



Victorian Aboriginal Legal Service Submission to the
Special Rapporteur on the Independence of Judges and
Lawyers – Thematic Report on Indigenous Justice

December 2024



Introduction

The Victorian Aboriginal Legal Service (VALS) welcomes the opportunity to provide this submission for the next thematic report on Indigenous justice. VALS has been at the forefront for the fight for Aboriginal justice in what is now called the state of Victoria since 1972. We have first-hand and expert knowledge on the failures of the Australian and Victorian legal systems to recognise Indigenous justice systems in the state. This has amounted to a denial of Aboriginal peoples' inherent right to self-determination.

Feedback and Recommendations for the next Thematic Report on Indigenous Justice

State Recognition of Indigenous Justice Mechanisms in Australia

Australian law is the product of the European invasion of this continent. Systemic racism, violence, the lie of *terra nullius*, injustice and the denial of Aboriginal peoples' inherent right to self-determination are at the heart of the Australian colonial legal system. Aboriginal understandings of law and justice are denied by the Australian legal system. Injustice is at its most acute in the criminal legal system. The criminal legal system operates to produce discriminatory outcomes for Aboriginal peoples in Victoria at each stage of the system.

Australia likes to present itself as a human rights leader.¹ It is a state party to the seven major human rights treaties.² Australia has also endorsed the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). Victoria has enacted the *Charter of Human Rights and Responsibilities Act 2006* (Vic) which incorporates international human rights into state law including the unique cultural rights of Aboriginal people.

Yet, Australian and Victorian law is often actively hostile to Aboriginal peoples' rights. Australia is one of the only western liberal democracies to have no Treaty or constitutional recognition of Indigenous peoples. The High Court of Australia has repeatedly refused to recognise Aboriginal peoples' inherent sovereignty³, governments have refused to legislate for the UNDRIP⁴ and the Australian Constitution does not contain a Bill of Rights. There is no federal human rights Act. The Victorian *Charter* fails to recognise Aboriginal peoples' right to self-determination, or economic and social rights and its protection of rights is weak and lacks enforceability.⁵

¹ Australian Government, *Australia's Commitment to Human Rights* (Webpage, 2024).

² See <https://www.humanrights.vic.gov.au/legal-and-policy/australias-human-rights-framework/>.

³ See *Coe v Commonwealth* (1979) 24 ALR 118; *Coe v Commonwealth (No 2)* (1993) 68 ALJR 110; *Walker v Commonwealth* (1994) 182 CLR 45; *Love v Commonwealth* [2020] HCA 3.

⁴ *Parliament of Australia - Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, Inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (November 2023).

⁵ Bruce Chen, 'The Quiet Demise of Declarations of Inconsistency under the Victorian Charter' (2021) 44(3) *Melbourne University Law Review*.



RECOMMENDATIONS

Recommendation 1. The Australian and Victorian parliaments should pass legislation incorporating UNDRIP into Australian law.

Recommendation 2. The Victorian Parliament should amend the *Charter of Human Rights and Responsibilities Act 2006* (Vic) to recognise Aboriginal peoples' right to self-determination.

In Victoria, the colonial legal system incorporates Indigenous justice systems to a very limited degree through the Koori Court which is a sentencing court which sits as a division of the Magistrates' Court and County Court. Participants must be Aboriginal and must plead guilty to offences that come within the jurisdiction of the Koori Court. Elders and Respected Persons sit on the court and assist the Magistrate or Judge to create more culturally appropriate sentencing orders for participants.⁶ This is through a sentencing conversation between the participant, Elders and the Magistrate or Judge. The sentencing conversation enables participants to have their say, to listen to cultural advice and enable the Aboriginal community to discuss the participant's behaviour. The Koori Court has had a positive impact on providing a culturally safe and accessible process for Aboriginal people.⁷

However, the Koori Court has significant limitations. These include:

- the Koori Court legislation does not specifically address the role or power of Elders;
- the Koori Court cannot hear bail applications;
- the Koori Court has limited jurisdiction to hear family violence matters;
- the Koori Court has no jurisdiction to hear serious or sexual offending; and
- the Koori Court cannot create unique sentencing orders for Aboriginal people.


Due to these and other limitations, the Koori Court does not act as an autonomous Indigenous justice system. The Koori Court sits as a *division* of the mainstream legal system. The mainstream legal system still has ultimate authority to hear appeals on a sentence or on points of law from the Koori Court. The *Charter* rights apply with equal force to the Koori Court as to all other courts. There is no reference to the right to self-determination or the UNDRIP in the Koori Court legislation or its practice directives.

A just legal system needs to place power in the hands of Aboriginal people to tell their story. This is critical to resisting racist stereotypes that contribute to the overrepresentation of Aboriginal people in prison.⁸ VALS has initiated Aboriginal Community Justice Reports (ACJR) to enable Aboriginal people to tell their story in the sentencing process. ACJRs aim to provide a holistic account of an individual's circumstances, including their aspirations, interests, strengths, connections, culture, and supports, as well as the adverse impact of colonial and carceral systems on their life. ACJRs are for Aboriginal people in the County Koori Court and some mainstream County Court cases. However, there are

⁶ *Re Firebrace* [2023] VSC 137 [116]-[117].

⁷ [Legislative Council of Victoria, *Inquiry into Victoria's criminal justice system* \(2022\)](#), Vol 2, p 483.

⁸ See <https://theconversation.com/the-role-of-re-storying-in-addressing-over-incarceration-of-aboriginal-and-torres-strait-islander-peoples-163577>.



funding and geographical limitations, and ACJRs are unavailable in the Magistrates Court or for more serious matters in the Supreme Court.

RECOMMENDATIONS

Recommendation 3. The Victorian Government should expand the jurisdiction, operation and capacity of Koori Court to form part of an autonomous Indigenous justice system for bail, trial and sentence.

Recommendation 4. The Victorian Government should expand funding for ACJRs for all Aboriginal people in contact with the criminal legal system.

The Injustices of the Mainstream Criminal Legal System

The colonial legal system has perpetuated profound injustices upon Aboriginal peoples. These injustices manifest in a myriad of ways, including through the overrepresentation of Aboriginal peoples in the prison population, and in the failure of the state to protect Aboriginal peoples' cultural and health rights when incarcerated. A more detailed analysis of both historical and contemporary injustices experienced by our peoples is contained in Annexure A.

In Victoria, there is a gross overrepresentation of Aboriginal people in pre-trial detention and in prisons compared to the non-Aboriginal population. Aboriginal people make up 1% of the adult population of Victoria but make up 12.6% of the adult prison population.⁹ This injustice is compounded for the pre-trial detention population with Aboriginal people making up 15.7% of Victoria's remand population.¹⁰ 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-Aboriginal children. Aboriginal children are 11 times more likely than non-Aboriginal children to be under youth criminal legal supervision.¹¹

Detention is incredibly dangerous for Aboriginal people. Ending Aboriginal deaths in custody has been a longstanding issue for our people. The Australian state has been on notice of the dangerousness of custody since the 1991 *Royal Commission into Aboriginal Deaths in Custody*. This is connected to the lack of culturally adequate healthcare. Health from an Aboriginal perspective is holistic. It is not just about physical health but includes mental, social, emotional and cultural wellbeing. Yet, in Victoria, Government commitments to Aboriginal peoples' self-determination, consultation and evidence-based health policy "end at the prison gates."¹²

The prison health care system is not Aboriginal designed or led and the state has been unable to understand Aboriginal health from our perspective.¹³ Health services provided to Aboriginal people in


⁹ Australian Bureau of Statistic, Prisoners in Australia 2023, Table 30 Indigenous status, sex and legal status by state/territory.

¹⁰ Ibid.

¹¹ 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.

¹² *Victorian Ombudsman, Investigation into healthcare provision for Aboriginal people in Victorian prisons (2024)* pp 17-22.

¹³ Ibid.



prison have been privatised and are provided by sub-contracted, private health care providers rather than directly engaged and contracted Aboriginal Community Controlled Health Organisations.¹⁴ Privatising prison health care attacks Aboriginal peoples' rights to culture and self-determination. We direct the Special Rapporteur to Annexure B which contains VALS Submission to Victorian Ombudsman - Investigation into Prison Healthcare August 2023 including case studies.

RECOMMENDATIONS

Recommendation 5. The Victorian Government should end the privatisation of health services for Aboriginal people in prison.

Recommendation 6. The Victorian Government should directly engage with Aboriginal Community Controlled Health Organisations to provide Aboriginal health services for Aboriginal people in detention.

The failures of Victorian bail and sentencing law makes it more likely that an Aboriginal person will be incarcerated. Victoria's harsh bail laws frequently impose reverse-onus obligations on people seeking bail. These bail laws have been found to be disastrous for Aboriginal people, are discriminatory, breach international human rights standards and have resulted in deaths in custody,¹⁵ notwithstanding recent successful reforms.¹⁶

Victorian sentencing law is deficits-based and requires Aboriginal people to provide evidence of deprivation and applies equally to Aboriginal and non-Aboriginal people.¹⁷ Automatic recognition of historical and contemporary injustices faced by Aboriginal people is not a part of Australian law.¹⁸

There are limited alternatives to imprisonment in Victoria for Aboriginal people. Although the formal criminal law in Victoria provides that imprisonment is to be the sanction of last resort,¹⁹ without substantive equality for Aboriginal people, this has not resulted in a reduction in the overrepresentation of Aboriginal people in the state's prison system. There is only one facility in the state which provides an alternative to imprisonment for Aboriginal - Wulunggo Ngalu Learning Place. It has an excellent record of addressing recidivism but is limited in the participants it can service and has capacity for only 20 men.²⁰

Sentencing courts may consider a stay at a residential rehabilitation centre as a form of 'quasi-custody' to reduce a person's sentence.²¹ There are several residential rehabilitation centres that cater exclusively to Aboriginal people, but limited spaces available, waiting lists can be lengthy, and many

¹⁴ Ibid.

¹⁵ [Coroner McGregor, Coroners Court of Victoria, Inquest into the Passing of Veronica Nelson](#) (30 January 2023).

¹⁶ See [Successful bail reforms prove more can be done – Victorian Aboriginal Legal Service](#).


¹⁷ *Bugmy v The Queen* [2013] HCA 27.

¹⁸ See *R v Gladue* [1999] 1 SCR 688 and *R v Ipeelee* [2012] 1 SCR 433.

¹⁹ *Sentencing Act 1991* (Vic) ss 5(3)–(4C).

²⁰ See https://files.corrections.vic.gov.au/2021-06/wulunggodl2015_acc.pdf.

²¹ *Akoka v The Queen* [2017] VSCA 214.



potential participants are excluded due to the nature of their offending or due to their medication regimen.²² Government funding is inadequate and inconsistent.

RECOMMENDATIONS

Recommendation 7. The Victorian Government should expand funding for creation and extension of therapeutic facilities that operate as an alternative to imprisonment for Aboriginal people.

Rules and Frameworks Governing the Relationship between Ordinary and Indigenous Justice Systems

Australian federal and state governments have expressed a commitment to Aboriginal self-determination for justice matters at a policy and service delivery level. In Victoria, this has given rise to *Wirkara Kulpa*, the State's Aboriginal Youth Justice strategy, and the Aboriginal Justice Agreement which is now in its fourth iteration - *Burra Lotjpa Dunguludja*.²³ The Aboriginal Justice Caucus (AJC) and the Aboriginal Justice Forum (AJF) are the primary governance forums that oversee the implementation and adherence to the [Aboriginal Justice Agreement](#) and advocates for reform.

The AJC and AJF are critical features of Aboriginal self-determination in Victoria's criminal legal system. However, there are significant limitations around decision-making authority and enforcement mechanisms for both. There is no legislative or executive requirement to enforce the commitments made under the AJA. There is no legal requirement for the state to consult with the AJC or to be bound by any decisions made at the AJC. A recent example of the consequences of this weak enforcement power came when the Victorian Government backtracked on a commitment to raise the age of criminal responsibility, contrary to international human rights law.²⁴ These limitations are ultimately due to the Australian legal system's fundamental denial of Aboriginal peoples' right to self-determination.

The Contributions of Indigenous Justice Systems

The work of Aboriginal Legal Services is essential to ensuring that our people have access to culturally safe legal and community justice services. Access to these services is a key measure to enliven the rights expressed by UNDRIP and essential to overcoming the generational impacts of colonisation.

In addition to direct practice and advocacy on behalf of clients, VALS is also heavily engaged in policy and systems reform at the federal and state level. Given the word constraints, it is not possible for us to provide an exhaustive list of the system changes initiatives that have been driven by VALS and

²² Examples of residential rehabilitation centres include Galiamble Men's Recovery Centre, Winja Ulupna Women's Recovery Centre, Yitjawudik Men's Recovery Centre and the youth focused Bunjilwarra Residential Rehabilitation.

²³ See <https://www.aboriginaljustice.vic.gov.au/the-agreement> and <https://www.aboriginaljustice.vic.gov.au/Aboriginal-youth-justice-strategy> and <https://www.aboriginaljustice.vic.gov.au/the-agreement>. At a federal level, the [National Agreement on Closing the Gap](#) is rooted in the concepts of partnership and shared decision-making. See

²⁴ See: <https://www.vals.org.au/the-victorian-governments-treachery-will-continue-the-overincarceration-of-aboriginal-children/>.



Aboriginal Legal Services across the continent to improve justice outcomes for Aboriginal people. In Victoria, for example, the advocacy of the Aboriginal legal sector resulted in changes to the *Youth Justice Act 2024* (Vic) and it now recognises the right to self-determination and structural inequality in sentencing for Aboriginal children. There are also the changes to the *Bail Act 1977* (Vic) which enhance Aboriginal peoples' rights when applying for bail.

The chronic underfunding of our sector to deliver essential service to our communities reflects both the limited recognition of Aboriginal peoples' right to maintain and use our own justice system, as well as the ongoing challenges we face in accessing justice through the mainstream colonial legal system. In 2024, the federal government established an [independent review into the National Legal Assistance Partnership \(NLAP\)](#). The NLAP sets out the funding commitments provided by the government for legal assistance.²⁵ VALS and other legal services engaged in this process in good faith to ensure that we are adequately funded to provide the support our communities expect of us. The review supported many of our recommendations for providing better access to justice for our peoples, including an urgent injection of \$12 million to address the high level of unmet legal need within our communities.²⁶ Yet, the federal government has not committed to implementing the recommendations of the review that they commissioned.

Despite the underfunding of our organisations, VALS and other Aboriginal legal services are strongly committed to our work because we provide holistic, Aboriginal led and designed legal services that are specifically tailored to meet the needs of our peoples and communities. Indeed, because our work is holistic and based on the needs of each individual community member, we regularly provide services that are not funded. We direct the Special Rapporteur to Annexure C, which provides a more detailed discussion of this issue.

RECOMMENDATIONS


Recommendation 8. The federal government should commit to implementing the recommendations of the NLAP review and ensure that Aboriginal Legal Services are funded to provide services to every Aboriginal person who wants to use a culturally safe service.

Concluding Remarks

In conclusion, we wish to highlight for the Special Rapporteur the opportunities that exist for a greater recognition of the rights of Aboriginal peoples by the Australian state. Treaty is the mechanism for redressing the foundational injustices that have occurred through the denial of our right to self-determination; and the negotiation of Treaty provides the strongest opportunity for recognising Aboriginal peoples' justice systems. At the time of writing, Victoria is the only state in which Treaty is

²⁵ Australian Government, [Independent Review of the National Legal Assistance Partnership](#) (2024).

²⁶ Ibid, p. xvi.



still being actively pursued. The *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) is the legislative basis for Treaty, and Aboriginal representatives and the Victorian Government began negotiating the first Statewide Treaty in November 2024.²⁷

The Yoorrook Justice Commission is a truth-telling process which was established by the Victorian Government to investigate historic and contemporary injustices experienced by Aboriginal peoples in Victoria. It called upon the Victorian Government to:

give full effect to the right of First Peoples to self-determination in the Victorian criminal justice system... This includes negotiating through the Treaty process, including through potential interim agreements, the transfer of decision-making power, authority, control and resources in that system to First Peoples.²⁸

At the time of writing, the Victorian Government has yet to full commit to this recommendation, indicating that it is “under consideration.”²⁹ While we understand that the government does not want to pre-empt Treaty negotiations, VALS would like to see a strong signal from the state that is committed to progressing a substantive transfer of power and resources to Aboriginal communities to enable us to develop a legal system that is designed, led and controlled by our communities and founded on Aboriginal Law and Lore, Traditions and Culture. VALS has been funded to develop a Justice through Treaty model, which seeks to develop a self-determined legal system that can end the persecution of our communities and truly deliver safe access to justice for our communities.

RECOMMENDATIONS

Recommendation 9. The Victorian Government should accept the *Yoorrook Justice Commission’s* recommendation to give full effect to the right of Aboriginal peoples to self-determination in the criminal justice system through Treaty.

²⁷ *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic).

²⁸ Yoorrook Justice Commission, *Report into Victoria’s Child Protection and Criminal Justice Systems* (2023), p 26.

²⁹ Victorian Government, *Victorian Government Response to the Yoorrook for Justice Report* (2024), p 13.



BACKGROUND TO THE VICTORIAN ABORIGINAL LEGAL SERVICE

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

Legal Services

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

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

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

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

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

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

Community Justice Programs

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

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



Policy, Research and Advocacy

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

Acknowledgement

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

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

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

Contributors

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

- Gary Hansell, Senior Policy Officer, Justice Treaty
- Janelle Young, Team Leader, Justice Treaty
- Emily Chauvel, Acting Head, Policy, Communications and Strategy Team

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.