the Aboriginal Social Justice Commissioner (**ASJC**), to provide oversight for Aboriginal justice in Victoria, including implementation of coronial recommendations and recommendations from the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**) and associated inquiries. This office should be properly funded, with appropriate powers (including powers to give it "teeth" and conduct own motion inquiries), and report directly to the Parliament.

Recommendation 29. The Federal government should enable the National Aboriginal Social Justice Commissioner to provide oversight for Aboriginal justice at a national level, including implementation of coronial recommendations and recommendations from the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**) and associated inquiries. They should be properly funded, with appropriate powers (including powers to give it "teeth" and conduct own motion inquiries), and report directly to the Parliament.

DETAILED SUBMISSIONS

PART A: The over-incarceration of Aboriginal children

Our children have been removed and imprisoned since colonisation

Since the arrival of Europeans in Victoria in the 1830s, Aboriginal children and young people have been removed from their families and detained at alarming rates. Frontier violence and disease imported by colonisers were the first forces to break apart Aboriginal children from their families. Colonial authorities viewed our people's resistance to invasion as a threat to white settlement, and utilised martial law to expel, detain and control us. Thousand of Aboriginal people were killed in massacres across Victoria, with evidence of children being found as sole survivors of massacres.[2] A culture of impunity developed when perpetrators of violence were failed to be brought to justice. As was found by the Yoorrook Justice Commission, "First Nations children were kidnapped, raised by Europeans and eploited for their labour." [3]

From the policies of the 'protection' era (1880s-1930s) to the 'assimilist' era (1930s-early 1970s), the removal and detention of our children and young people by the state has always been deeply political and linked to racism and control. There was increased reliance on the State's child protection and criminal justice systems to control and manage Aboriginal children and young people. In the mid-20th century, Aboriginal children stolen from their families were also effectively criminalised for it - even until 1989, children forcibly removed in Victoria could be given a criminal record that was frequently documented as being 'in need of care and protection.' The Yoorrook Justice Commission heard from Uncle Larry Walsh, who described being targeted by police from eight years of age, based on his existing criminal record (following forced removal at the age of two). He was first incarcerated at 14 for being "likely to lapse into a life of crime."[4] In his evidence to Australia's first truth-telling commission Uncle Larry declared, "governments, you made me the criminal I am!" [5]

The current legal system, including the criminal legal system, is grounded in violence, racism, the lie of terra nullius and denial of justice and Aboriginal self-determination. It is a system that was designed to destroy the oldest continuous culture on earth, and which has not finished pursuing this goal. We continue to see the legacies of historical injustices in the way that our children are criminalised, marginalised, incarcerated and re-traumatised. Until this structural violence is acknowledged and addressed, the legal system will continue to discriminate against Aboriginal children and communities and perpetuate the violence that has been perpetrated for the last 230 years.

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[2] Yoorrook Justice Commission, Yoorrook for Justice: Report into Victoria's Child Protection and Criminal Justice Systems (2023) pg 49.
[3] Ibid.
[4] Ibid,pg 59.
[5] Ibid.

Factors driving the over-representation of Aboriginal children in detention

Aboriginal children, who are disproportionately involved in both the child protection and youth justice systems, face significant challenges in Victoria. The child protection system, with its history of harm against Aboriginal families and communities, continues to perpetuate this legacy today. The Yoorrook Justice Commission found profound systemic failure in the 'pipeline' of children moved from the child protection system into the youth legal system and ultimately into the adult justice system.[6] Aboriginal children and young people in Victoria are removed and placed into care at a rate of 102.9 per 1,000 Aboriginal and Torres Strait Islander children — 22.5 times the rate of non-Indigenous children and almost twice that of the national average for Aboriginal children.[7] Victoria removes Aboriginal children from their families at the highest rate in the country. Due to systemic failings in the child protection system where their needs are not met, Aboriginal children are pushed in the youth justice system. Three-quarters of all Aboriginal young people aged 10 to 13 in the youth justice system have previously been in contact with child protection.[8] As the Yoorrook Justice Commission found, the child protection system must be completely transformed to reflect an Aboriginal self-determined system in order to disrupt this harmful trajectory and reduce the overrepresentation of Aboriginal children in detention.[9]

School refusal and exclusion both play a significant role in driving the overrepresentation of Aboriginal children in detention. Many Aboriginal children and young people in Youth Justice have complex needs that are not being met within the education system. As of 2019, 18% of Aboriginal children in Youth Justice had a primary school level of education, and 65% were not participating in education at all.[10] This lack of educational engagement leaves these children vulnerable, increasing their likelihood of involvement with the criminal legal system. School exclusion leaves these children without a vital support system, increasing their risk of interacting with the criminal legal system.

Poverty, rooted in the ongoing impacts of colonisation, is another critical driver of over-incarceration. Aboriginal children are disproportionately affected by adverse social outcomes, such as homelessness, with 16.9% of Aboriginal people in Victoria accessing homelessness services, compared to just 1.2% of non-Indigenous people.[11] This social marginalisation compounds the challenges faced by Aboriginal children, pushing many into contact with the criminal legal system.

The criminal legal system regularly criminalises Aboriginal children with disabilities or mental health issues, as evident from the high rates of disability and mental health issues among Aboriginal people in custody. In 2019, 81% of Aboriginal children and young people involved with Youth Justice in Victoria had experienced abuse, trauma, or neglect, 49% had cognitive difficulties, and 66% had mental health issues.[12] These complex needs are often not supported adequately, and instead, they

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[6] Ibid
[7] NIT, "Deplorable": More than 1 in 10 Aboriginal children in Victoria have been removed from their families, new data reveals (2024)
[8] Ibid
[9] Yoorrook Justice Commission, *Yoorrook for Justice: Report into Victoria's Child Protection and Criminal Justice Systems* (2023) Yoorrook Justice Commission, Recommendation One.
[10] DJCS, Annual Survey of Young People Involved in Youth Justice (2019)
[11] See First Peoples' Relations, 'Justice and Safety'.
[12] DJCS, Annual Survey of Young People Involved in Youth Justice (2019)

lead to further entrenchment in the criminal legal system, rather than receiving appropriate care or rehabilitation.

An additional factor driving the overrepresentation of Aboriginal children in detention is the intergenerational impact of parental incarceration. Findings from the recent Victorian inquiry into Children of Incarcerated Parents revealed that nearly one in five people in Australian prisons had a parent or carer in prison during their childhood, with the figure rising to 31% for Aboriginal people, compared to 11% for the general population.[13] The report also detailed that 20% of Aboriginal children experience the incarceration of a parent, compared to just 5% for the non-Indigenous population.[14] VALS is aware that over 60% of Aboriginal women in prison had a child or children in the last financial year. This disruption to family life and cultural responsibilities, and the associated trauma, further compounds the cycle of incarceration, particularly for Aboriginal women, who often carry cultural obligations for the care of non-biological children. The over-incarceration of Aboriginal women, in particular, entrenches this intergenerational cycle, contributing to the continued overrepresentation of Aboriginal children in detention.

Systemic racism pushes our children into youth prisons

The reasons for the over-representation of Aboriginal children and young people in detention are well-known, and are a direct result of the laws and policies introduced during colonisation which continue in many forms today. Victoria Police has acknowledged the historical and ongoing systemic and institutional racism that continues to infect their responses to Aboriginal people and communities.[15] This racism manifests in the denial of Aboriginality,[16] the over-policing of Aboriginal Communities,[17] arresting Aboriginal children and young people rather than issuing a summons,[18] use of force[19] and explicit racial abuse against Aboriginal people.[20]

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[13] Parliament of Victoria, Legislative Council Legal and Social Issues Committee, *Inquiry into children affected by parental incarceration* (2022), 31.
[14] Ibid
[15] In May 2023, Victoria Police Commissioner Patton appeared before the Yoorrook Justice Commission and acknowledged that policing of Aboriginal people today is still influenced by systemic and structural racism.
[16] Aboriginal people in Victoria are more likely to be apprehended and arrested by police, and they report higher rates of being hassled by police. See H. Blagg, N. Morgan, C. Cunneen, A. Ferrante (2005), *Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Criminal Justice System*; CCYP (2021), *Our Youth Our Way*, p. 430; *Finding into Death with Inquest: Inquest into the Death of Tanya Louise Day*, 9 April 2020, COR 2017 6424
[17] Data from Victorian police attendance registries in 2006 reveals that Aboriginal people are almost six times more likely to be held in a police station. See *Koori Complaints Project 2006-2008: Final Report*, p. 17
[18] The CYFA includes a presumption of proceedings by way of summons, rather than arrest; however, police regularly do not comply with this in relation to Aboriginal children and young people. See s. 345(1) *CYFA 2005* (Vic).
[19] For example, the CCYP Inquiry found that 5 children and young people reported sustaining broken bones and serious injuries as a consequence of assaults by police. CCYP (2021), *Our Youth Our Way*, p. 433. The Koori Complaints Project found that the largest number of allegations made by Aboriginal people whose complaint data was reviewed as part of the project, related to assaults by police at arrest, followed by racist language or abuse and failure to provide medical assistance and harassment. See *Koori Complaints Project 2006-2008: Final Report*, p. 18.
[20] See for example, CCYP, *Our Youth Our Way*, pp. 432-433. See also, IBAC (2021), *Operation Turon: special report*. In Operation Turon, IBAC found that the Assistant Commissioner for Professional Standards Command posted racist and homophobic material on the internet over a period of several years and faced civil litigation for using racist language in person, but concluded that this had no bearing on his decision-making about complaints investigations.

These experiences are deeply felt by our children. Systemic racism against Aboriginal children pervades every part of the operation of the criminal legal system, manifesting in Aboriginal children being over-representated at every stage and intersection in the criminal legal system. In Victoria, an Aboriginal child is more likely to be arrested and detained, and less likely to be cautioned, by Victoria Police. [21] Although since 2007-2008 there has been an almost 50 per cent decline in the rate of police arresting and processing non-Indigenous young people, this decline has not taken place for Aboriginal young people.[22] Because Aboriginal children enter criminal legal system supervision at a younger age, Aboriginal children have been disproportionately affected by the low age of criminal responsibility.[23] Aboriginal children who are granted bail are more likely to be recorded for breaching bail conditions than non-Indigenous children and young people. Aboriginal children are are overrepresented in every category of Youth Justice court order, including supervised bail, remand, community-based sentences and custodial sentences. Courts are more likely to sentence Aboriginal children and young people to longer periods of community-based supervision than non-Indigenous children and young people. Additionally, Aboriginal children enter Youth Justice supervision at a younger age than non-Indigenous children and young people.[24]

This systemic racism results in a gross overrepresentation of Aboriginal children in police cells, youth prisons and under youth justice supervision. In 2021-2022, Aboriginal children aged 10 to 17 years in Victoria were nearly 9 times as likely to be in youth detention than non-Indigenous children. Aboriginal children are 11 times more likely than non-Indigenous children to be under youth criminal legal supervision.[25]

PART B: Prisons harm and traumatise our children – we need self-determined youth justice systems

Imprisonment harms and traumatises young people

Victoria's correctional facilities have a long history of systemic issues and are sites of significant harm and suffering, especially for Aboriginal people.[26] Turana Reception Centre, where Aboriginal children who were stolen from their families were taken to become wards of the state and receive the first entry on their criminal history, later became Parkville Youth Justice Centre.[27] Recent inquiries into the Victorian government's prisons and youth justice detention centres have long documented that they

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[21] Commission for Children and Young People, *Our youth, our way: inquiry into the overrepresentation of Aboriginal children and young people in the Victorian youth justice system, Summary and recommendations*, (Melbourne 2021) 8.
[22] See First Peoples' Relations, 'Justice and Safety'.
[23] Yoorrook Justice Commission, *Yoorrook for Justice: Report into Victoria's Child Protection and Criminal Justice Systems (2023)*, 326.
[24] Commission for Children and Young People, *Our youth, our way: inquiry into the overrepresentation of Aboriginal children and young people in the Victorian youth justice system, Summary and recommendations*, Commission for Children and Young People, (Melbourne 2021) 8.
[25] Australian Institute of Health and Welfare, 'State and Territory Fact Sheets: Victoria', Youth Justice in Australia 2021–2022 (Online, 7 March 2023) Tables S130b and S130c
[26] Victorian Aboriginal Legal Service (VALS), 'Closure of Two Prisons: A Recognition of State Violence towards Aboriginal Peoples' (Web Page, 15 August 2023).
[27] Yoorrook Justice Commission, Yoorrook for Justice: Report into Victoria's Child Protection and Criminal Justice Systems (2023) pg 59.

are places of serious and frequent abuses, including excessive use of force,[28] routine and inappropriate strip searching,[29] interfering with camera recordings, trafficking contraband, excessive use of lockdowns, isolation and solitary confinement.[30] Part C of this submission further details the nature and harmful impacts of these practices in youth prison, many of which amount to torture and cruel and degrading treatment banned under international law.

These practices are contemporary forms of violence that are rooted in the colonial carceral system and continue to be used disproportionately against Aboriginal people, exacerbating pre-existing trauma, triggering new trauma, and undermining mental health and social and emotional wellbeing.

The harms caused to children by youth prisons, police cells and other places of detention are well documented nationally, including by the Inquiry into the Tasmanian Government's responses to Child Sexual Abuse in Institutional Settings for the sexual abuse suffered by children at Ashley Youth Detention Centre, and the Royal Commission into Protection and Detention of children in the Northern Territory.

Being imprisoned traumatises children, compounds mental illness, disrupts their development and make reoffending more likely. This is true even where children are detained for shorter periods of time. For Aboriginal children, the harm is further compounded by being removed from the critical support of their families, communities, Country and culture. Experiences during incarceration, such as isolation, sensory deprivation and abuse, cause and exacerbate mental health challenges. They also make it more likely for a child to self-harm, die from suicide, die earlier and from preventable causes, [31] experiences psychiatric disorders and misuse drugs and alcohol.[32]

Self-determined youth justice systems

While the terms of reference for the Inquiry largely focus on the issues within Australia's youth justice and incarceration system, the Committee should also consider the potential for a new approach to

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[28] In 2020-21, one prison guard every week was suspended for reasons including the excessive use of force, smuggling of contraband and sexual harassment. See Michael O'Brien MP, Media Release, 'One prison guard a week suspended in Andrews' chaotic corrections system,' (21 July 2021).

[29] IBAC reported that the General Manager of Port Phillip Prison told its investigators that strip searches were "one of the options available to assert control" over people in prison. IBAC, *Special report on corrections: IBAC Operations Rous, Caparra, Nisidia and Molara Turon*, (2021), p. 53.

[30] Victorian Ombudsman, *Report on investigations into the use of force at the Metropolitan Remand Centre and the Melbourne Assessment Prison* (2022); IBAC, *Special report on corrections: IBAC Operations Rous, Caparra, Nisidia and Molara Turon*, (2021); Victorian Ombudsman, *OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people* (2019); *Inquiry into Victoria's Criminal Justice System* (2022); CCYP, *Our Youth, Our Way*; CCYP, *The same four walls: Inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system*, p. 84.

[31] Christopher Wildeman and Lars Andersen, 'Solitary confinement placement and post-release mortality risk among formerly incarcerated individuals: a population-based study' (2020) 5(2) The Lancet Public Health.

[32] [Solitary Confinement & The Brain: The Neurological Effects | Solitary Watch Fact Sheet #5]; Stuart Grassian, 'Psychiatric Effects of Solitary Confinement' (2006) 22 Washington University Journal of Law and Policy; and J. Mendez, Special Rapporteur, Interim report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc A/66/268 (5 August 2011) 17 [62]; United Nations Standard Minimum Rules for the Treatment of Prisoners (*Mandela Rules*) UN Doc E/CN.15/2015/L.6/Rev, rule 44. 333-8.

justice for Aboriginal young people, one that is designed, led and controlled by community, and founded on principles of prevention, healing, and connection.

The harms caused by criminal legal systems and prisons are not adequately addressed by improving prison standards and guidelines while continuing the practice of incarcerating young and vulnerable people. We know from recent inquiries that prison policies to encourage less abusive practices are routinely breached with no accountability or transparency.[33]

The deficit lens imbued across the criminal legal system is a direct legacy of the racist and deficit based colonial carceral system. It can be seen in risk-based assessments, that cut across the youth bail system, sentencing processes, custodial classifications and parole. Earlier this year in a bail application for an Aboriginal young person represented by VALS, a Victorian youth justice worker admitted that Youth Justice were providing "more conservative" risk assessments to the court for children's bail applications due to the "current focus on youth crime" in the media and public discourse.[34] The deficit lens must be replaced with approaches that are self-determined and grounded in the strength and resilience of Aboriginal culture, community and Country.

There is already work underway in Victoria to include justice matters as part of a state-wide treaty. This follows on from Reccomendations 1 and 2 of the *Yoorrook for Justice* interim report, which recommended that that the Victorian Government must transfer decision-making power, authority, control and resources, to give full effect to the right of Aboriginal communities to self-determination in the criminal legal system and the child protection system.[35] Queensland has also just commenced its own treaty process. The Committee should build on this momentum and focus its attention on some of the opportunities that exist for transformational reform to how youth justice operates.

The existing legal system was established and developed with the purpose of criminalising and controlling Aboriginal children and young people, and their families.[36] Discrete reforms to the most dysfunctional and punitive aspects of the current system are necessary to address the immediate risk of harm to Aboriginal children, but will not achieve true justice. Any reform must respect and embed the right of Aboriginal peoples to self-determination in legislative and other policy reform processes. In particular, any proposed reform process to Australia's youth justice and incarceration system must centre the knowledge and expertise of Aboriginal young people, particularly those with lived experience of the system.

In Victoria, the *Our youth, our way: Inquiry into the over-representation of Aboriginal children and young people,* spoke with young people who had experienced the youth justice system. The 2021 report documented the failures of Victoria's current approach and made numerous recommendations

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[33] IBAC, *Special report on corrections: IBAC Operations Rous, Caparra, Nisidia and Molara Turon*, (2021); VALS Media Release, 'IBAC report finds that prison expansion and privatization are contributing factors to corruption and abuse within Victoria's Corrections system,' (23 January 2021).
[34] The Guardian, "Focus on youth crime may be influencing bail decisions for children, Victorian judge says", published 21 March 2024.
[35] Yoorrook Justice Commission, Yoorrook for Justice (2023), Recommendations 1 and 2
[36] Amanda Porter and Chris Cunneen in Philip Birch, Michael Kennedy and Erin Kruger (Eds), *Australian Policing: Critical Issues in 21st Century Police Practice* (Routledge Press, 2020) 397-411.

to prioritise Aboriginal decision-making and cultural authority across youth justice matters.[37] The Koorie Youth Council, through the 2018 *Ngaga-dji* report, has also worked directly with Aboriginal children and young people to develop some clear pathways for change through the development of a community-designed and led support system for young people.[38] We strongly recommend the Committee utilise the *Our Youth, Our Way* and *Ngaga-dji* reports in its inquiry and report. Both of these reports provide significant insight into what Aboriginal young people need to grow up safe and well, and the kinds of supports they require to ensure this is a reality. Their recommendations include:

- Aboriginal Community-Controlled Organisations are resourced to deliver holistic supports for young people, and that these replace the punitive, crisis-driven responses provided through state-run youth justice;
- Raising the minimum age of criminal responisibility to at least 14 years of age without exceptions;
- Raising the minimum age of detention to at least 16 years of age;
- Addressing the failures within the child protection system, including the criminalisation of Aboriginal young people in out-of-home care;
- Stronger recognition of the cultural rights held by Aboriginal children and young people and greater support for the network of family and community that help children feel connected and safe; and
- Addressing the racism and discrimination Aboriginal children and young people experience in mainstream society, including in educational settings.

While the goal for youth justice is the development of a system that is designed and led by Aboriginal people, VALS also recognises the need to implement reforms in the immediate that reduce the criminalisation and incarceration of Aboriginal young people. Furthermore, these progressive reforms will build the foundations and framework before moving toward a broader transfer of power and resources. While we recognise that some of these are responsibilities of the state and territory governments, given that many of these challenges are shared across jurisdictions, there is an opportunity to consider how we might improve consistent application of reforms and service delivery across Australia. Federalism should not serve as a convinient excuse to abbrogate a governments moral responsibility for the safety of all its people, particularly those who come from marginalised and oppressed communities. VALS has consistently identified the following as areas requiring immediate reform, and are relevant to all states and territories:

- Reforming punitive and unfair bail laws in accordance with Poccum's Law, to ensure children always have a presumption in favour of bail;
- Expanding access to culturally appropriate legal assistance for Aboriginal children and young people involved in the criminal legal system. Currently VALS operates Balit Ngulu, a dedicated legal and case management service for Aboriginal children and young people. Culturally safe legal representation is a right that Aboriginal children and young people across the country should have access to; and

[37] Commission for Children and Young People, *Our Youth, our way* (2021).
[38] Koorie Youth Council, *Ngaga-Dji: Young Voices Creating Justice for Change* (2018).

- Reforming police oversight to ensure that all states and territories have a mechanism for the independent investigation of complaints about police conduct. All jurisdictions must have a process in place that is culturally appropriate, and complies with international principles around transparency, powers, and resourcing.

Raising the minimum age of criminal responsibility

Australian states and territories must urgently raise the minimum age of criminal responsibility to at least 14 without exceptions. Victoria has recently passed legislation that will raise the age of criminal responsibility to 12 in 2025.[39]

The United Nations Committee on the Rights of the Child (**UNCRC**) issued General Comment 24 in 2019, which advised all UN member states that the minimum age of criminal responsibility should be at least 14 years, with no exceptions for any offences. This reflects the medical consensus regarding child brain development, which shows that children under the age of 14 are undergoing significant growth and development, which means that they may not have the required capacity to be criminally responsible.[40] The prefrontal cortex, which is responsible for skills like planning, prioritising, and making good decisions, does not finish developing until a person is in their mid-20s.[41] The development of this part of the brain is crucial to being able to form criminal intent by understanding that a behaviour is seriously wrong. In many countries around the world, the age of criminal responsibility is 14 years, and in other countries it is set even higher at 16 and 18 years.

The evidence overwhelmingly shows that when children in the very young age bracket of 10 to 13 years of age are forced through a criminal legal process during their formative developmental phases, they suffer immense and enduring harm. The byproducts of early criminal legal contact for a young child – including first contact with police, arrest, detention, the use of force, the use of handcuffs and other restraints, and being subjected to interrogation, searches and forensic sampling - can be highly distressing and lead to trauma, victimisation, stigmatisation and negative peer contagion. Worse still, these experiences compound the disadvantage they were experiencing prior to their first contact with the legal system, particularly for Aboriginal children who are chronically over-represented in the criminal legal system.[42]

It is critical that reform to raise the age is not accompanied by additional police powers over young children under the age of criminal responsibility. Exposing children to interactions with police is

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[39] *Youth Justice Act 2024 (Vic)* section 2.

[40] Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility' (Research Report, Comparative Youth Penalty Project, University of New South Wales, 2017) citing Sentencing Advisory Council, Sentencing Children and Young People in Victoria (2012) 11; Thomas Crofts, 'A Brighter Tomorrow: Raise the Age of Criminal Responsibility' (2015) 27(1) Current Issues in Criminal Justice 123; Enys Delmage, 'The Minimum Age of Criminal Responsibility: A Medico-Legal Perspective' (2013) 13(2) Youth Justice 102.

[41] The National Institute of Mental Health, The Teen Brain: 7 Things to Know

[42] Commission for Children and Young People, Our youth, our way: inquiry into the over- representation of Aboriginal children and young people in the Victorian youth justice system, Summary and recommendations (2021) 151-154; Meurk C, Steele M, Yap L, Jones J, Heffernan E, Davison S, et al. Changing direction: mental health needs of justice-involved young people in Australia. Sydney: Kirby Institute (2019); Sentencing Advisory Council, 'Crossover kids': vulnerable children in the youth justice system. Reports 2 and 3, Sentencing Advisory Council, Melbourne, (2020).

criminogenic and reinforces the very behaviours sought to be prevented through raising the age of criminal responsibility. As already outlined above, evidence and experience show that when Victoria Police hold discretionary powers, they frequently exercise them in ways that discriminate against Aboriginal and Torres Strait Islander people and other racialised communities. In May 2023, Victoria Police Commissioner Patton appeared before the Yoorrook Justice Commission and acknowledged that policing of Aboriginal people today is still influenced by systemic and structural racism.[43]

Raising the minimum age of detention

In addition to raising the age of criminal responsibility to at least 14 years, the Victorian Government must prohibit detention of children and young people below the age of 16 years. While harm arises from any contact with police and the criminal legal system, detention is invariably and acutely harmful, and the Government must progress towards having no children in detention.

The UN Committee on the Rights of the Child recommends that "no child be deprived of liberty, unless there are genuine public safety or public health concerns, and encourages State parties to fix an age limit below which children may not legally be deprived of their liberty, such as 16 years of age."[44] Many countries comply with these standards for a minimum age of detention to be set at 16, including Scotland and Slovenia.

Reforming Youth Bail Laws

This year Victoria saw the commencement of significant bail reform in response to the Coronial Inquiry into the passing of Veronica Nelson.[45] Prior to these reforms, 80% of children in Victorian prisons were on remand.[46] While these reforms are a step in the right direction, they fall short of what VALS, Aboriginal Communities and experts have asked for over many years, including for the full implementation of Poccum's Law for children's bail tests.[47]

Poccum's law, named after Veronica Nelson's childhood nickname, calls on the Victorian government to remove the presumption against bail, explicitly require that a person must not be remanded for an offence that is unlikely to result in a sentence of imprisonment, remove all bail offences, and grant access to bail unless the prosecution shows that there is a specific and immediate risk to the safety of another person; a serious risk of interfering with a witness; or a demonstrable risk that the person will flee the jurisdiction. [48] These changes are needed to ensure that detention is truly a last resort for children.

Following the new bail regime commencing in Victoria in March 2024, VALS' Balit Ngulu lawyers noticed an initial decrease in the number of Aboriginal children being remanded and an increase in

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[43] Victoria Police, 'Victoria Police response to the Yoorrook Justice Commission'.
[44] The United Nations Committee on the Rights of the Child (UNCRC), *General Comment 24* (2019).
[45] Coroners Court of Victoria, *Findings into the Passing of Veronica Nelson* (20 January 2023).
[46] Sentencing Advisory Council, 'Children Held on Remand In Victoria' 2020, [2.28].
[47] Victorian Aboriginal Legal Service, *Poccum's Law: the Blueprint for Bail Reform*; and Victorian Aboriginal Legal Service, *Victoria needs #Poccum'sLaw.*
[48] Ibid

the number of Aboriginal children getting bail. However as of October 2024, the number of Aboriginal children being remanded and bailed have reached pre-reform levels.

About half of the Aboriginal children in youth prisons have been denied bail after being charged with petty offending and being subject to the same bail tests as adults. VALS remains steadfast in our position that child bail tests should be reformed in line Poccum's Law, which provides a clear blueprint for bail reform. This is critical if Victoria is to meet its commitments under Closing the Gap, its Aboriginal Justice Agreement *Burra Lotjpa Dunguludja* and its Aboriginal Youth Justice Strategy *Wirkara Kulpa*.

We note that the Victorian government did introduce legislation in 2023 aimed at ensuring children had a different bail test than adults, with a presumption in favour of bail for almost all offences consistent with sector asks. However, this was withdrawn following a very targeted conservative media campaign, leveraging community fear and pushing a tough on crime agenda. At the time, the Victorian government made a very public commitment that progressive child bail reform would be contained in the *Youth Justice Bill* introduced in 2024. However earlier this year, they abandoned child bail provisions before the Bill was even introduced to Parliament. Instead, without any evidence and in the face of strong opposition by ACCOs and the legal assistance sector, the Victorian government introduced a new trial to electronically monitor children on bail.

RECOMMENDATIONS

Recommendation 1. Federal government should support states to raise the minimum age of criminal responsibility to 14 years without exceptions across all jurisdictions, including all relevant Federal legislation.

Recommendation 2. Commit to not giving police any new powers, including to arrest, search and detain, over children under the age of criminal responsibility.

Recommendation 3. Raise the minimum age of detention to 16 years without exceptions.

Recommendation 4. Federal government should support states to implement Poccum's Law in across all jurisdictions, including by removing reverse onus bail provisions and ensuring that children always have a presumption in favour of bail.

No child should be in prison – funding Decarcaration models

The goal of decarceration is to provide strong support systems to get people out of prison and keep them out. It involved working collectively to minimise the trauma and violence that prison inflicts on people. The approach emphasises the reduction of incarceration, especially for nonviolent offences, and shifts the focus toward rehabilitation and reintegration into society.[49] This concept prioritises

[49] Carrie Pettus and Stephanie Kennedy, 'Decarceration: A Complex, Multidimensional Process' in Michael Tonry (ed), Decarceration: New Policies and Practices to Reduce Imprisonment (Oxford University Press, 2023)

reducing the harm caused by the criminal legal system, especially for marginalised communities like Aboriginal and Torres Strait Islander people.[50] The model champions alternative approaches that address the root cause of criminal behaviour through culturally relevant and therapeutic interventions.[51]

There is substantial evidence that therapeutic interventions are more effective at reducing recidivism in young people than punitive approaches.[52] Many young people who interact with the criminal legal system have experienced trauma. A therapeutic model recognises that the underlying causes for offending behaviour are inherently due to disadvantage, poverty, discrimination and racism, involvement with the child protection system, housing distress, by fostering behaviour change through personal development.[53] These models incorporate trauma-informed and culturally safe practices, which are critical for supporting the rehabilitation and reintegration of youth in detention.[54]

Decarcerating models focus on healing, rehabilitation, connection to Country, and support reintegration into society. The models provide therapeutic interventions, support, and diversions for children and young people who are involved in, or at risk of involvement in, the youth justice system. Importantly, these models work. Scotland, who raised their minimum age of detention to 16, has committing to a plan to phase children under 18 out of youth prisons, and work towards ensuring that no child under 18 is imprisoned.[55]

Future justice system reforms should expand existing local programs, such as the Western Australia's Foundation for Indigenous Sustainable Health ('FISH') *Myalup Karla Waangkiny* program,[56] and consider international examples of decarcerating models such as the models from Spain and Hawai'i.

It is important to note that alternatives to the criminal legal system still include strong accountability for children who engage in negative behaviours, but that accountability is designed to help children learn rather than punish them. Alternative forms of accountability can be found in restorative justice options, diversion options, family focused interventions like family coaching which provides intensive in-home therapy, cultural interventions such as cultural camps and programs that connect the child to a broader community, civil law options, child protection options.[57] However, VALS cautions that given the significant systemic reforms needed in child protection, it would not be suitable for the role of that system to be expanded until that work is done.

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[50] Community Restorative Centre, Submission to the Inquiry into the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody (Submission No 71, 2021)
[51] Carrie Pettus and Stephanie Kennedy (n 47).
52 Liddle M, Boswell G, Wright S et al, Trauma and Young Offenders: A Review of the Research and Practice Literature, Beyond Youth Custody, 2016, accessed 19 December 2023.
[53] Commissioner for Children and Young People (WA), Youth Justice Discussion Paper (Discussion Paper, February 2023)
[54] Commissioner for Children and Young People (Tas), A Therapeutic Approach to Youth Justice in Tasmania (Report, 2016)
[55] https://www.gov.scot/publications/keeping-promise-implementation-plan/pages/2/
[56] Foundation for Indigenous Sustainable Health (FISH), 'Myalup Karla Waangkiny' (Web Page, 2024)
[57] Walsh, Tamara; Fitzgerald, Robin; Cornwell, Lucy; Scarpato, Cara --- "Raise the Age and Then What? Exploring the Alternatives of Criminalising Children Under 14 Years of Age" [2021] JCULawRw 3; (2021) 27 James Cook University Law Review 37

Learning from the success of existing international decarcerating models

Kawailoa: A Transformative Indigenous Model to End Youth Incarceration (Hawai'i)

Hawai'i has made significant strides toward reimagining the justice system by addressing root causes, including poverty, disenfranchisement, mental health challenges, and homelessness.[58] Instead of relying on punitive youth corrections, it has embraced cultural healing and restorative practices, prioritising rehabilitation over punishment.[59] The goal is to facilitate healing and divert young people from the justice system.[60]

Kawailoa's programs have achieved positive outcomes, including reducing the number of incarcerated youths by 75%.[61] This approach could be adapted in Australia by incorporating Aboriginal Elders as facilitators of cultural healing, mirroring the role that Native Hawai'ian Elders play in the Kawailoa model.

A notable service contributing to the success of the Kawailoa program is its Youth and Family Wellness Centre, which draws on native Hawai'ian concepts like *pu'uhonua* (place of refuge) to provide young people with complex trauma a safe place to heal.[62] This process, called 'justice reinvestment', which emphasises community-based interventions, redirecting resources from prisons and into individualised trauma-informed treatment.[63] The Wellness Centre is 'encircled by tropical forests', and sits on 300 acres of land, promoting healing by providing the youth with a 'sanctuary'.[64] It offers a residential vocational training program, a young adult homeless shelter, and a shelter for young victims of sex trafficking.[65]

Kawailoa also reflects the restorative justice framework, which focuses on rehabilitation through reconciliation with victims and the community.[66] This includes holding 'family group conferences, victim-impact panels, victim-offender meditation, circle sentencing, and community representative boards.[67] This approach takes a holistic view of the situation and prioritised relationship building with all stakeholders.[68] These practices should be grounded in culture and family-centred, which includes identifying support networks for the youth.[69]

Diagrama (Spain)

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58 Tai-An Miao, Earl Hishunuma, and Karen Umemoto (n 65).
59 Kawailoa Youth and Family Wellness Center, 'Our Work' (Web Page, 2024).
60 Ibid.
61 OHA Public Policy Staff (n 74).
62 Kate Crowe, 'Community-Based Alternatives to Secure Care for Seriously At-Risk Children and Young People: Learning from Scotland, The Netherlands, Canada and Hawaii' (2024) 4(3) *Residential Care of Children and Young People*
63 Ibid.
64 Kate Crowe (n 71).
65 OHA Public Policy Staff**,** 'A Correctional Center Becomes a Pu'uhonua' (Web Page, *Ka Wai Ola*, 6 September 2022).
66 Tai-An Miao, Earl Hishunuma, and Karen Umemoto 'Implications for a System of Care in Hawai'i for Youth Involved in the Justice System and Substance Use' (2022) *Hawaii Journal of Health and Social Welfare*
67 Ibid.
68 Ibid.
69 Ibid.

Diagrama, an international not-for-profit organisation founded in Spain, pioneered an alternative youth detention model that favours rehabilitation over punishment.[70] Diagrama aims to reduce recidivism by educating, rehabilitating, and reintegrating young people who have committed an offence back into their communities.[71]

Recently, Diagrama partnered with the Aboriginal Medical Services Alliance Northern Territory (AMSANT) to advise on how this model could be integrated into the current system, which is notoriously harmful to young people's development.[72] The advice, published by Amnesty International, should be applied to future reforms to transform the youth justice system into one that effectively facilitates rehabilitation, safety, and the well-being of young people.

Resource Aboriginal-led prevention and early intervention services – Balit Ngulu

Diversion from the youth justice system is a critical goal for addressing the over-incarceration of Aboriginal children in youth detention. Although they have the ability lead to life-changing outcomes, Aboriginal-led prevention and early intervention services, programs and pathways are not easily available or accessible to Aboriginal children and young people.

Balit Ngulu, which means 'Strong Voice' in Woiwurrung, is VALS' youth justice service for Aboriginal children and young people with criminal matters in the Melbourne metropolitan, Greater Shepparton areas (including Echuca) and Hume region. Early intervention is the primary focus of the program and diverting young people away from the criminal justice system remains a key priority. Young people have support from dedicated youth lawyers and Aboriginal Community Engagement (ACE) workers. Balit Ngulu has achieved great results for our clients and received praise in several courts for the extensive support that the service provides.

Bail Ngulu's 'Youth Crime Prevention and Early Intervention Project' in the West seeks to reduce rates of youth offending and re-offending in Wyndham and Brimbank among young people aged 10-24 years by increasing the use of police pre-charge warnings, cautions and diversion recommendations, streamlining referrals to legal and non-legal support, and providing community legal and non-legal education to young people and their families. Through stronger stakeholder relationships Balit Ngulu have been able to secure cautions for clients that even fall outside the catchment criteria, which has seen young adults diverted out of the criminal justice system.

In an evaluation of Balit Ngulu, several justice sector stakeholders said that Balit Ngulu ensured Aboriginal and/or Torres Strait Islander children were better prepared for court, had better follow up, and received high quality, holistic support. When asked about their experience, a client said, '*It [the*

[70] Diagrama Foundation, Blueprint for Change (Report Appendices, 2023)
[71] Rihannon Shine, 'What Does Youth Detention Look Like in Other Parts of the World?' (Web Page, *ABC News*, 21 November 2022)
[72] Amnesty International Australia, 'Don't Expand Don Dale, Keep Kids Out of Prison' (Web Page, 2024)

court proceedings] would have been really stressful, really hard to cope, I don't think I could have done it without them'.

The existing Balit Ngulu service model does not, however, work across all legal contexts. Best practice would advise that Aboriginal children and young people should, as far as possible, have one lawyer who can address the continuum of their legal needs, together with specialist relationship building and engagement skills, and a high degree of cultural capability. This includes addressing legal needs spanning the Child Protection, youth justice, family violence, family law and civil law domains. The majority of these children and young people have been disproportionately affected family members of family violence and/or have used family violence, have been subject to a previous or current Child Protections order, and are residing in an out of home care placement. Child Protection involvement makes this dedicated approach an acute need. Typically, children and young people aged 10-13 in out of home care attend court without a family member or other suitable adult to encourage them to consider the advice of legal practitioners. Further, Aboriginal children and young people nearly always lack choice as to whether they have representation form an Aboriginal-led or mainstream legal service. Additionally, Child Protection case managers mostly do not attend court when their client has a criminal matter. This can significantly impair the ability of the legal representative and the court to be informed of the circumstances of the children and young people, to understand the services and supports available to them and to identify and address causal factors that have contributed to alleged offending.

Despite the overall positive impact of Balit Ngulu expansion, we have identified specific gaps across Victoria indicating a clear unmet community need. During the period from 1 April to June 30 2024, Balit Ngulu received 21 referrals to Balit Ngulu that could not be accepted due to falling outside our catchment area or service eligibility. In the same quarter, we made exceptions for 5 referrals that did not fully meet our program's eligibility criteria, citing the vulnerable circumstances and urgent need for Balit Ngulu services by these clients, particularly the support of our ACE worker.

The expansion of Balit Ngulu to address the unmet legal needs of children in the Child Protection, youth justice, family law and civil law (family violence) domains would ensure that our children and young people have improved access to better quality, more equitable, holistic, and culturally safe legal representation and support. This would reduce the rate of involvement of Aboriginal children with child protection and the rate of removal of Aboriginal children and people into out of home care. It would, separately and in turn, reduce the over-representation of Aboriginal children in criminal legal systems and in detention. Importantly, it would assist in ensuring Aboriginal children enjoy healthy, safe and respectful relationships and help prevent the intergenerational cycle of trauma and family violence.

The establishment of this best practice approach is supported by the Victorian Commission for Children and Young People, the Children's Court and the Sentencing Advisory Council. However, despite requests for funding to the Victorian government, Federal government and through NLAP negotiations, this best practice approach is not funded. Balit Ngulu's funding is provided by the Victorian Department of Justice and Community Safety and is only adequate to sustain baseline

operations and support the existing workforce in the short term. It does not facilitate expansion and service delivery into other areas of Victoria or into the Family violence and child protection divisions.

In VALS' experience, Aboriginal-led prevention and early intervention services, programs and pathways in Victoria are underfunded and subject to funding uncertainty. In VALS' view, this directly contributes to the continued over-incarceration of Aboriginal children in Victoria.

The chronic underfunding of ATSILS and VALS

VALS and the other Aboriginal Legal Services are funded through the National Legal Assistance Partnership, which is a five-year agreement due to expire in June 2025. Over the past 2 years VALS and the ATSILS have tried to engage with the Federal Labor Government about the need to negotiate a new agreement that addresses the systemic underfunding of Aboriginal Legal Services. However, our voices have not been listened to.

Despite an independent review commissioned from Dr Mundy showing that the highest unmet legal need was with Aboriginal communities and the greatest need for funding was the ATSILS, the government recently signed a new Heads of Agreement for a new National Access to Justice Partnership which will see no expansion of ATSILS to meet community need.[73] As VALS CEO Nerita Waight reflected,

> "VALS has spent so much time working with community to develop plans for how we can deliver the services they want, and it hurts that the Federal Labor Government has chosen not to invest in those communities. *We are particularly concerned that Victoria might be worse off under the new agreement. VALS has been underfunded for so many years and it will be devastating for the people who rely on us if the Federal Labor Government cuts our funding.*[74]"

This announcement is a rebadging of existing funding plus funding for indexation and wage parity, which should always have been part of the funding. There is also no detail on the implications of a new funding stream for Aboriginal Legal Services. VALS holds fears it might be worse off due to changes in how funding is provided to different jurisdictions.

Funding for indexation and wage parity will not even allow us to maintain our current level of services. Over recent years we have secured a range of one-off funding sources that have allowed us to pilot new services and cover a new small amount of the unmet demand for our services. The Federal Labor Government's announcement will not allow us to continue any of those services.

Dr Mundy believes the real reason for the shortfall in funding to the ATSILS is that several jurisdictions don't believe that funding Aboriginal and Torres Strait Island legal services or Aboriginal Family Violence and Prevention Legal Services is their job, but rather the sole responsibility of the Federal. However, Mundy believes this should be a shared responsibility and VALS agrees.

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[73] Attorney General, National Access to Justice Partnership, 6 September 2024

[74] Victorian Aboriginal Legal Service, 'Victorian Aboriginal Legal Service Left Behind By Federal Government' (Media Release, 6 September, 2024.

The announcement is not reflective of the recommendations in Dr Mundy's NLAP Review, nor does it reflect what ALS' have been calling for. As he recently expressed, Dr Mundy is "… strongly of the view that the greatest urgency for new funding is the indigenous-controlled ATSILS and Family Violence Prevention Legal Services,".[75] This funding announcement risks VALS having to cutback or close services in the regions and with our Balit Ngulu program. VALS has advocated strongly for our regional hub model, because we know that it makes a difference to the community members we support. This decision will only further harm Aboriginal children, young people and adults who are the most overincarcerated peoples in the world.

This is yet another instance of Governments saying they believe in Aboriginal self-determination and then making decisions about our funding without us.

RECOMMENDATIONS

Recommendation 5. Federal government should support jurisdictions properly resource ACCOs to develop decarceration models and implement place-based programs based on decarceration principles.

Recommendation 6. The Federal and Victorian governments should properly resource Aboriginal Legal Services to run and expand best practice youth specific legal services, like Balit Ngulu, to meet the legal needs of Aboriginal children and young people.

Recommendation 7. Aboriginal Legal Services should be adequately funded to provided legal services to every Aboriginal and Torres Strait Islander child and young person who wants to use a culturally safe service.

PART C: The widespread and unceasing violation of our children's rights by youth prisons and police

The human rights and child rights frameworks in Victoria

Victoria, along with the other states and territories, has a very poor record of complying with the human rights of Aboriginal children coming into contact with the criminal legal system, and especially those in detention.[76]

In Victoria, the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**) protects the human rights of all Victorians, including children and young people in detention. They apply legislative force to those rights provided for by international law, and contain the right for children

[75] Is the $3.9 billion investment to bolster Australia's legal assistance sector all it seems? - Law Society Journal (lsj.com.au)
[76] *Certain Children By Their Litigation Guardian Sister Marie Brigid Arthur V Minister For Families And Children (No 2)* [2017] VSC 251; *Application for Bail by HL (No 2), Re* [2017] VSC 1; Victorian Ombudsman, '*OPCAT in Victoria: A Thematic Investigation of Practices Related to Solitary Confinement of Children and Young People*' (2019).

to be protected, Aboriginal cultural rights, the right to be treated humanely when deprived of liberty, the right to be protected from torture and cruel, inhuman or degrading treatment, and the right to privacy. However, the Charter does not allow a person to bring an independent action against a public authority for a breach of their rights. Instead, a person can only raise the Charter by joining or 'piggy backing' a claim to separate proceedings against a public authority. This limits the ability of children to effectively use the Charter when their rights in detention are breached.

The *Children, Youth and Families Act 2005* (Vic) (**CYF Act**) contains the power to detain children and young people and outlines the scope of that power.[77] Section 483 of the Act provides for the Secretary of the Department of Justice and Community Safety's legal custody of children and young people in detention, establishing a legislative duty of care. Part 5.8 of the CYF Act provides for the powers exercisable against children and young people in detention, including search and seizure powers, the power to isolate children and young people and the use of force. The CYF Act contains guiding principles that 'give guidance to the administration of the Act'. The 'best interest principles' provide that for the purposes of the Act, the best interests of the child must always be paramount.[78] The Act provides that the Secretary must determine the form of care, custody or treatment that they consider to be in the best interest of each child or young person detained.[79] When determining if a decision or action is in the best interest of a child, the need to protect the child from harm, protect their rights and promote their development must always be considered.[80]

On 15 August 2024, the Victorian parliament passed the *Youth Justice Act 2024*, which provides a standalone law governing youth justice in the State. The new *Youth Justice Act* will commence progressively until 30 September 2026. It contains provisions for the custodial rights of children and young people detained in Victorian youth justice centres.[81] These include the rights to positive development, to safety, security and stability, and to mental and physical health. The Bill also abolishes the use of solitary confinement and the use of spit hoods which is welcomed. Disappointingly, the new *Youth Justice Act* also provides for the powers exercisable against children and young people, including the use of force; isolation; and searches, including unclothed or 'strip' searches. [82]

In addition, there are Victorian frameworks and legislations that the government must comply with in respect to children in their care, including children in detention, such as the Child Safe Standards. [83]

Non-compliance with the human rights of children and young people in detention

Despite these frameworks, legislations and the charter of human rights, in our experience the Youth Justice regime in Victoria is plagued by poor compliance with human rights, weak oversight and organisational chaos. We are particularly concerned about the following breaches, which in our

[77] *Children, Youth and Families Act 2005* (Vic), s 412.
[78] *Children, Youth and Families Act 2005* (Vic), s 10(1).
[79] *Children, Youth and Families Act 2005* (Vic), s 482(1)(a).
[80] *Children, Youth and Families Act 2005* (Vic), s 10(2).
[81] *Youth Justice Act 2024* (Vic) Part 10.2, Division 1.
[82] *Youth Justice Act 2024* (Vic) Part 10.4, Divisions 2-7.
[83] *Child Wellbeing and Safety Act 2005* (Vic), s 19 and Sch 1, item 45.

view demonstrate continued and widespread non-compliance with the human rights of Aboriginal children under both Victorian and international human rights laws:

- The use of isolation and solitary confinement;
- Lack of access to education;
- Routine strip-searching;
- The detention of children and young people in adult prisons;
- The use of spit hoods; and
- Failure to protect the safety of children and young people.

The use of isolation and solitary confinement

We are deeply concerned about the continued excessive and inappropriate use of isolation and solitary confinement of children and young people who are detained in Victoria. In particular, the use of 'operational' isolation or lockdowns to manage staffing shortages.

Isolation is defined within the CYF Act to mean locking a child or young person in a separate room, separate from others and the normal routine of the centre.[84] This means children are locked in their cells alone, when they should be participating in school, attending programs or having positive social interactions with their peers.

The Same Four Walls inquiry into uses of solitary confinement in the Victorian justice system, published by the Commissioner for Children and Young People in 2017, raised the alarm on Victorian prisons subjecting children, including disproportionately Aboriginal children, to harmful isolation practices.[85] In 2019, Victorian Ombudsman found that children were being "damaged rather than rehabilitated" through the "excessive" use of isolation and separation, and detailed the experiences of young people detained in effective solitary confinement for more than 100 days. The Ombudsman found these practices that were incompatible with local and international human rights laws. The *Yoorrook for Justice* interim report recommended the state "need(ed) to stop harmful conditions in youth prisons including the use of solitary confinement."[86]

Despite this, isolation records obtained by VALS from Youth Justice confirm that our clients are regularly spending long periods of time locked in their cells due to Youth Justice staffing shortages. Data from 2021–22, in which 75 Aboriginal children and young people were housed under youth justice custodial supervision, showed 3187 instances where Aboriginal children were isolated in the 'interest' of the security of the facility they were housed in. In 2022–23, there were 663 'behavioural' isolations recorded.[87]

In their evidence to Yoorrook in 2024, Youth Justice have publicly acknowledged that staffing shortages in their youth custodial centres has resulted in excessive isolation of children and young

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[84] *Children, Youth and Families Act* 2005, s 488(1).
[85] Commission for Children and Young People, The same four walls: inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system (Melbourne: Commission for Children and Young People, 2017).
[86] Yoorrook Justice Commission, Yoorrook for Justice: Report into Victoria's Child Protection and Criminal Justice Systems (2023), 20.
[87] Dechlan Brennan, ""Torture": Calls for Victoria to end effective solitary confinement of youth inmates "National Indigenous Times, 13 November, 2023.

people[88], while also acknowledging that staff shortages are not a justification for "human rights violations."[89]

Youth Justice also excessively uses isolation to manage staff resourcing. In both Parkville and Cherry Creek, children are isolated daily for staff meetings, and regularly for staff lunch breaks. On 26 January 2024, the Commissioner for Youth Justice, Andrea Davidson, attended Cherry Creek for an all-staff meeting. All children in the centre were placed into isolation to accommodate this. The Deputy Secretary for Youth Justice, Jodi Henderson, admitted to VALS that this staff meeting resulted in one of our clients spending over 40 continuous hours in isolation. This amounts to solitary confinement, which under international law is prohibited against children.[90]

The use of isolation is never rehabilitative or constructive, and evidence shows it causes lasting trauma.[91] The isolation of Aboriginal children is particularly damaging, preventing the opportunity to connect with their communities and strengthen culture.

Our clients speak of the mental anguish isolation causes. Our clients find it particularly traumatic not being told when they will be isolated, or how long they will be isolated for.

Case Study – Max*, 17

I'm sick of them treating me like that. They have all the power, and I just sit in my room thinking.

It feels like I'm powerless. When we are in isolation, [Youth Justice] have the power to hang up on our phones and turn off our intercoms. If they don't want to do something for us they can just choose to not do it.

Some days, our clients are only let out of their cells for short periods of time (eg one hour a day), in which they do not have contact with other young people. Our clients tell us that they try to manage long periods of isolation by sleeping all day and pacing their cells. This is antithetical to the 'rehabilitative' ambitions of youth detention.

One client told us 'I felt like I was going crazy in my cell…I would just lie there all day and try to sleep.'

Case Study – Jason*

When I was locked down, I would try to sleep as much as possible to pass the time. On the days we weren't let out in the morning, the staff would bring food to our rooms. I would then eat breakfast and go back to sleep. I would wake up for lunch but then shut the curtains and go back to sleep for

[88] Transcript of public hearings (Day 5), Yoorrook Justice Commission (3 May 2023) (Andrea Davidson, Commissioner for Youth Justice and Joshua Smith, Deputy Secretary of Youth Justice), 359-360.
[89] Dechlan Brennan, ""Torture": Calls for Victoria to end effective solitary confinement of youth inmates "National Indigenous Times, 13 November, 2023.
[90] Solitary confinement is defined under rule 44 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (**Mandela Rules**) as isolation 'for 22 hours or more a day without meaningful contact'. Rule 45(2) references the prohibition on solitary confinement of children.
[91] Australian Children's Commissioners and Guardians, Conditions and treatment in youth justice detention, Statement, November 2017, p 21.

the rest of the day. I just wanted to pass the time. I got up for dinner and watched some television and then went back to bed at around 9:00pm. I hated sleeping all the time, it made me really depressed.

When children and young people are isolated, food is passed to them through a 'trap' in the door. One client told us that if you didn't ask for food, it wouldn't be brought to you. We are aware of multiple occasions where another client was not brought food after asking for breakfast. He described managing his hunger by trying to sleep all day.

One client told us that there was no air vent in his cell, and a window that couldn't open. He described the cell as like a 'sauna'. We are also aware of multiple incidents of self-harm in response to excessive isolation.

Being isolated may prevent children and young persons in detention from accessing healthcare. We are aware of instances where assessments for suicide risk or mental health appointments were conducted through the trap in a client's door.

It is particularly damning that children and young people in Youth Justice detention are subject to isolation for staffing reasons much more frequently than in adult custody. One client who has spent time in both youth detention and adult prison described the conditions in adult prison as 'much better' due to experiencing less isolations. When asked if he wanted to say anything directly to this Inquiry, another client currently in youth detention requested that we ask, 'if adults get out of their cells every day in their jails, why can't we?'.

Victoria's new *Youth Justice Act*, passed in August 2024 and just days before the death of a 17 year old boy kept in solitary confinement in WA, expands powers to keep children in isolation for behavioural reasons. While the Act prohibits solitary confinement, it still allows the isolation of children for 22 hours per day, and may even allow longer periods where a child has what Youth Justice defines as "meaningful human contact".[92] VALS holds concerns that the new *Youth Justice Act* will subject children to more frequent and longer periods of isolation, under the guise of complying with international law. Lawyers from Wirraway, VALS' police and prison accountability practice, have yet to see a reduction in the use of isolation practices by Victorian prisons following the *Youth Justice Act* commencing.

It should not be necessary for us to have to explain the necessity of exercise, learning and social interaction for the wellbeing and development of children and young people. It is integral to their positive development, which should be of fundamental concern when thinking of how to reintegrate young people into society and mitigate risk of recidivism. Instead, these practices are traumatising young people and causing unacceptable and inhumane harm and suffering. The excessive use of isolation and solitary confinement is a breach of the right to humane treatment when deprived of liberty, and to protection from cruel, inhuman or degrading treatment.

[92] *Youth Justice Act 2024* (Vic) section 486.

Lack of access to education

As a corollary of the excessive use of isolation, children and young people in youth detention are often unable to access schooling.

Attending school in the designated classrooms requires Youth Justice to provide enough staff to move young people from their Unit to the classroom. All young people on a Unit must also agree to go to class together as there are not enough staff to remain on the Unit to supervise any young people who refuse to attend.

In data we obtained under Freedom of Information, students were attended rostered classes at Parkville College less than 30 per cent of the time. Students were absent due to Youth Justice staff shortages around 12 per cent of the time. However, due to poor reporting compliance by Youth Justice staff, we suspect these numbers are much higher.

When our clients are in isolation, sometimes teachers attend their cell and speak to them through the intercom or a slot in the door. This is clearly an ineffective method of teaching, particularly for students with intensive learning support needs. The available data suggesting that a significant majority of detention have one or more disability.[93] One of our clients who has an intellectual disability and attended a specialist school in the community, recalls a teacher giving him work through the trap in the door and instructions through the intercom. He said his experience of schooling did not feel as if he was able to learn anything.

Children and young people who are criminalised already face barriers to participating in education and continuity of learning. Failure to provide schooling to children and young people in their care is a failure of the State to protect their best interests.

Routine use of unclothed searches

The use of unclothed searches, more commonly known as strip searches, is an inherently harmful practice for detained people. This is particularly true for children and young people.

In Victoria, the legislation that permits the strip search of a child or young person in detention is framed broadly. A strip search may be performed if it is in the officer's opinion necessary:

a. in the interests of the security and good order of the centre; or
b. in the interests of the safety or security of the person or another person in the facility.[94]

Strip searches are retraumatising, particularly for persons who have experienced sexual violence.

One client, who was 16 years old at the time, was strip searched many times at Cherry Creek. He says the strip searches made him feel uncomfortable and angry. Another client, who was

[93] Children and Young People with Disability Australia, Submission in response to Criminal justice system issues paper (submission to Royal Commission into Violence, Abuse, Neglect and Exploitation of People with a Disability), July 2020, ISS.001.00420, 3, cited in Final Report, volume 8, 85.
[94] *Children, Youth and Families Act 2005* (Vic), s 488AC(1).

incarcerated at Parkville, told us that he did not receive notice before a strip search, and that guards would randomly attend his room to perform searches.

Last year, Youth Justice reported performing 82 strip searches on children and young people in youth detention. The data does not reveal how many strip searches were performed on Aboriginal and Torres Strait Islander children. However, there is data that suggests that strip searches, like other discretionary powers, are disproportionately used against Aboriginal and Torres Strait Islander people.[95]

Strip searches are also ineffective at uncovering contraband and therefore unnecessary, as data from other jurisdictions reveals. In Victoria, only a few items of so called "contraband" are identified over months and months of strip-searching, with further inquiries revealing these items are often as innocuous as a texter. In Tasmania, children were subjected to 203 strip searches over a 6-month period in 2018, with no contraband located. In NSW, over 403 strip searches were conducted on children at two youth prisons in one month in 2018, uncovering only one item – a ping pong ball.[96]

Other available measures, such as body-scanning technology, are less invasive and more effective. The use of strip searching against children and young people breaches their right to privacy and dignity. The use of strip searches against children and young people must therefore be prohibited.

Detention of children and young people in adult prisons

In Victoria, children aged 16 or older may be ordered to be transferred from a youth justice centre to an adult prison.[97] An order is made by the Youth Parole Board on the application of the Secretary of the Department of Justice and Community Safety. The Youth Parole Board may order this transfer if the child or young person has engaged in conduct that threatens the good order and safe operation of the youth justice centre, or they cannot be properly controlled in a youth justice centre.

Prisons are never an appropriate place for children. Particularly, adult prisons. One of VALS' clients, who was 16 years old at the time, was forcefully transferred to Port Philip Prison. Port Phillip is a maximum-security private prison for adult men, which is notorious as a place of significant harm and torture. At Port Phillip, this client was subject to excessive periods of solitary confinement and was placed in a spit hood. Prison authorities also turned off the water in the child's cell for 22 hours.

On behalf of this client we made two applications to the Adult Parole Board to have the child transferred back into a youth justice facility. Both applications were denied. After an inquiry into the treatment of this client, the Commissioner for Children and Young People found 'the young person's health and wellbeing had been significantly impacted by the extended time separated from others, reflecting a range of evidence about the impact of solitary confinement'.[98]

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[95] In the ACT between October 2020 and April 2021, 58% of strip searches of women in prison were of Aboriginal, despite making up only 44% of the prison population: Dani Larkin (2021), 'Excessive strip-searching shines light on discrimination of Aboriginal women in the criminal justice system', The Conversation.
[96] Human Rights Law Centre, Explainer: Routine strip searching of kids in prisons, 22 December 2020,
[97] *Youth Justice Act 2024* (Vic), Part 13.1, Division 2.
[98] Commission for Children and Young People, *Annual Report 2022-23*, 41.

Failure to protect safety of children and young people

Prisons, including youth justice centres, are violent and traumatic environments. They are no place for children, and authorities cannot ensure the safety of children and young people detained in their care. It is widely known that youth detention facilities regularly experience incidents, including incidents of serious violence and attempted escapes. Report on Government Services data indicates a high number of assaults against young people in Victoria.[99]

These incidents are a symptom of a broken system that is under immense strain.

The CYF Act permits the use of physical force against children and young people if:

(i) is necessary to prevent the person or child from harming himself or herself or anyone else or from damaging property; or
(ii) is necessary for the security of the centre or police gaol; or
(iii) is otherwise authorised by or under this or any other Act or at common law.[100]

We are aware of individual instances of restraint that in our view exceed what is reasonably necessary or permitted under the Act.

One client told us about an incident that occurred in 2023 at Cherry Creek, where the Safety and Emergency Response Team (**SERT**) were called to manage our client's behaviour. Our client advised he was holding a pole, but upon the SERT entering the room, dropped the pole he was holding, kneeled, and put his hands behind his head. He described then being handcuffed to the rear, his legs being put in a "figure four" (which he described as his legs being crossed and put up towards his buttocks) and having his head slammed to the ground. Our client suffers from Epilepsy and, as a result of the force used by the SERT staff, suffered a seizure. He was taken to hospital after the incident.

The use of repressive practices against children and young people in youth detention creates an environment that is less safe for everyone, including for staff. Our clients in custody often tell us that young people direct their frustration at each other or at staff after being placed in isolation for long periods of time.

Incidents in youth justice, often referred to in the media as 'riots', do not occur in a vacuum. They are the result of children and young people being pushed to their limits by a violent and traumatising regime.

VALS remains firm in our position that children and young people never belong in prison, but in their communities.

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[99] Report on Government Services, 17A Youth Justice Services – Data tables and contents, Table 17A.17, Assaults in Custody, by Indigenous status.
[100] *Children, Youth and Families Act 2005* (Vic), s 487.

RECOMMENDATIONS

Recommendation 8. Prohibit solitary confinement in law in all settings, including in youth prisons, police cells and watch houses. This should include prohibiting routine isolations and isolations due to staff shortages in youth prisons.

Recommendation 9. Require Youth Justice to notify VALS' Custody Notification Service (**CNS**) whenever an Aboriginal child or young person is put in isolation and provide additional funding to VALS to respond to these notifications

Recommendation 10. Prohibit the transfer of children and young people to adult prisons for any reason.

Recommendation 11. Prohibit routine strip searching and provide that a strip search should only ever be permitted as a last resort after all other less intrusive search alternatives have been exhausted and there remains reasonable intelligence that the person is carrying dangerous contraband.[101]

Recommendation 12. Prohibit the use of spit hoods on children in all settings including youth detention centres, adult prisons and police stations.

Recommendation 13. The Federal government should support all states to ensure that children in custody with healthcare (including mental healthcare) that is the equivalent of that provided in the community. This means that their physical and mental health needs must be met to an equivalent standard; not just that there is an equivalence of services available.

Recommendation 14. Aboriginal children and young people in youth detention must be provided access to primary healthcare by Aboriginal Community Controlled Health Organisations (**ACCHOs**), as is available in the community.

Recommendation 15. Provision of healthcare in youth detention must be overseen by the Department of Health, not DJCS.

Recommendation 16. The Federal government must ensure children and young people in detention must have access to the Medicare Benefits Scheme (**MBS**), the Pharmaceutical Benefits Scheme (**PBS**), and the National Disability Insurance Scheme (**NDIS**). Children and young people should be assessed for NDIS eligibility upon entry to a youth justice detention centre.

[101] VALS, HRLC, FlatOut and St Kilda Legal Service, *Ending human rights abuses in Victorian prisons: Submission to the Cultural Review of the Adult Custodial Corrections System* (2021), p. 7.

PART D: Australia's international obligations in relation to youth justice

When Australia ratifies a treaty, it becomes a 'State party' and undertakes, as a matter of international law, to observe the rights and obligations expressed in the treaty. The Federal government has international obligations in relation to youth justice under the following treaty bodies:

- The Convention on the Rights of the Child ***(CROC)*** ratified in 1990
- International Covenant on Civil and Political Rights ***(ICCPR)*** adopted 1966
- International Covenant on Economic, Social and Cultural Rights ***(ICESCR)*** adopted 1966
- International Convention on the Elimination of All Forms of Racial Discrimination ***(ICERD)*** adopted 1965
- Convention on the Rights of Persons with Disabilities ***(CRPD)*** adopted 2006
- Universal Declaration of Human Rights ***(UDHR)*** proclaimed 1948
- The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ***(CAT)*** adopted 1984, and its Optional Protocol ***(OPCAT)***
- UN Declaration on the Rights of Indigenous Peoples ***(UNDRIP)*** adopted 2007
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty ***(Havana Rules)*** adopted 1990
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice ***(Beijing Rules)*** adopted 198

Broadly, these treaty bodies recognise all children's non-alienable human rights around health; education; liberty; development; protection from torture, abuse and exploitation, and to participate fully in family, cultural and social life.

These treaties do not automatically become part of Australian domestic law. For this to occur the provisions of the treaty must be implemented domestically through legislation. In practice, significant portions of Australia's international treaty obligations, especially in relation to the rights of Aboriginal children and their rights in detention, have not been incorporated in domestic law.

Key examples include Australia's continued failure to implement its obligations under OPCAT by implementing National Preventive Mechanisms, despite seeking two extensions to do so. Australia has failed to follow General Comment 24 from the UNCRC as all states and territories maintain low ages of criminal responsibility, and by continuing to imprison children under 16. Despite both the Geneva Convention and General Comment 24 requiring Australia to cease subjecting children to solitary confinement, these practices continue in all jurisdictions. Despite UNDRIP's specific articles recognising the rights of Aboriginal children to self-determination, liberty and improvement in

economic, health, housing and social conditions[102], Australia has failed to implement UNDRIP and progress on Closing the Gap on related Targets 1, 9, 10, 11 and 13 is lagging.[103]

RECOMMENDATION

Recommendation 17. The Victorian Government must urgently commence robust, transparent and inclusive consultations with the Victorian Aboriginal Community on the implementation of the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (**OPCAT**) in a culturally appropriate way.

Recommendation 18. The future mechanism for independent detention oversight in Victoria must:

(a) Be established by legislation;
(b) Have jurisdiction over all places where individuals are or may be deprived of their liberty, regardless of the length of time of detention (this includes police vehicles, police cells and PSO "pods" at train stations); and
(c) Have sufficient resources to carry out its mandate in a culturally appropriate way.

Recommendation 19. The Federal Government should pass legislation to implement UNDRIP in Australia. Legislation implementing UNDRIP must:

(a) Enshrine the right of Aboriginal and Torres Strait Islander peoples and communities to self-determination, as defined under UNDRIP; and
(b) Establish a clear pathway for implementing UNDRIP in Australia, including through a National Action Plan that is developed with Aboriginal communities and Aboriginal Community Controlled Organisations (**ACCOs**).

Australia has an appalling human rights record on the international stage

Australia has an incredibly poor record of respecting the rights of Aboriginal children, and that record has been repeatedly criticised by the United Nations, UN Treaty Bodies and UN member states. In Australia's last review by the Committee against Torture in 2022, the Committee expressed serious concern about the minimum age of criminal responsibility being set at ten and about children in detention being frequently subjected to verbal abuse, racist remarks and solitary confinement. It recommended that Australia raise the minimum age of criminal responsibility according to international standards, prohibit the use of physical restraints to discipline children

[102] UN Declaration on the Rights of Indigenous Peoples Articles 3, 7 and 21.
[103] Productivity Commission 2024, *Review of the National Agreement on Closing the Gap*, Study report, volume 1,

under supervision, and immediately end the practice of solitary confinement for children across all jurisdictions.[104]

Similarly in Australia's last Universal Periodic Review in 2021, Australia's lagging youth justice system and low age of criminal responsibility was a strong focus for scrutiny, with over 30 countries recommending that Australia raise its age of criminal responsibility and 19 countries calling specifically for a minimum age of at least 14 years old. In the same review, Australia's treatment of Aboriginal people was repeatedly chastised, with Azerbaijan recognising that "racism towards Indigenous people is deep rooted," Belarus raised concerns that Australia is "dodging its obligations to Indigenous people," El Salvador urged Australia to "step up your action to promote the Human Rights of Indigenous people." [105]

The Federal government has power to make laws around youth justice

VALS considers that, as it is the Federal government that negotiates and ratifies international standards concerning the treatment of young people who come into contact with the criminal legal system, it is also the Federal government who is answerable on matters of compliance.[106] Nation states such as Australia have a duty to bring its internal legal and political system into conformity with obligations under international law.[107]

The *Bringing them Home* Report first recommended National Minimum Standards grounded in international law for the treatment of Aboriginal children as far back as 1997.[108] The report considered that the Federal's responsibility for the rights of Aboriginal children flows from Australia's adoption of international human rights treaties, and that in turn expanded the Federal government's legislative power. Arguably the Federal government has constitutional power to legislate to protect Aboriginal children's well-being relying on its powers to legislate with respect to external affairs and for the people of any race.[109]

It is meaningless for the Federal government to sign on to treaties and not make them enforceable domestically. Legislation is one mechanism that should be used by the Federal government, but so is its budget. The existing Federal government has prioritised meaningless surpluses over using its financial power to implement greater levels of human rights and protections for its people.

The Inquiry should consider the basis upon which Australia could make national minimum standards in the form of legislation to ensure compliance with international obligations. The Federal can rely on the external affairs power to enact domestic legislation which gives effect to obligations imposed

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[104]United Nations, 'UN Committee against Torture publishes findings on Australia, Chad, El Salvador, Malawi, Nicaragua, Somalia and Uganda' 25 November 2022.
[105] NATSILS, Joint Media Release 'United Nations slams Australia's treatment of First Nations people and calls on Australia to Raise the Age in Universal Periodic Review' 20 January 2021.
[106] Neva Collings and Rhonda Jacobsen, 'Reconciliation with Australia's Young Indigenous People' (1999) 22(2) *UNSW Law Journal* 647, 651.
[107] Ibid.
[108] Neva Collings and Rhonda Jacobsen, 'Reconciliation with Australia's Young Indigenous People' (1999) 22(2) *UNSW Law Journal* 647, 650
[109] Ibid.

by international treaties to which Australia is a party.[110] While the external affairs power (section 51(xxix) of the Constitution) contains the strongest basis for the Federal to legislate across all jurisdictions around youth justice, the benefits power (section 51(xxiiiA) of the Constitution) and the territories power (section 122 of the Constitution) could be considered as alternative avenues for the Federal government to enact legislation regarding youth justice.

The content of National Minimum Standards

National Minimum Standards must be consistant with international best-practice and not with any current domestic practice. They must include arrest being a measure of last resort; raising the age of criminal responsibility to 14 years without exceptions and age of detention to 16 years; ensure children have access to culturally appropriate education, diversion and early intervention pathways; ban solitary confinement and isolation practices; ban routine strip-searching; outlaw the use of spit hoods; and ensure access to culturally safe and prompt healthcare in prison.

Discussions between state and territory governments should not be permitted to negotiate low standards that are not consistant with international benchmarks. ACCOs should be properly consulted about the content of National Minimum Standards before we support them.

National minimum standards must raise the conditions of children in the justice system in all jurisdictions in line with human rights standards.

Are National Minimum Standards enforceable?

This inquiry should also consider how, or whether it is even practically possible, to have effective mechanisms to enforce Federal laws around youth justice by state and territory government agencies. The fact remains that state and territory government agencies routinely breach their own minimum standards, child rights frameworks and youth justice legislation with impunity and very low levels of accountability

VALS are wary of throwing our support behind yet another set of standards that may not be practically enforceable, which state and territory governments may not agree to, and which government agencies may ignore as much they currently disregard their own legislated standards for youth justice. This inquiry should consider how, or whether it is even practically possible, to have effective mechanisms to enforce Federal laws around youth justice by state and territory government agencies.

Should the Federal government make enforceable National Minimum Standards?

VALS holds serious concerns that the implementation of national minimum standards for youth justice, even if enforceable, would not be sufficient to overcome the lack of political will for evidence-based youth justice reform.

This Inquiry should consider the lack of movement at a national level on the issue of raising the age, where the national Raise the Age Working Group reporting to the Standing Council of Attorneys-

[110] George Williams and Amelia Simpson, 'The Expanding Frontiers of Federal Intervention in Industrial Relations' (1997) 10 *Australian Journal of Labour Law* 222, 223.

General (**SCAG**) worked over a period of 3 years to attempt to make a recommendation to raise the age of criminal responsibility. Despite protracted and lengthy advocacy from Aboriginal communities and organisations, SCAG refrained from even making a recommendation to raise the age, citing difficulties achieving buy-in and brokering agreement between state and territory governments. Significantly, the Federal government has refrained from raising the age of criminal responsibility at the national level in Federal legislation.

VALS asks the Inquiry to consider that if state and territory governments cannot agree to comply with one international standard around youth justice, what is going to motivate them to comply with a whole set of standards?

RECOMMENDATION

Recommendation 20. National Minimum Standards around youth justice should be consistant with international best-practice and not with any current domestic practice, including the *UNCRC*, *CAT*, *OPCAT* and *UNDRIP*.

Recommendation 21. National Minimum Standards should improve the standards of all jurisdictions and not allow scope for the reduction of standards in any state or territory.

Recommendation 22. At a minimum, National Minimum Standards around youth justice must include

(a) arrest being a measure of last resort for children;
(b) raising the minimum age of criminal responsibility to 14 years without exceptions;
(c) raising the minium age of detention to 16 years;
(d) children having access to culturally appropriate education, diversion and early intervention pathways;
(e) Prohibiting torture and cruel and degrading treatment agianst childten in prison, including solitary confinement and isolation practices; routine strip-searching; and the use of spit hoods;
(f) access to culturally safe and prompt healthcare in prison, including MBS and PBS access.

Recommendation 23. The Inquiry should recommend a firm basis upon which the Federal government could make National Minimum Standards in the form of legislation to ensure compliance with international obligations.

Recommendation 24. The Inquiry should consider effective mechanisms to enforce Federal laws around youth justice by state and territory government agencies to hold them accountable to National Minimum Standards.

PART E: National Minimum Standards for youth justice – practical or viable?

Government inaction in reducing the over-representation of Aboriginal children in detention

The dangers to and harms caused by police, criminal legal systems, police cells, prison cells and prison guards to the lives and wellbeing of Aboriginal children and communities have been well-known in public and political discourse since the *Royal Commission Into Aboriginal Deaths in Custody* (**RCIADIC**) in 1991. Due to the sustained advocacy of Aboriginal communities fighting for justice and action, there have been whole-of-government and bipartisan frameworks in place for decades. The Closing the Gap Agreement of 2007 and the new National Agreement on Closing the Gap from 2021 requires all governments to work in partnership with Aboriginal communities to reduce the rate of Aboriginal and Torres Strait Islander young people in detention by at least 30 per cent. In Victoria, following staunch advocacy by Aboriginal communities, the Aboriginal Justice Agreement (**AJA**) was developed in 2000 following reccomendations from the RCIADIC. It is is now in its fourth phase - *Burra Lotjpa Dunguludja*. The Aboriginal Justice Caucus, consisting of respected Aboriginal people and elders, fiercely lobbied the Victorian government to enact the first Aboriginal Youth Justice Strategy in Victoria – *Wirkara Kulpa*. This sits under the AJA and requires the Victorian government to take action to divert Aboriginal young people away from the criminal legal system and address over-representation as a key priority[111].

Despite these frameworks and intitiatives, data still indicates that all governments, including the Federal and Victorian Governments, are either contradicting commitments it has made, acting against evidence-based policy, failing to meet targets or is inadequately funding Aboriginal led early intervention and diversion services.[112]

One of the key reasons for this is the ongoing denial of Aboriginal self-determination, addressed above. Additionally, we draw the Inquiry's attention to these barriers to political will and government appetite for evidence-based youth justice reform, which we discuss in further detail below:

- "Tough on crime" narratives
- Influence of Police services and Police Unions
- Excuses about a lack of funding
- Lack of accountability and oversight for implementing recommendations.

A recent example of how these issues interact, directly relevant to this inquiry, is the Raising the age working group. We ask the Inquiry to consider whether the implementation of national minimum standards for youth justice, if enforceable, would be enough to overcome these barriers.

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[111] *Wirkara Kulpa - Aboriginal Youth Justice Strategy 2022-2032*

[112] See Productivity Commission 2024, *Review of the National Agreement on Closing the Gap*, Study report, volume 1, Canberra, 3.

Government kow-towing to harmful 'law and order' narratives

The narrative surrounding the criminal legal system too often centres on punishment, deterrence, "community safety" and the false dichotomy of victim vs "offender." The "law and order" scare campaigns, especially in the lead up to political points of interest such as elections and key legislation passing, is driven deliberately by the harmful rhetoric of politicians and the media. When Aboriginal people are the focus of public discourse, it is often framed around deficits, which leads to negative public perceptions of Aboriginal people.[113]

Politicians love to talk about "community safety"; but they regularly fail to acknowledge that the best way to strengthen our communities is through healing and support.

The reality is that many people who get caught up in the criminal justice system are victims themselves, many have direct experience of trauma, and many have slipped through the holes in our society's safety net. Research shows that punishment and deterrence, including through incarceration, does not work; it only serves to reinforce past trauma and entrench cycles of marginalisation and criminalisation.

Recent reports of a moral panic about a 'youth crime crisis' coincided with the passage of the *Youth Justice Act 2024* in August 2024. In response to alarmist and racist media reporting, the Victorian Government disgracefully backtracked on commitments to raise the age of criminal responsibility from 10 to 14 years, expanded the use of isolation in youth detention facilities, maintained reverse onus provisions in bail applications for children contrary to international human rights law, and expanded the community surveillance of children through novel deployment of electronic monitoring.[114] This is all in the face of longitudinal research indicating that youth crime has steadily decreased over the past decade in Victoria.[115]

The 'penal populist' and 'tough on crime' narratives have long been used by racist media outlets and politicians to play political football with the lives of Aboriginal children and families to win votes and score political points. Media reporting does real harm to Aboriginal people and communities. In some case, outlets are so reckless and indifferent in their pursuit of sensationalist crime stories, courts have found them liable for traumatising their own journalists.[116] Media outlets that perpetrate this harm must be held accountable and they must be liable for that harm in certain circumstances.

This inquiry must consider the effect of, and debunk, these false narratives by listening to and amplifying the voices of Aboriginal leaders and communities.

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[113] *Passing the Message Stick: A guide to changing the story on self-determination and justice*, p. 49.
[114] See Victorian Aboriginal Community Controlled Health Organisation, 'VACCHO Outraged by Governments Potential Backflip on Raising the Age of Criminal Responsibility', (Media Release August 12, 2024) and Victorian Aboriginal Legal Service, 'Victorian Government Betrays Aboriginal Children', (Media Release, March 20, 2024)
[115] See Youth Law, 'The Facts: Youth Crime' (Webpage) and Crime Statistics Agency, 'Alleged Offender Incidents'..
[116] M. Ricketson and A. Wake, "Should news orgs be legally liable for the traumatic situations they put reporters in? A landmark court decision in Australia says yes," (8 March 2019).

RECOMMENDATIONS

Recommendation 25. Political parties and the media must stop manipulating "community safety" and "public safety" through law-and-order politics. Community safety and public safety must be determined by communities, and legal and policy responses to support safe and thriving communities must be informed by these definitions.

Recommendation 26. Media organisations should have greater civil liability for the impacts of their reporting, including in relation to:

(a) Harm and distress caused to individuals or peoples by reporting that could be reasonably considered to be racist.
(b) Inaccurate reporting on crime issues when it can be proven that such errors are systemic. and
(c) The mental health of journalists who report on crime.

Influence of Police services and Police Unions

Toxic tough-on-crime politics, played by both major parties and some minor parties, has created a situation where Victoria Police and The Police Association of Victoria (**TPAV**) wield an enormous amount of power over the Victorian Government and the Victorian Parliament.[117] Their opposition to independent and more robust police oversight, as well as other key reforms, has had a significant impact on the lack of acceptance and non-implementation of recommendations over many decades. This unprecedented level of influence, wielded to block progressive youth justice reform and police oversight, can also be seen in other states and territories.

The influence of the TPAV is evident from its history of undermining and blocking independent police oversight mechanisms. In 1976, the Beach Inquiry was expected to make adverse findings against 55 police officers and recommend "beyond doubt the undesirability of police investigating complaints against police."[118] The Association held a 4,200 person mass meeting and started work-to-rule action, before any findings of the report had been published. The Victorian government agreed that any reform to police oversight would result from a conference of the government, Police Association and police command – not be made on the recommendation of the Inquiry.[119]

Since that time, the TPAV has continued to dedicate major efforts to preventing any strengthening of the disciplinary or complaints investigation systems. When the Police Complaints Authority was established in 1986, it was fiercely criticised by the Association[120] and abolished in 1988. The TPAV has

[117] VALS, "Victoria's tough-on-crime politics has stolen billions of dollars from communities," (2 September 2022).
[118] Office of Police Integrity (2007), *Past Patterns – Future Directions: Victoria Police and the problem of corruption and serious misconduct*, p. 49.
[119] Ibid.
[120] Ibid., pp. 105-106.

also supported the abolition of the Office of Police Integrity,[121] and opposed any expansion of IBAC's police oversight function.[122]

Information revealed by *The Age* in May 2021 also indicates that Victoria Police and the TPAV may have been a key blocker for bail reform in Victoria. According to 2019-20 "confidential high-level government documents" obtained by *The Age*, most government departments supported bail reform to prevent the ongoing increase in the remand population, but the Secretary of the TPAV opposes any winding back of the bail laws.[123]

In 2022 and 2023, TPAV were openly opposing raising the age of criminal responsibility, arguing in media outlets for the provision of even more powers for police to arrest, search and detain young children under the age of criminal responsibility. VALS holds concerns about the role and influence of Victoria Police and the TPAV in relation to the recent backflips by the Victorian government on their commitment to improving bail laws for young people and raising the age of criminal responsibility to 14 by 2027.

Funding Excuses

Lack of funding is often put forward by the government as a reason for not implementing critical reforms that will prevent Aboriginal children from coming into contact with the criminal legal system or support them to get out of it. The ongoing failure to adequately fund ACCOs is but one example.[124]

In reality, a lack of money is just an excuse. Instead of investing in ACCOs and services that will divert children from the criminal legal system, the government prefers to, and chooses to, invest in police and prisons.

The investment disparity in carceral youth criminal legal policies compared to early intervention and therapeutic services is evidence of the orchestrated nature of this overrepresentation. The Victorian government has invested $419 million in the Cherry Creek Youth Justice Precinct (Cherry Creek) facility.[125] Victoria's expediture on youth criminal legal detention services totalled more than $233 million between 2022-2023. The value of capital assets held for the provision of youth criminal legal detention services is a staggering $740 million.[126] In addition, the Victorian government has recently allocated $34.4 million to establish a two-year trial of electronic monitoring and 'enhanced' bail

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[121] K. Moor, 'Don't point finger at us, says Police Association boss Greg Davies' (6 January 2010).
[122] The Police Association Victoria, *Submission to the IBAC Committee Inquiry into the external oversight and investigation of police corruption and misconduct* (2017).
[123] R. Millar, C. Vedelago & T. Mills, "Keep tough bail laws, says police union, as Greens try to wind them back," (17 May 2021).
[124] VALS Media Release, "Daniel Andrews and Jaclyn Symes have put the Governments legacy on Aboriginal justice at risk," (24 May 2021); VALS Media Release, "The Andrews Government fails to invest in essential Aboriginal legal services again," (3 May 2022).
[125] Community Safety Building Authority, Victorian Government, 'Cherry Creek Youth Justice Centre: Kangaroo Drive, Cherry Creek', Our Projects See also Department of Justice and Community Safety, Victorian Government, 'Cherry Creek', Youth Justice Precincts
[126] *Source: Steering Committee for the Review of Government Service Provision, Report on Government Services 2024*, Justice Data Tables.

supervision targetting a cohort of especially vulnerable young people caught within the state's carceral landscape.[127]

By way of contrast to the enormous amount spent and capital held pertaining to youth detention facilities, the Victorian government committed $5.95m over three years from the 2021-22 Budget to "support early intervention family services to keep Aboriginal children aged 14 years and under out of the criminal justice system" and $11.14m over two years from the 2022-23 Budget to support diversion initiatives including Aboriginal Youth Justice Hubs. [128]

In September 2022, the Victorian Auditor-Generals Office published a report that found that Victoria Police received $2 billion for new staff, without any proof that the funding was needed and without any evidence that the expenditure has delivered results.[129] Forcing ACCOs to provide excessive documentation and beg for every dollar, when Victoria Police are given $2 billion without an adequate business case, is direct evidence of systemic racism. The system is designed to put more barriers in front of Aboriginal organisations - rigging the process.

This funding and resource allocation disparity was highlighted in the *Yoorook For Justice Report* where it was stated:

> *Victorian Government funding priorities continue to frustrate First Peoples. Despite knowing the imperative to keep First Peoples out of the criminal justice system, government spending has consistently prioritised policing and imprisonment. Billions have been spent on building and operating new adult and youth prisons.*
>
> *It is indefensible that government is willing to invest on this scale in prisons and police when there is a desperate need for greater investment in early intervention programs and services and therapeutic and diversionary programs. That investment will help end systemic injustice faced by First Peoples in the criminal justice system, not more prisons and police*.[130]

It is time for governments to facilitate sustainable, long-term funding for all Aboriginal organisations, to ensure that Aboriginal people can access culturally safe services and that Aboriginal organisations are sufficiently resourced to represent the interests, both individual and collective, of Aboriginal peoples in Victoria.

RECOMMENDATIONS

Recommendation 27. Both the Victorian and Federal governments should be required to report annually on the percentage of government funding going to Aboriginal specific investments. Reporting should be broken down into funding that goes to government departments and agencies,

[127] Public Accounts and Estimates Committee, 'Inquiry into the 2024-25 Budget Estimates'
[128] First Peoples – State Relations, 'Justice and Safety' Wirkara Kulpa Aboriginal Youth Justice Strategy
[129] Victorian Auditor General's Officer (VAGO), *The Effectiveness of Victoria Police's Staff Allocation* (2022).
[130] Yoorrook Justice Commission, Yoorrook for Justice: Report into Victoria's Child Protection and Criminal Justice Systems (2023) , p238.

funding that goes to mainstream services, and funding that goes to Aboriginal organisations and individuals.

Lack of Accountability and Oversight for Implementing Recommendations

There has been a long history of inaction by successive governments and institutional failure despite long-standing evidence and fierce advocacy by Aboriginal communities. Criminal legal systems and corrections systems have been the subject of Royal Commissions and inquiries at both federal and state levels, including the CCYP's Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system (2017), the ALRC Pathways to Justice report (2017), the Inquiry into Youth Justice Centres in Victoria (2018), the Inquiry into Victoria's Criminal Legal System (2021), the Senate Inquiry into the Implementation of UNDRIP in Australia, the Royal Commission into the Detention and Protection of Children in the NT (2015), the Yoorrook Justice Commission (2022-ongoing), and the Children's Commissioner *''Help way earlier!' How Australia can transform child justice to improve safety and wellbeing*' report (2024).

These inquires have put forward hundreds of recommendations, many of which recommend urgent compliance with international obligations around youth justice and child rights, that remain woefully unimplemented. VALS asks this Inquiry to consider this deliberate government inaction and lack of political will - despite established bodies of evidence, governments' own commitments to self-determination and continued advocacy from our communities – as an insidious and racist driver of the over-representation of Aboriginal children in detention and a barrier to urgently needed evidence-based reform.

Lack of oversight was identified by the 2005 Implementation Review of RCIADIC recommendations in Victoria, which recommended the creation of an Aboriginal Social Justice Commissioner (**ASJC**).[131] The Review proposed an independent Commissioner, with "appropriate powers" support by "an adequately resourced Monitoring Unit."[132]

For the past 17 years, the Aboriginal Justice Caucus (**AJC**) and its members have advocated for the creation of an ASJC to provide oversight for Aboriginal justice in Victoria.[133] According to the AJC, the Victorian ASJC should:

- Monitor implementation of the RCIADIC recommendations;
- Improve justice services and outcomes for the Aboriginal community;
- Respond to justice services and outcomes for the Aboriginal community;

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[131] Victorian Government, *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody: Review Report*, (2005), Recommendation 154: "That the Victorian Government appoint an independent Commissioner for Aboriginal Social Justice charged with reporting annually to both the Government and Indigenous people on the implementation of the criminal justice and more general Recommendations of the Royal Commission into Aboriginal Deaths in Custody," pp. 703-704.
[132] Ibid.
[133] VALS Media Release, "It is time for a Victorian Aboriginal and Torres Strait Islander Social Justice Commissioner" (26 March 2021).

- Assess the potential impacts of existing and new justice legislation for Aboriginal people;
- Conduct systemic discrimination investigations and independent reviews to further equality and strengthen human rights protections for Aboriginal people;
- Prevent and address discrimination, unconscious bias, vilification toward Aboriginal people through education and engagement with communities, employers, government and the Victorian public;
- Advocate for greater respect for Aboriginal rights and equality; and
- Support Aboriginal people and communities when things go wrong, or human rights are at risk by helping to resolve discrimination complaints and intervening in court cases.[134]

At the national level, we consider that the national Aboriginal and Social Justice Commissioner can be properly resourced and given appropriate powers to fulfill this essential monitoring function.

The existing oversight and accountability mechanisms for implementing recommendations are not working. We ask the Inquiry to consider whether the introduction of national minimum standards for youth justice will simply introduce yet another set of laws that states do not comply with. The Inquiry must consider and provide us with detailed proposals to ensure governments are held accountable for their non-compliance and continued inaction, before we agree to the introduction of National Minimum Standards. We must break the cycle of non-implementation of recommendations, with no accountability.

RECOMMENDATIONS

Recommendation 28. In partnership with the Aboriginal Justice Caucus (**AJC**), the Victorian Government should establish an independent, statutory office of the Aboriginal Social Justice Commissioner (**ASJC**), to provide oversight for Aboriginal justice in Victoria, including implementation of coronial recommendations and recommendations from the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**) and associated inquiries. This office should be properly funded, with appropriate powers (including powers to give it "teeth" and conduct own motion inquiries), and report directly to the Parliament.

Recommendation 29. The Federal government should enable the National Aboriginal Social Justice Commissioner to provide oversight for Aboriginal justice at a national level, including implementation of coronial recommendations and recommendations from the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**) and associated inquiries. They should be properly funded, with appropriate powers (including powers to give it "teeth" and conduct own motion inquiries), and report directly to the Parliament.

[134] Aboriginal Justice Caucus (AJC), *Submission on the Legislative Council Legal and Social Issues Committee Inquiry into Victoria's Justice System* (2021), p. 12.

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

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Note on Language

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

This paper uses gendered language to refer to affected family members of family violence, as VALS recognises that family violence is a gendered phenomenon, most frequently and severely suffered by women. We recognise that family and domestic violence also takes a severe toll on trans and non-binary people, men and women in same-sex relationships, and in some cases is perpetrated by women against men. Aboriginal people of all genders are severely affected by family and sexual abuse and by the criminal legal system's response to it. This paper also chooses to use the language of affected family member and person using violence as the binary nature of victim/perpetrator doesn't reflect the complexity that so often arises with family violence incidents and can lead to misidentification.