



SYSTEMIC INJUSTICE IN THE CRIMINAL LEGAL SYSTEM

Submission to the Yoorrook Justice Commission

ABOUT THE FEDERATION

The Federation is the peak body for Victoria's 46 Community Legal Centres. Our members are at the forefront of helping those facing economic, cultural or social disadvantage and whose life circumstances are severely affected by their legal problems.

For 50 years Community Legal Centres have been part of a powerful movement for social change, reshaping how people access justice, creating stronger more equitable laws, and more accountable government and democracy.

We pursue our vision of a fair, inclusive, thriving community through challenging injustice, defending rights and building the power of our members and communities.

WE WANT A COMMUNITY THAT IS FAIR, INCLUSIVE AND THRIVING: WHERE EVERY PERSON BELONGS AND CAN LEARN, GROW, HEAL, PARTICIPATE AND BE HEARD.

The Federation:

- ▼ Enables a strong collective voice for justice and equality;
- ▼ Mobilises and leads CLCs in strategic, well-coordinated advocacy and campaigns;
- ▼ Works with members to continuously improve the impact of community legal services;
- ▼ Drives creativity and excellence in the delivery of legal services to communities;
- ▼ Helps make justice more accessible.

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ACKNOWLEDGEMENTS



The Federation of Community Legal Centres acknowledges the Traditional Custodians of the lands across Victoria and note that this document was developed on the lands of the Wurundjeri people of the Kulin Nations.

We recognise that the over-representation of Aboriginal and Torres Strait Islander families and children in the justice system, many of whom have experienced family violence, is in part a devastating consequence of colonisation, intergenerational trauma and ongoing experiences of systemic racism.

We pay our respects to the strength and resilience of Aboriginal and Torres Strait Islander peoples and cultures and to all Elders past, present and emerging and recognise their unceded sovereignty.

In this submission, we use the word 'Aboriginal' to refer to Aboriginal and/or Torres Strait Islander People, communities and organisations.

SECTION 1: INTRODUCTION AND RECOMMENDATIONS

Introduction

We recognise the leadership of Aboriginal communities and organisations in advocating for reform, and the importance of Aboriginal self-determination in shaping Victoria's criminal legal system. We endorse the submission made by the Victorian Aboriginal Legal Service (VALS) and Djirra to the Yoorrook Justice Commission's Inquiry into the Criminal Justice System (the **Inquiry**). We have not made a submission to the Yoorrook Justice Commission's Inquiry into the Child Protection System, but also endorse the recommendations made by VALS and Djirra in relation to this inquiry.

In this submission, we have focused on some immediate reforms that must be made to reduce the overrepresentation of Aboriginal people in the criminal legal system. We have also highlighted the importance of prioritising early intervention measures which are culturally safe and led by well-resourced Aboriginal Community Controlled Organisations (ACCOs).

While this submission is focused on immediate reforms to the criminal legal system, we acknowledge and support the critical recommendations made by VALS in relation to realising Aboriginal self-determination in the criminal legal context, addressing systemic racism and focusing on healing over criminalisation. In particular, we support VALS in its call for:

- a Justice Treaty with Aboriginal communities and ACCOs which "sets a new foundation to transform the criminal legal system, including through progressive transfer of power, resources, data and control to allow for Aboriginal justice models."¹
- the establishment of an independent, statutory office of the Aboriginal Social Justice Commissioner to provide oversight for Aboriginal justice in Victoria, including implementation of coronial recommendations, recommendations from the Royal Commission into Aboriginal Deaths in Custody and associated inquiries.²

For decades, the community legal sector in Victoria has advocated for evidence-based approaches to criminal justice issues. The evidence is clear that investing in early intervention, community-based support and diverting people away from the criminal legal system is the most effective approach. Fuelled by mainstream media, public debate on criminal justice issues

¹ The Victorian Aboriginal Legal Service, *Nuther-mooyoop to the Yoorrook Justice Commission: Criminal Legal System*, November 2022.

² Ibid, p.44.

generally focuses on punishment instead of prevention.³ In Victoria, there is a disconnect between what works to reduce crime and the policy approach of the Victorian Government. There is extensive evidence that providing a person with stable housing,⁴ employment opportunities,⁵ and community-based supports for mental ill-health,⁶ substance use⁷ or victimisation,⁸ can reduce the likelihood that a person will end up in contact with the criminal legal system.

However, despite the evidence in favour of prevention, over the past decade, a number of reforms have been implemented in Victoria that have increased the punitive nature of the criminal legal system and contributed to the escalating numbers of people in prison and on remand. A common feature of these reforms has been to reduce judicial discretion and limit the courts' ability to consider the particular circumstances of each person and the context of their offending.

These reforms have disproportionality and adversely impacted Aboriginal people. Victoria's prison population has more than doubled over the last 10 years.⁹ However, due to the ongoing impacts of colonisation, systemic racism and discriminatory policing, the number of Aboriginal people in prison has nearly tripled during this period.¹⁰ Aboriginal people now represent 10 per cent of the prison population in Victoria, compared to six per cent in 2010.¹¹ This is in context of Aboriginal people representing 1 per cent of the population in Victoria.¹²

Many people who come into contact with the criminal legal system have experienced trauma and abuse.¹³ We recognise that for Aboriginal people, these hardships and inequities must be seen in context of the legacy of colonisation and ongoing systemic racism.¹⁴ The Parliamentary Inquiry into Victoria's Criminal Justice System (the **Victorian Inquiry**) found that intergenerational trauma associated with ongoing colonisation, culturally unresponsive institutional structures, complex

³ J Grosholz & C Kubrun, *Crime in the news: how crimes, offenders and victims are portrayed in the media*, *Journal of Criminal Justice and Popular Culture*, January 2007; K Gelb, *Myths and Misconceptions: Public opinion versus public judgment about sentencing*, Sentencing Advisory Council, 2006; K Gelb, *More Myths and Misconceptions*, Sentencing Advisory Council, 2008.

⁴ D Padgett et al, *Housing First: Ending Homelessness, Transforming Systems, and Changing Lives*, November 2015.

⁵ S Lageson et al, *How work affects crime and crime affects work over the life course*, Handbook of life course criminology: Emerging trends and directions for future research, 2013, pp. 201-212.

⁶ K Heilbrun et al, *The movement towards community-based alternatives to criminal justice involvement and incarceration for people with severe mental illness*, 2015.

⁷ D Weatherburn, *Law and Order in Australia – Rhetoric and Reality*, Current Issues in Criminal Justice, 2004, p. 318-319.

⁸ Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victims Services Review*, November 2020 p. 23.

⁹ Corrections Victoria, *Annual Prisoner Statistical Profile 2009-10 to 2019-20*, December 2020.

¹⁰ Ibid.

¹¹ Ibid.

¹² Australia Bureau of Statistics, *Victoria: Aboriginal and Torres Strait Islander population summary*, July 2022.

¹³ Victorian Aboriginal Legal Service, *Submission to the Inquiry into Victoria's Criminal Justice System*, September 2021, p. 8.

¹⁴ Ibid.

disadvantage and systemic racism place Aboriginal people at greater risk of being criminalised than other populations in Victoria.¹⁵

There is an urgent need for reform to reduce the overrepresentation of Aboriginal people in the criminal legal system. This must be coupled with investment in culturally safe support services and early intervention programs for Aboriginal people which are designed and led by Aboriginal communities and well-resourced ACCOs.

Summary of recommendations

Our primary recommendation to the Inquiry is to support the recommendations made by VALS and Djirra. In addition to and emphasising those submissions, we support the Inquiry recommending the following:

Early intervention and culturally safe supports

- Investing in self-determined, holistic and culturally appropriate early intervention and prevention programs which divert Aboriginal people away from the criminal legal system and are designed and led by well-resourced ACCOs.
- Adopting of a justice reinvestment framework for Victoria with a focus on self-determined solutions led by Aboriginal communities and ACCOs.
- Increasing access to culturally safe legal assistance and holistic, wrap-around support led by well-resourced ACCOs.
- Improving access to affordable and culturally safe social housing to reduce the risk of criminalisation.
- Adopting a rehabilitative approach to substance use that is community based and led, health driven, culturally safe and based on harm reduction principles.

Reforming the criminal legal system

- Reforming the bail laws, including by:
 - removing the reverse-onus and double uplift provisions; and
 - creating a presumption in favour of bail for all offences with the onus on the prosecution to demonstrate that bail should not be granted due to there being a specific and immediate risk to the physical safety of another person or demonstrable flight risk.
- Raising the age of criminal responsibility from 10 to at least 14 years old in line with international human rights standards.
- Removing mandatory sentencing in Victoria.
- Decriminalising minor offending, including by:

¹⁵ Parliament of Victoria, Legislative Council – Legal and Social Issues Committee, *Inquiry into Victoria's Criminal Justice System*, 2022

- the Victorian Government prioritising the review of all offences with the purpose of reducing criminalisation of low-level offending linked to underlying issues of poverty, disadvantage, and substance use.
- the Victorian Government taking immediate steps to downgrade offences linked to poverty, disadvantage and substance use where there is already a clear evidence basis for action.
- Decriminalising public intoxication and replacing it with a state-wide health response by November 2023.
- Reforming the use of cautions and diversions, including by:
 - improving the consistency and use of cautions and diversions across Victoria.
 - removing the requirement for Victoria Police or prosecution to consent to a diversion and making it available at the instance of the court.
 - resourcing ACCOs to develop and implement culturally safe cautioning and diversion programs for Aboriginal children, young people, and adults.
- Implementing sentencing reforms, including by:
 - courts taking into account the unique systemic and background factors impacting Aboriginal people in sentencing decisions.
 - strengthening culturally appropriate community-based sentencing options.

Strengthening police accountability

- Establishing a Police Ombudsman to investigate police misconduct that meets human rights standards and is responsive to the needs of Aboriginal complainants.
- Establishing a robust police monitoring regime to increase transparency and accountability in Victoria.

Improving prison conditions and parole reform

- Establishing an independent and well-resourced detention oversight bodies under the *Optional Protocol to the Convention against Torture (OPCAT)* to monitor Victoria's prisons and address the use of harmful practices in prisons.
- Delivering healthcare in custody that is the equivalent of that provided in the community.
- Reforming parole laws to create a fairer parole process and to improve transparency and accountability of the Adult Parole Board.
- Investing in culturally appropriate supports for Aboriginal people on parole or seeking to access parole.

Misidentification of victim survivors as aggressors

- Developing a whole-of-system approach to rectifying misidentification of victim survivors as perpetrators of family violence with a focus on addressing the disproportionate impact on Aboriginal women.

SECTION 2: EARLY INTERVENTION AND CULTURALLY SAFE SUPPORT

Early intervention and prevention

Different forms of social disadvantage and inequality compound to increase the risk of engagement with the criminal legal system.¹⁶ Yet the punitive nature of the current system further entrenches this inequality, continuing the cycle of incarceration, rather than addressing the factors contributing to inequality and social disadvantage. We recognise that the inequality and discrimination experienced by Aboriginal people, leading to cycles of criminalisation, is inextricably linked to the legacy of colonisation and ongoing systemic racism, and only serves to exacerbate intergenerational trauma.¹⁷

As recognised in the Victorian Inquiry, “the current system and approaches are failing to create a safer community, to reduce offending, and to lead to just outcomes”.¹⁸ It is clear that evidence-based prevention and early intervention needs to be prioritised, with investment in services that address inequality and disadvantage (including housing, employment, education and health).

In shifting to a prevention model, it is critical that Aboriginal self-determination is at the forefront of any reform and that there is access to culturally safe support services which are ACCO led.¹⁹ We support VALS’ call for the Victorian Government to invest in holistic, integrated and wrap around support for people to prevent contact with the criminal legal system, including culturally safe housing and social services, health, education and support for parents and families.²⁰ Early intervention programs targeted at Aboriginal children and young people are also critical.

Another cost-effective way of preventing crime is to tackle its causes through criminal justice policies such as justice reinvestment.²¹ Justice reinvestment diverts a portion of the funds spent on prisons to local communities to design and deliver local, community-based solutions. We support a justice reinvestment approach aimed at delivering local solutions that address socio-economic disadvantage and other underlying causes of crime, in partnership with community and

¹⁶ Ibid, p.xiv.

¹⁷ The Victorian Aboriginal Legal Service, *Nuther-mooyoop to the Yoorrook Justice Commission: Criminal Legal System*, November 2022.

¹⁸ Parliament of Victoria, Legislative Council – Legal and Social Issues Committee, *Inquiry into Victoria’s Criminal Justice System*, 2022, p. 1.

¹⁹ The Victorian Aboriginal Legal Service, *Nuther-mooyoop to the Yoorrook Justice Commission: Criminal Legal System*, November 2022, p. 38.

²⁰ Ibid, p. 34.

²¹ Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander peoples*, March 2018.

using data to identify local need. As part of this, it is critical that the government invests in self-determined solutions led by Aboriginal communities and ACCOs.²²

We recommend:

- investment in self-determined, holistic and culturally appropriate early intervention and prevention programs which divert Aboriginal people away from the criminal legal system and is designed and led by well-resourced ACCOs.
- the adoption of a justice reinvestment framework for Victoria with a focus on self-determined solutions led by Aboriginal communities and ACCOs.

Increase access to legal services which are culturally safe and ACCO led

It is essential that Aboriginal communities across Victoria have access to culturally safe and holistic legal services led by well-resourced ACCOs.²³ Increased investment in holistic and integrated support models, which include legal assistance, will help to address criminal legal issues before they escalate, as well as ensure people can receive support they need, when they need it. We support VALS' call for significant investment "to recognise the importance of cultural safety and self-determination in providing services to Aboriginal people, given the significant overrepresentation of Aboriginal people in the legal system."²⁴

We recommend additional investment to increase access to culturally safe legal assistance and holistic, wrap-around support led by well-resourced ACCOs.

Increase access to safe and affordable housing

A lack of affordable and social housing, in particular Aboriginal community-controlled housing, means that Aboriginal people in Victoria are at increased risk of entering the criminal legal system due to homelessness and being released from prison into homelessness each year.

Homelessness forms part of entrenched disadvantage experienced by many people who come into contact with the criminal legal system. The Australian Institute of Health and Welfare found

²² Djirra, *Submission to the Victorian Inquiry into the Criminal Justice System*, p. 15.

²³ The Victorian Aboriginal Legal Service, *Nuther-mooyoop to the Yoorrook Justice Commission: Criminal Legal System*, November 2022, p. 38.

²⁴ Parliament of Victoria, Legislative Council – Legal and Social Issues Committee, *Inquiry into Victoria's Criminal Justice System*, 2022, p. 166.

that about one third (33 per cent) of people reported being homeless in the four weeks prior to entering prison.²⁵ Among other factors, homelessness increases the likelihood of interactions with the police and visibility in public areas. The lack of access to stable housing can have profound flow on effects once people enter the criminal legal system. Lack of secure housing can be a barrier to being granted bail and parole.²⁶

It is critical that there is investment in safe, stable and affordable housing, including Aboriginal community-controlled housing, in order to ensure that people are not refused bail or parole due to homelessness and housing instability. As highlighted by Djirra in its submission to the Victorian Inquiry, this issue is particularly acute for Aboriginal women.²⁷ Djirra observed that “there is a clear causal link between family violence, housing instability and homelessness, and the incarceration of Aboriginal and Torres Strait Islander women.”²⁸ We support Djirra’s call for investment in “appropriate and culturally safe housing options to ensure Aboriginal women are safe from violence and not criminalised due to lack of housing”.

In line with the Housing First principles,²⁹ and in recognition of housing as a basic human right, access to transitional housing for people exiting prison should not be conditional on engagement with supports or run through Corrections Victoria. According to Housing First principles,³⁰ access to safe and permanent housing must be the priority for people experiencing homelessness. This recognises the significant challenges in addressing people’s complex needs where they do not have a home. Once housing is secured, then this provides an opportunity for support services to address a person’s complex needs, including culturally appropriate services for Aboriginal people, drug and alcohol counselling or mental health treatment. It follows that housing is vitally important to reduce risk factors for offending or recidivism post-release.

We recommend improving access to affordable and culturally safe social housing to reduce the risk of criminalisation.

Adopt a harm-reduction approach to substance use

A significant number of people in prison are charged with drug use and possession offences. As of 30 June 2020, 14.7 per cent of people were in prison in Victoria for drug offences (as their

²⁵ Australian Institute of Health and Welfare 2019, *The Health of Australia’s Prisoners 2018*, Cat. No. PHE 246. Canberra: AIHW, p.vii.

²⁶ See for example, E Russell et al, *A Constellation of Circumstances – The Drivers of Women’s Increasing Rates of Remand in Victoria*, July 2020.

²⁷ Djirra, *Submission to the Victorian Inquiry into the Criminal Justice System*, p.9.

²⁸ Ibid.

²⁹ D Padgett et al, *Housing First: Ending Homelessness, Transforming Systems, and Changing Lives*, November 2015.

³⁰ Ibid.

most serious offence/charge) which was higher for women at 26 per cent.³¹ While Aboriginal people are no more likely to use illicit substances than non-Aboriginal people, they are disproportionately impacted by the criminalisation of substance use and are more often charged with drug use offences.³² As highlighted by VALS in a recent policy paper, Victoria's strict bail laws results in high numbers of people in prison awaiting trial for drug charges that will not necessarily result in a term of imprisonment once the matter is finally determined by a court.³³

We support personal drug use being framed as a public health matter rather than a criminal justice issue.³⁴ In order to reduce drug-related offending, people must be able to access health and support services that focus on rehabilitation, and are delivered through community-based and led, culturally appropriate programs that take a harm reduction approach.

A harm reduction approach aims to address issues relating to alcohol and drug use by reducing the harmful effects of substances. Harm reduction considers the health, social and economic consequences of alcohol and other drug use on both the individual and the community as a whole. It includes interventions such as, needle and syringe programs and medically supervised injecting centres. The National Indigenous Drug and Alcohol Council highlighted the importance of introducing culturally appropriate drug treatment services for Aboriginal people to improve public health and criminal justice outcomes for Aboriginal communities.³⁵

We recommend adopting a rehabilitative approach to substance use that is community based and led, health driven, culturally safe and based on harm reduction principles.

³¹ Corrections Victoria, *Annual Prisoner Statistical Profile 2009–10 to 2019–20*.

³² The Victorian Aboriginal Legal Service, *VALS Policy Paper – Harm Reduction Not Harm Maximisation: An Alternate Approach to Drug Possession*, 2022, p.5.

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid.

SECTION 3: IMPROVING VICTORIA'S CRIMINAL LEGAL SYSTEM

Reforming the criminal legal system

Reform the bail laws

The Royal Commission into Aboriginal Deaths in Custody highlighted the importance of enforcing the principle that “imprisonment should be utilised only as a sanction of last resort”.³⁶ However, recent amendments to the *Bail Act 1977 (Vic)* (the **Bail Act**) has undermined this key principle and led to an exponential growth of unsentenced people being incarcerated in Victorian prisons with a disproportionate impact on Aboriginal people.

In 2013, new offences of contravening a conduct condition of bail and committing an indictable offence while on bail were introduced. In 2018, there was a significant expansion of the reverse onus tests for bail, with higher thresholds applying to minor offences through the creation of a new ‘show compelling reasons’ test and a much wider application of the ‘show exceptional circumstances’ test.

These changes have resulted in a substantial number of people charged with low-level and non-violent offences being refused bail and being held in prison on remand. The number of people in Victoria’s prisons who have not been found guilty of a crime has increased by more than 140 per cent in just under a decade with just under half of the people in prison being unsentenced,³⁷ costing taxpayers more than approximately \$1 million each day.³⁸

The Victorian Inquiry highlighted that Aboriginal people are disproportionately represented among the remand population in Victoria. In 2020, 44 per cent of all Aboriginal people in prison were on remand—up from 20 per cent in 2010—compared with 35 per cent of the general prison population being on remand.³⁹ Aboriginal women are further overrepresented, with data showing that approximately 90 per cent of Aboriginal women entering prison are unsentenced.⁴⁰

³⁶ National Report, Royal Commission into Deaths in Custody, Volume 5.

³⁷ Corrections, Prisons and Parole, Monthly time series prisoner and offender data, available at: <https://www.corrections.vic.gov.au/monthly-time-series-prisoner-and-offender-data>. See also: B Kolvos, ‘Victoria paying more than \$1m a day to keep unsentenced prisoners in jail’, *Guardian Australia*, 29 August 2022, available at: <https://www.theguardian.com/australia-news/2022/aug/29/victoria-paying-more-than-1m-a-day-to-keep-unsentenced-prisoners-in-jail>

³⁸ Ibid. Also see: Australian Government, Productivity Commission, *Report on Government Services 2022*, January 2022, available at: <https://www.pc.gov.au/ongoing/report-on-government-services/2022/justice/corrective-services>

³⁹ Parliament of Victoria, Legislative Council – Legal and Social Issues Committee, *Inquiry into Victoria’s Criminal Justice System*, 2022, p. 450.

⁴⁰ Ibid.

As noted by VALS in its submission to the Victorian Inquiry, Aboriginal people experience higher rates of housing instability, making it more difficult to access bail.⁴¹ Further, there is a lack of culturally safe bail support and accommodation for Aboriginal people.⁴² Detaining an Aboriginal person on remand “separates an individual from their family, community, country and culture, and jeopardises their health, wellbeing and safety”, as well as compromising education, employment and housing.⁴³

The Victorian Inquiry found that Victoria’s criminal legal system does not fairly balance the maintenance of community safety with the presumption of innocence for people accused of an offence.⁴⁴ The Victorian Inquiry recommended that there must be a review of the Bail Act with a view to simplifying the bail tests, making presumptions against bail more targeted to serious offending and serious risk and ensuring that bail decision makers have discretion to consider a person’s circumstances when deciding whether to grant bail.⁴⁵

We consider that a further review is not required, but that there is the need for urgent reform to the bail system in Victoria in light of its disproportionate impact on Aboriginal people who have engaged in low-level, non-violent offending.

We recommend the Bail Act is urgently reformed by:

- removing the reverse-onus and double uplift provisions in the Bail Act; and
- creating a presumption in favour of bail for all offences with the onus on the prosecution to demonstrate that bail should not be granted due to there being a specific and immediate risk to the physical safety of another person or demonstrable flight risk.

Additionally, we support VALS’ recommendations to this Inquiry in relation to reforming the bail system in Victoria.

Raise the age of criminal responsibility

The current minimum age of criminal responsibility in Australia at 10 years of age harms children, and in particular Aboriginal children. It is discriminatory and out of step with human rights standards and research which shows that children below the age of 14 have not yet reached the stage of brain development where they can be held criminally responsible. The United Nations

⁴¹ Parliament of Victoria, Legislative Council – Legal and Social Issues Committee, *Inquiry into Victoria’s Criminal Justice System*, 2022, p. 450.

⁴² Ibid.

⁴³ Ibid, p.451.

⁴⁴ Ibid, p.459.

⁴⁵ Ibid, p.460.

Committee on the Rights of the Child has called for countries to have a minimum age of criminal responsibility set at 14 or higher and recommends that children under 16 should not be deprived of their liberty. Incarceration at a young age has a damaging impact on children's wellbeing and growth, with long term implications, such as potential disability, suicide risk and increased risk of longer-term imprisonment as an adult.

There should be increased investment in therapeutic, child-centred, and culturally appropriate responses which are designed and led by Aboriginal communities and ACCOs, rather than criminal responses.

We recommend the age of criminal responsibility be raised from 10 to at least 14 years old in line with international human rights standards.

End mandatory sentencing in Victoria

There are a wide range of offences in Victoria which require courts to impose custodial sentences and fix a minimum term of imprisonment. Mandatory sentencing laws can lead to unjust and unfair outcomes. Mandatory sentencing requires the court to treat people who have committed offences identically, even when there may be varying levels of culpability. This is because they constrain the court from considering the context of offending, mitigating factors or alternative sentencing options. More punitive sentences and imprisonment may follow, which diverts focus away from rehabilitation, particularly for young people.

The Victorian Court of Appeal has been critical of mandatory sentencing as unjust and out of step with the community's best interests. Due to mandatory sentencing, a young person was sentenced to over three years in an adult prison in circumstances where the court considered that a sentence involving rehabilitation would have been a better outcome.⁴⁶ The UN Committee Against Torture has also called for Australia to abolish mandatory sentencing because of its discriminatory and disproportionate impact on Aboriginal people.⁴⁷

We recommend the removal of mandatory sentencing in Victoria.

⁴⁶ *Buckley v The Queen* [2022] VSCA 138

⁴⁷ UN Committee Against Torture (CAT), *Concluding observations of the Committee against Torture: Australia*, 22 May 2008, CAT/C/AUS/CO/3; UN CAT, *Concluding observations on the combined 4th and 5th periodic reports of Australia*, 23 December 2014, CAT/C/AUS/CO/4-5.

Decriminalise low level offences linked to poverty and disadvantage

Many minor offences are used by police to unfairly target Aboriginal people and people experiencing poverty. There have been repeated calls for the decriminalisation of minor offending and the implementation of non-punitive responses, following key recommendations made by the Royal Commission into Aboriginal Deaths in Custody. This is important in reducing the criminalisation of Aboriginal people and people experiencing poverty or mental ill-health, as well as decreasing pressures on the criminal legal system.

Recently, the Victorian Inquiry called for a review of all offences with a view to minimising the criminalisation of low-level offending linked to underlying issues such as income stress or alcohol and other drug issues.⁴⁸ We call on the government to prioritise this review, while also taking immediate steps to downgrade certain offences so there is a greater focus on diversion where there is already a clear evidence basis for action.⁴⁹ This includes petty theft (below a certain property level),⁵⁰ handling stolen goods and obtaining property by deception⁵¹ (where this is due to poverty/survival), common law offences of public nuisance and unlawful assembly⁵² and possessing drug of dependence.⁵³

We recommend that the Victorian government:

- prioritise the review of all offences with the purpose of reducing criminalisation of low-level offending linked to underlying issues of poverty, disadvantage, and substance use.
- take immediate steps to downgrade those offences where there is already a clear evidence basis for action.

Decriminalise public intoxication

The decriminalisation of public intoxication was recommended by the Royal Commission into Aboriginal Deaths in Custody over 30 years ago. This recommendation has since been reaffirmed in many subsequent reports, including the Drugs and Crime Prevention Committee's Inquiry into

⁴⁸ Parliament of Victoria, Legislative Council – Legal and Social Issues Committee, *Inquiry into Victoria's Criminal Justice System*, 2022, p.478-480.

⁴⁹ Ibid.

⁵⁰ *Crimes Act 1958* (Vic), section 74

⁵¹ Ibid, sections 88 and s 81.

⁵² Ibid, section 320

⁵³ *Drugs, Poisons and Controlled Substances Act 1991* (Vic), section 73. Also see the Smart Justice for Women, Submission to the Inquiry into Victoria's Criminal Justice System: Reducing the criminalisation of women, September 2021.

Public Drunkenness in 2001 and the Victorian Parliament's Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody in 2005.⁵⁴

The passing of Yorta Yorta woman Auntie Tanya Day after she was arrested for being intoxicated when she fell asleep on a train, is a stark illustration of the devastating impact of this law. The coroner who presided over the inquest into the death of Auntie Tanya Day supported decriminalisation of public intoxication in December 2018, and the government committed to do this in August 2019.

The Expert Reference Group on decriminalising public intoxication concluded that the "current punitive, criminal justice led response to intoxicated people is unsafe, unnecessary and inconsistent with current community standards" and called for urgent repeal of these laws.⁵⁵ The report also found that the criminalisation of public intoxication discriminates against vulnerable people, and in particular Aboriginal people.⁵⁶

We call on the government to ensure it meets its commitment to decriminalise public intoxication and replace it with a state-wide health response by November 2023. To implement a true public health response to public intoxication, Victoria police should not be accorded additional powers. Victoria police and other first responders should not be granted new powers to detain people or lock people up in police cells or other places of detention if they are intoxicated in a public place.

We recommend that public intoxication is decriminalised and replaced with a state-wide health response by November 2023.

Increase access to diversion and use of cautions

Cautions and diversion programs offer a pathway away from criminalisation and access to treatment and other therapeutic supports to address underlying causes.⁵⁷ These mechanisms are particularly important for children and young people to reduce cycles of imprisonment from an early age and are critical in reducing the overrepresentation of Aboriginal children and young people in youth detention. However, the limited opportunities for people to engage in these programs, and the ability of police to refuse to give cautions or diversion, undermines its effectiveness.

⁵⁴ Expert Reference Group, *Seeing the Clear Light of Day: Expert Reference Group on Decriminalising Public Drunkenness*, Report to the Victorian Attorney General, August 2020, p.1.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Parliament of Victoria, Legislative Council – Legal and Social Issues Committee, *Inquiry into Victoria's Criminal Justice System*, 2022, p.209.

The use of cautions and diversion is inconsistent, has declined in recent years, and is often left to a police officer's discretion.⁵⁸ For example, the use of diversion has gradually declined from 8.1 per cent of sentenced cases in 2005–06 to 6.4 per cent in 2019–20.⁵⁹ This decline is without oversight and public accountability and raises concerns as to why the Victoria Police guidelines for diversions are not publicly available.

It is important that opportunities for cautions and diversion are prioritised at every stage of the legal process.⁶⁰ Police should be encouraged to initiate diversion, and prosecutions should be encouraged to consent to a diversion wherever possible. However, there are no public guidelines or framework for police in how to exercise their discretion, and there is no right of appeal against a decision by police to withhold consent, or for the court to review a refusal of diversion by police. This means that decision making by police may be arbitrary, inconsistent or discriminatory, and without any oversight. The Victorian Inquiry found that the requirement for prosecution to consent to court-based diversion contributes to inequalities in the criminal legal system.⁶¹ A similar finding was made about diversion for children and young people.⁶²

This disproportionately impacts Aboriginal people in contact with the criminal legal system. The Victorian Inquiry found that police officers are less likely to caution young Aboriginal people and young people from lower socio-economic communities.⁶³ Research has also shown that Aboriginal people were found to be less likely to be provided with opportunities for diversion following their first offence compared to other first-time offenders.⁶⁴

Diversion provides an opportunity for a therapeutic response to address the underlying causes that led to the offending. Diversion into a care program or treatment that addresses the root cause reduces the rate of recidivism and therefore the number of people held in custody. It is important that ACCOs are resourced to develop and implement culturally safe programs for cautioning and diversion for Aboriginal children, young people and adults.

⁵⁸ Ibid., p.xiv, 217.

⁵⁹ Sentencing Advisory Council, Sentencing Outcomes in the Magistrates' Court, accessed September 2021.

⁶⁰ Victorian Aboriginal Legal Service, *Nuther-mooyoop to the Yoorrook Justice Commission: Criminal Legal System*, November 2022, p. 53.

⁶¹ Parliament of Victoria, Legislative Council – Legal and Social Issues Committee, *Inquiry into Victoria's Criminal Justice System*, 2022,, p.227.

⁶² Department of Justice and Community Safety, *Review of the Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017: Statutory Review under section 492B of the Children, Youth and Families Act 2005*, May 2022, p.74.

⁶³ Ibid., p.217.

⁶⁴ N Papalia, *Disparities in Criminal Justice System Responses to First-Time Juvenile Offenders According to Indigenous Status*, May 2019.

We recommend reforms to:

- improve the consistency and use of cautions and diversions across Victoria.
- remove the requirement for Victoria Police or prosecution to consent to a diversion and make it available at the instance of the court.
- resource ACCOs to develop and implement culturally safe cautioning and diversion programs for Aboriginal children, young people and adults.

Additionally, we support VALS' recommendations to this Inquiry to work with Aboriginal communities to increase access to pre-charge cautions and diversion in both the youth and criminal legal systems.

Sentencing reform

As highlighted by VALS in its submission to this Inquiry, sentencing processes regularly fail to consider the unique systemic and background factors affecting Aboriginal people in the justice system.⁶⁵

VALS has also highlighted that Aboriginal people are less likely to receive a community-based sentence than non-Aboriginal people,⁶⁶ and are more likely to breach a community-based sentence.⁶⁷ This is because such sentencing options are not appropriately tailored to the unique circumstances of Aboriginal people.

We support VALS' recommendations on sentencing reforms, including:

- courts taking into account the unique systemic and background factors impacting Aboriginal people in sentencing decisions
- strengthening culturally appropriate community-based sentencing options.

⁶⁵ Victorian Aboriginal Legal Service, *Nuther-mooyoop to the Yoorrook Justice Commission: Criminal Legal System*, November 2022, p. 56.

⁶⁶ Ibid. See also Productivity Commission, *Report on Government Services 2020*, Part C, Corrective Services Data Tables, Table 8A.8, Table 8A.6.

⁶⁷ Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, 2018, pp. 234 and 254.

Strengthening police accountability

Establish a Police Ombudsman to investigate police misconduct

There has been a significant investment in policing in Victoria. As policing increases, greater trust is placed in the hands of the police. However, the mechanisms in place for independent oversight of police conduct are inadequate. Most complaints against police officers are investigated by the police themselves. While the Independent Broad-based Anti-Corruption Commission has legislative power to investigate police misconduct, it investigated less than one per cent of allegations and referred all other matters to the police for investigation, including complaints about serious police misconduct (such as, serious assault).⁶⁸ A system where police investigate their own misconduct undermines public confidence in the police and weakens police accountability.

This has a disproportionate impact on communities that experience systemic racism and over-policing, in particular Aboriginal communities. In Victoria, Aboriginal people are substantially more likely to be apprehended and arrested by police and experience police misconduct and harassment.⁶⁹ A recent audit found most complaints by Aboriginal people about police conduct included use of force or assaults with many involving children. However, very few of these complaints were substantiated by police with significant evidence of bias, lack of impartiality and poor management of conflicts of interest.⁷⁰ The Commission for Children and Young People found that over 70 per cent of Aboriginal children and young people consulted spoke about racism, mistreatment, or violence by police, raising significant human rights issues.⁷¹ The Victorian Inquiry supported the establishment of a new independent body to investigate allegations of police misconduct and increase the accountability of Victoria Police.⁷² We also support VALS' call for independent and culturally appropriate investigation of Aboriginal deaths in custody and police-contact deaths.⁷³

⁶⁸ Independent Broad-based Anti-Corruption Annual Report 2020-21, p26. Also see: Independent Broad-based Anti-Corruption Commission Committee, *Inquiry into the external oversight of police corruption and misconduct in Victoria*, report for Victorian Parliament, Victorian Government Printer, September 2018, p. 185.

⁶⁹ The Victorian Aboriginal Legal Service's Policy Paper – *Reforming Police Oversight in Victoria*, July 2022, p.18.

⁷⁰ Independent Broad-based Anti-Corruption Commission, *Victoria Police handling of complains made by Aboriginal People – Audit report*, May 2022, p.8-11.

⁷¹ Commission for Children and Young People, *Our youth, our way: Inquiry into the overrepresentation of Aboriginal children and young people in the Victorian youth justice system*, Commission for Children and Young People, Melbourne, 2021, p.33, 432.

⁷² Parliament of Victoria, Legislative Council – Legal and Social Issues Committee, *Inquiry into Victoria's Criminal Justice System*, 2022, p. 256.

⁷³ Victorian Aboriginal Legal Service, *Nuther-mooyoop to the Yoorrook Justice Commission: Criminal Legal System*, November 2022, p. 67.

We recommend the establishment of a Police Ombudsman to investigate police misconduct. This body must meet human rights standards, including:

- having adequate powers and resources to carry out independent investigations; and
- being independent, prompt, transparent, victim-centred, and responsive to the needs of Aboriginal complainants.

Additionally, we support VALS' other recommendations to this Inquiry in relation to strengthening police accountability and oversight.

Establish a robust police monitoring regime

The Victorian Inquiry highlighted the ongoing issues with racial profiling and over-policing of Aboriginal communities.⁷⁴ It is important that there is increased accountability and transparency of police contact with Aboriginal people, particularly in relation to police stop and searches.

To strengthen police accountability, Victoria requires a wide-ranging police monitoring regime to review police conduct and performance. In addition to recording the perceived ethnicity of people subject to a police stop and search, this should include metrics about police use of force and weapons (OC foam and tasers), complaints and complaint handling data, and the impact of litigation against Victoria Police. Policing metrics should be monitored by an external body that provides publicly available reports to Parliament, with compliance obligations for police.

We recommend the establishment of a robust police monitoring regime to increase transparency and accountability in Victoria.

⁷⁴ Parliament of Victoria, Legislative Council – Legal and Social Issues Committee, *Inquiry into Victoria's Criminal Justice System*, 2022, p.196.

Improving prison conditions and parole reform

Ensure Victorian prisons are human rights compliant

OPCAT is an international human rights treaty aimed at preventing inhumane treatment and torture in detention facilities. While OPCAT was ratified by Australia in 2017, it has not yet been implemented. The implementation of OPCAT is critical in increasing independent oversight of prison conditions in Victoria and addressing harmful practices, such as solitary confinement, strip searches and physical restraints.⁷⁵ As highlighted by VALS, these practices are used disproportionately against Aboriginal people with harmful and traumatic consequences.⁷⁶

The Victorian Inquiry recognised the urgent need to establish and adequately resource independent detention oversight bodies under OPCAT (National Prevention Mechanisms (NPMs))⁷⁷ in close consultation with civil society and ACCOs.⁷⁸ The NPM's operations, policies and governance must be culturally appropriate and safe for Aboriginal people.⁷⁹ It is critical that the visit of the United Nations Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment is resumed.

As highlighted by VALS in its submission to this Inquiry, “healthcare in prisons is both inadequate and culturally unsafe” for Aboriginal people.⁸⁰ To further ensure prisons are human rights compliant, people in custody must be provided with healthcare (including, mental healthcare) that is the equivalent of that provided in the community. This requires an equivalent standard of health care to be met; not just an equivalence of available services.⁸¹

⁷⁵ Parliament of Victoria, Legislative Council – Legal and Social Issues Committee, *Inquiry into Victoria's Criminal Justice System*, 2022, p.624, 631.

⁷⁶ Victorian Aboriginal Legal Service, *Nuther-mooyoop to the Yoorrook Justice Commission: Criminal Legal System*, November 2022, p. 61.

⁷⁷ Parliament of Victoria, Legislative Council – Legal and Social Issues Committee, *Inquiry into Victoria's Criminal Justice System*, 2022, p.628-629.

⁷⁸ Ibid.,

⁷⁹ The Victorian Aboriginal Legal Service's (VALS) Policy Paper – *Reforming Police Oversight in Victoria*, July 2022, p.16.

⁸⁰ Victorian Aboriginal Legal Service, *Nuther-mooyoop to the Yoorrook Justice Commission: Criminal Legal System*, November 2022, p. 59.

⁸¹ Ibid, p.60

We recommend:

- the establishment of independent and well-resourced detention oversight bodies under OPCAT to monitor Victoria's prisons and address the use of harmful practices in prisons.
- the provision of healthcare in custody that is the equivalent of that provided in the community.

Additionally, we support VALS' other recommendations to this Inquiry in relation to ending ill-treatment in custody and strengthening independent detention oversight and accountability mechanisms.

Parole reform

Following the *Review of the Parole System in Victoria*, conducted by Ian Callinan AC in 2013, the onus shifted from the state to the individual applicant to make an application for release on parole. Despite the purpose of these reforms being to "improve community safety", the Victorian Inquiry found that it is not clear whether these reforms have actually improved community safety outcomes, and has recommended that the Victorian Government undertake an evaluation of these reforms.⁸²

Since these reforms, parole has become harder to access. In 2009–10, 30 per cent of people released from prison in Victoria were released on parole, compared to 6 per cent in 2019–20.⁸³ This decline is having a disproportionate impact on Aboriginal people, who are less likely to both apply for or be released on parole than non-Aboriginal people.⁸⁴

There are various barriers hindering people from accessing parole once their non-parole period has ended. These barriers include the lack of availability of appropriate programs in prisons, as well as challenges accessing secure accommodation in the community. The Victorian Inquiry highlighted that these challenges are particularly acute for Aboriginal people, in particular, Aboriginal women, due in part to limited accessibility of culturally appropriate pre-release programs.⁸⁵

Significant reform is needed to create a fairer parole process. Parole can assist people to reintegrate into the community where it is coupled with intensive case management delivered by well-resourced support services, reducing the risk of recidivism. It is vital that these supports are

⁸² Parliament of Victoria, Legislative Council – Legal and Social Issues Committee, *Inquiry into Victoria's Criminal Justice System*, 2022, p.708.

⁸³ Corrections Victoria, *Annual Prisoner Statistical Profile 2009–10 to 2019–20*.

⁸⁴ Victorian Aboriginal Legal Service, *Submission to the Victorian Inquiry into the Criminal Justice System*, p. 174.

⁸⁵ Parliament of Victoria, Legislative Council – Legal and Social Issues Committee, *Inquiry into Victoria's Criminal Justice System*, 2022, p.701.

accessible and culturally appropriate for Aboriginal people. We support VALS' recommendation that the Victorian Government invest in, and ensure access to, culturally appropriate rehabilitation programs and holistic support (including transitional housing) that are designed and delivered by ACCOs.⁸⁶

We recommend:

- reform to parole laws to create a fairer parole process and to improve transparency and accountability of the Adult Parole Board.
- investment in culturally appropriate supports for Aboriginal people on parole or seeking to access parole.

Additionally, we support VALS' recommendations to this Inquiry in relation to reform to the parole system and the provision of culturally appropriate support for people transitioning out of prison.

Addressing misidentification of victim survivors

The misidentification of women as perpetrators of family violence remains a complex and pervasive issue in Victoria. Victoria Police estimated that women who are respondents on family violence reports about intimate partner violence are misidentified approximately 12 per cent of the time.⁸⁷ A study conducted by Women's Legal Service Victoria in 2018 revealed that of the 55 women they assisted that were named by police as respondents to family violence intervention orders, 32 were incorrectly identified (58 per cent).⁸⁸

Certain cohorts of women are at greater risk of being misidentified, including Aboriginal women.⁸⁹ As highlighted by VALS, there are certain factors that increase the risk of misidentification by police, including:

- victim survivors being reluctant to engage with the police
- victim survivors displaying heightened emotional state in the presence of the police (while the perpetrator appears calmer)
- mental health and addiction issues resulting in unclear presentation to the police

⁸⁶ Victorian Aboriginal Legal Service, *Submission to the Victorian Inquiry into the Criminal Justice System*, p. 174.

⁸⁷ Family Violence Reform Implementation Monitor (FVRIM), *Monitoring Victoria's family violence reforms: Accurate identification of the predominant aggressor*, December 2021, p.11.

⁸⁸ Women's Legal Service Victoria, *Snapshot of police family violence intervention order applications*, January – May 2018.

⁸⁹ Family Violence Reform Implementation Monitor (FVRIM), *Monitoring Victoria's family violence reforms: Accurate identification of the predominant aggressor*, December 2021, p.11.

- the victim survivor having a criminal history.⁹⁰

As noted by VALS, these factors increase the risk of police misidentifying Aboriginal women as aggressors. Aboriginal women are less likely to be willing to cooperate with the police, more likely to have had contact with the criminal legal system and are disproportionately impacted by mental health issues.⁹¹ Misidentification of Aboriginal women by police is also more likely due to racism and bias among police and service providers.⁹²

The flow-on effects for women who have been misidentified can be devastating. Without adequate protection, this places Aboriginal women at higher risk of ongoing violence and can lead to far-reaching consequences, such as separation from children, reduced access to family violence services, criminalisation, and homelessness.⁹³ As highlighted by Djirra, misidentification can also influence outcomes in other legal proceedings and can limit access to critical support services, increasing isolation for Aboriginal women.⁹⁴

The Family Violence Reform Implementation Monitor recently highlighted the urgent need to address misidentification in its monitoring report.⁹⁵ The Victorian Inquiry recommended the implementation of a review mechanism to address misidentification.⁹⁶ To effectively reduce and respond to misidentification, as intended by the Royal Commission into Family Violence, a genuine whole-of-system effort is required.⁹⁷

We recommend the development a whole-of-system approach to rectifying misidentification of victim survivors as perpetrators of family violence with a focus on addressing the disproportionate impact on Aboriginal women.

⁹⁰ The Victorian Aboriginal Legal Service, *VALS Policy Paper – Addressing Coercive Control without Criminalisation: Avoiding Blunt Tools that Fail Victim-Survivors*, 2022, p.25. See also Victorian Aboriginal Legal Service, *Submission to the Victorian Inquiry into the Criminal Justice System*, p. 71-72.

⁹¹ The Victorian Aboriginal Legal Service, *VALS Policy Paper – Addressing Coercive Control without Criminalisation: Avoiding Blunt Tools that Fail Victim-Survivors*, 2022, p.26.

⁹² Ibid.

⁹³ Djirra, *Submission to the Victorian Inquiry into the Criminal Justice System*, p.14.

⁹⁴ Ibid, p. 13.

⁹⁵ Ibid., p.5.

⁹⁶ Parliament of Victoria, Legislative Council – Legal and Social Issues Committee, *Inquiry into Victoria's Criminal Justice System*, 2022, p. 245

⁹⁷ Djirra, *Submission to the Victorian Inquiry into the Criminal Justice System*, p.5.