

RECOMMENDATIONS

Transformative change through the Treaty process

1. The Victorian Government must:

- a) transfer decision-making power, authority, control and resources to First Peoples, giving full effect to self-determination in the Victorian child protection system. Transferring or creating decision-making power includes but is not limited to:
 - i. system design
 - ii. obtaining and allocating resources
 - iii. powers of, and appointments to bodies or institutions, and
 - iv. accountability and oversight functions including new First Peoples led bodies, oversight processes or complaints pathways
- b) negotiate this through the Treaty process including through potential interim agreements
- c) in doing so, go beyond the transfer of existing powers and functions under the *Children, Youth and Families Act 2005* (Vic), which will require new, dedicated legislation, developed by First Peoples, for the safety, wellbeing and protection of First Peoples children and young people, and
- d) recognising the urgent need for immediate reform and without delay, take all necessary steps to begin and diligently progress the establishment of a dedicated child protection system for First Peoples children and young people supported by stand-alone legislation based on the right of First Peoples to self-determination and underpinned by human and cultural rights to be developed by the First Peoples' Assembly of Victoria which must be sufficiently resourced by government for this purpose.

2. The Victorian Government must give full effect to the right of First Peoples to self-determination in the Victorian criminal justice system as it relates to First Peoples. This includes negotiating through the Treaty process, including through potential interim agreements, the transfer of decision-making power, authority, control and resources in that system to First Peoples. Transferring or creating decision-making power includes but is not limited to:

- a) system design
- b) obtaining and allocating resources
- c) powers of, and appointments to bodies or institutions, and
- d) accountability and oversight functions including new First Peoples led oversight processes or complaints pathways.

Urgent reforms: accountability, cultural competence and compliance with human and cultural rights

Open monitoring and evaluation underpinning accountability

3. To ensure State accountability for First Peoples related programs and policies by those responsible for their development and delivery:

- a) government bodies must ensure that First Peoples related programs and policies are rigorously monitored and evaluated
- b) monitoring and evaluation must be designed alongside the development of the program or policy so that it is built into the program or policy (and commences at the same time as implementation) with measurement focused on real outcomes
- c) where programs or policies have existing commitments to monitoring and evaluation, but little or no progress has been made, these must be actioned within six months
- d) where programs or policies do not have monitoring or evaluation included, the inclusion of these must be actioned urgently, and
- e) these monitoring and evaluation processes must be in accordance with the Burra Lotjpa Dunguludja (AJA4) Monitoring and Evaluation Framework including:
 - i. being consistent with First Peoples values
 - ii. reflecting First Peoples priorities for what is measured and how it is measured
 - iii. having an approved regular reporting cycle, and
 - iv. having a commitment to the open reporting of results.

4. The Victorian Government must as an urgent priority, having regard to the right of First Peoples to self-determination, negotiate in good faith with the First Peoples' Assembly of Victoria:

- a) the establishment of an independent and authoritative oversight and accountability commission for the monitoring and evaluation of First Peoples related policies and programs
- b) the detailed functions and membership of the commission, and
- c) to give the commission the necessary resources and authority to hold responsible government ministers, departments and entities to account for the success or failure of the programs they develop and deliver.

Strengthening cultural competence and responsiveness

5. The Victorian Government must as soon as possible significantly upscale the capability, competence and support in relation to human rights, including Aboriginal cultural rights, of all persons appointed to work or working in:

- a) the child protection system
- b) the corrections system, including prisons
- c) the youth justice system, including youth detention and like facilities and the bail system
- d) the adult justice system including the bail system
- e) Victoria Police, and
- f) the forensic mental health system,

to ensure that they have that capability, competence and support necessary for them to carry out their obligations under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) and other human and cultural rights laws, and in particular for this purpose the government must:

- g) review and revise all relevant policies, procedures, protocols, administrative directions, guidelines and like documents
- h) review all relevant training courses and programs, and
- i) ensure that Victorian First Peoples businesses or consultants participate on a paid basis in the review and revision of training courses and programs, and the delivery of these, wherever possible.

Strengthening human rights and cultural rights compliance

6. Drawing on (but not confined to) the recommendations of the 2015 Review of the Charter and its response to that review, the Victorian Government, following a public consultation process that includes the First Peoples' Assembly of Victoria and other First Peoples organisations, must clarify and strengthen the Charter so that it more effectively:

- a) requires public authorities to act in a way that is and make decisions that are substantively compatible with human rights including Aboriginal cultural rights, and
- b) ensures that public authorities are held accountable for acting or making decisions incompatibly with human rights including Aboriginal cultural rights, including by:
 - i. enabling individuals to bring a legal proceeding in the Victorian Civil and Administrative Tribunal for a remedy (including compensation) against public authorities who have made decisions or acted incompatibly with human rights including Aboriginal cultural rights under the Charter, and
 - ii. enabling individuals to rely upon the human rights including Aboriginal cultural rights in the Charter in any legal proceedings, as provided (for example) in section 40C of the *Human Rights Act 2004* (ACT).

Urgent reforms: child protection system

Oversight

7. The Victorian Government must amend the *Commission for Children and Young People Act 2012 (Vic)* to:

- a) specifically establish the role of the Commissioner for Aboriginal Children and Young People in the same way that the Principal Commissioner for Children and Young People's role is provided for in the legislation
- b) provide the Commissioner for Aboriginal Children and Young People with the same statutory functions and powers as the Principal Commissioner insofar as these powers relate to Aboriginal children and young people in Victoria
- c) expressly provide the Commissioner for Aboriginal Children and Young People the function to receive and determine individual complaints from or relating to First Peoples children and young people concerning their treatment in child protection, including out of home care, and
- d) give the Commissioner for Aboriginal Children and Young People and the Principal Commissioner rights of intervention in legal proceedings relating to a child or young person's rights under the Charter to be exercised at their discretion.

These roles and powers must be appropriately resourced.

Early help, prevention and intervention

8. The Victorian Government must:

- a) work with Aboriginal organisations to develop a consistent definition of early help, early intervention and prevention that aligns with the perspectives of First Peoples. This definition should be adopted across the Victorian Government
- b) enshrine prevention and early help/intervention as a guiding principle in the *Children, Youth and Families Act 2005 (Vic)* and take all necessary steps to implement this principle in the administration of the Act
- c) as an immediate action, substantially increase investment in Aboriginal Community Controlled Organisation prevention and early help/intervention services to keep First Peoples children out of the child protection system and to prevent their involvement from escalating when it does occur, and
- d) review the governance model for implementing target 12 of the Closing the Gap Agreement, with a view to broadening the responsibility to achieve this target beyond the Department of Families, Fairness and Housing.

9. The Victorian Government must publicly report annually on the amount and proportion:

- a)** of total child protection and family services funding allocated to early intervention (family and parenting services) compared to secondary and tertiary services (community delivered child protection services, care services, transition from care services and other activities), and
- b)** of funding allocated to Aboriginal Community Controlled Organisations compared to mainstream services for early intervention (family and parenting services), secondary and tertiary services.

10. The Victorian Government must immediately give a direction to health services (including perinatal, maternal and child health services) that:

- a)** clinical and allied health staff working with pregnant women must undertake appropriate training to address bias and build expertise in working safely and effectively with First Peoples women and families to address their social and emotional needs, and
- b)** this training must be designed and delivered by a Victorian First Peoples business or consultants on a paid basis, and completion rates of this training must be publicly reported.

11. The Department of Families, Fairness and Housing must ensure that:

- a)** when a child protection worker is considering making a pre-birth report, that prior to birth, and with the consent of the pregnant Aboriginal women, organisations (including Aboriginal Community Controlled Organisations or Aboriginal Community Controlled Health Organisations) are informed of the rationale for and intention to make a pre-birth report so that they can:
 - i. provide input into that decision
 - ii. ensure people with appropriate training and expertise are involved, and
 - iii. offer culturally safe supports to the mother, father and/or significant others in the family network
- b)** when DFFH receives a pre-birth report from any source, that pregnant Aboriginal women are informed of the report by a person(s) with the appropriate expertise to hold such a sensitive discussion and who has the skills to respond appropriately and offer a range of culturally safe support options, including a referral to a supporting organisation (including an Aboriginal Community Controlled Organisation or Aboriginal Community Controlled Health Organisation), and
- c)** pre-birth reports that are assessed as not requiring further action are to be excluded from this scheme.

Child removal

12. Whenever:

- a) the Department of Families, Fairness and Housing receives a pre-birth report regarding a pregnant Aboriginal woman, or
- b) a child protection report is substantiated regarding an Aboriginal child,
then:
- c) subject to the consent of the person to whom the report relates, the Department must automatically notify a Victorian Aboriginal legal service provider to be funded by the Victorian Government so that the child's parents and/or primary care giver are offered legal help and, where appropriate non-legal advocacy.

13. The Victorian Government must ensure that an impact evaluation of the Child Protection Risk Assessment Framework (SAFER) is commenced within 12 months, and in the case of First Peoples children:

- a) is First Peoples led and overseen by a First Peoples governance group
- b) has methodology that includes a review of individual cases by the Commissioner for Aboriginal Children and Young People, and
- c) makes recommendations that include actions to reduce child protection practitioner racial bias when applying the Framework.

14. The Department of Families, Fairness and Housing must ensure that:

- a) all incoming child protection staff, as part of their pre-service education, complete cultural awareness and human and cultural rights training covering issues including:
 - i. the history of colonisation and in particular the impact of 'protection' and assimilation policies
 - ii. the continuing systemic racism and paternalism inherent in child protection work today that must be identified, acknowledged and resisted
 - iii. the value of First Peoples family and child rearing practice
 - iv. upholding human rights including Aboriginal cultural rights, and
 - v. the strength of First Peoples families and culture and culturally appropriate practices
- b) all child protection staff and Department executives undertake regular, mandatory cultural safety training, to be designed and delivered by a Victorian First Peoples business or consultants on a paid basis, and
- c) completion rates for training are published by the Department annually.

15. In relation to determining the identity of First Peoples children:

- a) the Department of Families, Fairness and Housing, in consultation with the Commissioner for Aboriginal Children and Young People and relevant Aboriginal Community Controlled Organisations, must improve how they identify and deidentify First Peoples children in the Victorian children protection system, and
- b) the Commissioner for Aboriginal Children and Young people must undertake regular audits and publish the results to ensure child protection practitioners are correctly identifying and deidentifying First Peoples children and doing so in a timely way.

16. The Department of Families, Fairness and Housing must urgently take steps to ensure full compliance with its obligations to:

- a) convene an Aboriginal Family Led Decision Making meeting before making any significant decision about an Aboriginal child, and record the outcome, and
- b) consult with the Aboriginal Child Specialist Advice and Support Service on all significant decisions affecting an Aboriginal child and record the outcome.

17. The Victorian Government must amend the *Children, Youth and Families Act 2005 (Vic)* to:

- a) specify that priority be given to keeping siblings together in placement decisions (both in out of home care and permanent placements)
- b) include in the decision-making principles a presumption that removal of a First Peoples child from their family or community causes harm
- c) provide that a child protection practitioner must record how they have considered the presumption of harm caused by removal in their decision to remove a First Peoples child, and
- d) provide that the Children's Court is required to include in its reasons for a removal decision how the presumption of harm caused by removal has been considered.

These amendments must be made urgently while a new First Peoples led child protection system and accompanying Act is designed and implemented in accordance with recommendation 1.

18. The Victorian Government must:

- a) ensure Children's Court of Victoria judicial officers determine child protection matters state-wide, and
- b) abolish the current practice of having non-specialist magistrates determining child protection matters in some rural and regional court locations.

19. The Victorian Government must as soon as possible expand and sufficiently resource the Marram-Ngala Ganbu (Koori Family Hearing Day) state-wide.

Out of home care

- 20. The Victorian Government must address barriers to First Peoples becoming carers for First Peoples children in the child protection system by:**
- a)** simplifying application and vetting processes and improving support for people navigating the process
 - b)** ending the substantive inequality between kinship carers and foster carers by removing the automatic commencement of kinship payments at level one such that payments are made at a rate that reflects the complexity of kinship care, and
 - c)** ensuring kinship carers have appropriate access to training, support, and services at a level that is at least equivalent to the training, support and services offered to foster carers.
- 21. The Victorian Government must amend the *Children, Youth and Families Act 2005 (Vic)* to require the Department of Families, Fairness and Housing to ensure that all children who are placed in out of home care receive a developmental disability assessment and health assessment consistent with the National Out of Home Care Standards and in a timely way.**
- 22. The Victorian Government must amend the *Children, Youth and Families Act 2005 (Vic)* to provide the Children’s Court with greater powers to ensure that cultural plans are developed, implemented and monitored, particularly when out of home care orders are being extended and children’s separation from their families is prolonged.**
- 23. The Victorian Government must urgently:**
- a)** ensure that the Framework to Reduce Criminalisation of Young People in Residential Care is applied in all cases
 - b)** establish a mechanism within the Commission for Children and Young People through which young people can report that a residential care provider or Victoria Police has failed to apply the Framework, so that the Commissioner can advocate for that young person, including (in the case of police) by referring the matter to an independent police oversight body
 - c)** ensure that, when the Commissioner for Aboriginal Children and Young People is placed on a statutory footing, these functions are performed by that Commissioner with respect to those children and young people, and
 - d)** fund the development and delivery of training to residential care providers and Victoria Police on implementing the Framework in practice.

24. The Commission for Children and Young People and Commissioner for Aboriginal Children and Young People must:

- a) monitor compliance with the Framework to Reduce Criminalisation of young people in residential care current 18-month action plan
- b) review individual cases
- c) specify targets for reduced police contact, and
- d) publicly report on outcomes.

Permanency and reunification

25. The Victorian Government must amend the *Children, Youth and Families Act 2005* (Vic) to allow the Children's Court of Victoria to extend the timeframe of a Family Reunification Order where it is in the child's best interest to do so.

26. The Victorian Government must:

- a) recognise that the human and cultural rights of First Peoples children in permanent care to have, express, develop and maintain their culture, and to maintain contact with their Aboriginal family, kin and community, are not presently adequately respected and ensured in practice, and
- b) urgently work with the First Peoples' Assembly of Victoria and relevant Aboriginal organisations to formulate and implement all necessary legislative, administrative and other means for respecting and ensuring those rights, including by authorising Aboriginal Community Controlled Organisations to monitor the cultural care plans of Aboriginal children who are the subject of permanent care orders.

Urgent reforms: criminal justice system

Police

27. The Victorian Government must establish and adequately resource a new independent police oversight authority, headed by a statutory officer who has not been a police officer, to:

- a) investigate and determine all complaints about police (except for minor customer service matters)
- b) investigate and report on all police contact deaths and serious incidents
- c) conduct independent monitoring of and reporting on police custody and detention
- d) on its own motion, monitor, audit, systemically review and report on the exercise of police powers and interactions with the public including customer service matters

- e) undertake own motion, public interest investigations, and
- f) publish reports in the public interest.

The new authority must:

- g) have powers to arrest, search property and compel the production of information including from Victoria Police, and
- h) include a dedicated division for complaints from First Peoples that is under First Peoples leadership.

28. Access to pre-charge cautions in the adult criminal legal system in appropriate cases should be increased by all necessary legislative, administrative and others means including by:

- a) legislating a positive duty upon Victoria Police to:
 - i. take into account an Aboriginal person's unique background and systemic factors when making decisions on cautioning or diversion
 - ii. demonstrate the steps taken to discharge this obligation, and
 - iii. record reasons for their decisions
- b) introducing a legislative presumption in favour of alternative pre-charge measures in appropriate cases (for example, verbal warnings, written warnings, cautions and referrals to cautioning programs), and
- c) Victoria Police publishing cautioning data its Annual Report, including specific data comparing cautioning rates for Aboriginal and non-Aboriginal people.

29. The *Equal Opportunity Act 2010 (Vic)* must urgently be amended to prohibit race and other forms of discrimination in the administration of State laws and programs, including all functions performed by Victoria Police, Corrections Victoria and child protection authorities.

30. In relation to the decriminalisation of public intoxication:

- a) the Chief Commissioner of Police must ensure that Victoria Police conduct is closely monitored to ensure police members do not use existing powers to unnecessarily take intoxicated people into custody, for example by 'up-charging', and
- b) the Victorian Government's planned independent evaluation of the monitoring of police conduct must:
 - i. be First Peoples led, with appropriate governance by them
 - ii. cover at least the first 12 months and then three years of implementation, and
 - iii. have results that are made public.

31. The following mandatory criteria must be introduced for the selection and appointment of the Chief Commissioner of Police and when undertaking annual executive performance reviews of the Commissioner:

- a)** knowledge, experience, skills and commitment to changing the mindset and culture of Victoria Police, to end systemic racism and to ensure the human rights of First Peoples are respected, protected and promoted in all aspects of police operations
- b)** understanding of the history of colonisation and in particular the role of Victoria Police in the dispossession, murder and assimilation of First Peoples, and the ongoing, intergenerational trauma and distrust of police this has caused
- c)** recognition of ongoing systemic racism within Victoria Police and the need for this to be identified, acknowledged and resisted, and
- d)** experience, skills in, and commitment to, changing the culture of Victoria Police to end systemic racism and to ensure the human rights of First Peoples are respected, protected and promoted in all aspects of police operations and the organisation.

Bail

32. The *Bail Act 1977* (Vic) must immediately be amended to:

- a)** create a presumption in favour of bail for all offences with the exception of murder, terrorism and like offences
- b)** place the onus on the prosecution to prove that bail should not be granted due to a specific, serious or immediate risk to the safety of a person or to the administration of justice, with the exception of murder, terrorism and like offences
- c)** prohibit remand if a sentence of imprisonment is unlikely if there is a finding of guilt (unless it is necessary to protect the safety of a person or the proper administration of justice pending hearing)
- d)** repeal the bail offences contained in current sections 30, 30A and 30B
- e)** require all bail decision-makers to explain what information they have considered to understand how a person's Aboriginality is relevant, and provide the reasons for any refusal to grant an application for bail made by an Aboriginal person, and
- f)** require the Victorian Government and Victoria Police to publicly report, at least annually, bail and remand rates for Aboriginal people, and summary data of the reasons given by bail decision-makers for refusing bail.

33. The Victorian Government must:

- a)** develop, deliver and publicly report on a cultural change action plan to ensure all bail decision-makers exercise their powers and functions on the basis that imprisonment on remand (including that of First Peoples) is used only as a last resort, and
- b)** ensure that the development and ongoing monitoring of performance of the action plan is First Peoples led.

34. The Victorian Government must ensure access to culturally safe and appropriate bail hearings for Aboriginal people, and culturally safe support for First Peoples on bail.

Youth justice

35. The Victorian Government must urgently introduce legislation to raise the minimum age of criminal responsibility in Victoria to 14 years without exceptions and to prohibit the detention of children under 16 years.

36. The Victorian Government’s planned new Youth Justice Act must:

- a)** explicitly recognise the paramountcy of human rights, including the distinct cultural rights of First Peoples, in all aspects of the youth justice system
- b)** embed these rights in the machinery of the Act, and
- c)** require all those involved in the administration of the Act to ensure those rights.

Courts, sentencing and classification of offences

37. The Victorian Government must:

- a)** amend the *Sentencing Act 1991* (Vic) to include a statement of recognition acknowledging:
 - i. the right of First Peoples to self-determination
 - ii. that First Peoples have been disproportionately affected by the criminal justice system in a way that has contributed to criminalisation, disconnection, intergenerational trauma and entrenched social disadvantage
 - iii. the key role played by the criminal justice system in the dispossession and assimilation of First Peoples
 - iv. the survival, resilience and success of First Peoples in the face of the devastating impacts of colonisation, dispossession and assimilationist policies, and
 - v. that ongoing structural inequality and systemic racism within the criminal justice system continues to cause harm to First Peoples, and is expressed through decision-making in the criminal justice system and the over-representation of First Peoples in that system
- b)** amend the *Sentencing Act* to require courts to, in appropriate cases, consider alternatives to imprisonment for all offenders, with particular attention to the circumstances of Aboriginal offenders
- c)** amend the *Sentencing Act* to, in relation to sentencing:
 - i. require courts to take into account the unique systemic and background factors affecting First Peoples, and
 - ii. require the use of Gladue-style reports for this purpose, and

- d) ensure that:
 - i. there is comprehensive cultural awareness training of lawyers and the judiciary to support the implementation of these requirements, and
 - ii. the design and delivery of such training must be First Peoples led and include education about the systemic factors contributing to First Peoples over-imprisonment.

38. The Victorian Government must amend the *Criminal Procedure Act 2009 (Vic)* and the *Children, Youth and Families Act 2005 (Vic)* to remove the requirement that the prosecution (including police) consent to diversion and replace it with a requirement that the prosecution be consulted.

39. The Victorian Government must:

- a) where appropriate decriminalise offences linked with disadvantage arising from poverty, homelessness, disability, mental ill-health and other forms of social exclusion, and
- b) review and then reform legislation as necessary to reclassify certain indictable offences (such as those kinds of offences) as summary offences, and for this purpose, by 29 February 2024, refer these matters to the Victorian Law Reform Commission (or similar independent review body) for urgent examination which includes consultation with the First Peoples' Assembly of Victoria and relevant Aboriginal organisations.

The Victorian Government must promptly act on the review's recommendations.

Prisons

40. The Victorian Government must:

- a) amend relevant legislation to expressly prohibit routine strip searching at all Victorian prisons and youth justice centres, and
- b) ensure that data on the use of strip searching is made publicly available and used to monitor compliance with the prohibition on routine use.

41. Noting that cooperation with the Australian Government is required, the Victorian Government must immediately take all necessary legislative, administrative or other steps to designate an independent body or bodies to perform the functions of the National Preventive Mechanism of monitoring the State's compliance with the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment of Punishment in places of detention*.

42. The Victorian Government must immediately take all necessary steps to ensure prisoners (whether on remand or under sentence and whether in adult or youth imprisonment or detention) including Aboriginal prisoners can make telephone calls for free or at no greater cost than the general community.

43. The Victorian Government must, as soon as possible and after consultation with the First Peoples' Assembly of Victoria and relevant Aboriginal organisations, take all necessary steps to structurally reform the Victorian prison system based on the recommendations of the Cultural Review of the Adult Custodial Corrections System and in particular the following recommendations:

- a)** a new legislative framework for the adult custodial corrections system which focusses on rehabilitation, safety, cultural and human rights (recommendation 2.1)
- b)** a new independent Inspectorate of Custodial Services including an Aboriginal Inspector of Adult Custodial Services (recommendation 2.3)
- c)** enhanced data capability and information management system (recommendation 2.6), but which must apply Indigenous Data Sovereignty principles in relation to data of First Peoples
- d)** improved professional development for the custodial workforce (recommendation 3.9), but taking into account the above recommendations for strengthening capability, competence and support in relation to human and cultural rights, and
- e)** other recommendations in relation to Aboriginal prisoners (see recommendations 5.3 to 5.16).

44. The Victorian Government must:

- a)** take all legislative, administrative and other steps to implement the *United Nations Standard Minimum Rules for the Treatment of Prisoners* in relation to the use of solitary confinement at all Victorian prisons and youth justice centres, including an express prohibition on the use of solitary confinement on children and on the use of prolonged or indefinite solitary confinement on adults, and
- b)** ensure that Victorian prisons and youth justice centres are adequately funded and properly operated so that the common practice of locking down prisoners in their cells for prolonged periods for administrative or management reasons in violation of their human and cultural rights is ended.

Law reform to enable truth telling

45. By 29 February 2024 the Victorian Government must legislate to create new statutory protection for public records that ensure that information shared on a confidential basis with Yoorrook will be kept confidential for a minimum of 99 years once Yoorrook finishes its work and its records are transferred to the Victorian Government.

46. The Victorian Government must:

- a)** review section 534 of the *Children, Youth and Families Act 2005* (Vic) to identify a workable model that:
 - i. places clear time limits on the operation of section 534 so that where the only individuals identified in a publication are adults who have provided their consent, and the Children’s Court matter is historical in nature, then the prohibition does not apply, and
 - ii. enables a Royal Commission or similar inquiry to publish information about a child who is subject to protection proceedings or a protection order, where the child provides that information, is capable of understanding the consequences of losing anonymity and provides their consent, and

- b)** ensure that any review of section 534 of the *Children, Youth and Families Act* is First Peoples led insofar as the proposed reforms affect First Peoples.