Victorian Aboriginal Legal Service Shadow Report to the United Nations Committee Against Torture

(75th Session, 31 Oct 2022 - 25 Nov 2022)

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Table of Contents

Background to the Victorian Aboriginal Legal Service 3

Legal Services 3

Community Justice Programs 4

Policy, Research and Advocacy 4

Acknowledgements 4

EXECUTIVE SUMMARY 5

SUBMISSIONS 6

Key Issues of Concern 6

Introduction 6

Accountability and Oversight of Places of Detention in Victoria 7

The Victorian Charter of Human Rights and Responsibilities Act 2006 and Protection Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment 12

Overincarceration of Aboriginal People 12

Treatment and Conditions in Detention 25

Key Material on the Criminal Legal System and Detention in Victoria 36

OPCAT 36

Aboriginal Deaths in Custody 36

Prisons (General) 36

Prisons (Healthcare) 37

Prisons (Strip Searching) 37

Places of Detention (Solitary Confinement) 37

COVID-19 Responses in Places of Detention 37

Police Oversight and Accountability 37

Bail 37

Decriminalising Public Intoxication 37

Criminal Legal System (General) 38

Mental Healthcare and Disability 38

Anti-Racism and Systemic Racism 38

Aboriginal Self Determination and UNDRIP 38

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Background to the Victorian Aboriginal Legal Service

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

Legal Services

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

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

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

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

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

Community Justice Programs

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

The Community Justice Team also run the following programs:

- Family Violence Client Support Program[1]
- Community Legal Education
- Victoria Police Electronic Referral System (**V-PeR**)[2]
- Regional Client Service Officers
- Baggarrook Women's Transitional Housing program[3]
- Aboriginal Community Justice Reports[4]

Policy, Research and Advocacy

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

Acknowledgements

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

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

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

[3] The Baggarrook Women's Transitional Housing program provides post-release support and culturally safe housing for six Aboriginal women to support their transition back to the community. The program is a partnership between VALS, Aboriginal Housing Victoria and Corrections Victoria.

[4] See https://www.vals.org.au/aboriginal-community-justice-reports/

EXECUTIVE SUMMARY

VALS welcomes the opportunity to submit a Shadow NGO Report to assist in the UN Committee Against Torture's consideration of Australia's State Report during the upcoming 75 Session (31 Oct 2022 - 25 Nov 2022). Areas of focus of this report include factors contributing to the overincarceration of Aboriginal people, treatment and conditions in detention, and accountability and oversight of places of detention in Victoria.

In the final section, we have provided links to VALS submissions, policy briefs and papers, factsheets, webinars and other material, to assist the UN CAT in understanding the criminal legal system and detention context in Victoria. Outlined in these documents are concerns, challenges and opportunities, with regards to preventing the death, torture and ill-treatment of Aboriginal and/or Torres Strait Islander people deprived of their liberty in Victoria (including by way of reducing the overincarceration of Aboriginal people).

SUBMISSIONS

Key Issues of Concern

Introduction

Across Australia, at least 512 Aboriginal and/or Torres Strait Islander people have died in custody since the watershed Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**).[5] In Victoria, and across Australia, the recommendations of RCIADIC have still not been implemented. A key finding of RCIADIC, whose report was handed down more than 30 years ago, was that the number of deaths in custody is due primarily to the extreme and disproportionate rate at which Aboriginal people are imprisoned.

Recommendations from the RCIADIC included changes to prison conditions and procedures, reforms to how police worked, and changes in the law to keep Aboriginal people out of prison. Governments have not done enough to implement these recommendations, and in many cases they have gone backwards. For example, the Victorian Government is only now going through the process of decriminalising public drunkenness – more than 30 years after the RCIADIC's report – and has made it harder to access bail, when the RCIADIC recommended it should be easier. The Commonwealth Government's own review found that only 64% of the RCIADIC's recommendations have been fully recommended[6] – and an independent report by academics found that number is actually much lower.[7] Many recommendations have been implemented then reversed, or implemented on paper without leading to the intended outcomes.

The Victorian Sentencing Advisory Council has reported that "Aboriginal and Torres Strait Islander imprisonment rate almost doubled between 2011 and 2021, from 965.2 to 1903.5 per 100,000 adults. Overall, Victoria's imprisonment rate also grew, albeit to a smaller extent, from 110.2 in 2011 to 138.7 in 2021."[8] Data on the Victorian prisons system can be found on the Corrections Victoria website. It shows the substantial growth in the prison population in Victoria, driven by a rapid increase in the number of people held on remand. Both the scale of the increase in Victoria's imprisonment of Aboriginal people, and the concentration of that growth in the remanded population, are putting more

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[5] Australian Institute of Criminology, Deaths in custody in Australia (June 2022), available at https://www.aic.gov.au/statistics/deaths-custody-australia

[6] Lorena Allam and Calla Wahlquist, Indigenous deaths in custody: key recommendations still not fully implemented (2018), available at https://www.theguardian.com/australia-news/2018/oct/24/indigenous-incarceration-rate-doubles-since-royal-commission-report-finds

[7] T.Anthony et al, 30 years on: Royal Commission into Aboriginal Deaths in Custody recommendations remain unimplemented (2021), available at https://caepr.cass.anu.edu.au/research/publications/30-years-royal-commission-aboriginal-deaths-custody-recommendations-remain

[8] Sentencing Advisory Council, Victoria's Indigenous Imprisonment Rates, available at https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/victorias-indigenous-imprisonment-rates#:~:text=The%20imprisonment%20rate%20for%20Aboriginal,to%20138.7%20in%20June%202021.

and more Aboriginal lives at risk. A recent analysis found that, of the over 470 Aboriginal people who have died in custody since the Royal Commission's report, more than half had not been sentenced.[9]

The Government is committed under the Closing the Gap (**CTG**) Agreement to reducing the incarceration rate of Aboriginal adults by 15%, and of Aboriginal children by 30%, by 2031.[10] Given the increase in imprisonment of Aboriginal people in recent years, Victoria could meet the Closing the Gap target merely by returning to the incarceration rate of 2017.[11] The CTG targets are clearly inadequate, and reverting back to numbers from a few short years ago is much too unambitious a goal. But even such a conservative improvement will not be achieved without major policy change by the Victorian Government. *Burra Lotjpa Dunguludja*, the Aboriginal Justice Agreement Phase 4, set a more ambitious target to fully close the gap by 2031.[12]

Accountability and Oversight of Places of Detention in Victoria

Currently Existing Oversight

In 2019, the Commonwealth Ombudsman stated that, "[i]n Victoria, there is a patchwork of entities that fulfil various inspection, oversight, visiting and complaint-handling roles in places of detention. Several of them possess legislative and organisational characteristics that are consistent with OPCAT articles… However, there is not currently any one entity that fulfils a regular, preventive, independent prison inspection mandate."[13] Since that assessment, there has been no progress.

The Commonwealth Ombudsman listed the following bodies in its report: Commission for Children and Young People (**CCYP**), Independent Broad-based Anti-corruption Commission (I**BAC**), Justice Assurance and Review Office (**JARO**), Mental Health Complaints Commissioner, Office of the Chief Psychiatrist Office of the Public Advocate (**OPA**) and the Victorian Ombudsman.

VALS highlights the following:

- VALS, along with many other community legal centres in Victoria, is of the view that the police complaints-handling function at IBAC is ineffective, and that a new, independent police complaints body needs to be established. You can find further information on our concerns and our recommendations in our policy paper, 'Reforming Police Oversight in Victoria'.

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[9] The Guardian, 9 April 2021, 'The 474 deaths inside: tragic toll of Indigenous deaths in custody revealed'. Accessed at https://www.theguardian.com/australia-news/2021/apr/09/the-474-deaths-inside-rising-number-of-indigenous-deaths-in-custody-revealed.

[10] Coalition of Aboriginal and Torres Strait Islander Peak Organisations and Australian Governments, National Agreement on Closing the Gap (July 2020), pp31-32.

[11] Productivity Commission, *Closing the Gap: Information Repository*, Target 10. Accessed at https://www.pc.gov.au/closing-the-gap-data/dashboard/socioeconomic/outcome-area10.

[12] Aboriginal Justice Agreement, *Burra Lotjpa Dunguludja*, pp30-31. Accessed at https://files.aboriginaljustice.vic.gov.au/2021-02/Victorian%20Aboriginal%20Justice%20Agreement%20Phase%204.pdf.

[13] Commonwealth Ombudsman, Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT): Baseline Assessment of Australia's OPCAT Readiness (2019).

- JARO is not an independent body, and is described as follows by the Department of Justice and Community Safety: "The business unit operates as an internal assurance and review function to advise the Secretary of the Department of Justice and Community Safety… on ways to achieve higher performing, safer and more secure youth justice and adult corrections systems."[14] JARO, part of the Department of Justice, is tasked with conducting post-death investigations and improving the safety of Victoria's prison system. However, VALS considers that JARO reviews are grossly inadequate and lack any independence. In the investigation into the death of Veronica Nelson at the Dame Phyllis Frost Centre, JARO did not conduct interviews with crucial witnesses and failed to obtain evidence that was revealed in the coronial inquest process. In the Inquest, both Veronica's partner (whom VALS represents) and mother submitted that this review was grossly inadequate, misleading, and failed to identify health and safety issues which could have prevented subsequent deaths in custody.[15]

OPCAT Implementation in Victoria

VALS has repeatedly called for the Victorian Government to take steps to implement Australia's obligations under the *Optional Protocol on the Convention Against Torture, Cruel, Inhuman and Degrading Treatment and Punishment* (**OPCAT**).[16] Australia ratified OPCAT in December 2017 and missed its January 2022 deadline to fully implement its legal obligations under this protocol. Australia was granted an extension until January 2023 to implement OPCAT, but very little progress has been made in Victoria, and Victoria is on track to miss the extended deadline too.

The urgent need to implement OPCAT in Victoria has been identified by the Victorian Ombudsman, which carried out two OPCAT style investigations in custodial facilities in 2017 and 2019.[17] The Victorian Government had not responded to the Ombudsman's recommendation to establish, and properly resource, a NPM in Victoria.[18] According to the Ombudsman, "DJCS has advised that a considerable amount of work has been done on the government's implementation of its responsibilities under OPCAT, and that a lack of public statements about OPCAT is not an indicator that progress is not being made."[19]

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[14] Department of Justice and Community Safety, Justice Assurance and Review Office (JARO), available at https://www.justice.vic.gov.au/contact-us/justice-assurance-and-review-office-jaro

[15] VALS, Submissions on behalf of Uncle Percy Lovett for the Coronial Inquest into the passing of Veronica Nelson, available at https://www.vals.org.au/wp-content/uploads/2022/06/2022.06.17-Submissions-of-Uncle-Percy-Lovett-Veronica-Nelson-Inquest.pdf

[16] Including - VALS, *Submission to the Commission for Children and Young People Inquiry: Our Youth Our Way*, p. 21; VALS, *Supplementary Submission to the Royal Commission on Victoria's Mental Health System*, p. 8-13; VALS, *Public Accounts and Estimates Committee COVID-19 Inquiry*, p. 44-45; VALS, *Building Back Better: COVID-19 Recovery Plan*, pp. 87-91, VALS Submission to the Inquiry into Victoria's Criminal Justice System, VALS Submission to the Prison Culture Review.

[17] Victorian Ombudsman, *Implementing OPCAT in Victoria: Report and inspection of Dame Phyllis Frost Centre*, 2017; Victorian Ombudsman, *OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people* (2019), p. 61.

[18] Victorian Ombudsman (2020). *Ombudsman's Recommendations – Third Report*, p. 14.

[19] Ibid., p. 14.

Since June 2020, the Government has remained silent on its "considerable" progress. The only information on the public record regarding Victoria's NPM body is the allocation of $500,000 for OPCAT implementation between 2021-2025.[20] This is woefully inadequate, and VALS is concerned that this once in a generation opportunity is being squandered. Other than that, there has only been the introduction of the *Monitoring of Places of Detention by the United Nations Subcommittee on Prevention of Torture (OPCAT) Bill 2022.*

In August 2021, the Commonwealth Government released the Commonwealth Closing the Gap Implementation Plan, which dedicates funding over two years (2021-2022) to support states and territories to implement OPCAT.[21] Although the document indicates the amount of funding for other actions under the Plan, it is silent on the amount of funding that will be provided to States and Territories for OPCAT implementation.[22] With a recent change in government at the Federal level, VALS hopes that there will be renewed interest in and commitment to the Federal and State Governments working together to meet their responsibilities under OPCAT.

VALS is of the view that the Victorian Government must be transparent and provide a public update on its progress in implementing OPCAT. VALS expects the Victorian Government to engage in robust consultations in developing an appropriate model and legislation for Victoria.

VALS recommendations include:

- *The Victorian Government must urgently undertake robust, transparent and inclusive consultations with the Victorian Aboriginal community, its representative bodies and Aboriginal Community Controlled Organisations (ACCCOs) on the implementation of OPCAT in a culturally appropriate way.*
- *The operations, policies, frameworks and governance of the designated detention oversight bodies under OPCAT (National Preventive Mechanisms - NPMs) must be culturally appropriate for Aboriginal people.*
- *The Victorian Government must legislate for the NPM's mandate, structure, staffing, powers, privileges and immunities.*
- *The Victorian and Commonwealth Governments must ensure that the NPM is sufficiently funded to carry out its mandate effectively.*
- *In accordance with Article 3(1) of OPCAT, the NPM in Victoria must have jurisdiction over all places where individuals are or may be detained, including correctional facilities, youth detention facilities, all police places of detention (including cells and modes of transport), court*

[20] VALS (2021), 'This International Day in Support of Victims of Torture, the Andrews Government must do better on OPCAT'. Available at https://www.vals.org.au/this-international-day-in-support-of-victims-of-torture-the-andrews-government-must-do-better-on-opcat/.
[21] Commonwealth of Australia (2021). *Commonwealth Closing the Gap Implementation Plan,* p. 48. The funding is linked to Targets 10 (By 2031, reduce the rate of Aboriginal and Torres Strait Islander adults held in incarceration by at least 15%) and Target 11 (By 2031, reduce the rate of Aboriginal and Torres Strait Islander young people (10-17 years) in detention by at least 30%).
[22] Ibid., pp. 152 and 157.

custody, secure residential care facilities, forensic mental health hospitals and other places where people are or may be deprived of their liberty.

Need for Improved Data Collection and Reporting by Government

In practice, the concepts of Indigenous Data Sovereignty (**IDS**) and Indigenous Data Governance (**IDG**) are a specific exercise of the right to self-determination as enshrined in Article 3 (as well as numerous other Articles) of the *United Nations Declaration on the Rights of Indigenous Peoples*. The following key concepts relating to Indigenous Data Sovereignty were defined by consensus by delegates of the Indigenous Data Sovereignty Summit:[23]

- *Indigenous Data*: 'In Australia… refers to information or knowledge, in any format or medium, which is about and may affect Indigenous peoples both collectively and individually.'
- *Indigenous Data Sovereignty (IDS)*: 'refers to the right of Indigenous peoples to exercise ownership over Indigenous Data. Ownership of data can be expressed through the creation, collection, access, analysis, interpretation, management, dissemination and reuse of Indigenous Data.'
- *Indigenous Data Governance (IDG)*: 'refers to the right of Indigenous Peoples to autonomously decide what, how and why Indigenous Data are collected, accessed and used. It ensures that data on or about Indigenous peoples reflects our priorities, values, cultures, worldviews and diversity.'[24]

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

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

VALS recommends that existing legislation and policies be reformed to ensure that Aboriginal people and ACCOs are provided access to data collected which concerns Aboriginal individuals and communities. This should also extend to participation in decisions regarding the evaluation and dissemination of such data, in a manner consistent with Indigenous Data Sovereignty and Indigenous Data Governance. Both IDS and IDG require the meaningful and effective participation of Aboriginal people before decisions are made in relation to policies and legislation concerning Indigenous data.

In May 2022, British Columbia became the first government in North America to introduce an Anti-Racism Data Bill.[25] The Bill aims to "dismantle systemic racism and discrimination" by helping to

[23] The Indigenous Data Sovereignty Summit was held in Canberra, ACT, on 20 June 2018.
[24] *Indigenous Data Sovereignty, Communique*. Indigenous Data Sovereignty Summit. 20 June 2018, p. 1.
[25] Anti-Racism Data Act, available at https://www.bclaws.gov.bc.ca/civix/document/id/bills/billscurrent/3rd42nd:gov24-3

"identify gaps in programs and services, and allow government to better meet the needs of Indigenous, Black and racialized British Columbians."[26] It will also help advance IDS and IDG, by establishing a process for government to seek consent from Indigenous communities to use their data.[27]

The Bill follows a major report by the BC Office of the Human Rights Commissioner in 2020, which recommended that the Government legislate the collection, use and disclosure of demographic data for social change. According to the report:

> *By making systemic inequalities in our society visible, data can lead to positive change. The same data, used or collected poorly, can reinforce stigmatization of communities, leading to individual and community harm.*[28]

The Act has been co-developed with Indigenous leadership under the *Declaration on the Rights of Indigenous Peoples Act 2021*,[29] which provides a road map for implementing the *United Nations Declaration on the Rights of Indigenous Peoples* (**UNDRIP**) in Canada.

The Act provides a framework for collecting personal information for the purposes of identifying and eliminating systemic racism and advancing racial equity. In particular, it provides for:

- Public bodies can be required to collect and disclose information, including personal information, for the purpose of identifying and eliminating systemic racism and advancing racial equity;
- Development of data standards and directives, including to support culturally safe collection, use and disclosure of personal information;
- Annual publication of statistics or other information respecting systemic racism and racial equality, in consultation and cooperation with Indigenous peoples whose rights or interests could be affected;
- Annual identification of research priorities relating to the identification and elimination of systemic racism and advancement of racial equality, in consultation and cooperation with Indigenous peoples whose rights or interests may be affected by the research;
- Creation of an anti-racism data committee - composed of a majority of individuals who are racialised - to collaborate with government on how data is collected and used;
- An enforcement mechanism to ensure that public bodies are complying with the Act.

The Anti-Racism Data Act in British Columbia is an example of strong legislative and policy reform to address systemic racism, in line with the government's commitments under the UNDRIP. We believe

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[26] New anti-racism data act will help fight systemic racism, available at https://news.gov.bc.ca/releases/2022PREM0027-000673

[27] New anti-racism data act will help fight systemic racism, available at https://news.gov.bc.ca/releases/2022PREM0027-000673

[28] British Columbia's Office of the Human Rights Commissioner, Disaggregated Demographic Data Collection in British Columnbia: The grandmother perspective, available at https://bchumanrights.ca/wp-content/uploads/BCOHRC_Sept2020_Disaggregated-Data-Report_FINAL.pdf

[29] Available at https://laws-lois.justice.gc.ca/eng/acts/U-2.2/

that an equivalent legal framework in Victoria would go a long way towards identifying and eliminating systemic racism in Victoria.

The *Victorian Charter of Human Rights and Responsibilities Act 2006* and Protection Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment

Under section 22 of the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**),[30] all persons deprived of liberty have a right to be treated with humanity and dignity. The Charter also provides people in detention with a range of other human rights, such as to privacy, non-discrimination and cultural rights. Public authorities, including prison officials, must consider human rights when implementing prison policies and practices and cannot act incompatibly with human rights. While the Charter is undoubtedly important at a normative and policy level, it only provides very limited substantive remedies for breaches of human rights. According to the Victorian Government, the Charter does not introduce an independent cause of action or type of relief for a person whose human rights have been breached.[31]

Overincarceration of Aboriginal People

Bail and Remand

In response to the Bourke Street incident, bail laws[32] were drastically changed to remove the presumption of bail for over 100 'serious' offences. These reforms are contrary to international human rights laws and the Victorian *Charter of Human Rights and Responsibilities*. The 2017 reforms have disproportionately impacted Aboriginal men, women and children, and since the implementation of the reforms the number of Aboriginal people in prison on remand has increased by approximately 20%. The reforms inappropriately created multiple hurdles an accused person must overcome in order to be granted bail for many low-level non-violent offences, such as multiple charges of shoplifting or possession of drugs.[33]

When Aboriginal people are remanded, they become disconnected from family, community, Country and culture. Remanding Aboriginal people puts their health, wellbeing and safety at risk, and disrupts education and employment opportunities. Although the current legislation requires a person's Aboriginality to be considered during a bail hearing,[34] there is a lack of understanding amongst bail decision makers, prosecutors and defence practitioners regarding the scope and content of this obligation. In particular, the obligation is either not complied with, or if it is, a person's Aboriginality is regularly considered as a deficit rather than a strength. Where an Aboriginal person is self-

[30] Available at https://www.legislation.vic.gov.au/in-force/acts/charter-human-rights-and-responsibilities-act-2006/014
[31] Charter of Human Rights and Responsibilities Bill 2006 Explanatory Memorandum, 29
[32] *Bail Act 1977* (Vic). Accessed at: http://www5.austlii.edu.au/au/legis/vic/consol_act/ba197741/
[33] Victorian Aboriginal Legal Service, 'Policy Brief – Fixing Victoria's Broken Bail Laws', (Policy Brief, May 2022), https://www.vals.org.au/wp-content/uploads/2022/05/Fixing-Victorias-Broken-Bail-Laws.pdf.
[34] See Section 3A and 3AA Bail Act 1977 (Vic). Accessed at http://www5.austlii.edu.au/au/legis/vic/consol_act/ba197741/

represented in their bail hearing, the prosecution and judge should make enquiries as to whether the accused person is Aboriginal. If the unrepresented person is Aboriginal, the judicial decision maker must consider the person's cultural background, including ties to extended family or place, and any other relevant cultural issues.[35] These considerations should also extend to other bail decisions under the *Bail Act,* including where bail is granted by a police member, and with regards to what bail conditions are appropriate to be imposed as part of the person's undertaking. A person's Aboriginality and connection to culture is lifelong, and the obligations of bail decision makers under section 3A and 3AA of the *Bail Act* must always be considered, regardless of whether the person's connection to culture has been intermittent throughout their lives.[36]

Additionally, being detained on remand can affect sentencing outcomes and future contact with the legal system. If someone is remanded, they are more likely to receive a custodial sentence, because they have effectively already been "punished" for their offending.[37] Once someone has received a prison sentence, they are more likely to be refused bail if they are arrested again, and are more likely to receive a more severe sentence if they are sentenced again in the future.

Bail offences, including breaching bail conditions and failing to answer bail, carry maximum penalties that include custodial sentences, regardless of whether the primary charge that resulted in the person being on bail would lead to a custodial sentence. These bail offences serve no purpose other than to further criminalise people who are already criminalised. No person should ever be remanded for an offence that would not ultimately result in a custodial sentence.

VALS has advocated for bail reform for many years. We strongly support a bail system which includes a presumption in favour of bail for all offences, prohibits remand of people who will not ultimately receive a prison sentence, appropriately considers Aboriginality in relation to all bail decisions, provides culturally appropriate bail hearings in Koori Courts,[38] and provides culturally safe supports for Aboriginal people applying for bail. Any bail reform must be driven by self-determination and must be developed in conjunction with the Victorian Aboriginal community through Aboriginal Community Controlled Organisations (**ACCO**s) and relevant experts. The judiciary and bail decision makers must regularly undertake cultural awareness training and the Government must invest in appropriate services to support Aboriginal people facing bail hearings.

Low Age of Criminal Responsibility

The age of criminal responsibility is astonishingly low across Australia, at only 10 years old. The low age of criminal responsibility disproportioatley impacts Aboriginal children, who are more likely to come into contact with the youth justice system and less likely to receive a caution from police,

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[35] *Bail Act 1977* (Vic), (n11).
[36] Re Hooper (No 2) [2021] VSC 476. Accessed at https://www.jade.io/article/827250?at.hl=+%255B2021%255D+vsc+476.
[37] Sentencing Advisory Council, Time Served Prison Sentences in Victoria (February 2020). Accessed at: https://www.sentencingcouncil.vic.gov.au/publications/time-served-prison-sentences-victoria
[38] Victorian Koori Courts currently do not hear any matters prior to the sentencing stage of a matter.

compared to non-Aboriginal children. Target 11 of the National Agreement on Closing the Gap aims to reduce the rate of Aboriginal young people in detention by 30% by 2031.[39] Raising the age of criminal responsibility is an obvious way to contribute to this target, yet the government has not made meaningful progress towards this reform.

Evidence shows that children under 14 lack the maturity to meet legal standards of culpability. The existing protection of the presumption of *doli incapax,*[40] is ineffective and regularly misapplied in practice, which leads to criminalisation of children who are incapable of forming the relevant criminal intent. Children engaged with the criminal legal system regularly have complex needs that are not being met.

Many organisations across Australia, including VALS, are advocating for legislative amendments to raise the age of criminal reasponsibility to at least 14, and the minimum age of detention to 16 years. We are advocating for holistic wrap-around support systems for at-risk young people at the earliest stage, to prevent contact with the youth justice system, by identifying risk factors early and ensuring children have appropriate supports. It is imperative that this model is driven by Aboriginal self-determination, to ensure Aboriginal children's rights and wellbeing are front and centre.

Decriminalisation of Public Intoxication

Criminalisation of public intoxication in Victoria disproportionately impacts Aboriginal communities.[41] In 1991, the Royal Commission into Aboriginal Deaths in Custody investigated the deaths of 99 Aboriginal people who died in custody across Australia, 30% of whom had died whilst in custody in relation to public intoxication.[42] VALS' experience and data shows that Aboriginal people continue to be disproportionality affected by this offence.

In 2017, Aunty Tanya Day, a proud Yorta Yorta woman, passed away after falling and hitting her head in police custody in Castlemaine, Victoria. Aunty Tanya Day was being held in police custody for public intoxication after falling asleep on a train. In the Inquest into Aunty Tanya Day's death, the Coroner found that Victoria Police should have sought urgent medical care for Aunty Tanya instead of arresting her, and that her death was clearly preventable had she not been arrested. The Coroner also found that welfare checks conducted by the members on shift were inadequate, amounting to a failure to take proprer care. The Coroner also found that had these checks been conducted appropriately, Aunty Tanya's deterioration would have been identified and treated earlier.[43]

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[39] National Agreement on Closing the Gap. Accessed at: https://www.closingthegap.gov.au/national-agreement

[40] *Doli incapax* is the presumption that a child under the age of 14 years old is not capable of forming the *mens rea* required to form the basis of culpability of an offence.

[41] Aboriginal people make up 0.8% of the Victorian population, yet 6.5% of all public intoxication offences between 2014 and 2019 were recorded against Aboriginal people.

[42] Victorian Aboriginal Legal Service, 'Community Factsheet – decriminalising public intoxication', (Factsheet, 3 August 2022), https://www.vals.org.au/wp-content/uploads/2022/08/Community-fact-sheet-Decriminalisation-of-public-intoxication-August-2022.pdf.

[43] Ibid.

Since RCIADIC - which recommended decriminalisation of the offence of public intoxication - there have been multiple inquiries that have reaffirmed this recommendation, yet substantial reform is yet to occur.

In August 2019, the Victorian Government committed to decriminalising public drunkenness and replacing it with a public health response. The Government initially requested advice from an Expert Reference Group, which carried out extensive consultations and completed a final report in August 2020.

In March 2021, the Government passed legislation to decriminalise public intoxication, due to come into effect in November 2022. However, due to delays in developing and implementing the health response, decriminalisation has been pushed back to November 2023.

VALS has advocated for decriminalising public intoxication for decades, and continues to advocate for a health model for public intoxication that genuinely seeks to prioritise the safety, health and wellbeing of any person who is intoxicated in public.[44] We strongly oppose law enforcement approaches to public intoxication, including "protective custody", which has been implemented in many other states and territories across Australia, and which continues to disproportionality impact Aboriginal people in these jurisdictions.

Criminalisation of Drug Use and Possession

Charges for drug use and possession are disproportionately brought against Aboriginal people in Victoria, and this is an important factor in the overincarceration of Aboriginal people. The police-led response to drug use has led to a 215% increase in drug use/possession incidents involving Aboriginal people since 2012, compared to 94% for non-Aboriginal people.[45] Drug charges are particularly harmful under Victoria's onerous bail regime, as people arrested on drug charges are often held in prison awaiting trial for a charge which, even if they are found guilty, will not ultimately lead to a custodial sentence. This is especially problematic because it leads to very high numbers of Aboriginal people imprisoned on remand while under the influence of, or withdrawing from, drugs – a situation which increases the risk of health problems and, the Victorian Ombudsman has found, of prison officers using force against people in custody.[46]

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[44] Victorian Aboriginal Legal Service, 'Community Factsheet – decriminalising public intoxication', (n18).
[45] Crime Statistics Agency, *Alleged offender incidents by Aboriginal and Torres Strait Islander Status – Tabular* Visualisation, Victoria – Principal offence. Accessed at https://www.crimestatistics.vic.gov.au/crime-statistics/latest-aboriginal-crime-data/alleged-offender-incidents-by-aboriginal-and-torres.
[46] Victorian Ombudsman (2022), *Report on investigations into the use of force at the Metropolitan Remand Centre and the Melbourne Assessment Prison.*

Diversion and Cautioning

A key reason for the continued growth in Victoria's adult prison population is the underuse of diversion and formal cautioning, approaches which can avoid extended contact with the criminal legal system and reduce incarceration. VALS has set out our positions on the need for greater diversion and appropriate models on numerous occasions.[47]

Currently, diversion is only available in limited circumstances, and even when it is available, the Criminal Justice Diversion Program does not adequately cater for the needs and experiences of Aboriginal people. Significant changes are required in order to ensure that diversion is available and effective in diverting Aboriginal people away from the criminal legal system.

Diversion is currently available in Victoria if the following criteria[48] are met:

- The offence is not precluded from diversion;[49]
- The accused acknowledges responsibility for the offence;
- It appears appropriate to the Magistrates Court that the accused should participate in the diversion program;
- Both the prosecution and the accused consent to the Magistrates Court adjourning the proceedings for the purposes of diversion;
- Whilst not a strict requirement, generally, diversion is only available in cases of first offence.

Pursuant to section 59 of the *Criminal Procedure Act*, the magistrate can adjourn proceedings for up to 12 months, and require the accused to complete certain conditions as set out under the diversion plan. If the program is completed successfully, no plea is taken and the court must discharge the accused without any finding of guilt.

Data from the Victorian Sentencing Advisory Council indicates that in 2019-20, 6.4% of cases before the Magistrates' Court were adjourned for diversion, a figure which has not shifted substantially in the last decade.[50] Unfortunately, data is not available publicly on the number of Aboriginal people who received diversion in Victoria. However, research from across Australia indicates that Aboriginal people are less likely than non-Aboriginal people to receive a police caution and less likely to have their matters adjourned for diversion.[51] In 2019-20, only 2.5% of VALS criminal law matters were

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[47] VALS (2020), *Submission to Sentencing Act Reform Project*, pp17-20. Accessed at https://www.vals.org.au/wp-content/uploads/2021/03/Sentencing-Act-Reform-Project-VALS-submission-FINAL1.pdf.

[48] Section 59, *Criminal Procedure Act* (CPA) (Vic) 2009.

[49] Under section 59(1) of the CPA, the following offences are excluded: (a) an offence punishable by a minimum or fixed sentence or penalty, including cancellation or suspension of a licence or permit to drive a motor vehicle and disqualification under the Road Safety Act 1986 or the Sentencing Act 1991 from obtaining such a licence or permit or from driving a motor vehicle on a road in Victoria but not including the incurring of demerit points under the Road Safety Act 1986 or regulations made under that Act; or (b) an offence against section 49(1) of the Road Safety Act 1986 not referred to in paragraph (a).

[50] Sentencing Advisory Council, *Sentencing Outcomes in the Magistrates' Court*. Accessed at https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/sentencing-outcomes-magistrates-court.

[51] Lucy Snowball and Australian Institute of Criminology, 'Diversion of Indigenous Juvenile Offenders' (Trends & Issues in Crime and Criminal Justice No 355, Australian Institute of Criminology, 2008).

adjourned for diversion, and this fell to 1.3% in 2020-21.[52] These are well below the already low figure of around 4% we experienced from 2017 to 2019.[53] This is a phenomenon seen in many parts of the justice system, with data from NSW revealing that Aboriginal people were far less likely to receive cautions for cannabis possession than non-Aboriginal people.[54]

The current approach to diversion fails Aboriginal people for a number of reasons:

- Inconsistent decisions by police informants as to when diversion is available;
- Even when diversion is approved by the informant and considered suitable by the diversion coordinator, the prosecution at court can refuse to consent;
- Generally diversion is only available in cases of first offence – as Aboriginal people are engaged in the system earlier than non-Aboriginal people, they often use up diversion options and escalate more quickly up the sentencing hierarchy;
- Financial contributions can be problematic for many of our clients;
- Lack of culturally appropriate diversion programs, particularly in rural and regional areas;
- An expectation of cooperativeness with police, which Aboriginal people may not initially meet due to mistrust rooted in personal and/or intergenerational trauma – in the ACT, criteria for a restorative justice programme were altered to make eligible anyone who did not *deny* responsibility for offending, rather than requiring full and proactive confession at the outset.[55]

While some of these issues can be mitigated through reforms to and expansion of existing diversion programmes, VALS is of the view that the full benefits of diversion for Aboriginal people can only be realised through diversion processes developed and implemented by Aboriginal communities, grounded in self-determination. There are models in some parts of Canada, as part of a much broader approach to Aboriginal self-determination in the justice system.[56]

Diversion and cautioning are particularly important for children and young people. Early contact with the criminal legal system has a tendency to reproduce itself, and children are particularly likely to be fully integrated into society and avoid reoffending if they are given appropriate support.[57] There is clear evidence from Victoria that diversion away from the court system has a positive impact in

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[52] In 2019-20, VALS provided legal representation in relation to 1,648 criminal law matters and 41 of these resulted in diversion. In 2020-21, VALS provided legal representation in relation to 1,045 criminal law matters and 14 of these matters resulted in diversion.

[53] In 2017-2018, VALS provided legal representation in relation to 1,367 criminal law matters and 57 of these resulted in diversion. In 2018-2019, VALS provided legal representation in relation to 1,253 criminal law matters and 55 of these matters resulted in diversion.

[54] The Guardian, 10 June 2020, 'NSW police pursue 80% of Indigenous people caught with cannabis through courts'. Accessed at https://www.theguardian.com/australia-news/2020/jun/10/nsw-police-pursue-80-of-indigenous-people-caught-with-cannabis-through-courts.

[55] Australian Association for Restorative Justice (2020), *Winter 2020: Review of contemporary restorative practice*.

[56] Aboriginal Legal Services, *Evaluation of the Gladue Court Old City Hall, Toronto* (2016), 43-44.

[57] VALS (2019), *Submission to the Commission for Children & Young People Inquiry: Our Youth, Our Way*. Accessed at http://vals.org.au/wp-content/uploads/2019/12/VALS-Submission-to-CCYP-Inquiry-Our-Youth-Our-Way-November-2019.pdf.

reducing reoffending for young people.[58] Avoiding the use of full judicial proceedings for children is also part of Australia's obligations under the *Convention on the Rights of the Child*. [59]

For children, the principal options for diversion in the current system are:

- Pre-charge caution by Victoria Police;[60]
- Referral to a pre-charge cautioning program, where available;[61]
- Court-based diversion through the Children's Court Youth Diversion (**CCYD**) Service.[62]

There are challenges with the current cautioning and court-based diversion mechanisms, which mean that they are inconsistency applied. In particular, we believe that the lack of a legislative basis for pre-charge cautions, the discretionary powers of police in relation to cautions, and the police veto on court-based diversion undermine the potential for a rehabilitative approach to youth justice and instead channel children and young people into a cycle of reoffending.

To strengthen the mechanisms for diverting Aboriginal children and young people away from the youth justice system, we believe that there is a need for significant legislative and policy reform. In relation to the legislative framework, VALS believes that several key changes must be incorporated into the new Youth Justice Act. These would operate to expand the circumstances in which diversion is available.

Additionally, we believe that there is a significant need to invest in culturally appropriate pre-charge and court-based diversion programs that are gender-sensitive and respond to the intersectional needs of Aboriginal youth. We believe that Aboriginal Community Controlled Organisations (**ACCO**)s are best placed to develop and implement such programs, building on the existing work by ACCOs in this space.[63]

VALS is firmly of the view that there must be a statutory presumption in favour of cautioning children, that there should be no limit to the number of cautions a child can receive, and that children with a criminal history should not be excluded. Cautioning should not be conditional on a child or young person formally admitting an offence – cautions should be available to children who do not deny the offence.

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[58] Crime Statistics Agency, *In Brief 9: The Cautious Approach: Police cautions and the impact on youth reoffending*, (2017).
[59] United Nations Convention on the Rights of the Child, Article 40(3)(b).
[60] Under the *Victoria Police Manual – Procedures and Guidelines*, young people are eligible for a caution if they meet the following mandatory criteria: the individual admits to the offence; the individual is between the ages of 10-17 years; parent/guardian consents to the caution; and parent/guardian is present at the time of the formal provision of the caution.
[61] There have been several pre-charge cautioning pilot programs in Victoria, including: a 12-month Koori Youth Cautioning Pilot in Mildura (2007-2008); Youth Cautioning Pilot introduced in 2010 in Western Region Division 4, the Northern Grampians and Horsham Police Service Areas, the Eastern Region Division 2 Knox PSA and the Southern Metro Region Division 3 Casey PSA. Victoria police are currently working with Aboriginal communities in Echuca, Dandenong and Bendigo to develop and implement a new Aboriginal Youth Cautioning Pilot program.
[62] See s. 356 *CYFA 2005*. Court-based diversion has been available in all Children's Courts across Victoria since January 2017. The scheme is managed across Victoria by the Children's Court Youth Diversion Service (CCYD).
[63] Programs such as Bareng Maroop, Dardi Munwurro Youth Journeys Program and the Bert Williams Koori Youth Justice Program are excellent examples of ACCO diversion programs.

Snap decisions by police regarding cautioning can have lifelong and devastating impacts for children; children who have often been let down by multiple systems. The data shows that Aboriginal and Torres Strait Islander children are less likely to receive a caution from police than non-Aboriginal children. The CCYP report, *Our Youth Our Way* noted the following:

> The cautioning rate for Aboriginal children and young people in Victoria declined from 14.6% of outcomes in 2008 to 3.9% of outcomes in 2015, while the proportion of arrests increased over the same period. Data from the Crimes Statistics Agency shows that between January 2018 and December 2019 Aboriginal children and young people aged 10 to 17 years were cautioned in 13% of incidents compared to 21% of incidents involving non-Aboriginal children and young people. This is important given that most children and young people who are effectively cautioned will not have further contact with the criminal justice system.[64]

We also know that many of the children who come into contact with police and the criminal legal system are involved in the child protection system. It is critical that reforms in relation to cautioning, and more broadly, reforms aimed at diverting children away from the criminal legal system, have the appropriate protections and safeguards in place to ensure that the objectives can be achieved. We would expect cautioning reforms to be reflected in legislation, not only police policies and procedures, and updated training to Victoria Police. We would expect police to make consistent and genuine efforts to build relationships with Aboriginal children, families, communities and services. And we would expect Victoria Police to address racism at both an individual and systemic level, so that Aboriginal children are not left behind in these reforms.

There is an opportunity, that is too often squandered by Victoria Police, to support Aboriginal children, particularly those children who have been removed from their families, to strengthen their connection to their community and culture. There is an opportunity missed when police do not consider what might be happening in the child's family or whether the child might have an undiagnosed disability; when police do not step aside, and make space for community-driven solutions. Cautioning more Aboriginal children, and involving Elders in this process, would be a positive step forward. We hope to see the promise of such an approach be realised.

In relation to pre-charge cautioning, we note that the current five-year Aboriginal Youth Cautioning Pilot (**ACYP**) program is a priority under *Burra Lotjpa Dunguludja* (AJA4), and we support this collaboration between Victoria Police and Aboriginal communities in the three pilot sites (Echuca, Dandenong and Bendigo).[65] However, we are concerned that this is now the second Koori specific youth cautioning pilot program in Victoria, and the Government has still not committed to long-term sustainable funding to ensure that pre-charge cautioning programs are available across Victoria. VALS welcomes Victoria Police's intended change of policy, but emphasises that it is critical that changes are enshrined in legislation.[66]

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[64] CCYP, *Our Youth Our Way* report, p33

[65] Under *Burra Lotjpa Dunguludja,* the Aboriginal Justice Forum has committed to implement this program in four sites over the next 5 years. See AJF, *Burra Lotjpa Dungulugja* (2018), p. 41.

[66] Tammy Mills, Police Change Tack on Youth Cautions, The Age (9 September 2021)

Regarding court-based diversion, we are concerned that the lack of culturally safe diversion programs, particularly for Aboriginal youth in rural and regional Victoria means that an Aboriginal young person may be eligible for Court-based diversion, but there are no programs available to support diversion. It is critical to ensure that the commitment under *Burra Lotjpa Dunguludja* (AJA4) to deliver community-based diversion programs is adequately funded and implemented in a timely manner.[67] Additionally, there is a need to enhance the cultural safety of the CCYD, by ensuring that there are Koori Diversion Coordinators.

Mandatory Sentencing

Under the *Sentencing Act 1991* (Vic), the Court must impose a custodial order for "Emergency worker harm offences," which include the following offences committed against an "emergency worker" on duty:

- intentionally causing serious injury in circumstances of gross violence against an emergency worker on duty;
- recklessly causing serious injury in circumstances of gross violence against an emergency worker on duty;
- causing serious injury intentionally against an emergency worker on duty;
- causing serious injury recklessly against an emergency worker on duty;
- causing injury intentionally or recklessly against an emergency worker etc on duty intentionally exposing an emergency worker to risk by driving if the emergency worker is injured, and
- aggravated intentionally exposing an emergency worker to risk by driving if the emergency worker is injured.

Additionally, amendments were made to the *Sentencing Act* in 2017, requiring courts to issue a custodial order (imprisonment, drug treatment order or a youth justice detention order) for Category 1 offences. Custodial orders must also be made for Category 2 offences, unless certain circumstances exist.

Similarly, the *Sentencing Act* provides for mandatory uplifting of certain offences committed by a young person (under the age of 21), meaning that the young person cannot receive a youth justice detention order under the dual track youth justice system; they must be sentenced to adult prison.

VALS continues to oppose mandatory sentencing schemes for the following reasons:

- They erode the fundamental principle of an independent judiciary and discretion in sentencing;
- They increase incarceration rates, and are therefore more costly;
- Mandatory sentencing is not an effective deterrent;
- They contradict the principle of proportionality and imprisonment as a last resort;

[67] See *Burra Lotjpa Dunguludja*, p. 43. Development and delivery of community based diversion programs is yet to commence. See AJA4 in Action.

- Mandatory sentencing schemes have proven to be an ongoing driver of the over-incarceration of Aboriginal and Torres Strait Islander people. In this regard, mandatory sentencing contradicts the Victorian Government's commitment to addressing over-incarceration of Aboriginal people;
- Mandatory sentencing for offences against emergency workers acts as a deterrent and disincentive for Aboriginal people to call on emergency and protective services to assistance in a time of crisis.

VALS recommends that the Victorian Government repeal mandatory sentencing schemes under the *Sentencing Act 1991* (Vic), including for the following offences: Category 1 and Category 2 offences; Offences against "emergency workers"; Category A and Category B "serious youth offences."

Parole

Since the reform of the Victorian parole system in 2015, parole has become harder to access, which is another factor contributing to the growing prison population.[68] The "tougher" parole system has had a disproportionate impact on Aboriginal people in prison, who are less likely to apply for parole than non-Aboriginal people, and also less likely to be released on parole.[69]

Significant reform is required to reverse the changes made in 2015 and establish a fair, transparent and equitable parole system that is genuinely committed to the rehabilitation and reintegration of incarcerated people. These reforms include:

- Replacing the discretionary adult parole system with automatic parole for certain sentences;
- Permitting time spent on parole to contribute to the head sentence, even if parole is cancelled;
- Amending the parole process to incorporate procedural fairness and natural justice;
- Investing in, and ensuring access to, culturally appropriate rehabilitation programs that are designed, developed and delivered by Aboriginal organisations;
- Ensuring that parole conditions are achievable and culturally appropriate;
- Investing in, and ensuring access to, culturally appropriate support for Aboriginal people on parole, including transitional housing and holistic support.

[68] VALS has previously indicated its concerns with the adult parole system. See VALS (2017). Submission to ALRC Inquiry, 2017; VALS (2011). Submission to SAC review of parole in Victoria, 2011.

[69] Evaluation of AJA2 found that 67% of Aboriginal offenders released from prison were not released on parole. See Nous Group, *Evaluation of the Aboriginal Justice Agreement—Phase 2: Final Report* (2012) [10.2.5]; Australian Law Reform Commission (2019), *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, pp.268-269.

Avenues available to people with severe cognitive disabilities, include the statutory scheme for people found unfit to plead or stand trial. In Victoria, people deemed unfit to stand trial are still subject to a 'special hearing' to determine whether they did the act that comprises the offence – with no guarantee that they will understand the proceedings against them, which are meant to be conducted "as nearly as possible as if they were criminal trials".[70] In some cases, people found unfit to stand trial end up facing indefinite detention, including for periods longer than if they had been convicted in an ordinary trial.[71]

In 2017, VALS was a participant in the University of Melbourne's *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities* project. The project was built on the recognition that 'unfit to stand trial' provisions alone are not adequate to ensure people with cognitive disabilities have access to justice, and the principle that people should be supported to understand the process they are being subjected to wherever possible.

The research element of the project found a number of barriers to justice for people with cognitive disabilities, which mean they are not treated with procedural fairness, increasing the likelihood they will receive unjustified court outcomes and avoidable prison sentences. These include:

- inaccessible court proceedings that rely on complex language;
- the inconsistent availability of support through proceedings;
- legal services that are under-resourced and not necessarily prepared to respond to the access needs of persons with disabilities;
- long delays in proceedings involving accused persons with cognitive disabilities; and
- the 'criminalisation of disabilities', in which the environmental causes of difficult behaviour are ignored or played down, and/or disability is misinterpreted as deliberately difficult or defiant behaviour.[72]

VALS' role in the Unfitness to Plead project was to implement a 6-month Disability Justice Support Program, aiming to "optimise the participation of accused persons with cognitive disabilities in proceedings against them by focusing on the supports they may require to exercise legal capacity and access to justice on an equal basis with others."[73] There was consensus among clients, their families, lawyers and support workers that the project delivered significantly better outcomes.

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[70] Judicial College of Victoria, 'Special Hearings' paragraph 14. Accessed at https://www.judicialcollege.vic.edu.au/eManuals/CCB/29030.htm.

[71] NATSILS (2020), *Submission to the Disability Royal Commission's Criminal Justice Issues Paper*, p36. Available at https://disability.royalcommission.gov.au/system/files/submission/ISS.001.00157.PDF.

[72] Ibid, p10

[73] Ibid, p30.

VALS recommends the following:

- The Victorian Government should establish safeguards against indefinite detention of people who are found unfit to plead or stand trial in line with those recommended by NATSILS, including:
  - Imposing effective limits on the total period of imprisonment a person can be subject to;
  - Requiring regular reviews of the need for someone's imprisonment after a finding that they are unfit to plead or stand trial;
  - Mandating the adoption of individualised rehabilitation plans, developed by appropriately qualified professionals, which progress a person's transition to their community.
- The Government should amend the *Sentencing Act 1991* (Vic) to ensure that individuals with an acquired brain injury and/or withan intellectual disability that was not diagnosed before the age of 18 years, are eligible for a Justice Plan.
- The Victorian Government should require that all people entering adult or children's prisons are screened for disability, particularly psychosocial or cognitive disabilities and other neurodiverse conditions such as an autistic spectrum condition, dyslexia and attention deficit hyperactive disorder.
- The Victorian Government should fund VALS to restart and sustain the Disability Justice Support Program piloted as part of the Unfitness to Plead Project.
- Given the lengthy periods of non-criminal detention faced by some people with cognitive disabilities, the scope of OPCAT monitoring bodies established in Victoria must include forensic mental health hospitals and other places where people with cognitive disabilities are deprived of their liberty.

Overpolicing of Aboriginal People and Lack of Police Accountability

The risks of ill treatment in police and prison custody are disproportionately high for Aboriginal people in Victoria because of the overpolicing of Aboriginal communities, and the lack of effective police accountability. Aboriginal people are disproportionately targeted in the enforcement of minor summary offences, and the use of police powers such as move-on orders and stop-and-search powers. There is no effective police oversight body to receive and adjudicate complaints about misconduct, with complaints instead being investigated by other police officers. This allows misconduct to persist, and increases the risks associated with police custody, because complaints about mistreatment are not independently investigated.

VALS has published a comprehensive policy paper on improving police accountability.[74] Oversight needs to be built into every part of Victoria Police's operations, from its most everyday policing activity, to its special operations, to the way it engages with coronial inquests.

[74] Available at https://www.vals.org.au/wp-content/uploads/2022/07/Policy-Paper-Reforming-Police-Oversight.pdf

The key pillars of a police oversight system are:

- Police complaints
    - Independent investigation of individual police complaints
    - Independent investigation of systemic issues (including through own motion investigations)
    - Legislative mechanisms for accessing documents and footage from Body Worn Cameras (BWCs), for the purposes of making a complaint against police
- Investigation of police-contact deaths and serious injuries
    - Independent investigation of police-contact deaths and serious injuries, including for the purposes of assessing whether disciplinary or criminal offences have been committed, as well as for the coronial process
- Legal and disciplinary sanctions
    - A robust police disciplinary system, to ensure that officers are held accountable for disciplinary offences
    - Criminal prosecution of police officers
    - Civil litigation against police officers and/or Victoria Police
- Monitoring, Auditing & Reporting
    - Record-keeping and reporting: Robust legislative provisions for comprehensive record-keeping practices, including in relation to body worn cameras (BWCs); publicly available and transparent reporting on police activity and the use of police powers
    - Auditing: Independent auditing of police record-keeping and public reporting requirements; independent auditing of the police complaints system
    - Monitoring: Independent monitoring of police decisions and exercise of police power
- Detention Inspections in Compliance with OPCAT
    - Independent visits to places where police or the government may deprive people of their liberty (implementation of OPCAT)
- Accountability for Implementation
    - Independent oversight of implementation of police-related recommendations, including Royal Commission into Aboriginal Deaths in Custody (RCIADIC) recommendations, coronial recommendations and recommendations from police complaints.

Systemic Racism

Systemic racism is when laws, policies and practices across agencies work together to produce a discriminatory outcome for racial or cultural groups. While the laws, policies and practices may appear to be neutral, they result in uneven or unfair outcomes. Systemic racism is different to individual or interpersonal racism, which takes place when individuals hold racist views and treat people differently based on those views, for example, hate speech or racial abuse. Laws, policies and practices can contribute to systemic racism, even if this is not acknowledged or recognised by the authorities that develop and implement them.

Systemic racism permeates all facets of the legal system in Victoria. Aboriginal people continue to be overrepresented in the criminal and youth justice systems and Aboriginal children are ten time more likely to be removed from their families and placed in out-of-home-care than non-Aboriginal children.[75] The racism Aboriginal communties endure is the result of the violent and racist colonial history of this country. Australia's colonial legal systems are built on foundations of violence and dispossession, denial of soverignty and humanity, and assimilation. The laws and policies that disproportionately impact Aboriginal people, such as public intoxication, bail laws and the low age of criminal responsibility, must be reformed and protective mechanisms must be implemented.

The implementation of protective mechanisms, such as accountability and oversight bodies, would allow systemic racism to be independently examined and investigated. Systemic racism must be considered by the NPM, as well as in coronial inquests of Aboriginal and Torres Strait Islander people who have passed away either in custody or in connection to a police operation, as we very often see the overarching role systemic racism plays in these circumstances.

Treatment and Conditions in Detention

The below is a snapshot of some of the key areas of concern including:

- Cultural Issues
- Solitary Confinement
- Use of Force and Restraints
- Strip Searching
- Equivalence of Healthcare
- Privatisation of Prisons
- Disciplinary Proceedings
- Children Transferred to Adult Prisons

Cultural Issues

Victoria's prison system has become characterised by poor administration and deteriorating conditions, as the imprisoned population has increased. In 2020-21, one prison guard every week was suspended for reasons including the excessive use of force, smuggling of contraband and sexual harassment.[76] An IBAC inquiry into the corrections system found widespread corruption risks and "problematic workplace cultures", manifesting themselves in misconduct including the inappropriate use of force – including against people with disabilities – and in the lack of real accountability for that misconduct.[77]

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[75] Family Matters, *The Family Matters Report 2021: Measuring Trends to Turn the Tide on the Over-representation of Aboriginal and Torres Strait Islander Children in Out-of-home Care in Australia* (Report, Month 2021) 5.
[76] David Southwick MP, 20 July 2021, 'One prison guard a week suspended in Andrews' chaotic corrections system
[77] IBAC (2021), *Special report on corrections*, https://www.ibac.vic.gov.au/publications-and-resources/article/special-report-on-corrections.

Solitary Confinement

Solitary confinement has a particularly detrimental impact on Aboriginal people, with the Royal Commission into Aboriginal Deaths in Custody noting that it is "undesirable in the highest degree that an Aboriginal person in prison should be placed in segregation or isolated detention."[78] The excessive use and normalisation of solitary confinement throughout the pandemic, by way of Protective Quarantine, Transfer Quarantine, Isolation and lockdowns, has been of particular concern to VALS (also in the context of reduced family visits and court backlogs), leading to a deterioration in the mental health and wellbeing of detained Aboriginal people, including children. Despite a decrease in the population of incarcerated Aboriginal people during the pandemic, the number of incidents involving self-harm among detained Aboriginal people increased more than 50 per cent.[79] While the use of solitary confinement has increased during the pandemic, this practice predated COVID-19.

VALS is of the view that solitary confinement should be prohibited entirely, in all detention settings, let alone prolonged solitary confinement.

Use of Force and Restraints

VALS is of the view that excessive force and the inappropriate use of restraints are widespread practices throughout the Victorian prison system, but not fully captured by existing inquiries due to under-reporting, a lack of continuous monitoring, and the absence of an NPM.

The use of force and restraints in prisons may sometimes be necessary. However, the fact that prisons are closed environments where a severe power imbalance exists between detained people and staff means that there is a high potential for force to be used excessively and in inappropriate situations. Aboriginal people are disproportionately subjected to violence in prison. In Victoria, the only investigation that examined and quantified this disproportionality was undertaken by the Commission for Children and Young People's analysis of the youth prison system, which found that "Aboriginal children and young people were alarmingly overrepresented in relation to injury as a result of a serious assault in custody"; and that force and restraints were used against Aboriginal children in youth prisons more than twice a day in 2018 and 2019.[80]

Ingrained problems with the excessive use of force and restraints can only by addressed by legislative reform of the thresholds for the use of force, not by tweaks to prison policy and inconsistently-delivered training programs.

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[78] Human Rights Law Centre et al. (2021), *Joint open letter on ongoing and arbitrary use of 14 day quarantine in prisons*. Available at https://www.hrlc.org.au/s/Open-letter-29-March-2021.pdf

[79] Self-harm incidents among Victorian Aboriginal prisoners jump by more than 50 per cent (February 2022), available at https://www.theage.com.au/national/victoria/self-harm-incidents-among-victorian-aboriginal-prisoners-jump-by-more-than-50-per-cent-20220216-p59wyj.html

[80] Commission for Children & Young People (2021), *Our youth, our way: Systemic inquiry into the over-representation of Aboriginal children and young people in Victoria's youth justice system*, p. 38. Accessed at https://ccyp.vic.gov.au/upholding-childrens-rights/systemic-inquiries/our-youth-our-way/.

VALS has repeatedly made detailed recommendations on how to improve protections for people in prison, including those outlined below:

- *Prohibitions on use of force/restraints that should be enshrined in legislation:*
    - *There must be an explicit prohibition on the use of chemical (medical and pharmacological) restraints.*
    - *Use of force/restraints must never involve deliberate infliction of pain and should not cause humiliation or degradation.*
    - *There must be an express prohibition for the use of stress positions (positional torture).*
    - *Use of force/restraints must not be used for punishment, discipline, or to facilitate compliance with an order or direction, or to force participation in an activity the incarcerated person does not want to engage in. Use of restraints rarely leads to behavioural change, can be counterproductive, and can cause physical and psychological harm and retraumatise people.*
    - *Instruments of restraint must never be used on girls or women during labour, during childbirth and immediately after childbirth.*
    - *The use of mechanical restraints, including handcuffs, as routine centre management practice must be prohibited.*
    - *Only approved restraints should be kept at places of detention.*
    - *The use of chains, irons or other instruments of restraint which are inherently degrading or painful must be prohibited. Other restraints which should be explicitly prohibited include: weighted restraints; restraints which have a fixed rigid bar between cuffs; restraints where the cuff cannot be adjusted; fixed restraints – that is, cuffs 'designed to be anchored to a wall, floor or ceiling'; restraint chairs; and shackle boards and shackle beds (chairs, boards or beds fitted with shackles or other devices to restrain a human being).*
    - *Carrying of weapons by personnel in youth detention must be prohibited.*
- *When use of force/restraints may be permitted:*
    - *Use of force/restraints must only be permissible when necessary to prevent an imminent and serious threat of injury to the incarcerated person or others, and only as explicitly authorised and specified by law and regulation.*
    - *Use of force/restraints should be exceptional, as a last resort, when all other control methods (including de-escalation techniques) have been exhausted and failed.*
    - *The decision to use physical restraints must be made by more than one person, and must be authorised by senior management.*
    - *Use of force/restraints must be used restrictively, for no longer than is strictly necessary.*
    - *A minimum level of restraint/degree of force must be used.*
    - *Restraint instruments must be used appropriately/restraint techniques properly executed.*
    - *The safety of the incarcerated person must be a prime consideration.*

- *Additional safeguards:*
    - *The use of force/restraint should be under close, direct and continuous control of a medical and/or psychological professional.*
    - *The person who is restrained must be regularly observed, while subjected to restraint instruments, at least every 15 minutes.*
    - *Use force/restraint should be reported to senior management as soon as practicable.*
    - *The privacy of restrained people should be respected/protected when the person in restraints is in public.*
    - *Staff who use restraint or force in violation of the rules and standards should be disciplined and/or have their employment ceased. Staff should be prosecuted where appropriate.*

Strip Searching

This issue of strip searching is of particular concern to VALS because there is mounting evidence of the disproportionate rates at which Aboriginal people are subjected to strip searching. For example, in the ACT women's prison between October 2020 and April 2021, 58% of strip searches were of Aboriginal women, who made up only 44% of the prison population.[81]

The law in Victoria allows incarcerated people to be strip searched when there is a belief based on reasonable grounds that the search is necessary for the security or good order of the prison, or the safety or welfare of any incarcerated person, or that the incarcerated person being searched is hiding something that may pose a risk.[82] The standards for strip searching in Victoria are lower than those in other Australian jurisdictions. In adult prisons in New South Wales, strip searches can only be performed when absolutely necessary[83] and never involve body cavity searches.[84] Meanwhile, in the ACT, strip searching is only performed on reasonable grounds and in the least restrictive manner possible, while respecting the dignity of the detainee.[85]

Legal practitioners at VALS report that some clients had been required to be strip searched in front of multiple guards. These clients often had histories of abuse, and the practice of strip searching was re-traumatising. Some of these clients had medical evidence which suggested that a strip search could be re-traumatising, and this evidence was often not considered before the searches were undertaken. It is clear that the use of strip searching is not confined to situations where it is truly necessary or a last resort for prison staff. At the highest level, data on strip searches reveal that they are extremely ineffective in uncovering contraband. For example, in youth detention, figures obtained by the Human

[81] Dani Larkin (2021), 'Excessive strip-searching shines light on discrimination of Aboriginal women in the criminal justice system', *The Conversation*. Accessed at https://theconversation.com/excessive-strip-searching-shines-light-on-discrimination-of-aboriginal-women-in-the-criminal-justice-system-163969.
[82] S. 45 of the *Corrections Act 1986*.
[83] Inspector of Custodial Services, New South Wales (2020). Inspection standards: For adult custodial services in New South Wales, at 40.9
[84] Ibid., at 40.13.
[85] Inspector for Custodial Services, ACT (2019). ACT Standards for Adult Correctional Services, Standard 28.

Rights Law Centre showed that "over a four month period between July and October 2019, 1,277 strip searches were conducted on children and young people at the two juvenile justice centres in Victoria [and]… Only 6 items were found as a result."[86] This strongly suggests that strip searches are used far more often than could be justified by any reasonable suspicion that they are necessary or likely to uncover contraband.

In 2017, the Victorian Ombudsman identified "a significant number of routine and unnecessary strip searches", including searches of detained people before and after receiving visits, in violation of the Victorian Charter, the Mandela Rules, and prison policy. The Ombudsman recommended this practice should immediately cease; that recommendation was not accepted by the Government.[87]

IBAC's recent report on the corrections system exposed serious misconduct in the way that strip searches are managed and conducted. Several specific incidents of inappropriate searches were investigated by IBAC, which found that staff were unfamiliar with the human rights standards supposed to govern their behaviour and that prison management did not properly investigate complaints about inappropriate searches.[88]

Most concerningly, 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.[89] This is a clear demonstration that strip searches are used not out of necessity, but as a tool of discipline and to exert power over detained people – echoing the concerns of an earlier investigation in Western Australia.[90] The fact that the strip searches investigated by IBAC were conducted shortly after unrelated behavioural incidents reinforces this, as does the escalation of the searches into assaults on incarcerated people by staff. While the IBAC report is disturbing, issues concerning strip searches have been raised in other Australian jurisdictions

It is clear that strip searching is being used for general discipline and order in Victorian prisons. The legislative threshold for strip searching is too low, and training on human rights standards is wholly inadequate. Legislation needs to raise the bar so that strip searching is only to be used as a last resort, not as a routine tool for corrections staff.

VALS has repeatedly made recommendations on how to improve protections for people in prison, including those outlined below:

- *The threshold for authorising a strip search in adult prisons should be raised by legislation. 'Good order' and 'security of the facility' should be removed as grounds for a strip search and*

[86] Dani Larkin (2021), 'Excessive strip-searching shines light on discrimination of Aboriginal women in the criminal justice system', *The Conversation*. Accessed at https://theconversation.com/excessive-strip-searching-shines-light-on-discrimination-of-aboriginal-women-in-the-criminal-justice-system-163969.
[87] IBAC (2021), *Special report on corrections*, p54. Accessed at https://www.ibac.vic.gov.au/docs/default-source/special-reports/special-report-on-corrections---june-2021.pdf?sfvrsn=ee450c8c_2.
[88] IBAC (2021), *Special report on corrections*, p54, 62.
[89] Ibid, p53.
[90] Ibid, p. 55.

legislation should provide that strip searching must be a last resort and must be based on intelligence. Prior to strip searching, other means of searching such as pat searches, metal detectors and increased surveillance must be used. Strip searching must never be routinely conducted as part of the general routine of the centre or on entry to a centre.

- *Prisons should adopt policies which require them to consider the effect of strip searches on re-traumatisation.*
- *Strip searching of children should be prohibited.*

Please also see our Community Fact Sheet on a relevant case on strip searching, in which we intervened.

Failure to Ensure Equivalence of Healthcare

Aboriginal people already have serious health conditions at a much higher rate than other parts of the Australian population. Aboriginal people detained in prisons are, according to research from the Victorian Aboriginal Community Controlled Health Organisation (**VACCHO**), less healthy than Aboriginal people in the community and less healthy than non-Aboriginal people in prison.[91] In youth detention, across the country, the majority of Aboriginal children are found to have multiple health and social issues upon entering detention.[92]

High-quality healthcare for people in prison is particularly important given the high rates of mental ill-health among the prison population and among Aboriginal people in Victoria. There is a lack of sustainably resourced culturally appropriate health services and programs to meet the social and emotional wellbeing needs of Aboriginal people in prison.[93] VALS continues to call for increased access to culturally safe, trauma-informed forensic mental health services throughout the criminal legal system.[94]

The Australian Health Practitioner Regulation Authority has defined cultural safety as follows:

> Cultural safety is determined by Aboriginal and Torres Strait Islander individuals, families and communities. Culturally safe practise is the ongoing critical reflection of health practitioner knowledge, skills, attitudes, practising behaviours and power differentials in delivering safe, accessible and responsive healthcare *free of racism*.[95]

The Victorian *Charter of Human Rights and Responsibilities* requires that "[a]ll persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human

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[91] Victorian Aboriginal Community Controlled Health Organisation. Keeping our mob healthy in and out of prison: Exploring Prison Health in Victoria to Improve Quality, Culturally Appropriate Health Care of Aboriginal People.(2015), 9, 13. Available at http://www.vaccho.org.au/assets/01-RESOURCES/TOPIC-AREA/RESEARCH/KEEPING-OUR-MOB-HEALTHY.pdf.

[92] Parliament of the Commonwealth of Australia. Doing Time – Time for Doing: Indigenous youth in the criminal justice system (2011),87-88. Available at https://www.aph.gov.au/binaries/house/committee/atsia/sentencing/report/fullreport.pdf.

[93] Ibid., p.34.

[94] Ibid., p.43.

[95] Australian Health Practitioner Regulation Authority, National Scheme's Aboriginal and Torres Strait Islander Health and Cultural Safety Strategy, available at https://www.ahpra.gov.au/About-Ahpra/Aboriginal-and-Torres-Strait-Islander-Health-Strategy/health-and-cultural-safety-strategy.aspx

person".[96] The Victorian Coroners Court has found, in its inquest into the death of Yorta Yorta woman Ms Tanya Day, that in custodial settings this requires police and prison staff to ensure access to medical care, given that people detained are completely dependent on the state to provide for their health.[97]

The importance of equivalence of care to Aboriginal people in prison was recognised by the Royal Commission into Aboriginal Deaths in Custody more than thirty years ago. Recommendation 150 of the Royal Commission was that "health care available to persons in correctional institutions should be of an equivalent standard to that available to the general public," and specifically identified access to mental health and AOD services and the importance of culturally safe care. Equivalence of care is also the underlying goal of other RCIADIC recommendations regarding healthcare in prisons and police custody, including Recommendations 127, 252, 152, 154, 133, 265 and 283.[98]

A Guardian analysis of 474 Aboriginal and/or Torres Strait Islander Deaths in Custody since 1991, published in April this year for the 30th anniversary of the Royal Commission into Aboriginal Deaths in Custody, found that:

> For both Aboriginal and Torres Strait Islander people and non-Indigenous people, the most common cause of death was medical problems, followed by self-harm. However, Indigenous people who died in custody were three times more likely not to receive all necessary medical care, compared to non-Indigenous people. For Indigenous women, the result was even worse – less than half received all required medical care prior to death.[99]
>
> Aboriginal and Torres Strait Islander women were less likely to have received all appropriate medical care before death (54%) compared to men (36%)… Agencies such as police watch houses, prisons, and hospitals did not follow all of their own procedures in 43% of the cases in which Aboriginal and Torres Strait Islander people died, compared to 19% of the cases of non-Indigenous people.[100]

The principle of equivalency is not only applicable to prisons but to all places where people are deprived of their liberty. The sheer number of deaths in custody, from a variety of causes, are testament to the inadequate provision of health care – including mental health care – and the failure of Australian jurisdictions to enact the principle of equivalency. Victoria is not an exception to this pattern of failure. But Victoria is unusual among Australian states and territories in not providing healthcare in places of detention through its health department, but through private providers sub-contracted by the Department of Justice and Community Safety.[101] This arrangement falls short of

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[96] Charter of Human Rights and Responsibilities Act 2006, s22(1).
[97] Coronial Inquest into the Death of Tanya Day, [533].
[98] Williams (2021), 'Comprehensive Indigenous health care in prisons requires federal funding of community-controlled services', The Conversation. Accessed at https://theconversation.com/comprehensive-indigenous-health-care-in-prisons-requires-federal-funding-of-community-controlled-services-158131.
[99] Allam, L. et al. (2021). The facts about Australia's rising toll of Indigenous deaths in custody. Available at https://www.theguardian.com/australia-news/2021/apr/09/the-facts-about-australias-rising-toll-of-indigenous-deaths-in-custody.
[100] Ibid.
[101] For further information concerning contracted providers of healthcare in Victorian prisons, see https://www.corrections.vic.gov.au/justice-health.

international human rights standards which are themselves inadequate in many respects, and the lack of transparency around places of detention makes scrutiny of healthcare provision extremely difficult.

Equivalence of care, particularly for Aboriginal people with serious health issues, and a need for culturally safe healthcare services, can only be delivered with substantial resourcing. This requires greater investment from the state Government, but there is also a need for people in prison to have access to funding from Medicare and the Pharmaceutical Benefits Scheme, to ensure that resources are available to provide all the care needed to the same standard enjoyed in the community. This is particularly important for Aboriginal people, as there are a number of specific items in the Medicare Benefits Schedule which support enhanced screenings, assessments and health promotion activities for Aboriginal people. These streams of Medicare funding are critical to the operation of Aboriginal health services.[102] Access to Medicare funding for people in prison would enable the expansion of in-reach care in prisons by Aboriginal health services. It would also bring funding arrangements in line with those for people in the community. ACCHOs receive direct state and federal funding, as well as being eligible for Medicare funding streams. Similar funding arrangements should be available in relation to custodial settings to ensure the same quality of care can be provided.[103]

VALS has repeatedly made recommendations on how to improve protections for people in prison, including those outlined below:

- *People in detention must be provided medical care that is the equivalent of that provided in the community. Medical care must be provided without discrimination, andmust be culturally safe.*
- *Health care should be delivered through Department of Health rather than DJCS, and not through for-profit organisations.*
- *A model of delivery of primary health services by Aboriginal Community Controlled Health Organisations in places of detention in Victoria should be considered, in consultation with VACCHO and member organisations.*
- *The Federal Government must ensure that incarcerated people have access to the Pharmaceutical Benefits Scheme (PBS) and the Medicare Benefits Schedule (MBS).*
- *The Federal and State Governments should ensure that incarcerated people have access to the National Disability Insurance Scheme (NDIS) and are assessed for eligibility for NDIS upon entry to a prison or youth justice centre.*

[102] Ibid, p. 83.
[103] ABC News, 19 October 2020, 'Greg Hunt rejects Danila Dilba's request for Medicare-funded health services in Don Dale'. Available at https://www.abc.net.au/news/2020-10-19/don-dale-medicare-health-services-rejected-by-greg-hunt/12776808.

Privatisation of Prisons

Across Victoria, there are eleven public operated prisons and three privately operated prisons. The three privately managed prisons are Port Phillip Prison run by G4S, and Ravenhall Correctional Centre and Fulham Correctional Centre both run by the GEO Group. Around 40% of Victoria's prison population is held in private prisons, a significant proportion compared with 15% of people in privately managed prisons in the United States, and the highest number in Australia.

VALS is deeply concerned about the degree of privatisation in Victoria's prison system. In addition to the wholly privately-run prisons, particular services – including healthcare – are contracted to private operators in many public prisons. The effect of this is to weaken accountability, undermine democratic control of the prison system, and put private profits before the wellbeing of people in prison and the integrity of the system. It also puts private profit ahead of rehabilitation and reducing recidivism.

Challenges in Management and Accountability

In Victoria, a 2021 report by IBAC found issues with the arms-length approach to monitoring and managing prisons. IBAC concluded that "[i]ssues related to transparency are of particular concern in privately managed prisons", in part because of "commercial-in-confidence clauses in contracts between the state and private service providers which may affect the public's ability to identify contractual violations and any remedial actions taken".[104]

The lack of transparency and accountability means that even identified problems can be difficult to remediate in private prisons. Risk management and the response to serious incidents has been a particular cause of concern in Victoria. The Victorian Auditor-General has reported that "[s]erious incidents at both Port Phillip and Fulham have, in some instances, exposed weaknesses in how G4S and GEO manage safety and security risks," and that these incidents are not being investigated in a way that identifies or addresses their underlying causes.[105]

The absence of functional risk management, or processes to respond to serious incidents and prevent their recurrence, poses an enormous risk to the wellbeing of people in prison in Victoria.

Healthcare Contracting

Another important element of Victoria's troubling approach to privatisation in the prison system is the contracting of healthcare. As discussed above, equivalency of healthcare is an important principle for prisons, set out in the Mandela Rules, which establish minimum standards for the treatment of

[104] IBAC (2021), *Special report on corrections*. Accessed at: https://www.ibac.vic.gov.au/publications-and-resources/article/special-report-on-corrections

[105] Victorian Auditor-General's Office (2018), *Safety and Cost Effectiveness of Private Prisons*, p45. Accessed at https://www.audit.vic.gov.au/sites/default/files/2018-03/20180328-Private-Prisons.pdf.

people in prison. Healthcare equivalency means that people held in prison must have access to an equivalent standard of healthcare as they would if living freely in the community.

This vital principle can be undermined by subcontracting. In Australia, all jurisdictions except Victoria have healthcare in prisons managed by the health department. In Victoria, healthcare is managed by the Department of Justice and Community Safety, and service delivery is contracted to six private providers. These providers also subcontract some services.[106] The effect is a patchwork system where continuity of care is very hard to provide, particularly since people in prison may move between facilities, and the reliability and quality of services is highly inconsistent. Reducing the quality of health services and the possibility for people in prison to receive consistent, comprehensive care further contributes to poor prison conditions, undermining rehabilitation and increasing the risk of reoffending.

The Government should end privatisation of prisons in Victoria. This should include wholly privately-run prisons, as well as particular services, such as healthcare. The Government should move towards public control of all prison facilities as a matter of urgency.

Disciplinary Proceedings

As noted by the Victorian Ombudsman in her recent report, "[d]isciplinary hearings in Victorian prisons are still carried out 'in the dark' with insufficient scrutiny, oversight or transparency."[107] The disciplinary system in Victoria must operate in accordance with procedural fairness, and key protections derived from procedural fairness must be enshrined in legislation.

The prison disciplinary system deals with incarcerated people who break prison rules. The process has three stages: (1) investigation of the alleged offence, resulting in a decision to charge the incarcerated person; (2) a disciplinary hearing; and (3) determination of a penalty (if the person pleads guilty or is found guilty of the offence).[108] According to the Victorian Ombudsman, there are approximately 10,000 disciplinary hearings each year across Victoria's 14 prisons.[109]

Although the disciplinary process is bound by procedural fairness, the Ombudsman's report demonstrates that important protections derived from procedural fairness are not being respected in practice. VALS' is of the view that protections must be enshrined in legislation, with clear avenues for recourse when the rights of incarcerated people are not respected. This is particularly essential to ensure that the obligations on staff and rights of detainees are consistent across both public and private prisons in Victoria.

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[106] Corrections Victoria, 'Justice Health', https://www.corrections.vic.gov.au/justice-health.
[107] Victoria Ombudsman (2021). Investigation into good practice when conducting prison disciplinary hearings, p. 4.
[108] Ibid., p. 11.
[109] Ibid., p. 4.

The Ombudsman's report notes that the "consequences for a prisoner can be serious, can impact on parole and include the loss of 'privileges' – such as telephone calls or out of cell time – and can even result in contact visits with family or children being withdrawn."[110] This is particularly concerning as contact with family is critical to rehabilitation. According to the Mandela Rules, "disciplinary sanctions or restrictive measures shall not include the prohibition of family contact."[111]

Regarding people with disability, the Mandela Rules provide that: "Before imposing disciplinary sanctions, prison administrations shall consider whether and how a prisoner's mental illness or developmental disability may have contributed to his or her conduct and the commission of the offence or act."[112] This is of particular importance, given the report's finding that there was inconsistent use of Corrections Independent Support Officer volunteers for incarcerated people with an intellectual disability.

Children Transferred to Adult Prisons

Under current Victorian law, the "Youth Parole Board may, on the application of the Secretary, direct a person aged 16 years or more sentenced as a child by the Children's Court or any other court to be detained in a youth justice centre be transferred to a prison to serve the unexpired portion of the period of his or her detention as imprisonment",[113] if it is "satisfied that the person has engaged in conduct that threatens the good order and safe operation of the youth justice centre; and cannot be properly controlled in a youth justice centre."[114] Decisions regarding transfers of children are particularly concerning in the context of the Youth Parole Board not being bound by the rules of natural justice,[115] and being exempt from the application of the *Charter of Human Rights and Responsibilities Act*.[116]

VALS brings the CAT's attention to the Victorian Ombudsman's 2013 report that stated the following:

> It is evident that the youth justice system is limited in its capacity to deal with a small, but increasing, cohort of young people exhibiting violent behaviours. It is important that the youth justice system respond appropriately to these children rather than abrogate its responsibility by transferring them to the adult system. I am of the view that there are no circumstances that justify the placement of a child in the adult prison system."[117]

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[110] Ibid., p. 4.
[111] Rule 43(3) of the *Mandela Rules*.
[112] Rule 39(3) of the *Mandela Rules*.
[113] s467(1) *Children Youth and Families Act 2005*
[114] s467(2)(d) *Children Youth and Families Act 2005*
[115] s449(2) *Children, Youth and Families Act 2005* provides that the Youth Parole Board is not bound by the rules of natural justice.
[116] s2 *Charter of Human Rights and Responsibilities Act 2006* states that the "main purpose of this Charter is to protect and promote human rights by (c) imposing an obligation on all public authorities to act in a way that is compatible with human rights." However, the Regulations (r5) state that "Each of the following entities is declared not to be a public authority for the purposes of the *Charter of Human Rights and Responsibilities Act 2006*— (c) the Youth Parole Board continued in existence by section 442 of the *Children, Youth and Families Act 2005*."
[117] Victorian Ombudsman, Investigation into children transferred from the youth justice system to the adult prison system (December 2013)

In Victoria, children can be sentenced to prison in superior courts if they commit certain offences.[118] After the child is sent to an adult prison, s471 of the *Children Youth and Families Act 2005* empowers the Adult Parole Board to transfer the child back to a youth justice centre. However, the Adult Parole Board is also exempt from the Charter[119] and rules of natural justice.[120]

VALS is of the firm position that children should never be transferred to an adult prison, and that there must be no exceptions to this.

Key Material on the Criminal Legal System and Detention in Victoria

OPCAT

1. Community Factsheet – OPCAT: An opportunity to prevent the ill-treatment, torture and death of Aboriginal and Torres Strait Islander people in custody
2. Dragging its feet on torture prevention: Australia's international shame
3. Victoria has spent billions on prisons, but has shirked its duty to oversight
4. Australia must act now to protect children and young people in detention
5. Webinar - Unlocking Victorian Justice: OPCAT
6. *See also Submission to the Inquiry into Victoria's Criminal Justice System (September 2021), Supplementary Submission to the Royal Commission into Victoria's Mental Health System (August 2020)*

Aboriginal Deaths in Custody

7. Community Factsheet - Ending Aboriginal Deaths in Custody
8. Submissions on behalf of Uncle Percy Lovett for the Coronial Inquest into the passing of Veronica Nelson
9. Video Podcasts for the 30 year anniversary of RCIADIC: with Aunty Rosemary Roe, with Senator Patrick Dodson, with Anyupa Butcher, and with Lee-Anne Carter.
10. *See also Submission to the Inquiry into Victoria's Criminal Justice System (September 2021)*

Prisons (General)

11. Submission to the Cultural Review of the Adult Custodial Corrections System (December 2021)

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[118] Under s356 *Children Youth and Families Act 2005*, it is mandatory to uplift certain matters to a higher court (murder, attempted murder, manslaughter, child homicide, homicide by firearm, arson causing death, culpable driving causing death), there is presumption of uplift of certain matters to a higher court where the child is 16 years or older (intentionally causing serious injury in circumstances of gross violence, aggravated home invasion, aggravated carjacking, one or more of various terrorism offences) and the Court must consider the appropriateness of uplift of certain matters to higher court where the child is 16 years or older (recklessly causing serious injury in circumstances of gross violence, rape, rape by compelling sexual penetration, home invasion, carjacking).

[119] r5(a) *Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2013*

[120] s69(2) *Corrections Act 1986*

Prisons (Healthcare)

12. Submission to the Consultation on the Royal Australian College of General Practitioners (RACGP) Standards for Health Services in Australian Prisons (May 2022)
13. Victoria's prison health care system should match community health care
14. *See also Submission to the Inquiry into Victoria's Criminal Justice System (September 2021)*

Prisons (Strip Searching)

15. Community factsheet: VALS intervention in Court of Appeal Strip Searching and Urine Testing Case
16. Strip searches in prison are traumatising breaches of human rights. So, why are governments still allowing them?

Places of Detention (Solitary Confinement)

17. Webinar – Unlocking Victorian Justice: Solitary Confinement
18. *See also Submission to the Inquiry into Victoria's Criminal Justice System (September 2021)*

COVID-19 Responses in Places of Detention

19. Submission to the Public Accounts and Estimates Committee COVID-19 Inquiry (September 2020)
20. Policy Paper - Building Back Better: Victorian Aboriginal Legal Service COVID-19 Recovery Plan (February 2021)
21. Submission to the Senate Legal and Constitutional Affairs Committee concerning the *Crimes Amendment (Remissions of Sentences) Bill* 2021 (Cth) (September 2021)
22. Community Factsheet - Managing the Pandemic in Victoria

Police Oversight and Accountability

23. Policy Brief – Reforming Police Oversight
24. Policy Paper – Reforming Police Oversight
25. Webinar – Who Polices the Police?

Bail

26. Policy Brief – Fixing Victoria's Broken Bail Laws

Decriminalising Public Intoxication

27. Community Factsheet - Decriminalising Public Intoxication

Raising the Age of Criminal Responsibility

28. Policy Brief - Raising the Age of Criminal Responsibility (2022)

Criminal Legal System (General)

29. Submission to the Inquiry into Victoria's Criminal Justice System (September 2021)
30. Website - Aboriginal Community Justice Reports
31. Webinar – Unlocking Victorian Justice: Aboriginal Community Justice Reports
32. Submission to the Inquiry into the Use of Cannabis in Victoria (September 2020)
33. Submission to the Sentencing Act Reform Project (April 2020)
34. Submission to the Parliamentary Inquiry into Spent Convictions Scheme (July 2019)
35. Submission to the Inquiry into Children of Imprisoned Parents (May 2022)
36. Submission to the Victorian Law Reform Commission Project – Improving the Response of the Justice System to Sexual Offences (March 2021)
37. Policy Paper - Addressing Coercive Control Without Criminalisation – Avoiding Blunt Tools that Fail Victim-Survivors
38. Webinar - Addressing Coercive Control Without Criminalisation – Avoiding Blunt Tools that Fail Victim-Survivors

Mental Healthcare and Disability

39. Submission to the Royal Commission into Victoria's Mental Health System (July 2019)
40. Supplementary Submission to the Royal Commission into Victoria's Mental Health System (August 2020)
41. Submission on Current Proposals for the new *Mental Health and Wellbeing Act* (August 2021)
42. Submission to Department of Families, Fairness and Housing, Victoria Review of the *Disability Act* 2006 (October 2021)

Anti-Racism and Systemic Racism

43. Submission on Victoria's Anti-Racism Strategy (December 2021)
44. Supplementary Submission on Victoria's Anti-Racism Strategy (June 2022)
45. Submission on the National Anti-Racism Framework (February 2022)
46. Community Factsheet - Systemic Racism

Aboriginal Self Determination and UNDRIP

47. Community Factsheet – Aboriginal Self-Determination
48. Submission to the Inquiry on the Implementation of United Declaration of the Rights of Indigenous Peoples in Australia in Australia (June 2022)