

YOORROOK

for Justice

**Report into Victoria's
Child Protection and
Criminal Justice Systems**



YOORROOK
Justice Commission

Published by order, or under the authority, of the Parliament of Victoria August 2023

© Copyright: Yoorrook Justice Commission, 2023

ISBN
Electronic version:
978-0-6455219-4-8

This report should be cited as
*Yoorrook Justice Commission,
Yoorrook for Justice: Report into
Victoria's Child Protection and
Criminal Justice Systems (2023)*

Photo credits

Cover: Mark Thomson
David Callow pg ii
Brianna Young pgs ii, 3, 5, 7, 14-15,
44-45, 55-57, 62, 76, 79, 93, 106, 111,
118, 125-128, 130, 133, 135, 153-154,
157, 163-164, 178, 183, 191, 196, 198,
212, 216, 218, 233, 235, 253, 255,
261, 268, 270, 272, 297, 319-320,
324, 345, 350, 368, 371, 375, 381,
392-393, 401
Nikki Castle pgs 3, 14, 23, 106, 201
James Eastoe-Collins pg 7, 78,
83, 117, 256, 297

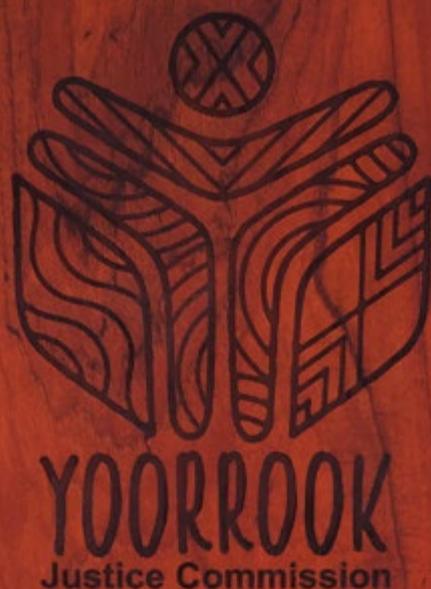
Graphic Design
Stephen Horsley,
[Propellant](#)

Acknowledgement of country

The Yoorrook Justice Commission (Yoorrook) acknowledges the Traditional Owners of country of the lands and waters currently known as Victoria, and pays respect to them, their cultures and their Elders past and present.

Yoorrook is required to investigate and report on injustice against First Peoples. Our mandate uses a broad and inclusive definition of First Peoples which includes the Traditional Owners of a place in Victoria, including family and clan groups, and their ancestors. It also includes all Aboriginal and Torres Strait Islander people living in Victoria or who previously lived in Victoria.

Native title and heritage laws have specific legal processes to recognise Traditional Owner groups. Yoorrook acknowledges the creation of these processes are part of the impact of colonisation. Yoorrook is committed to being inclusive and to the promotion of self-determination. The use by Yoorrook of a particular name or word is not an endorsement of a particular view. Yoorrook's mandate states that it cannot inquire into or report on decisions or outcomes in relation to native title or heritage laws. Yoorrook extends deep respect to all Traditional Owners.



The Hon. Professor Margaret Gardner AC
Governor of Victoria
Government House
Government House Drive
Melbourne VIC 3004

Ms Ngarra Murray and Mr Rueben Berg
Co-Chairs
First Peoples' Assembly of Victoria
48 Cambridge Street
Collingwood VIC 3066

31 August 2023

Your Excellency, Ms Murray and Mr Berg

In accordance with the amended Letters Patent dated 4 April 2023, we are pleased to present to you the second interim report of the Yoorrook Justice Commission, examining historical and current systemic injustices in the child protection and criminal justice systems in Victoria.

Yours sincerely,



Professor
Eleanor A Bourke
AM
CHAIR



Adjunct Professor
Sue-Anne Hunter
DEPUTY CHAIR



Travis Lovett
COMMISSIONER



Distinguished
Professor
Maggie Walter
COMMISSIONER



Professor the
Honourable Kevin
Bell AM KC
COMMISSIONER



CONTENTS



A : 2

Introduction



Acknowledgements	2
Chairperson's foreword	4
About this report	6
List of figures and tables	12

B : 14

Executive summary and recommendations



Executive summary	14
Key facts	24
Recommendations	26

C : 44

Focus on child protection and criminal justice systems



1. The past is the present: the continuation of the colonial project in child protection and criminal justice	46
2. Self-determination	74
3. Accountability, capability, and compliance with human and cultural rights obligations	92

D : 106

Child protection



4. Overview of the child protection system	108
5. Early help, prevention and intervention	126
6. Child removal	146
7. Out of home care	178
8. Permanency and family reunification	212

E : 234

Criminal justice



9. Overview of the criminal justice system	236
10. Police	252
11. Bail	290
12. Youth justice	314
13. Courts, sentencing and classification of criminal offences	342
14. Victorian prisons	360

F : 392

Other matters



15. Law reform to enable truth telling	394
--	-----

Appendices

A. Witness list	402
B. Glossary	405
C. Child protection policy frameworks, oversight bodies and previous reviews	412
D. Previous reviews and inquiries into the criminal justice system	428
E. Aboriginal led youth justice diversionary programs	437
F. Victoria's adult custodial corrections system	440



Introduction

ACKNOWLEDGEMENTS

Commissioners thank former Commissioner Dr Wayne Atkinson for his contribution to the establishment of Yoorrook and his tireless work for First Peoples.

We also thank everyone who contributed to this inquiry into historic and ongoing systemic injustice in the criminal justice and child protection systems including those who made submissions, attended roundtables and appeared in hearings.

Yoorrook particularly acknowledges the vital contributions of First Peoples who shared their lived experiences of these systems. By sharing their experiences of injustice, they provided the foundation for this report and its recommendations to address injustice. Their contributions have created the momentum for change to build a better future.

Yoorrook thanks everyone who worked to gather the evidence-base for this inquiry and produce this report. Yoorrook's staff supported witnesses and participants who shared experiences of trauma and loss, drawing on their trauma-informed and cultural safety expertise. They ensured hearings, submissions and other processes ran smoothly, managed and analysed a large volume of evidence, and drafted this report. They ensured Yoorrook's work was communicated effectively to huge audiences via media and social media.

Yoorrook's Counsel Assisting team of Tony McAvoy SC, Fiona McLeod AO SC, Timothy Goodwin, Sarala Fitzgerald and others ensured Yoorrook's hearings were critical to the accountability that this inquiry has brought. They expertly exposed the evidence that shows the urgent need for change and how it can be brought about. They ensured hearings were conducted with deep sensitivity and respect for First Peoples witnesses.

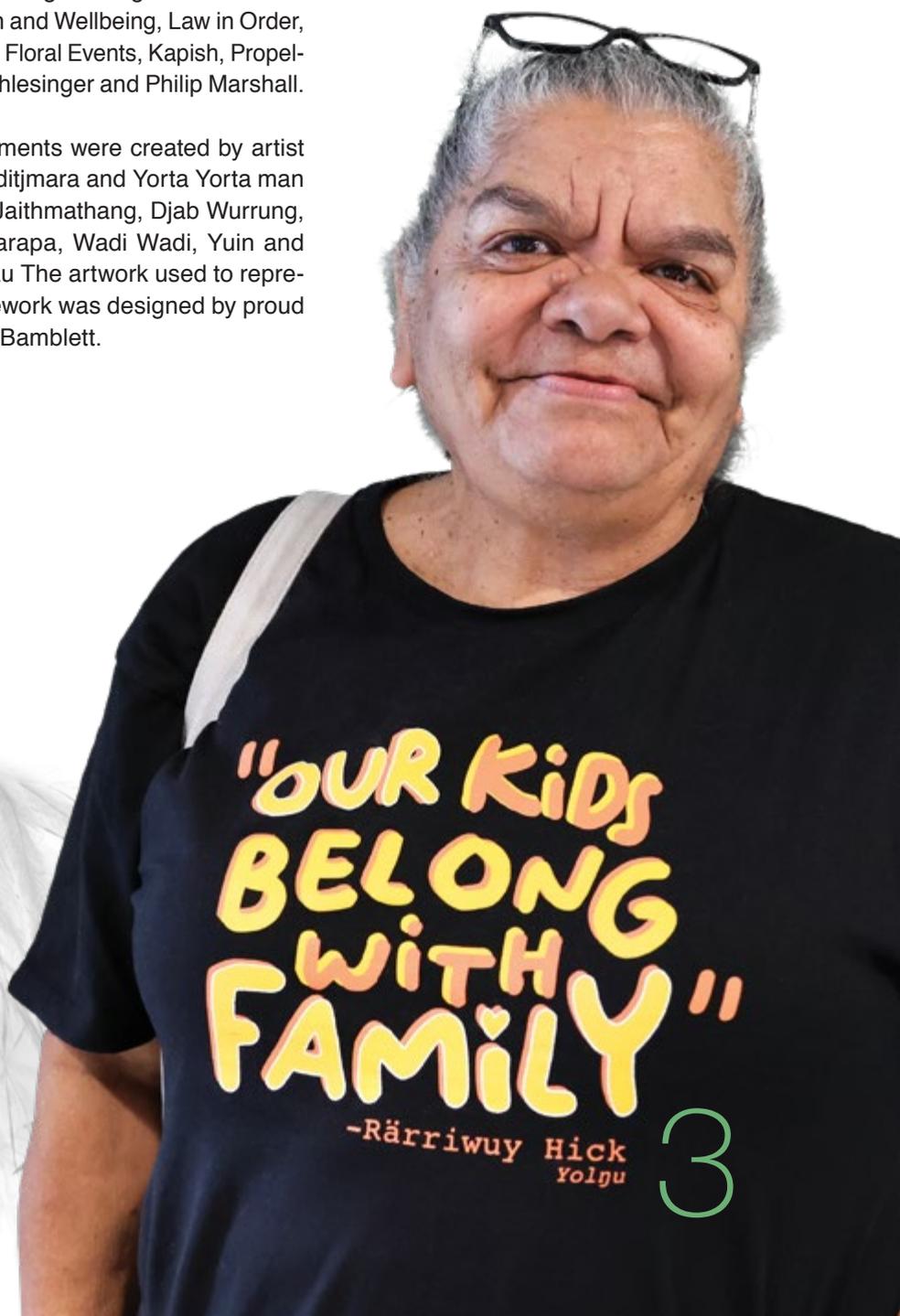
Yoorrook's team of Solicitors Assisting, King & Wood Mallesons (KWM), led by Ben Kiely, Emily Heffernan and Chris Holland, were essential to Yoorrook's evidence gathering and particularly the conduct of hearings and Notices to Produce. They provided expert legal advice, supported hearings, liaised with the government's lawyers and carefully prepared witness statements that were true to the voice and experiences of people who have endured great injustice.

Yoorrook acknowledges and thanks all the contractors who supported Yoorrook's work over this inquiry, including the Lotjpa Independent Legal Service run by the Victorian Aboriginal Legal Service and Victoria Legal Aid, First Peoples' Health and Wellbeing, Law in Order, David Callow Photography, Gathermore Floral Events, Kapish, Propellant, Indigi-Print, Mary Polis, Nicole Schlesinger and Philip Marshall.

Yoorrook's logo and other design elements were created by artist Dixon Patten. Dixon is a Gunnai, Gunditjmara and Yorta Yorta man who has bloodlines from Dhudhuroa/Jaithmathang, Djab Wurrung, Monaro, Wemba Wemba, Barapa Barapa, Wadi Wadi, Yuin and Wiradjuri. His website is: bayila.com.au The artwork used to represent Yoorrook's methodological framework was designed by proud Gurang and Ngarigo artist Anjee-Lee Bamblett.



Aunty Rieo Ellis,
Grandmothers Against Removal



CHAIRPERSON'S FOREWORD

Wherever the British flag was raised upon the land of Indigenous people in the world, the story of exploitation and dispossession is depressingly similar ...¹ HEATHER LE GRIFFON

Since the arrival of Europeans in Victoria in the 1830s, First Peoples have been removed from our families and our country and institutionalised at alarming rates as a result of the colonial systems forced upon us. Police and the processes of the criminal law were part of that system with devastating consequences for our people. From the early 'protection' legislation that allowed the government to control and regulate our lives, we have experienced and continue to experience systemic racism, harm and injustice at the hands of the State. Gross human and cultural rights violations occurred which set the pattern for the future.

This second report of the Yoorrook Justice Commission focuses on the past and ongoing systemic injustice experienced by our communities within Victoria's child protection and criminal justice systems. Like our June 2022 Interim Report, *Yoorrook with Purpose*, this report is grounded in the voices of our Elders. We are proud and strong people, with deep connections to each other, to country, to cultural knowledge and to traditions. This report must do justice to those who have guided the Commission's work, those who have appeared before it and those who have suffered harm because of these systems.

The Commission heard powerful evidence from First Peoples, Aboriginal organisations, experts and leaders, as well as senior public servants, Ministers and Victoria Police. Yoorrook undertook hearings, on country visits, yarning circles, prison visits and roundtable discussions. Evidence was also gathered through submissions, Notices to Produce and extensive research.

Witnesses told Yoorrook how the child protection and criminal justice systems have routinely failed our families and communities. Yoorrook heard of a 'pipeline' in which our children are moved from the child protection system into the youth justice system

and ultimately into the adult justice system. There were devastating accounts of the harm caused to our people by these systems. For example, Yoorrook heard of the established process of identifying expectant mothers for the potential removal of their child once born. In effect, this means an Aboriginal child in our community can be in a pipeline to the justice system before being born. It is hard to imagine a scenario that more profoundly demonstrates systemic failure.

Individuals and organisations from our communities gave clear and consistent evidence about the change that is needed. Our people called for a child protection system that supports families in culturally appropriate ways and enables our children to develop, stay safe, connected to culture and community. Our people have called for a criminal justice system that moves away from police and prison expansion and that prioritises investment in stronger communities. We need a justice system that supports people to break the cycle of offending and makes police accountable.

During Yoorrook's public hearings, seven Ministers and senior public servants including the Chief Commissioner of Victoria Police made formal apologies for the historic and ongoing harm caused by the child protection and criminal justice systems against our people. It is important that these apologies are on the public record. It was conceded that human and cultural rights violations occurred and were still occurring. However, what value should be placed on apologies and concessions unless action is taken?

There has been some progress since Yoorrook started this inquiry. On the opening day of hearings in December 2022, Premier Daniel Andrews was questioned in a press conference about the evidence Yoorrook was hearing. The Premier responded by committing to overhaul the child protection system. Similarly, throughout the course of the investigation, there has



been progress regarding Victoria's bail laws, public drunkenness laws and the minimum age of criminal responsibility — all of which disproportionately harm our people. For these reasons, I am optimistic that truth telling works.

However, the most meaningful, transformative change needed is to embed genuine self-determination in Victoria's child protection and criminal justice systems. This is what our people seek. Self-determination means Aboriginal people having decision making power over the issues that affect our lives, including designing, establishing and controlling the systems and services to support our families and communities to thrive. It means that the human and cultural rights of our people are respected and fulfilled. The Victorian Government and the First Peoples' Assembly have created the opportunity to do this through the treaty process. Negotiations will commence shortly, with the Treaty Negotiation Framework including interim, state-wide and local Traditional Owner agreements. This report helps to inform that treaty process. It also recommends measures that should be taken urgently to address critically important issues.

The Yoorrook Justice Commission represents a critical point in Victoria's history. This report must be a catalyst for change. The foundations to create transformational change in Victoria have been laid. Other states, territories and the Commonwealth are watching as they embark on Truth, Treaty and Voice processes.

I want to acknowledge the tireless, unrelenting advocacy of generations of Aboriginal Elders, community and other allies who have brought Victorian First Peoples to this point. I also want to thank the incredibly hardworking and dedicated Yoorrook staff, Solicitors Assisting and Counsel Assisting who have helped bring the critical evidence to light in this report. I also

want to thank my fellow commissioners — Sue-Anne Hunter, Travis Lovett, Maggie Walter and Kevin Bell — for their stewardship of the important findings and recommendations for reform in this report.

Now is the time for action. 2023 should usher in the beginning of the transformation to true self-determination for First Peoples. The past continues to overshadow the present. However, Yoorrook looks forward and makes 46 recommendations in this report for a better future for First Peoples and all Victorians. I urge Premier Andrews and his government to move swiftly to accept and implement all these recommendations.

Professor Eleanor A Bourke AM
Chairperson, Yoorrook Justice Commission



1. Heather Le Griffon, *Campfires at the Cross: An Account of the Bunting Dale Aboriginal Mission 1839–1851* (Australian Scholarly Publishing, 1 December 2007).

ABOUT THIS REPORT

This is Yoorrook’s second interim report. It considers systemic injustices in the child protection and criminal justice systems. It fulfils the requirement in the amended Letters Patent dated 4 April 2023 to deliver a second interim report by 31 August 2023.

A note on content

First Peoples are advised that this report may contain photos, quotations and names of people who are deceased. This report discusses sensitive topics that some readers may find distressing. Yoorrook urges you to consider how and when you read this report and what supports you might need.

If you are upset by any content in this report or if you or a loved one need support, help is available with the following services:

- First Peoples Health and Wellbeing
03 9070 8181 (dial 4)
- 13YARN (13 92 76)
- Lifeline on 13 11 14 for free and confidential support
- Beyond Blue 1300 22 4636.

Copyright notice

Yoorrook’s legal status as a Royal Commission means it does not have legal personality independent of the State of Victoria. One result of this is that copyright over its written products, including this report, is held by the State. This highlights the challenges associated with ensuring Indigenous Data Sovereignty over information about First Peoples, even when collected or produced in the context of a First Peoples’ led process such as Yoorrook.

Structure of this report

This report is divided into seven parts:

Part A (this section) includes the Letter of Transmission, Chairperson’s foreword, and this brief introduction to the report’s methodology and terminology.

Part B includes an Executive Summary, list of recommendations and key facts.

Part C examines the historical foundations of the child protection and criminal justice systems. It explains how current injustices, including systemic racism and human and cultural rights violations created by these systems, are not just historical, but continue to persist today with critical impacts on First Peoples families and communities.

It then goes on to discuss matters for Treaty in relation to child protection and criminal justice. In particular, Yoorrook finds that the transformation necessary to end the harms that the child protection and criminal justice systems continue to inflict on First Peoples can only be addressed through self-determination involving the transfer of power, authority and resources to First Peoples via the treaty process.

Part C concludes by examining consistent themes in evidence to Yoorrook that span both the child protection and criminal justice systems including accountability and transparency, cultural competence and responsiveness, and compliance with cultural and human rights obligations. Whole of government recommendations to address these issues are made.

Part D examines critical issues in the child protection system. It begins with a short overview of some of the key policies, laws and human and cultural rights that are engaged by this system. It then examines the pathway into, through and beyond child protection with chapters on early help, child removal, out of home care, permanency and reunification. Findings on critical issues and recommendations for urgent action are made in each chapter.



Terminology

Part E adopts a similar approach to the criminal justice system. Following a brief overview, each of the major parts of that system are considered: Victoria Police; the bail system; youth justice; courts, sentencing and classification of offences; and Victorian Prisons. Key systemic injustices are identified, findings made, and recommendations for urgent action put forward.

Part F considers other issues that have arisen during this stage of Yoorrook's work including legislative barriers to Yoorrook properly fulfilling its truth telling mandate. Yoorrook outlines legal problems which mean that Yoorrook cannot guarantee that confidential information shared by First Peoples and others will be kept confidential once Yoorrook finishes its work. It also discusses barriers to members of the Stolen Generation and others who have been or are currently subject to child protection orders telling their truth. Recommendations to resolve these issues are made.

Part G contains appendices to the report, including a list of witnesses and a glossary. Further information relating to the child protection and criminal justice systems is also provided.

Yoorrook uses the term First Peoples to include all Traditional Owners of a place in the state of Victoria including family and clan groups and their ancestors, as well as Aboriginal and/or Torres Strait Islander persons who are living or have lived in Victoria before or since the start of colonisation. This definition is provided in Yoorrook's Letters Patent. Where appropriate, Yoorrook may also use other terms such as Traditional Owners or custodians, Aboriginal people, Indigenous or Koori to describe First Peoples, especially where they have identified themselves in this way.

When citing submissions, consultations, evidence, research or data, Yoorrook adopts the terminology used in the original document; this includes using terms such as Aboriginal, Aboriginal and Torres Strait Islander, Indigenous, Koori and Koorie.

When referring to certain words, the Commission adopts the terminology used in the original document/submission. For example, country is used by Yoorrook without capitalisation, while some submissions and other research use the word Country with capitalisation.

Wherever possible, Yoorrook uses First Peoples' words and ways of speaking.



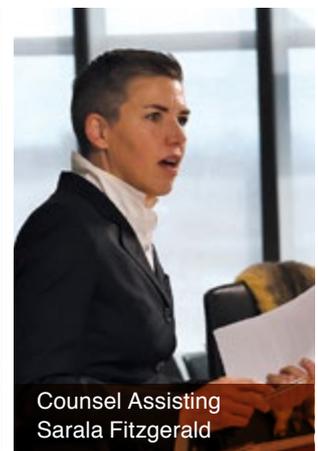
Counsel Assisting
Tony McAvoy SC



Counsel Assisting
Fiona McLeod AO SC



Counsel Assisting
Tim Goodwin



Counsel Assisting
Sarala Fitzgerald

How Yoorrook approached this inquiry into child protection and criminal justice

Consistent with the methodological framework described in *Yoorrook with Purpose*¹, Yoorrook’s work to achieve truth, understanding and transformation prioritises and centres First Peoples’ voices, experiences, cultural and human rights, and their right to self-determination. Yoorrook:

- hears stories and gathers information from First Peoples about experiences of past and ongoing injustices
- hears and demonstrates how First Peoples’ cultures and knowledge have survived
- supports First Peoples to choose how they wish to share their experiences and to avoid experiencing further trauma
- supports First Peoples’ sovereignty over their knowledge and right to choose how they wish to protect their evidence through Yoorrook’s Indigenous Data Sovereignty protocols
- prioritises Victorian First Peoples’ perspectives in the interpretation of the Letters Patent, the conduct of the Commission’s inquiries, and in the recommendations for systemic change and practical changes to laws, policies and practices.

For a more detailed description of Yoorrook’s methodological framework see *Yoorrook with Purpose* pages 6–9.

YOORROOK’S METHODOLOGY

As an Aboriginal-led Commission, Yoorrook’s unique methodology guides all aspects of its work. This includes how it gathers information and from what sources, how it supports First Peoples’ choices to participate and treats their knowledge, how it interprets its mandate and uses its powers and how it recommends changes.

CENTRE CIRCLE

Letters Patent

- Historic and ongoing systemic injustices
- Causes and consequences
- Who/what is responsible
- Redress and reform

SECOND CIRCLE

Priority themes based on the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and other human rights standards, focus on:

- Political organization, resistance and self determination
- Lore and Law
- Culture, language and heritage
- People, society and wellbeing
- Country, sky and waters
- Dislocation and economics

THIRD CIRCLE

Truth: create a record of truth and who or what is responsible

Understanding: create broader Victorian community understanding of First Peoples and the links between past, present and future

Transformation: support change to remedy injustice against first Peoples in Victoria

OUTSIDE CIRCLE

Aboriginal ways of knowing, being and doing – understand cultural practice, respect lore and protocols, care and custodianship, safety and support, minimise harm and allow healing to occur

Self-determination – follow lead of communities, ensure Aboriginal participation and free prior and informed consents are included in all processes

Indigenous data sovereignty – ensure First Peoples’ continued ownership, control and determination of how First Peoples’ knowledge is treated/protected

First People’s Nation Rebuilding – restore dignity of participants, use Language, uphold accountability of the state and those responsible, profile strength and survival, contribute to treaty

This development of this methodology was led by Commissioner Sue-Anne Hunter.

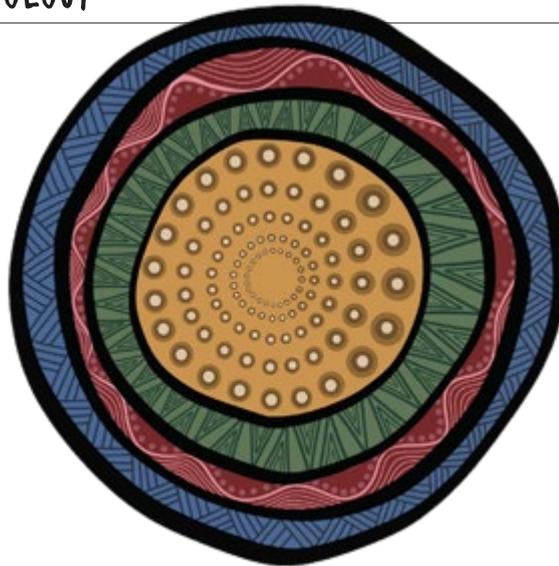


FIGURE I: Yoorrook’s methodological framework. Artwork by Anjee-Lee Bamblett.

Avoiding trauma, promoting healing

Yoorrook's Letters Patent require Yoorrook to adopt practices to minimise harm and re-traumatisation for First Peoples and preserve the safety and wellbeing of all participants. Through its methodology, Yoorrook employs the social and emotional wellbeing (SEWB) support model. This is further described in *Yoorrook with Purpose* at pages 10–11.

The SEWB model Yoorrook uses takes a strengths-based approach to those who wish to participate. Yoorrook emphasises the importance of using the strengths, resilience and connectedness of First Peoples and their communities to provide a safe, supportive and culturally appropriate forum for First Peoples to exercise their rights to truth and justice with dignity while demonstrating their cultural resilience and survival. Yoorrook's model also seeks to address the risks of staff and contractors who work with people impacted by trauma being adversely impacted by vicarious trauma and other health and wellbeing issues.

Yoorrook's community engagement

Yoorrook's Community Engagement Team are based throughout the state and undertake regular information sharing and evidence gathering activities. To inform this Critical Issues Report, Yoorrook engaged with First Peoples across Victoria including with community on every Traditional Owner country.

Between 1 July 2022 and 30 June 2023, this included 56 group engagement activities — including 25 community information stalls, 21 community information sessions, and site visits, roundtables or yarning circles (listed below).

Additionally, Yoorrook's engagement with First Peoples included dedicated and culturally safe support to more than 105 individuals who wished to provide evidence.

Yoorrook harnesses traditional and digital media coverage to ensure the stories and evidence brought before the Commission are heard by the widest possible audience. This is in line with the objectives set out in Yoorrook's Letters Patent to develop a shared

understanding among all Victorians of 'the individual and collective impact of systemic injustice and the intergenerational trauma that has flowed from them since the start of colonisation' and 'of the diversity, strength and resilience of First Peoples' cultures, knowledge, and traditional practices'.

Between 1 July 2022 and 30 June 2023, Yoorrook's work was mentioned in more than 9100 media stories across print, online, television and radio, with an estimated audience reach of over 228 million.

Evidence gathering

On 12 and 13 September 2022, Commissioners held roundtables with experts, academics, and Aboriginal Community Controlled Organisations (ACCOs) on the topics of child protection and criminal justice. These discussions were instrumental in refining the focus of Yoorrook's inquiry and resulted in two Critical Issues papers released for public and expert comment on 8 November 2022.

SUBMISSIONS

In response to the Critical Issues papers Yoorrook received 33 submissions from organisations and academics involved in criminal justice and child protection. These are available on Yoorrook's website.

In addition, between 1 July 2022 and 30 June 2023 Yoorrook received 88 submissions from the public, 28 of which were anonymous. Over three quarters of public submissions speak to Yoorrook's inquiry into the criminal justice and child protection systems.

ROUNDTABLES

Commissioners attended 10 community roundtables and site visits to hear local First Peoples communities' experiences of child protection and of criminal justice. These events reinforced evidence coming through submissions from individuals about the deeply ingrained systemic racism across these systems, as well as the 'casual' racism First Peoples face on a daily basis in Victoria. Organisations and roundtable participants described success stories and programs making a positive difference in the lives of First Peoples affected by systemic injustices in these critical areas.

Yoorrook also engaged with First Peoples in custody in adult and youth prisons. Commissioners held five site visits in prisons and youth detention centres. Yoorrook deeply thanks all participants for their time, courage and truth-sharing.

HEARINGS

Three rounds of public hearings were held at Yoorrook’s office in Collingwood. These public hearings were scheduled in blocks and were sequenced to build public understanding of systemic issues. The first, in December 2022, involved hearing from Elders, ACCOs and experts with experience in child protection and criminal justice. The next set of hearings listening to ‘community voices’ held in March 2023 built on this groundwork, with Commissioners listening to

the lived experience of First Peoples affected by systemic injustices in child protection and criminal justice. Commissioners also travelled to Lake Condah to hold hearings on witnesses’ country. Recordings of these hearings were streamed in the main hearing program and released on Yoorrook’s website.

Directions hearings were held on 27 March and 4 April 2023. The purpose of these hearings was for Yoorrook to obtain an update on the status of the State’s compliance with Notices to Produce and other information requests issued in connection with the planned government accountability hearings and to make related procedural directions. Commissioners also took the opportunity in these hearings to reinforce their expectations of the State. In response to

TABLE A: On country site visits and roundtables

PLACE	LOCATION	DATE
Roundtables		
Bangerang Aboriginal Corporation	Shepparton	19 December 2022
Barengi Gadjin Land Council	Horsham	2 February 2023
Goolum Goolum Aboriginal Co-operative	Horsham	3 February 2023
Dardi Munwurro	Preston, Reservoir and Mernda	6 February 2023
Winda-Mara Aboriginal Corporation, Dhauwurd Wurrung Elderly & Community Health Service	Portland	16 February 2023
Prison and youth justice visits		
Dame Phyllis Frost Centre		20 February 2023 and 21 April 2023
Malmsbury Youth Justice Centre		21 February 2023
Barwon Prison		23 February 2023
Margoneet Correctional Centre		24 February 2023

submissions made by Counsel for the State of Victoria at these hearings (particularly regarding the extent of the relevant work and the timeframes reasonably required), the planned hearing commencement date was further delayed to late April 2023, and small amounts of additional time were granted to the State for compliance with the various outstanding productions necessary to inform those hearings.

State witnesses then attended government accountability hearings in late April–May 2023. This included evidence from the Attorney-General, Minister for Police, Minister for Corrections, Youth Justice and Victim Support and the Minister for Child Protection and Family Services. Senior government officials including departmental Secretaries, Associate Secretaries and Deputy Secretaries also gave evidence along with the Chief Commissioner of Victoria Police. The Commissioner for Aboriginal Children and Young People, Corrections Commissioner and the Youth Justice Commissioner also gave evidence.

In total, 84 people, including international witnesses, gave evidence at Yoorrook’s hearings across 27 days. Yoorrook thanks all witnesses for their insights, expertise and generosity.

While a primary purpose of holding public hearings is to increase public awareness and understanding of systemic injustices imposed on First Peoples in Victoria through truth-telling, some community witnesses spoke to Commissioners under restricted publication orders. The truths and themes shared with Commissioners and Counsel in closed session, while not public, have equally informed the writing of this report, its findings and its recommendations.

Evidence production and analysis

Yoorrook built on the existing body of knowledge and the vast experience of First Peoples who have been affected by and who have pushed for reform of the child protection and criminal justice systems over many years. As heard often in hearings, roundtables and submissions, the problems, and solutions to address systemic injustices in these sectors are not new — First Nations people and organisations have been proposing evidence-based solutions for decades.

Commission staff and the legal team thematically analysed all the direct evidence received through submissions and roundtables to develop key themes and lines of inquiry that were then explored and tested during hearings. In addition, Yoorrook issued 29 Notices to Produce to the State, and received 4100 documents in response. Yoorrook also examined evidence of previous major inquiries and actions taken since those inquiries to inform its findings and recommendations.

DATA ANALYSIS

Much of the statistics in this report, especially current figures, were not publicly available before being requested by Yoorrook. To analyse the data provided by the State, Yoorrook engaged a data research analyst. At several points through this report Yoorrook notes the inconsistencies among State data. The most up-to-date data produced by the State as well as previous research is presented in this report in a range of charts and diagrams throughout each chapter. A summary of key data is in infographic form in Part B.

As a result of Yoorrook’s approach to thematic analysis and in an effort to ensure First People’s voices are heard, this report includes quotes from submissions, roundtables and evidence in hearings. Not all participants have been directly quoted, and many wished to remain anonymous, but their truth has been used to form the evidence base for Yoorrook’s findings and recommendations throughout the remainder of this report.

1. Yoorrook Justice Commission, *Yoorrook with Purpose* (Interim Report, June 2022) 6–10.

LISTS OF TABLES AND FIGURES

List of tables

Table A	On country site visits and roundtables	10
Table 4-1	Key human rights relevant to child protection	109
Table 4-2	Three key principles in child protection legislation and policy	112
Table 4-3	Additional CYFA requirements specific to Aboriginal children	113
Table 4-4	Additional binding principles inserted by the Statement of Recognition Bill	115
Table 5-1	ACCO proportional funding targets and achievement for different front end service types, 2021–22	131
Table 6-1	Compliance with DFFH policy on AFLDM meetings — First Peoples children in out of home care	159
Table 6-2	Percentage of unique clients where ACSASS was consulted during investigation	160
Table 7-1	Educational and household income disparities between kinship and foster carers	184
Table 9-1	Key human and cultural rights relevant to the criminal justice system	240
Table 9-2	Key criminal justice legislation — adults	242
Table 9-3	Key legislation — youth justice	242
Table 9-4	Main criminal justice complaints mechanisms and oversight bodies	246
Table 13-1	DJCS community-based diversion programs for Aboriginal people (including post-release and on bail supports)	348
Table 14-1	Sentenced and unsentenced prisoners median length of stay, 2021–22	363
Table 14-2	Aboriginal specific programs delivered in Victorian prisons	373



List of figures

Figure i	Yoorrook's methodological framework	8
Figure 6-1	Over-representation of Victorian Aboriginal children in reports to child protection and entry into care based on known 'risk factors' and other factors that are not known 'risk factors'	148
Figure 6-2	Rate of over-representation of Aboriginal children through the child protection process 2021–22	148
Figure 7-1	Aboriginal children in out of home care per 1000 as at 30 June 2022	180
Figure 7-2	Aboriginal children in care by relationship with caregiver, 30 June 2022	180
Figure 7-3	DFFH assessments completed within timeframes, including annual assessments	188
Figure 9-1	Legislative factors attributable to prison population growth	238
Figure 10-1	Arrest as outcome of alleged offender incident, year ending December 2022	254
Figure 10-2	Proportion of Victoria Police recorded Aboriginal and non-Aboriginal alleged offender incidents that received a caution/warning, year ending December 2013 to 2022	257
Figure 11-1	Number of prisoner receptions	293
Figure 11-2	Number and proportion of Aboriginal unsentenced prisoner receptions, 2012–13 to 2021–22	294
Figure 11-3	Prison terms imposed by all Victorian adult courts, 2011–12 to 2017–18	295
Figure 14-1	Number of First Peoples in Victorian prisons, and as a proportion of all Victorian prisoners, 2013–2022	362
Figure 14-2	Imprisonment rate per 100,000 adults for Aboriginal and Torres Strait Islander Victorians and for Victorians overall	362

B

Executive summary and recommendations

EXECUTIVE SUMMARY

Introduction

The Yoorrook Justice Commission is tasked with establishing an official public record of Victorian First Peoples' experiences of systemic injustice and determining their causes and consequences. The timeline extends from 1788 to the present and includes the role of State policies and laws. This report meets these obligations in relation to the child protection and criminal justice systems.

For First Peoples, the child protection and criminal justice systems have long been sites of systemic injustice. The removal of Aboriginal children from their families and the criminalisation of resistance to dispossession were state-sanctioned colonial practices in the lands now known as Victoria. They involved gross human and cultural rights violations.

There is an unbroken line between these actions, laws and policies and current systems. The highly contemporary disparate outcomes for First Peoples are evidence of this. First Peoples children are removed from their families at the highest rate in Australia with around one in 10 now in out of home care.¹ In the justice system First Peoples are around 15 times more likely to be in adult prison.² Victorian bail law changes of 2013 and 2018 are linked to a 560 percent increase in the number of First Peoples entering prison unsentenced.³ In 2021–22, 87 per cent of Aboriginal women who arrived in prison were unsentenced.⁴

The Victorian Government acknowledges that Victoria's laws and policies and their administration are creating systemic injustice for First Peoples. Premier Daniel Andrews told Yoorrook that the over-representation of First Peoples in the child protection and criminal justice systems is 'a source of great shame for the Victorian Government'.⁵ He acknowledged that the government is responsible for 'ensuring that racism and injustice are confronted and addressed'.⁶



Systemic racism lies at the heart of much of the systemic injustice affecting First Peoples in both systems. Systemic racism is racial discrimination that occurs through systems and institutions and goes beyond individual racist acts. It refers to laws, policies or practices that may, on their face, look neutral and applied equally, but which in practice unfairly disadvantage certain racial groups and advantage others.

The impact of systemic racism on the over-representation of First Peoples in the child protection and criminal justice systems is acknowledged by the Victorian Government.⁷ The State also acknowledges the individual prejudice and bias of some working within these systems.⁸

Talking about systemic failures risks obscuring the responsibility of the people with the power to address those failures. Laws, policies and decisions are made and administered by people: from Ministers and senior public servants creating the laws and policies through to the public servants, police officers and others implementing them. All, in their respective roles, have the power and responsibility to address systemic injustice. They have human and cultural rights obligations to do so. Yet the evidence heard by Yoorrook shows that too often they have failed to do this.

First Peoples leaders, organisations and lived experience witnesses are united in their call for self-determination to address the systemic harms of the child protection and criminal justice systems. Self-determination is a collective right, with the First Peoples' Assembly of Victoria describing the concept in the context of government systems as 'the power to shape and make the decisions about the systems, laws, policies and programs that affect our communities, families and children'.⁹ For the child protection and criminal justice systems this means a fully realised transfer of power to Victorian First Peoples and, while this is being implemented, urgent immediate measures.



Why Yoorrook chose to investigate Victoria's criminal justice and child protection systems

The evidence of injustice against First Peoples in the child protection and criminal justice systems is stark. From its inception, First Peoples called on Yoorrook to investigate injustice in these systems as a priority. This was a common theme raised by Elders in yarning circles Yoorrook ran across Victoria in the first half of 2022.

Further, Yoorrook's Letters Patent require it to investigate and report on issues including:

- the forced removal of children and unfair policies and practices relating to child protection, family and welfare matters¹⁰
- past and ongoing injustices in policing, youth and adult criminal justice, incarceration, detention and the broader legal system.¹¹

Yoorrook announced its intention to investigate these issues as a priority when it published its interim report, *Yoorrook with Purpose*, in July 2022.¹² The change in these systems cannot wait until delivery of its Final Report. Yoorrook will continue to monitor injustice in these systems, and the implementation of this report's recommendations, until Yoorrook concludes in June 2025.

How Yoorrook conducted this inquiry

Yoorrook began receiving evidence about the injustice experienced by First Peoples in the Victorian child protection and criminal justice systems as soon as it started meeting with and hearing from First Peoples in 2021. Yoorrook's dedicated inquiry into injustice in these systems commenced in the second half of 2022 with the publication of two Issues Papers inviting submissions.

Yoorrook received evidence in different ways including:

- **Submissions:** 33 submissions from organisations and other experts in response to the Issues Papers. This was in addition to many broader submissions from individuals which talked about their experiences with either or both systems. Of 88 submissions received from individuals in 2022–23, over three quarters included issues about the child protection or criminal justice systems.
- **Hearings:** 27 days of hearings, receiving evidence from 84 witnesses in Melbourne, on country and from international witnesses.
- **Roundtables and visits:** 12 roundtables across Victoria with experts, people working in the criminal justice and child protection systems and people affected by these systems. This included five visits to adult and youth prisons.
- **Documents:** more than 4000 documents from the Victorian Government in response to Notices to Produce.

Yoorrook heard directly from First Peoples and the community organisations that support them. It received submissions and evidence from academics and researchers. It also received witness statements and oral evidence from Ministers and senior public servants from the Victorian Government and its agencies.

Yoorrook thanks all the people and organisations who gave their valuable time and expertise to this inquiry.

The past is the present: understanding the connection between contemporary and historic injustice

The present-day failures of Victoria's criminal justice and child protection systems for First Peoples are deeply rooted in the colonial foundations of the State of Victoria. European invasion, and the colonial laws and policies which followed it, were predicated on beliefs of racial superiority. The systemic racism which persists today has its origins in colonial systems and institutions.

Before European invasion, First Peoples were independent and governed by collective decision-making processes with shared kinship, language and culture. They belonged to and were custodians of defined areas of country. First Peoples were self-governing, and wielded economic and political power within their own systems of law, lore, culture, spirituality and ritual.¹³

The purpose of colonisation was land acquisition. Theft of land was achieved by multiple strategies including destruction of culture and language and efforts to eliminate First Peoples through assimilation and violence. Colonial law was imposed on First Peoples. First Peoples were forced off their country and onto reserves and missions where their lives were controlled and cultural practices, spirituality and language suppressed. First Peoples' children were taken.

Police were frequently the agents of injustice. The early criminal justice system was used to criminalise and imprison First Peoples and legitimise violence to respond to First Peoples' resistance. While colonial law prohibited murder and rape of First Peoples, its enforcement was almost entirely absent.

The *Aboriginal Protection Act 1869* (Vic) was the first legislation to explicitly authorise the making of regulations that resulted in the removal of Aboriginal children. It was followed in 1886 by amendments that became commonly known as the 'Half-Caste Act'. Under this legislation, the Victorian Government

tore Aboriginal communities and families apart to weaken collective identity and resistance, furthering the attempted erasure and elimination of First Peoples.

The Stolen Generations refers to First Peoples removed from their families as children and infants under these assimilationist laws and policies which started in 1886 and ended in around 1970. These laws and policies followed the logic of eliminating First Peoples by removing them from their families, culture and language and attempting to shape them according to European culture and values.¹⁴

Police often carried out forced child removals. Until 1985 police were ‘empowered to forcibly remove children under the child welfare laws’.¹⁵ Justification for child removal under the various Acts was often linked to racist judgments of living conditions in Aboriginal communities.

Even after the explicit assimilationist intent written into child removal policies was finally removed, the administration of the laws was still infected by racial bias. The assimilationist impact continued — Aboriginal children removed from their families and siblings were placed in non-Aboriginal homes, with their Aboriginality often denied or ignored by their carers.

Nationally, awareness of the Stolen Generations grew following the landmark *Bringing Them Home* report in 1997. The report found that Australia’s forced child removal practices involved genocide under international law.¹⁶ Prime Minister Kevin Rudd’s Apology to Australia’s Indigenous Peoples followed in 2008.

For many non-Indigenous Australians, the forced removal of Aboriginal children from their families is considered ‘history’ and consigned to the past. For First Peoples its impact has never ceased.

The removal of Aboriginal children into white society caused immeasurable harm. Children removed from their families were traumatised, disconnected from family, culture and identity, and in many cases criminalised, experiencing homelessness, poverty, poor health and other disadvantage. Families traumatised by the loss of their children spent decades trying to reunite or simply make contact. For others, finding families was beset with obstacles, was not possible, or came too late.

The trauma and harm of child removal policies has had devastating lifelong impacts. It has been passed down across generations and continues today. This history and its impacts are explained further in Chapter 1: The past is the present.

Self-determination

The right to self-determination of First Peoples is a collective right that is of fundamental importance under international law and especially to realising human and cultural rights. It is recognised by the State of Victoria.¹⁷ It is the foundation of Yoorrook’s Letters Patent and the treaty-making process underway in this state. The Victorian Government has committed to self-determination as the primary driver in First Peoples policy since 2015.¹⁸

As outlined in the Letters Patent, the Yoorrook Justice Commission is required to:

*identify Systemic Injustice which currently impedes First Peoples achieving self-determination and equality and make recommendations to address them, improve State accountability and prevent continuation or recurrence of Systemic Injustice.*¹⁹

For Indigenous Peoples, the essence of the meaning of self-determination is the capacity to control their own destiny.²⁰ The foundation for the assertion of self-determination for First Peoples is inextricably tied to their relationship to country, land and waters.²¹ It also requires ensuring all human and cultural rights of First Peoples.

Yoorrook repeatedly heard from First Peoples witnesses and organisations of the need for self-determination in the child protection and criminal justice systems and some of the ways that could work.²² Many government witnesses spoke about how self-determination should underpin or be at the centre of reform.²³ Accordingly, it is critical that government understands and applies the full meaning of self-determination if the commitments it has made are to be realised. Otherwise, the necessary transformation of the child protection and criminal justice system cannot occur.

Yoorrook also heard that self-determination requires transferring decision-making power, authority, control and resources to First Peoples. It is not merely about consultation or transfer of service delivery responsibilities. It is not about transferring broken systems.²⁴ Self-determination can be realised through treaty and interim agreements as part of the treaty negotiation process that could include legislative, administrative and other measures for ensuring all human and cultural rights of First Peoples.

In relation to the child protection and criminal justice systems, Victoria has an opportunity to achieve self-determination by transferring decision-making power, authority, control and resources to First Peoples as these systems relate to them. This transformative, structural change could include transferring the power to make decisions about:

- system design
- obtaining and allocating resources
- powers of, and appointments to bodies or institutions.

It could also include the transfer of accountability and oversight functions and the creation of new First Peoples-led bodies, oversight processes and complaints pathways.

Accountability, capability and compliance with human and cultural rights obligations

This report documents serious deficits in three key areas that are critical to government making good on its commitments to self-determination and to ending the systemic injustices that the State has inflicted and continues to inflict on First Peoples. These span both the child protection and criminal justice systems and have whole of government implications. They are:

- monitoring and accountability
- cultural competence and responsiveness, including human rights capability
- the need to strengthen human and cultural rights compliance.

These lie at the heart of the cultural, practice and institutional changes that must be made to the child protection and criminal justice systems to address the systemic racism and policy failures Yoorrook has identified throughout this report.

Addressing systemic injustice in the child protection system

Everything is measured through a white lens of how children should be cared for.²⁵

Chapters 4 to 8 of this report highlight critical issues that need addressing in Victoria's child protection system.

Yoorrook received evidence showing that as involvement in the child protection system intensifies from an initial report to child removal, Aboriginal children are increasingly over-represented. At 30 June 2022, when compared to non-Aboriginal children, Aboriginal children in Victoria were:

- 5.7 times as likely to be the subject of a report to child protection services²⁶
- 7.6 times as likely to have a finalised investigation by child protection services
- 8.5 times as likely to be found to be ‘in need of protection’ by child protection services
- 21.7 times as likely to be in out of home care.²⁷

Yoorrook heard of ‘report fatigue’ in this area. In the last decade there have been at least 19 inquiries about the child protection system in Victoria.²⁸ Recurring themes on the performance of the child protection system for First Peoples include:

- poor information gathering
- inadequate risk assessment
- lack of collaboration and information sharing between services
- poor responses to children experiencing family violence
- poor responses to children experiencing poor mental health and cumulative harm
- missed opportunities to provide early supports when receiving an unborn notification
- failures to uphold First Peoples children’s cultural rights
- lack of early support for vulnerable mothers.²⁹

Yoorrook heard extensive evidence about:

- how systemic failures across multiple systems drive child protection involvement
- how discriminatory attitudes in universal services such as health can lead to unnecessary reports to child protection
- the Victorian Government not supporting First Peoples families who need help to avoid involvement in the child protection system
- the investment needed to ensure access to culturally safe and effective early help.

Yoorrook was told about the urgent need to reform the way child protection authorities are notified of concerns for the welfare of unborn children. Yoorrook heard evidence of systemic racism across health services and the lack of culturally appropriate support to new mothers and how this can result in removal of their babies.

Yoorrook was told that risk assessment tools and decisions were affected by racial bias. Yoorrook further heard that many of the positive laws and policies developed to address systemic injustice in child protection were not working as intended and compliance was often poor. For example, the Victorian Government established the Aboriginal Family Led Decision Making (AFLDM) program to improve family involvement in decision-making about a child, yet in 2021–22 only 24 per cent of First Peoples children in out of home care had an AFLDM meeting.³⁰ Similarly, the Aboriginal Child Specialist Advice and Support service, which promotes culturally appropriate and effective decisions around the best interests of Aboriginal children, was consulted during the investigation stage in only 63 per cent of relevant cases.³¹

Yoorrook was told that one way to improve compliance with laws and policy was to provide free early legal help for Aboriginal families through a notification system. This would ensure families were aware of their rights and could enforce them. Evidence also highlighted the positive evaluation of Marram-Ngala Ganbu, a specialist Koori court hearing day designed around the cultural needs of Aboriginal children and families, which operates at two locations in Victoria. There were calls to expand the reach of this program statewide.

Yoorrook heard about ongoing failures in the out of home care system for First Peoples children including that:

- too many First Peoples children are still being placed with non-Aboriginal families
- too many First Peoples children are not being placed with their siblings
- there are barriers to First Peoples becoming carers in the child protection system
- there are inequities in the support provided to kinship carers (who are overwhelmingly Aboriginal carers) and foster carers
- First Peoples children are not provided with adequate cultural plans
- First Peoples children’s health and disability needs are not being adequately assessed or met
- First Peoples children are being criminalised in residential care and the framework developed to address this is not being implemented.

Yoorrook heard that once a child is removed from their family, the strict time limits for family reunification operate unfairly for Aboriginal parents, who are less likely to be able to access supports needed to address protective concerns within those timeframes.

Yoorrook heard positive evidence that when care and case management of First Peoples children is transferred to Aboriginal Community Controlled Organisations, there are better outcomes for children and families. This includes improved connection to culture and community.

Yoorrook heard about the need to strengthen the legislative basis and powers of the Commissioner for Aboriginal Children and Young People to give certainty to that role and to improve oversight in the child protection and youth justice systems.

Addressing systemic injustice in the criminal justice system

I believe the system is riddled with racism; the system focuses on punishment and not rehabilitation; and the system needs to change.³²

Chapters 9 to 14 of this report highlight critical issues that need addressing in Victoria's criminal justice system.

Evidence before Yoorrook shows that:

- First Peoples are subject to racial profiling and over-policing
- cultural awareness training for police is inadequate and, in the case of recruit training, contains offensive content
- police are less likely to issue cautions and recommend diversion for Aboriginal people.

Yoorrook heard that Victoria's police complaints system is failing First Peoples. The system routinely denies or justifies police misconduct and fails to hold officers or management to account. The vast majority of complaints about police are investigated by police

which undermines effectiveness and generates mistrust. There is compelling evidence for the need of a truly independent police complaints system.

Yoorrook received evidence about the long overdue decriminalisation of public drunkenness that will occur in November 2023. Evidence was heard about the need for independent evaluation to ensure that police do not use other existing powers to detain intoxicated people after the public drunkenness offence is repealed.

Yoorrook heard evidence about a serious gap in the protection offered by Victoria's anti-discrimination laws, meaning that if a police or prison officer mistreats someone because of their race, the person is unlikely to be able to bring a racial discrimination complaint in the Victorian jurisdiction. Yoorrook was also advised of ways this problem has been fixed in other Australian jurisdictions.

Children and young people involved in the criminal justice system are particularly vulnerable and face multiple forms of disadvantage. This includes being victims of abuse, trauma, neglect or family violence, having a history of substance abuse, having cognitive difficulties and mental health issues and being disengaged from education.³³ Yoorrook heard that this reinforces the need for justice responses that help children and young people instead of harsh, punitive responses that are likely to lead to greater criminal justice involvement.

Yoorrook received evidence about ongoing problems with the over-representation of First Peoples children and young people in the youth justice system but heard that there has been recent success in reducing this rate and that the Victorian Government has a goal of zero involvement.

Yoorrook also heard about the need for improved cautioning and diversion programs for First Peoples children and young people, and the need to stop harmful conditions in youth prisons including the use of solitary confinement.

There is an urgent need to raise the age of criminal responsibility to at least 14. Victoria's laws allow children as young as 10 to be arrested, charged, prosecuted and imprisoned. The Victorian Government

has committed to raise the age to 12 within the next year and to 14 by 2027. Yoorrook heard that this is too slow.

Punitive changes to Victoria's bail laws in 2013 and 2018 led to a dramatic rise in the number of First Peoples imprisoned on remand, waiting for their trial or sentence. Yoorrook heard that Aboriginal women were hardest hit by these changes and were often denied bail and imprisoned for repeat low level non-violent offending. Yoorrook received evidence that government ignored the concerns and advice of First Peoples about the inevitable impact of its bail reforms, making a mockery of government commitments to self-determination and reducing over-imprisonment and eroding the trust that had been generated through the justice-related forums established to listen to and consult with Aboriginal people.

What eventuated was a stark reminder that the State retains power and control over the fate of First Peoples, even when it adopts the language of 'partnership', 'working together', 'respect' and 'self-determination'. It highlights why treaty is so critical to realising First Peoples' fundamental right to self-determination. Yoorrook heard that the government is now willing to wind back many of the punitive changes it made and that legislation to do this is imminent.

Yoorrook received evidence about the need for sentencing reforms to reduce the rate of imprisonment of First Peoples. This included reforms to take into account the unique systemic and individual background factors affecting First Peoples. Mandatory sentencing laws which limit the ability of courts to ensure that each sentence is fair and appropriate need to be repealed.

Yoorrook heard evidence about failures in Victoria's prison system including:

- systemic failures in prison health care
- lack of cultural connection and programs
- poor access to rehabilitation programs
- cruel, inhuman and degrading treatment in prison through the use of solitary confinement and strip searching
- barriers to reporting abuse and misconduct
- lack of independent oversight

- non-compliance with human and cultural rights obligations
- non-compliance with inspection processes that Australia has agreed to under an international treaty.

Yoorrook also received evidence about problems accessing parole. Parole is the system that allows some people to be released from prison into the community under supervision after they have served their minimum term of imprisonment. The best evidence is that supervised and supported release on parole reduces the risk that someone will reoffend. As a result of reforms in 2013 which made it harder to get parole, the number of people accessing parole has fallen significantly. First Peoples are less likely to be granted parole. This denies them the benefits of parole, increases the risk of reoffending and contributes to over-imprisonment, as more First Peoples will be in prison for longer.

Finally, Yoorrook heard evidence about the acute and ongoing pain and trauma of deaths in custody for First Peoples. First Peoples are dying at higher rates in custody not because they are more likely to die once they are in custody, but because of the staggering rates at which governments are arresting and jailing Aboriginal people. Evidence shows that the key to reducing First Peoples deaths in custody is reducing the rate at which they are put in custody by police, courts and governments.

Yoorrook's recommendations for change

Yoorrook makes 46 recommendations across five categories:

- transformative change to the child protection and the criminal justice systems through the treaty process (recommendations 1 to 2)
- urgent actions across both the child protection and criminal justice systems relating to accountability, cultural competency and responsiveness, and strengthening compliance with human and cultural rights obligations (recommendations 3 to 6)
- urgent reforms to the child protection system (recommendations 7 to 26)
- urgent reforms to the criminal justice system (recommendations 27 to 44)
- legislative reforms required to enable Yoorrook to fulfill its mandate for truth telling (recommendations 45 to 46).

Yoorrook expects that the Victorian Government immediately commence work to implement the urgent recommendations made in this report so that they can be achieved over the next 12 months. Yoorrook recognises that work to fulfil these urgent recommendations may be supplemented by consultations within the treaty process due to commence before the end of 2023. This must not be used as an excuse for delay given the evidence Yoorrook has presented. Yoorrook also notes that the treaty framework allows the negotiation of interim agreements.

Where Yoorrook makes recommendations that require oversight agencies and Aboriginal organisations to assume additional responsibilities or functions, it is essential that the government provide adequate resources to those organisations. Similarly, where Yoorrook makes recommendations that require or improve compliance with laws, policies and cultural and human rights obligations, the State must adequately resource this. Lack of resources must not be used as an excuse for failing to act.

Some of Yoorrook's legislative recommendations will benefit all Victorians in addition to addressing the significant injustices that First Peoples continue to experience in the child protection and criminal justice systems. Examples include recommendations to improve the *Children, Youth and Families Act 2005* (Vic) and to improve bail, sentencing and other criminal justice laws. It is normal practice that government considers full implications of any legislative change, however in doing so this must not be an excuse for delay or deferral. First Peoples cannot wait for these injustices to be addressed and nor should other Victorians be denied the positive changes that will flow from them.

Yoorrook will monitor the implementation of the recommendations made in this report and will require the State to report on the status of implementation during the remainder of this royal commission. ■



KEY FACTS: CHILD PROTECTION



the number of First Peoples children **in out of home care** increased from

922 **TO** 2595¹

Aboriginal children are **over-represented** in the child protection system by



LESS THAN 12%

of assessments of the **child's wellbeing and progress** met the target to be conducted annually⁷

Only **67%** of First Peoples children in care **have a cultural plan** as required⁵



83%

of First Peoples children are **reunited with their parents or family** when case managed by an ACCO under a section 18 authorisation **compared to**



rate of First Peoples children in out of home care is the **worst in the country**³

Reports to child protection for unborn First Peoples children are more than

DOUBLE those for non-Aboriginal children⁴

64%

when case managed by the Department of Families, Fairness and Housing Child Protection⁶

1. Australian Government Productivity Commission, 'Part F, Section 16 Child Protection Services', *Report on Government Services 2023* (2023), Table 16A.2.
2. Over-representation rate ratio calculated from data at AIHW, *Child Protection Australia 2020-21*, Cat No. CWS 87, Table S2.3.
3. Productivity Commission, *Report of Government Services 2023*, Table 16A.2, Rate per 1000 children in at least one OOHC placement during 2021-22.
4. Witness Statement of Argiri Alisandratos, 21 March 2023, 138 [631].
5. Department of Families, Fairness and Housing, Response questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 6 May 2023, Attachment 2, 12 [40], 14 [58]-[59].
6. State of Victoria, Response to Issues Paper 2: Call for Submissions on Systemic Injustice in the Child Protection System, [46]. Section 18 authorisation refers to s18 *Children, Youth and Families Act 2005* (Vic).
7. 2018-2020 data: Victorian Auditor-General's Office, *Kinship Care Independent assurance report to Parliament*, June 2022, 1.

KEY FACTS: CRIMINAL JUSTICE

Aboriginal Victorians accused of a crime are **more likely to be**

ARRESTED,¹¹



and less likely to be given a caution or warning than other Victorians accused of a crime¹²



Aboriginal **women** are

13.2 TIMES

as likely than non-Aboriginal women to be in prison⁹

64%



of Aboriginal young people **subject to Victorian youth justice supervision** have also had child protection involvement¹⁵



Aboriginal children **aged 10–17** are

11 TIMES

more likely than non-Aboriginal children to be under youth justice supervision (in custody or under community supervision)¹⁴



Aboriginal **men** are

13.6 TIMES

as likely than non-Aboriginal men to be in prison⁸

BETWEEN 2010 AND JUNE 2019

the number of **Aboriginal women in prison on remand** increased by

475%

the number of **Aboriginal men in prison on remand** increased by

598%¹³



There have been

34 DEATHS



of Aboriginal people **in custody** in Victoria since 1991¹⁰

8. Allowing for differences in structural age distributions between the Aboriginal community and non-Aboriginal Victorians, the age-standardised imprisonment rate for Aboriginal men at 30 June 2022 was 3048.9 per 100,000 compared to 223.5 per 100,000 for non-Aboriginal men. On 30 June 2022, Aboriginal men were 13.6 times more likely to have been held in prison custody than non-Aboriginal men in Victoria: Australian Bureau of Statistics (ABS), 'Prisoners in Australia: Table 17', Crime and Justice (Web page, 24 February 2023) <<https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release>>.
9. Age standardised rate per 100,000 as at 30 June 2022. *ABS Prisoners in Australia, 2022*. Table 17.
10. Transcript of Minister for Corrections, Youth Justice and Victim Support, the Hon. Enver Erdogan, 15 May 2023, 857 [29]-[33].
11. Crime Statistics Agency, 'Indigenous Data Tables' (Data release, December 2022) Table 06. <https://files.crimestatistics.vic.gov.au/202303/Indigenous_Data_Tables_Alleged_Offender_Incidents_Visualisation_Year_Ending_December_2022.xlsx>.
12. Department of Justice and Community Safety, 'Response to NTP-002-014 — Agency response to the Yoorrook Justice Commission', 22 [65], produced by the State of Victoria in response to the Commission's Notice to Produce

- dated 15 March 2023. See also Figure 4 from Supplement to the Department of Justice and Community Safety, Agency response to the Yoorrook Justice Commission's 71 Questions, 22 May 2023, 18. Updated to December 2022 using Crime Statistics Agency, 'Indigenous Data Tables' (Data release, December 2022) Table 06. <https://files.crimestatistics.vic.gov.au/202303/Indigenous_Data_Tables_Alleged_Offender_Incidents_Visualisation_Year_Ending_December_2022.xlsx>.
13. Department of Justice and Community Safety, Corrections Victoria, 'Annual Prisons Statistical Profile 2009–10 to 2019–2020: Table 1.9', *Corrections, Prisons & Parole* (Web Page, Undated) <https://files.corrections.vic.gov.au/2021-06/Annual_Prisoner_Stats_profile_2009%20to_2019%20to_2020.xlsx>.
14. That is 53 per 10,000 compared with five per 10,000: *Youth Justice in Australia 2020–2021*, 19, Table S130a. From 1 July 2022 to 31 December 2022, there were 42 Aboriginal children and young people aged 10–17 under youth justice supervision on an average day: Department of Justice and Community Safety, 'Client Relationship Information System (DJCS CRIS)', cited in Department of Justice and Community Safety, 'First Nations Facts and Figures', May 2023.
15. Australian Institute of Health and Welfare, *Young People under Youth Justice Supervision and Their Interaction with the Child Protection System 2020–2021* (Report, 2022) 79–80 Table S4.

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.

Endnotes

1. Australian Government Productivity Commission, *Report on Government Services 2023* (Report, 2023), Part F, Section 16, Child Protection Services, Table 16A.2 ('*Report on Government Services 2023*').
2. Age standardised rate per 100,000 population as at 30 June 2021: Australian Government Productivity Commission, 'Socioeconomic Outcome Area 10', *Closing the Gap Information Repository* (Web page, March 2023) Table CtG10A.3 <<https://www.pc.gov.au/closing-the-gap-data/dashboard/socioeconomic/outcome-area10>>.
3. Between 2009-10 and 2019-20: State of Victoria, Response to Issues Paper 1: Call for Submissions on Systemic Injustice in the Criminal Justice System, 21 [73].
4. Department of Justice and Community Safety, Corrections Victoria, 'Annual Prisons Statistical Profile 2009-10 to 2019-2020', *Corrections, Prisons & Parole* (Web page, Undated) Table 2.3 <https://files.corrections.vic.gov.au/2021-06/Annual_Prisoner_Stats_profile_2009%2010_%20to_2019%2020.xlsx>; Department of Justice and Community Safety, Corrections Victoria, 'Annual Prisons Statistical Profile 2012-13 to 2021-22', *Corrections, Prisons & Parole* (Web page, 5 May 2021) Table 2.3 <<https://www.corrections.vic.gov.au/annual-prisons-statistical-profile>>.
5. State of Victoria, Response to Issues Paper 1: Call for Submissions on Systemic Injustice in the Criminal Justice System, Cover Letter from Premier Daniel Andrews.
6. *Ibid.*
7. State of Victoria, Response to Issues Paper 1: Call for Submissions on Systemic Injustice in the Criminal Justice System, 12 [37], [40]. State of Victoria, Response to Issues Paper 2: Call for Submissions on Systemic Injustice in the Child Protection System, [26], [30]. See also, in regards to the child protection system: Children and Health Legislation Amendment (Statement of Recognition, Aboriginal Self-determination and Other Matters) Bill 2023 (Vic).
8. Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 496 [44]–[46], 500 [8]–[29]; Transcript of Minister for Corrections, the Hon Enver Erdogan, 15 May 2023, 921 [16]–[41], 924 [45]; Transcript of Ryan Phillips, 3 May 2023, 385 [7]–[9].
9. First Peoples' Assembly of Victoria, Submission 43, 2.
10. Victoria, *Yoorrook Justice Commission*, Letters Patent, paras 3(a)(v), 3(a)(viii), 3(b)(ii).
11. *Ibid* paras 3(a)(vii), 3(b)(i).
12. Yoorrook Justice Commission, *Yoorrook with Purpose* (Interim Report, June 2022) 65–66 ('*Yoorrook with Purpose*').
13. See, eg, Chris Keeler and Vicki Couzins (eds), *Meerreeeng-an Here Is My Country: The Story of Aboriginal Victoria Told through Art* (Koorie Heritage Trust, 2010); Iris Lovett-Gardiner, *Lady of the Lake: Aunty Iris' Story* (Koorie Heritage Trust Inc, 1997) 12; Gary Presland, *First People: The Eastern Kulin of Melbourne, Port Phillip & Central Victoria* (Museum Victoria Publishing, 2017) 37, 65, 67.
14. See Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8(4) *Journal of Genocide Research* 387; Patrick Wolfe, *Traces of History: Elementary Structures of Race* (Verso, 2016) 48, 58; Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Final report, 1997) ('*Bringing Them Home Report*')
15. *Ibid* 62.
16. *Bringing Them Home Report* (n 14) 260, 270–275. See also *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) art 2(e); *United Nations Declaration on the Rights of Indigenous People*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) art 7(2) ('*UNDRIP*'); Colin Tatz, *Australia's Unthinkable Genocide* (Xlibris, 2017) 32–36, 57, 64, 109, 113–116.
17. *UNDRIP* (n 16). Self-determination is also common article 1 in the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 99 UNTS 171 (entered into force 23 March 1976) and the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
18. Victorian Government, *Victorian Aboriginal Affairs Framework 2018–2023* (2018).
19. Victoria, *Yoorrook Justice Commission*, Letters Patent, 2(g).
20. S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2004) 98.
21. Michael Mansell, *Treaty and Statehood: Aboriginal Self-Determination* (Federation Press, 2016) 173, relying on *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001) 79 Inter-Am Court HR (ser C) [144], [148]–[149].
22. See, eg, Victorian Aboriginal Child Care Agency, Submission 77, 22; Transcript of Chris Harrison, 3 March 2023, 101 [5]– [8].

23. Victoria's Minister for Child Protection told Yoorrook, 'The Victorian Government recognises the critical role of self-determination in addressing the over-representation of First Peoples children in the Child Protection system ... I recognise that successful reforms are built on good foundations, are gradual and iterative, and are underpinned by self-determination': Witness Statement of Minister for Child Protection, the Hon Elizabeth (Lizzie) Blandthorn MLC, 24 March 2023, [25]. Victoria's Attorney-General also told Yoorrook, '... it is clear that systemic injustices faced by Aboriginal peoples can only be properly addressed where self-determined solutions are fostered and embedded': Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 11 [54].
24. Transcript of Attorney General, the Hon Jaclyn Symes, 5 May 2023, 434 [4]–[9].
25. Outline of Evidence of Lisa Thorpe, 9 December 2022, 6 [30].
26. *Report on Government Services 2023* (n 1) Table 16A.1. Further government evidence is that at 31 December 2022, Aboriginal children were five times more likely than non-Aboriginal children to be reported to child protection in the prior year: Department of Families, Fairness and Housing, Response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 6 May 2023, Attachment 1, 7 [16.8].
27. *Report on Government Services 2023* (n 1) Table 16A.1, Table 16A.2. See also Witness Statement of Argiri Alisandratos, 21 March 2023, 30 [89]. Note further government evidence is that at 31 December 2022, Aboriginal children were 24 times as likely to be in care than non-Aboriginal children: Department of Families, Fairness and Housing, Response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 6 May 2023, Attachment 1, 7 [16.8].
28. These, along with main findings can be found at Appendix C (Child protection policy frameworks, oversight bodies and previous reviews).
29. Statement of Commissioner Meena Singh, 2 December 2023, 31 [103].
30. Department of Families, Fairness and Housing, 'Response to NTP-002-001 — *Tranche 2 data response supplied by the Performance and Analysis, System Reform and Workforce Division*', 9, produced by the Department of Families, Fairness and Housing in response to the Commission's Notice to Produce dated 3 November 2022.
31. Department of Families, Fairness and Housing, 'Response to NTP-002-001 — *Tranche 2 data response supplied by the Performance and Analysis, System Reform and Workforce Division*', 9, produced by the State of Victoria in response to the Commission's Notice to Produce dated 3 November 2022. The data provided by the Department of Families, Fairness and Housing does not differentiate whether the consultation occurred during the investigation or where a decision has been made to substantiate. Consultation is required at both points: Department of Health and Human Services, Victorian Government, *Program Requirements for the Aboriginal Child Specialist Advice and Support Service* (2019) 27.
32. Transcript of Aunty Jill Gallagher AO, 6 December 2022, 119 [34]–[36].
33. Department of Justice and Community Safety, *Wirkara Kulpa: Aboriginal Youth Justice Strategy 2022–2032* (2022) 20.

c Focus on child protection and criminal justice systems





FAMILIES BOORAIS CLANS
TOLERANCE
PEOPLE FUTURE CHILDREN
PRACTICES YOUTH OLDERS WOMEN MEN

MAYS WAS

KEEP-IMARA

Joanne Farrant, Donna and Tina Wright

1 THE PAST IS THE PRESENT: THE CONTINUATION OF THE COLONIAL PROJECT IN CHILD PROTECTION AND CRIMINAL JUSTICE

From the earliest stages of colonisation, colonists used violence and policing, and forcibly separated First Peoples' children from their families. The reality for our people is that the conflict has never stopped.¹ FIRST PEOPLES' ASSEMBLY OF VICTORIA

The Yoorrook Justice Commission received comprehensive evidence that Victoria's child protection and criminal justice systems inflict serious harm on First Peoples and have done so since European invasion. The structural and systemic injustices created in these systems are not just historical, they persist today with critical impacts on First Peoples families and communities. For Aboriginal people in these two intertwined colonial systems, the past is the present.

Evidence received by Yoorrook from the Victorian Government has acknowledged that 'contemporary systems have their roots in colonisation', and that the continuing impact of structural and systemic injustices flow from this.² This evidence has included apologies and acknowledgements from the Premier, Attorney-General, other relevant ministers and the Chief Commissioner of Police.³ The government has acknowledged:

The State's dispossession, criminalisation and dehumanisation of First Peoples, the removal of their children, and the denial of Law, Lore and culture, created the conditions for the intergenerational trauma and social and economic inequality experienced today.⁴

British law — and the police and court officials who enforced it — was a key tool of colonisation and dispossession, creating a very particular and enduring oppressive relationship between First Peoples and the criminal justice system.⁵

The over-representation of First Peoples children in the Child Protection and Care systems is a direct result of laws and policies introduced during colonisation. The impact of historical laws and policies ... continue to be felt profoundly today.⁶

As detailed throughout this report, these systems function to separate, punish, control and harm Aboriginal people and families and do so at both the individual and collective level. Law and practices of criminalisation, imprisonment, forced child removal and family and community separation, as well as fundamental human and cultural rights violations, have simply shape-shifted since the arrival of colonisers into present-day Victoria. In evidence, these systems are described and understood as a continuation of the colonial project under which systemic injustice continues today.⁷ As detailed in the submission to Yoorrook from the Victorian Aboriginal Legal Service:

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

system will continue to discriminate against Aboriginal Communities and perpetuate the violence that has been perpetrated for the last 230 years.⁸

The relationships between criminal legal institutions and First Peoples in Victoria have continuously formed within the colonial structure — both as a political process and a mentality.⁹ As will be detailed in later chapters, Yoorrook heard of racism and power imbalances influencing the services provided by government agencies, ongoing child removal and family policing, barriers to navigating the courts and legal system, and the cycle of children in the child protection system entering the criminal justice system.

Yoorrook heard that, in the administration of the child protection system for example, cultural differences are judged through a Western moral lens, leading to actions that are racially discriminatory and violate human and cultural rights. Yoorrook heard of a systemic culture where First Peoples experiencing the ongoing impacts of colonisation and intergenerational trauma are punished rather than supported. This evidence sits firmly within a continuity of systemic injustice since European invasion. Governed by successive legislation, policy and racist practice, the human and cultural rights violations of the past remain alive in the present.

Settler colonialism and the logic of elimination

The present-day criminal justice and child protection systems are deeply rooted in the colonial foundations of the State of Victoria. Australia is a settler colony, meaning the colonisers ‘come to stay’.¹⁰ This form of colonisation differs from forms of colonisation that have operated in other parts of the globe, such as parts of Africa, where resources are extracted for the benefit of the colonising nation.¹¹

The primary purpose of settler colonialism is to possess land, which is considered a resource. Colonisers, therefore, are dependent on acquiring territory. This is crucial to the ‘success’ of the colony, the wealth of the colonisers, and is necessary to sustain life.¹² Because First Peoples’ ownership and presence is ‘in the way’ of the colonisers’ settlement and occupation, non-Indigenous historian Patrick Wolfe describes the settler-colonial project as operating under a ‘logic of elimination’.¹³ The colony ‘destroys to replace’, targeting not only First Peoples’ lives (for example through frontier violence), but their societies, families, cultures, identity, and connections, access and claims to land.¹⁴

During the present-day State of Victoria’s frontier period, it was the colonisers (actively enabled or not prevented by colonial authorities) who did the work of elimination and erasure, both independently and together in groups. Over time, the violence of the frontier transitioned to the violence of the State, via

legislation, policies, and institutions, among other measures. Race is at the centre of this process. In Victoria’s history, race has been used and constructed by the State to facilitate and justify its dehumanisation of, and violence toward, First Peoples.

Since colonisation, the State has sought to control the lives of Victoria’s First Peoples — forcing clans off their respective countries, detaining people on missions and reserves, and in children’s institutions and prisons, separating families and controlling reproduction via restrictions on marriages. First Peoples have been criminalised and imprisoned for resisting State intervention, for maintaining their sovereign rights to country and culture and not complying with imposed Western laws. These actions and policies involved gross violations of human and cultural rights and were based on complete rejection of the equal dignity and humanity of First Peoples. Commentators have described the way Victoria’s project of settler-colonialism in its many forms contravenes the United Nations Genocide Convention.¹⁵ As the Lowitja Institute stated in evidence to Yoorrook:

Government and governance for our peoples did not look like dominant cultural conceptions of government, which originate in British and European models. Our way of governing takes a long-term and holistic approach, understanding the intrinsic

connection between participation in community, culture, caring for Country, and health and wellbeing. This means that there is a disconnect between the systems and institutions in place to govern broader society and our ways of knowing, being and doing.¹⁶

Colonisation is a ‘structure’ not an ‘event’.¹⁷ It is this structure that created (and now supports and maintains) both the criminal justice and child protection systems in Victoria. The word ‘protection’ is linked directly to colonisation, having been used to label the long-reaching and harmful State governance of Aboriginal people across three centuries. This chapter outlines some of the key legislation and institutions that have continued the colonial project of elimination throughout Victoria’s history.

An important part of the history of Victoria’s criminal justice and child protection systems is inaction by successive governments and institutional failure despite long-standing evidence and advocacy from First Peoples in Victoria. These systems have been the subject of Royal Commissions and inquiries at both federal and state levels, which have put forward hundreds of recommendations that have not been implemented. Systemic injustice stems from this deliberate inaction just as it does from decisions that have been made to control First People’s lives with lasting and harmful consequences. Some of these issues were explored in Yoorrook’s Interim Report, *Yoorrook with Purpose*, and are revisited here to illustrate this continuity.

First Peoples families, law and lore before invasion and colonisation

First Peoples have lived on and owned the land now known as ‘Victoria’ since time immemorial. They belong to 35 to 40 cultural/language groups in defined areas of country, comprised of 300 to 500 clan groups that form the longest continuous living cultural tradition in the world.¹⁸ Before invasion, First Peoples lived in an intricate social structure that was ‘almost impossible to fathom’ by European invaders.¹⁹ First Peoples were sovereign and governed by collective

decision-making processes, shared kinship, language and culture and belonged to and were custodians of a defined area of country.²⁰ As the State of Victoria accepts, this sovereignty was never ceded.²¹

As Victorian First Peoples have described,

Laws [were] set down in the Dreaming, ensuring conservation and sustainability and maintaining an inextricable connection to and respect for the Country to which people belonged. This deep knowledge of Country was accompanied by a highly sophisticated system of cosmology and belief together with complex social and cultural frameworks. Strict protocols and laws governed all aspects of life including ceremony, trade, marriage, dispute settlement and movements between and across the Country of neighbouring groups.²²

Movement was a central aspect of the life of First Peoples. Children were raised by intergenerational extended family and involved in important aspects of clan life such as hunting and collecting food.²³ Like all aspects of the rich and complex life of First Peoples across Victoria, their existing systems of law, lore, culture, spirituality and ritual governed the care of country, movement on country, hunting, gathering, marriage, kinship, the coming together for ceremony and celebration, and the sharing of food.²⁴ These strong cultures of kinship, sharing and collective living continue today.²⁵ This was described to Yoorrook by the Lowitja Institute:

As Aboriginal and Torres Strait Islander peoples, we have maintained sophisticated and diverse cultures and knowledge systems for millennia. We also established and adhered to sophisticated systems of law and lore, which maintained our nations and the health and wellbeing of our peoples ... Despite the traumatic and ongoing consequences of colonisation and institutional racism, we continue to maintain and develop our cultures and knowledge systems ... [and] continue to rebuild our nations.²⁶

Early Port Phillip: governance, punishment and control

European people began entering parts of present-day Victoria in the late 18th century. They invaded Gunditj-mara country (through present-day Portland) in 1834, and Kulin Country in 1835, permanently settling land in the area they named Port Phillip that would later become Melbourne. The Port Phillip settlement was not authorised by the Crown and was illegal under British law.²⁷ The absence of a legitimate treaty or land deal meant that the colonisers quickly set about 'removing' First Peoples from the region with a speed and ruthlessness that has been argued remains the 'largest fact' in Victoria's history.²⁸ Dr Jacyntha Krakouer explained in evidence:

When the British came here to colonise or invade ... they declared terra nullius and that was one act of erasing or attempting to erase Aboriginal and Torres Strait Islander sovereignty. That was one way of trying to clear the land and clear the problem. When that didn't quite work, we then saw ... massacres, we saw frontier violence, we saw brutal, brutal acts ... to attempt to clear the native from the land, almost like pests to be exterminated.²⁹

Frontier violence and disease imported by the colonisers were the first forces to break apart Aboriginal families. Thousands of First Peoples were killed in massacres across Victoria.³⁰ These were crimes even under colonial law, however Britain failed to create institutions of state that were adequate to prevent them from happening and for bringing the perpetrators to justice. A culture of impunity developed. First Peoples children were kidnapped, raised by Europeans and exploited for their labour.³¹ Elders cited in Yoorrook's Interim Report described this as 'a source of free labour, translation and knowledge of country, [which] also served to warn other family groups what would be done to them if they didn't comply with settler demands'.³² Yoorrook has heard evidence of children found as sole survivors of massacres.³³ Alma Thorpe told Yoorrook:

When the massive massacres were happening [in Mortlake], two brothers were kids there and were watching the massacre in a log. They were hiding ... They named him Thorpe and another fella they named Thomas, but they were two brothers. But they seen massacres. They seen the killing of their people.³⁴

Early policing was militarised, and 'profoundly influenced by the need to overcome Aboriginal resistance to dispossession',³⁵ which was described by Western District settlers in 1842 as 'peculiarly formidable'.³⁶ This strength of resistance was consistent throughout Victoria.³⁷ In the Western District, for example, police were the principal means of overcoming this resistance.³⁸ As detailed in Dr Michael Maguire and Emeritus Professor Jude McCulloch's submission to Yoorrook:

Port Phillip, unlike New South Wales or Tasmania was a free colony, and as a result Aboriginal people, rather than convicts, were the major preoccupation of the colony's early police. Early policing, a combination of mounted and Native police, was highly militarised with Aboriginal people the enemy. When first deployed around Port Phillip in 1836 the main task of police was to create a space in which settlement could grow, by keeping Aboriginal people off land that had been deemed fit for pastoral use.³⁹

The colonial State established the Port Phillip Protectorate in 1838.⁴⁰ It appointed five officials known as 'Protectors' to advocate for and 'protect' First Peoples from conflict with colonisers and the 'evils of settlement'.⁴¹ Aboriginal people were governed through segregation as 'protected persons' rather than citizens, a philosophy that informed and justified the establishment of Aboriginal reserves and stations.⁴² In evidence, Dr Michael Maguire and Emeritus Professor Jude McCulloch described the police role in violence and dispossession during this period:

Although the official mandate of Port Phillip's police included the protection of Victorian First Peoples and minimisation of conflict ... police were involved in violently overcoming any resistance to settlement. This

is unsurprising given that police were under the supervision of local magistrates, dominated by pastoralists. During the first years of European settlement, massacres, rapes and casual killings of First Peoples were so common they barely rated discussion.⁴³

On stations and reserves, First Peoples were encouraged to take up farming, and schools were established to encourage children away from 'tribal' influences.⁴⁴ One Protector in the Port Phillip District, Edward Stone Parker, recorded in 1842 that an Aboriginal leader had 'complained in his anger that the white fellow had stolen their country and that I was stealing their children by taking them away to live in huts, and work, and "read the book like whitefellows"'.⁴⁵ The protectorate failed and was abandoned in 1849.⁴⁶

The British legal system forcefully imposed on First Peoples was grounded in racist attitudes that had evolved through Britain's history of global colonisation and slavery.⁴⁷ This racism was compounded by the need to rationalise the brutal dispossession of country from its Aboriginal owners. The legal system was skewed heavily in favour of the colonists, who were rarely prosecuted for crimes committed towards First Peoples.⁴⁸ First Peoples were not eligible to sit on juries or be called as witnesses in court.⁴⁹ As non-Christians, they were not considered capable of giving evidence under oath, which required swearing to 'Almighty God'.⁵⁰

The colonial government of the time passed legislation in 1839 to accept First Peoples' evidence as witnesses, however this was disallowed by the British government as 'contrary to the principles of British jurisprudence'.⁵¹ Evidence given by Aboriginal people was not binding and therefore ignored by those administering the criminal justice system.⁵² As the State of Victoria acknowledged in its evidence to Yoorrook, courts were equally 'sites of oppression' for First Peoples, 'interpreting and applying laws in discriminatory ways'. First Peoples were forced to act within a foreign law, with its foreign norms and language. Because this system was 'underpinned by racist ideas of inferiority, immorality and incompetency, courts did not and could not ensure First Peoples had equitable access to justice'.⁵³ The full force of this system was brought to bear against First Peoples

in Victoria. The legal system enabled and did not prevent gross human and cultural rights violations.

Over-representation of First Peoples in the criminal justice system began early.⁵⁴ In 1840, only five years after invasion, 42 per cent of people in custody were Aboriginal.⁵⁵ Two years later, the first people hanged in Melbourne were Tunnerminnerwait and Maulboyheenner, two Palawa men.⁵⁶ Hangings were used to demonstrate the colonial legal system's 'ultimate power' across language barriers.⁵⁷

Public language dehumanised Aboriginal people for defending their land and lives and neutralised the violence of colonisers. First Peoples' acts of resistance to occupation on the frontier was publicly described as 'attacks, incursions, atrocities, outrages, crimes, murders, or depredations', while the violence of squatters and border police was described as 'incidents, clearing operations, self-defence', or 'police actions'.⁵⁸ During this time, each development in the legal system represented 'deeper roots for the colony'.⁵⁹

By the late 1850s, most of Victoria's First Peoples had been forced from their lands.⁶⁰ This was the result of a coordinated effort by the State, backed by the operation of the British legal system, using both Native and Border Police to 'follow Aborigines to their camping places normally inaccessible to Europeans'.⁶¹ This was done with the express purpose of defeating First Peoples resistance by violence and terror.⁶² First Peoples were considered a 'remnant' population whose 'extinction' was inevitable.⁶³ Use of alcohol and other drugs arose as a symptom of dispossession, with around half of the arrests and convictions of First Peoples around this time related to drunkenness.⁶⁴

The continuing logic of elimination now transitioned to a paternalistic administrative project which was intended to 'smooth the pillow of the dying race'.⁶⁵ A Select Committee of the Legislative Council was appointed in 1858 to 'enquire into the present condition of the Aborigines of this Colony.' It heard from colonists but did not call any Aboriginal witnesses.⁶⁶

As a result of this Committee's report, the government established a 'Central Board Appointed to Watch Over the Interests of Aborigines' (the Board) in 1860.⁶⁷ The first of its kind in Australia, the Board was given the

task of ‘overseeing the establishment of reserves to which Aboriginal people would be confined’.⁶⁸ In effect, the very purpose of the Board was to carry out fundamental human and cultural rights violations. The Board consisted of seven members appointed by the Governor, three of whom were members of

parliament.⁶⁹ The Board, often in conjunction with the Church of England or Protestant Churches, established missions and reserves to which Aboriginal people would be confined at Coranderrk, Framlingham, Lake Condah, Ebenezer (Lake Hindmarsh), Lake Tyers and Ramahyuck.⁷⁰

‘Protection’: imprisonment and child removal in the 19th Century

The State reinforced its control of land by imprisoning First Peoples on missions and reserves, taking away their freedom and culture in exchange for ‘protection’ from the violence of the colony.⁷¹ This created further freedom for colonial expansion⁷² at the expense of respect for the human and cultural rights of First Peoples and their equal dignity and humanity. Mission managers were ‘uniquely empowered’ with ‘unparalleled civil, legal and physical powers’.⁷³ First Peoples were placed under permanent supervision and surveillance and expected to be ‘civilised’. They were denied human rights, cultural rights, agency and autonomy, and especially self-determination. Uncle Johnny Lovett told Yoorrook:

The original deaths in custody have been around since 1788. It continued with the establishment of the missions. The Aboriginal people who died on those missions had no choice as to whether to be there and had no freedom of movement.⁷⁴

In its submission to Yoorrook, the Aboriginal Justice Caucus stated that ‘the surveillance, control and regulation of the lives of Aboriginal people on reserves was akin to incarceration’.⁷⁵ Mission managers controlled every aspect of life. Speaking language and practicing lore and culture were prohibited and harshly punished.⁷⁶ Witnesses emphasised the cruelty of mission life. Uncle Colin Walker and Aunty Fay Carter told Yoorrook:

[The missionaries] put the fear of the Christ in us. I have to say that word. Because if you don’t come to Sunday school, Satan will get you. And then our Elders ... they’d speak the language, but if we were there, they wouldn’t talk in it. So that was a cruel thing for us First People. Couldn’t even speak our language.⁷⁷

At Cummeragunja, Aboriginal people were not allowed to practise their culture ... They used to go out into the bush where nobody knew about it and do the ceremony out there. So, they used to make things happen in their own way. But if they were caught doing things, they’d be punished by taking rations off them or taking something that they valued off them or hurting them in some way.⁷⁸

The formal separation of children from their families began in Victoria at Coranderrk station on Woiwurrung Wurundjeri Country.⁷⁹ This was done via a school with separate living quarters, mirroring residential school practices that were instruments of genocide in the settler-colonies of the Americas.⁸⁰ The manager of Coranderrk travelled around the region, taking Aboriginal children he deemed ‘neglected’ for the school. At first, he had no legal power to do this, but this changed in 1869 with the arrival of the *Aboriginal Protection Act 1869* (Vic).⁸¹

The *Aboriginal Protection Act 1869* was the first piece of legislation to explicitly authorise the making of regulations that resulted in the removal of Aboriginal children.⁸² It was introduced by Irish-born Mr James

Joseph Casey, Minister of Justice, into the Victorian Parliament on the 19 August 1869.⁸³ Casey stated that the Bill was intended to give the Board ‘power’ to make rules and regulations and act ‘*in loco parentis*’ to the [A]borigines’, particularly to keep First Peoples confined to stations. The rationale given was to ‘give the Board ... greater power to protect the natives ... [to] watch over the adult [A]boriginals throughout the colony—to prevent them wandering ... becoming waifs and strays’.⁸⁴

This Act contained few substantive provisions but authorised regulations to be made on a wide range of subjects, including the ‘care, custody and education’ of Aboriginal children.⁸⁵ The *Bringing Them Home* report noted, ‘[a]s regulations do not attract the kind of Parliamentary scrutiny and publicity that occurs with proposed statutes, major decisions about the treatment of Indigenous children could go unnoticed’.⁸⁶ The provisions of the 1869 Act were used by authorities to separate Aboriginal children from their families on missions and reserves across Victoria.⁸⁷

First Peoples families resisted the removal and separation of their children and their cruel treatment on the missions, writing to the Board, local newspapers, MPs, and circulating petitions.⁸⁸ Resistance ranged from ‘quiet’ acts of refusal and disagreement to full-scale rebellion.⁸⁹ Because First Peoples residing on the missions and reserves were denied rights, their resistance and activism was often carefully carried out in a way that subtly appealed to colonial power dynamics, to protect themselves and their families from further punishment.⁹⁰

The 1869 Act ‘set the pattern for subsequent laws applying to Indigenous people in Victoria’.⁹¹ As the State of Victoria acknowledged in its evidence to Yoorrook:

This extraordinarily powerful law marked the beginning of legislating racialised control, enabling regulations that circumscribed many aspects of First People’s lives ... This strengthened the State’s ability to force First Peoples into poverty and onto newly established missions and reserves, preventing their participation in the colonial economy and allowing the allocation of stolen land to pastoralists.⁹²

Elimination through legislation: the 1886 Half-Caste Act

Throughout the 19th century, the colonial project of elimination continued to be supported by Victorian legislation.⁹³ First Peoples communities in Victoria had grown in size and strengthened their collective identity and resistance.⁹⁴ In 1886, Parliament passed an amendment to the *Aboriginal Protection Act 1869* that became commonly known as the ‘Half-Caste Act’.⁹⁵ For decades to come, this highly significant legislative amendment caused serious and complex harm to First Peoples in Victoria, violating their human and cultural rights.⁹⁶

The amendment was a response by the colonial authorities to a rising (so-called) ‘half-caste’ population, and the ‘cost of their maintenance’ to the Board while living on missions and reserves.⁹⁷ It was also a response to the activism of First Peoples who had been educated on the reserves and were now advocating and petitioning their rights.⁹⁸

At Coranderrk, Wurundjeri residents, guided by senior ngurungaeta (Elder) Simon Wonga and his nephew William Barak, had led ‘a sustained campaign of petition and protest, principally directed to the colonial Parliament over the heads of the Protection Board’.⁹⁹ The Coranderrk residents protested their treatment by certain managers and the Board’s plans to close the reserve and sell the land off to local settlers.¹⁰⁰ Their activism and resistance led to the Parliamentary Coranderrk Inquiry in 1881, one of few inquiries where First Peoples appeared as witnesses.¹⁰¹ Here, the Coranderrk residents openly called for the abolition of the Board.¹⁰² As Uncle Jack Charles told Yoorrook:

It was the women at Coranderrk who wrote countless letters to Parliament, to the chief secretary, the Premier complaining about conditions. Many people gave evidence [and] they mulled it over for three years, and in ... 1884, the Parliament ... said yes, this is Aboriginal land, blackfellas, this is their land. So they had a win. And this really upset the black hats in Parliament and the local squatters. So ... two years later in 1886, to counteract this win, they invented the Aboriginal Half-Caste Act 1886.¹⁰³

The Half-Caste Act was a ‘catastrophe’ for First Peoples in Victoria.¹⁰⁴ Under this legislation, the Victorian government used race to separate Aboriginal communities and families and weaken collective identity and resistance, furthering the project of erasure and elimination.¹⁰⁵ The Half-Caste Act was a reprehensible attack on the human and cultural rights of First Peoples, individually and collectively, and on their equal and inviolable dignity and humanity.

The legislation classified First Peoples by blood quantum, distinguishing ‘Aboriginal natives’ from people of mixed descent. ‘Aboriginal natives’, or ‘full bloods’, were legally Aboriginal and could remain on missions and reserves where they were expected to ultimately ‘die out’.¹⁰⁶ People of mixed descent were legally classified as ‘half-caste’, and those aged between 13 and 35 were forced to leave the missions and reserves to seek employment. The Victorian colonial authorities’ rationale for these evictions was to ‘merge’, ‘disperse’ and eventually disappear the ‘half-caste’ population into the settler population.¹⁰⁷

The 1886 amendment was introduced to the Legislative Assembly on 15 December 1886 by a young Mr Alfred Deakin, who would go on to become the second Prime Minister of Australia.¹⁰⁸ Deakin stated in Parliament that this was not a government bill but a bill of the Board, which ‘provided ... for the licensing out of half-castes by the board, so that they might be educated to earn their own living’. This, he stated, had the chief object of ‘making the half-castes useful members of society’ and ‘relieving the State of the cost of their maintenance’.¹⁰⁹ With the help of the Act’s provisions, ‘it was believed that the half-castes would gradually cease to be a [sic] burthen upon the State’.¹¹⁰

During debate, objections and doubts were raised over whether the Board ‘was doing the thing that it ought to do’. The proposed amendment was described as ‘a travesty on legislation’, a ‘disgrace to Parliament’, and ‘hasty legislation with a vengeance’ that was rushed through in the last moments of the session in an ‘indecent manner’. Despite this, the Bill was passed, and the Half-Caste Act became law.¹¹¹

Having first forced people onto reserves, the State now forced people off, according to newly constructed legal definitions of race that separated children, parents, families, and communities.¹¹² Police and Protection

Board agents carried out these forced movements, and ‘terrible things were done’.¹¹³ The very purpose of the legislation was to make First Peoples disappear as peoples and to ensure that individuals were deprived of their identity and access to their history, culture, families and land. This led to gross human and cultural rights violations.

New State institutions were established to accommodate the growing number of children removed from their families. Children over the age of 13 were apprenticed or sent away to farms or training homes to enter domestic service.¹¹⁴ They were not allowed to visit their families without official permission.¹¹⁵ Alma Thorpe told Yoorrook:

My mother, Edna Brown, had to leave Framlingham when she was between 12 and 14 under the Half-Caste Act ... It’s very important that when you were thrown off a mission, you were a half-caste. That affected me badly.¹¹⁶ The Half-Caste Act ... it assaulted my mind.¹¹⁷

Uncle Colin Walker told Yoorrook:

Well, we was under the Aboriginal Protection Board [and] we were controlled by the managers that lived there. And if you come to stay on the mission ... you had to go and sign with a paper to say were you staying with your mum and dad. So when you think about it today, how disgusting that was, that you had to do that ... Why did you have to do that? It wasn’t our law. It was the white man’s law that ... bought that in. And I think that hurt a lot of our Elders, you know, to do that.¹¹⁸

The Board described their policy as ‘the beginning of the end’, the aim of which was the ‘absorption of the whole race into the general community’.¹¹⁹ It has more recently been described as ‘an attempt at legal genocide’.¹²⁰ The amendment halved the ‘official’ Aboriginal population.¹²¹ and reduced numbers on reserves, which were progressively closed. Uncle Jack Charles told Yoorrook:

So all the full bloods were left there. All the half-castes had to remove themselves and put themselves at great risk wandering around the state of Victoria. If you were a blackfella, you know, wandering alone or with your family and etcetera, you were still at risk of being shot ... We had that win but — but then they developed the [Half-Caste Act] and we are still confounded and bedevilled with the Aboriginal Half-Caste Act right to today.¹²²

First Peoples forcibly displaced from missions and reserves entered a hostile and openly racist society. They were located at the bottom of the social hierarchy and were discriminated against in employment, housing and all other aspects of life.¹²³ Victoria Police enforced the new regulations and became the administrators of State ‘protection’, which allowed them to encroach into private realms that included health, residence, diet, employment, education and child rearing.¹²⁴

First Peoples communities formed on riverbanks and town fringes, moving around to access seasonal work. They tried to remain connected to each other, camping near reserves, sharing rations and visiting relatives in secret.¹²⁵ Any First Peoples on reserves thought to be sharing rations with those who had been expelled were threatened with having their own rations cut.¹²⁶ By 1924, all First Peoples remaining on reserves were moved to Bung Yarnnda (Lake Tyers).

As Yoorrook heard in evidence, the Half-Caste Act had dire psychological impacts on First Peoples that are still felt today.¹²⁷ It forced First Peoples off the missions and reserves and into poverty, which could then be cited as the grounds for child removal.¹²⁸ First Peoples communities were targeted by police, and people became ‘scared to identify as Aboriginal’, as Alma Thorpe described to Yoorrook:

We had to really struggle because we couldn't talk to one another in the street if you were black. It was called a Black Maria (police car) that used to go around. If two black people were standing and talking, they would pinch them. I remember those days. This was in the 1940s. You couldn't be caught consorting with other Aboriginal

people ... People were scared to identify as Aboriginal. We formed a community that protected one another, of aunties and uncles. They'd see you in the street and choof you home.¹²⁹

A lot of the people that did have a voice were thrown in jail. So if you said too much, you went to jail. I used to have a cousin who would get pinched — probably put in jail every couple of days — because he wouldn't back down. And they used to bash him all the way up Gertrude Street. That was Georgie Wright. Battered all his life.¹³⁰

Legacies of the Half-Caste Act persist today through both the child protection and criminal justice systems.

Forced child removal and the Stolen Generations

The history of the Stolen Generations in Victoria is one where ‘Aboriginal and Torres Strait Islander family life and cultures were purposefully disrupted, sometimes with genocidal intent’.¹³¹ The Stolen Generations refers to First Peoples removed from their families as children and infants under protectionist and assimilationist laws between 1886 and 1970. Forced child removal practices follow the ‘logic of elimination’ established through colonisation and have been found to constitute genocide under the United Nations Genocide Convention.¹³²

The Half-Caste Act established race as the grounds for the State to remove children and separate Aboriginal families, specifically targeting children of mixed descent.¹³³ It represented the ‘legislative onset of the Australia-wide policy of Aboriginal child abduction’.¹³⁴ The White Australia policy was introduced at Federation in 1901. By the 1920s the rising numbers of Aboriginal people (‘half-castes’) were considered another threat to white Australia.¹³⁵ Assimilation policies were developed in the 1930s and nationally adopted in 1937. Prevailing views about First Peoples were heavily influenced by 18th and 19th century eugenics, which was concerned with both ‘breeding out’ Aboriginality and ‘breeding in’ ‘good’ white blood.¹³⁶ As Dr Jacyntha Krakouer told Yoorrook:



When we started seeing this apparent up rise of so-called half caste, Aboriginal and Torres Strait Islander children, we realised that the problem of the native had not been solved. So the answer was to actually remove that child from the influence of their family because how they were being raised within that family was seen as the problem ... because it was racialised.

We had the 1901 White Australia Policy in place, we didn't want future White Australia to look like how Aboriginal people raise their families, we didn't want Aboriginal people. We wanted to eliminate Aboriginal people. That's something that's hard to sit with but that's how assimilation links into this logic of elimination. Child removal was the policy that was used to enforce that assimilation and that logic.¹³⁷

Child removals were intended to be permanent separations from Aboriginal family, community, culture and identity.¹³⁸ Children were expected to be 'improved' under European influence, which was intended to achieve both 'biological' and 'cultural' assimilation.¹³⁹ Not only would the child be raised to be culturally white, but they were also expected to 'marry white', thus increasing the whiteness of subsequent generations.¹⁴⁰ As Alma Thorpe told Yoorrook:

When you got married, you were supposed to marry white. You had to eliminate your blackness.¹⁴¹

Aboriginal 'protection' legislation ensured that the population was always moving towards whiteness.¹⁴² Wolfe has argued that 'abduction was actually a purer form of elimination than massacre'.¹⁴³ Aunty Eva Jo Edwards told Yoorrook:

When you are living in an environment that's all non-Aboriginal, you know, you are assimilated from all of your family and your culture and your identity, you know, those assimilation processes work within the system of why they wanted to remove Aboriginal children. That's how I see it ... I honestly believed that, you know, they wanted to clear us out. Eventually there would be none of us left. I'd marry a white man and my kids would marry white people and eventually there would be none of us left. What a way to do things.¹⁴⁴

Stolen Generations children were cut off from their families and separated from siblings, and experienced horrific abuse, neglect and punishment in State institutions and foster homes.¹⁴⁵ Children were often told their parents had died or did not want them, and in many cases did not know of their Aboriginality until adolescence or adulthood. This had lifelong impacts on individuals and families and is a source of ongoing intergenerational trauma for First Peoples. As Aunty Eva Jo Edwards said:

My daughter one day asked me, pretty emotional, you know, why didn't I ever hug her or kiss them goodnight or read them bedtime

stories, things like that, when they were little, yet my sister could do that to them when she came over. I said, 'Look, you know, they are the things that were never given to me. So how could I give that to you if I didn't have it?' ... it was heartbreaking because that's when I realised that I'd done what I'd done to my kids, and it's pretty traumatic.¹⁴⁶

Police often carried out forced child removals. Until 1985 police were 'empowered to forcibly remove children under the child welfare laws'.¹⁴⁷ such as the *Aborigines Protection Act 1869*, its 1886 amendment, the *Aborigines Act 1910*, the *Aborigines Act 1957*, as well as subsequent legislation.¹⁴⁸

As the Victorian Government acknowledged in its submission to the *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, police often used coercion and 'bullying' to forcibly remove children, and few Aboriginal families were aware of their legal rights or avenues to reclaim their children once taken.¹⁴⁹ Children were routinely locked in police cells when removed from their families and escorted by police between institutions of State care.¹⁵⁰ The Wright Family described their family's experiences in evidence to Yoorrook:

Aunty Phyllis attempted to hide Ronnie under a bed in her house. She told the police officer that he wasn't there, but he walked in and looked around and said, 'Mrs Saunders, if you don't give me Ronnie, I'm going to take your kids too', so she was coerced to get Ronnie from under the bed and hand him over. It hurts to think about how awful this must have been for her. Coercion was a common tactic; the families tried to hide children away so they wouldn't be taken, but the authorities would threaten to take their own children away, so they were left with no choice.¹⁵¹

Yoorrook heard of the many ways parents of stolen children advocated to have their children returned to them. The archives hold records of family members including aunts, uncles and grandparents who 'lobbied the BPA [Board for the Protection of Aborigines], Members of Parliament, the Governor and local white sympathisers for the return of, or even contact and visiting rights' to their family members.¹⁵² The archives hold letters written by parents to their children that were not passed on.¹⁵³ Members of the Stolen Generations are still fighting to gain access to records made about them under the Acts that enabled



The Wright Family. Aunty Donna, Aunty Tina and Aunty Joanne Farrant with Yoorrook Commissioners and Counsel

child removal. Aunty Eva Jo Edwards described the impact of the State withholding documents from Stolen Generations children:

You had that abandonment, their rejection, you know, thinking that they didn't want you, and then to find out that my mother did want us, you know, you are never told these things. We were never read a letter from our mother. That was just put in your files ... I think that's a little bit disturbing that when a letter is written to a child, why can't the child hear the letter, whether it may be upsetting or not? We were told so many bad stories as children, you know, our parents had died, our parents didn't want us, you know, they threw us to the gutter.¹⁵⁴

From the late 1940s, welfare officers took over 'protection' roles from police.¹⁵⁵ Witnesses described being 'watched' by the government under the *Aborigines Protection Act* through to the 1960s.¹⁵⁶ Welfare workers would intrude into homes, checking for things like food in the cupboards, with the ever-present threat of children being taken. Alma Thorpe described being followed around, 'so you knew that they were watching ... we never trusted the government'.¹⁵⁷ Families and communities resisted these intrusions, developing strategies, issuing warnings, hiding children.¹⁵⁸ Uncle Colin Walker told Yoorrook:

Our people always said, our Elders said that [Dhungalla] was ... our protector when we'd have to run away from the welfare. We would just jump into the river and swim to another state ... so we learnt to swim at a pretty young age.¹⁵⁹

Aunty Fay Carter described to Yoorrook her family's experiences of welfare surveillance:

They [welfare] would just walk in with no notice. So just walk in walk through, checking everything out and checking to see if there was enough food, checking who was sleeping where ... [t]hey really were heavy, heavy people. My grandmother used to save — you know how you get lots of food in different cans, like fruit or baked beans or powdered milk or whatever. My grandmother

used to save those cans and she would fill them up with dirt, put the lids back on, put them high up in the cupboards so that when the welfare came, they could look up there and say, 'Oh, she's pretty well stocked with food. She's really looking after these kids, yeah.' So she was very clever, you know.¹⁶⁰

Justification for child removal under the various Acts was often linked to racist and discriminatory perceptions of living conditions in Aboriginal communities. Networks of community care, culture and strength were not recognised, but rather documented as grounds for forced child removals, and First Peoples communities were stereotyped as 'dirty'.¹⁶¹ Aboriginal people and communities lived on fringes and margins and remained at the lowest social status. In evidence, Uncle Ross Morgan illustrated the way the logic of elimination extended to keeping Aboriginal people out of sight:

In around 1957/8, I was living down the riverbank with my Uncle and Aunty when the Queen drove past and asked what was over there at Daishes Paddock. All the blackfella huts were on the side of the highway along the river, but they'd put hessian bags up so the Queen couldn't see them. Shortly after that they moved us all from off the riverbank into Rumbalara.¹⁶²

Many witnesses described that, despite relative poverty, their childhood homes were warm, full of love, caring and sharing, extended family, and a strong sense of community and belonging.¹⁶³ Their families



Uncle Ross Morgan

were hardworking, resourceful, vigilantly clean, and excellent housekeepers. Children ‘belonged to the whole community’ with aunties, uncles, cousins and grandparents taking on parenting roles.¹⁶⁴ Witnesses described these as ‘real homes’ that were dismissed in the eyes of authorities as slums, humpies, camps or otherwise neglectful or unacceptable living arrangements.¹⁶⁵

Our life was happy there, we lived off the land. Dad used to catch eel, tarpon and trout, anything, black fin ... we shared a lot, a lot of people we shared a lot. If one family were running short, they’d send over a feed.¹⁶⁶

I would ask [government officials] what do you mean by neglect, you know? What is ... your interpretation of neglect? Because, I mean, we had love, we had food. Not a lot of it, but we hunted. That was part of our traditional lifestyle. So we wasn’t doing anything that was new to us ... we were doing things that were old to us.¹⁶⁷

My father was living, yes ... in a humpy by the banks of the Goulburn River. My father’s family had been living in humpies on the banks of rivers for hundreds and hundreds of years. He was in no more danger than any other child who was raised in that way.¹⁶⁸

The Board continued to have powers over Aboriginal children until the arrival of the *Aborigines Welfare Act 1957* (Vic). For the first time, the Board (now Aborigines Welfare Board) had no specific powers relating to Aboriginal children. However, the assimilation policies of the time advanced the view that Aboriginal children’s best interests were served by being away from ‘degenerate’ family influences, as part of non-Indigenous society.¹⁶⁹ The Board could still notify police of ‘concerns’ about a child and initiate forcible removal. It also functioned as an official adoption agency.¹⁷⁰ What had been achieved by explicitly racist legislation continued to be achieved under the new racially neutral legislation because it was administered in practice along racially discriminatory lines. The problem persists today.

Nationally, awareness of the Stolen Generations began to build following the 1997 *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* and its landmark *Bringing Them Home* report. The report found that Australia’s forced child removal practices involved genocide as defined by international law.¹⁷¹ For many non-Indigenous Australians, the forcible removal of Aboriginal children from their families is considered ‘history’ and consigned to the past. For First Peoples it has never ceased. Sissy Austin, daughter of Neville Austin — the first member of the Stolen Generations to receive a letter of apology from the Victorian Government¹⁷² — told Yoorrook:

[When dad] fought really hard for that letter of apology from the Victorian State Government, we were so proud ... at that time, it almost felt like it was the end of the Stolen Generation. There was hope ... and I just acknowledge that feeling. ... I acknowledge that fight, and I wish that that point was ... the end of the Stolen Generation.¹⁷³

We would never have thought that his grandchildren would go through a similar experience to him, being removed.¹⁷⁴

As detailed in Chapter 6: Child removal, State removal of children continues in Victoria at the highest rates in Australia and more than double the rate at the time of the *Bringing Them Home* report.¹⁷⁵ Meena Singh, Commissioner for Aboriginal Children and Young People, stated in evidence that ‘if we talk about it as a child protection system, what Aboriginal children and young people and their families are telling us is that it doesn’t work for them. If we talk about the system as a system of removing Aboriginal children, then you might say that it’s doing exactly what it was meant to do’.¹⁷⁶

The criminalisation of Aboriginal children in Victoria

In the mid-20th century, Aboriginal children abducted from their families were also effectively criminalised for it under the *Children's Welfare Act 1958* (Vic). Children stolen from their families were taken directly to the nearest reception centre of the Children's Welfare Department, for example the Turana Reception Centre, where children committed to State 'care' were received until 1961.¹⁷⁷ Here, they were given a criminal conviction that was frequently documented as being 'in need of care and protection'.¹⁷⁸ Their sentence was to become a ward of the State. In 1993, Turana became the present-day Parkville Youth Justice Centre.¹⁷⁹

Until 1989, children forcibly removed could be given this criminal record.¹⁸⁰ They were treated like offenders rather than as victims of human and cultural rights violations. This record remained for life and often became the precursor to further imprisonment as a child or young adult. Uncle Larry Walsh described being targeted by police from eight years of age, based on his existing criminal record (following forced removal at the age of two). He was first incarcerated at 14 for being 'likely to lapse into a life of crime'.¹⁸¹ In evidence Uncle Larry declared, 'governments, you made me the criminal I am!'.¹⁸²

In 2021, Victoria introduced a spent convictions scheme following activism from First Peoples and others whose lives had been affected by childhood convictions.¹⁸³ Uncle Larry's daughter, Isobel Paipadjerook Morphy-Walsh, told Yoorrook:

[W]e don't come from a culture that actually believes in imprisoning people. If you actually look traditionally at Taungurung traditional lore, you would die before you were imprisoned. ... locking someone up has a different effect on a culture that has a different relationship with freedom and movement.¹⁸⁴

Australia's formal assimilation policy ended in the late 1960s. Following this, there was increased reliance on the State's child protection and criminal justice systems to control and manage First Peoples. As the

Royal Commission into Aboriginal Deaths in Custody report described in 1991:

[W]hat has happened, and is still happening, in all too many places, is that Aboriginals are 'criminalised' at an early age by a policing and justice system that is intolerant of cultural differences, and which targets and overpolicing Aboriginal communities and deals harshly with resulting resentment ... [this] comes to be seen ... as a natural condition for Aboriginals.¹⁸⁵

Impact of inter-generational trauma

Rather than 'merging' or 'disappearing' Aboriginal children into white society, the child removal policies of successive governments left these children traumatised, racialised, criminalised, disconnected from family, culture and identity, and in many cases homeless and living with addiction in poverty. The State of Victoria caused these human and cultural rights violations through laws and their administration over a long period of time. The harm has been suffered by First Peoples individually and collectively. The *Bringing Them Home* report cited a three-year longitudinal study conducted in Melbourne in the mid-1980s. It showed that Stolen Generations survivors had less stable living arrangements, were twice as likely to report having been arrested by police and convicted for an offence, and three times as likely to have been imprisoned compared to Aboriginal people who had been raised by family.¹⁸⁶ As Alma Thorpe told Yoorrook:

The Half-Caste Act has caused intergenerational trauma. This intergenerational trauma has led to mental health issues, alcoholism and drug addiction for many Aboriginal people. It's also why you have generations of Aboriginal people going to prison. Alcohol and drug use are a way of overcoming, hiding and deadening these feelings of trauma. And because they never really had a right.¹⁸⁷

Isobel Paipadjerook Morphy-Walsh described the lifelong impact of child removal on people of her father's generation:

I remember that in my youth when dad left home for a while and lived as a parky ... the parkies are disproportionately made up of foster care kids, of kids that are wards of the State. ... And so I suppose the reason my dad identified and also fell into that community so easily ... [is] because they came from the same places. Sort of not a mistake actually. [It's] no mistake that the parkies [all have] ward of the State backgrounds.¹⁸⁸

Those who were reunited with their families described difficulty reconnecting with their parents, Aboriginal identity, and community.¹⁸⁹ Families who had been traumatised by the loss of their children, spent decades trying to be reunited or to simply make contact. For others, finding families was beset with obstacles, was not possible, or came too late.¹⁹⁰ Aunty Fay Carter told the story of her Aunty Margaret:

Like many of the young girls at Cummeragunja, Aunty Margaret was taken from her family to a training home for Aboriginal girls in Cootamundra in New South Wales. Aboriginal girls were taken from other missions as well. They were taught to be servants and housekeepers there. Aunty Margaret would have been in her teens or early twenties when the training home got in touch with Granny Mag and Grandfather Henry, who were still living on Cummeragunja, and told them that Aunty Margaret was coming home for a holiday. They went to go and meet Aunty Margaret at the train station at Echuca. The train pulled in and they waited, but she didn't get off the train. They noticed her bag being put on the station platform. It turned out Aunty Margaret had died. They'd buried her at Cootamundra, and they never even let her family know. Granny Mag and Grandfather Henry never found out what happened to their daughter. That's something that's always disturbed me.¹⁹¹

How cruel. How cruel can people be? And doesn't it highlight how racist people can

be that they don't think it's important for Aboriginal people to know these things, that they can just do these things and get away with it.¹⁹²

Yoorrook has heard evidence where three or four generations in one family have experienced forced child removal.¹⁹³ Isobel Paipadjerook Morphy-Walsh described her father's removal and then criminalisation as a child as 'the basis of fundamental changes to my father's life and also to the intergenerational trauma that's handed on.'¹⁹⁴ Others described the impact across generations.

I raised my children as a single mother in public housing, where I am still living now. The experience of raising my children has made me realise the effects of my removal. I realise now that unbeknown, for a time, I repeated with my children what I experienced in the institutions: tough rules and a lack of affection. You don't set out to do that. It is intergenerational. Several of my children have been impacted by my trauma and are on their own journeys of healing.¹⁹⁵

Dad would say to us ... 'It breaks daddy's heart' [for his kids] to come head on with the same system that removed him. ... It's been quite traumatising for dad to see ... in real time [that] all over again.¹⁹⁶

It was a societal expectation that children would be removed so they could be brought up away from their family, culture, community and Country, so they could perform or be useful contributors to the dominant society. That's what it was. Now, children are removed for a range of reasons, but ... the consequence can be the same; that is, people ... are disconnected from their Country, their culture, their community, their families and, therefore, they lose their identity. [This] is just as much an outcome now as it was for previous generations.¹⁹⁷

Child removals irreversibly impact not only the children taken but the families and communities left behind. Witnesses to Yoorrook described trauma, heartbreak, breakdown, addiction, incarceration and 'death from

a broken heart' shaping the lives of people whose children had been removed.¹⁹⁸ Families throughout Victoria's history have worked hard against oppressive circumstances and unattainable conditions to have their children returned. As the Wright Family told Yoorrook:

Gran was a hardworking woman — she worked numerous jobs to prove to the authorities that she was 'fit and capable' to look after her children. She did everything she could to try and get them back. She worked cleaning houses, trying to please white people ... She wrote numerous letters requesting to live with her children, but none of these requests were ever granted. She would try and visit her children in the orphanage, but it was difficult because there was no bus to get to Ballarat.¹⁹⁹

Intergenerational trauma is experienced through loss of culture, language and country and the ongoing impacts of dispossession, family separation and punitive control. Human and cultural rights law protects the right to have and speak First Peoples' languages, both as an individual and collective right.²⁰⁰ Human and cultural rights law protects possession and use of the language as an individual expression of personal Indigenous identity as well as the collective expression of part of what defines and unites the speakers as a people.

Elders described violations of these cultural rights. They expressed that their parents and grandparents did not teach them language because they were trying to protect their children from being punished, or from 'getting into trouble' as they had been themselves for speaking language on the missions.²⁰¹ Uncle Johnny Lovett linked this to the threat of child removals:

We don't speak language today. When my dad and his brothers were sitting at the woodheap, I didn't hear them speak language. I believe that this is because of the way of the old days, when their mothers and fathers saw the change coming. They had started taking Aboriginal children on Lake Condah Mission and putting them in dormitories and they were not given back to their parents or given any rations until they

promised they would not teach their children song, dance and language. I believe that is why I don't speak the language. The gran-nies stopped teaching the children language to protect them, because they didn't want us to be persecuted and condemned for it.²⁰²

Many witnesses spoke about the harmful effects of the denial and loss of their Aboriginal and cultural identity, their relationships with older generations and country, and its contribution to complex intergenerational trauma. As Coree Thorpe said:

I think the trauma that's carried through generations and ... we know now that's carried in the blood. In Victoria [we are] three generations removed from living off Country. So, you know, that violence of disruption and colonisation is carried through. ... how do you deal with that pain when that emotional pain is always really raw and it doesn't subside? We see that come through with the families, with the young people, with the partners, and it's a lack of connection, identity.²⁰³

The Wright Family likewise told Yoorrook:

It is very clear that the government had a hand in the murder and destruction of our family. They destroyed the beautiful, happy lives they were living, raising their children on their Country. It was a deliberate, calculated murder of our family heritage, culture, songlines, connection to Country, and our future. They stole our land, created laws to prevent us from speaking our language, took our children and disconnected us from Country. It is the definition of genocide. Why have there been no charges ever brought against the government for this? ... The murder of our family has impacted on all our lives from a very young age.²⁰⁴

This intergenerational trauma is driving Stolen Generations survivors, their children and their grandchildren in turn into the very systems that are doing harm. This cycle must be broken.

Perpetuating harm through current colonial structures

Colonisation, as implemented by colonial and later Victorian State authorities, created the structure, systems and conditions under which First Peoples continue to be subjected to harm and systemic injustice, as well as human and cultural rights violations. As an ongoing process, this State-sanctioned framework continues to dehumanise First Peoples families and use race and social division to justify continuing discrimination, criminalisation and family separation through the child protection and criminal justice systems.

The missions and reserves were the extension of frontier violence that was intended to eliminate First Peoples from both their land and society. Genocidal intent continued through the abduction of children, while imprisonment transitioned from reserves to children's institutions and adult prisons, all under the guise of successive pieces of legislation. With the dismantling of the missions and reserves and their independent systems of regulation and punishment, the criminal justice system and its institutions took over the role of policing, controlling, and imprisoning Aboriginal people.²⁰⁵ The Victorian criminal legal system plays a critical role in the continued criminalisation and imprisonment of First Peoples.²⁰⁶ As the First Peoples' Assembly of Victoria stated:

Colonial violence in Victoria, including murders and large-scale massacres, as well as practices such as detainment, forcible transfer of children, the suppression of cultural practices and languages, formed a manifest pattern of behaviour that was intended to destroy, in whole or in part, the First Peoples in Victoria as a group. There is a direct line between structural conditions of colonisation, including policing practices, and the contemporary criminal justice system which continues to 'reproduce marginalised peoples as criminal sub-groups'.²⁰⁷



Aunty Geraldine Atkinson, Co-Chair, First Peoples' Assembly of Victoria

The present-day Victorian child protection system was described in evidence as a 'family policing system'.²⁰⁸ Aunty Geraldine Atkinson illustrated this historical continuity to Yoorrook:

[As children] we were petrified of the police. They were the things passed down because of those injustices that had occurred ... It was the police that were sent to remove children from their families. It still is. Police are still sent to remove. When I was a child that happened. And I'm 70. It's still happening today. Police are being used to collect children and place them in out-of-home care — into the out-of-home system.²⁰⁹

The concept of 'protection' is a distinctive feature of colonisation, both past and present. Protection has been used to justify the effective imprisonment of First Peoples and the removal of children. As Dr Jacyntha Krakouer told the Commission:

I personally believe the State has a responsibility to look after these families, given that the State has, through history, perpetuated the damage and put Aboriginal families into positions of poverty through colonisation and hasn't resourced enough of the therapeutic, holistic supports to enable families to get themselves out of the situations they are in ... I believe the State has a responsibility to the Aboriginal people in Victoria because ultimately it has created the issues.²¹⁰

As will be set out in this report, the State still perpetuates violence, harm and human and cultural rights abuses against First Peoples in Victoria through the criminal justice and child protection systems. Yoorrook has repeatedly heard that the only way forward is fully self-determined justice and child protection systems under treaty. It is critical that these systems recognise the strength of First Peoples cultures, families and communities and accommodate and deliver both individual and collective self-determination.²¹¹ Only self-determined systems can dismantle the colonial structures that allow systemic injustice to continue. As Aunty Charmaine Clarke told Yoorrook:

Aboriginal people have the solutions, that communities do, around those issues. All issues. The governments need to actually cut those little purse strings around our funding, and let us get on with the work.²¹²

It is to self-determination and matters for treaty that this report now turns. ■

Policy timeline: criminal justice and child protection

1834–1849

1834

Henty brothers invade Gunditjmara country through Portland.

1835

Invasion and illegal settlement at present-day Melbourne, Geelong and the Bellarine Peninsula.

1836

First officials sent from Sydney to the illegal settlement at Melbourne, including bureaucrats and convicts. A police magistrate is sent from Sydney to investigate whalers' offences against Aboriginal people at Westernport.

1836–1838

New settlement officially sanctioned as Port Phillip district of colony of New South Wales.

1838

Aboriginal men escaping imprisonment burn down Melbourne's first gaol, built on Batman's Hill.¹

1838–1849

Port Phillip Protectorate established.

1839

The *Act to Allow the Aboriginal Natives of New South Wales to be Received as Competent Witnesses in Criminal Cases 1839* (NSW) sought to permit 'every aboriginal native or any half-caste native' to act as a witness in criminal proceedings by making an affirmation to tell the truth (rather than taking an oath). Royal Assent to this Act is refused.

1839–1851

Bunting Dale Aboriginal Mission is established near Colac. Operated by Wesleyan Methodist Missionary Society (missionaries Hurst, Tuckfield and Oron).²

1842

Palawa men Tunnerminnerwait and Maulboyheenner are the first two people publicly hanged in Melbourne.

1841

Merri Creek protectorate station established. Located at confluence of Merri Creek and the Yarra River. Includes Merri Creek Aboriginal School, Merri Creek Aboriginal School Dormitory, Merri Creek Aboriginal School Stockyards and Sheds.³

1843

The *(Colonies) Evidence Act 1843* (UK) enacted. This authorised colonial legislatures to pass laws permitting Indigenous peoples (described as 'tribes of various barbarous and uncivilised people... destitute of the knowledge of God and of any religious belief' and 'incapable of giving evidence on oath') to give unsworn evidence in criminal and civil proceedings.

1849

Port Phillip Protectorate deemed a failure and abandoned.

1851–1863

1851

Colony of Victoria created (separate from NSW) under *Australian Constitutions Act 1850* (UK).

1853

An Act for the Regulation of the Police Force 1853 (Vic) establishes the Victoria Police Force, replacing the 'colonial police force' administered from NSW.

1854

An Act to amend further the Law of Evidence 1854 (Vic) provides that in any civil or criminal proceedings, evidence of 'Aboriginal natives' or 'half-caste natives' is admissible upon affirmation where the witness is 'an uncivilised person destitute of the knowledge of God and of any fixed belief in religion or in a future state of rewards and punishments'. Replaced (with similar provisions) in 1857, 1860, 1864 and 1890.

1858–1859

Select Committee of the Victorian Legislative Council reviews the 'present conditions' of Aboriginal people and recommends reserves be established to 'protect' Aboriginal people from violence and disease.⁴

1859

Ebenezer (Lake Hindmarsh) Mission established by the Moravian Church on Wotjabaluk Country.

1860

'Central Board Appointed to Watch over the Interests of Aborigines' (the Board) established.

1861

Framlingham Aboriginal Reserve established by the Board and the Church of England on Kirrae Wurrung (Girai Wurrung) Country, on the Hopkins River.

1863

Lake Tyers Mission (Bung Yarnda) established by the Church of England on Gunai/Kurnai Country.

1863

Ramahyuck mission established by Moravian Church on Gunai/Kurnai country, along Lake Wellington near the Avon River. Reverend Hagenauer, who established Ramahyuck mission, was one of the architects of the 1886 amendment known as the 'Half Caste Act'.⁵

1863

Coranderrk Aboriginal Reserve established on Woivurrung Country, led by Kulin leaders Simon Wonga and William Barak.

1864-1888

- 1864**
Neglected and Criminal Children's Act 1864 (Vic) introduced. This was the first piece of Victorian legislation to define situations where children might be removed from their parents. Industrial schools for 'neglected' children and reformatory schools for convicted juveniles are established under the Act.⁶
- 1867**
Lake Condah Mission established by the Church of England on Kerrupjmara Country. It was built on the Country where the Eumerella Wars had been fought between the Gunditjmarra and white settlers in the 1830s and 1840s.⁷
- 1869**
Aborigines Protection Act 1869 (Vic) explicitly authorises the removal of Aboriginal children. The Aborigines Protection Board replaces the Board for the Protection of the Aborigines.
- 1871**
The *Aborigines Protection Act* is amended to include regulations where the Governor 'may order the removal of any child neglected by its parents or left unprotected to any of the places of residence or to an industrial or reformatory school'.
- 1877**
Royal Commission on the Aborigines is conducted. No Aboriginal witnesses are called.
- 1881**
Parliamentary Coranderk Inquiry launched, officially titled 'The Board Appointed to Enquire into, and Report upon the Present Condition and Management of the Coranderk Station'. Kulin leaders are called to give evidence. This is 'the only occasion in the history of nineteenth-century Victoria when an official commission was appointed to address Aboriginal peoples' calls for land and self-determination, and one of the few times that Aboriginal witnesses were called to give evidence on matters'.⁸ However, more weight is given to the evidence given by non-Aboriginal witnesses.⁹
- 1886**
Aborigines Protection Act Amendment 1886 (Vic) enacted, known commonly as the 'Half Caste Act'. As a result of this legislation, families are forcibly separated and First People of mixed descent aged between 13 and 35 (now legally classified as 'half caste') expelled from their communities on the missions.
- 1888**
Cumeragunja Reserve established on Yorta Yorta/Bangerang Country, along the NSW banks of the Murray River.

1890-1924

- 1890**
Licensing Act 1890 (Vic) provides that liquor must not be sold or disposed to, or to be drunk on any licensed premises by 'any Aboriginal native at any time'.
- 1890**
Aborigines Act 1890 (Vic) extends the powers of the Governor to separate Aboriginal children from their families. It grants wider regulatory powers over the living and working conditions of Aboriginal peoples, including their residence, earnings, care, custody and education of Aboriginal children, rations and medical assistance. Powers include 'the transfer of any half-caste child, being an orphan, to the care of the department for neglected children or any institutions within Victoria for orphan children'.
- 1904**
Ebenezer (Lake Hindmarsh) Reserve closed.
- 1908**
Ramahyuck Reserve closed.
- 1910**
Aborigines Act 1910 (Vic) extends the power of the Board for the Protection of Aborigines by permitting them to make decisions about 'half-caste' Aboriginal people.
- 1915**
Aborigines Act 1915 (Vic) consolidates previous Acts, empowering the Governor to make regulations governing the lives of Aboriginal people. Also creates offences around supplying 'goods and chattels' to Aboriginal people including liquor, 'harbouring' an Aboriginal person without permission, and assisting Aboriginal people to leave Victoria without written consent from the Minister.
- 1919**
Lake Condah Reserve closed.
- 1924**
Coranderk officially closed. All Aboriginal people remaining on stations around Victoria are moved to Lake Tyers, the only staffed institution remaining.¹¹
- 1924**
Children's Welfare Act 1924 (Vic) renames the 'Department of Neglected Children' to the 'Children's Welfare Department'.¹⁰

1928-1967

1939

Cummeragunja walk off. Around 200 people walk off the reserve to protest poor living conditions and management, the first Aboriginal mass protest in Australia. A strike camp is established across the river at Barmah. The strike camp lasts nine months and results in the removal of the manager. Some families return to Cummeragunja, others remain either at the Barmah Flats or the Mooroopna Flats.

1957

Aborigines Act 1957 (Vic) establishes the Aborigines Welfare Board to administer the Act. This Board does not have the power to remove children but can instruct police to carry out removals, with the Board deciding where children should be placed under the *Children's Welfare Act 1954* (Vic).¹⁴

1964

Adoption of Children Act (Vic) replaces the 1928 Act, with stricter procedures for selecting adoptive parents.

1966

Summary Offences Act 1966 (Vic) sets out a number of offences, including public intoxication.

1967

Referendum where Australians vote 'overwhelmingly to amend the Constitution to allow the Commonwealth to make laws for Aboriginal people and include them in the census'.¹⁷

1928

Adoption of Children Act 1928 (Vic) provides for the transfer of parental rights, duties, obligations and liabilities to adoptive parents, and for the legitimisation of informal adoptions without the consent of both parents. This allows 'anyone' to arrange an adoption, and parents signing a consent form lost all rights to their child.¹²

1954

Children's Welfare Act 1954 (Vic) gives the government power to 'establish its own institutions for the care of children and for the detention of young offenders'. The Act widens the scope for judging a child as being 'in need of care and protection', significantly increasing the number of children sent into care.¹³

1958

Children's Welfare Act 1958 (Vic) expands the definition of neglect to include 'a child living under conditions where he/she is likely to lapse into a career of vice or crime', also extending the government's authority and power to remove Aboriginal children.¹⁵ Over 10 per cent of Aboriginal children in Victoria are in State institutions.¹⁶

1967

Aboriginal Affairs Act 1967 (Vic) gives the newly appointed Minister for Aboriginal Affairs 'very broad powers' emphasising housing, welfare, education and economic projects. Ministry/Director of Aboriginal Affairs, an Aboriginal Affairs Advisory Council (replacing the Aborigines Welfare Board) and Aboriginal Affairs Fund are established. For criminal proceedings, the Director can appear on behalf of an Aboriginal defendant. 'Aborigine' now means any person who is descended from an Aboriginal native of Australia.

1973-1987

1973

Victorian Aboriginal Legal Service (VALS) established. In 1975, VALS reports that '90 per cent of its clients involved in criminal matters had been removed from their families as children'.¹⁸

1975

Racial Discrimination Act (Cth) enacted, giving effect to Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination. It makes it unlawful to discriminate against people on the basis of race, colour, descent or national or ethnic origin in certain areas of public life.

1976

Victorian Aboriginal Child Care Agency (VACCA) established. Its efforts combined with other Aboriginal organisations reduced the number of Aboriginal children in children's homes by 40 per cent in three years.¹⁹

1977

Equal Opportunity Act 1977 (Vic) makes it unlawful to discriminate on the basis of sex or marital status and creates the Equal Opportunity Board and Office of Equal Opportunity Commissioner (which later becomes the Victorian Equal Opportunity and Human Rights Commission). In 1995 and again in 2010, the Act expands protection from discrimination on a range of attributes, including race. 'Race' includes colour, descent or ancestry, nationality, ethnic background and any characteristics associated with a particular race.

1979

The Victorian Government adopts the Aboriginal Child Placement Principle which was included in the main welfare and protection laws. This stipulated that an Aboriginal family was the preferred placement for a child in out of home care.

1982

A national prison census reveals the significant over-representation of Aboriginal people in prisons around Australia. Aboriginal people in Victoria were 29 times as likely to be imprisoned than non-Indigenous people. This increased throughout the 1980s.²⁰

1984

Adoption Act 1984 (Vic) contains definitions of an 'Aborigine' through descent and identity; section 50 concerns adoption of an Aboriginal child.

1984

Children (Guardianship & Custody) Act 1984 (Vic) states that a court shall not make a guardianship or custody order with respect to an Aboriginal child unless a report has been received from an Aboriginal Agency.

1987

The Royal Commission into Aboriginal Deaths in Custody examines the deaths of 99 Aboriginal people who died in custody between 1 January 1980 and 31 May 1989.²¹



1988–2006

2008–2022

1988
Bicentenary 'celebrations' are held across Australia. Aboriginal people and supporters hold protests across Australia against the celebration of colonisation and dispossession. The largest march ever at the time was held in Sydney, with up to 100,000 peaceful protesters.

1997
The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families publishes the landmark *Bringing Them Home* report.

2005
Children, Youth and Families Act (Vic) makes provisions specifically relating to Aboriginal children, including the right of Aboriginal people to self-determination, Aboriginal Cultural Support Plans for children in out of home care, and 'Aboriginal Guardianship' which allows Aboriginal agencies to make decisions about the protection of Aboriginal children. These provisions aim to ensure Aboriginal children maintain contact with their community and culture.

1989
Children and Young Persons Act 1989 (Vic) incorporates the Aboriginal Child Placement Principle.

2002
Victoria's first Koori Court opens in Shepparton as a division of the Magistrates Court.

2005
The first Children's Koori Court established at the Melbourne Children's Court.

2006
Charter of Human Rights and Responsibilities Act 2006 (Vic) enacted.

2008
Victoria's first County Koori Court opens in Morwell.

2010
New Equal Opportunity Act 2010 (Vic).

2019
First Peoples' Assembly of Victoria established to advance the treaty process with the government.

2022
Victoria passes legislation (the *Treaty Authority and Other Treaty Elements Bill 2022*) to create the Treaty Authority to oversee treaty negotiations between the First Peoples' Assembly of Victoria and the Victorian government, becoming the first jurisdiction in Australia to do so.

2018
Advancing the Treaty Process with Victorians Act (Vic) commits the Victorian Government to treaty.

2021
Yoorrook Justice Commission formally established.



1. State Library of Victoria, 'Melbourne's First Gaols', *Explore History* (Web Page, 2023). <https://ergo.slv.vic.gov.au/explore-history/rebels-outlaws/law-enforcement/melbournes-first-gaols>.
2. Heather Le Grifon, *Campfires at the Cross: An Account of the Bunting Dale Aboriginal Mission 1839-1851* (Australian Scholarly Publishing, 1 December 2007).
3. Clark and Toby Heydon, *A Bend in the Yarra: A History of the Merri Creek Protectorate Station and Merri Creek Aboriginal School 1841-1851*, (Australian Institute of Aboriginal and Torres Strait Islander Studies, 2004).
4. Select Committee of the Legislative Council on the Aborigines, *Report of the Select Committee of the Legislative Council on the Aborigines; together with the Proceedings of Committee, Minutes of Evidence, and Appendices* (Victorian Parliamentary Papers, Vol. 1, 1858-9); cited by Victorian Aboriginal Child Care Agency, Submission 77, Appendix A, 145.
5. Clare Land, 'Shifting Definitions: The 1886 *Aborigines Protection Act*, 'Race' and 'Half-Castes' (Bachelor of Arts (Honours) Thesis, The University of Melbourne, 2001) 24, 37, submitted in evidence by Alma Thorpe, 3 May 2022, Annexure B.
6. Find and Connect, *The Neglected and Criminal Children's Act 1864 (1864-1888)* (Web Page, 3 June 2021). <<https://www.findandconnect.gov.au/guide/vic/E000178>>.
7. Outline of Evidence of Donna, Tina, Joanne and Sonny Wright, 14 February 2023, 3 [21].
8. Minutes of Evidence, *The Coranderrk Inquiry* (Web Page, 2013). <<http://www.minutesofevidence.com.au/the-coranderrk-story/>>.
9. Tiernan Morrison, 'Beyond Coranderrk: station era Aboriginal political resistance in the Victorian archives' (2016-2017)(15) *Provenance: The Journal of Public Record Office Victoria*. See also the Minutes of Evidence project, 'The Coranderrk Inquiry: A Window onto the History of Colonial Dispossession in Settler States', (Web Page, 2013) <<http://www.minutesofevidence.com.au/the-coranderrk-story/>>.
10. Find and Connect, *Children's Welfare Act 1924 (1924-1929)* (Web Page, 28 February 2019). <<https://www.findandconnect.gov.au/guide/vic/E000172>>.
11. National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (Australia), *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, 52 (Final Report, 1997) ('*Bringing Them Home Report*').
12. Ibid 56.
13. Find and Connect, *Children's Welfare Act 1924 (1924-1929)* (Web Page, 28 February 2019). <<https://www.findandconnect.gov.au/guide/vic/E000174>>.
14. Judith Cue, 'The Intergenerational Impact of Government Policies and Administrations on a Gunditjmarra Family', 32 (Masters Thesis, La Trobe University, 2014), submitted in evidence by Judith McDonald, Submission 13, Attachment 1.
15. Ibid.
16. Victorian Aboriginal Child Care Agency, Submission 77, 5, citing the Victorian government's submission to the *Bringing Them Home* report.
17. Parliament of Australia, *The 1967 Referendum*, (Web Page, undated). <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2017/May/The_1967_Referendum>.
18. Elizabeth Sommerlad, 'Homes for Blacks: Aboriginal Community and Adoption' in C Picton (ed), *Proceedings of First Australian Conference on Adoption* (The Committee of the First Australian Conference on Adoption, 1976) 161; cited in *Bringing Them Home Report* (n 11) 58.
19. *Bringing Them Home Report* (n 11) 59.
20. Don Weatherburn, *Arresting Incarceration – Pathways out of Indigenous Imprisonment* (Aboriginal Studies Press, 2014) 13-14. Cited in Australian Law Reform Commission, Australian Government, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report, December 2017) 60.
21. *Royal Commission into Aboriginal Deaths in Custody*, (Final Report Vol. 1, 185 ('*Royal Commission into Aboriginal Deaths in Custody*')); Eddie Cubillo, '30th Anniversary of the RCIADIC and the 'white noise' of the justice system is loud and clear' (2021) 46(3) *Alternative Law Journal* 185-192.

Endnotes

1. First Peoples' Assembly of Victoria, Submission 43, 5.
2. State of Victoria, Response to Issues Paper 1: Call for Submissions on Systemic Injustice in the Criminal Justice System, 6 [2.1].
3. See State of Victoria, Response to Issues Paper 1: Call for Submissions on Systemic Injustice in the Criminal Justice System, 3, 58 [1]–[23]; State of Victoria, Response to Issues Paper 2: Call for Submissions on Systemic Injustice in the Child Protection System, [1]–[4], [12]–[33]; Transcript of Minister for Treaty and First Peoples, the Hon Gabrielle Williams, 6 May 2022, 287–288 [41]–[47]; Witness Statement of Attorney-General, the Hon Jaclyn Symes, 5 May 2023, 2–3 [3]–[11]; Opening Comments of the Chief Commissioner of Police, Shane Patton, 8 May 2023; Opening Statement of the Minister for Child Protection and Family Services, the Hon Elizabeth (Lizzie) Blandthorn MLC, 12 May 2023; Opening Statement of the Minister for Corrections, Youth Justice and Victim Support, the Hon Enver Erdogan, 15 May 2023; Witness Statement of Minister for Police, the Hon Anthony Carbines, 8 May 2023, 1–2 [1]–[14]; Transcript of Kate Houghton, 2 May 2023, 247–249 [33]–[3]; Transcript of Ryan Phillips, 3 May 2023, 384–385 [28]–[20]; Transcript of Adam Reilly, 15 May 2023, 948–951 [40]–[23].
4. State of Victoria, Response to Issues Paper 1: Call for Submissions on Systemic Injustice in the Criminal Justice System, [36].
5. State of Victoria, Response to Issues Paper 1: Call for Submissions on Systemic Injustice in the Criminal Justice System, [33].
6. State of Victoria, Response to Issues Paper 1: Call for Submissions on Systemic Injustice in the Child Protection System, [12].
7. See Parts D and E.
8. Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 23.
9. Quoted in Aboriginal Justice Caucus, Submission 74, 22.
10. Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8(4) *Journal of Genocide Research* 388.
11. Transcript of Dr Jacyntha Krakouer, 8 December 2022, 241 [9]–[20].
12. Wolfe (n 10) 387; Patrick Wolfe, *Traces of History: Elementary Structures of Race* (Verso, 2016) 40–45.
13. Wolfe, 'Settler Colonialism and the Elimination of the Native' (n 10); Patrick Wolfe, 'Nation and Miscegenation: Discursive Continuity in the Post-Mabo Era' (1994) 36 *Social Analysis: The International Journal of Anthropology* 93, 33; Wolfe, *Traces of History: Elementary Structures of Race* (n 12).
14. Wolfe, 'Settler Colonialism and the Elimination of the Native' (n 10) 387–388; Wolfe, *Traces of History: Elementary Structures of Race* (n 12) 31–37.
15. Wolfe, *Traces of History: Elementary Structures of Race* (n 12) 48–58; Colin Tatz, *Australia's Unthinkable Genocide* (Xlibris, 2017) 32–36, 57, 64, 109, 113–116. This was also a finding of the Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) 260, 270–275 ('*Bringing Them Home Report*').
16. Lowitja Institute, Submission 30, 5.
17. Wolfe, 'Settler Colonialism and the Elimination of the Native' (n 10) 388.
18. Chris Keeler and Vicki Couzins (eds), *Meerreeeng-an Here Is My Country: The Story of Aboriginal Victoria Told through Art* (Koorie Heritage Trust, 2010) 3; Richard Broome, *Aboriginal Victorians: A History since 1800* (Allen & Unwin, 2005) xxi, cited in Victorian Aboriginal Child Care Agency, Submission 77, 47.
19. Broome (n 18) xxi.
20. Keeler and Couzins (eds) (n 18) 3; Gary Presland, *First People: The Eastern Kulin of Melbourne, Port Phillip & Central Victoria* (Museum Victoria Publishing, 2017) 18.
21. State of Victoria, Response to Issues Paper 1: Call for Submissions on Systemic Injustice in the Criminal Justice System, 3.
22. Keeler and Couzins (eds) (n 18) 3–4.
23. Iris Lovett-Gardiner, *Lady of the Lake: Aunty Iris' Story* (Koorie Heritage Trust Inc, 1997) 9; Presland (n 20) 50, 57, 65.
24. Lovett-Gardiner (n 23) 12; Presland (n 20) 37, 65, 67.
25. Lovett-Gardiner (n 23) 12. See also Transcript of Dr Jacyntha Krakouer, 8 December 2022, 229 [15]–[23]; Transcript of Aunty Fay Carter, 2 May 2022, 152 [17]–[22], 174 [15]–[20].
26. Lowitja Institute, Submission 30, 5.
27. See, eg, Clare Land, *Tunnerminnerwait and Maulboyheenner: The Involvement of Aboriginal People from Tasmania in Key Events of Early Melbourne* (Melbourne, 2014) 16; Thomas James Rogers, *The Civilisation of Port Phillip: Settler Ideology, Violence and Rhetorical Possession* (Melbourne University Press, 2018) 97; Wolfe, *Traces of History: Elementary Structures of Race* (n 12) 43.
28. Wolfe, *Traces of History: Elementary Structures of Race* (n 12) 44. See also James Boyce, *1835: The Founding of Melbourne and the Conquest of Australia* (Black Inc, 2013) 192. The legal fiction of 'terra nullius' was the basis of the proclamation by Governor Richard Bourke on 26 August 1835. This proclamation was 'enacted to invalidate the treaty struck between John Batman and the Wurundjeri Woi Wurrung people, who owned the land on which Melbourne now stands': see Sarah-Jane (SJ) Burton, 'Pastoral Ponderings and Settler Politics: How a Colonial Judge and Poet Wrote Terra Nullius into Law', *The Conversation* (Online, 6 April 2023). <<https://theconversation.com/pastoral-ponderings-and-settler-politics-how-a-colonial-judge-and-poet-wrote-terra-nullius-into-law-199962>>.
29. Transcript of Dr Jacyntha Krakouer, 8 Dec 2022, 241 [22]–[28].

30. See, eg, University of Newcastle, Centre for 21st Century Humanities, 'Colonial Frontier Massacre Map', *Colonial Frontier Massacres, Australia, 1788 to 1930* (Web page, 16 March 2022). <<https://c21ch.newcastle.edu.au/colonialmassacres/map.php>>; Guardian Australia, 'Interactive Map', *The Killing Times* (Web page, 16 March 2022) <<https://www.theguardian.com/australia-news/ng-interactive/2019/mar/04/massacre-map-australia-the-killing-times-frontier-wars#top>>; Jane Morrison, 'Frontier Conflicts Map – Victoria', *Australian Frontier Conflicts 1788–1940s* (Web page, 26 January 2022) <<https://australianfrontierconflicts.com.au/maps/conflict-map-of-victoria/>>.
31. *Bringing Them Home Report* (n 15) 27; John Mickle, Submission 1, 7.
32. Yoorrook Justice Commission, *Yoorrook with Purpose* (Interim Report, June 2022) 35 ('*Yoorrook with Purpose*').
33. Witness Statement of Aunty Fay Carter, 29 April 2022, 8–9 [35]–[39]; Transcript of Alma Thorpe, 4 May 2022, 186–187 [35]–[15].
34. Transcript of Alma Thorpe, 4 May 2022, 186 [40]–[47].
35. Dr Michael Maguire and Emeritus Professor Jude McCulloch, Submission 26, 5; Jude McCulloch and Michael Maguire, 'Reforming Police Oversight in Victoria: Lessons from Nothern Ireland' (2022) 34(1) *Current Issues in Criminal Justice*, 40, submitted in evidence by Dr Michael Maguire and Emeritus Professor Jude McCulloch, Submission 26, Appendix 1.
36. Jan Critchett, 'A History of Framlingham and Lake Condah Aboriginal Stations, 1860–1918' (MA Thesis, University of Melbourne, 1980) 28, citing an appeal by Port Fairy Settlers published in the Port Phillip Gazette, 30 March 1842, seen in Michael Christie, 'Race Relations between Aborigines and Colonists in Early Victoria 1835–86' (PhD Thesis, Monash University, 1978) 92.
37. Critchett, 'A History of Framlingham and Lake Condah Aboriginal Stations, 1860–1918' (n 36) 28.
38. Jan Critchett, *A Distant Field of Murder: Western District Frontiers 1834–1848* (Melbourne University Press, 1990) 157–174.
39. Dr Michael Maguire and Emeritus Professor Jude McCulloch, Submission 26, 5.
40. Present-day Victoria was part of the colony of NSW until 1851, following the passing of the *Australian Constitutions Act 1850* (UK) that created the colony of Victoria.
41. John Chesterman and Brian Galligan, *Citizens without Rights: Aborigines and Australian Citizenship* (Cambridge University Press, 1997) 16; Giordano Nanni and Andrea James, *Coranderrk: We Will Show the Country* (Aboriginal Studies Press, 2013) 6.
42. Chesterman and Galligan (n 41) 16.
43. Dr Michael Maguire and Emeritus Professor Jude McCulloch, Submission 26, 5.
44. *Bringing Them Home Report* (n 15) 57.
45. Michael Christie, *Aborigines in Colonial Victoria* (Sydney University Press, 1979) 126, quoted in Penny van Toorn, 'Authors, Scribes and Owners: The Sociology of Nineteenth-Century Aboriginal Writing on Coranderrk and Lake Condah Reserves' (1999) 13(3) *Continuum: Journal of Media & Cultural Studies* 333–343, 333.
46. Critchett, 'A History of Framlingham and Lake Condah Aboriginal Stations, 1860–1918' (n 36) 8–9.
47. See, eg, discussions in Wolfe, *Traces of History: Elementary Structures of Race* (n 12) 1–44; Henry Reynolds, *Truth-Telling: History, Sovereignty and the Uluru Statement* (NewSouth Publishing, 2021); Hannah Robert, *Paved with Good Intentions: Terra Nullius, Aboriginal Land Rights and Settler-Colonial Law* (Halstead Press, 2016); Clare Land, 'Shifting Definitions: The 1886 Aborigines Protection Act, 'Race' and 'Half-Castes'' (Bachelor of Arts (Honours) Thesis, The University of Melbourne, 2001) 6–19, submitted in evidence by Alma Thorpe, 3 May 2022, Annexure B.
48. Tatz (n 15) 81.
49. Rogers (n 27) 13; Land, *Tunnerminnerwait and Maulboyheenner: The Involvement of Aboriginal People from Tasmania in Key Events of Early Melbourne* (n 27) 14. See also State of Victoria, Response to Issues Paper 1: Call for Submissions on Systemic Injustice in the Criminal Justice System, [29].
50. CD Rowley, *The Destruction of Aboriginal Society* (Pelican Books, 1972) 127–128, cited in Rogers (n 27) 24–25 n 56; State of Victoria, Response to Issues Paper 1: Call for Submissions on Systemic Injustice in the Criminal Justice System, [29].
51. Early Port Phillip was under the jurisdiction of New South Wales: *An Act to Allow the Aboriginal Natives of New South Wales to Be Received as Competent Witnesses in Criminal Cases 1839* (NSW); Rowley (n 50) 127–128, cited in Rogers (n 27) 24–25 n 56.
52. Rogers (n 27) 13.
53. State of Victoria, Response to Issues Paper 1: Call for Submissions on Systemic Injustice in the Criminal Justice System, 9 [29]–[30].
54. Jeff Sparrow and Jill Sparrow, *Radical Melbourne: A Secret History* (The Vulgar Press, 2001), cited in Land, *Tunnerminnerwait and Maulboyheenner: The Involvement of Aboriginal People from Tasmania in Key Events of Early Melbourne* (n 27) 14, cited by First Peoples' Assembly of Victoria, Submission 43, 8; State of Victoria, Response to Issues Paper 1: Call for Submissions on Systemic Injustice in the Criminal Justice System, 9 [26].
55. Sparrow and Sparrow (n 54), cited in Land, *Tunnerminnerwait and Maulboyheenner: The Involvement of Aboriginal People from Tasmania in Key Events of Early Melbourne* (n 27) 14, cited by First Peoples' Assembly of Victoria, Submission 43, 8.
56. Land, *Tunnerminnerwait and Maulboyheenner: The Involvement of Aboriginal People from Tasmania in Key Events of Early Melbourne* (n 27) 14, cited in First Peoples' Assembly of Victoria, Submission 43, 8; Cassandra Pybus, *Truganini: Journey Through the Apocalypse* (Allen & Unwin, 2020) 213.
57. Critchett, *A Distant Field of Murder: Western District Frontiers 1834–1848* (n 38) 158.

58. Michael Christie, 'The Language of Oppression: The Bolden Case, Victoria 1845' in Michael Walsh and Colin Yallop (eds), *Language and Culture in Aboriginal Australia* (Aboriginal Studies Press, 1993) 169–180, 171.
59. Land, *Tunnerminnerwait and Maulboyheenner: The Involvement of Aboriginal People from Tasmania in Key Events of Early Melbourne* (n 27) 14–16.
60. Christie, 'Race Relations between Aborigines and Colonists in Early Victoria 1835–86' (n 36) 100, cited in Critchett, 'A History of Framlingham and Lake Condah Aboriginal Stations, 1860-1918' (n 36) 14; Jessie Mitchell and Ann Curthoys, 'How Different Was Victoria? Aboriginal 'Protection' in a Comparative Context' in Leigh Boucher and Lynette Russell (eds), *Settler Colonial Governance in Nineteenth-Century Victoria* (ANU Press, 2015) 200; Nanni and James (n 41) 6.
61. Critchett (n 38) 158–159; State of Victoria, Response to Issues Paper 1: Call for Submissions on Systemic Injustice in the Criminal Justice System, 9 [27].
62. Critchett, *A Distant Field of Murder: Western District Frontiers 1834–1848* (n 38) 157–174.
63. Critchett, 'A History of Framlingham and Lake Condah Aboriginal Stations, 1860–1918' (n 36) 9–11, 41–53; Wolfe, *Traces of History: Elementary Structures of Race* (n 12) 44–45. For persistence of this sentiment into the 20th Century see Tatz (n 15) 112.
64. Critchett, 'A History of Framlingham and Lake Condah Aboriginal Stations, 1860–1918' (n 36) 38–40.
65. 'Editorial', *Age* (28 October 1858), cited in Critchett, 'A History of Framlingham and Lake Condah Aboriginal Stations, 1860-1918' (n 36) 11.
66. Select Committee of the Legislative Council on the Aborigines, *Report of the Select Committee of the Legislative Council on the Aborigines; Together with the Proceedings of Committee, Minutes of Evidence, and Appendices* (Victorian Parliamentary Papers, Vol 1, 1858-9).
67. Chesterman and Galligan (n 41) 16.
68. *Bringing Them Home Report* (n 15) 57.
69. Chesterman and Galligan (n 41) 16.
70. *Bringing Them Home Report* (n 15) 49.
71. Judith Cue, 'The Intergenerational Impact of Government Policies and Administrations on a Gunditjmarra Family' (Masters Thesis, La Trobe University, 2014) 23, submitted in evidence by Judith McDonald, Submission 13, Attachment 1; Critchett, 'A History of Framlingham and Lake Condah Aboriginal Stations, 1860-1918' (n 36) 8–19.
72. Wolfe, *Traces of History: Elementary Structures of Race* (n 12) 49, 51; Dr Michael Maguire and Emeritus Professor Jude McCulloch, Submission 26, 5.
73. Tatz (n 15) 20.
74. Witness Statement of Uncle Johnny Lovett, 27 April 2022, 13 [79].
75. Aboriginal Justice Caucus, Submission 74, 22. See also Witness Statement of Alma Thorpe, 6 [25].
76. Witness Statement of Aunty Fay Carter, 29 April 2022, 10–11 [47]–[48]; Witness Statement of Alma Thorpe, 4 May 2022, 6 [25]–[26].
77. Transcript of Uncle Colin Walker, 27 May 2022, 233 [20]–[26].
78. Witness Statement of Aunty Fay Carter, 29 April 2022, 10–11 [47]–[48].
79. *Bringing Them Home Report* (n 15) 57–58.
80. Canada's House of Commons unanimously recognised the Indian Residential School System as genocide on 27 October 2022. This followed Canada's 2015 Truth and Reconciliation Commission: Temitayo Olarewaju, 'Residential School System Recognized as Genocide in Canada's House of Commons: A Harbinger of Change', *The Conversation* (Online, 12 January 2023) <<https://theconversation.com/residential-school-system-recognized-as-genocide-in-canadas-house-of-commons-a-harbinger-of-change-196774>>; Margaret D Jacobs, 'Indian Boarding Schools in Comparative Perspective: The Removal of Indigenous Children in the United States and Australia, 1880-1940', in Clifford E Trafzer, Jean A Keller and Lorene Sisquoc (eds), *Boarding School Blues: Revisiting American Indian Educational Experiences* (University of Nebraska Press, 2006).
81. *Bringing Them Home Report* (n 15) 57–58.
82. *An Act for the Protection and Management of the Aboriginal Natives of Victoria 1869* (Vic) ('Aboriginal Protection Act').
83. Victoria, *Parliamentary Debates, Legislative Assembly, 19 August 1869, 1726* (Mr James Casey, Minister of Justice). See also 'Casey, James Joseph (1831 – 1913)', *Encyclopedia of Australian Science and Innovation* (Web page, 9 March 2018) <<https://www.eoas.info/biogs/P003417b.htm>>.
84. Victoria, *Parliamentary Debates, Legislative Assembly, 19 August 1869, 1726* (Mr James Casey, Minister of Justice).
85. *Bringing Them Home Report* (n 15) 58.
86. Ibid.
87. Ibid.
88. Land, 'Shifting Definitions: The 1886 Aborigines Protection Act, 'Race' and 'Half-Castes' (n 47) 8–9.
89. See, eg, Diane E. Barwick, *Rebellion at Coranderrk* (Aboriginal History Inc, 1998); Tiernan Morrison, 'Beyond Coranderrk: Station Era Aboriginal Political Resistance in the Victorian Archives' (2016–2017) 15 *Provenance: The Journal of Public Record Office Victoria*; Critchett, 'A History of Framlingham and Lake Condah Aboriginal Stations, 1860–1918' (n 36) 4–5; Penny van Toorn, 'Hegemony or Hidden Transcripts?: Aboriginal Writings from Lake Condah, 1876–1907' (2005) 29(86) *Journal of Australian Studies* 13–27.
90. van Toorn, 'Hegemony or Hidden Transcripts?: Aboriginal Writings from Lake Condah, 1876–1907' (n 89); Elizabeth Nelson, Sandra Smith and Patricia Grimshaw (eds), *Letters from Aboriginal Women of Victoria, 1867–1926* (University of Melbourne, 2002), cited in Land, 'Shifting Definitions: The 1886 Aborigines Protection Act, 'Race' and 'Half-Castes' (n 47) 4–5, 7–11.

91. *Bringing Them Home Report* (n 15) 58. See also State of Victoria, Response to Issues Paper 1: Call for Submissions on Systemic Injustice in the Criminal Justice System, 6 [2.1].
92. State of Victoria, Response to Issues Paper 1: Call for Submissions on Systemic Injustice in the Criminal Justice System, 6–11.
93. See, eg, State of Victoria, Response to Issues Paper 1: Call for Submissions on Systemic Injustice in the Criminal Justice System, 7 [15]–[16].
94. See, eg, Land, ‘Shifting Definitions: The 1886 *Aborigines Protection Act*, ‘Race’ and ‘Half-Castes’” (n 47) 24–26, 41; Wolfe, *Traces of History: Elementary Structures of Race* (n 12) 48–49; Nanni and James (n 41) 12–14.
95. *Act to Amend an Act Entitled “an Act to Provide for the Protection and Management of the Aboriginal Natives of Victoria” 1886* (Vic) (‘Half-Caste Act’).
96. See, eg, Transcript of Alma Thorpe, 4 May 2022, 205 [12]–[14]; Transcript of Uncle Jack Charles, 26 April 2022, 14–15 [40]–[27].
97. Victoria, *Parliamentary Debates*, Legislative Assembly, 15 December 1886, 2912 (Mr Alfred Deakin, Chief Secretary and Minister of Water Supply).
98. Christie, *Aborigines in Colonial Victoria* (n 45) 182–195, cited in Land, ‘Shifting Definitions: The 1886 *Aborigines Protection Act*, ‘Race’ and ‘Half-Castes’” (n 47) 24–25; Wolfe, *Traces of History: Elementary Structures of Race* (n 12) 48–49; Nanni and James (n 41) 20.
99. Wolfe, *Traces of History: Elementary Structures of Race* (n 12) 46–48.
100. van Toorn, ‘Authors, Scribes and Owners: The Sociology of Nineteenth-Century Aboriginal Writing on Coranderrk and Lake Condah Reserves’ (n 45) 334; Barwick (n 89).
101. Board Appointed to Enquire into, and Report upon, the Present Condition and Management of the Coranderrk Aboriginal Station, *Coranderrk Aboriginal Station: Report of the Board Appointed to Enquire into, and Report Upon, the Present Condition and Management of the Coranderrk Aboriginal Station, Together with the Minutes of Evidence* (Report, 1882). See also Nanni and James (n 41) 2, 20.
102. Nanni and James (n 41) 20; Wolfe, *Traces of History: Elementary Structures of Race* (n 12) 48.
103. Transcript of Uncle Jack Charles, 26 April 2022, 14–15 [40]–[27].
104. Wolfe, *Traces of History: Elementary Structures of Race* (n 12) 49.
105. *Ibid* 49–52.
106. The Board was heavily influenced by European racial attitudes and social Darwinism that viewed First Peoples as a ‘doomed’ or ‘dying race’: see Chesterman and Galligan (n 41) 19; Land, ‘Shifting Definitions: The 1886 *Aborigines Protection Act*, ‘Race’ and ‘Half-Castes’” (n 47) 15–16; Wolfe, *Traces of History: Elementary Structures of Race* (n 12) 50–51; Jennifer Marie Anderson, ‘The Children’s Court: Implications of a New Jurisdiction’ (PhD Thesis Thesis, University of Melbourne, 2021) 67.
107. *Bringing Them Home Report* (n 15) 58–60; Land, ‘Shifting Definitions: The 1886 *Aborigines Protection Act*, ‘Race’ and ‘Half-Castes’” (n 47) 20–40; Wolfe, *Traces of History: Elementary Structures of Race* (n 12) 50–52.
108. Victoria, *Parliamentary Debates*, Legislative Assembly, 15 December 1886, 2912 (Mr Alfred Deakin, Chief Secretary and Minister of Water Supply).
109. Victoria, *Parliamentary Debates*, Legislative Assembly, 15 December 1886, 2912 (Mr Alfred Deakin, Chief Secretary and Minister of Water Supply).
110. Victoria, *Parliamentary Debates*, Legislative Assembly, 15 December 1886, 2912 (Mr Alfred Deakin, Chief Secretary and Minister of Water Supply).
111. Victoria, *Parliamentary Debates*, Legislative Assembly, 15 December 1886, 2912–13.
112. Discussed in Chesterman and Galligan (n 41) 24–25; Land, ‘Shifting Definitions: The 1886 *Aborigines Protection Act*, ‘Race’ and ‘Half-Castes’” (n 47) 20; Wolfe, *Traces of History: Elementary Structures of Race* (n 12) 49–52.
113. Wolfe, *Traces of History: Elementary Structures of Race* (n 12) 52.
114. Witness Statement of Aunty Fay Carter, 29 April 2022, 9 [41]; Transcript of Alma Thorpe, 4 May 2022, 187 [25]–[34]; *Bringing Them Home Report* (n 15) 58.
115. *Bringing Them Home Report* (n 15).
116. Witness Statement of Alma Thorpe, 4 May 2022, 13 [74].
117. See, eg, Transcript of Alma Thorpe, 4 May 2022, 205 [12].
118. Transcript of Uncle Colin Walker, 27 May 2022. 230 [5]–[14].
119. Board for the Protection of the Aborigines, *Twenty-Third Report for the Protection of the Aborigines in the Colony of Victoria. Presented to Both Houses of Parliament* (Report, 1887) 4, cited in Land, ‘Shifting Definitions: The 1886 *Aborigines Protection Act*, ‘Race’ and ‘Half-Castes’” (n 47) 13–14. See also Broome (n 18) 188, cited in Victorian Aboriginal Child Care Association, Submission 77, 50.
120. Christie, *Aborigines in Colonial Victoria* (n 45) 205, quoted in Nanni and James (n 41) 184; see also Wolfe, *Traces of History: Elementary Structures of Race* (n 12) 48.
121. Wolfe, *Traces of History: Elementary Structures of Race* (n 12) 51–52.
122. Transcript of Uncle Jack Charles, 26 April 2022, 14–15 [40]–[35].
123. See, eg, *Royal Commission into Aboriginal Deaths in Custody* (National Report, April 1991) vol 2, 25 [10.05.13] (‘*RCIADIC*’); Land, ‘Shifting Definitions: The 1886 *Aborigines Protection Act*, ‘Race’ and ‘Half-Castes’” (n 47) 30–31, 33–35; *Bringing Them Home Report* (n 15) 59–60; Wolfe, *Traces of History: Elementary Structures of Race* (n 12) 51–60.
124. *RCIADIC* (n 123) 25 [10.05.15].

125. *Bringing Them Home Report* (n 15) 85; Chesterman and Galligan (n 41) 23; Victorian Aboriginal Child Care Agency, Submission 77, 49. See also Daryl Tonkin and Carolyn Landon, *Jackson's Track: Memoir of a Dreamtime Place* (Viking, 1999).
126. Chesterman and Galligan (n 41) 23.
127. Witness Statement of Alma Thorpe, 4 May 2022, 13–14 [74]–[83]. See also Transcript of Alma Thorpe, 4 May 2022, 205 [12], 217 [15]–[40]; Transcript of Uncle Jack Charles, 26 April 2022, 15 [34]–[35].
128. As Yoorrook heard in evidence, reasons for some child removals were, for example, 'no visible means of support', or 'no settled place of abode': see Witness Statement of Uncle Larry Walsh, 19 May 2022, 10 [48], Exhibit 7.1; Transcript of Isobel Paipadjerook Morphy-Wash, 20 May 2022, 153 [35]–[40]; Transcript of Aunty Charmaine Clarke, 203–204 [41]–[2]; Transcript of Dr Jacynta Krakouer, 8 December 2022, 227 [18]–[25]. The 'pauperisation' of First Peoples is discussed in Land, 'Shifting Definitions: The 1886 *Aborigines Protection Act*, 'Race' and 'Half-Castes'" (n 47) 30–31.
129. Witness Statement of Alma Thorpe, 4 May 2022, 6 [23]–[24].
130. Witness Statement of Alma Thorpe, 4 May 2022, 7 [30].
131. Jacynta Marie Krakouer, 'Journeys of Connecting: Understanding Cultural Connection for First Nations Children and Young People in Out-of-Home Care in Victoria, Australia' (Unpublished PhD Thesis Thesis, University of Melbourne, 2022) 17.
132. Wolfe, 'Settler Colonialism and the Elimination of the Native' (n 10); Wolfe, *Traces of History: Elementary Structures of Race* (n 12) 48, 58; *Bringing Them Home Report* (n 15) 260, 270–275. See also *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) art 2(e) ('*Genocide Convention*'); United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) art 7(2) ('*UNDRIP*').
133. Wolfe, *Traces of History: Elementary Structures of Race* (n 12) 50–55.
134. *Ibid* 53.
135. Land, 'Shifting Definitions: The 1886 *Aborigines Protection Act*, 'Race' and 'Half-Castes'" (n 47) 44.
136. Tatz (n 15) 52; Land, 'Shifting Definitions: The 1886 *Aborigines Protection Act*, 'Race' and 'Half-Castes'" (n 47) 39–50.
137. Transcript of Dr Jacynta Krakouer, 8 December 2022, 241–242 [36]–[2].
138. Tatz (n 15) 116.
139. Wolfe, *Traces of History: Elementary Structures of Race* (n 12) 54–60; Land, 'Shifting Definitions: The 1886 *Aborigines Protection Act*, 'Race' and 'Half-Castes'" (n 47) 42–43, 47.
140. Transcript of Alma Thorpe, 4 May 2022, 203 [35]–[45], 204 [31]–[32], 205 [16]–[18]; Land, 'Shifting Definitions: The 1886 *Aborigines Protection Act*, 'Race' and 'Half-Castes'" (n 47) 39–50; Wolfe, *Traces of History: Elementary Structures of Race* (n 12) 54–60.
141. Transcript of Alma Thorpe, 4 May 2022, 203 [42]–[43].
142. Wolfe, *Traces of History: Elementary Structures of Race* (n 12) 54–60.
143. Wolfe, 'Nation and Miscegenation: Discursive Continuity in the Post-Mabo Era' (n 13) 117, cited in Land, 'Shifting Definitions: The 1886 *Aborigines Protection Act*, 'Race' and 'Half-Castes'" (n 47) 14 n 55.
144. Transcript of Aunty Eva Jo Edwards, 5 December 2023, 19 [28]–[34].
145. See, eg, Witness Statement of Uncle Jack Charles, 26 April 2022 4–5 [16]–[26]; Transcript of Aunty Charmaine Clarke, 8 December 2022, 203 [19]–[20], 204–205 [2]–[40]; Transcript of Aunty Eva Jo Edwards, 5 December 2022, 12 [30]–[50], 16 [11]–[16].
146. Transcript of Aunty Eva Jo Edwards, 5 December 2022, 22 [4]–[10].
147. *Bringing Them Home Report* (n 15) 62.
148. Transcript of Aunty Geraldine Atkinson, 13 December 2022, 336 [19]–[26].
149. *Bringing Them Home Report* (n 15) 62–63.
150. Outline of Evidence of Donna, Tina, Joanne and Sonny Wright, 14 February 2023, 4–5 [32]–[38]. See also Transcript of Uncle Jack Charles, 26 April 2022, 32, [12]–[20].
151. Outline of Evidence of Donna, Tina, Joanne and Sonny Wright, 14 February 2023, 5 [33].
152. Land, 'Shifting Definitions: The 1886 *Aborigines Protection Act*, 'Race' and 'Half-Castes'" (n 47) 8–9. See also Nelson, Smith and Grimshaw (eds) (n 90); Transcript of Aunty Charmaine Clarke, 8 December 2022, 208 [8]–[38].
153. See, eg, Transcript of Aunty Eva Jo Edwards, 5 December 2022, 13 [7]–[11], 18–19 [20]–[26].
154. Transcript of Aunty Eva Jo Edwards, 5 December 2022, 19 [9]–[16].
155. *RCIADIC* (n 123) 25 [10.05.15].
156. See, eg, Transcript of Aunty Fay Carter, 2 May 2022, 154 [32]–[49]; Transcript of Alma Thorpe, 4 May 2022, 189 [1]–[4].
157. Transcript of Alma Thorpe, 4 May 2022, 189 [1]–[6].
158. See, eg, Transcript of Aunty Fay Carter, 2 May 2022, 154 [32]–[49]; Transcript of Uncle Colin Walker, 27 May 2022, 228 [1]–[6]; Outline of Evidence of Donna, Tina, Joanne and Sonny Wright, 14 February 2023, 5 [33].
159. Transcript of Uncle Colin Walker, 27 May 2022, 228 [1]–[6].
160. Transcript of Aunty Fay Carter, 2 May 2022, 154 [34]–[41].
161. *Bringing Them Home Report* (n 15) 61. See also Witness Statement of Aunty Fay Carter, 29 April 2022, 13 [60].
162. Outline of Evidence of Uncle Ross Morgan, 5 March 2023, 1 [5].
163. Witness Statement of Aunty Fay Carter, 29 April 2022, 5–6 [21]–[22]; Outline of Evidence of Donna, Tina, Joanne and Sonny Wright, 14 February 2023, 1–2 [7]–[10]; Transcript of Dr Jacynta Krakouer, 8 December 2022, 229 [20]–[23].
164. See, eg, Witness Statement of Aunty Fay Carter, 29 April 2022, 5–6 [21]–[22]; Transcript of Uncle Johnny Lovett, 28 April 2022, 81–82 [49]–[2].
165. Families of Dja Dja Wurrung, Jessica Hodgens, *Djuwima Djarra: Dja Dja Wurrung: Kiakiki Wangedak* (Dja Dja Wurrung Clans Aboriginal Corporation, 2014) 102, submitted in evidence by Aunty Fay Carter, 29 April 2022, Exhibit 3.1, Annexure A.

166. Outline of Evidence of Donna, Tina, Joanne and Sonny Wright, 14 February 2023, 2 [9].
167. Transcript of Uncle Johnny Lovett, 28 April 2022, 82 [7]–[12].
168. Transcript of Isobel Paipadjerook Morphy-Walsh, 130 [12]–[16].
169. *Bringing Them Home Report* (n 15) 62.
170. *Bringing Them Home Report* (n 15) 62, 64–65; Tatz (n 15) 28.
171. *Bringing Them Home Report* (n 15) 260, 270–275. See also Tatz (n 15) 32–36, 57, 64, 109, 113–116; *Genocide Convention*, art 2(e); *UNDRIP*, art 7(2).
172. Outline of Evidence of Sissy Eileen Austin, 2 March 2023, 1 [9].
173. Transcript of Sissy Austin, 2 March 2023, 79 [4]–[13].
174. Outline of Evidence of Sissy Eileen Austin, 2 March 2023, 1 [13].
175. Victorian Aboriginal Child Care Agency, Submission 77, 25.
176. Transcript of Commissioner Meena Singh, 5 December 2022, 61 [46]–[48].
177. Transcript of Uncle Larry Walsh, 20 May 2022, 129 [39]–[44]; Find & Connect Web Resource Project for the Commonwealth of Australia, ‘Victoria — Organisation: Turana (1955 – 1993)’, *History & Information about Australian Orphanages, Children’s Homes & Other Institutions* (Web page, 10 August 2021) <<https://www.findandconnect.gov.au/guide/vic/E000626>>. See also Witness Statement of Uncle Jack Charles, 26 April 2022, 7–8 [43].
178. Aboriginal Justice Caucus, Submission 74, 22; See also Transcript of Uncle Larry Walsh, 20 May 2022, 129 [35]–[37]; Evidence of Uncle Larry Walsh, 20 May 2022, Annexure A.
179. Find & Connect Web Resource Project for the Commonwealth of Australia (n 177). See also Transcript of Uncle Larry Walsh, 20 May 2022, 129 [39]–[44].
180. Aboriginal Justice Caucus, Submission 74, 22; Victorian Aboriginal Child Care Agency, Submission 77, 62. See also Woor-Dungin, *Criminal Record Discrimination Project: Submission to Aboriginal Justice Forum 49* (2017).
181. Witness Statement of Uncle Larry Walsh, 19 May 2022, 7 [32].
182. Transcript of Uncle Larry Walsh, 20 May 2022, 129, [21].
183. See Woor-Dungin (n 180).
184. Transcript of Isobel Paipadjerook Morphy-Walsh, 20 May 2022, 188 [4]–[9].
185. *Royal Commission into Aboriginal Deaths in Custody* (Regional Report of Inquiry In New South Wales, Victoria & Tasmania, April 1991) 22 (‘*RCIADIC*’).
186. *Bringing Them Home Report* (n 15) 13.
187. Witness Statement of Alma Thorpe, 4 May 2022, 15 [89].
188. Transcript of Isobel Paipadjerook Morphy-Walsh, 20 May 2022, 128 [3]–[14].
189. See, eg, Transcript of Uncle Jack Charles, 26 April 2022, 35 [4]–[20]; Transcript of Aunty Charmaine Clarke, 8 December 2022, 204 [20]–[34].
190. See, eg, Anonymous, Submission 24, 1–5.
191. Witness Statement of Aunty Fay Carter, 29 April 2022, 9 [42].
192. Transcript of Aunty Fay Carter, 2 May 2022, 166 [19]–[22].
193. Outline of Evidence of Aunty Eva Jo Edwards, 4 December 2022, 1–2.
194. Transcript of Isobel Paipadjerook Morphy-Walsh, 20 May 2022, 128 [45]–[46].
195. Outline of Evidence of Aunty Eva Jo Edwards, 4 December 2022, 2 [25]–[27].
196. Transcript of Sissy Austin, 2 March 2023, 79 [25]–[30].
197. Transcript of Ian Hamm, 8 December 2022, 256 [26]–[35].
198. Outline of Evidence of Donna, Tina, Joanne and Sonny Wright, 14 February 2023, 3 [17]; see also at Annexure 2.
199. Outline of Evidence of Donna, Tina, Joanne and Sonny Wright, 14 February 2023, 3 [19].
200. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 19(2)(b); see also *UNDRIP* art 13(1).
201. Transcript of Aunty Fay Carter, 2 May 2022, 152 [41]–[45], 168 [5]–[9]; Witness Statement of Uncle Johnny Lovett, 27 April 2022, 9–10 [54]–[55].
202. Witness Statement of Uncle Johnny Lovett, 27 April 2022, 9–10 [54]–[55].
203. Transcript of Coree Thorpe, 14 December 2022, 400 [7]–[16].
204. Outline of Evidence of Donna, Tina, Joanne and Sonny Wright, 14 February 2023, 8 [62]–[63].
205. Chris Cuneen et al, *Penal Culture and Hyperincarceration: The Revival of the Prison* (Routledge, 2016) 32, cited in Australian Law Reform Commission, Australian Government, *Pathways to Justice — an Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report, December 2017) 59 [2.17].
206. Aboriginal Justice Caucus, Submission 74, 22.
207. First Peoples’ Assembly of Victoria, Submission 43, 8.
208. Transcript of Dr Jacynta Krakouer, 8 December 2022, 251 [15]–[17].
209. Transcript of Aunty Geraldine Atkinson, 13 December 2022, 336 [13]–[30].
210. Transcript of Dr Jacynta Krakouer, 8 December 2022, 229 [7]–[13].
211. Outline of Evidence of Karinda Taylor, 7 December 2022, 6 [51]–[52]; Transcript of Dr Jacynta Krakouer, 8 December 2022, 235 [11]–[38].
212. Transcript of Aunty Charmaine Clarke, 8 December 2022, 202 [25]–[27].

2 SELF-DETERMINATION

Self-determination is not a seat at the table or a negotiation. It is Aboriginal people having control over the issues that affect our communities.¹ THE VICTORIAN ABORIGINAL LEGAL SERVICE

Introduction

The right to self-determination of First Peoples is a collective right that is of fundamental importance under international law and especially to realising human and cultural rights. It is recognised by the State of Victoria. It is the foundation of Yoorrook's Letters Patent and the treaty-making process underway in this state.

As outlined in the Letters Patent, Yoorrook Justice Commission is required to

*identify Systemic Injustice which currently impedes First Peoples achieving self-determination and equality and make recommendations to address them, improve State accountability and prevent continuation or recurrence of Systemic Injustice.*²

The First Peoples' Assembly of Victoria (FPAV) has urged Yoorrook to 'lay the evidence clear for all to see, as a foundation stone on the path to Treaties and self-determination'.³ The Preamble to the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) states:

*Victorian traditional owners maintain that their sovereignty has never been ceded, and Aboriginal Victorians have long called for treaty. These calls have long gone unanswered. The time has now come to take the next step towards reconciliation and to advance Aboriginal self-determination.*⁴

This report sets out enduring system failures across the child protection and criminal justice systems. It identifies systemic racism and violations of cultural and human rights in those systems. It clearly lays out why self-determination is needed.

This chapter examines what self-determination is and what it is not. It draws on the voices of First Peoples leaders, organisations and those with lived experience of the child protection and criminal justice systems to articulate why self-determination is critical to ending the harms these systems are causing. It looks underneath the commitments of the Victorian Government, which has led the nation in legislating for a treaty process, to examine progress in embedding self-determination in the criminal justice and child protection systems. It finds that while steps have been taken at a policy and program level, these have not, and cannot, deliver the transformative reform needed. The fundamental problem is that non-First Peoples laws, institutions and practices have created broken systems that do not work for First Peoples. Instead, they inflict avoidable harm, trauma and injustice.

The chapter concludes by recommending system transformation whereby decision-making power, authority, control and resources are transferred to First Peoples, giving full effect to self-determination in the criminal justice and child protection systems. This can be achieved through treaty and interim agreements as part of the Treaty process.

What is self-determination?

Yoorrook repeatedly heard from First Peoples' witnesses and organisations of the need for self-determination in the child protection and criminal justice systems and some of the ways that could work.⁵ Many government witnesses spoke about how self-determination should underpin or be at the centre of reform.⁶ Accordingly, it is critical that government understands and applies the full meaning of self-determination if the commitments it has made are to be realised. Otherwise, the necessary transformation of the child protection and criminal justice systems cannot occur.

SELF-DETERMINATION IN INTERNATIONAL LAW

Self-determination may be said to have crystallised as a principle and right in international law following World War II, although its origins were much earlier. The principle and then the right to self-determination were enshrined in several United Nations instruments such as the *United Nations Charter*, the *United Nations International Covenant on Civil and Political Rights* and the *United Nations International Covenant on Economic, Social and Cultural Rights*.⁷

The right to self-determination is a people's right, held by a collective, as opposed to the more typical Western focus on individual rights. As the concept emerged, Indigenous peoples from around the world started to claim a right to self-determination, rather than accept that the right was only vested in nation-states.⁸ The significance of this assertion is that it was based on the concept of Indigenous peoples being organised as sovereign nations.⁹

For Indigenous peoples, the essence of the meaning of self-determination is the capacity to control their own destiny.¹⁰ The foundation for the assertion of self-determination is inextricably tied for First Peoples to their relationship to country, land and waters.¹¹

As outlined in its Interim Report,¹² Yoorrook takes its definition of self-determination from the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) articles 3–5.

Article 3 of UNDRIP states:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4 states:

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5 states:

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.¹³

Australia has endorsed UNDRIP.¹⁴

The right to self-determination can be explained in various ways. One way of explaining the right to self-determination for most First Nations peoples is to distinguish between internal self-determination rather than external self-determination. This emphasises that First Peoples aspire to 'govern themselves and make decisions related to their internal affairs' and 'seek internal autonomy and the right to enter into negotiations and agreements with local, state and federal governments as distinct, self-governing peoples'.¹⁵

Another way of viewing this is 'relational self-determination that conceives the Indigenous-state relationship as one of non-domination, where Indigenous peoples are not unilaterally controlled by the state'.¹⁶ This concept of internal self-determination has also been described as 'a right of a defined part of the population, which has distinctive characteristics on the basis of race or ethnicity, to participate in the political life of the state, to be represented in its government and not be discriminated against'.¹⁷

UNDRIP makes it clear that self-determination for Indigenous peoples is not about secession or the right to form an independent nation-state. Article 46 of UNDRIP states:

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.¹⁸

Another way of explaining the right to self-determination is to distinguish between substantive and remedial self-determination. Substantive self-determination refers (as one example) to the realisation of self-determination by Indigenous peoples within an existing state. Remedial self-determination refers to remedies available under international law where the existing state does not permit this to happen.

Importantly, substantive self-determination involves two stages: constitutive and ongoing. Constitutive self-determination refers to the establishment of a political order which reflects the will of the Indigenous peoples concerned. Institutions created by treaty-making may be seen to be an example. Ongoing self-determination refers to that order continuing in a way that allows those people to live and develop as people according to their own meaningful choices over time — politically, economically, socially and culturally.¹⁹

It is critical to both constitutive and ongoing self-determination that Indigenous peoples equally and fully enjoy all human rights in the state concerned — civil and political rights; economic, social and cultural rights; individual and collective rights; cultural and environmental rights; in Victoria, the rights in the Charter; and other rights.

Calls for self-determination in Australia



There are numerous examples of Australian First Peoples calling for the full implementation of the right to self-determination:

- The Barunga Statement of 1988 presented to then Prime Minister Bob Hawke by Dr Yunupingu, then Chairperson of the Northern Land Council, and Wenten Rubuntja, then Chairperson of the Central Land Council, asserted the right of First Peoples to self-determination and self-management.
- In 1991, the Royal Commission into Aboriginal Deaths in Custody recommended that the self-determination principle be applied in the design and implementation of any policy or program that particularly affects First Peoples.²⁰
- The Eva Valley Statement of 1993, in response to debate regarding the *Native Title Act* 1993 (Cth), called for First Peoples' control of decision-making processes
- In 1999, Patrick Dodson, then Chair of the Council for Aboriginal Reconciliation, stated in the 4th Vincent Lingiari Memorial Lecture that treaties might enshrine the right to self-determination for First Peoples.

The Uluru Statement from the Heart also calls for 'a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination'.²¹



SELF-DETERMINATION FOR AUSTRALIAN FIRST PEOPLES

Professor Larissa Behrendt has set out a list of five recurring threads that underlie the notion of the exercise of self-determination:

- the recognition of past injustices
- autonomy and decision-making powers
- property rights and compensation
- the protection of cultural practices and customary laws
- equal protection of rights.²²

She states:

The evidence is settled that self-determination is the only strategy that has generated the sustainable wellbeing — cultural, physical, spiritual, economic, and social — that Aboriginal and Torres Strait Islander communities and the broader community desire. Self-determination relates to the capacity of the Aboriginal community itself to determine its preferred future and to create the human, institutional and financial infrastructure to bring those aspirations into being.²³

Professor Behrendt has also spoken of the indivisible relationship between realising self-determination and realising all human and cultural rights for Indigenous peoples in Australia:

The rights enmeshed in the concept of ‘self-determination’ include ... everything from the right not to be discriminated against, to the rights to enjoy language, culture and heritage, our rights to land, seas, waters and natural resources, the right to be educated and to work, the right to be economically self-sufficient, the right to be involved in decision-making processes that impact upon our lives and the right to govern and manage our own affairs and our own communities. These rights that can be unpacked from the concept of ‘self-determination’ point to a vision ... of increased Indigenous autonomy within the structures of the Australian state.²⁴

The Yoorrook Justice Commission itself, being First Peoples-led and tasked with the recognition of past injustices, is an element of the exercise of self-determination.²⁵ In the context of the child protection and criminal justice systems, the evidence was clear that the aspiration, and the right of First Peoples in Victoria, is for autonomy and decision-making powers within and in control of those systems, as a tool of self-determination.

What Yoorrook heard

Self-determination is about transfer of power, authority and resources

Yoorrook received numerous submissions and heard in evidence what self-determination means for First Peoples in Victoria. FPAV described the concept in the context of government systems as ‘the power to shape and make the decisions about the systems, laws, policies and programs that affect our communities, families and children’.²⁶

The Victorian Aboriginal Child Care Agency (VACCA) stressed that in the child protection system sector-wide reform to give effect to self-determination is needed.²⁷ This requires the removal of the imposition of Western colonial frameworks and instead allowing the cultural authority of First Peoples’ families and communities to drive reform.²⁸

Bringing them Home did not recommend the transfer of western child protection and welfare models to Aboriginal community control, instead it recommended the design and development of Aboriginal child welfare systems based on Aboriginal ways of being and doing to replace mainstream models.²⁹

VACCA also expressed that self-determination must cover the design, decision-making and implementation of law, policies and programs affecting First Peoples’ children and families.³⁰ VACCA and the Victorian Aboriginal Children and Young People’s Alliance also argued for new, standalone child protection legislation for First Peoples children in Victoria.³¹ This was also recommended by the Victorian Aboriginal Legal Service (VALS) and supported during testimony by Victoria Legal Aid.³²



Adam Reilly, Executive Director, Wimmera South Region, Department of Families, Fairness and Housing

Department of Families, Fairness and Housing (DFFH) Executive Director Adam Reilly said:

I can say with absolute confidence every initiative that we've tried in the child protection space under the current system where we've handed power and control to the community have been hugely successful.³³

In the criminal justice system, it was clearly expressed by First Peoples' organisations and organisations that work closely with First Peoples that no reform would be successful without building genuine self-determination.³⁴ This requires a transformation of the criminal justice system itself.³⁵

The Aboriginal Justice Caucus referred to ultimate decision-making authority as a key element of self-determination.³⁶ Similarly, VALS stated that self-determination requires the transfer of decision-making power and resources to First Peoples communities.³⁷ It stressed that an important aspect of self-determination is not only the capacity to make decisions over issues that affect the lives of First Peoples, but that this capacity is underpinned by the economic infrastructure and power to do so.³⁸

VALS said self-determination should not be seen as a spectrum but rather the fully realised transfer of power to First Peoples community control.³⁹ It also suggested negotiating a Justice Treaty that might cover areas including

involving Aboriginal Communities in decisions regarding cautioning, diversion, and



The Hon. Enver Erdogan MP, Minister for Corrections, Youth Justice & Victim Support

supervision of diversion plans; Aboriginal supervision of community-based sentences, in particular for low-level offences; [an] Aboriginal-led body for investigation of Aboriginal Deaths In Custody and police contact; expanding the Koori Court's jurisdiction to the pre-resolution stage, including bail and diversion; expanding the role of Elders and Respected Persons in Koori Courts; [and] Aboriginal pre and post-release support for Aboriginal people transitioning out of prison and youth justice centres.⁴⁰

Full realisation of the right to self-determination is inarguably an aspiration of First Peoples.⁴¹ At its core is a demand for decision-making power and control over the systems, laws, policies and programs that affect First Peoples and the resources necessary to exercise the power and control.

Yoorrook also heard from the Minister for Corrections, Youth Justice and Victim Support, Enver Erdogan, that:

Aboriginal people must have a leading role in this work, recognising that advancing Aboriginal self-determination is a fundamental right of Aboriginal people and also because we know it leads to better outcomes.⁴²



The Hon. Jaclyn Symes MLC,
Attorney General

Similarly, the Attorney-General, the Hon. Jaclyn Symes MLC, acknowledged that:

For too long, Aboriginal communities have been denied their right to self-determination through the dispossession of land, the denial of culture and very often the silencing of voices. I do recognise that self-determination is not just the correct thing to do; it's a fundamental right of Aboriginal people. And inherent to self-determination is the right of Aboriginal people to define for themselves what self-determination means.⁴³

WHAT SELF-DETERMINATION IS NOT

The Expert Mechanism on the Rights of Indigenous Peoples, which advises the UN Human Rights Council, explained that recognition, reparation and reconciliation are central to the right to self-determination in UNDRIP being fully realised.⁴⁴ It is important to note that self-determination is not only a right, but there is consistent Australian and international evidence that establishes that self-determination is critical to reform and for First Peoples to achieve their economic, social and cultural goals.⁴⁵

These concepts — both of self-determination and its core features and meaning — are broader than minor reform, increased resources to First Peoples communities and organisations, consultative forums, or ad hoc power-sharing arrangements between the State and First Peoples. Rather, the call for realisation of the right to self-determination reflects the aspiration to exercise the inherent power and decision-making that is based on the recognition of First Peoples as a

collection of nations tied to, bound by, and responsible for country and each other. Given the failings of the child protection and criminal justice systems, it is a call for true structural reform.

Merely consulting with First Peoples is not self-determination, nor is providing funding for programs, particularly when these programs are needed because of the cumulative effect of historic and current laws, policies and practices that continue to drive over-representation of First Peoples in the child protection and criminal justice systems. Aunty Geraldine Atkinson stated:

[W]e have been advisers, we have been consulted, all of those things have occurred over the very many years ... and I know what we need to do is we need to make decisions that are through negotiations, not through consultations, not through just advising ministers, not just co-designing with bureaucrats. It is about ensuring that we are in control and that the decisions that we are negotiating are for the betterment of our community, and that's all that we want.⁴⁶

Indigenous peoples' right to self-determination requires the State to seek to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.⁴⁷ However, during this Inquiry, Yoorrook was told of numerous occasions when significant changes were being made to legislation that would have a direct impact on First Peoples, yet representative organisations were either not consulted at all, or only a select few were consulted. On other occasions First Peoples leaders, organisations and oversight bodies such as the Aboriginal Justice Forum, the Aboriginal Children's Forum and the Commissioner for Aboriginal Children and Young People repeatedly raised concerns, but these were ignored.⁴⁸ This is not self-determination — far from it.

Further, involving First Peoples voices in the design and delivery of programs and initiatives, or delegating authority to Aboriginal organisations for administration or delivery of programs and services, is not in itself self-determination. Yoorrook recognises that there have been many achievements by Aboriginal Community Controlled Organisations (ACCOs) designing

and delivering programs, often with limited resources, trying to pick up the pieces when government has failed. The many programs designed and delivered by ACCOs under the four Aboriginal Justice Agreements is strong evidence of this.⁴⁹

The Commission for Children and Young People's report *Our Youth, Our Way* showed that services designed, controlled and delivered by the Aboriginal community have the greatest potential to produce the best outcomes.⁵⁰ Similarly, the transfer of child protection case management and service functions to the Aboriginal Children in Care program has also led to better outcomes for those children and families compared to DFFH management.⁵¹ However, as noted by VALS:

While changes like section 18 of the Children, Youth and Families Act gesture in the direction of self-determination in the child protection system, they fall far short of what is needed to genuinely empower the Aboriginal Community to take responsibility for the care of Aboriginal children. Proper recognition of the right to self-determination would be transformative, but it would require a reckoning with the way that the Victorian Government's past attempts at enabling self-determination have been inadequate.⁵²

Nor is self-determination handing over a broken system or the transfer of responsibility without power and control of resourcing. Djirra states, 'Aboriginal self-determination does not mean simply delegating existing powers or responsibilities. The current system fails Aboriginal and Torres Strait Islander children, and this failure is being transferred from government to ACCOs'.⁵³

As clearly articulated by the Aboriginal Justice Caucus and others, self-determination in the justice system can only be achieved through the 'progressive transfer of authority, resources and responsibilities until Aboriginal Communities have oversight of all aspects of the justice system for Aboriginal people'.⁵⁴ The Aboriginal Justice Caucus further stated:

The AJC's aspiration for self-determination is an Aboriginal Community-Controlled Justice System ..., designed by the Aboriginal Community for the Aboriginal Community.

An Aboriginal Community-Controlled Justice System must be based upon Aboriginal conceptions of justice. In accordance with Aboriginal approaches to wrongdoing, restorative and therapeutic approaches, cultural, spiritual and physical healing, and strengthening culture and community are central elements.

To achieve this ambition requires moving beyond delegating authority to Aboriginal organisations for the administration of parts of the existing system where Aboriginal people are involved, to transforming the system so that all aspects of it reflect Aboriginal cultural protocols, principles, ethics and standards.⁵⁵

GOVERNMENT UNDERSTANDING OF SELF-DETERMINATION

Ministers, the Chief Commissioner of Police and senior government officials were each asked during Yoorrook's hearings what their definition or view of self-determination was. While many focused on greater control in the design and delivery of services,⁵⁶ some took a broader view and recognised that self-determination is not about handing the problem over to First Peoples at the service delivery level. The Attorney-General acknowledged,

self-determination for Aboriginal people must be led, determined and defined by Aboriginal people. But what I do know is that it is not just handing over everything to Aboriginal people and saying, you fix it. It requires meaningful partnership with government to ensure that self-determination principles can be respected, enacted and have meaningful effect for Victoria.⁵⁷



The Hon. Lizzie Blandthorn MP, Minister for Child Protection and Family Services

The Minister for Child Protection and Family Services recognised that government has a role to play:

Self-determination is obviously a human right. It's not for government to define self-determination in that sense, but it's certainly for government to enable it.⁵⁸

The Minister for Corrections, Youth Justice and Victim Support recognised that self-determination requires a transfer of power:

I feel as though self-determination is about Aboriginal people ... making decisions about matters that affect them. That simple. So ... it is not about consultation. That's part of it, but it's really about decision-making power, and that's a fundamental right of our Indigenous people, the Aboriginal people ... I think there is a great investment in programs run by ACCOs but there's a lot more that needs to be done ... I haven't seen a transfer of power.⁵⁹

How the Victorian Government has promoted First Peoples' self-determination to date

The Minister for Treaty and First Peoples acknowledged in her testimony to Yoorrook:

Under international law, self-determination is an inalienable right of First Nations peoples. The Victorian Government is committed to self-determination as a foundational and guiding principle ...

For most of Victoria's history, First Peoples have been denied the opportunity to make decisions for themselves. First Peoples' fundamental right to self-determination — as enshrined in the United Nations Declarations of the Rights of Indigenous Peoples (UNDRIP) — should never have been violated. Justice in Victoria must mean a commitment to self-determination — supporting the transfer of relevant decision-making power from the State to First Peoples. That is why, in 2016, the Victorian Government committed to pursuing treaty.⁶⁰

She further stated:

The Government is committed to the transition of relevant decision-making control, to First Peoples. The Government recognises that we have only begun this transition of power in some areas and there is a long way to go before self-determination has been genuinely achieved.⁶¹

The Victorian Government states that it has been committed to self-determination as the primary driver in First Peoples policy since 2015.⁶² This is expressed through the inclusion of self-determination in the Victorian Aboriginal Affairs Framework 2018–23 (VAAF), and the subsequent development of the Victorian Government Self Determination Reform Framework in 2019. The Self Determination Reform Framework is intended to guide public service action to enable self-determination in line with government's commitments in the VAAF. It also provides an architecture for reporting on this action'.⁶³ There are also policies

that sit underneath the VAAF and the Framework at a departmental and agency level.

In 2018, the *Advancing the Treaty Process with Victorians Act* (Treaty Act) passed the Victorian Parliament. It was the first of its kind in Australia and committed the government to treaty.⁶⁴

In 2019, a statewide election established FPAV to represent Traditional Owners of Country and Aboriginal and Torres Strait Islander peoples in Victoria. FPAV members are elected by communities in particular regions, or are representatives appointed by Traditional Owner groups with formal recognition under legislation.⁶⁵

Since its establishment, FPAV has been negotiating critical elements of the treaty process as well as undertaking consultations with First Peoples to inform treaty negotiations.⁶⁶

During 2022 FPAV and the Victorian Government reached agreement on three pillars for future treaty negotiations:

- Treaty Negotiation Framework: sets the ground rules to negotiate treaty, including a statewide treaty and Traditional Owner treaties
- Treaty Authority: an independent umpire to facilitate and oversee negotiations⁶⁷
- Self-Determination Fund: a First Peoples controlled fund to support First Peoples to negotiate ‘on a level playing field with the State and build capacity, wealth and prosperity for future generations’.⁶⁸

The 2023–24 State Budget allocated \$138.2 million over four years to progress treaty.⁶⁹ It is intended that negotiations for a statewide treaty will commence later in 2023 with FPAV as the representative body, following the completion of the Assembly’s election in June.⁷⁰ In addition to the statewide treaty that will cover statewide matters, the treaty process contemplates the possibility of earlier interim agreements and Traditional Owner treaties which reflect the specific aspirations and priorities of the diverse Traditional Owner groups in Victoria.⁷¹

PORTFOLIO INITIATIVES

Against this background, there have also been progressive steps taken at an issue or portfolio level. As discussed throughout this report, two main agreements have been established to progress program and policy reforms relating to the child protection and criminal justice systems. These are the Aboriginal Justice Agreements (AJA), now in its fourth iteration called *Burra Lotjpa Dunguludja*,⁷² and *Wungurilwil Gaggapduir: Aboriginal Children and Families Agreement*.⁷³ Each have governance arrangements — the Aboriginal Justice Forum (and within that the Aboriginal Justice Caucus) and the Aboriginal Children’s Forum.

Aboriginal Justice Caucus

The Aboriginal Justice Caucus has worked in partnership with successive governments for more than 22 years, with the aim of preventing the imprisonment of First Peoples and deaths in custody, and improving the lives of First Peoples, families and communities across Victoria.⁷⁴ The achievements of the Aboriginal Justice Caucus are important, not only in terms of advocacy, programs and initiatives, but also in the work they have done to progress reforms in criminal justice institutions. This includes *Wirkara Kulpa*, the Aboriginal Youth Justice Strategy 2022–2032,⁷⁵ and their work with Professor Larissa Behrendt and the Jumbunna Institute for Indigenous Education and Research team to examine Aboriginal self-determination in the criminal legal system.⁷⁶

As noted in their submission, ‘with each subsequent phase of the Agreement, the role of the Aboriginal Justice Caucus has evolved, and resources provided for Aboriginal organisations to deliver programs and services have grown, but government have retained ultimate decision-making authority’.⁷⁷

The AJA’s wide-reaching impacts, along with its strong partnerships, are a great strength. However, in the pursuit of true self-determination, there are significant limitations to this partnership approach where ultimate authority remains with the State.⁷⁸



Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing

Aboriginal Children’s Forum

The Aboriginal Children’s Forum provides important governance for the *Wungurilwil Gaggapduir* but, like the Aboriginal Justice Forum, is a place of partnership rather than self-determining authority. This issue is discussed further in the Chapter 3: Accountability, capability, and compliance with cultural and human rights obligations.

It is important to note that government has, over the last decade or more, embarked on several reforms to respond to the continued removal of First Peoples children. However, as acknowledged by Acting Associate Secretary of DFFH Argiri Alisandratos:

While these reforms have been guided by consultation, co-design and strong partnerships with First Peoples leaders, caucuses of strategic governance forums and ACCOs, I recognise that they are unlikely to achieve the outcomes we are seeking without a self-determined approach led by First Peoples. It is evident, within the current social and cultural context, that reform approaches need to be bold and focused more on system transformation through self-determination and Treaty and less on incremental change to the existing system.⁸⁰

A key deliverable under *Wungurilwil Gaggapduir* is the commitment to have all Aboriginal children in out of home care under the care of an ACCO by July 2021.⁸¹ In addition to transitions through contracted case management, a key vehicle for this has been

Aboriginal Community-Controlled Justice System



‘The [Aboriginal Justice Caucus (AJC)] worked with Professor Larissa Behrendt and the Jumbunna Institute for Indigenous Education and

Research (JIIEER) team to examine Aboriginal self-determination in the context of the Victorian criminal legal system. The AJC’s aspiration for self-determination is an Aboriginal Community-Controlled Justice System (ACCJS), designed by the Aboriginal Community for the Aboriginal Community. An Aboriginal Community-Controlled Justice System must be based upon Aboriginal conceptions of justice. In accordance with Aboriginal approaches to wrongdoing, restorative and therapeutic approaches, cultural, spiritual and physical healing, and strengthening culture and community are central elements. An Aboriginal Community-Controlled Justice System requires that the Aboriginal Community:

- Determine the priorities and goals for the system
- Set the policy agenda as it applies to Aboriginal people’s interaction with the system
- Develop the legislative agenda, including drafting legislation
- Determine the Aboriginal justice budget and allocate resources
- Set benchmarks against which service providers would be held accountable
- Establish justice institutions to exercise self-determination’.⁷⁹

the establishment of a category of ACCOs authorised by the Secretary of DFFH to perform this function. This is called Aboriginal Children in Aboriginal Care initiative (ACAC).⁸²

The law is being amended to also enable ACAC to undertake investigations of child protection reports. This change is contained in the *Children and Health Legislation Amendment (Statement of Recognition, Aboriginal Self-Determination and Other Matters) Bill 2023* that recently passed the parliament but at the time of writing this report was yet to be proclaimed.⁸³ This transfer of functions has been welcomed by ACAC providers; however, others have concerns.⁸⁴

These are discussed further in Chapter 7 (Out of home care). Regardless of views on that issue, Yoorrook notes that this transfer of responsibilities does not amount to a fully self-determined child protection system.

The Bill also inserted important statements into the *Children, Youth and Families Act 2005* (Vic) (the CYFA) which recognise the role the child protection system has played in the dispossession, colonisation and assimilation of Aboriginal people, and ongoing systemic racism in the system.⁸⁵ Yoorrook welcomes this change, noting its important symbolism, however these recognition statements do not give rise to any legal rights.⁸⁶

Importantly, the Bill also amends the CYFA to state that ‘Parliament acknowledges Victoria’s treaty process and the aspiration of Aboriginal people to achieve increased autonomy, Aboriginal decision-making and control of planning, funding and administration of services for Aboriginal children and families, including through self-determined Aboriginal representative bodies established through treaty’.⁸⁷

While this is welcome, Yoorrook notes that the legislation refers to ‘services’ rather than to transformation of the system as a whole, which is the stated aspiration of First Peoples.⁸⁸

An Aboriginal child protection system, that’s a destination, that’s where we would like to get to.⁸⁹

The way forward

Treaty is about putting First Peoples in the driver’s seat. It is about empowering First Peoples to reimagine and re-shape systems with which our people interact. Treaty is the means by which First Peoples will give effect to self-determination — First Peoples’ voices deciding First Peoples’ issues. Treaty can deliver the freedom and power for First Peoples to make the decisions about our Communities, our culture and our Country.⁹⁰

As the rest of this report makes clear, the child protection and criminal justice systems are failing First Peoples in Victoria. Antoinette Braybrook, CEO of Djirra, sums it up: ‘there are no happy endings here for Aboriginal women and their children when it comes to child protection and criminal justice. The odds are stacked up against us’.⁹¹

Even with the urgent actions recommended by Yoorrook that can and must occur, both the criminal justice and child protection systems cannot work properly for First Peoples until they are fully self-determining. As Aunty Geraldine Atkinson told Yoorrook, ‘while changes to these systems are necessary and long overdue — the most significant changes will be to the ways that First Peoples make decisions in this State’.⁹²

Yoorrook agrees that it is not for government to decide what self-determination is, but to enable it. In its submission to Yoorrook, government acknowledged that the principle and process of enabling self-determination to achieve enduring change involves more than consulting and partnering with First Peoples on policies and programs that affect their lives.⁹³ However during hearings, in evidence from government witnesses there remained a strong focus on Aboriginal-led service delivery or transfer of functions from departments. Yoorrook reiterates, this is only a step towards self-determination. It is not the destination. Self-determination requires the transfer of decision-making authority, power and resources to First Peoples communities.

The transformation needed in the child protection and criminal justice systems must be founded on the fundamental right of the self-determination of

First Peoples as peoples. Without that, government plans, strategies and programs will continue to fail.

This transformation can only be achieved by acknowledging that the current systems are broken and are failing First Peoples and all Victorians. It can also only be achieved by transferring power to First Peoples to enable fully self-determined systems. It must also be based on the equal enjoyment by First Peoples in Victoria of all human rights — civil and political rights; economic, social and cultural rights; individual and collective rights; cultural and environmental rights; in Victoria, the rights in the Charter; and other rights.

Self-determination is not the tokenistic transfer of inadequate resources and limited authority within a failing system. Self-determination means giving First Peoples people genuine power, resources and authority over the issues that affect their lives so that they can create the systems to support their families and communities to thrive.

The negotiation of treaties in Victoria is an opportunity to achieve this, by shifting the child protection and criminal justice systems as they relate to First Peoples to self-determining systems.⁹⁴ Transferring or creating decision making power so that these systems become self-determining includes decisions about system design; revenue raising and resource allocation; powers of, and appointments to bodies and institutions including accountability and oversight bodies so that these are First Peoples led. In child protection it will require a fundamental rethink and transformation of processes and parties involved in child protection reporting, referral and decision-making. In the criminal justice system, it could include system features such as cautioning and diversion, pre-sentence decisions such as bail and supervision of community-based sentences. These are all matters for First Peoples to negotiate through treaty.

In the meantime, urgent reforms have clearly been identified by First Peoples during Yoorrook's and many other inquiries.

Treaty negotiations are set to commence shortly. The treaty process also contemplates the possibility of earlier interim agreements at both the statewide and local Traditional Owner level. Yoorrook encourages the full flexibility of the treaty process to be applied

to deliver on what First Peoples have long fought for in child protection and criminal justice — full self-determination.

In progressing towards treaty, there may be different approaches in the child protection system and the criminal justice system, for example having standalone child protection legislation for First Peoples children. It may be that First Peoples negotiate responsibility for controlling parts of the criminal justice system but not others. These are all matters for First Peoples to determine and negotiate through the treaty process.

Given the evidence that follows in this report highlighting the systemic racism and ongoing injustices that permeate these two systems, the time to act is now. ■

RECOMMENDATIONS

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.

Endnotes

1. Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 24–25.
2. Victoria, *Yoorrook Justice Commission*, Letters Patent, 2(g).
3. First Peoples' Assembly of Victoria, "Tyerri Yoo-rrook" (*Seed of Truth*): Report to the Yoo-Rrook Justice Commission from the First Peoples' Assembly of Victoria (Report, June 2021) 10.
4. *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) Preamble.
5. See, eg, Victorian Aboriginal Child Care Agency, Submission 77, 22; Transcript of Chris Harrison, 3 March 2023, 101 [5]–[8].
6. Victoria's Minister for Child Protection told Yoorrook, 'The Victorian Government recognises the critical role of self-determination in addressing the over-representation of First Peoples children in the Child Protection system ... I recognise that successful reforms are built on good foundations, are gradual and iterative, and are underpinned by self-determination': Witness Statement of Minister for Child Protection, the Hon Elizabeth (Lizzie) Blandthorn MLC, 24 March 2023, [25]. Victoria's Attorney-General also told Yoorrook, '... it is clear that systemic injustices faced by Aboriginal peoples can only be properly addressed where self-determined solutions are fostered and embedded': Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 11 [54].
7. *Charter of the United Nations; International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 99 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976). See also Larissa Behrendt, Amanda Porter and Alison Vivien, *Indigenous Self-determination Within the Justice Context: Literature Review* (UTS: Jumbunna Indigenous House of Learning, 2017) 11.
8. Behrendt, Porter and Vivien, *Indigenous Self-determination Within the Justice Context: Literature Review* (n 7) 11–12.
9. Ward Churchill, *Struggle for the Land: Native North American Resistance to Genocide, Ecocide and Colonization* (City Lights Publishers, 2002) 37.
10. S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2nd ed, 2004) 98.
11. Michael Mansell, *Treaty and Statehood: Aboriginal Self-Determination* (Federation Press, 2016) 173; relying on *Mayagna (Sumo) Awas Tingni Community v Nicaragua* Inter-Am Ct HR (Ser C) No 79 (2001) at [144], [148]–[149].
12. Yoorrook Justice Commission, *Yoorrook with Purpose: Interim Report* (2022) 8 ('*Yoorrook with Purpose*').
13. *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) arts 3–5 ('*UNDRIP*').
14. Australia announced its support for the Declaration in 2009: Australian Human Rights Commission, 'United Nations Declaration on the Rights of Indigenous Peoples' (Web page, Undated) <<https://declaration.humanrights.gov.au>>.
15. Behrendt, Porter and Vivien (n 7) 14.
16. *Ibid* 15.
17. Mansell (n 11) 175.
18. *UNDRIP* (n 13) art 46.
19. S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2nd ed, 2004) 97–128.
20. *Royal Commission into Aboriginal Deaths in Custody* (National Report, April 1991) vol 5, 111, Recommendation 188 ('*RCIADIC*').
21. The Uluru Statement, 'Uluru Statement from the Heart', *The Statement* (Web page, 2023) <<https://ulurustatement.org/the-statement/>>.
22. Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Federation Press, 2003) 106–115.
23. Behrendt, Porter and Vivien, *Indigenous Self-determination Within the Justice Context: Literature Review* (n 7) 5. Cited in Submission of the Centre for Innovative Justice, Submission 56, 16.
24. Larissa Behrendt, 'Unfinished Journey — Indigenous Self-Determination' (April 2002) *Arena Magazine* 58, 24.
25. *Recognition, Reparation and Reconciliation*, Report of the Expert Mechanism on the Rights of Indigenous Peoples, A/HRC/EMRIP/2019/3/Rev.1 (2 September 2019) [47].
26. First Peoples' Assembly of Victoria, Submission 43, 2.
27. Victorian Aboriginal Child Care Agency, Submission 77, 22.
28. Victoria Legal Aid, Submission 39 (Child Protection), 5.
29. Victorian Aboriginal Child Care Agency, Submission 77, 44.
30. Victorian Aboriginal Child Care Agency, Submission 77, 21.
31. Victorian Aboriginal Child Care Agency, Submission 77, 11; Victorian Aboriginal Children and Young People's Alliance, Submission 243 (The case for systemic reform), 3, 7.
32. Victorian Aboriginal Legal Service, Submission 38 (Child Protection), 12; Transcript of Louise Glanville, 15 December 2022, 473 [1]–[8].
33. Transcript of Adam Reilly, 15 May 2023, 970 [13]–[18].

34. Non-First Peoples organisations also gave their views on the benefits and features of self-determination as it relates to the criminal justice and child protection systems: see, eg, Victoria Legal Aid, Submission 28 (Criminal Justice) 2; Centre for Innovative Justice, Submission 56, 16. See also reference to a CIJ developed table that examines features of Rangatahi and Pasifika courts, Gladue courts and Gladue reports, Circle sentencing, Cree courts, Tsuu T'ina Peacemaking courts, an Aboriginal Legal Service Community Council, Hollow Waters Community Holistic Healing Circle Initiative, First Nations sentencing courts, Aboriginal Community Justice reports, Family Group Conferencing, Laws and Justice Groups, and Indigenous Justice of the Peace courts from Australia, Canada and Aotearoa New Zealand: Centre for Innovative Justice, Submission 56, 5.
35. Human Rights Law Centre, Submission 60, 12.
36. Aboriginal Justice Caucus, Submission 74, 10.
37. Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 24.
38. Victorian Aboriginal Legal Service, Submission 38 (Child Protection), 56.
39. Victorian Aboriginal Legal Service, Submission 38 (Child Protection), 56–57.
40. Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 29.
41. Behrendt (n 21) 116-117.
42. Transcript of Minister for Corrections, Youth Justice and Victim Support, the Hon Enver Erdogan, 15 May 2023, 858 [4]–[6].
43. Transcript of Attorney-General, the Hon Jaclyn Symes, 5 May 2023, 430 [9]–[15].
44. *Recognition, Reparation and Reconciliation* (n 24) [73].
45. Behrendt, Porter and Vivien, *Indigenous Self-determination Within the Justice Context: Literature Review* (n 7) 20; Chris Cunneen, *Self-Determination and the Aboriginal Youth Justice Strategy: Report Prepared for the Aboriginal Justice Caucus and Department of Justice and Regulation, Victoria* (Report, 2019) 12.
46. Transcript of Aunty Geraldine Atkinson, 13 December 2022, 324 [1]–[9].
47. *UNDRIP* (n 13) art 19.
48. For example, in relation to raising the age of criminal responsibility, the Minister for Youth Justice stated in evidence: ‘They would like to see the age raised to 14 immediately. That was communicated by First Peoples’ Assembly, Justice Caucus and Djirra and many organisations I have spoken to’: Transcript of Minister for Youth Justice, the Hon Enver Erdogan, 15 May 2023, 905 [35]–[38]. See also First Peoples’ Assembly Victoria, Submission 43, 15–17; Aboriginal Justice Caucus, Submission 74, 32. Djirra also stated, ‘Djirra is often overlooked and excluded from or not meaningfully consulted on legislative changes and policy that directly impact Aboriginal and Torres Strait Islander women. As a specialist organisation working exclusively with Aboriginal and Torres Strait Islander victim survivors of family violence, Djirra’s on the ground experience and expertise must be recognised by government’: Djirra, Submission 44, 20.
49. ‘The [Aboriginal Justice Agreement (AJA)] provides over \$30 million in community grants per annum. The community grants program primarily funds ACCOs to deliver community-based initiatives aimed at preventing contact with the justice system or improving outcomes in the justice system’: Department of Justice and Community Safety, *Appendix B: Summary of Aboriginal Justice Agreement Community Grant Initiatives*, 1. See also evaluation of the Aboriginal Justice Agreement 3: Victorian Government, ‘Outcomes’, *Victorian Aboriginal Justice Agreement* (Web page, 24 March 2023) <<https://www.aboriginaljustice.vic.gov.au/outcomes>>; Koori Justice Unit, Department of Justice and Regulation, *Evaluation of the Aboriginal Justice Agreement Phase 3: Synthesis of Program Evaluations* (Synthesis, 2021).
50. Commission for Children and Young People, *Our Youth, Our Way: Inquiry into the Over-Representation of Aboriginal Children and Young People in the Victorian Youth Justice System* (Report, 2021). Yoorook notes that a self-determined youth justice system would be enhanced by the recommendations made in that report.
51. For example, more First Peoples’ children in the Aboriginal Children in Aboriginal Care (ACAC) program are reunified with their parents than children managed by DFFH child protection: State of Victoria, Response to Issues Paper 2: Call for Submissions on Systemic Injustice in the Child Protection System, [46].
52. Victorian Aboriginal Legal Service, Submission 38 (Child Protection), 56–57.
53. Djirra, Submission 44, 20.
54. Aboriginal Justice Caucus, Submission 74, 11. See also Outline of Evidence of Aunty Karin Williams, 14 December 2022, 8 [74].
55. Aboriginal Justice Caucus, Submission 74, 11.

56. See, eg, 'firstly, I would like to say that self-determination is not for government to determine but in terms of my experience, self-determination creates the better outcomes because the people that are affected by the issue or the opportunity to have control and design and deliver either the program or the policy. So the ultimate outcome is a better outcome': Transcript of Kate Houghton, 2 May 2023, 265 [19]–[23].
57. Transcript of Attorney General, the Hon Jaclyn Symes, 5 May 2023, 434 [5]–[10].
58. Transcript of Minister for Minister for Child Protection and Family Services, the Hon Elizabeth (Lizzie) Blandthorn MLC, 24 March 2023, 12 May 2023, 827 [21]–[23].
59. Transcript of Minister for Corrections, Youth Justice and Victim Support, the Hon Enver Erdogan, 15 May 2023, 868 [1]–[44].
60. Transcript of (then) Minister for Aboriginal Affairs, the Hon Gabrielle Williams, 6 May 2022, 292 [31]–[33], 301 [26]–[32].
61. Transcript of (then) Minister for Aboriginal Affairs, the Hon Gabrielle Williams, 6 May 2022, 323 [30]–[34].
62. Victorian Government, *Victorian Aboriginal Affairs Framework 2018–2023* (2018).
63. Victorian Government, *Self Determination Reform Framework* (2019) 5.
64. *Advancing the Treaty Process with Victorians Act 2018* (Vic).
65. In the 2019–2023 Assembly there were 31 Members, 21 occupying general seats and the remaining in reserved seats, designated for each formally recognised Traditional Owner group. The Assembly has developed an additional pathway for Traditional Owner groups who do not have formal recognition under legislation to apply for a reserved seat: First People's Assembly of Victoria, 'We Are the First People's Assembly', *The Assembly* (Web page, 2022) <<http://firstpeoplesvic.org/the-assembly/>>.
66. For further information, see First Peoples' Assembly of Victoria, 'Treaty' (Web page, 2022) <https://www.firstpeoplesvic.org/treaty/>.
67. Established by the *Treaty Authority and Other Treaty Elements Act 2022* (Vic). A copy of the Agreement can be found at First Peoples-State Relations, Victorian Government, 'Treaty Authority Agreement' (Web page, 28 September 2022) <<https://www.firstpeoplesrelations.vic.gov.au/treaty-authority-agreement/>>. See also First People's Assembly of Victoria, 'Establishing the Treaty Authority', *Treaty* (Web page, 2022) <<https://www.firstpeoplesvic.org/treaty/treaty-authority/>>; First People's Assembly of Victoria, *A Path to Treaty: First Peoples' Assembly of Victoria Treaty Information Pack* (June 2022).
68. First Peoples' Assembly of Victoria, Submission 43, 4.
69. 'This initiative will support the state and First Peoples' Assembly of Victoria as the First Peoples' Representative Body to meet Minimum Standards and prepare for Treaty negotiations. Funding is also provided to continue the work of the Yoorrook Justice Commission': Department of Treasury and Finance, Victorian Government, *Victorian Budget 2023–24: Service Delivery* (Budget Paper No 3, 2023) 3–4.
70. First Peoples' Assembly of Victoria, 'Treaty Negotiation Framework', *Reports & Resources* (Web page, 21 October 2022) ss 15–16 <<https://www.firstpeoplesvic.org/reports-resources/treaty-negotiation-framework/>>. See also First People's Assembly of Victoria, *A Path to Treaty: First Peoples' Assembly of Victoria Treaty Information Pack* (June 2022).
71. See First Peoples' Assembly of Victoria, 'This is Treaty' (Web Page, 2022) <<https://www.firstpeoplesvic.org/treaty/>>.
72. Victorian Government and Victorian Aboriginal Community, *Burra Lotjpa Dungaludja: Victorian Aboriginal Justice Agreement Phase 4* (Partnership Agreement, 2018).
73. This is a tripartite agreement between the Victorian Aboriginal Children and Young People's Alliance, the government and community service organisations to improve outcomes for Victorian children and families: see Victorian Government, *Wungurilwil Gaggapduir: Aboriginal Children and Families Agreement* (2021).
74. The Aboriginal Justice Caucus provides statewide representation and leadership to amplify community voices in all areas relating to justice. It comprises the Aboriginal signatories to the AJA, the Aboriginal community members of the Aboriginal Justice Forum, and includes Chairpersons of each of the nine Regional Aboriginal Justice Advisory Committees (RAJACs), representatives from statewide Aboriginal justice programs, Aboriginal peak bodies, and ACCOs: Aboriginal Justice Caucus, Submission 74, 6.
75. 'The [Aboriginal Justice Caucus (AJC)] has undertaken substantial work to reimagine the youth legal system in Victoria in line with our vision for a self-determined Aboriginal community-controlled system. As with the adult system, the AJC envisions that a self-determined youth justice system would see the progressive transfer of resources, authority and responsibilities from government to the Aboriginal community over time until the Aboriginal community has full control over all justice responses for Aboriginal children and young people': Aboriginal Justice Caucus, Submission 74, 14. *Wirkara Kulpa* states that 'as a fundamental right of 'peoples', self-determination is based on the notion of Aboriginal people having control over their own destiny including their social, economic, and cultural needs, and to have that right respected by others': Department of Justice and Community Safety, *Wirkara Kulpa: Aboriginal Youth Justice Strategy 2022–2032* (2022) 11 ('*Wirkara Kulpa*').
76. Aboriginal Justice Caucus, Submission 74, 11.
77. Aboriginal Justice Caucus, Submission 74, 10.
78. Aboriginal Justice Caucus, Submission 74, 7.
79. Aboriginal Justice Caucus, Submission 74, 11.

80. Witness Statement of Argiri Alisandratos, 21 April 2023 (amended 24 April 2023) 19 [29].
81. See Victorian Government, *Wungurilwil Gaggapduir: Aboriginal Children and Families Agreement* (2021). As at 31 December 2022, there were 198 Aboriginal children in ACAC which represents 7.5 per cent of all Aboriginal children in care (excluding those on Permanent Care Orders): Department of Families, Fairness and Housing, Supplementary response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 6 May 2023, Attachment 1, 10 [31].
82. *Children, Youth and Families Act 2005* (Vic) s 18 ('CYFA').
83. Children and Health Legislation Amendment (Statement of Recognition, Aboriginal Self-Determination and Other Matters) Bill 2023 (Vic) cl 7 substituting s 18 ('*Statement of Recognition Bill*').
84. Djirra, Submission 44, 18.
85. *Statement of Recognition Bill* (n 82) cl 4 inserting new s 7A.
86. *Ibid* cl 4. The new s 7C (inserted by this clause) provides that the Parliament does not intend by new pt 1.1A to create in any person any legal right or give rise to any civil cause of action.
87. *Ibid* cl 4 inserting new s 7B.
88. *Ibid*.
89. Summary Report — Winda-Mara Aboriginal Corporation and Dhauwurd Wurrung Elderly & Community Health Service On Country Visit, 16 February 2023, 1 [2].
90. First Peoples' Assembly of Victoria, Submission 43, 1.
91. Transcript of Antoinette Braybrook, 13 December 2022, 350 [32]–[34].
92. Outline of Evidence of Aunty Geraldine Atkinson, 12 December 2023, 3–4 [26].
93. State of Victoria, Response to Issues Paper 1: Call for Submissions on Systemic Injustice in the Criminal Justice System, 13 [42], [44].
94. First Peoples' Assembly of Victoria, Submission 43, 1–2.



Dights Falls

3

ACCOUNTABILITY, CAPABILITY, AND COMPLIANCE WITH HUMAN AND CULTURAL RIGHTS OBLIGATIONS

Introduction

This chapter draws together consistent themes in evidence to Yoorrook that span both the child protection and criminal justice systems, and in many cases the whole of the Victorian Government. It examines three areas that must be urgently addressed if government is to make good on its stated policy commitments to First Peoples and to enable self-determination:

- accountability and transparency
- cultural competence and responsiveness
- compliance with cultural and human rights obligations.

These areas lie at the heart of the cultural, practice and institutional changes that must be made to the child protection and criminal justice systems to address the systemic racism and policy failures Yoorrook has identified throughout this report. All three must be prioritised across government if Victoria is to end the shocking over-representation of First Peoples in child protection and criminal justice systems. They are the foundations upon which Yoorrook’s other urgent recommendations rest.

None of this should be controversial. These are all principles to which multiple government witnesses, including departmental Secretaries have committed.¹ They are features of good government and sound public policy. They are the basics.

What Yoorrook heard

There must be accountability for government policies and programs

Within the child protection and criminal justice systems power is exercised over First Peoples’ lives through the policies and programs designed and delivered by the entities that form these systems. Yet, a consistent theme throughout evidence to Yoorrook was a lack of accountability by those responsible for these policies and programs. This includes a ‘widening disconnect’ between key policies and the progress needed to achieve real change.²

The Victorian Government’s overarching framework for working with Aboriginal Victorians, organisations and the wider community is the *Victorian Aboriginal Affairs Framework 2018–23* (VAAF). The VAAF states: ‘The goals, objectives, measures and self-determination guiding principles and actions within the VAAF set a clear direction for how government will ‘Plan’, ‘Act’, ‘Measure’ and ‘Evaluate’ to progress change across government, address inequity and deliver stronger outcomes for and with Aboriginal Victorians’.³

The VAAF includes 111 measures across six domains, each with objectives and goals.⁴ As a whole-of-Victorian-Government framework, each department is responsible for, and must report on its actions in the VAAF every year. These are contained in an annual report which is tabled in parliament and includes a data dashboard.⁵

The Victorian Government specifically included a commitment in the VAAF to establish an Aboriginal-led evaluation and review mechanism to track progress against the framework.⁶ Public consultation on this took place and a community engagement report was published in 2019.⁷ Further community consultation on a potential model for the mechanism was promised

for 2020, once it became clear how this accountability mechanism would intersect with the First Peoples' Assembly of Victoria. Yet in 2023, the final year of this framework, this evaluation and review mechanism has still not been established.

This matters. One of the stated benefits of the VAAF is that it is a whole-of-Victorian-Government framework, with all departments responsible for their relevant objectives and the Department of Premier and Cabinet playing a coordination role. Without evaluation and review, the risks of fragmented accountability rise dramatically.⁸ In simple terms, if everyone is responsible but no one is held to account, then it is likely that no agency or department will be accountable.

Yoorrook was disturbed to hear in evidence that other major policy frameworks relating to First Peoples have also not been subject to any monitoring or evaluation, despite stated commitments to do so. Government representatives admitted that despite some of these strategies being more than half-way through delivery, the evaluation process had not yet been designed, let alone implemented. For example, five years into the 10-year strategy, *Balit Murrup: Aboriginal social emotional wellbeing framework 2017–2027*, there had only been 'ad hoc monitoring of parts of it'. Katherine Whetton, Deputy Secretary of Mental Health and Wellbeing, Department of Health, stated in her evidence:

We are going to own it on behalf of the department, we have not undertaken good evaluation and monitoring.⁹

In other examples, outcomes have been set at a high level, without specific measures to gauge progress. For example, the Aboriginal Youth Justice Strategy, *Wirkara Kulpa (2022-2032)*, commits to monitoring under the *Burra Lotjpa Dunguludja* (Victorian Aboriginal Justice Agreement: Phase 4) Monitoring and Evaluation Framework.¹⁰ This is welcome, but there were no specific, data-based KPIs set in the strategy and a governance structure was only approved in June 2023. This effectively means that no monitoring or evaluation of this strategy has been implemented to date.¹¹



Katherine Whetton, Deputy Secretary, Mental Health and Wellbeing, Department of Health

An action under *Burra Lotjpa Dunguludja* is establishing Aboriginal governance structures to ensure initiatives are evaluated against criteria that reflect Aboriginal values and measures of success. This is currently reported as being 'in progress'.¹²

Problems also exist at a program level. As the government noted in its submission to Yoorrook, 'the State Budget does not include a mechanism for Aboriginal community decision making on budget priorities and outcomes, and it is difficult to track First People's funding over multiple years'.¹³ Yoorrook is also concerned that there is very little outcome measurement of programs ostensibly developed by non-First Peoples organisations or government departments to address the well-documented failures of the child protection or criminal justice systems to operate justly for First Peoples. At the same time Aboriginal-led organisations have significant reporting requirements, especially when trying to piece together small amounts of funding or short-term funding to deliver their services. State witnesses also recognised the need to shift the focus of measurement to real outcomes.¹⁴

This lack of follow up for program efficacy raises doubt about the commitment of government to the outcomes that these strategies are meant to deliver. It also creates a barrier for programs that have been given one-off or fixed funding to become ongoing if they are not given an opportunity to prove their worth for further investment.¹⁵

Yoorrook notes that the Victorian Auditor-General's Office (VAGO) conducts performance audits of state and local government agencies and can also review non-government agencies that receive government funding. While many of VAGO's audits have been powerful in their examination of the child protection and criminal justice system and have assisted Yoorrook's inquiry, only three of VAGO's reports since 1955 have focused specifically on Aboriginal affairs.¹⁶

Some organisations, such as the Victorian Aboriginal Community Controlled Health Organisation (VACCHO), have called for an independent Aboriginal Affairs Commission 'to evaluate services that should be delivering outcomes for Aboriginal and Torres Strait Islander people'. This body would report to Victoria's Parliament and the First Peoples' Assembly.¹⁷ Yoorrook understands that VACCHO and the Lowitja Institute have been working to further develop this proposal.

Yoorrook is greatly concerned at the systemic failure to consistently implement standard accountability and measurement practices. Lack of evaluation limits capacity to deliver benefits for First Peoples in Victoria. The lack of monitoring limits the accountability of those responsible for the delivery and outcomes of the programs. The lack of measurement of progress limits the likelihood of improvements for First Peoples.

Yoorrook notes that government has entered into partnerships with key First Peoples organisations under major agreements — *Wungurilwil Gapgapduir: Aboriginal Children and Families Agreement*¹⁸ and *Burra Lotjpa Dungaludja*. The Aboriginal Children's Forum¹⁹ and the Aboriginal Justice Forum (which includes the Aboriginal Justice Caucus) have been designated as the bodies responsible for holding the government to account for First Peoples policy and programs under those agreements.²⁰

Both forums receive data reports from multiple agencies, but do not control how it is presented or own that data under Indigenous Data Sovereignty principles.²¹ As noted by Adam Reilly, Executive Director, Wimmera South Region, Department of Families, Fairness and Housing (DFFH):

I think, for me, the biggest challenge around our data and it's one of the strongest criticisms I receive from community is that when you own the data you own the narrative. And for me, what we are missing and we could really benefit from is external oversight of our data and practice, where that data is tested.²²

These two bodies have done, and continue to do, critically important work. Both play an important role in pursuing greater justice for First Peoples in the child protection and criminal justice systems.²³ However, critically, neither forum holds any formal authority to act on failures of policy or its implementation once identified. Some members of these forums were highly critical of government's engagement in these processes. In relation to mechanisms established to provide accountability:

I would say that [Aboriginal Children's Forum] had the best of intentions of when it was set up for ... I would suggest that the last four, we have been spoken to, and there was no interactive.

Completely run by the department and, you know, attended by Ministers but in a tokenistic way. So, you know, effectively, Minister such and such is here for 15 minutes, that's all we have got, off they go, they walk around, smile and tap you on the hand and go nice to meet you.²⁴

The Aboriginal Children's Forum and the Aboriginal Justice Caucus are consulted²⁵ but do not have sufficient power to bring government to account when it is going down a path that harms First Peoples. A clear example of this is the Victorian Government's decision to proceed with punitive changes to Victoria's bail laws despite repeated advice from the Aboriginal Justice Caucus against this course. These changes,

as predicted, led to staggering growth in the imprisonment of First Peoples on remand.²⁶

Yoorrook proposes the urgent development and implementation of a First Peoples-led mechanism to strengthen performance evaluation and accountability that could operate across existing policies and programs as work progresses on treaty. Yoorrook does not specify which body should hold that function, noting the work of the Lowitja Institute and VACCHO over recent months, and the critical accountability role the First Peoples' Assembly of Victoria will play in negotiating this through treaty.

Cultural and human rights capability must improve

How do we expect someone who has done half a day of training to be culturally competent?²⁸

Yoorrook found, and government agreed, that systemic racism exists within institutions in the child protection and criminal justice system.²⁹ This manifests through the content of laws and policies and their administration. It also manifests in the attitudes and behaviours of people working in these systems. None of the institutions that Yoorrook examined in this inquiry were immune from systemic racism.

Leaders within these institutions are failing to ensure their staff understand the truth about systemic injustices that First Peoples have endured since invasion and continue to endure. Without that understanding they cannot work effectively or fairly with First Peoples.

This plays out in the violations of cultural and human rights of First Peoples that are documented throughout this report. These include breaches of rights to culture, equality before the law, freedom from cruel and degrading treatment, rights to family and privacy (which includes the right to have, express and develop Aboriginal identity) and protecting the best interests of the child.³⁰

Human and cultural rights must be respected and implemented as part of forming and deepening relationships with First Peoples. These relationships must be based on equality of dignity and common humanity



'The Treaty Negotiation Framework includes funding and revenue raising as potential subject matters for Treaty negotiations, and offers the potential, over time to transfer the Victorian Government's spending on First Peoples to a representative decision-making body. An ongoing representative body could lead reforms to improve budget outcomes for First Peoples — working with ACCOs to determine funding priorities and linking budget reporting measures to Aboriginal-led outcomes measures'.²⁷

and on recognising the distinct cultural position of First Peoples. This way of thinking and of understanding the relationship between First Peoples and other Victorians must be brought into the architecture of the child protection and criminal justice systems — into relations between First Peoples and those systems. First Peoples must be involved in meaningful ways that give effect to their profound cultural knowledge and responsibilities and to the right of First Peoples to self-determination. Child protection practitioners, police, judicial officers, court staff and all who work in prisons and youth justice must become culturally competent in relation to First Peoples history and their contemporary challenges.

Cultural competence and responsiveness have a human rights and cultural rights dimension as well as an administrative dimension. The State of Victoria is responsible for ensuring that the human and cultural rights of individuals in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) are observed.³¹ The State of Victoria is therefore responsible for ensuring that its workforce, procedures and administrative processes are fit for this purpose. To be appropriately valued and applied, these human and cultural rights must be adequately understood by all officials administering the system. Yoorrook is not satisfied that these requirements are currently met. Nor is Yoorrook satisfied that the necessary training, procedures and protocols are in place to do so.

Cultural awareness and capability must be a first order issue for organisational leaders. This must be subject to rigorous evaluation.³² Yet too often Yoorrook heard of short programs (some of less than

three hours), opt-in training rather than mandatory training, and content that was not always developed and delivered by First Peoples.³³ In some cases, First Peoples staff were called on (on a 'voluntary' basis) to talk about their life experiences, which itself can be a culturally unsafe practice when it adds to the cultural load of First Peoples.³⁴ Disturbingly, Yoorrook found that police recruit cultural competency training contained racial stereotypes that were offensive and dangerous.³⁵

While there were some examples of long-term, immersive learning that helped to build relationships with First Peoples communities, Elders and Respected Persons, and of some micro-certificate learning opportunities at a master's level,³⁶ these were the exception rather than the norm. This is a lost opportunity that places First Peoples at risk of unfair and discriminatory decision-making by public officials. It also denies staff the chance to learn at a deep level the truth about invasion, dispossession, deprivation and ongoing racism that First Peoples have endured with strength and resilience. Without this understanding, child protection practitioners and those working in the criminal justice system are unlikely to recognise and resist the ingrained racism that still permeates the systems they work in.

Child protection staff, police officers, prison officers, youth justice staff and judicial officers have enormous power over First Peoples' lives. They must exert that power fairly and without discrimination. That will not happen if they have not developed the capability to do so.

The Charter of Human Rights must be strengthened

First Peoples' individual human and cultural rights have not been respected in Victoria's child protection and criminal justice systems, and systemic racism and discrimination persists. There is evidence that a culture of impunity and indifference exists in these systems including among police, in prisons and in child protection administration. This must be addressed.

One important way to do that is to place more power in the hands of those whose rights are being violated, by strengthening the Charter.

WHAT ARE HUMAN RIGHTS?

Human rights aim to ensure that every person can live a decent, dignified life. Respect for human rights helps to keep societies fair and just. Human rights include civil and political rights like the right to life, to vote, to freedom of movement and to freedom of religion; economic and social rights like the rights to health, housing and education; and cultural rights including the rights of First Peoples and others to enjoy their culture and use their own language.

The Australian Government, like most governments around the world, has promised to comply with the human rights rules set out in a number of important international treaties. These treaties do not automatically become part of Australia's domestic law. Australia also has endorsed the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) which sets out collective and individual rights that belong to Indigenous Peoples.³⁷ UNDRIP is a resolution of the United Nations General Assembly and is not enforceable under Australian domestic law.

UNDRIP contains a catalogue of the human and cultural rights of Indigenous Peoples which are derived from legally binding international human rights treaties, including the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).³⁸ UNDRIP is an authoritative bringing together of the human and cultural rights obligations of government with respect to Indigenous Peoples, and is regularly referred to by domestic and international courts of high authority. It is expressly supported by Australia and Victoria and is listed in Yoorrook's Letters Patent

as the first of the relevant human rights instruments to be taken into account.³⁹

Australia, unlike every other Western democracy, has no national Charter of Human Rights that comprehensively protects people's human rights in Australian law. Further, Australia has not comprehensively protected the rights in UNDRIP in Australian law. However, in 2006, Victoria became the first state in Australia to create a state-based charter, which protects a number of individual human and cultural rights in Victorian law.⁴⁰ The individual cultural rights protected by the Charter do not constitute all the individual (and collective) cultural rights protected by international law but rather a subset of them.

REALISING INDIVIDUAL HUMAN AND CULTURAL RIGHTS TO REALISE THE COLLECTIVE RIGHT TO SELF-DETERMINATION

As recognised in Yoorrook's Letters Patent, effective protection and implementation of individual human rights including specifically Aboriginal cultural rights are very important purposes in themselves and for realising the collective right of First Peoples to self-determination. The Letters Patent recognise the responsibility of the State of Victoria to uphold the individual human rights in the Charter, which include the cultural rights of First Peoples. The Letters Patent also refer to a number of international human rights treaties, including the ICCPR and the ICESCR. The Letters Patent's definition of 'systemic injustice' refers to human dignity and human rights.

The collective right of peoples (including First Peoples) to self-determination is the foundation of all individual human and cultural rights. However, realising individual human and cultural rights is critical for realising the collective right to self-determination. This is why UNDRIP does not stop at the right of Indigenous Peoples to self-determination but goes on to specify that human and cultural rights are inseparably related to each other. They cannot be split up. All must be upheld, which involves both negative and positive obligations on the part of the State.

As regards First Peoples in Victoria, the importance of realising individual human and cultural rights of First Peoples for realising their collective right to self-determination can be easily demonstrated:

- First Peoples whose children are taken under a discriminatory child protection system cannot be fully self-determining
- First Peoples who are subject to racist and discriminatory policing cannot be fully self-determining
- First Peoples whose right to culture is not understood and respected cannot be fully self-determining
- First Peoples who are liable to very high rates of insecure housing and homelessness cannot be fully self-determining.

Each of these situations, and others, involve serious violations of a number of different kinds of individual human and cultural rights which harm the capacity of First Peoples to realise self-determination. As the Letters Patent recognise, individual human and cultural rights violations against First Peoples are part of the truth that must be told. How well their individual human and cultural rights are now protected and ensured is related to how well their collective right to self-determination can now be fully realised.

HUMAN AND CULTURAL RIGHTS PROTECTED BY THE CHARTER

The Charter protects 20 individual human rights drawn from international human rights treaties. While these human rights protect all Victorians, some have particular significance for First Peoples, and some have particular significance for the child protection and criminal justice systems.

The individual human rights protected by the Charter include:

- the right to recognition, equality and non-discrimination
- the right to be protected from cruel, inhuman or degrading treatment
- the right not to have privacy, family or home arbitrarily interfered with
- the right to protection of families
- the right of every child to have protection as is in their best interests
- the right to culture, including distinct cultural rights of Aboriginal peoples
- the right to liberty and security
- the right to humane treatment when deprived of liberty.

To some extent, the Charter also provides enforceable domestic legal protection for aspects of the rights set out in UNDRIP, including individual cultural rights.



The UN Permanent Forum on Indigenous Issues has recognised that:

Cultural rights are of particular relevance for Indigenous Peoples given that Indigenous Peoples are culturally distinct from the majority societies in which they live. Cultural rights involve protection for traditional and religious practices, languages, sacred sites, cultural heritage, intellectual property, oral and traditional history, etc. And, economic, social and cultural rights are deeply rooted in the lands, territories and resources as well as the life ways of Indigenous Peoples.⁴¹

The Charter recognises, in its introduction, that:

Human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.⁴²

Section 19(2) of the Charter protects cultural rights 'including Aboriginal peoples' cultural rights to enjoy identity and culture, maintain and use language, maintain kinship ties and maintain their distinctive spiritual, material and economic relationship with the land and water and other resources'.⁴³

HOW THE CHARTER PROTECTS INDIVIDUAL HUMAN AND CULTURAL RIGHTS

The Charter requires public authorities, such as government departments and public servants, to properly consider human rights (including the cultural rights in section 19(2)) when making decisions, and to act compatibly with human rights.⁴⁴ These obligations apply when public authorities take actions such as delivering services, developing policies and laws, making decisions and managing risks and complaints.

The definition of public authority is reasonably broad and covers some private bodies funded by government to undertake services on behalf of government, such as private prisons.⁴⁵ In the child protection system, it includes public authorities such as DFFH and child protection workers. In the criminal justice system, it includes public authorities such as the Department of Justice and Community Safety, Victoria Police, police officers and prison officers.

The Charter allows government to limit or restrict human and cultural rights if the limitations on rights are prescribed in law, reasonable, justified, proportionate, logical and balanced.⁴⁶ The Charter also requires courts and tribunals to interpret Victorian laws compatibly with cultural and human rights as far as possible consistently with their purpose.⁴⁷

THE CHARTER NEEDS STRENGTHENING AND CLARIFYING

While the Charter has delivered important benefits in stating individual human and cultural rights in law, and in obliging all parts of government to protect them, it has weaknesses that limit its effectiveness in addressing rights violations against First Peoples and indeed all Victorians. These weaknesses particularly affect individual First Peoples because they are especially subject to human and cultural rights violations, as the evidence given to Yoorrook regarding the child protection and criminal justice systems amply demonstrates.

A major weakness is that it is often difficult for someone whose human rights are breached to take action to stop the breach or obtain redress for the breach. A person can complain to the Victorian Ombudsman about the breach. The Ombudsman can investigate and make recommendations to resolve the issue.⁴⁸ But the government does not have to follow the Ombudsman's recommendations.

There is also no way for someone to take direct legal action if a public authority fails to properly consider their human rights in decision-making or acts incompatibly with their human rights. Instead, a person must raise the Charter breach as part of another legal action, if one is available.⁴⁹ One way to do this is to raise the Charter breach as part of a judicial review application to seek a court order stopping government from breaching someone's human rights.

Unfortunately, these applications must be made in the Victorian Supreme Court, which is time consuming, expensive and out of reach for most people. Further, the Charter provides that people cannot obtain compensation if their human rights are breached.⁵⁰

People whose individual human rights are breached should have a simple, accessible and enforceable way of taking legal action. People should also be entitled to compensation if their human rights are breached.

Another major weakness is that the drafting of the Charter, and a number of court decisions interpreting it, have introduced or revealed uncertainty in how the Charter operates, particularly in relation to determining when a public authority is acting compatibly with someone's human rights. This among other things needs to be addressed to provide more clarity and certainty in the Charter's operation.

In 2015, the Victorian Government commissioned an independent review of the Charter as the first step in 'upholding and strengthening' it and 'ensuring its ongoing effectiveness'.⁵¹ The review made many important recommendations to improve the Charter. These included enabling a person who claims a public authority has acted incompatibly with their human rights to apply to the low cost and accessible Victorian Civil and Administrative Tribunal for a remedy or to rely on the Charter in any legal proceedings.⁵²

The review also recommended addressing uncertainty in how the Charter operates. For example, it recommended that the Charter should specify that 'to act' includes 'to make a decision' so it is clear that it is unlawful if a public authority makes a decision which is incompatible with human rights. Further, it recommended that the Charter should specify that a public authority acts compatibly with a human right only if it does not limit that human right or limits it only to the extent that is reasonable and justified.⁵³

In 2016, the Victorian Government announced it supported in full or part 45 of the 52 recommendations to 'strengthen human rights culture in Victoria and make the Charter more effective, accessible and practical'.⁵⁴ Despite this commitment, the government has failed to introduce any legislation to implement the many legislative changes recommended by the review and agreed to by the government.

These issues matter to First Peoples, particularly given the evidence set out in this report showing the systemic failures to protect First Peoples' rights in the child protection and criminal justice systems.

Governments will be more likely to respect individual First Peoples' human and cultural rights if First Peoples have an accessible way to take enforceable action to obtain a remedy if their rights are breached. Part of this is about ensuring First Peoples have access to legal help, so they know their rights and can take action to protect them. Another part is fixing the problems with the Charter set out above. Giving people an accessible and enforceable way to protect their rights will help prevent rights breaches, as it will focus government attention on ensuring it complies with its obligations.

Victoria's Charter was introduced around 17 years ago. Changes to clarify and strengthen its operation are well overdue. The Victorian Government can draw on the 2015 review in implementing the necessary changes. It should consult with the First Peoples' Assembly of Victoria and other First Peoples organisations when doing so. These changes to the Charter will benefit First Peoples and all Victorians in the child protection and criminal justice systems and beyond.

The intention of the recommendations in this area is to address the compelling evidence of systemic individual human and cultural rights violations that Yoorrook has received. The Charter needs to be strengthened and clarified as one element of enhancing accountability for protecting and realising individual human and cultural rights on a whole-of-government basis. It is not the intention of the recommendations to bring the collective cultural rights of First Peoples into the Charter nor to foreclose discussion on additional or alternative ways to protect and realise their individual human and cultural rights or on ways for protecting and realising their collective human and cultural rights, including under treaty. ■

RECOMMENDATIONS

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.

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.

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).

Endnotes

1. 'Accountability is something that I, as a Secretary, need to live by': Transcript of Kate Houghton, 2 May 2023, 273 [28].
2. SNAICC — National Voice for our Children, *The Family Matters Report 2022: 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, 2022), 79–80.
3. Victorian Government, *Victorian Aboriginal Affairs Framework 2018–2023* (2018) 10 ('*Victorian Aboriginal Affairs Framework 2018–2023*').
4. *Ibid.* 31.
5. See State of Victoria, *Victorian Government Aboriginal Affairs Report 2021*. The *Victorian Government Aboriginal Affairs Annual Report* (VGAAR) also includes reporting on the Self Determination Reform Framework and progress against Closing the Gap Targets. For copies of previous years' reports with data dashboards, see First Peoples-State Relations, Victorian Government, *Victorian Government Aboriginal Affairs Report* (Web page, 28 September 2022) <<https://www.firstpeoplesrelations.vic.gov.au/aboriginal-affairs-report>>.
6. *Victorian Aboriginal Affairs Framework 2018–2023* (n 3) 56–71.
7. Victorian Government, *Establishing an Aboriginal-led Evaluation and Review Mechanism in Victoria: Community Engagement Report* (October 2019).
8. In response to Commissioner's questions about the risk of fragmentation, the Acting Associate Secretary, DFFH stated 'By its very nature, I think it has to be dispersed. I don't think there is a model — there might be - that brings it together in a more elegant way. It is a complex environment. It is a significant machinery, if you like, of how we bring government policy and investment to the — to citizens at the end of the day': Transcript of Argiri Alisandratos, 27 April 2023, 29 [28]–[31].
9. Transcript of Katherine Whetton, 1 May 2023, 220 [5]–[6].
10. 'Monitoring and evaluation of Wirikara Kulpa will progress through the Burra Lotjpa Dunguludja (AJA4) Monitoring and Evaluation Framework. All monitoring and evaluation activities will be consistent with the standards listed in the AJA4 to ensure they are respectful of Aboriginal values as well as accepted guidelines for conducting ethical research (Appendix 2). Monitoring and reporting will also inform the annual Victorian Aboriginal Affairs Report and the Victorian Closing the Gap Implementation Plan': Department of Justice and Community Safety, *Wirikara Kulpa: Aboriginal Youth Justice Strategy 2022–2032* (2022) 56.
11. Transcript of Minister for Corrections, Youth Justice and Victim Support, the Hon Enver Erdogan, 867, [21]–[37].
12. Victorian Government, 'Aboriginal Governance for Evaluation', *Victorian Aboriginal Justice Agreement* (Web page, 27 October 2022) <<https://www.aboriginaljustice.vic.gov.au/the-agreement/aboriginal-justice-outcomes-framework/goal-41/aboriginal-governance>>.
13. Yoorrook further notes that government will 'undertake an expenditure review in 2023 to examine spending on Aboriginal-specific services from 2019–20, quantify the benefit that First Peoples receive from mainstream services and programs and identify opportunities for reprioritisation to ACCOs': State of Victoria, Response to Issues Paper 1: Call for Submissions on Systemic Injustice in the Criminal Justice System, 27 [101]–[102]. See also Outline of Evidence of Aunty Karin Williams, 14 December 2022, 8 [74]: 'Self-determination should be enshrined in legislation, and ACCOs and the Aboriginal community should have input into State budget planning'.
14. 'We have to move towards and look at different reporting mechanisms that — that drive outcomes rather than outputs, and that's something that we've been on a journey to try and shift over the last few years. I don't think we're there yet, Commissioner. I think we've got a way to go before we've got a truly outcomes driven reporting framework ... I think for sophistication of how we get to that point is probably needing further work on our part': Transcript of Argiri Alisandratos, 11 May 2023, 727–728 [44]–[4]. also, in relation to police: Transcript of Dr Tamar Hopkins, 2 May 2023, 330 [19]–[22].
15. For example, the Prison Disability Support Initiative. 'It's fair to say that that pilot has shown the real value of it. And we need to, I guess, build up that evidence base of that need and the value it provides. There's unmet demand there, without a doubt... So we will absolutely need to build into that an evaluation to build a case for how that has been of value and what difference it has made': Transcript of Commissioner Larissa Strong, 3 May 2023, 405 [6]–[13], 405–406 [46]–[2].
16. Victorian Aboriginal Community Controlled Health Organisation (VACCHO), *Aboriginal Health in Aboriginal Hands: Victorian Election Platform 2022* (2022) 1, 4.
17. *Ibid.*
18. This is a tripartite agreement between the Victorian Aboriginal Children and Young People's Alliance, the government and community service organisations to improve outcomes for Victorian children and families: Victorian Government, *Wungurilwil Gaggapduir: Aboriginal Children and Families Agreement* (2021) <<https://www.dffh.vic.gov.au/publications/wungurilwil-gaggapduir-aboriginal-children-and-families-agreement>>. A Steering Committee, co-chaired by a DFFH official and a representative of an ACCO, provides oversight relating to the agreement and its associated strategic (rolling action) plans: Objective Working Group to the Steering Committee, *Report to the Aboriginal Childrens Forum*, 11 March 2020.

19. Describing the ACF governance arrangements, the Acting Associate Secretary of DFFH stated, 'governance at the moment is a shared governance model between Aboriginal Children's Forum Caucus and the children and families division who take the lead responsibility to work with Caucus to formulate the agenda for — for the Aboriginal Childrens Forum, and the monitoring and evaluation activities that are undertaken through it': Transcript of Argiri Alisandratos, 11 May 2023, 766 [1]–[4]. Overall progress towards each Strategic Objective under Wunguril Gagapaduir was reported as 44 per cent at 30 September 2022 (with varying rates for each objective under the agreement): *Presentation to Aboriginal Childrens Forum*, 30 September 2022.
20. The *Burra Lotjpa Dunguludja* governance structure includes the AJF, six collaborative working groups, nine Regional Aboriginal Justice Advisory Committees and 12 Local Aboriginal Justice Action Committees: Victorian Aboriginal Justice Agreement, 'Roles and Responsibilities', *Burra Lotjpa Dunguludja: Governance, Implementation and Accountability* (Web page, 27 June 2022) <<https://www.aboriginaljustice.vic.gov.au/the-agreement/governance-implementation-and-accountability/roles-and-responsibilities>>. Establishing Aboriginal governance structures for AJA program evaluations to ensure AJA initiatives are evaluated based on criteria that reflect Aboriginal values and measures of success is an action under *Burra Lotjpa Dunguludja*. This is currently reported as being 'in progress': Victorian Aboriginal Justice Agreement, 'Goal 4.1: Greater Accountability for Justice Outcomes — Aboriginal Governance for Evaluation', *Burra Lotjpa Dunguludja: Aboriginal Justice Outcomes Framework* (Web page, 27 October 2022) <<https://www.aboriginaljustice.vic.gov.au/the-agreement/aboriginal-justice-outcomes-framework/goal-41/aboriginal-governance>>.
21. Transcript of Adam Reilly, 15 May 2023, 965 [19]–[33].
22. Transcript of Adam Reilly, 15 May 2023, 965 [16]–[19].
23. Government has stated, and evaluations confirm, that without the Aboriginal Justice Agreement the rate of over-representation of First Peoples in the Victorian criminal justice system would be worse: see, eg, Transcript of Kate Houghton, 2 May 2023, 265 [5]–[12], referring to the Evaluation of the Aboriginal Justice Agreement 3. See also Victorian Aboriginal Justice Agreement, *Outcomes* (Web Page, 24 March 2023), <<https://www.aboriginaljustice.vic.gov.au/outcomes>>; Koori Justice Unit, Department of Justice and Regulation, *Evaluation of the Aboriginal Justice Agreement Phase 3: Synthesis of Program Evaluations* (2021).
24. Transcript of Shellee Strickland, 7 December 2022, [34]–[40].
25. Transcript of Kate Houghton, 2 May 2023, 272 [5]–[19].
26. The number of Aboriginal men in prison on remand increased by 598 per cent in the decade to 30 June 2019, and by 475 per cent for Aboriginal women. Corrections Victoria, Annual Prisons Statistical Profile 2009-10 to 2019-20 Table 1.9. See Chapter 11(Bail) regarding advice provided to government from Aboriginal organisations predicting the deleterious effects of the reforms.
27. State of Victoria, Response to Issues Paper 1: Call for Submissions on Systemic Injustice in the Criminal Justice System, 27 [101].
28. Summary Report – Winda-Mara Aboriginal Corporation and Dhauwurd Wurrung Elderly & Community Health Service On Country Visit, 16 February 2023, 1 [2].
29. State of Victoria, Response to Issues Paper 1: Call for Submissions on Systemic Injustice in the Criminal Justice System, 11–13. See also, in regards to the child protection system: Children and Health Legislation Amendment (Statement of Recognition, Aboriginal Self-determination and Other Matters) Bill 2023 (Vic).
30. For findings regarding human rights violations, see Chapter 6 (Child Removal); Chapter 7 (Out of Home Care); Chapter 10 (Police); Chapter 12 (Youth Justice) and Chapter 14 (Prisons)
31. As well as cognate international human rights, as a federal unit of the Australia state: *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Charter').
32. 'In relation to evaluation of that cultural awareness training and an absolute need for us to ensure that there is a rigorous evaluation framework or process around cultural awareness training. So that is something that we will take away from these hearings, from this block of hearings, that we've already kind of identified as wanting in Youth Justice. So we heard that loud and clear in other evidence as well': Transcript of Josh Smith, 3 May 2023, 366 [40]–[44].
33. Summary information about cultural awareness or competency training is discussed in chapters of this report including Chapter 6 (Child Removal), 10 (Police); 11 (Bail); 12 (Youth Justice); 13 (Courts, Sentencing and Classification of Offences) and 14 (Prisons). For a summary of training courses for child protection practitioners, see Department of Families, Fairness and Housing, 'Q6: All learning programs available to Child Protection staff in 2022' and Department of Families, Fairness and Housing 'Curriculum for cultural awareness and cultural safety training (as at February 2023)'.

34. Transcript of Chief Commissioner of Police, Shane Patten, 8 May 2023, 511 [40]–[44]. Victoria Police provided further information on human rights in response to Questions on Notice. This includes two hours of dedicated mandatory training on the *Charter* (n 31) in the Foundation training for all new police recruits, one hour for protective services officer and police custody officer recruits, and an e-learning package, ‘Human Rights in Everyday Policing’, which as at 10 May 2023 has been completed by approximately 13,000 Victoria Police staff: Response to Questions taken on Notice by Chief Commissioner of Police, Shane Patton on 8 May 2023, 14 June 2023, Attachment A, 1.
35. Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 554 [19]–[21]; 557 [26]; 558–559 [18]–[2].
36. Transcript of Adam Reilly, 15 May 2023, 955 [1]–[19].
37. *United Nations Declaration on the Rights of Indigenous People*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) (‘*UNDRIP*’).
38. *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 99 UNTS 171 (entered into force 23 March 1976) (‘*ICCPR*’); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (‘*ICESCR*’).
39. Victoria, *Yoorrook Justice Commission*, Letters Patent, Background.
40. *Charter* (n 31). The ACT established its *Human Rights Act 2004* (ACT), and Queensland has also enacted a *Human Rights Act 2019* (Qld).
41. UN Permanent Forum on Indigenous Issues, ‘14th Session: Concept Note for Discussion’ (Online, 2015) <<https://www.un.org/esa/socdev/unpfii/documents/2015/concept-notes/escr.pdf>>.
42. *Charter* (n 31) Preamble.
43. Section 19(2) of the *Charter* (n 31) and its equivalent provision in Queensland and ACT human rights legislation has been successfully used by First Peoples in complaints and litigation. See, eg, *Cemino v Cannan* (2018) 56 VR 480, where an Aboriginal man relied on the Charter to successfully argue that a court failed to properly consider his cultural rights and right to equality in refusing to transfer his criminal case to the Koori Court. See also *Director of Public Prosecutions v SE* [2017] VSC 13 where s 19(2) of the Charter was successfully relied upon by a young Aboriginal person with an intellectual disability in a bail application.]
44. *Charter* (n 31) s 38(1).
45. *Ibid* s 4.
46. *Ibid* s 7(2).
47. *Ibid* s 32.
48. See *Ombudsman Act 1973* (Vic) s 13(2).
49. *Charter* (n 31) s 39(1) provides that if a person may seek any relief or remedy for an act or decision of a public authority on grounds of unlawfulness other than the Charter, then that person may also seek relief or remedy on a ground of unlawfulness arising because of the Charter.
50. *Charter* (n 31) s 39(3). For a discussion on remedies for breaches of human rights under the Charter, see Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Report, 2015), 117–124.
51. Premier of Victoria, the Hon Daniel Andrews, ‘Review to Strengthen Victoria’s Charter of Human Rights’ (Media release, 2 March 2015) <<https://www.premier.vic.gov.au/review-strengthen-victorias-charter-human-rights>>.
52. Michael Brett Young (n 50) viii, Recommendation 27a. The review recommended that the amendment should be modelled on s 40C of the *Human Rights Act 2004* (ACT).
53. See, eg, *ibid* viii–ix, Recommendations 17, 28 and 29 around interpreting human rights and compatibility with human rights. See also s 8 of the *Human Rights Act 2019* (Qld).
54. Premier of Victoria, the Hon Daniel Andrews, ‘Rebuilding our Human Rights Culture’ (Media release, 22 July 2023) <<https://www.premier.vic.gov.au/site-4/rebuilding-our-human-rights-culture-victoria>>.



Scar tree, Fitzroy Gardens



Child protection





Kimberley Do, Yappera, Lisa Thorpe,
Bubup Wilam, and Stacey Brown, Yappera

4

OVERVIEW OF THE CHILD PROTECTION SYSTEM

On the face of it, Aboriginal children and families have never been in better hands, better supported to thrive and be connected to their culture. The truth, however, is this record investment is predicated on the enforced failure of Aboriginal parents, families and communities. This innovative and ground breaking system, created and maintained by government, entrenches disadvantage, intergenerational poverty and cultural genocide on Aboriginal Victorians as a condition of help and support.¹ VICTORIAN ABORIGINAL CHILD CARE AGENCY

Introduction

For First Peoples in Victoria there is an unbroken connection between their experiences with colonial child removal practices and their experiences with the current Victorian Child Protection system. These traumas, historical and contemporary, continue to impact First Peoples families and communities.

These impacts were acknowledged in evidence from the State. Minister for Child Protection and Family Services the Hon. Elizabeth (Lizzie) Blandthorn MLC acknowledged:

[T]he profound impact of colonisation and the role that governments, including decision-makers who have held Ministerial portfolios similar to those I now hold, have played in historic injustices towards First Peoples in Victoria, including the removal of children from their families and communities and their disconnection from Country and culture.²

Department of Families, Fairness and Housing (DFFH) Acting Associate Secretary Argiri Alisandratos agreed that Victoria's rate of removing First Peoples children is shameful, and that the current system violates First Peoples' human rights.³

This chapter summarises current laws and government policy regulating child protection, including decision-making principles specific to Aboriginal children.⁴ It discusses the numerous previous inquiries into child

protection and notes that, despite these inquiries, [the over-representation of Aboriginal children and young people in the system has worsened](#). The chapter concludes with a brief discussion of oversight of the child protection system and the role of the Commissioner for Aboriginal Children and Young People.

Relevant cultural and human rights protections

International and Australian laws protect cultural and human rights relevant to child protection. Australia has agreed to be bound by international human rights treaties such as the United Nations *Convention on the Rights of the Child* (CRC), the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).⁵ Australia also has endorsed the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), which sets out collective and individual rights that belong to Indigenous peoples.⁶

As set out in Chapter 3: Accountability, capability and protection of cultural and human rights — when Australia ratifies an international human rights treaty, the treaty does not automatically become part of Australia's domestic law. Australia, unlike every other Western democracy, has no national Charter of Human Rights

that comprehensively protects people’s human rights in Australian law.

Further, UNDRIP is a resolution of the United Nations General Assembly and is also not enforceable under Australian domestic law. To date, no Australian government at the federal, state or territory level has established laws that comprehensively protect the rights set out in UNDRIP.

Victoria, however, protects a range of human rights through the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter), discussed further below.⁷ Key rights from these instruments relevant to child protection — and in particular First Peoples children in child protection — include those set out in Table 4-1.⁸

TABLE 4-1: Key human rights relevant to child protection

RIGHT	PROTECTED IN
Right to life and survival and development of the child	CRC (article 6) UNDRIP (article 7) ICCPR (article 6) Charter (section 9)
Self-determination of peoples	UNDRIP (articles 3, 4 and 5) ICCPR (article 1) ICESCR (article1) ⁹
Equal treatment under the law	CRC (article 2) UNDRIP (article 2) ICCPR (article 26) Charter (section 8)
Protection of children according to their best interests	ICCPR (article 24(1)) Charter (section 17(2)) CRC (article 3)
Enjoyment of culture, to practice religion and to maintain and use language	CRC (article 30) UNDRIP (articles 8, 11, 12, 13 and 15) ICCPR (article 27) Charter (sections 19(2), 14(1))
Right to maintain distinctive spiritual, material and economic relationship with the land and waters and other resources	UNDRIP (article 25) Charter (section 19(2)(d))
Preserve identity, including nationality, name and family relations	CRC (article 8) UNDRIP (article 9)
Right to personal identity and development	ICCPR (article 17.1) Charter (s 13 (a))

RIGHT	PROTECTED IN
Maintain contact with parents and protection from forcible removal	CRC (article 9) UNDRIP (article 7)
Respect for views of the child	CRC (article 12)
Non-interference with privacy, family and home	CRC (article 16) ICCPR (article 17) Charter (section 13(a))
Protection of families	CRC (article 18) ICCPR (article 23(1)) Charter (section 17(1))
Protection from torture and cruel, inhuman or degrading treatment	ICCPR (article 7) Charter (section 9)
Freedom of movement	ICCPR (article 12) Charter (section 12)
Special protection and assistance by the state where a child cannot stay at home	CRC (article 20)
Recognise and provide for the special needs of children with disabilities	CRC (article 23) UNDRIP (articles 21 and 22)
Right to housing	ICESCR (article 11)
Right to health	ICESCR (article 12)
Right to education	ICESCR (article 13)

The Charter applies to aspects of the child protection system, including:

- the safety and wellbeing of children
- the separation of children from their families
- the promotion and maintenance of cultural rights¹⁰
- access to services that are culturally safe and non-discriminatory.

The Charter requires public authorities, such as government departments and child protection workers, to properly consider human rights when making decisions and to act compatibly with human rights.¹¹ These obligations apply when public authorities deliver services, develop policies and laws, make decisions and manage risks and complaints.¹²

The Charter allows government to limit or restrict human and cultural rights but requires that any limitations on rights be reasonable, justified, proportionate, logical and balanced.¹³

The Charter also requires courts and tribunals to interpret Victorian laws compatibly with cultural and human rights as far as possible consistently with their purpose.¹⁴ Human rights apply in child protection proceedings in the Children’s Court of Victoria.¹⁵

There are limited avenues for redress of breaches of Charter rights in Victoria. One option is to request that the Ombudsman investigate a breach of human rights.¹⁶ The Ombudsman can resolve complaints informally and make recommendations to public authorities to address problems and promote human rights.

Individuals can also bring a claim to a court or tribunal that a public authority has failed to properly consider their human rights in decision-making or acted incompatibly with their human rights. However, the Charter does not have a ‘standalone’ cause of action.¹⁷ This means that any Charter claim must be accompanied by a non-Charter claim of unlawfulness (although the non-Charter claim is not required to succeed for the Charter claim to succeed). Non-Charter claims include a judicial review application to the Supreme Court, a tort claim in the County Court or discrimination claim in the Victorian Civil and Administrative Tribunal. Any relief or remedy must arise from the non-Charter cause of action (noting that the Charter bars any award of damages for breaches of human rights). This is discussed further in Chapter 3, where Yoorrook makes recommendations to strengthen the Charter in child protection, the criminal justice system, and all areas of government.



Laws governing child protection

The *Children, Youth and Families Act 2005* (Vic) (the CYFA) governs child protection in Victoria. It incorporates many of the rights and principles recognised by the CRC and protected by the Charter. A number of the cultural rights outlined in UNDRIP are also reflected in the Act.¹⁸ The CYFA is complemented by the *Child Wellbeing and Safety Act 2005* (Vic), which provides foundational principles for the development and delivery of child and family services across all service systems in Victoria, including child protection.

The CYFA outlines the types of decisions the State can make about children, who can make them, and how they should be made. It also sets out the three key principles that DFFH, the Children’s Court and relevant community services must consider for these decisions. These principles are described in Table 4-2 below.

The CYFA also includes other requirements specific to Aboriginal children to safeguard their rights. These

TABLE 4-2: Three key principles in child protection legislation and policy

BEST INTERESTS	DECISION-MAKING	ABORIGINAL CHILD PLACEMENT PRINCIPLE (ACPP) ¹⁹
<p>The best interests of the child must always be paramount.</p> <p>When determining whether a decision or action is in the best interests of the child, the following needs must always be considered:</p> <ul style="list-style-type: none"> • to protect the child from harm • to protect the rights of the child • to promote the development of the child. <p>When determining what decision to make or action to take in the best interests of an Aboriginal child, the need to protect and promote their Aboriginal cultural and spiritual identity as well as, wherever possible, to maintain or build their connection to family and community must be considered.</p> <p>There are additional specific considerations designed to promote support for families, stability and cultural identity and connectedness.²⁰</p>	<p>These principles apply to decision-making by DFFH, community services and secure welfare services and require that decision-making processes are:</p> <ul style="list-style-type: none"> • fair and transparent • collaborative • empowering • assist children, young people and families to participate in a meaningful way • promote Aboriginal self-management and self-determination.²¹ 	<p>The ACPP is an extension of the best interest principle applicable to Aboriginal children. It prioritises and specifies the criteria for the placement of Aboriginal children in out of home care.²² This is discussed further in the table below.</p>

requirements and how to implement them are set out in the Child Protection Manual.²³ As shown in this report, Yoorrook has heard many of these legal requirements are not consistently met. These are summarised in Table 4-3 below.

The CYFA is being amended by the Children and Health Legislation Amendment (Statement of Recognition, Aboriginal Self-Determination and Other Matters) Bill 2023 (Vic) (Statement of Recognition Bill).³⁰ While the Bill has passed the parliament, the Act has not yet been proclaimed. Importantly, the Bill provides

recognition of Aboriginal people as the First Nations people of Australia. It also inserts into the CYFA an acknowledgement by parliament of the role the child protection system has played in the dispossession, colonisation and assimilation of Aboriginal people, as well as the forced removal of Aboriginal children in an effort to extinguish their identity and culture. It also recognises ongoing systemic racism and its connection to the over-representation of Aboriginal children in the child protection system.³¹

TABLE 4-3: Additional CYFA requirements specific to Aboriginal children

PROVISION(S)	PURPOSE	STATE COMPLIANCE
Aboriginal Child Placement Principle Sections 13, 14	<p>When an Aboriginal child is placed in out of home care, their placement must be prioritised with extended Aboriginal family or relatives and where this is not possible, other extended family or relatives.</p> <p>If, after consultation with the relevant Aboriginal agency (see ACSASS below) the first option is not possible or feasible, the child may be placed with members of their own Aboriginal community or members of a different Aboriginal community.</p> <p>Placement with a non-Aboriginal family in close proximity to the child's natural family is the last resort.</p> <p>When an Aboriginal child is placed away from Aboriginal family or community, arrangements must be made to ensure their continuing contact with their own Aboriginal family, community and culture.</p>	<p>On 30 June 2021, only 41.2 per cent of Aboriginal children in out of home care were living with Aboriginal relatives or kin (39.6 per cent) or other Aboriginal carers (1.6 per cent).²⁴</p>
Aboriginal Family Led Decision-Making (AFLDM) Section 12(1)(b)	<p>An AFLDM meeting is convened by DFFH and an Aboriginal convenor and where possible, attended by the child, parents and members of extended family and/or community. At an AFLDM meeting, decisions are made concerning placement or other significant decisions in relation to an Aboriginal child</p>	<p>In 2021–22, only 24 per cent of Aboriginal children in out of home care had an AFLDM meeting.²⁵</p>
Consultation with Aboriginal Child Specialist Advice and Support Service (ACSASS). Section 12(1)(c)	<p>In making a decision to place an Aboriginal child in out of home care, an Aboriginal agency must first be consulted and the ACPP must be applied.</p> <p>ACSASS is the relevant Aboriginal agency. The ACSASS program manual provides a list of 33 'significant decisions' which at a minimum ACSASS must be consulted about.²⁶</p>	<p>In 2021–22, ACSASS was consulted during the 'investigation stage' in 63 per cent of cases and consulted for only 21 per cent of children in permanent care.²⁷</p>

PROVISION(S)	PURPOSE	STATE COMPLIANCE
Cultural plans Sections 166(3) (b), 176	All Aboriginal children in out of home care who are subject to a Children's Court order are required to have a case plan that has an attached cultural plan. All cultural plans for Aboriginal children must aim to maintain and develop the child's Aboriginal identity and encourage the child's connection to their Aboriginal community and culture. The cultural plan must address the specific needs of the child, expected time in out of home care, whether they are with family, community or with non-Aboriginal carers, and how connected they are to their Aboriginal identity. ²⁸	As at the end of March 2023, only 67 per cent of Aboriginal children in care for over 19 weeks had a cultural plan. ²⁹
Restrictions on Permanent Care Orders Sections 321(1) (ca), 323	<p>The court must not make a Permanent Care Order (PCO) to place an Aboriginal child solely with a non-Aboriginal person(s) unless: no suitable placement can be found with an Aboriginal person(s); the decision to seek the order has been made in consultation with the child where appropriate; and the DFFH Secretary is satisfied that the order will meet the ACPP.</p> <p>The court must not make a PCO for an Aboriginal child unless it has received a report from an Aboriginal agency that recommends the order be made and a cultural plan has been prepared.</p> <p>A standard condition is to be included on the PCO (unless otherwise ordered) that the permanent care parents preserve the child's identity and their connections with culture and birth family (this does not only apply to Aboriginal children).</p>	Data not available
Authorisation of an Aboriginal agency to act Sections 6, 18, 18A-D, (and 18 AAA and 18 AAB when enters into force)	An Aboriginal agency may be authorised by the Secretary of DFFH to perform functions and powers conferred on the Secretary in relation to an Aboriginal child.	N/A

Among other things, the Bill also aims to strengthen implementation of the requirements in Table 4-3 above. It inserts binding recognition principles into the CYFA to provide guidance and ensure cultural rights and self-determination are respected and supported.³² These 10 binding recognition principles will apply to dealings with Aboriginal children, Aboriginal families and Aboriginal-led community services under the CYFA (but not to youth justice). Amendments under

the Statement of Recognition Act will also require the Children's Court to have regard to and apply five of the 10 recognition principles (where relevant) in making any decision or taking any action in relation to an Aboriginal child to which the recognition principles apply.³³ It is important to note that the recognition principles are all subject to section 10 of the CYFA (the best interests principles).³⁴ A summary of the new recognition principles is at Table 4-4.

TABLE 4-4: Additional binding principles inserted by the Statement of Recognition Bill³⁷

BINDING PRINCIPLE (ONCE PROVISIONS COME INTO FORCE)	NEW SECTION IN THE CYFA	CHILDREN'S COURT MUST ALSO HAVE REGARD
The right of Aboriginal children, families and communities in Victoria to self determination must be recognised, respected and supported.	7E(1)	Yes
When considering the views of Aboriginal children, decision-makers must uphold their cultural rights and sustain their connections to family, community, culture and Country.	7E(2)	Yes
Understanding of, and respect and support for, Aboriginal culture, cultural diversity, customary lore, knowledge, perspectives and expertise is to be demonstrated in decision making.	7E(3)	Yes
Strong connections with culture, family, Elders, communities and Country are to be recognised as the foundations needed for Aboriginal children to develop and thrive and to be protected from harm.	7E(4)	Yes
Historic and ongoing biases and structural and everyday racisms create barriers to the best interests of the Aboriginal child and are to be recognised and overcome.	7E(5)	Yes
Planning and provision of child and family services for Aboriginal children and Aboriginal families under the Act is to be based on commitment, accountability and responsibility to Aboriginal people in Victoria, with proper consideration to be given to the views of Aboriginal-led community services.	7E(6)	
An Aboriginal child's Aboriginal family, Elders and any Aboriginal-led community service that is responsible under the Act for the provision of services to the Aboriginal child each have a right to participate in the making of decisions under the Act that relate to the child, and must be given an opportunity to participate in the making of those decisions.	7E(7)	
Partnerships between the Secretary and Aboriginal-led community services in relation to the planning and provision of child and family services are to be equitable and support self-determination.	7E(8)	
Any transfer of decision-making to an Aboriginal-led community service under the Act is to be with the free, prior and informed consent of the Aboriginal-led community service.	7E(9)	
Funding provided under the Act to Aboriginal-led community services (separately or in partnership with other community services) to provide child and family services is to be transparent, equitable, flexible and sustainable and support self-determination.	7E(10)	

State Budget outcomes 2023–24



In the 2023–24 State Budget, the Victorian Government announced \$140 million (over four years) ‘to improve outcomes for First Nations children’ stating that ‘Aboriginal people know the unique needs of their communities best and this funding will help Aboriginal-led organisations provide vital child protection services and support to keep families together’.⁴³ This investment includes:

- ‘the transfer of an additional 774 Aboriginal children to the ACAC program
- expansion of the Community Protecting Boora trial, an Aboriginal-led investigation team for child protection reports for 348 Aboriginal children
- early intervention supports, including Koorie supported playgroups, the Aboriginal Rapid Response service model, and the Family Preservation and Reunification Response for Aboriginal families
- continued support for the Aboriginal Workforce Fund, business planning resources for ACCOs, targeted training packages for approximately 100 sector workers and support for the Aboriginal Community Infrastructure Program’.⁴⁴

In addition, all five elements of the ACPD will be inserted into the CYFA by the Statement of Recognition Bill.³⁵ The Bill also amends the *Health Services Act 1988* and the *Public Health and Wellbeing Act 2008* to include an Aboriginal Statement of Recognition and the Statement of Recognition principles.³⁶

The Statement of Recognition Bill and its relationship with self-determination and system transformation is discussed in Chapter 2. Other aspects of the reforms contained in the Statement of Recognition Bill are discussed below, and in the chapters that follow.

Aboriginal Children in Aboriginal Care initiative

Under Section 18 of the CYFA, DFFH may authorise an Aboriginal Community Controlled Organisation (ACCO) to undertake case planning and case management responsibilities for Aboriginal children and young people subject to protection orders made by the Children’s Court. This is called the Aboriginal Children in Aboriginal Care initiative (ACAC). ACAC providers are at different stages of authorisation. The Victorian Aboriginal Child Care Agency and the Bendigo and District Aboriginal Cooperative are fully authorised providers. Ballarat and District Aboriginal Cooperative and Njernda Aboriginal Corporation are in the process of becoming authorised ACAC providers (referred to as ‘pre-authorisation’). Rumbalara Aboriginal Cooperative is preparing for pre-authorisation.³⁸

Amendments contained in the Statement of Recognition Bill also enable DFFH to transfer responsibilities for child protection investigations regarding Aboriginal children to ACAC providers. Once these amendments come into force, ACAC providers can be authorised to investigate reports to child protection, assess whether a child needs protection and refer them to appropriate supports before a court order is made.³⁹

There are differing views among the Aboriginal community and ACCOs about the ACAC initiative and the transfer of investigation functions. These are discussed in Chapter 6: Child removal.

National commitments and Victorian policy frameworks

Victoria has numerous policy frameworks and commitments that seek to improve outcomes for children and young people in the child protection system. Many have come from previous inquiries or Royal Commissions. Some are specific to Aboriginal children and families such as the *Wungurilwil Gapgapduir: Aboriginal Children and Families Agreement*.⁴⁰ Other overarching policy frameworks relate to First Peoples more generally such as the *Victorian Aboriginal Affairs*



Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing

Framework (VAAF). These and other important policies are summarised in Appendix C.

The government has recommitted to *Wungurilwil Gapgapduir* through a refreshed three-year strategic action plan (2021–24). Strategic action plans set out priorities and actions for the relevant period.⁴¹ DFFH told Yoorrook:

Core to that commitment is the reduction of the over-representation of Aboriginal children in child protection and alternative care, primarily by providing enablers to advance Aboriginal models of care and the transfer of decision-making for Aboriginal children to ACCOs.⁴²

In undertaking this truth-telling inquiry, Yoorrook has examined evidence about compliance with these policy frameworks and commitments. Yoorrook has also looked at Victoria’s performance under the National Closing the Gap agreement. This has a target to reduce the rate of over-representation of Aboriginal children in out of home care by 45 per cent by 2031.⁴⁵ The VAAF also has an objective to ‘eliminate the overrepresentation of Aboriginal children and young people in [out of home] care’.⁴⁶

Despite the Victorian Government’s commitment to partnership and many forward-thinking policies and reforms, the rate of Aboriginal children in state care in Victoria remains the worst in the country (currently 102.2 per 1000).⁴⁷ Witnesses told Yoorrook that DFFH compliance with its own legislation, policies and procedures is patchy at best, and very poor in some

key areas. DFFH Acting Associate Secretary Argiri Alisandratos noted in evidence to Yoorrook:

While many of the responses demonstrate our collective efforts to address the over-representation of First Peoples children in the child protection system and improve outcomes for children and families, I acknowledge that these efforts have not succeeded in reducing rates of over-representation.

It is becoming increasingly apparent that efforts to add new requirements and procedures and drive compliance with legislation and policies are not achieving the desired change and are failing to address the drivers of over representation. In addition, the cultural competence of our workforce, our ability to recognise and address our own biases and form culturally attuned relationships with First Peoples children, families and carers continue to curtail efforts to address over-representation.⁴⁸

Yoorrook notes that DFFH has now established an Aboriginal self-determination and outcomes division and a number of Aboriginal executive roles.⁴⁹ In evidence to the Commission, the newly appointed Deputy Secretary, Aboriginal Self-Determination and Outcomes, Raylene Harradine, expressed her optimism about the willingness of DFFH to work with her division, stating:

This is a point in time that will hopefully resonate and also be a turning point for our communities to be able to stand proud but change some of the systems as well ... going into this role it wasn’t just to keep the seat warm. It’s actually to make a difference.⁵⁰

Similarly, Adam Reilly, Executive Director, Wimmera South Region at DFFH, spoke of supportive non-Aboriginal senior colleagues who have an appetite for change.⁵¹



Yoorrook acknowledges the genuine commitment of Aboriginal staff who work within the system to improve Aboriginal children's lives and bring about change. This work can often come at significant personal cost. The many failed promises and the ongoing devastation to Aboriginal families in contact with the child protection system as told to Yoorrook, underscores the need for urgent and wholesale system reform.

First Peoples' views on how recommendations have been carried out

Indigenous people have a lot at stake when participating in these sorts of advocacies. We have a huge responsibility to our family, extended families and community. It is not a game for us. It is our family, extended families and communities. It is not a game for us. It is our families' and our kids' lives that are at stake. Our mob keep hearing promises, but those promises have not led to real implementation to make change.⁵²

In the last decade there have been at least 19 inquiries about the child protection system in Victoria.⁵³ This number includes 10 systemic inquiries by the Commission for Children and Young People (CCYP) since 2015. Each examined significant issues in the

Landmark reports



The over-representation of Aboriginal children in child protection has been the subject of many inquiries and reports. Current responses and strategic directions have been largely influenced by the Taskforce 1000 project and subsequent inquiries.⁶⁰

Taskforce 1000 was a state-wide initiative that examined the circumstances of 980 Aboriginal children in care on final orders between 2014 and 2016. It was a joint initiative of the then Department of Health and Human Services and the Commissioner for Aboriginal Children and Young People. The findings of Taskforce 1000 were published in CCYP's 2016 *Always Was, Always Will Be Koori Children* report. In the same year, CCYP also released its report on compliance with the intent of the Aboriginal and Torres Strait Islander Child Placement Principle, *In the Child's Best Interests*.⁶¹

The Victorian Government states that almost all of CCYP's recommendations from these two landmark reports have been implemented.⁶² Yet the rate of Aboriginal children in care has worsened considerably. At 31 December 2016, there were 1743 Aboriginal children in out of home care. At 31 December 2022, there were 2635 Aboriginal children in out of home care — a 51 per cent increase.⁶³

child protection and out of home care systems.⁵⁴ Key findings of these inquiries are summarised in Appendix C.

These reports are distinctive for their iteration of recurring themes on the performance of the child protection system for First Peoples. These include:

- poor information gathering
- inadequate risk assessment
- lack of collaboration and information sharing between services
- poor responses to children experiencing family violence
- poor responses to children experiencing poor mental health and cumulative harm
- missed opportunities to provide early supports in the event of receiving an unborn notification

- failures to uphold Aboriginal children's cultural rights
- lack of early support for vulnerable mothers.⁵⁵

First Peoples and ACCOs have continuously called for implementation of the multitude of recommendations to address the identified system failures. Many told Yoorrook that recommendations are outstanding.⁵⁶ Nerita Waight, CEO of the Victorian Aboriginal Legal Service, described how First Peoples have 'report fatigue'.⁵⁷ Yoorrook heard that inquiries and reviews are 'big on policy, but poor on listening, meaningful action, participatory decision-making and implementation'.⁵⁸ Yoorrook also heard that there is limited accountability and 'a widening disconnect between the aims of [key policies such as] Wungurilwil Gagapduir and the progress that is really achieved in advancing the needed reforms from year to year'.⁵⁹

The role of the Commissioner for Aboriginal Children and Young People

CCYP provides independent oversight of services for children and young people in Victoria. Its functions include:

- undertaking inquiries into systemic issues affecting children in child protection and the out of home care systems⁶⁴
- conducting inquiries into service responses to individual children
- conducting inquiries into the services provided (or not) to children who died or were known to child protection in the year prior to the death
- monitoring serious incidents in out of home care
- conducting on-site or online inspections of residential care services.

CCYP has a Principal Commissioner for Children and Young People and a Commissioner for Aboriginal Children and Young People. However, the Commissioner for Aboriginal Children and Young People role does not appear in the *Commission for Children and Young People Act 2012* (Vic).

The existence of the Commissioner for Aboriginal Children and Young People relies on the Victorian Government choosing to create an additional Commissioner position under that legislation.⁶⁵ That additional Commissioner position has no powers unless the Principal Commissioner chooses to delegate them.⁶⁶ This means the extent of the powers of the Commissioner for Aboriginal Children and Young People are determined by the Principal Commissioner.

This situation contrasts with jurisdictions such as South Australia and ACT where the role of Commissioner for Aboriginal Children and Young People is expressly set out in legislation.⁶⁷ Submissions to Yoorrook, including that of the Commissioner herself,⁶⁸ called for the same approach in Victoria.⁶⁹ Yoorrook agrees. Yoorrook is concerned that such an important role is not guaranteed or protected under legislation. This undermines the self-determination of both the role and the Aboriginal community.⁷⁰ There must be an independent, dedicated, properly resourced and empowered Commissioner for Aboriginal Children and Young People in Victoria whose role is expressly recognised in legislation.

Yoorrook notes that CCYP does not have an individual complaint handling function.⁷¹ Currently complaints can be made to DFFH (or other service provider) or to the Victorian Ombudsman. Following the passage of the Statement of Recognition Bill, once the Act is proclaimed, CCYP will gain new powers, to assist and advocate for a protected child or young person (including those who are or have been, a child protection client in the last six months, and children in out of home care). This includes advocating for their safety, welfare, wellbeing and human rights.⁷² This is a very welcome addition to CCYP's powers.

It is unclear if this equates to a general individual complaint handling function. To avoid doubt, a culturally safe complaints pathway should be enshrined in the powers and functions of the Commissioner for Aboriginal Children and Young People. This function needs to be adequately resourced and the Commissioner/CCYP empowered to compel information, documents and records from relevant entities including DFFH, the Department of Education, Department of Health, Department of Justice and Community Safety, out of home care providers and others.

In recommending this individual complaints function, Yoorrook recognises that, despite its best efforts, the Victorian Ombudsman's complaints process may not be the most appropriate pathway for complaints concerning First Peoples children. Yoorrook believes it is important to provide the option of complaining to the Commissioner for Aboriginal Children and Young People who is likely to be better able to provide a culturally safe specialist response.⁷³ In developing this function, Yoorrook is confident that CCYP and the Victorian Ombudsman will carefully consider how best to avoid duplication, along with other entities such as the Mental Health Complaints Commissioner and the Social Services Regulator. ■

RECOMMENDATION

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.

Endnotes

1. Victorian Aboriginal Child Care Agency, Submission 77, 7.
2. Statement of Minister for Child Protection and Family Services, the Hon. Elizabeth (Lizzie) Blandthorn MLC, 24 March 2023, 1 [3].
3. Transcript of Argiri Alisandratos, 27 April 2023, 5 [24]; Transcript of Argiri Alisandratos, 28 April 2023, 109 [13]–[16].
4. Detail on relevant legislation and departmental policy can be found in Appendix C.
5. *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*CRC*'); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 99 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*').
6. *United Nations Declaration on the Rights of Indigenous People*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) ('*UNDRIP*') arts 8, 11, 12, 13, 15. Australia endorsed UNDRIP in 2009, two years after it was passed as a resolution by the UN General Assembly.
7. *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*'). Section 19(2) of the Charter recognises that Aboriginal persons hold distinct cultural rights and that they must not be denied the right, with other members of their community, to enjoy their identity and culture; to maintain and use their language; to maintain their kinship ties; and to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.
8. Note that this is not a full list of all human rights relevant to children and families. Note also that rights are expressed slightly differently in each human rights instrument.
9. The right to self-determination of peoples is specified in common article 1 of both the ICCPR (n 5) and the ICESCR (n 5).
10. Note also cultural rights contained in *UNDRIP* (n 6) at arts 8, 11, 12, 13, 15.
11. *Charter* (n 7) s 38.
12. Victorian Equal Opportunity and Human Rights Commission, *The Charter of Human Rights and Responsibilities: A Guide for Victorian Public Sector Workers* (2nd ed, 2019) 5.
13. Department of Families, Fairness and Housing, *Child Protection Manual* (26 July 2016) 'Human Rights and Child Protection: Considerations for Good Practice' <<https://www.cpmanual.vic.gov.au/our-approach/roles-and-responsibilities/human-rights-and-child-protection>>.
14. *Charter* (n 7) s 32(1).
15. *Secretary, Department of Human Services v Sanding* (2011) 36 VR 221, 257–9 [155]–[167].
16. See Appendix C for a summary of complaints and oversight mechanisms relating to child protection.
17. *Charter* (n 7) s 39 provides that if a person may seek any relief or remedy for an act or decision of a public authority on grounds of unlawfulness other than the Charter, then that person may also seek relief or remedy on a ground of unlawfulness arising because of the Charter. Damages cannot be awarded under the Charter.
18. See, eg, *Children, Youth and Families Act 2005* (Vic) ss 13, 14, 166(3)(b), 176 ('*CYFA*').
19. Yoorrook notes that nationally, the term used is 'Aboriginal and Torres Strait Islander Principle', however *CYFA* (n 18) s 13 uses the term 'Aboriginal Child Placement Principle (ACPP)'. Therefore, Yoorrook uses ACPP in this report.
20. *CYFA* (n 18) s 10.
21. *Ibid* ss 11–12.
22. *Ibid* ss 13–14.
23. See Department of Families, Fairness and Housing, *Child Protection Manual* (Online) <<https://www.cpmanual.vic.gov.au/>>.
24. Australian Government Productivity Commission, Report on Government Services 2023 (2023) 'Part F, Section 16 Child Protection Services, Table 16A.22'.
25. Department of Families, Fairness and Housing, 'Response to NTP-002-001 — Tranche 2 data response supplied by the Performance and Analysis, System Reform and Workforce Division', 9, produced by the State of Victoria in response to the Commission's Notice to Produce dated 3 November 2022.
26. Department of Health and Human Services, *Program Requirements for the Aboriginal Child Specialist Advice and Support Service* (2019) 42–43.
27. Department of Families, Fairness and Housing, 'Response to NTP-002-001 — Tranche 2 data response supplied by the Performance and Analysis, System Reform and Workforce Division', 9, produced by the State of Victoria in response to the Commission's Notice to Produce dated 3 November 2022.
28. Section 323 of the *CYFA* prohibits the Children's Court from making a Permanent Care Order for an Aboriginal child unless a cultural support plan has been prepared. Permanent Care Orders are discussed in Chapter 8.

29. Department of Families, Fairness and Housing, Response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 6 May 2023, Attachment 2, 12 [40]. Yoorrook received other information stating that at 31 December 2022, 52 per cent of Aboriginal children had cultural plans: Witness Statement of Argiri Alisandratos, 21 March 2023, 51 [204]; and that in 2021–22, 52 per cent of Aboriginal children had a cultural plan: Witness Statement of Argiri Alisandratos, 21 March 2023, Attachment AA–17, 33; Department of Families, Fairness and Housing, ‘Response to NTP-002-001 — *Tranche 2 data response, supplied by the Performance and Analysis, System Reform and Workforce Division*’ 13, produced by the State of Victoria in response to the Commission’s Notice to Produce dated 3 November 2022. Yoorrook notes that the requirement to have a cultural plan within 19 weeks is not a legislative requirement, however there is a general legislative requirement to have a cultural plan under the CYFA (n 18) s 176.
30. Children and Health Legislation Amendment (Statement of Recognition, Aboriginal Self-Determination and Other Matters) Bill 2023 (Vic) (‘Statement of Recognition Bill’).
31. *Ibid* cl 4 inserting new s 7A.
32. *Ibid* inserting proposed new ss 7E, 7F, 7G, 7H.
33. *Ibid*.
34. *Ibid* inserting new 7H(2).
35. The five Aboriginal Child Placement Principle (ACPP) elements are prevention, partnership, participation, connection and placement. Prior to the Statement of Recognition Bill (n 30) amendments, contained in cl 5 of that Bill, the ACPP in the CYFA only referred to placement. See CYFA (n 18) s 13.
36. Statement of Recognition Bill (n 30) pts 8–9.
37. Statement of Recognition Bill (n 30).
38. Department of Families, Fairness and Housing, Supplementary response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 10 May 2023, Attachment 1, 9 [37], [42].
39. Statement of Recognition Bill (n 30) cl 7 substituting s 18.
40. This is a tripartite agreement between the Victorian Aboriginal Children and Young People’s Alliance, the government and community service organisations to improve outcomes for Victorian children and families: see Victorian Government, *Wungurilwil Gaggapduir: Aboriginal Children and Families Agreement* (2021).
41. The main additions/changes in the 2021–24 Strategic Action plan include creating Closing the Gap projections for divisions to guide efforts to meet the target; refreshed cultural plan actions to increase compliance to a new target of 90 per cent; developing a 10 year plan for ACAC; developing a foster care policy to increase the ACCO carer pool; actions to better support the needs of carers of Aboriginal children; trialing ACSASS endorsement of reunification plans and their implementation: Department of Families, Fairness and Housing, ‘Response to NTP-002-002 — *Pre-reading paper: Wungurilwil Gaggapduir Strategic Action Plan: Aboriginal Children’s Forum – 30 and 31 March 2022*’, 1, produced by the State of Victoria in response to the Commission’s Notice to Produce dated 3 November 2022.
42. Witness Statement of Argiri Alisandratos, 21 March 2023, 40–41, [144].
43. Victorian Government, ‘Victorian Budget 2023/24: A Fairer State for Every Victorian’ (Media release, 23 May 2023) <<https://www.premier.vic.gov.au/sites/default/files/2023-05/230523-A-Fairer-State-For-Every-Victorian.pdf>>.
44. Department of Treasury and Finance, Victorian Government, *Victorian Budget 2023–24: Service Delivery* (Budget Paper No 3, 2023) 5.
45. Australian Government Productivity Commission, ‘Socioeconomic Outcome Area 12: Aboriginal and Torres Strait Islander Children Are Not Overrepresented in the Child Protection System’, *Closing the Gap Information Repository* (Online dashboard, 8 March 2023) <<https://www.pc.gov.au/closing-the-gap-data/dashboard/socioeconomic/outcome-area12>>.
46. This is objective 2.1 of goal 2, ‘Aboriginal children are raised by Aboriginal families’: Victorian Government, *Victorian Aboriginal Affairs Framework 2018–2023* (2018) 34 <<https://www.firstpeoplesrelations.vic.gov.au/victorian-aboriginal-affairs-framework-2018-2023>>.
47. Witness Statement of Argiri Alisandratos, 21 March 2023, 19 [28].
48. Witness Statement of Argiri Alisandratos, 21 March 2023, 17 [18]–[19].
49. Witness Statement of Argiri Alisandratos, 21 March 2023, 90 [376].
50. Transcript of Raylene Harradine, 15 May 2023, 944 [18]–[21].
51. Transcript of Adam Reilly, 15 May 2023, 962 [45]–[50], 963 [1]–[6]].
52. Transcript of Dr Eddie Cubillo, 15 December 2022, 518 [11]–[16].
53. See Appendix C.
54. Statement of Commissioner Meena Singh, 2 December 2023, 23 [59].
55. Statement of Commissioner Meena Singh, 2 December 2023, 31 [103].

56. For example, a number of submissions noted the lack of accountability for implementation of the recommendations from the Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) ('Bringing Them Home Report'): see Victorian Aboriginal Child Care Agency, Submission 77, 23–47; First Peoples' Assembly of Victoria, Submission 43, 5; Mackillop Family Services, Submission 69, 4. The Victorian government stated to Yoorrook that it has not specifically reviewed the implementation of each recommendation from *Bringing them Home*: Department of Families, Fairness and Housing, Response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 6 May 2023, Attachment 2, 15 [67].
57. Transcript of Nerita Waight, 14 December 2022, 422 [24].
58. Victorian Aboriginal Child Care Agency, Submission 77, 18.
59. SNAICC — National Voice for our Children, *The Family Matters Report 2022: 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, 2022), 79.
60. Witness Statement of Argiri Alisandratos, 21 March 2023, 36 [122].
61. Witness Statement of Argiri Alisandratos, 21 March 2023, 36 [122]–[124].
62. Evidence from the Victorian Government is that 'of the 128 recommendations accepted by government, 104 of these have been fully implemented or retired. Of the remaining 29 recommendations, 19 are considered complete by the department and are to be assessed by the Commission for Children and Young People (CCYP). The remaining 10 are being progressed with approximately half of these related to legislative amendments to strengthen the ACPP that are expected to be acquitted through the passage of the Statement of Recognition Bill currently before Parliament': Witness Statement of Argiri Alisandratos, 21 March 2023, 37 [126]. Yoorrook notes Commissioner Singh's statement that '[i]mplementing recommendations, whilst making some improvements, may not completely address the systemic issues identified by an inquiry... Systemic changes require sustained attention with appropriate resourcing to ensure issues identified are dealt with': Supplementary Statement of Commissioner Meena Singh, 10 May 2023, 41 [173].
63. Witness Statement of Argiri Alisandratos, 21 March 2023, Attachment AA-10, 26.
64. See Appendix C for a list of inquires conducted by the CCYP and the status of recommendations as stated by Commissioner Meena Singh, Supplementary Statement to the Yoorrook Justice Commission, 10 May 2023, 42–46 [180]–[197].
65. *Commission for Children and Young People Act 2012* (Vic) s 12.
66. *Ibid* s 20(1).
67. The role of the South Australian Commissioner for Aboriginal Children and Young People was established in legislation in 2021 by amendment to the *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA). The role of the Aboriginal and Torres Strait Islander Children and Young People Commissioner in the ACT was established in 2022 by enactment of the *Aboriginal and Torres Strait Islander Children and Young People Commissioner Act 2022* (ACT).
68. Supplementary Statement of Commissioner Meena Singh, 10 May 2023, 55 [222].
69. Victorian Aboriginal Child Care Agency, Submission 77, 47, Recommendation 13 (also calling for annual audits of *Bringing Them Home* implementation); Aboriginal Justice Caucus, Submission 74, 60 calling for a stronger legislative basis for the role of the Commission for Aboriginal Children and Young People in investigating the deaths of children in care.
70. Transcript of Commissioner Meena Singh, 5 December 2022, 36 [29]–[42].
71. Complaints about the actions and decisions of DFFH or DFFH funded child protection services can be made to DFFH, the organisation providing the service, or the Victorian Ombudsman.
72. Statement of Recognition Bill (n 30) cl 39 inserting new pt 4A into the *Commission for Children and Young People Act 2012* (Vic).
73. Yoorrook notes that under the *Charter* (n 7), '[m]easures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination' — see at s 8(4).



5 EARLY HELP, PREVENTION AND INTERVENTION

In Victoria, if you are Aboriginal and want help, you have to wait until you went into the child protection system. This saddens me so much. So many families have to rebuild because they can't ask for help early... We are at the bottom of the cliff waiting for families to fall off.¹

AUNTY MURIEL BAMBLETT AO, CEO, VICTORIAN ABORIGINAL CHILD CARE AGENCY

Introduction

It is in the best interests of First Peoples children to stay with their family wherever possible. However, the ongoing legacy of intergenerational trauma, poverty, systemic racism and societal marginalisation experienced by First Peoples in Victoria result in many facing barriers to achieving stable family life. The evidence overwhelmingly shows that providing families with early, wrap around support from culturally safe services can help parents achieve the strong families they want for their children.

Government policy, specifically the *Roadmap to Reform* and the *Wungurilwil Gapgapduir* Aboriginal Children and Families Agreement, emphasise early intervention.² Yet despite this and all the evidence, many reports and consistent calls from First Peoples organisations and experts, the vast majority of child protection resources are still spent on the statutory (tertiary) end of the system, removing children, rather than investing in keeping children with their families.

This chapter examines the systemic injustices that lead to removal of First Peoples children into the child protection system. It also explores how to keep families strong, connected to culture, country and community to stop the over-involvement in child protection of First Peoples children.

Yoorrook heard evidence from First Peoples who have been involved in the Victorian child protection system, Aboriginal Community Controlled Organisations (ACCOs), families, the Commissioner for Aboriginal Children and Young People and other child wellbeing experts. Their evidence, discussed in this chapter, addressed:



Sarah Gafforini and Aunty Muriel Bamblett AO, CEO, Victorian Aboriginal Child Care Agency

- how systemic failures across multiple systems drive child protection involvement
- how discriminatory attitudes in universal services such as health can lead to unnecessary reports to child protection
- that the State is not supporting First Peoples families who need help to avoid involvement in the child protection system
- what investment is needed to ensure access to culturally safe and effective early help.

In this chapter, Yoorrook also examines the evidence on reports to child protection made about unborn Aboriginal children. This issue exemplifies the failures and harms discussed in this chapter — retraumatising child removal driven by systemic and overt racism, and a lack of support services despite government commitments.

The Commission for Children and Young People's (CCYP) *Always Was, Always Will Be Koori Children* and *In the Child's Best Interests* reports both found that the child protection system is inherently culturally unsafe for Aboriginal children and their families. It also found that many children in out of home care experience continuing harm in care.³

More than six years since those reports, the task of reducing child protection involvement through effective early help has only become more urgent. The

over-representation of Aboriginal children in child protection has worsened.⁴

Yoorrook strongly believes that the strengths of First Peoples families must be respected, supported and enabled. Properly funded, self-determining, early, flexible and culturally appropriate services and programs will help to ensure that First Peoples children grow up with their families healthy, happy, strong, loved, connected, knowing their culture and who they are in themselves.

What Yoorrook heard

Aboriginal over-representation in the child protection system has grown and is unacceptable

[W]hatever we are doing, it's not working and we've got to stop it.⁵

Victoria's child protection legislation contains important cultural and human rights protections for First Peoples children. The *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) also protects the rights of children and families and their cultural rights, drawing on international human rights.⁶ Child protection staff are trained in these laws and should be aware of these legal obligations.⁷

Nevertheless, in the last six years the rate of involvement of Aboriginal children in the child protection system has disproportionately increased (43 per cent compared to 32 per cent for non-Aboriginal children). The rate of Aboriginal children in out of home care has also disproportionately increased (40 per cent compared with a 21 per cent increase for non-Aboriginal children).⁸

As discussed in the next chapter, the further into the child protection system Aboriginal children go, the worse the over-representation becomes. These statistics point to continued and worsening failure of the child protection system. They are also a product of long-standing, broader systems failures and systemic racism across government, that if corrected could help to prevent Aboriginal children ending up in the child protection system in the first place.



Aunty Jill Gallagher AO, CEO, Victorian Aboriginal Community Controlled Health Organisation

[T]he reality of the child protection system, these families are doing it real tough... then when they ask the system for help, what happens is they are met with punishment. They are not met with help. They are not wrapped around, therapeutically supported. We don't work with the whole family in a way that says, 'Hey, what do you need to be able to look after this child. What support do you need, what can we put in place?'⁹

Multiple systems are failing Aboriginal families

Non-Aboriginal people know that if they are struggling they can go to any service and demand it as their right. Our people often feel that if they go and ask for help, that their parenting will be judged and their children will be taken away.¹⁰

Colonisation has caused profound ongoing systemic injustice for First Peoples communities. This is reflected in high rates of poor social and emotional wellbeing, substance misuse, family violence, homelessness and justice system contact. On a human level, the intergenerational and ongoing trauma that creates these 'risk factors' was a strong theme in the evidence before Yoorrook:

It's easier for us to take drugs and drink and not deal with our trauma, to push it down. Our men and women are good at pushing down the trauma with drug or drink and just getting on with it. I've lost family and so many mates to drugs and alcohol. I've lost a couple of sisters to alcohol addictions that led to other sicknesses, and two of my nephews passed before they were 40.¹¹

These factors in child protection involvement have been well documented in past inquiries and reports.¹² The government acknowledges,

risk factors such as family violence, substance abuse, homelessness, and poor mental health, are closely correlated with Child Protection involvement across all families. Due to the racist legacies of colonialism and dispossession, these risk factors statistically present with greater frequency in First Peoples families. Structurally biased systems and decision-making play a role in compounding this.¹³

The Department of Families, Fairness and Housing (DFFH) estimates that these factors account for 55 per cent of the difference in the rate of reports to child protection and 35 per cent of the difference in the rate of entry to care between Aboriginal and non-Aboriginal people.¹⁴



If culturally safe early intervention support was readily available, child protection involvement would be reduced.

We need ... collaborative efforts from ... health, from education, from a whole range of spaces, that prevent — that really wrap around families as soon as they are struggling, as soon as they are finding that they have need. We also need to support families to seek help without that threat of child removal which is so entrenched into our beings because it's what, you know, so many of our ancestors went through.¹⁵

For example, in Victoria, Aboriginal people are more than twice as likely than non-Aboriginal people to experience family violence, and 15 per cent of clients of homelessness services are Aboriginal. Analysis of linked data shows that known risk factors like these are the most significant driver for higher rates of involvement with child protection for Aboriginal people.¹⁶

Yoorrook emphasises that the ongoing disadvantage of First Peoples is due to poverty and intergenerational trauma caused by colonisation. As such, it considers the use of the term 'risk factors' to describe this disadvantage problematic because it blames First Peoples for harm caused to them by others, including the State. Where Yoorrook discusses 'risk factors', we do so on that basis, noting that evidence shows that decision making tools used by child protection to assess risk contain inherent bias because of this connection between 'risk' and disadvantage. This is discussed further in Chapter 6: Child removal.

There is a lack of cultural safety in universal services

Government witnesses told Yoorrook how universal services like health and education are important for children in contact with child protection. They spoke about the whole-of-Victorian-Government responsibility for bringing down the rates of First Peoples children entering out of home care.¹⁷ Yet evidence to Yoorrook shows that mainstream, universal systems are not working to address the causes of child protection contact.

The Commission heard of systemic racism and a lack of cultural safety in mainstream services, particularly hospitals.¹⁸ Yoorrook also received evidence of cultural ignorance by general practitioners and clinics.¹⁹

These experiences are internalised by First Peoples and can lead to them delaying or missing out on important help to which all Victorians should be entitled.²⁰ The impact of this on expectant Aboriginal mothers who are subject to pre-birth reports is discussed at the end of this chapter.

Lack of cultural safety in early intervention services

Say your mum's a drug addict, your dad's an alcoholic, your brothers are doing whatever and your sister gets bashed by her boyfriend. And you've got no positive outcome out there. What's stopping them from [inventing] an organisation [that] says, 'Well, listen, if you've got no positive outcome, this is the place that you come. This is your safe place... you can come here if you need a feed. You can come here if you need somewhere to sleep. You can come here and speak to our people. We'll have a psych here if you need to see a psych.' ... Why can't they invent a place like that? ²¹

Early intervention can help prevent contact with the child protection system and divert families from child removal.²² This fact is recognised in the government's policy for the child and family sector, *Roadmap for Reform*. This policy aims to shift the focus of the system to 'intervene earlier to improve family functioning,

keep children with their families and safely reunify children'. It has a priority focus on First Peoples families.²³ However, as the Commissioner for Aboriginal Children and Young People told Yoorrook, these 'efforts to support families earlier prior to removal are not working for Aboriginal children'.²⁴

Efforts to provide early assistance will not work if First Peoples families do not feel able to access services because of cultural safety concerns. Most prevention and early intervention child and family services are delivered through the government or Community Service Organisations (CSOs).²⁵ The government knows that this is preventing First Peoples getting help:

[B]ecause of the way in which State services have been and continue to be seen as unsafe and untrustworthy for First Peoples, many First Peoples do not trust these services and are therefore less likely to engage early in need for fear of being reported to Child Protection and experiencing unsafe cultural practices where services they are referred to are provided by CSOs.²⁶

The government also acknowledges that a lack of resources is contributing to the problem:

Insufficient capacity in these services can lead to repeated reports to Child Protection and ultimately to children and young people requiring more intensive services where earlier intervention may have otherwise successfully diverted them. This is likely to be contributing to the increase in rates of First Peoples children involved in child protection and care services.²⁷

Cultural safety is not just about eliminating racist or discriminatory behaviours, it also means understanding and incorporating First Peoples' cultural understandings, especially of family, kinship, support and child-rearing, in models of care.²⁸ Cultural safety requires services to recognise the past harm perpetrated against First Peoples and incorporate it in their design and delivery.²⁹

Cultural safety is particularly important for services that act as the 'front door' to specialist help. For example, Yoorrook heard that Aboriginal women may

not use the Orange Door (the entry point to child and family services and family violence services) as that service includes government child protection staff. This means women do not seek help or seek it later.³⁰ This creates a major blind spot for the early intervention end of the child protection system and also for the family violence system.

Government investment should reflect the value of early intervention

The aspiration would be to divert as many children as possible because we have a suite of services that are Aboriginal led, evidence informed and impactful, that hold families together. That's where we want to be.³¹

While the Victorian Government does not directly report on 'front end' (prevention and early intervention) versus 'back end' investment in child protection, the annual Family Matters report uses a proxy to measure this.³² Using this data, in 2021–22, Victoria spent:

- \$1,894.8 million on all child protection services, and
- \$ 532.02 million (28.1 per cent) on prevention and early intervention.³³

Or in other words, for every dollar spent on 'back end' services, only 28 cents was spent on 'front end' services.

Victoria invested the highest proportion of its total spending on front end services in Australia. However, Family Matters notes that this proxy indicator must be interpreted with caution when examining the extent to which states and territories are prioritising family support for First Peoples children. Factors to consider include the amount of funding provided relative to the number of families requiring support, quality of services funded, whether services are genuinely focused on prevention rather than child protection intervention, the cultural safety of services, and whether they are used by — and effective for — Aboriginal families.³⁴ Proportionate funding for ACCOs is discussed below.



Aunty Glenys Watts

Significant investment is needed in Aboriginal-led front end services

You know, that family sometimes hasn't got adequate housing, and hasn't got, you know, the wage coming in, especially if they have been through family violence they are usually separated from their partner, or whatever, so they haven't got enough money. Some of the money that they are putting into foster caring and different things can be put into that family to actually get them working together.³⁵

Lack of trust in mainstream services, and continued bias in service delivery across multiple systems, underscores the need for urgent and equitable funding for ACCOs to deliver culturally safe, self-determined prevention and early help services. ACCOs know how to work in ways that work best for First Peoples families, taking the time to build 'relationships of trust, mutual respect, and support'.³⁶

Submissions to Yoorrook called for more funding for Aboriginal-led early help and intervention programs.³⁷ Emphasising the need for holistic service provision, the Commissioner for Aboriginal Children and Young People called for more early intervention funding for ACCOs from numerous departments, not only DFFH.³⁸

The value of early help was well stated by Raylene Harradine, Deputy Secretary, Aboriginal Self-Determination and Outcomes, DFFH, when she told Yoorrook:

When a First Nations family comes to the attention of the Department, it is crucial to provide wrap-around, supportive services immediately to guarantee a coordinated response that meets their needs. In the initial stages, implementing structured, supportive services pre-emptively, can help prevent the need for invoking statutory child protection measures.³⁹

Acknowledging the ‘systemic and structural barriers’ to accessing early help or diversion from child protection, DFFH told Yoorrook that

the department has focussed on achieving proportional funding for ACCOs over the last decade and since 2015–16 has allocated approximately 15 per cent of family services funding within ACCOs.⁴⁰

In 2021–22, of the \$1,883.2 million annual expenditure on the Child Protection and Family Services portfolio, \$904.92 million was provided to CSOs and ACCOs.⁴¹ Of that, total funding delivered through ACCOs overall was \$127.38 million (14 per cent).⁴²

However, only a small proportion of that funding appears to be targeted to front end services. DFFH provided information about its proportional funding

targets for family and parenting services delivered by ACCOs and CSOs. This category of services broadly aligns with the measure of ‘front end’ investment used in the Family Matters report. The total amount of family and parenting services delivered by CSOs and ACCOs in 2021–22 was \$309.82 million, with \$46.59 million to ACCOs (15 per cent).⁴³

It is important to note that the category of ‘family services and parenting’ varies according to the intensity of service provided. DFFH divided the category of ‘Family and Parenting Support’ into three subcategories according to service intensity.⁴⁴ These are:

- Parenting Support
- Integrated Family Services and Intensive Family Services, and
- Placement Prevention Reunification Services.

In Table 5-1 below, proportional funding targets have been calculated for each of these three subcategories according to the proportion of Aboriginal children in the child protection system at different points. This shows that while funding proportions to ACCOs are nearing targets for more intensive forms of front end support, it lags significantly for less intensive front end support. This is the case even with recent programs and trials coming online.

TABLE 5-1: ACCO proportional funding targets and achievement for different front end service types, 2021–22⁴⁶

TYPE OF SERVICE	CALCULATION USED FOR PROPORTIONAL FUNDING TARGET	PROPORTIONAL FUNDING TARGET	ACTUAL PROPORTION OF FUNDING
Parenting Support	The proportion of Aboriginal children in reports to Child Protection	9%	2.8%
Integrated Family Services	The proportion of Aboriginal children in reports to Child Protection	9%	8.8%
Intensive Family Services and Placement Prevention Reunification Services	The proportion of Aboriginal children in entries to care	24%	23.5%

The government concedes that ‘more work needs to be done to increase the amount of Parenting Support services delivered through ACCOs’.⁴⁵

The government reports funding over the last two years of \$335 million and \$328 million ‘respectively to test and expand trials of new service models, such as Koorie Supported Playgroups, Early Help Family Services, Family Preservation and Reunification Response, Family Group Conferencing and Putting Families First’.⁴⁷ These are all welcome initiatives.

Acting Associate Secretary of DFFH Argiri Alisandratos told Yoorrook that Aboriginal-led early intervention models need to be ‘enabled, they need to be supported, and they need to be invested in’.⁴⁸ He also agreed that investment of this kind in ACCOs sees a return in the level of trust of Aboriginal communities.⁴⁹

However, the Victorian Aboriginal Child Care Agency (VACCA) submitted that ACCOs are not funded for the same range of early help services as CSOs and that ‘[a]ccess to early help, family support and early intervention services for Aboriginal families is significantly, and disproportionately, lower than for non-Aboriginal families’.⁵⁰ Further, VACCA noted that the categorisation of some types of services as ‘early help’ (such as the Orange Door) is misleading, as these services are mainly provided for Aboriginal families once they are already in the child protection system.⁵¹

Yoorrook also notes that government provides data on proportional investment to ACCOs through the Aboriginal Children’s Forum. This data uses the categories in the *Roadmap to Reform* of ‘early help’, ‘targeted and specialist support’ and ‘care services’. These are different to the categories above. The latest data provided to Yoorrook (from the October 2022 Aboriginal Children’s Forum) show that at July 2022, ACCOs received:

- two per cent of early help funding
- 19 per cent of targeted and specialist support funding
- 11 per cent of care services funding.⁵²

There are many different ways that government is describing and reporting on early help and proportional ACCO funding. A simple, consistent and

transparent method of reporting is well overdue. That said, what is clear from the evidence provided to Yoorrook is that more investment is needed at the front end of the child protection system to keep First Peoples children at home.

Program barriers prevent Aboriginal Community Controlled Organisations working flexibly with families

In its evidence to Yoorrook, DFFH acknowledged the need for ACCOs to be able to determine how they provide services:

First Peoples agencies have told us that offering accessible, holistic, integrated, and non-stigmatising services early to First Peoples in need is critical to addressing vulnerability. The need for coordinated culturally safe and integrated place-based solutions and corresponding investments that centre First Peoples knowledge and agency in ways that facilitate enduring and self-determined solutions across all government-provided and funded services is paramount.⁵³

Acting Associate Secretary Argiri Alisandratos elaborated on this, telling Yoorrook: ‘We have a long way to go. But incrementally, ... where we want to move the system to, [is] to be truly First Peoples-led, informed and where the funding can be used in a holistic and wrap around way to engage more families at that early intervention...’⁵⁴

However, Yoorrook was told that bureaucratic barriers such as funding program boundaries still prevent ACCOs working flexibly to meet the needs of First Peoples families:

[T]here is a remit of what the funding will be used for and you see organisations like ours constantly stretching them to ensure that we navigate in the background what those complexities are to support a family but with limited resources, it’s actually really difficult.⁵⁵

For example, First Peoples early years services such as Bubup Wilam, Yappera and Berrimba are not categorised as prevention or early intervention services despite the protective benefits (such as nurturing children’s cultural identity) and the holistic services (such as on-site health) they provide. These services provide an excellent opportunity to detect and respond early to issues:

They’ve got the best eyes on these children than anybody else out there, besides their families ... but there’s no recognition given to our early years educators ... [who] ... are well equipped to support and watch and see the development of these children.⁵⁶

As Winda-Mara Aboriginal Corporation and the Dhauwurd Wurrung Elderly and Community Health Service told Yoorrook, ‘[Aboriginal Community Controlled Health Organisations] cover everything from birth to death and everything in between’.⁵⁷

In another example, Yoorrook was told how the changed funding classification of the highly successful Cradle to Kinder Program (which provided intensive pre-birth, early parenting and family support for vulnerable young mothers) has created a gap for families who may not need such intensive forms of support.⁵⁸ Aunty Hazel Hudson, Director of Family Services at Njernda, told Yoorrook, ‘the entry point has been decreased and the expansion of child protection referrals was increased’.⁵⁹

Yoorrook also heard that fixed-term funding for ACCOs acts as a barrier to effective service delivery, preventing the development of the community-controlled sector, a key commitment under *Wungurilwil Gagapduir* and Victoria’s Implementation Plan for Closing the Gap.⁶⁰

VACCA reported that 43 per cent of mainstream CSOs funded by DFFH received more than 80 per cent of their funding on an ongoing basis. By comparison,



Panel hearing with organisations providing early years childcare. L-R Tracey Dillon, Njernda, Aunty Hazel Hudson, Njernda, Lisa Thorpe, Bubup Wilam, Stacey Brown, Yappera, Kim Do, Yappera

ACCOs receive 50 per cent of their DFFH funding as ongoing.⁶¹ This short-term funding has a flow-on effect for the ACCO workforce and certainty for families using those supports:

Aboriginal staff who work in these programs possess a huge amount of cultural knowledge and expertise, and in ACCOs they must work on short-term contracts governed by funding agreements, with lower salary commitments than their mainstream counterparts. Staff are often lost to mainstream organisations and government due to the need for higher earning potential and certainty in their contracts, jeopardising the programs run by ACCOs.⁶²

The government did not provide an explanation for funding disparities between ACCOs and CSOs or why programs are or are not funded recurrently. They noted that ‘many explanations are subject to Cabinet in Confidence decisions’.⁶³

Pre-birth reports

[T]he first person that she sees, before any of her family arrive to meet her new baby, is a child protection worker to take her child.⁶⁴

Any person concerned about the wellbeing of a child can make a report to child protection, including pre-birth reports. Data shows that the most common pre-birth report notifiers in 2021–22 were child protection practitioners (19 per cent), followed by hospital social workers (18 per cent) and hospital midwives (eight per cent).⁶⁵

The evidence Yoorrook received on pre-birth reports exemplifies the issues raised in this chapter. It demonstrates how systemic racism in universal services and the lack of involvement of culturally safe services affects pregnant Aboriginal women, all too often resulting in the removal of babies from their mothers.

In 2022, there were 491 pre-birth reports regarding First Peoples children. That is around one in five of all pre-birth reports.⁶⁶ Unpublished DFFH data shows that the rate of pre-birth reports for Aboriginal children is more than double that of non-Aboriginal children.⁶⁷

For many Aboriginal children, pre-birth reports are the entry to the child protection system — of Aboriginal children subject to one or more pre-birth reports in 2021:

- 21.5 per cent entered care within three months of birth
- 24.2 per cent had entered care within six months of birth
- 28.4 per cent had entered care within 12 months of birth.⁶⁸

Evidence suggests that racist stereotypes and assumptions about Aboriginal mothers continue to drive health practitioners’ reports to child protection. The national non-governmental peak body for Aboriginal and Torres Strait Islander children, the Secretariat of National Aboriginal and Islander Child Care (SNAICC) states:

It is highly concerning that approximately 40 per cent of reports about Aboriginal children to child protection services — particularly for unborn children — originate in healthcare systems ... Clearly, unsubstantiated reports are causing Aboriginal pregnant women unnecessary stress and trauma at an extremely vulnerable time.⁶⁹

The systemic bias in the contemporary health system in pre-birth reporting continues the long history of hospitals (and ‘mother and baby homes’) being unsafe places where Aboriginal babies were stolen from their mothers at birth.⁷⁰

I heard the baby crying, but I never saw the baby and I was told not to ask any questions. Six hours after the birth my husband told me that my baby was dead and that he had signed the death certificate. This was impossible as he couldn’t read or write. He told me this, walked out, and I never saw him again. After the birth the staff at the hospital told me and the other woman in the room with me not to leave the room... If that child survived, that’s wonderful — if he didn’t survive, they’ve still done wrong to me. I’ve moved on — I’ve had four sons now. I’ve tried not to let it harden me, but it is still at the back of the mind, it has affected my entire life.⁷¹



Dr Jacyntha Krakouer, SFeST Start Coalition and Karinda Taylor, CEO, First Peoples' Health and Wellbeing

The Commissioner for Aboriginal Children and Young people told Yoorrook that fear of child removal is 'absolutely entrenched in the psyche of the Aboriginal community and Aboriginal women'.⁷² The operation of the contemporary pre-birth report system crystallises these fears.

Being part of the Stolen Gen, I think it leads to more attention on you and every time you go to have a child you get paranoid that they'll want to take that baby away.⁷³

In Victoria, pre-birth reports cannot proceed to investigation until after birth. Referrals can be made during pregnancy to the Orange Door⁷⁴ or other services such as ACCOs for advice and assistance to the mother of the unborn child.⁷⁵ However, Yoorrook heard that pre-birth reports often do not lead to support for pregnant Aboriginal women. Yoorrook heard that pregnant Aboriginal women are often not told that a pre-birth report has been made because they are considered a 'flight risk', even though this 'is not a justifiable rationale supported by evidence'.⁷⁶ Yoorrook was also told that Aboriginal support services — even those already supporting the woman — are generally not told that a report has been made. Instead, the report is placed on the woman's file until she gives birth. It is at this point that child protection receives a formal report.⁷⁷

It is enormously traumatising for mothers to have a child protection officer as one of their first visitors at hospital as a new mother. Sometimes the child protection officer is literally the first person, other than a doctor or nurse, that a new mum sees ... If we had

advance notice that an unborn notification had been raised, we could reach out to the mother and family and offer early services and supports that are designed to set them up for success. But the system operates in a very secretive way.⁷⁸

This evidence contradicts the government's statement that its 'guiding practice principle is one of supportive intervention, rather than interference with the pregnant woman's rights'.⁷⁹ Nor is it consistent with the statement that a pre-birth report should be made when the pregnancy is confirmed to allow time for well-informed assessment and planning, referrals and 'to provide opportunities for the mother to engage with professionals and services and contribute her ideas and solutions to resolve any concerns and to achieve better outcomes'.⁸⁰

When questioned about this, Acting Associate Secretary Argiri Alisandratos said that the practice of not informing an expectant mother of a pre-birth report might occur in 'extreme situations', but that it is not the standard approach.⁸¹ However, further data received after this questioning states that 76 per cent of Aboriginal mothers with one or more notification in 2022 were not notified of the report.⁸² Even allowing for data limitations in the child protection case management system (CRIS), this demonstrates the gap between policy and practice.

Yoorrook considers that expectant mothers should always be informed where there are protective concerns about the wellbeing of an unborn child and that it is the duty of DFFH to ensure trusted services are available to engage with pregnant Aboriginal women. As DHHS Executive Director Adam Reilly stated in evidence:

[T]he lights and sirens statutory response, we're not good at that generally. I think that sort of conversation — and really the child protection response to support any concerns that that expectant mother is facing, should be designed and really prescriptively delivered at the bequest of the families and the Traditional Owners from where that person comes from. Our role, if any, should be to support wraparound as directed, not to apply our clinical response to that situation.⁸³

Case study from the First Peoples' Health and Wellbeing service



We had one client who was reported to child protection when she was five weeks' pregnant because she had an argument with her partner. Her

neighbours called the police. When the police came, they asked our client if she had been drinking. She responded that she had not been drinking, because she was pregnant.

She was not aware that the police then made an unborn report about her. This was in the very early stages of her pregnancy. ... By the time she had her baby, she was no longer with the partner. But when she gave birth, child protection turned up straight away.

At no point did anyone contact her during the remaining period of her pregnancy to attempt to assist her or offer her support. She had been seeing First Peoples' Health and Wellbeing, regularly throughout her pregnancy, but we were never contacted by child protection. She also has a case worker from the Victorian Aboriginal Child Care Agency because she grew up in the child protection system and, again, they were not contacted. A normal human conversation with a bit of respect could have resolved it. They waited until she had given birth.⁸⁴

DFFH informed Yoorrook that if a pregnant woman 'is not willing to work with Child Protection, she cannot be compelled to accept advice and assistance or services to which she may be referred'.⁸⁵ Despite the principle of consent to services, Yoorrook heard that Aboriginal women are judged if they do not voluntarily engage with services (that they may not trust) or meet the expectations of maternity staff. This increases the risk of child removal.⁸⁶ The Commission was given an example where a new mother with an intellectual disability was 'written up' by a maternity service for using 'sexualised behaviour' because she used common language like 'titty' for breastfeeding.⁸⁷ Karinda Taylor from the First Peoples' Health and Wellbeing service told Yoorrook:

I remember looking at her talking to her baby, you know, those attachments, bonding, she was so attentive. I wrote attentive. They wrote intense. She was intense. They [had] actually seen it as negative. Had she ignored her baby they would have wrote that up as well.⁸⁸

The government states that '[g]iven the involvement of Aboriginal Child Specialist Advice and Support Service (ACSASS) at all decision making points, it is anticipated that culturally appropriate support services are identified and made available to mothers as early as practicable'.⁸⁹

However, as detailed throughout this report, ACSASS is not always consulted on all the matters in which it should be involved⁹⁰ and not all mothers are prioritised for help. The State admits that 'while the intent of responding to an unborn report is to assist the mother of the child, current resourcing levels and demand for family services can mean work and services are prioritised towards families and children requiring immediate support and assistance'.⁹¹ This means that expectant mothers may not receive help if they are deemed less in need than a family and child who requires immediate help.

Yoorrook notes that the need for early referral of pre-birth reports to ACCOs has consistently been raised through the Aboriginal Children's Forum and is included in the Wungurilwil Gagapaduir Strategic Action Plan. In evidence, Acting Associate Secretary Argiri Alisandratos stated that the requirement to refer pre-birth reports to ACCOs will become mandatory.⁹² Responding to Questions of Notice he stated that while it is not a legislative requirement, in order to achieve the 100 per cent target agreed by the Aboriginal Children's Forum, government has taken a number of actions, including funding two trials underway to 'connect unborn reports to ACCOs'.⁹³ DFFH confirmed that 'evaluation results demonstrate the trials are diverting First Peoples families from child protection led investigations and fewer substantiations'.⁹⁴

Yoorrook received evidence that great results can be achieved where culturally appropriate services are available to pregnant Aboriginal women subject to a pre-birth report. A First Peoples-led trial program (Garinga Bupup) run by the Bendigo and District

Aboriginal Cooperative had a 63 per cent diversion rate.⁹⁵ This is one of the two trials referred to above. An independent evaluation found excellent uptake of this program and that:

- parents were very satisfied with their service and experienced a high level of personal and cultural safety during care and felt supported by ACCO convenors/case managers
- mothers showed a high level of trust in the Garinga Bupup Senior Case Manager, and the Garinga Bupup Senior Case Manager also highlighted the close ‘family-like’ relationship she formed with mothers
- the trials improved parents’ self-esteem, self-agency and personal empowerment, and successfully engaged parents in community-based support to address struggles linked to poverty and disadvantage and exacerbated by social isolation.⁹⁶

These results create a compelling case for government investment. However, as discussed below, there is a continuing lack of availability of culturally appropriate early intervention services, particularly early parenting support.

We are waiting for babies to be born in hospital to remove kids. Imagine if we had our own early years parenting centres. I think we could change the world.⁹⁷

The way forward

The over-representation of First Peoples children in Victoria’s child protection system is a symptom of ongoing failures and systemic racism across multiple systems including health, education, housing and justice. Efforts to reduce over-representation cannot work if these other systems continue to fail First Peoples. It is a whole-of-government problem that requires whole-of-government effort. Yet the governance arrangements for achieving Target 12 of Closing the Gap (to reduce the over-representation of Aboriginal children and young people in out of home care) has responsibility resting solely with the Minister for Child Protection and Family Services and

DFFH when other departments and ministers clearly have a role to play.

Also, as revealed in Yoorrook’s hearings, while government officials across multiple departments share responsibility to drive down over-representation through the *Victorian Aboriginal Affairs Framework*, no one on the ground is being held truly accountable. Thus, while the Department of Premier and Cabinet coordinates the Framework, and each part of government has its actions and targets,⁹⁸ First Peoples children continue to be removed at unacceptably high rates from their families and cultures.⁹⁹

First Peoples families are over-represented in reports to child protection, many of which are not substantiated,¹⁰⁰ or would not need to be if appropriate, culturally safe early help was provided.

The rate of infant removals for First Peoples children subject to a pre-birth report highlights systemic racism across health services and the lack of culturally appropriate support to new mothers. Where there are concerns about the parenting capability of pregnant Aboriginal women, they must be informed and offered timely, ongoing and culturally appropriate supports that prioritise existing relationships with service providers. They should also have access to legal help delivered by an Aboriginal legal service provider at this critical point.

While there are moves to fund ACCOs proportionally and examples of successful First Peoples-led interventions, the Victorian Government is still not adequately investing in holistic, culturally safe early help and support. This undermines self-determination. The short-term nature of funding to ACCOs also has flow on effects on the sector’s ability to recruit and retain a strong workforce — acknowledged by the government as critical to reducing the removal of Aboriginal children from their families. Similarly, funding program barriers must be removed so ACCOs can work with the whole family, when and how they need it, to achieve best results.

DFFH stated in evidence that one of the causes of over-representation is ‘the recent focus on designing programs for, and responding to, families with the most complex needs... at the expense of supporting more vulnerable families earlier in need’.¹⁰¹ This goes

to the government's priorities and its commitment to keeping Aboriginal children out of the system.

To achieve that aim, investment:

- is needed at both ends of the child protection system
- must be proportional between ACCOs and CSOs for all intensities of service, based on the rate of Aboriginal representation in the child protection system, at each stage of that system
- must reflect the complexity and skill required in ACCO service delivery.

Only then will 'early help' be truly realised for Aboriginal families and children. ■

RECOMMENDATIONS

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.

Endnotes

1. Transcript of Aunty Muriel Bamblett AO, 6 December 2022, 96 [15]–[18], [44].
2. See Department of Families, Fairness and Housing, Victorian Government, *Roadmap for Reform: Strong Families, Safe Children* (2016); Department of Families, Fairness and Housing, Victorian Government, *Roadmap for Reform: Children and Families* (2018); Department of Families, Fairness and Housing, Victorian Government, *Roadmap for Reform: Pathways to Support for Children and Families – Priority Setting Plan 2021–2024* (2021) ('*Roadmap for Reform: Pathways to Support for Children and Families*'); Victorian Government, *Wungurilwil Gaggapduir: Aboriginal Children and Families Agreement* (2021) ('*Wungurilwil Gaggapduir*').
3. Commission for Children and Young People, *Always Was, Always Will Be Koori Children: Systemic Inquiry into Services Provided to Aboriginal Children and Young People in out-of-Home Care in Victoria* (Inquiry Report, 2016) 12 ('*Always Was, Always Will Be Koori Children*'); Commission for Children and Young People, *In the Child's Best Interests: Inquiry into Compliance with the Intent of the Aboriginal Child Placement Principle in Victoria* (Inquiry Report, 2016) 3 ('*In the Child's Best Interests*'). See also Statement of Commissioner Meena Singh, 2 December 2023, 14 [38].
4. Data contained in Witness Statement of Argiri Alisandratos, 21 March 2023, Attachment AA-3, 7.
5. Transcript of Aunty Jill Gallagher AO, 6 December 2022, 123 [33]–[34].
6. *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 8, 17 and 19 ('*Charter*').
7. Witness Statement of Argiri Alisandratos, 21 March 2023, 73 [317].
8. Witness Statement of Argiri Alisandratos, 21 March 2023, Attachment AA-3, 7.
9. Transcript of Dr Jacyntha Krakouer, 8 December 2022, 228 [44]–[49].
10. Transcript of Aunty Muriel Bamblett AM, 6 December 2022, 101 [2]–[4].
11. Outline of Evidence of Uncle Ross Morgan, 5 March 2023, 3 [22].
12. See, eg, *Always Was, Always Will Be Koori Children* (n 3). In addition, the annual Family Matters report provides a succinct summary of these drivers and charts actions in the sector: SNAICC — National Voice for our Children, *The Family Matters Report 2022: 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, 2022) ('*The Family Matters Report 2022*'). See also *Royal Commission into Family Violence* (Final Report, March 2016) vol V, Chapter 26: Aboriginal and Torres Strait Islander Peoples ('*Royal Commission into Family Violence*').
13. State of Victoria, Response to Issues Paper 2: Call for Submissions on Systemic Injustice in the Child Protection System, 17 March 2023, [30].
14. Witness Statement of Argiri Alisandratos, 21 March 2023, 16 [14].
15. Transcript of Commissioner Meena Singh, 5 December 2022, 51 [6]–[11].
16. Department of Fairness, Families and Housing, Response to NTP Item 002-023 — *Risk Factors for Involvement in Child Protection — Linked Data Analysis 2023*, 1, produced by the State of Victoria in response to the Commission's Notice to Produce dated 21 April 2023.
17. Transcript of Argiri Alisandratos, 27 April 2023, 31 [13]–[50].
18. 'This happened this year 2022 ... there was a young Aboriginal man ... entered a ... major hospital, and he was quite ill ... security marched him up to his ward ... marched him up to his bed, body searched him, searched his belongings in the drawer looking for drugs ... He died four days after being released from that hospital being treated like a criminal in a public hospital system. That's one horrific story. There are many more': Transcript of Aunty Jill Gallagher AO, 6 December 2022, 124 [29]–[41]; another example of the same stereotyping is at 131 [15]–[22]. For other examples see Outline of Evidence of Damian Griffis, 2 March 2023, 3 [17]; Transcript of Isobel Paipadjerook Morphy-Walsh, 20 May 2022, 184 [41]–[46], 185 [1]–[14] speaking of the assumption by a hospital that her father was drunk when he presented with a pancreatic attack.
19. Karen Jackson, Submission 57, Attachment 4 (case study of Marlene), 2.
20. Victorian Aboriginal Child Care Agency, Submission 77, 107.
21. Summary of Community Evidence (De-Identified Direct Quotes) Obtained at Roundtables and Prison Visits, 14 June 2023, 1 [1].
22. The Commission for Children and Young People noted that '[i]n the absence of easily accessible, culturally appropriate support services to strengthen the capacity of families to provide optimal care, the trajectory to child protection intervention is increasingly the outcome for many Aboriginal children and their families': *Always Was, Always Will Be Koori Children* (n 3) 53.
23. *Roadmap for Reform: Pathways to Support for Children and Families* (n 2).
24. Statement of Commissioner Meena Singh, 2 December 2022, 11 [36].

25. These services aim to support families to build skills and resilience, increase their ability to provide a safe and nurturing home environment and reduce the likelihood of subsequent child protection involvement: Witness Statement of Argiri Alisandratos, 21 March 2023, 31 [95]. The funding split between ACCOs and CSOs for these services is discussed below.
26. Witness Statement of Argiri Alisandratos, 21 March 2023, 31 [95]. See also Department of Health Statement, 21 March 2023, 15 [62], acknowledging the importance of culturally safe and inclusive services and noting, '[w]e know that there is a long way to go to achieve this.'
27. Witness Statement of Argiri Alisandratos, 21 March 2023, 32 [98].
28. Victorian Aboriginal Child Care Agency, Submission 77, 107.
29. *The Family Matters Report 2022* (n 12) 42.
30. Djirra, Submission 44, 16. See also Victorian Aboriginal Child Care Agency, Submission 77, 108: 'The government states that in 2021–22, 10,964 out of 128,273 Orange Door clients (8.5 per cent) identified as Aboriginal: Witness Statement of Argiri Alisandratos, 21 March 2023, 24 [54]; It also notes that Aboriginal Access Points are being established to provide a culturally safe referral pathway into the Orange Door for Aboriginal people impacted by family violence: Witness Statement of Argiri Alisandratos, 21 March 2023, 61 [264]; Note that in further information provided to Yoorrook, DFFH states that 'there is an Aboriginal Response Team and an Aboriginal Practice Leader in every [Orange Door] network. These practitioners are employed by the Aboriginal Community Controlled Organisation partners.' Department of Families, Fairness and Housing, Supplementary response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 11 May 2023, 23 May 2023, Attachment 1, 13. DFFH funds 34 ACCOs to deliver family violence supports services across five program areas: the Orange Door, case management, refuges, therapeutic responses and adolescent family violence: at 13-15.
31. Transcript of Argiri Alisandratos, 27 April 2023, 27 [14]–[16].
32. *The Family Matters Report 2022* (n 12) 39. This draws on government reporting on real recurrent expenditure on all child protection services. It uses annual Report on Government Services data on investment in intensive and non-intensive family support ('front end') compared with expenditure on protective intervention services and care services ('back end') as the proxy. Data is drawn from the Australian Government Productivity Commission, 'Part F, Section 16 Child Protection Services', *Report on Government Services 2023* (2023) ('*Report on Government Services 2023*').
33. *Report on Government Services 2023* (n 32) Table 16A.8.
34. *The Family Matters Report 2022* (n 12) 41.
35. Transcript of Aunty Glenys Watts, 6 December 2022, 87 [40]–[45].
36. Victorian Aboriginal Child Care Agency, Submission 77, 107.
37. Victorian Aboriginal Child Care Agency, Submission 77, 104. Victorian Aboriginal Legal Service, Submission 38 (Child Protection System), 21–22; Djirra, Submission 44, 20; Transcript of Felicia Dean, 7 December 2022, 169 [16]–[29]; Supplementary statement of Commissioner Meena Singh, 10 May 2023, 36–37 [153]–[155].
38. Supplementary statement of Commissioner Meena Singh, 10 May 2023, 50 [206]. Yoorrook further notes the importance of parenting programs (including pre and post birth; Maternal and Child Health Services and Koori Playgroups).
39. Witness Statement of Raylene Harradine, 29 May 2023, 6 [30].
40. Witness Statement of Argiri Alisandratos, 21 March 2023, 16 [16].
41. Witness Statement of Argiri Alisandratos, 21 March 2023, 112 [488]–[489].
42. Witness Statement of Argiri Alisandratos, 21 March 2023, 113 [491].
43. Witness Statement of Argiri Alisandratos, 21 March 2023, Attachment AA-26, 53. Note that Yoorrook received other information that states that in 2021, \$284 million was invested in family services programs of which \$45.5 million (16 per cent) was provided to ACCOs: Department of Fairness, Families and Housing, Response to NTP Item 002-023 — *Risk Factors for Involvement in Child Protection — Linked Data Analysis 2023*, 4, produced by the State of Victoria in response to the Commission's Notice to Produce dated 21 April 2023.
44. 'Service intensity' is the term used by DFFH for these subcategories within Family and Parenting support. Yoorrook assumes Parenting support is the least intense and Intensive Family Services and Placement Prevention Reunification Services is the most intense.

45. Witness Statement of Argiri Alisandratos, 21 March 2023, Attachment AA-26, 55. Yoorrook notes that the 2023–24 budget provides \$3.9 million for an Aboriginal-led Early Parenting Centre and the \$140 million over four years funding package across various parts of the family and child protection system: Victorian Government, 'Victorian Budget 23/24', *Supporting Treaty and Self-Determination* (Web Page, 19 May 2023) <https://www.budget.vic.gov.au/supporting-treaty-and-self-determination>. See also, 'Stronger Families — Closing the Gap by Transforming the Children and Families Service System': Department of Treasury and Finance, Victorian Government, *Victorian Budget 2023–24: Service Delivery* (Budget Paper No 3, 2023) 3, 5 ('*Victorian Budget 2023–24: Service Delivery*').
46. Witness Statement of Argiri Alisandratos, 21 March 2023, Attachment AA-26, 55–56.
47. Witness Statement of Argiri Alisandratos, 21 March 2023, 39 [135]; Yoorrook notes that these programs continue to be funded in the 2023–24 State Budget: *Victorian Budget 2023–24: Service Delivery* (n 45). See also Victorian Government, 'Victorian Budget 23/24', *Supporting Treaty and Self-Determination* (Web Page, 19 May 2023) <https://www.budget.vic.gov.au/supporting-treaty-and-self-determination>.
48. Transcript of Argiri Alisandratos, 27 April 2023, 36 [19].
49. Transcript of Argiri Alisandratos, 27 April 2023, 39 [15]–[20].
50. Victorian Aboriginal Child Care Agency, Submission 77, 98.
51. 'Data from the Department shows that 58 per cent of referrals to the Orange Door involving Aboriginal children are from Police or Child Protection, with a further 20 per cent from professionals, only 21 per cent are self-referrals. To classify referrals to the Orange Door as a form of early intervention is misleading and further masks the lack of genuine investment in early intervention to keep children at home': Victorian Aboriginal Child Care Agency, Submission 77, 98.
52. Department of Families, Fairness and Housing, Response to NTP Item 002-002 — *ACF October 2022 Data Pack*, 4, produced by the State of Victoria in response to the Commission's Notice to Produce dated 3 November 2022.
53. Witness Statement of Argiri Alisandratos, 21 March 2023, 19 [27].
54. Transcript of Argiri Alisandratos, 27 April 2023, 35 [43]–[46]. Mr Alisandratos further noted that ACCOs have called for a more flexible approach to reporting, but that this 'continues to be a challenge in terms of how we account for delivery of State investment across all our funded services': Transcript of Argiri Alisandratos 11 May 2023, 727 [33]–[42].
55. Transcript of Karinda Taylor, 8 December 2022, 231 [8]–[11]. See also Supplementary Statement of Commissioner Meena Singh, 10 May 2023, 36 [151].
56. Transcript of Lisa Thorpe, 9 December 2022, 280 [10]–[14]; See also Transcript of Stacey Brown, 9 December 2022, 281 [20]–[23], noting 'one of the things we ... pride ourselves on is those relationships that we do have with our families and community that they can come to us and they can talk to us about the challenges that they are facing. We will implement strategies straight away to support that family thus reducing child protection intervention because we know what's happening'.
57. They also reported that there were over 400 First Peoples children in care in the region, with only one community service to meets their needs. They further reported Significant gaps in DFFH services in the region, including lack of case workers and not listening to advice from ACCHOs: Summary Report — Winda-Mara Aboriginal Corporation and Dhauwurd Wurrung Elderly & Community Health Service On Country Visit, 16 February 2023, 1.
58. Victorian Aboriginal Child Care Agency, Submission 77, 108.
59. Transcript of Aunty Hazel Hudson, 9 December 2022, 286 [24]–[25].
60. *Wungurilwil Gaggapduir* (n 2) Objective 2; Victorian Government, *The Victorian Closing the Gap Implementation Plan 2021–2023* (2021) Priority Reform 2.
61. Victorian Aboriginal Child Care Agency, Submission 77, 64. Note that information provided by DFFH about recurrent funding for family services is not clear. The table provided does not clarify whether the programs referred to are delivered through ACCOs only. Further, some of the data is contradictory stating funding is recurrent but also that it is funded until 2023–24: Witness Statement of Argiri Alisandratos, 21 March 2023, 65, Table 6.
62. Outline of Evidence of Aunty Karin Williams, 14 December 2022, 7 [67]; see also Supplementary Statement of Commissioner Meena Singh, 10 May 2023, 36 [152].
63. Witness Statement of Argiri Alisandratos, 21 March 2023, 66 [286].
64. Transcript of Karinda Taylor, 8 December 2022, 245 [40]–[41].
65. Department of Families, Fairness and Housing, Supplementary response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 11 May 2023, 23 May 2023. Attachment 1,5.
66. That is 19.4 per cent out of a total of 2,527 unborn notifications: Department of Families, Fairness and Housing, Supplementary response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 11 May 2023, 23 May 2023. Attachment 1, 11.

67. 'The annual rate of unborn reports for First Peoples children has consistently been between four and five per cent of all reports of concern to Child Protection for First Peoples children over the period 2017 to 2022. This compares with a rate of between 1.5 per cent and 1.8 per cent for unborn reports for Non-First Peoples children over the same period': Witness Statement of Argiri Alisandratos, 21 March 2023, 138 [631]. The 'annual rate of unborn reports' data refers to the percentage of all reports to child protection which were for unborn children.
68. This compares with 13.5 per cent at three months, 15 per cent at six months and 17.8 per cent at 12 months for non-Aboriginal children over the same period: Department of Families, Fairness and Housing, Supplementary response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 10 May 2023, Attachment 1, 10 [43], [45]. Note that the figures at six months and 12 months are cumulative — that is, each figure represents the total number of children subject to unborn reports within the timeframe: Transcript of Argiri Alisandratos, 11 May 2023, 747 [35]–[44].
69. *The Family Matters Report 2022* (n 12) 79. SNAICC also notes that 'VACCA is commencing cross-disciplinary work with organisations in the health sector, including VACCHO and the Department of Health, in order to combat the discriminatory practices that underpin this phenomenon and encourage a more constructive approach to Aboriginal pregnant women.'
70. Anonymous, Submission 24, 1. David Peverill, Submission 94, 4.
71. Meryle Maxwell, Submission 12, 1.
72. Transcript of Commissioner Meena Singh, 5 December 2022, 49 [47].
73. Victoria Legal Aid, Submission 39 (Child Protection), 17 (case study of Mikala).
74. The Orange Door provides an entry point to access child and family services and family violence services. The Orange Door conducts assessments and can make referrals to services.
75. Witness Statement of Argiri Alisandratos, 21 March 2023, 139–140 [638].
76. Transcript of Dr Jacyntha Krakouer, 8 December 2022, 244 [39]–[43] Supporting Aboriginal and Torres Strait Islander Families to Stay Together from the Start (SAFeST Start), Submission 40, 50. DFFH stated that 'the department does not have a 'flight risk' policy or any practice guidance requiring that contact not be made with a mother when it is considered this may impact on knowing her whereabouts': Department of Families, Fairness and Housing, Supplementary response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 11 May 2023, 23 May 2023, Attachment 1, 11.
77. Transcript of Karinda Taylor, 8 December 2022, 243 [26]–[39].
78. Outline of Evidence of Karinda Taylor, 7 December 2022, 5 [42]–[43].
79. Witness Statement of Argiri Alisandratos, 21 March 2023, 139 [635].
80. Witness Statement of Argiri Alisandratos, 21 March 2023, 139 [636].
81. Transcript of Argiri Alisandratos, 11 May 2023, 740 [17]–[21].
82. This data was for unborn reports received in 2022. 491 of these reports were in relation to 375 Aboriginal expectant mothers. That is 19.4 per cent of unborn notifications in that year. This data also shows that 79 per cent of non-Aboriginal expectant mothers were not notified of an unborn report. DFFH note that the tick box for recording whether the mother is aware of the notification is not a mandatory field and as such, the data may not reflect the true percentage of mothers notified. DFFH further note that where child protection determines that the report can be closed with advice provided to the reporter or a referral, it may not be necessary for child protection to make contact with the mother: Department of Families, Fairness and Housing, Supplementary response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 11 May 2023, 23 May 2023, Attachment 1, 11.
83. Transcript of Adam Reilly, 15 May 2023, 958 [19]–[27].
84. Outline of Evidence of Karinda Taylor, 7 December 2022, 7 [62]–[65]. When questioned about the response to this example, Mr Alisandratos said that there has been a review and guidance provided to practitioners, reinforcing the need for timely engagement in a way that engages pre-existing supports: Transcript of Argiri Alisandratos, 11 May 2023, 729 [1]–[6].
85. Witness Statement of Argiri Alisandratos, 21 March 2023, 140 [639]. Note that consent is not required to exchange information with other entities (like hospitals) or when providing information or advice to the person who has made the report: Witness Statement of Argiri Alisandratos, 21 March 2023, 142 [649].
86. Supporting Aboriginal and Torres Strait Islander Families to Stay Together from the Start (SAFeST Start), Submission 40, 21.
87. Transcript of Karinda Taylor, 8 December 2022, 233 [14]–[16].
88. Transcript of Karinda Taylor, 8 December 2022, 233 [12]–[14].

89. Witness Statement of Argiri Alisandratos, 21 March 2023, 145 [671].
90. DFFH data show that in 2021–22, ACSASS was consulted in 17 per cent of cases during the ‘intake phase’. Data was not specifically provided on ACSASS consultation on unborn reports: Department of Families, Fairness and Housing, Response to NTP Item 002-001 – *Tranche 2 data response supplied by the Performance and Analysis, System Reform and Workforce Division*, 9, produced by the State of Victoria in response to the Commission’s Notice to Produce dated 3 November 2022.
91. Witness Statement of Argiri Alisandratos, 21 March 2023, 140 [640].
92. Mr Alisandratos could not confirm the start date of this requirement but noted there is ‘a little more work to be done to operationalise the policy’: Transcript of Argiri Alisandratos, 11 May 2023, 718 [11]–[31].
93. This includes the Garinga Bupup program and the Bringing Up Babies At Home (BUBAH) program. The 2020–21 State Budget increased ongoing funding to ACCOs to expand capacity of intensive family services for pre-birth notification by 171 x 200 hour targets’. DFFH has also ‘updated program guidelines and the ACCO pre-birth notification referral process to be tabled for discussion and endorsement at the next ACF’: Department of Families, Fairness and Housing, Supplementary response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 11 May 2023, 23 May 2023, Attachment 1,3.
94. State of Victoria, Response to Issues Paper 2: Call for Submissions on Systemic Injustice in the Child Protection System, 17 March 2023, [51].
95. State of Victoria, Response to Issues Paper 2: Call for Submissions on Systemic Injustice in the Child Protection System, 17 March 2023, [50]–[51].
96. Witness Statement of Argiri Alisandratos, 21 March 2023, 144 [663].
97. Transcript of Aunty Muriel Bamblett AO, 6 December 2022, 106 [43]–[44].
98. For example, within DFFH there does not appear to be Key Performance Indicators for executives that relate to the reduction in the over-representation of Aboriginal children in out of home care: Transcript of Argiri Alisandratos, 27 April 2023, 32 [37]–[49].
99. See, eg, discussion between Commissioners and witness in Transcript of Argiri Alisandratos, 27 April 2023, 19–20 [19]–[47].
100. Over-representation in reporting and substantiation rates are discussed in the next chapter.
101. Witness Statement of Argiri Alisandratos, 21 March 2023, 16 [16].

6 CHILD REMOVAL

The Department never offered me any direction. They raised protective concerns for me and my children but didn't resource supports or make referrals. They never told me what they needed from me in order to stop my child from being removed, or for me to get my child back. If they had been willing to work with me, to tell me what I needed to do to have my child stay with me, I would have done what was needed to get my baby back. I would have done anything just to get my baby back.¹ MIKALA

Introduction

Rather than supporting First Peoples families, the Victorian child protection system frequently causes further harm and ongoing trauma. The evidence received by Yoorrook indicates a system still exhibiting signs of the systemic racism inherent in its genesis as a tool of colonisation. The Department of Families, Fairness and Housing (DFFH) does not follow its own legislative requirements and policies in relation to First Peoples and is deeply feared and mistrusted by First Peoples families and communities.

The most harmful flaws in the current child protection system are in the Department's practices and processes relating to the removal of Aboriginal children from their families into out of home care. This chapter looks at how decisions are made by DFFH to remove First Peoples children from their parents. It identifies key aspects of the reporting and investigation processes, and their application, that are failing those families. This includes how the process for identifying Aboriginal children works in practice.²

As noted throughout this chapter, the government admits that the very high rates of over-representation of First Peoples children in out of home care is itself proof that the current system is shameful.³ Yoorrook agrees. Victoria's child protection system operates in a way which is discriminatory, breaches fundamental cultural and human rights of the child, causes trauma and disconnects children from their culture which in itself causes harm.

Yet the continuation of child removal has become so normalised that rates are higher than they were at the time of the *Bringing Them Home* report.⁴ It is

as if the State has learnt very little. In government evidence to Yoorrook the sentiment of deep listening to Aboriginal communities, progressive transfer of functions to ACCOs and 'we know we must do better' were constant themes.⁵ That is not enough.

What Yoorrook heard

Aboriginal children are over-represented in the child protection system

THEY ARE MORE LIKELY TO BE REPORTED TO CHILD PROTECTION

A child enters the child protection system when a report is made about them. Aboriginal children are 5.7 times as likely to be reported to child protection than non-Aboriginal children.¹⁵ This high rate is likely to be at least in part due to racism and bias in universal services (as noted in Chapter 5: Early help), as well as in the general community. Acting Associate Secretary of DFFH Argiri Alisandratos acknowledged this, stating:

Given the higher rates of reports for First Peoples children... and the rates at which reports for all children do not reach the threshold for investigation I believe some reporters are misjudging the level of risk, lack awareness and trust in the secondary service system or prefer to have Child Protection assess the level of risk all of which is leading to unnecessary reporting.¹⁶

How child protection intake and investigation works



The first step in the child protection process ('intake'⁶) is when a person makes a report to child protection, to the Child and Family Information, Referral and Support Team (Child FIRST),⁷ or Orange Door (none of which are Aboriginal-led services).⁸ Reports can be made by anyone. Victoria also has a mandatory reporting scheme compelling certain professionals (such as doctors, nurses, midwives, teachers and psychologists) to report to child protection if they form a belief on reasonable grounds that a child needs protection from physical injury or sexual abuse.⁹

Child protection intake workers gather a range of information from the reporter and from other sources like the child protection and family violence databases and from other services. Intake workers conduct a risk assessment using the SAFER children framework.¹⁰ Where family violence is identified as a risk factor, they also conduct a family violence risk assessment using the Multi Agency Risk Assessment and Management Framework (MARAM).¹¹ These assessments determine the next step in the process:

- Where a report is considered to have low to moderate impact on the child, it is classified as a 'child wellbeing report' and referred to Child FIRST or the Orange Door for further assessment and referrals to family services.
- Where the consequence of harm to a child is either significant or severe, and the probability of harm is either likely or very likely, a report may be classified as a 'protective intervention report'. Protective intervention reports require investigation.¹²

Where a report is classified as a protective intervention report at intake, child protection workers investigate whether the child is 'in need of protection'. Child protection workers visit the child and family and gather information from them and other sources. This information is used to assess whether the child has suffered or is likely to suffer significant physical harm, sexual abuse or emotional or psychological harm and whether the child's parents have not or are unlikely to protect the child from it.¹³ If the child is assessed as 'in need of protection', the report is 'substantiated'. Outcomes of investigations must be determined within 28 days.

Child protection workers must try to determine as early as possible whether the child is Aboriginal. For Aboriginal children, Aboriginal Child Specialist and Support Services (ACSASS) must be consulted to provide culturally attuned advice on the investigation process and substantiation decisions.¹⁴

Most reports (61 per cent) for First Peoples children do not proceed to an investigation.¹⁷ However, DFFH's cumulative harm policy means that some of these will still be investigated. This policy requires an investigation of the third report in 12 months or the fifth report in the child's life. The more reports the greater the likelihood of child protection involvement in the lives of Aboriginal families. Aboriginal children are on average reported to child protection for the first time at an earlier age¹⁸ and are subject to more re-reports. In 2021–22, 87 per cent of reports to child protection concerning First Peoples children were re-reports, compared with 73 per cent for non-First Peoples children.¹⁹

As noted in Chapter 5: Early help, Aboriginal children and families are more likely to experience family and other violence, insecure and inadequate housing and homelessness and ill-health including mental ill-health because of the ongoing impacts of colonisation. However, these factors alone do not fully explain the level of the over-representation of Aboriginal children and families in child protection reports or their removal into out of home care. DFFH gave evidence that

even if Aboriginal and non-Aboriginal children presented with equivalent known risk factors, Aboriginal children would likely still be over-represented. For example, an Aboriginal child under the age of 10 who hasn't yet interacted with the child protection system is nonetheless 78 per cent more

likely to have a placement over their lifetime (to age 18) compared with a non-Aboriginal child, after controlling for known risk factors.

This additional gap widens as children move through the system, and most of this increase is driven by further over-representation at the re-report and intervention stages. This difference could be due to factors not available in the data.²⁰

Figure 6-1 shows that a significant percentage of the over-representation of Aboriginal children at the report stage and the entry to care stage is *not* associated with known ‘risk factors’ (45 per cent for reports and 65 per cent for care entry). This data suggests potential bias in the community (with regard to reports) and within the child protection system itself.

THE OVER-REPRESENTATION IS WORSE FURTHER INTO THE SYSTEM

In 2021–22, just over one in four First Peoples children in Victoria were the subject of a report to child protection and one in 10 were in out of home care.²²

Evidence shows that at 30 June 2022, when compared to non-Aboriginal children, Aboriginal children in Victoria were:

- 5.7 times as likely to be the subject of a report to child protection services²³
- 7.6 times as likely to have a finalised investigation by child protection
- 8.5 times as likely to be found by DFFH to be ‘in need of protection’
- 21.7 times as likely to be in out of home care.²⁴

FIGURE 6-1:
Over-representation of Victorian Aboriginal children in reports to child protection and entry into care based on known ‘risk factors’ and other factors that are not known ‘risk factors’²¹

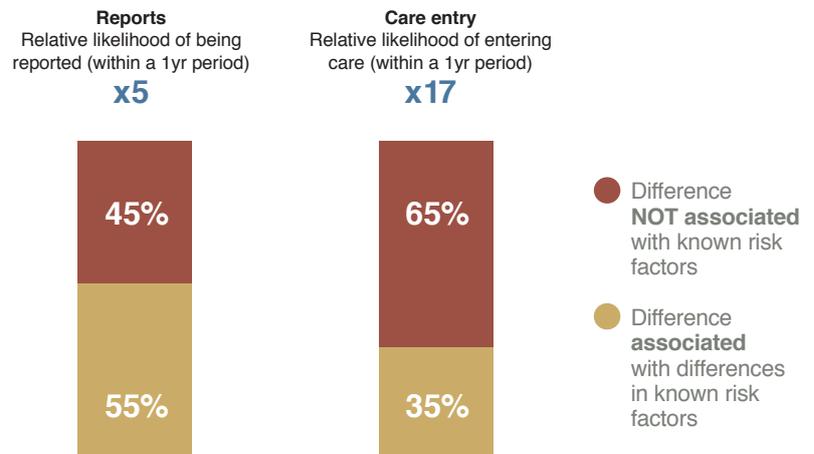
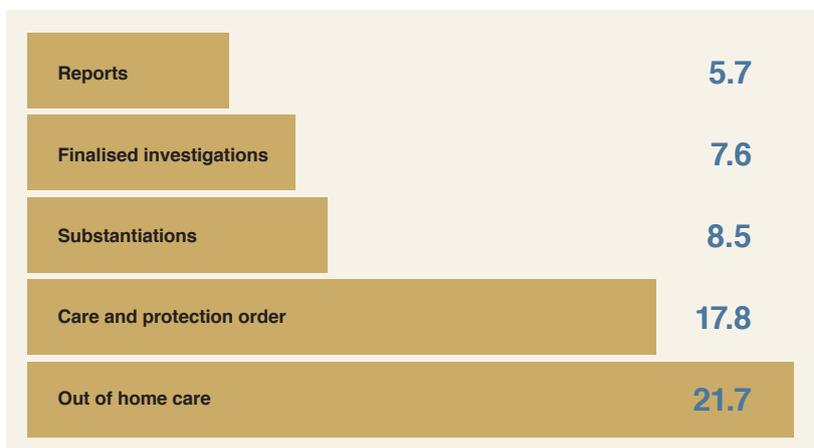


FIGURE 6-2:
Rate of over-representation of Aboriginal children through the child protection process 2021–22



DFFH told Yoorrook that there has been a very small decline in the rate of Aboriginal children in out of home care, from 103 per 1000 in 2020–21, to 102.2 per 1000 in 2021–22.²⁵ DFFH data shows that in the 12 months to 31 July 2022, the number of Aboriginal children in out of home care fell by approximately three per cent. DFFH later clarified that his reduction was not statistically significant.²⁶ This was described as ‘promising’, ‘a start’ and ‘an important pivot point’, which DFFH attributes to a number of family preservation diversionary programs and emerging models of care through ACCOs.²⁷

Yoorrook, like the Victorian Government, hopes that the over-representation rate is starting to head in the right direction.²⁸ However it is too soon to tell if this is a trend or an aberration.

On any measure, the rate of Aboriginal children in out of home care in Victoria remains shameful. It is the highest in Australia and close to double the national average.²⁹ The need for urgent action to address it is acute. These are not just numbers. Behind each statistic is an Aboriginal child, family and community torn apart by child removal.

Legal help is needed early

Through our work, we see the unnecessary removal of children because mothers are not supported to escape violence and do not understand that they have legal rights. For example, Djirra has been told by women that child protection advised them not to involve lawyers because that would only complicate matters. Our women are rarely given the full picture when child protection is planning to go to Court, and frequently do not fully understand the risk of losing their children.³⁰

The child protection system is extremely complex and the stakes for children and families are very high. Yoorrook heard that legal information and advice is needed so that Aboriginal parents can meet their obligations and to ensure decisions made by the system are fair.

In its submission, Djirra called for a child protection report and referral scheme that would immediately refer First Peoples families to an appropriate service for legal advice when a child protection report is made.³¹ Djirra’s proposal for this scheme is similar to the notification scheme that requires police to notify the Victorian Aboriginal Legal Service (VALS) when an Aboriginal person is taken into police custody.

Yoorrook agrees such a system would benefit Aboriginal families many of whom struggle to navigate the complexity of the child protection system — particularly given the intersections between risk of child protection involvement and homelessness, family violence and other areas of disadvantage. Evidence described below on bias in risk assessment and decision-making further supports creating a mechanism to make legal advice and information more accessible to First Peoples families particularly at the point of substantiation.

Post substantiation is the period where case planning commences, so it is critical that parents have legal and non-legal advocacy support to navigate that process and respond when DFFH is seeking families to commit to actions. Another point where legal advice is critical is when a pre-birth report has been made.

To ensure its effectiveness and consistent with the right to self-determination, any new notification mechanism should be designed, delivered, monitored and evaluated by First Peoples. It should take into account privacy and health information legislation protections by requiring consent prior to a referral being made to the legal provider. Identification and management of any legal conflicts of interest will also be needed, for example if the legal provider(s) selected for the scheme has provided legal advice to the other parent in a family violence matter.

Investigation and risk assessment processes are failing First Peoples

FAST INVESTIGATIONS ARE DRIVING UP THE RATE OF SUBSTANTIATIONS

Once a report is made, DFFH must decide whether the child is in need of protection under the relevant criteria.³² If DFFH decide the child needs protection, the decision on whether a report is ‘substantiated’ must be made within 28 days. DFFH must then either close the case or issue a protection application within 90 days.³³

DFFH states that ‘these timeframes are intended to ensure intervention is limited to that necessary to secure the safety and wellbeing of the child, avoid case drift and to support workflow’.³⁴ However, as the government concedes, due to the long history of serious systemic injustice and ongoing injustice, these timeframes ‘may not allow sufficient time to develop an informed assessment and for families to be referred and engaged with trusted services’.³⁵

The rate of report substantiation is higher for First Peoples and more of these reports are substantiated quickly:

- As at 31 January 2023, 20 per cent of all reports concerning First Peoples children were substantiated compared to 13 per cent of reports about non-First Peoples children.³⁶ In 2021–22, Aboriginal children were nine times as likely as non-Aboriginal children to have a report about them substantiated.³⁷
- As at 31 January 2023, 45 per cent of reports for First Peoples children were substantiated within 28 days compared to 39 per cent for all children.³⁸

The rate and pace of substantiations raises a significant concern about the quality of investigations and substantiation decisions by child protection. Yoorrook heard that ongoing workforce pressures within the child protection system also affect the quality of decision making. For example, The Victorian Aboriginal Children and Young People’s Alliance submitted that:

If you are a child protection practitioner in a response team, undertaking initial investigations of allegations of abuse and neglect, and you are drowning under your case load, feeling that you can’t do justice to the complex and vitally important work you are doing — if that is the case, the easiest and safest way to shift a case off your caseload is to substantiate abuse and hand the case onto a case management team to do further work. If you substantiate incorrectly, you might say to yourself, no harm done — at least the child is safe, and we will do more work with them. Do not forget that if you make a mistake the other way, where you do not substantiate, but the child really is at risk of child abuse, the outcome could be catastrophic. It is ‘safer’ to substantiate and pass it on. However, what this approach fails to consider is that once the substantiation decision is made, the child is in the child protection system, and ... the rate of over-representation compounds at every step.³⁹

VALS told Yoorrook:

Child protection is so under-resourced and under-staffed that the best-interests principle is systematically disregarded — because the paramount consideration in decision-making is, unavoidably, the need to allocate very scarce resources and prioritise work accordingly.⁴⁰

Under-resourcing in the child protection system is a chronic issue. The problem has been raised by numerous past inquiries, including two recent inquiries by the Victorian Auditor General’s Office.⁴¹ Data provided by government confirms that the child protection workforce continues to be severely overstretched.⁴² The average case load for child protection practitioners

is 13 cases.⁴³ DFFH Executive Director Adam Reilly noted that in his area, Wimmera South West, the case load is around 20 cases, but that does not include work on unallocated cases. This means ‘as a team we are operating at 140 per cent capacity’.⁴⁴ He described child protection workers as ‘grossly overworked’.⁴⁵

While government is attempting to address child protection resourcing through its Child Protection Workforce Strategy, the problem remains.⁴⁶ Yoorrook is very concerned that under-resourcing is directly leading to poorer outcomes and human and cultural rights violations for Aboriginal children and families. If the focus is on getting cases completed (‘throughput’), this increases risks that the system will breach the cultural and human rights of children and families, fail to protect children who need it and divert those who do not.⁴⁷ It also increases the risk that DFFH (child protection) is not acting as a ‘good parent would’, a requirement under the *Children, Youth and Families Act 2005* (Vic) (CYFA).⁴⁸ As made clear throughout this report, lack of resources is not an excuse for failing to meet human and cultural rights obligations.

SIMPLISTIC RISK ASSESSMENT TOOLS CONTAIN BIAS

Yoorrook heard that risk assessment tools and processes contain an inherent bias because of the way they concentrate on risk rather than strengths and punish families who seek help to address protective concerns.⁴⁹

In applying the CYFA and undertaking risk assessments to determine if a child is in need of protection, DFFH child protection practitioners have to navigate many complex and lengthy policies, guidelines and practice guidance materials. These include the Child Protection Manual and the Best Interests Case Practice Model (BICPM). In recognition of this complexity, in 2021 DFFH produced the *SAFER Children Framework Guide* (SAFER Guide) to provide practitioners with greater direction.⁵⁰

However, Yoorrook heard evidence that:

- The SAFER Guide contains no specific guidance for the child practitioner to consider the strength of culture as a protective factor. To find this, DFFH staff must refer to further practice guidance elsewhere.⁵¹

- The SAFER risk assessment snapshot tool does not instruct the practitioner to analyse the harm of removal.⁵² In particular, it does not specify the particular harm that being removed from culture has on First Peoples children.⁵³
- Child development and trauma departmental guidance lists racism and intergenerational trauma as risk factors.⁵⁴ This is problematic because racism and intergenerational trauma are highly likely to be present for Aboriginal families, so by default being Aboriginal might be seen by practitioners as a risk factor in itself. Important context is not provided in the guidance.

Yoorrook is concerned that in an effort to create simplicity and to help child protection staff find their way through the risk assessment process, negative stereotypes are being reinforced and positives about First Peoples families and cultures are being ignored. More nuanced and effective guidance is contained in other departmental documents and guides.⁵⁵ DFFH expects its staff to utilise these and to develop their practice over time to supplement tools like the SAFER guide:

[T]hose guides, particularly for newer practitioners, are there to orient and support the attention that they need to be given to how they work their way through a risk assessment process. Over time and with practice wisdom, those become embedded...⁵⁶

However, Yoorrook sees a significant risk that overstretched practitioners cannot effectively navigate all the various practice guides, frameworks, manuals and policies provided. This increases the risk of poor decision-making which does not give proper effect to human rights.⁵⁷ This risk is intensified if practitioners have not received effective learning and development to improve their understanding of First Peoples culture, families and the impacts of systemic and enduring racism. The risk is further intensified by the biases that practitioners can bring to the task of making child protection decisions.

There has not yet been a substantive outcomes evaluation of the SAFER Risk Assessment Framework which was introduced in 2021, however performance indicators have been established.⁵⁸

POOR RISK ASSESSMENT CAN LEAD TO DEATHS

The ultimate failure of systems focused on throughput is the death of a child. As the Commissioner for Aboriginal Children and Young People notes:

Before any child or young person comes into contact with the Child Protection system, that child or young person and their family is likely to have had a number of interactions with various government funded services, including, but not limited to, maternal and child health and wellbeing services, education, and family services. Each of these interactions represents an opportunity to identify and act upon any concerns regarding a child or young person has experienced, or is at risk of experiencing, harm.⁵⁹

The themes identified by CCYP's reviews of the deaths of children in contact with the child protection system paint a devastating picture of missed opportunities, lack of care and ongoing harm of vulnerable children, a high proportion of whom are Aboriginal.⁶⁰ The Commissioner for Aboriginal Children and Young People provided a thematic analysis of 29 child death inquiries completed for Aboriginal children and young people from 2017–22.⁶¹ These inquiries found:

- Child protection often did not properly assess family violence. In one example, a report regarding a child being bashed again by a parent was classified as a child wellbeing report and closed, because the child was by that stage considered old enough to 'self-protect'.
- There were multiple missed opportunities to link children and their families to early supports, including parenting supports, and lack of follow up to understand why families were not engaging with the supports to which they were referred.
- There was a failure to assess (and therefore respond to) cumulative harm typically relating to family violence, substance use and sexual abuse — again a lost opportunity to link a child and their family to support to disrupt the child's exposure to future harm.⁶²

These themes echo those in CCYP's systemic review of 35 children who had contact with the child protection system and had died through suicide between 2007 and 2019, *Lost, Not Forgotten*.⁶³ 17 per cent of those children were Aboriginal. That review found (among other things) that risk assessments were 'frequently shallow' and did not appropriately consider cumulative harm, information was not shared effectively, there was a lack of follow up on referrals to support and the voices of children were often not heard or taken into account.⁶⁴

RISK ASSESSMENTS ARE TAINTED BY RACIAL ASSUMPTIONS

They judge us because we're Aboriginal, and not following white societal norms for families. It has been going on for years. To us in Community, it's no longer the boogyman under the bed, its child removal.⁶⁵

Yoorrook heard that risk assessments are often made using a white middle-class lens. This raises fundamental human rights issues. Systemic racism in the child protection system plus the unconscious bias and overt racism of some non-Aboriginal child protection staff affects risk assessments and decisions about First Peoples children's futures.⁶⁶

As a result of the racism and biases embedded in the child protection workforce, there is a perception that Aboriginal people are not capable of looking after their own children. Everything is measured through a white lens of how children should be cared for, and it is not a good enough reason to take children away because the family is not perfect by western standards. There is no focus on the positives of how Aboriginal people care for children, such as the importance of connectedness and sense of belonging in a community.⁶⁷

Ignorant assumptions included perceived overcrowding in homes where families were staying.⁶⁸ Yoorrook heard of child protection workers making comments about houses being dirty⁶⁹ or, in one case, a child having dirty feet. These echo attitudes that drove child removal during the Stolen Generations:



Aunty Rieo Ellis, Grandmothers Against Removal



Damian Griffis, CEO, First Peoples Disability Network

Well, the inference in that case was that, 'You're not looking after this child properly, he's got dirty feet.' Common sense in the Department is not so common ... We'd say, 'Well, there's mud outside.' That's not neglecting the child. He's come inside from a muddy backyard. I got to say that, if they are doing this by the book, having... a child having dirty feet is not in that book that they are following, you know. It's just sometimes their made-up version and that's got to stop because it's denigrating a parent, questioning parenting skills, you know?⁷⁰

Yoorrook also heard that Aboriginal parents of children with disabilities faced discriminatory attitudes regarding both race and disability:

Parents are judged as being bad parents just because they can't afford the resources they need to support their child with disability ... The Child Protection system, and case workers, are quick to assume that a child is being neglected, when reality the issue is one of poverty. Having a disability is inherently expensive, and that's not well understood.⁷¹

Highlighting the subjective and discretionary nature of risk assessments, Yoorrook also heard that decisions may differ between regions and between individual workers,⁷² with better outcomes in regions used to working with First Peoples organisations and advocates.⁷³

Yoorrook welcomes the amendments to the CYFA contained in the Children and Health Legislation Amendment (Statement of Recognition, Aboriginal Self-Determination and Other Matters) Bill 2023 (Vic) (Statement of Recognition Bill), that will establish binding principles that child protection practitioners will apply in their decision making, including risk assessments, once the legislation comes into force.⁷⁴ These include that:

- the right of Aboriginal children, families and communities in Victoria to self-determination must be recognised, respected and supported
- when considering the views of Aboriginal children, decision-makers must uphold their cultural rights and sustain their connections to family, community, culture and country
- understanding of, and respect and support for, Aboriginal culture, cultural diversity, customary lore, knowledge, perspectives and expertise is to be demonstrated in decision-making
- strong connections with culture, family, Elders, communities and country are to be recognised as the foundations needed for Aboriginal children to develop and thrive and to be protected from harm, and
- historic and ongoing biases and structural and everyday racisms create barriers to the best interests of the Aboriginal child and are to be recognised and overcome.⁷⁵

In passing this legislation, the parliament has made clear that child protection must enliven these principles and apply them in their daily practice. Yoorrook urges the State to implement this change without delay.

This is an opportunity for DFFH to make good on its commitments to respect the human and cultural rights of First Peoples and to break the pattern ingrained in the State's treatment of Aboriginal children to remove them from their families, rather than invest in supporting parents so children can thrive in their culture. Changing this mindset cannot be achieved until DFFH addresses racial bias among its staff.

There is racism and a lack of cultural competence among DFFH staff

DFFH STAFF DISPLAY OVERT RACISM

I believe the child protection system is fundamentally racist.⁷⁶

Yoorrook also received evidence of overt racism among DFFH child protection staff. For example, Aunty Glenys Watts who had worked for the Department (then DHHS) recounted how non-Aboriginal workers in child protection:

(a) talked down about Aboriginal families; (b) talked down about Aboriginal Community Controlled Organisations (ACCOs) that were trying to help Aboriginal children; and (c) commonly said racist things and were screaming to each other across the office with these remarks. The way that child protection workers were talking to Aboriginal grandparents, carers and youth was horrible.⁷⁷



Aunty Glenys Watts

Yoorrook also heard of the damaging practice of biased assessments being recorded in file notes which follow the family throughout their contact with child protection:

There is also a distinct lack of reflective practice exercised by child protection workers, which is demonstrated by inaccuracies in the file notes and the culturally inappropriate interactions they have with Aboriginal families. This is critical because once their observations are written on the file, then that's the record and you can't simply change it ... As each social worker reviews the file (without proper reflection) their biases will remain ... From my professional experience, I have seen workers being biased against particular families, saying things like, 'watch out for this particular mother, she gets angry.'⁷⁸

Yoorrook heard that trauma and fear can make First Peoples families reluctant to engage with child protection, which then becomes a further risk factor for child removal:

[Y]ou don't actually want to talk to them because you are so scared that it's going to happen to you, what happened to our ancestors, what happened to our Elders, what might have happened to your mum or your grandma or your dad. That trauma kicks off this kind of response where you are so fearful that you don't really want to have child protection in your home, you don't really want to cooperate. Child protection actually then put that as a risk factor, 'Unwilling to cooperate.' ... It doesn't understand how the history continues to impact the present, how it actually impacts our families right now.⁷⁹

This evidence indicates a serious lack of cultural competence in the child protection workforce. Some witnesses linked this to lack of professional experience:

[C]hild protection workers are often young, inexperienced, and come to this work loaded with stereotypes ... They are young people with a set of rules they must follow,

but it is not culturally safe or appropriate when dealing with Aboriginal children ... many child protection workers we come into contact with ... do not see any value in Aboriginality.⁸⁰

In other cases, there is just simple disrespect. Aunty Stephanie Charles told Yoorrook:

I was told by the child protection worker that I had to do a parenting course. I am an Elder who has raised seven children and four grandchildren, and I had a child protection worker who was so young that she must have only just finished her course, telling me that I needed to learn how to be a parent.⁸¹

DFFH staff are given extensive powers under child protection laws to make critical decisions affecting the lives of children, families and communities in relation to which they have an obligation to respect cultural and human rights. As the agency tasked with being the parent of the children it removes from their families, it is incumbent on DFFH to eliminate racism, whether conscious or not, found in the attitudes and behaviours of some of its child protection workforce.

EFFORTS TO BUILD CULTURAL CAPABILITY HAVE NOT LED TO CONSISTENTLY BETTER PRACTICE OR COMMUNITY TRUST

The Victorian Government concedes that racism still exists in child protection:

[T]here is insufficient cultural understanding and competence across our system. While there has been an increased focus on professional development and training... the cultural competence of the workforce has resulted in failures to understand and respond appropriately to First Peoples families and is likely to be driving reports, higher rates of substantiation and intervention. While it is difficult to quantify, I do accept, given accounts by First People over my professional career and our increasing rates of over-representation that both conscious and unconscious bias and racism still exist in our service system as it does in the broader community.⁸²

The Commissioner for Aboriginal Children and Young People noted the lack of understanding of identity and culture among child protection workers, stating 'there must be ongoing training and reinforcement for child protection practitioners in understanding Aboriginal identity and culture... and not to rely on assumptions in decision making.'⁸³

DFFH provided evidence to Yoorrook about the various training courses and policies it has introduced in an effort to improve capability. For example, all department staff must complete a 20-minute cultural safety e-learning module and also a human rights e-learning module.⁸⁴

All DFFH child protection staff are required to complete basic Aboriginal cultural safety training and receive training on engaging with Aboriginal children and their families as part of modules in the Beginning Practice in Child Protection program.⁸⁵ This is a two-hour component.⁸⁶ Managers must also complete dedicated cultural safety training.⁸⁷ In addition, there is optional training on cultural awareness.⁸⁸ All of the practice training concerning First Peoples children and families has been developed and delivered by First Peoples.⁸⁹

However, in evidence DFFH informed Yoorrook that while there are various compulsory and voluntary modules, these do not include an assessment of what has been learnt. Instead 'they are designed for raising awareness, raising proficiency, and then the assessment goes back to the supervisory accountability structures that we have in place'.⁹⁰

Online child protection practice forums are held fortnightly on a range of topics. But since 2020, only three have related to working with First Peoples families and children. Staff may also access the content through the Child Protection Learning Hub.⁹¹ DFFH told Yoorrook that a series of 30-minute forums on the Aboriginal Child Placement Principle are starting to be offered this year. A new e-learning module about asking the questions around Aboriginal identity is also in development.

DFFH is also currently 'procuring the development and delivery of a new culturally safe practice for child protection training program' to be delivered to all child protection staff over the next three years.⁹² DFFH also

has an Aboriginal and Torres Strait Islander Cultural Safety Framework⁹³ and since 2019 has conducted an annual cultural safety survey for First Peoples staff.⁹⁴

DFFH Executive Director Adam Reilly noted the varying degrees of cultural proficiency among child protection practitioners, commenting that ‘power without knowledge can be extremely dangerous’.⁹⁵ As well as emphasising the need for local connection to avoid a ‘one size fits all’ approach, he noted the benefits of accredited and deeper cultural competency training in providing staff with the tools they need to do their jobs more effectively.⁹⁶ He told Yoorrook:

I use language like ‘specialist’ when I describe what we need to provide in terms of that bare minimum training to our staff. And I think about with if I went to a GP and it was determined that I needed to have surgery on my brain, I would be really concerned if the GP started performing that. And it’s a crude comparison but I hope it makes the point. I would expect to see a specialist. The brain is a fragile, sensitive, very complex part of our body, and in the same spirit, I would like to think that we will get to a place where we understand the significance, the complexity, the fragility and the power that will come from culture and that we land at a place that says: yes, these clinical qualifications are critical to do your role but if you’re going to come in contact or in any way influence an outcome for an Aboriginal person or family, you need to satisfy us with these qualifications.⁹⁷

Mr Reilly spoke of a DFFH partnership with a university which developed a training module of micro certificates taught at the master’s level. Completing all four micro certificates in the Community Services and Self Determination Series is equivalent to completing one master’s level subject.⁹⁸ He told Yoorrook, ‘the clear pattern from the feedback of this, and it is powerful stuff in terms of the modules that staff are doing — is that, at completion, people were saying, “Why didn’t I know this before?”’. He added,

it’s not just about a benefit for our families and our communities. It will actually assist our grossly overworked child protection workers with increased referral options,

better connection in terms of kinship, and I think once you know what you don’t know then the resources and the relationships that will come from that, I think that can only be good for all of our organisation.⁹⁹

This type of learning has the potential to build much deeper capability than short e-learning modules or courses that only touch the edges of what is needed to work effectively with First Peoples. Further, while some remedial work is being proposed by DFFH, most of this has yet to be achieved or is still in the development phase.

As the government admits, racism and bias persist, contributing to the injustice of high rates of removal of Aboriginal children. This is a fundamental human rights issue which DFFH and the government are obliged to urgently address.

Targeted help is often not provided

IDENTIFICATION OF ABORIGINALITY IS CRUCIAL TO MEETING LEGAL OBLIGATIONS

As noted at the start of this chapter, child protection staff must try to identify Aboriginal children as early as possible in the child protection process and have specific obligations around confirming that identity during the initial investigation.¹⁰⁰ This is because Aboriginal children’s rights (including important human rights relating to culture) hinge on this identification. If a child is Aboriginal, there are legislative and human rights responsibilities to preserve children’s connections to culture and family and involve families and other relevant community members in decisions. Identification of Aboriginality is a gateway for:

- eligibility to specialist services
- access to the Aboriginal Children in Aboriginal Care (ACAC) initiative (discussed in Chapter 7: Out of home care)
- the obligation for consultation with ACSASS on child protection decisions
- safeguards such as Aboriginal Family Led Decision Making (AFLDM) meetings
- the Aboriginal Child Placement Principle
- mandatory requirements to have a cultural plan.¹⁰¹

Aboriginal children and families have cultural rights under s 19(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter), the United Nations Declaration on Rights of Indigenous Peoples and international human rights treaties to which Australia is a party. DFFH and its staff must uphold these rights. Correct and timely identification has immense impacts on the cultural rights of the child being able to be realised. This is not just about knowing whether a child is Aboriginal or not, but about being able to identify, if possible, the child’s cultural background, country and Traditional Owner group and wider Aboriginal family.

Consistent with evidence given to previous inquiries,¹⁰² Yoorrook heard that non-Aboriginal child protection staff do not have the skills or knowledge to assess whether a child is Aboriginal and do not properly understand the importance of correctly identifying a child as Aboriginal.¹⁰³ This means that children may be in the child protection system for an extended period without having their identity confirmed. In other cases, children may be falsely identified as Aboriginal.¹⁰⁴ A child finding out they have been wrongly identified as Aboriginal — for example when they turn 18 and are

leaving care and need identification documents — is highly traumatising.¹⁰⁵

There are lots of kids in the system that have not had their identity confirmed... everyone is scared of the trauma that the child will experience when they are told they are not Aboriginal.¹⁰⁶

The Commission heard that appropriate Aboriginal identification work is not being done. Yoorrook received evidence that often inexperienced DFFH intake workers will tick the ‘identify as Aboriginal’ box without enough information to confirm whether the child is or is not Aboriginal.¹⁰⁷ ACCOs are left to confirm Aboriginality,¹⁰⁸ without the funding to support them: ‘we are told it’s an urgent placement and they will get back to us with further details and never do, hoping we do not raise it again.’¹⁰⁹ This work can be very intensive because of difficulties in accessing records for Stolen Generations and children with interstate connections.¹¹⁰



Panel hearing with Section 18 organisations. L-R Counsel Assisting Fiona McLeod AO SC, Aunty Hazel Hudson, Njernda, Felicia Dean, Rumbalara Aboriginal Co-operative, Shellee Strickland, Gippsland & East Gippsland Aboriginal Co-Operative

Yoorrook understands that issues around Aboriginal identification have been raised through the Aboriginal Children’s Forum.¹¹¹ Yoorrook’s view is that ACCOs should be appropriately paid for work they do to confirm a child’s Aboriginality on behalf of DFFH.

Audits on requests to de-identify First Peoples children were conducted in 2021 and 2022. These give some insights into how well DFFH staff are fulfilling their obligations regarding identification of Aboriginal children. These audits showed that:

- during that period there were 93 requests to de-identify 150 individual children
- most related to identification during the intake phase (54 per cent), followed by the investigation phase (20 per cent)¹¹²
- the primary reason for identification error (29 per cent of cases) was that the child protection worker had assumed Aboriginality without checking (for example, based on siblings or reporter information) or had confused Torres Strait Islander identity with other Pacific Island identities
- the next most common reason was that the family incorrectly self-identifies (19 per cent of cases), followed by administration error (13 per cent of cases).¹¹³

This audit led to the ‘Enhancing Identification Project.’ The government noted, ‘there is currently targeted professional development underway to improve the identification of Aboriginal and Torres Strait Islander children in the child protection system’.¹¹⁴ The project also led to a change of policy (to be implemented in July 2023) to change the de-identification process to allow DFFH to do this with ACSASS approval, rather than requiring approval from CCYP or the State-wide Principal Practitioner for Aboriginal Children and Families.¹¹⁵

Yoorrook acknowledges efforts to improve identification practice, but remains very concerned about this issue, including the impacts of the new de-identification approvals process. The Commission considers that this should be closely monitored to ensure that Aboriginal children’s rights are not erased through inappropriate de-identification.

Yoorrook makes recommendations at the end of this chapter regarding the need for further work on identification and the need for regular audits to ensure child protection practitioners are correctly identifying First Peoples children. This requires urgent prioritisation as it is foundational to the intended system transformation that Yoorrook recommends under treaty (recommendation 1) and new standalone child protection legislation for First Peoples (recommendation 1(d)).

THERE IS LARGE-SCALE FAILURE TO CONSULT WITH ACSASS AND HOLD AFLDM MEETINGS

The government acknowledges the gravity of the decision to remove a First Peoples child. However, its own data shows poor compliance with having AFLDM meetings and to consult ACSASS in relation to significant decisions about Aboriginal children.

AFLDM MEETINGS ARE OFTEN NOT HELD, HELD LATE OR NOT CULTURALLY SAFE

AFLDMs need to be done at the investigation phase to assess what supports are there, not once they’ve been placed on an order... It’s an add-on in mainstream child protection. It would be revolutionary if the system were changed to conduct AFLDMs earlier. AFLDMs allow families to take back some control — it’s important for self-determination. Because the conversation happens too late, it is ‘where can we place these kids?’ It should be done earlier, so the conversation can be ‘how can we help this family?’.¹²³

DFFH data shows that in 2021–22 only 24 per cent of First Peoples children in out of home care have had a AFLDM meeting.¹²⁴ Yoorrook was not provided with data on the stage in the process these meetings were held.

Processes DFFH must follow before a child is removed from their family



Where a report is substantiated, child protection uses the SAFER children framework to conduct a risk assessment and make a decision about the child's safety in parental care. Under this framework, consideration is only given to removing a child from parental care where:

- the consequence of harm is rated as either severe or significant
- the probability of harm is considered very likely
- the child's safety needs cannot be met by the parents.¹¹⁶

For Aboriginal children, a referral must be made to the AFLDM program¹¹⁷ within one business day following substantiation¹¹⁸ and an AFLDM meeting held within 21 days from substantiation to develop the case plan.¹¹⁹ Consultation with ACSASS is also required where consideration is being given to removing a child.¹²⁰ The case plan sets out the permanency objective (the objective for ongoing care for a child¹²¹), as well as decisions for the child's care and wellbeing, such as where the child will live, who they will have contact with, cultural support, education, healthcare, and developmental supports.¹²²

Although AFLDM meetings are supposed to be recorded, the data provided to Yoorrook is likely to be an underestimate based on past reviews of compliance that show a higher rate of AFLDM meetings.¹²⁵

Yoorrook notes that in 2016, CCYP recommended that AFLDM compliance data be provided to the Aboriginal Children's Forum and publicly reported in the DFFH annual report.¹²⁶ More than six years later, this has not been introduced. DFFH told Yoorrook that it supports provision of this data to the Aboriginal Children's Forum and CCYP but that 'data of this nature is not considered to be of adequate significance to warrant including in the department's annual report'.¹²⁷ Yoorrook considers the public provision of this data a key accountability measure for the Department's adherence to its own policies.

While the absence of reliable data makes it difficult to track compliance, Yoorrook received other evidence that shows non-compliance or late compliance,

including where an AFLDM meeting was scheduled to take place after the conclusion of a contested final hearing.¹²⁸

Where meetings do occur, they are not necessarily culturally safe. Witnesses told Yoorrook of DFFH's lack of preparation,¹²⁹ that decisions are 'often overridden by the Department ... [and that] what the family wants and suggests is regularly not listened to'.¹³⁰

The government acknowledges that resourcing levels and the co-convenor model '[do] not always support the occurrence of timely meetings in all instances'.¹³¹ It also acknowledges that families are given strict parameters within which they can make a decision and decision-making power is ultimately retained by child protection.¹³² DFFH also considers that AFLDM meetings are not legislatively required and that 'consultation and engagement with an Aboriginal community organisation is what is intended' in the CYFA.¹³³

TABLE 6-1: Compliance with DFFH policy on AFLDM meetings – First Peoples children in out of home care

	2017–18	2018–19	2019–20	2020–21	2021–22
% of unique clients with meeting	18%	19%	22%	25%	24%

ACSASS IS NOT BEING CONSULTED

While it is a legislative requirement, compliance with the consultation obligations is not monitored. This means that child protection either consults with ACSASS after the decision about a child has already been made (i.e. when it's too late), or it doesn't consult with them at all.¹³⁴

DFFH data shows that in 2021–22, ACSASS was consulted during the investigation stage in only 63 per cent of cases.¹³⁵ While this is a significant increase from 2015–16, compliance has flatlined. This data is corroborated by evidence to Yoorrook that ACSASS is often not consulted or is consulted late. ACSASS advice also does not have to be followed.¹³⁶

Yoorrook also heard that ACSASS is underfunded and cannot keep up with demand.¹³⁸ Government provided data shows that ACSASS has ongoing annual funding of \$6,746,844.¹³⁹

NOT ENOUGH HELP IS PROVIDED WHEN PROTECTIVE CONCERNS ARE IDENTIFIED

[C]hild protection act too soon in taking kids away from Aboriginal families. Often a mother, who might have gone through family violence, only wants to move things forward for herself and for her family, but the first thing that child protection ask is whether the children are safe and when the mother is leaving. There is no help or support given.¹⁴⁰

As noted in Chapter 5: Early help, Yoorrook received consistent evidence that help is not provided or not provided early enough to families to address protective concerns and prevent child removal. Yoorrook also heard that child protection workers do not sufficiently recognise the support systems First Peoples have or could draw on to keep their family together.¹⁴¹ For example, Aunty Eva Jo Edwards, a Stolen Generations

advocate, recounted how child protection removed her grandchildren without even asking whether she could care for them.¹⁴² She added:

DFFH do nothing for us, other than tell us we need to do everything for ourselves. That cannot be self-determination, if these parents don't know what is out there to support them.¹⁴³

Delays in making referrals to services, waiting lists for services and services that are not culturally safe or accessible also mean families do not get the help they need to keep families together.¹⁴⁴

By contrast, Yoorrook heard of successful efforts by ACCOs¹⁴⁵ and Grandmothers Against Removals Victoria to support families and prevent children from being removed.

We can say 'I am not the Department' ... When we're talking to parents about relapsing, we can say 'don't bullshit me, I'm your Aunty, you've got to tell me the truth. I'm here to help you and not anyone else Darling'. If we can get there as soon as possible, we can understand what is really going on, build them up, and help keep that family together. If a family member relapses, we don't kick them while they're down. We pick them up and support them.¹⁴⁶

Key features of successful interventions are trust, understanding of intergenerational trauma and a supportive non-judgmental approach. Evaluations of First Peoples-led diversion trials confirm these as core components of successful programs.¹⁴⁷

TABLE 6-2: Percentage of unique clients where ACSASS was consulted during investigation¹³⁷

2015–16	2016–17	2017–18	2018–19	2019–20	2020–21	2021–22
44%	58%	61%	65%	63%	62%	63%

Harm caused by removing a child from culture and community is not adequately considered

For children and young people it is so important to know who you are and your identity is ... if you have got your culture and your identity that's something to be strong with and to fall back on. But if that's missing from a child's life, it's a huge gap that you can't understand, and it's a huge hole.¹⁵¹

Removing a First Peoples child from their family disconnects them from their culture. Witnesses and submissions to Yoorrook said that the actual harm that this disconnection causes is not given enough weight in DFFH assessments that recommend removing a child.¹⁵²

Case law makes it clear that risk assessments must balance the perceived risk of remaining in parental care against the risk of harm caused by removal.¹⁵³ The Charter makes it clear that this balancing must be reasonable and proportionate.¹⁵⁴ This means not just considering the reasons in favour of removing the child but also the risk of cultural and other harm to the child if they are removed. However, a former Children's Court magistrate estimates that at least 80 per cent of child protection applications are based on the risk of future harm,¹⁵⁵ indicating that the actual harm of removal may not be receiving appropriate attention.

The Minister for Child Protection and Family Services agreed that workers should give due weight to the protective factors of culture, family and connection to country for Aboriginal children¹⁵⁶ and that a bespoke risk assessment tool for Aboriginal children may be appropriate for this purpose.¹⁵⁷

By contrast, Yoorrook heard that decisions made by ACCOs exercising powers under the ACAC do weigh up the risk of severing connection to family against the risk of harm.¹⁵⁸

While assessing risk of future harm is critical, Yoorrook considers that DFFH and the court should more directly consider the actual harm caused by removing First Peoples children from their parents.

The best interests principle



The 'best interests' principle in the CYFA means removing a child should be the last resort. It requires child protection workers to give the widest possible protection and assistance to the parent and child as the fundamental group unit of society and to ensure that 'intervention into that relationship is limited to that necessary to secure the safety and wellbeing of the child'.¹⁴⁸ Child protection must only remove a child if there is an unacceptable risk of harm to the child¹⁴⁹ having considered the capacity of each parent or other adult relative or potential caregiver to provide for the child's needs and any action taken by the parent to give effect to the goals set out in the case plan relating to the child.¹⁵⁰

DFFH also has obligations under the Charter and international law to protect a child's best interests when undertaking child protection work including when making child removal decisions.

The Statement of Recognition Bill amends the CYFA to include a statement that: 'The Parliament acknowledges that removing an Aboriginal child from the care of a parent may—

- a) disrupt the child's connection to their culture; and
- b) cause harm to the child, including serious harm'.¹⁵⁹

While this is a welcome acknowledgement, Yoorrook notes that it only states that harm 'may' be caused. The amendment also states that this does not affect 'in any way the interpretation of this Act or of any other laws in force in Victoria'.¹⁶⁰ Yoorrook further notes that the amendment was not placed in the section of the CYFA that contains the Aboriginal Child Placement Principles. The Minister for Child Protection and Families stated that this 'would be more likely to create challenges in balancing the assessment of what is in the best interest of the child and may lead to unintended consequences'.¹⁶¹

Yoorrook considers that the amendment to the CYFA, though welcome, does not go far enough. Given the

importance of a decision to remove a First Peoples child from their family and culture, not least the human rights implications, a better approach would be to introduce a presumption that removal of an Aboriginal child from their family or community causes harm.¹⁶² Legislation could require the Children's Court to include in its reasons how the presumption has been considered. A similar amendment was recently in draft legislation before the NSW Parliament before it was discontinued due to the NSW state election.¹⁶³ Yoorrook strongly encourages the Victorian Government to introduce such an amendment to the CYFA.

There is a better way for courts to hear child protection matters

CHILD PROTECTION COURT PROCEEDINGS ARE ADVERSARIAL

I still clearly remember the Department of Human Services coming to get us from Melbourne to drive to the Magistrates Court at Ballarat and I looked my son in the eyes and told him, 'Mummy will see you soon.' By the time I got to the DHHS office at 5 o'clock, my baby was already gone.¹⁶⁴

Court reports do not always contain information that the Court needs to make an informed decision about what is in the child's best interest. One witness described the court process and its associated requirements — including recording in the court report that help has been considered — as 'a system on autopilot ... [where] everyone's kind of going through the motions'.¹⁶⁷ Sissy Austin, kinship carer, advocate and daughter of Neville Austin who received the first letter of apology from the Victorian Government to the Stolen Generations, told Yoorrook:

[T]he way our mums are treated, the conditions that are placed on Aboriginal mums from the courts are unrealistic ... I'd love to see one of those, you know, non-Indigenous, like, white women who you see walking around the city rushing from tram to tram ... rushing to, like, a service to do one of the three urine tests that you've had to do that day ... I'd love to see them attending court, the most culturally unsafe, dehumanising place to enter into.¹⁶⁸

Protection applications in the Children's Court



Where child protection is not satisfied that protective concerns have been addressed it can apply for a protection application by notice to the Children's Court (and in regional areas in the Magistrates' Court sitting as the Children's Court). Where there is an assessment that the child is in a situation of imminent and significant harm a child may be removed immediately and a protection application by emergency care issued.

The application to the Court must include a report based on the risk assessment setting out the concerns identified, the case plan, recommendations for the order that child protection believes the Court should make and a statement outlining the steps taken by child protection to provide the services necessary to enable the child to remain in the parent's care.¹⁶⁵

The Court must not make a protection order that removes a child from the child's parent unless it has considered, and rejected as not in the child's best interests, an order allowing the child to stay with the parent; and the court is satisfied with the statement in child protection's report that all reasonable steps have been taken to provide the services necessary to enable the child to remain in the parent's care.¹⁶⁶

Protection orders are discussed further in Chapter 7: Out of home care and Chapter 8: Permanency and reunification.

Yoorrook heard, and research confirms that the conduct of child protection practitioners can be adversarial.¹⁶⁹ Child protection prepares the reports that the Court relies on to make a decision. This makes it critical that information is accurate, fair and culturally attuned. DFFH advised that following review, a new template has been used since 2020 which includes a new section on cultural needs and rights for Aboriginal children and guidance on how to complete this information.¹⁷⁰ However, Yoorrook heard that court reports 'are drafted in a way to maximise the "prosecution" of the DFFH case against the parent, using deficit language and including unnecessary details whilst also omitting relevant context'.¹⁷¹



Sissy Austin

Further, critical information from ACSASS relied on for culturally attuned advice is not directly presented in reports. Instead, it is summarised in child protection's account of the advice in its report.¹⁷² VALS notes that magistrates have expressed frustration about not receiving ACSASS advice directly.¹⁷³

VALS also told Yoorrook that the way child protection consults with ACSASS may compromise the quality of ACSASS advice. It noted that because ACSASS providers are not legally trained, if child protection leaves out critical information or includes misleading information in its discussions, ACSASS may not fully understand the legal ramifications of the child protection advice they are being asked to endorse.¹⁷⁴

Aunty Muriel Bamblett, CEO of VACCA, spoke of the court as being adversarial and not having the understanding or capacity to prioritise cultural connection:

[T]here's no recognition of what it is to be Aboriginal ... for the magistrates to be able to say, 'Has the child got a return to Country, have they got a genealogy, ... do they know their Aunts and Uncle, have they got story'? That doesn't meet within the court's barometer of looking at the best interests of children. So stability, health, education, all of those things are important, but for Aboriginal children, knowing who you are, being able to connect, being able to be able to live as an Aboriginal child, is critical as well.¹⁷⁵

There was also evidence that some magistrates may not have strong cultural competence. As described in Chapter 13: Courts, sentencing and classification of offences, this is also a problem in the criminal justice system.

I believe that all magistrates need to have that cultural competency and learning before they can do their findings and hand overs and I think that any of us, as Aboriginal people in organisations, would love to be able to support them through that.¹⁷⁶

First Peoples living in regional areas are further disadvantaged as protection applications are heard in Magistrates' Courts sitting as the Children's Court. These magistrates are less likely to have specialist child protection expertise, including in applying a cultural lens. Legal stakeholders put strong arguments that a lack of dedicated Children's Court sittings in regional areas contributes to what can already be a traumatic process for Aboriginal families and children. For example, 'limited listing capacity of regional Magistrates' Courts to hear urgent child protection matters can result in delays to family reunification, and that a lack of judicial knowledge of child protection law can lead to multiple adjournments and unnecessary hearings'.¹⁷⁷

This can have a disproportionate impact on First Peoples families who are more likely to have matters listed in regional courts.¹⁷⁸

FIRST PEOPLES DESIGNED PROGRAMS ARE SUCCESSFUL

[T]he Children’s Court has not always offered a safe experience for Aboriginal children and families. Historically, trauma has precluded the full, culturally safe participation of Aboriginal families in court processes — processes that until the introduction of Marram-Ngala Ganbu were inadequately equipped to determine sensitive child protection matters in culturally welcoming, competent and safe ways.¹⁷⁹

In contrast to Children’s Court proceedings, Yoorrook heard of the success of Marram-Ngala Ganbu, a specialist Koori court hearing day designed around the cultural needs of Aboriginal children and families.¹⁸⁰

Marram-Ngala Ganbu (meaning ‘We are One’ in Woiwurrung language) is a Koori Family Hearing Day established by the Children’s Court of Victoria in 2016. It sits on a Tuesday at Broadmeadows and every second Thursday at Shepparton.¹⁸¹ It is the first Aboriginal child protection court in Victoria.¹⁸²

Marram-Ngala Ganbu was established to address concerns that Aboriginal parents were not attending court for child protection matters because of distrust of courts.¹⁸³ This meant that the court only had one side of the story — that of the child protection worker. As Marram-Ngala Ganbu Lead Magistrate Kay MacPherson explained:

I was left with a case where all I had was the information from child protection. I didn’t have any information from the parents, and I assumed, incorrectly, that what child protection told me was correct. I’m not saying that child protection deliberately misled the court but they weren’t aware, for example, that some of these families and parents were dealing with and addressing their problems through Aboriginal organisations and I simply wasn’t in receipt of that information.¹⁸⁴

We have noticed a significant increase in the numbers of parents attending for court hearings with [Marram-Ngala Ganbu], which always results in better outcomes for them because the court gets to hear their side of the story, and the court can see how much they care about their kids.¹⁸⁵

Marram-Ngala Ganbu is a First Peoples designed program. It features a culturally safe space with a round table that all participants sit at with the magistrate. It brings together the family, extended family, child protection staff, family support services, lawyers, and ACSASS. Proceedings are conducted informally, and fewer cases are heard on a court day which allows more time for matters to be heard.¹⁸⁶



Magistrate Kay McPherson and Ashley Morris, Marram Ngala-Ganbu

A Koori Family Support Officer works with the Koori Services Coordinator to:

- coordinate the list of cases
- assist family members to obtain legal representation and understand the court process
- assist in providing warm referrals to culturally appropriate support services as required.¹⁸⁷

Marram-Ngala Ganbu has provided services to more than 800 First Peoples families.¹⁸⁸ Yoorrook heard that it has also led to much better identification of First Peoples children by the court, which helps ensure DFFH is applying the Aboriginal Child Placement Principle.¹⁸⁹

Before we started Marram-Ngala Ganbu ... we had a high number of children who the court just didn't know whether they were Aboriginal or not ... Our magistrates are getting the file with no trigger point to ask the question: does the placement comply with the Aboriginal Child Placement Principle?¹⁹⁰

A 2019 evaluation heard that the court experience for Aboriginal children and families had been transformed and families were more likely to follow court orders as they were part of the decision-making process.¹⁹¹

Simple changes made to the court room and process had a dramatic effect — including offering support before, during and after court from Koori staff who built relationships with families and into the community.¹⁹²

In the words of one Koori parent attending Marram-Ngala Ganbu:

Any worries and concerns with the stress leading up to Court, I could get in contact with the support workers, and it makes a whole lot of difference. I was excited going to [Marram-Ngala Ganbu] because of the fairness.¹⁹³

The evaluation also found better outcomes for families, with improved Aboriginal and Torres Strait Islander Child Placement Principle compliance, more families staying together and more children being placed in kinship care.¹⁹⁴ VALS noted 'these are highly significant

Marram-Ngala Ganbu case study

'A large family with six children attended court on a protection application by notice. The Preston DFFH office worked with the Marram-Ngala Ganbu team to have the matter issued for its first mention on a Tuesday in Marram-Ngala Ganbu. This enabled the team to offer support to the family prior to arriving at court.

The family was experiencing homelessness and had been couch surfing with friends, living in their car, and there had been unconfirmed reports of family violence and substance use by the father.

The family was supported by the Marram-Ngala Ganbu team and other services for about 13 months to support them in finding safe, stable accommodation. Throughout the 13 months, the family was offered emergency accommodation before being offered a stable tenancy with the support and advocacy of the team. The matter was finalised following an application to withdraw from the department.

The family has had no further child protection involvement and still has a relationship with past and present Marram-Ngala Ganbu team members'.¹⁹⁸

findings: they demonstrate that Koori Family Hearing Days directly tackle many of the gravest failings of the child protection system'.¹⁹⁵

The Commissioner for Aboriginal Children and Young People supports an appropriately resourced implementation of Marram Ngala Ganbu across Victoria, noting: 'It is an example of Aboriginal practice excellence which places Aboriginal families at the centre of all court proceedings, not as passive participants'.¹⁹⁶ In evidence to Yoorrook, Acting Associate Secretary of DFFH Argiri Alisandratos indicated support for extending Marram-Ngala Ganbu, stating: 'We would support absolutely any extension and further integration of models that bring therapeutic justice approaches to our families across the system'.¹⁹⁷

The recognised success of the Marram-Ngala Ganbu system raises the question of why, seven years after the program started, the model has not been extended by DFFH to other areas.

The way forward

Victorian legislation and policy, on its face, has strong protections for Aboriginal children and families' right to culture and connection. Yet, as past inquiries have extensively documented, these are often not complied with in practice and accountability for compliance is low.¹⁹⁹ As established throughout this chapter, systemic racism is still observable in the differential way the system interacts with and affects First Peoples families and communities. There is also a lack of cultural competence and knowledge about human rights principles and obligations among DFFH child protection staff that further drives decision-making towards substantiation of reports and the removal of First Peoples children into out of home care.

This is likely compounded by strict timeframes for investigating reports and addressing protective concerns that do not allow for building trusting relationships or adequate engagement with Aboriginal families. An overstretched workforce also means that checks and balances for important decisions and processes are not being observed, which compromises decision-making.

Processes to identify Aboriginality in the child protection system are not working well. This has far-reaching implications for First Peoples children, families and services. More must be done to ensure First Peoples children's identity is confirmed early and correctly and ACCOs are paid for the work they do to assist with this process.

Child protection risk assessments and decisions can be tainted by racist assumptions about what being a good parent looks like. Key tools to help child protection practitioners undertake risk assessments can have in-built biases and are too reliant on practitioners navigating multiple practice guidance materials to avoid a discriminatory result.

This is all brought into sharp focus where child protection makes a recommendation to remove a First Peoples child. Under human rights law, this can only be justified where it is a reasonable and proportionate response to the risk to the child; this must take into account the harm that flows from the removal of the child from their parents.

The government acknowledges the importance of removal decisions. It also acknowledges how critical it is to ensure that risk assessments are not influenced by unconscious bias or systemic racism, and are culturally attuned, so that child protection intervenes only when there is real, objective risk of harm.²⁰⁰ It also agrees that it is intolerable that those biases make their way into assessments of what is in the best interests of First Peoples children.²⁰¹

Yet while the government concedes that bias can and does exist in the child protection system and among DFFH staff,²⁰² not nearly enough has been done to either address systemic racism or the individual lack of cultural competence or bias exhibited by some staff.

Current training for child protection staff is not sufficient. Child protection staff do not consistently understand or appreciate the value of Aboriginal ways of child rearing and how to take this into account in their work, even though Yoorrook was told they receive (non-assessed) training on this as part of the 'Beginning Practice Induction Program'.²⁰³ Much more comprehensive, immersive learning and development is needed.

A more comprehensive, assessed, First Peoples designed training program is critical to shifting the dial on practice and ensuring child protection staff meet their cultural and human rights obligations. Training for all child protection staff, from frontline staff to DFFH executives, based on human rights (including specifically cultural rights) should be a prerequisite before those staff can work with, or interact with, First Peoples. Further, ongoing training must be mandatory and include competency testing within each module. Proper records should be kept to ensure staff have completed training and are meeting learning goals to improve their practice when working with First Peoples.

In addition to their work with families, the attitudes, cultural capability and behaviours of DFFH staff necessarily have implications for the advice provided to magistrates who make decisions based on child protection reports. Of particular importance is how well child protection staff have considered the risk of harm caused by removing an Aboriginal child from their family and culture. Yoorrook welcomes that this harm will now be recognised in the Statement of Recognition

in the CYFA. However, government can, and should strengthen this by legislating a presumption of harm that child protection practitioners and the Court must consider in their decision-making.

Yoorrook recognises that mainstream court processes are adversarial and can lack cultural competence. This can be amplified in regional areas where Magistrates' Courts may not have the specialist expertise to properly consider the importance of cultural connection. This contributes to postcode injustice which disproportionately affects First Peoples.

Evidence to Yoorrook strongly supports the expansion of Marram-Ngala Ganbu to other locations beyond its existing two sites.²⁰⁴ *Burra Lotjpa Dunguludja* (Aboriginal Justice Agreement 4) already calls for increasing the number of courts offering Marram-Ngala Ganbu. That Agreement was signed by government in 2018, the same year that the Koori Youth Council *Ngaga-dji* (Hear Me) report also called for a statewide expansion.

It is Yoorrook's view that innovation of this kind is critical to improving outcomes for First Peoples children, and its statewide rollout should be an urgent priority for government.

In the next chapter, Yoorrook considers the experiences of First Peoples children in out of home care. This sets out further failures to protect the wellbeing, safety and cultural and human rights of Aboriginal children. At the end of that chapter Yoorrook makes further recommendations for urgent action. Below are recommendations for urgent government action relating to State decisions to remove a child. ■

RECOMMENDATIONS

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.

Endnotes

1. Outline of Evidence of Mikala, 23 February 2023, 5 [44].
2. The *Children, Youth and Families Act 2005* (Vic) ('CYFA') does not define an 'Aboriginal child'.
3. Transcript of Argiri Alisandratos, 28 April 2023, 102 [17]–[23].
4. The *Bringing Them Home Report* references *Report on Government Services* data as at 30 June 1996. At that time in Victoria, Aboriginal children were on care and protection orders at a rate of 16 per 1000. In that report, there is no separate data on children in out-of-home care, so a direct comparison on that metric is not possible: Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) 431. In comparison, as at 30 June 2022, Aboriginal children are on care and protection orders at a rate of 135.2 per 1000: Australian Government Productivity Commission, *Report on Government Services 2023* (2023) Part F, Section 16 'Child Protection Services', Table 16A.1 ('*Report on Government Services 2023*').
5. 'It is evident that the current system is failing First Peoples children and we must do better': Transcript of Argiri Alisandratos, 27 April 2023, 8 [3]–[5].
6. The following reports can be received by the intake team under the CYFA (n 2): report of significant concern about the wellbeing of a child (s 28); report of a child in need of protection (s 183); report about an unborn child (s 29); report of a child in need of therapeutic treatment (s 185); report on information that each permanent carer parent of a child subject to a Permanent Care Order has died (s 325A). See Department of Families, Fairness and Housing, *Child Protection Manual* (20 November 2021) 'Intake Phase — Advice' <<https://www.cpmanual.vic.gov.au/advice-and-protocols/advice/intake/intake-phase-advice>>.
7. See Department of Families, Fairness and Housing, 'Families and Children', *Reporting Child Abuse* (Web Page, 7 March 2022) <<https://services.dffh.vic.gov.au/reporting-child-abuse>>.
8. See Department of Families, Fairness and Housing, 'Families and Children', *The Orange Door and Family Services* (Web Page, 29 March 2023) <<https://services.dffh.vic.gov.au/child-first-and-family-services>>.
9. CYFA (n 2) s 182. Mandatory reporting obligations for other professionals are included in the *Family Law Act 1975* (Cth) s 67ZA. See also Department of Families, Fairness and Housing, *Child Protection Manual* (29 June 2020) 'Mandatory Reporting' <<https://www.cpmanual.vic.gov.au/advice-and-protocols/advice/intake/mandatory-reporting>>.
10. Department of Families, Fairness and Housing, Victorian Government, *SAFER Children Framework Guide: The Five Practice Activities of Risk Assessment in Child Protection* (2021) ('*SAFER Children Framework Guide*') (online, 20 November 2021). <<https://www.cpmanual.vic.gov.au/our-approach/safer-children-framework/safer-children-framework-guide>>.
11. See Victorian Government, 'MARAM Practice Guides and Resources' (Web Page, 28 March 2023) <<https://www.vic.gov.au/maram-practice-guides-and-resources>>.
12. See Department of Families, Fairness and Housing, *Child Protection Manual* (31 January 2023) 'Risk Assessment — Advice' <<https://www.cpmanual.vic.gov.au/advice-and-protocols/advice/case-planning/risk-assessment-advice>>.
13. CYFA (n 2) s 162. Note there are other factors that mean a child is in need of protection, such as where the child has been abandoned or the child's parents are dead or incapacitated and no suitable carer is available, or where the child's physical development or health has been, or is likely to be, significantly harmed and the child's parents have not provided, arranged or allowed the provision of, or are unlikely to provide, arrange or allow the provision of, basic care or effective medical, surgical or other remedial care.
14. Department of Health and Human Services, Victorian Government, *Program Requirements for the Aboriginal Child Specialist Advice and Support Service* (2019) 30 ('*Program Requirements for the Aboriginal Child Specialist Advice and Support Service*').
15. *Report on Government Services 2023* (n 4) Table 16A.1. Note further government evidence is that at 31 December 2022, Aboriginal children were five times more likely than non-Aboriginal children to be reported to child protection in the prior year: Department of Families, Fairness and Housing, Response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 6 May 2023, Attachment 1, 7 [16.8].
16. Witness Statement of Argiri Alisandratos, 21 March 2023, 32 [102].
17. Most reports for non-Aboriginal children (71 per cent) also do not reach the threshold for investigation: Witness Statement of Argiri Alisandratos, 21 March 2023, 32 [100].
18. The average age for a third report for Aboriginal children is 6.5 years compared to 7.9 years for a non-Aboriginal child. The average age for a fifth report is 8.5 years for an Aboriginal child and 9.2 years for a non-Aboriginal child: Witness Statement of Argiri Alisandratos, 21 March 2023, 34 [112].

19. The cumulative harm policy requires the third report in twelve months and the fifth in the child's life to be investigated unless otherwise approved by a more senior worker. In 2021–22, 53 percent of First Peoples children involved in child protection (at any phase) had had more than five reports, compared with 34 per cent of non-First Peoples children. In 2021–22, 53 percent of First Peoples children involved in child protection (at any phase) had had more than five reports, compared with 34 per cent of non-First Peoples children: Witness Statement of Argiri Alisandratos, 21 March 2023, 33 [110]–[111].
20. Department of Families, Fairness and Housing, 'Response to NTP Item 002-023 — *Risk factors for involvement in child protection — linked data analysis 2023*', 1, produced by the State of Victoria in response to the Commission's Notice to Produce dated 21 April 2023.
21. Department of Families, Fairness and Housing, 'Response to NTP Item 002-023 — *Risk factors for involvement in child protection — linked data analysis 2023*', 1, produced by the State of Victoria in response to the Commission's Notice to Produce dated 21 April 2023.
22. *Report on Government Services 2023* (n 4) Table 16A.1.
23. *Report on Government Services 2023* (n 4) Table 16A.1. Further government evidence is that at 31 December 2022, Aboriginal children were five times as likely than non-Aboriginal children to be reported to child protection in the prior year: Department of Families, Fairness and Housing, Response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 6 May 2023, Attachment 1, 7 [16.8].
24. *Report on Government Services 2023* (n 4) Table 16A.1, Table 16A.2. See also Witness Statement of Argiri Alisandratos, 21 March 2023, 30 [89]. Note further government evidence is that at 31 December 2022, Aboriginal children were 24 times as likely to be in care than non-Aboriginal children: Department of Families, Fairness and Housing, Response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 6 May 2023, Attachment 1, 7 [16.8].
25. *Report on Government Services 2023* (n 4) Table 16A.2. See also Witness Statement of Argiri Alisandratos, 21 March 2023, 30 [89].
26. DFFH, in answering questions on notice, stated that this information was presented to the Aboriginal Children's Forum in October 2022. The latest data from the *Report on Government Services* (for the 12 months to 30 June 2022) shows that the number of Aboriginal children in out-of-home care in Victoria had increased from 2572 to 2595 — an increase of 0.89 per cent. DFFH stated that the difference in the two data sets may be explained by the use of different counting rules: Department of Families, Fairness and Housing, Response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 6 May 2023, Attachment 1, 4 [2]–[5]. Yoorrook further notes that Mr Alisandratos referred to this three per cent as being a reduction in the over-representation rate in his testimony, however that data relates to numbers of children only: Transcript of Argiri Alisandratos, 28 April 2023, 193 [16]–[40].
27. Transcript of Argiri Alisandratos, 27 April 2023, 19 [28]–[30]; Transcript of Argiri Alisandratos, 28 April 2023, 193 [38]–[40].
28. Witness Statement of Argiri Alisandratos, 21 March 2023, 19 [28].
29. South Australia has the second highest rate of Aboriginal children in out-of-home care at 92.7 per 1000. The national average is 56.8 per 1000: *Report on Government Services 2023* (n 4) Table 16A.2.
30. Djirra, Submission 44, 17.
31. Djirra, Submission 44, 16–17.
32. *CYFA* (n 2) ss 30 and 187.
33. See Department of Families, Fairness and Housing, *Child Protection Manual* (2 February 2023) 'Substantiation — Advice' (Web Page, 2 February 2023). <<https://www.cpmanual.vic.gov.au/advice-and-protocols/advice/investigation/substantiation-advice>>. A protection application may be issued where child protection assess that the child's parents cannot or will not address the protective concerns identified through the investigation: *CYFA* (n 2) s 240. See also Witness Statement of Argiri Alisandratos, 21 March 2023, 33 [107].
34. Witness Statement of Argiri Alisandratos, 21 March 2023, 33 [107].
35. Witness Statement of Argiri Alisandratos, 21 March 2023, 33 [108].
36. Witness Statement of Argiri Alisandratos, 21 March 2023, 33 [109].
37. Witness Statement of Argiri Alisandratos, 21 March 2023, 30 [89].
38. Witness Statement of Argiri Alisandratos, 21 March 2023, 33 [109]. Data shows that Victoria generally completes investigations within the mandated timeframe of 28 days at around double the rate of other jurisdictions (in 2021-22, Victoria completed 35.4 per cent of investigations within 28 days or less. The national average for completion of investigations within 28 days was 17.9 per cent): *Report on Government Services 2023* (n 4) Table 16A.11.
39. Victorian Aboriginal Children and Young People's Alliance, Submission 243 (The case for systemic reform), 14.
40. Victorian Aboriginal Legal Service, Submission 38 (Child Protection), 77.

41. For example, the Victorian Auditor-General's Office found that staffing vacancies have more than doubled over the past year, child protection practitioners receive only 56 per cent of minimum mandatory supervision, and work pressure has got more severe and is getting worse: Victorian Auditor-General's Office, *Follow-up of Maintaining the Mental Health of Child Protection Practitioners* (September 2022) 1 ('*Follow-up of Maintaining the Mental Health of Child Protection Practitioners*'). Similarly, its inquiry into the quality of child protection data noted high caseloads and growing demand: Victorian Auditor-General's Office, *Quality of Child Protection Data* (Independent Assurance Report to Parliament, September 2022) 7. See also recent comments in Commission for Children and Young People, *Annual Report 2021–22* (2022), 22–23.
42. As at 27 February 2023, there were 462 ongoing vacant positions: Witness Statement of Argiri Alisandratos, 21 March 2023, 88 [368]. In 2022, the Victorian Auditor-General's Office reported that, '[i]n the last 2 years the gap between the actual CPP workforce and the number of funded positions has more than doubled, from 5.6 per cent to 13.9 per cent, or 119 to 305': *Follow-up of Maintaining the Mental Health of Child Protection Practitioners* (n 41) 8.
43. Note that in evidence, Argiri Alisandratos stated that the average case load was 16–18 cases: Transcript of Argiri Alisandratos, 11 May 2023, 733 [31]–[35]. Yoorrook was later informed that 'as at 31 March 2023, the median caseload for Child Protection Practitioner CPP levels 3-4 is 13': Department of Families, Fairness and Housing, Response to Questions taken on Notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing in 11 May 2023, 16 May 2023, 1.
44. Transcript of Adam Reilly, 15 May 2023, 957 [10]–[11].
45. Transcript of Adam Reilly, 15 May 2023, 955 [36].
46. Victorian Government, *Child Protection Workforce Strategy 2021–2024* (2021). The 2021–22 Victorian State Budget provided \$171 million to increase the number of frontline child protection staff. The government has also launched a campaign to recruit more child protection staff: The Hon Anthony Carbin MP, 'New Child Protection Recruits Ready to Go' (Media Release, 17 December 2021) <<https://www.premier.vic.gov.au/new-child-protection-recruits-ready-go>>. Yoorrook also notes that DFFH has instituted the Aboriginal Workforce Strategy 2021–2026. This is a joint strategy with the Department of Health: Department of Health and Department Families, Fairness and Housing, 'Aboriginal Workforce Strategy 2021–2026' (Strategy, 2021) <<https://www.dffh.vic.gov.au/publications/aboriginal-workforce-strategy-2021-2026>>.
47. Yoorrook notes DFFH evidence that 'a risk assessment must be endorsed by a team manager before a phase change': Department of Families, Fairness and Housing, Response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 6 May 2023, Attachment 2, 22 [130].
48. *CYFA* (n 2) s 174(1)(b).
49. Transcript of Karinda Taylor, 8 December 2022, 237 [13]–[31].
50. Transcript of Argiri Alisandratos, 28 April 2023, 146 [25]–[40]; see also *SAFER Children Framework Guide* (n 10). In answer to questions from Yoorrook, DFFH stated that 'the SAFER Children's Framework Guide is a foundational document and is not exhaustive guidance for practitioners. It is supported by the Child Protection Manual as the primary source of advice, procedures and policies': Department of Families, Fairness and Housing, Response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 6 May 2023, Attachment 2, 21 [124].
51. Transcript of Argiri Alisandratos, 28 April 2023, 149 [30]–[44]. In response to questions from Yoorrook, DFFH provided information about the guidance provided on consideration of culture in risk assessments. Aside from one reference to 'loss of culture as a possible risk factor' in the Best Interests Case Practice Model (BICPM) summary guide, this information refers generally to 'cultural safety and self-determination': Department of Families, Fairness and Housing, Response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 6 May 2023, Attachment 2, 20–21 [118]–[124].
52. Transcript of Argiri Alisandratos, 28 April 2023, 152–153 [39]–[6]. See also *SAFER Children Framework Guide* (n 10) 7; Department of Families, Fairness and Housing, 'Response to NTP Item 002-009 — *SAFER Risk Assessment Snapshot April 2022*' produced by the Department of State of Victoria in response to the Commission's Notice to Produce dated 6 March 2023.
53. In reply to questions from Yoorrook, DFFH stated that loss of culture as a possible risk factor is contained in the BICPM summary guide: Department of Families, Fairness and Housing, Response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 6 May 2023, Attachment 2, 21 [119].
54. Department of Human Services, *Child Development and Trauma Guide Introduction* (2012) 4 (online, 2012) <https://www.cpmanual.vic.gov.au/sites/default/files/child_development_%26_trauma_intro_2012.pdf>.
55. See, eg, Transcript of Argiri Alisandratos, 28 April 2023, 149 [35]–[39].
56. Transcript of Argiri Alisandratos, 28 April 2023, 150 [25]–[29].

57. DFFH advised that it does not currently undertake audits directed solely at reviewing the consistency of decision making with human rights, but that this 'will be explored as an opportunity for improvement': Department of Families, Fairness and Housing, Response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 6 May 2023, Attachment 1, 8 [21].
58. Witness Statement of Argiri Alisandratos, 21 March 2023, 7879 [341]–[345].
59. Supplementary Statement of Commissioner Meena Singh, 10 May 2023, 9–10 [37].
60. The CCYP is required to hold inquiries about services provided (or not provided) to children who have died and have had active involvement with child protection at the time of their death or within 12 months before their death: *Commission for Children and Young People Act 2012* (Vic) s 34. The CCYP reports on these inquiries in its annual reports.
61. Supplementary statement of Commissioner Meena Singh, 10 May 2023, 62, Annexure 2. See also Commission for Children and Young People, *Annual Report 2021–2022* (2022) 31–38. The annual report includes data and analysis of 41 deaths investigated by CCYP spanning the period June 2018 to January 2022. Seven of these deaths (17 per cent) were of Aboriginal children. Note that the data provided by Commissioner Singh includes deaths still open before the Coroners Court. These are not included in the child death inquiries reported in the annual report and therefore the number of Aboriginal child death inquiries reported in the annual report is lower.
62. Supplementary statement of Commissioner Meena Singh, 10 May 2023, 63, Annexure 2.
63. Commission for Children and Young People, *Lost, Not Forgotten: Inquiry into Children Who Died by Suicide and Were Known to Child Protection* (Inquiry Report, 2019).
64. Ibid 20–21. As previously noted, DFFH evidence is that 'a risk assessment must be endorsed by a team manager before a phase change': Department of Families, Fairness and Housing, Response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 6 May 2023, Attachment 2, 22 [130]. Yoorrook notes that This requirement came in with SAFER and therefore post-dates the Lost, Not Forgotten report.
65. Outline of Evidence of Aunty Rieo Ellis, 2 [22]–[23].
66. For example, see The Supporting Aboriginal and Torres Strait Islander Families to Stay Together from the Start (SAFeST Start) Coalition, Submission 40, 11–13, citing a body of international research on the 'culturally bound and value laden' understandings of child abuse and neglect, as well as children's 'best interests'.
67. Outline of Evidence of Lisa Thorpe, 9 December 2022, 6 [30].
68. Transcript of Dr Jacyntha Krakouer, 8 December 2022, 228 [33]–[45].
69. Transcript of Felicia Dean, 7 December 2022, 165 [4]–[10]; Outline of Evidence of Aunty Rieo Ellis, 7 December 2022, 3 [41].
70. Transcript of Aunty Rieo Ellis, 7 December 2022, 182 [14]–[20].
71. Outline of Evidence of Damian Griffiths, 2 March 2023, 2 [11]–[12].
72. Outline of Evidence of Mikala, 23 February 2023, 4 [41]; Outline of Evidence of Aunty Rieo Ellis, 7 December 2022, 3–4 [41]–[42].
73. Transcript of Aunty Hazel Hudson, 7 December 2022, 160–161 [40]–[14].
74. Children and Health Legislation Amendment (Statement of Recognition, Aboriginal Self-Determination and Other Matters) Bill 2023 (Vic) ('Statement of Recognition Bill').
75. Ibid.
76. Outline of Evidence of Aunty Rieo Ellis, 7 December 2022, 2 [19].
77. Outline of Evidence of Aunty Glenys Watts, 5 December 2022, 5 [66]–[67].
78. Outline of Evidence of Aunty Charmaine Clarke, 7 December 2022, 5 [20(b)(vii)].
79. Transcript of Dr Jacyntha Krakouer, 8 December 2022, 240 [35]–[48].
80. Outline of Evidence of Lisa Thorpe, 9 December 2022, 6 [28]–[29]. See also Summary Report - Barengi Gadgin On Country Visit, 2 February 2023, [2].
81. Outline of Evidence of Aunty Stephanie Charles, 8 March 2023, 9 [68].
82. Witness Statement of Argiri Alisandratos, 21 March 2023, 34 [115].
83. Supplementary Statement of Commissioner Meena Singh, 10 May 2023, 52–53 [216].
84. Department of Families, Fairness and Housing, Response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 6 May 2023, Attachment 2, 16 [81], [84]–[87].
85. Witness Statement of Argiri Alisandratos, 21 March 2023, 83 [355]–[357].
86. Witness Statement of Argiri Alisandratos, 21 March 2023, 83 [355]–[357]; Department of Families, Fairness and Housing, Supplementary response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 6 May 2023, Attachment 2, 17 [88]. Module 1 includes Human Rights and Module 2 includes working with Aboriginal Families: see 'Beginning Practice in Child Protection program: Intensive program', 3–4. Exhibit accompanying evidence of Argiri Alisandratos, tendered 22 May 2023.
87. Transcript of Argiri Alisandratos, 28 April 2023, 109–110 [46]–[2].
88. Transcript of Argiri Alisandratos, 28 April 2023, 123 [1]–[9].
89. Witness Statement of Argiri Alisandratos, 21 March 2023, 85 [364].
90. Transcript of Argiri Alisandratos, 28 April 2023, 115 [38]–[40].
91. Transcript of Argiri Alisandratos, 28 April 2023, 127 [1]–[11].

92. Transcript of Argiri Alisandratos, 28 April 2023, 110–111 [44]–[1]. DFFH later advised that ‘Aboriginal Cultural Safety training completion rates are tabled quarterly at the Aboriginal Workforce Committee’: Department of Families, Fairness and Housing, Response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 6 May 2023, Attachment 2, 17 [90].
93. Department of Health and Human Services, Victorian Government, *Aboriginal and Torres Strait Islander Cultural Safety Framework: For the Victorian Health, Human and Community Services Sector* (2019).
94. In 2022, the department engaged Aboriginal consultancy firm, ABSTARR, to undertake a review of the survey to develop an Aboriginal Cultural Safety Measurement and Assessment Tool: Witness Statement of Argiri Alisandratos, 21 March 2023, 85 [365] and n 64. The government cited a range of other policies and guidelines including those for health and safety, code of conduct, and managing misconduct as relevant to cultural safety and managing racism and unconscious bias: Witness Statement of Argiri Alisandratos, 21 March 2023, 85–86 [365].
95. Transcript of Adam Reilly, 15 May 2023, 953 [19]–[21].
96. Transcript of Adam Reilly, 15 May 2023, 953 [5]–[39].
97. Transcript of Adam Reilly, 15 May 2023, 953 [27]–[38].
98. There were 633 DFFH staff enrolments from November 2021 to February 2023. Department of Families, Fairness and Housing, Response to questions taken on notice by Adam Reilly, Executive Director, Wimmera South West, Department of Families, Fairness and Housing on 15 May 2023, 17 July 2023, Attachment 1, 3.
99. Transcript of Adam Reilly, 15 May 2023, 955 [15]–[39].
100. Government policy is that where a child or family member identifies the child as Aboriginal, the child will be recorded as Aboriginal (self-identification): Witness Statement of Argiri Alisandratos, 21 March 2023 161–162 [777]. However, child protection workers are expected to complete a genogram during the initial investigation. A genogram is a picture that provides a visual representation of the child’s current and extended family and kinship network. The Victorian Child Protection Manual explains that this should ‘include as much information as is available, including immediate and extended family members’ and cover at least three generations. Genograms can also include people significant to the child who may not be biologically related. See Department of Families, Fairness and Housing, Child Protection Manual ‘Genograms — Advice’ (online, 22 December 2020) <<https://www.cpmanual.vic.gov.au/advice-and-protocols/advice/investigation/genograms-advice>>.
101. See, eg, Transcript of Aunty Muriel Bamblett AO, 6 December 2022, 106 [1]–[10]. Victorian Aboriginal Children and Young Peoples’ Alliance, Submission 42, 11.
102. Correct identification and recording of Aboriginality was raised in Commission for Children and Young People, *Always Was, Always Will Be Koori Children: Systemic Inquiry into Services Provided to Aboriginal Children and Young People in Out-of-Home Care in Victoria* (Inquiry Report, 2016) Finding 5, Recommendation 2.1 (*‘Always Was, Always Will Be Koori Children’*); Commission for Children and Young People, *In the Child’s Best Interests: Inquiry into Compliance with the Intent of the Aboriginal Child Placement Principle in Victoria* (Inquiry Report, 2016) Recommendations 8–12 (*‘In the Child’s Best Interests’*).
103. For example, a child of a non-Aboriginal mother removed at birth may be assumed to be Aboriginal if the child’s siblings have been identified as Aboriginal through their father, without checking if the children have the same father: see Outline of Evidence of Lisa Thorpe, 9 December 2022, 4 [20].
104. Outline of Evidence of Stacey Brown and Kimberley Do, 8 December 2022, 3 [12].
105. Transcript of Felicia Dean, 7 December 2022, 151 [18]–[27].
106. Outline of Evidence of Felicia Dean, 6 December 2022, 1 [6]. See also Transcript of Aunty Hazel Hudson, 9 December 2022, 276 [8]–[15]; Transcript of Stacey Brown, 9 December 2022, 278 [9]–[14].
107. Outline of Evidence of Felicia Dean, 6 December 2022, 1 [5]. Transcript of Aunty Hazel Hudson, 7 December 2022, 152 [42]–[46].
108. Transcript of Aaron Wallace, 7 December 2022, 151 [1]–[5]; Transcript of Felicia Dean, 7 December 2022, 151 [18]–[43]; Outline of Evidence of Stacey Brown and Kimberley Do, 2–3 [11]; Outline of Evidence of Lisa Thorpe, 9 December 2022, 4 [20]–[21]; Transcript of Stacey Brown, 9 December 2022, 275 [44]–[48].
109. Outline of Evidence of Lisa Thorpe, 9 December 2022, 4 [19].
110. Victorian Aboriginal Child Care Agency, Submission 77, 93–94.
111. Witness Statement of Argiri Alisandratos, 21 March 2023 163 [787].
112. Witness Statement of Argiri Alisandratos, 21 March 2023, 163 [784].
113. Witness Statement of Argiri Alisandratos, 21 March 2023, Attachment AA-30, 67. See also Supplementary statement of Commissioner Meena Singh, 10 May 2023, 34–35 [146].
114. This includes a mandatory e-learning module commencing in May 2023 about how to ask the question about First Peoples identity: Witness Statement of Argiri Alisandratos, 21 March 2023, 162 [780].
115. ‘This change was authorised by the Wungurilwil Gagapduir Working Group on 24 August 2022’: Witness Statement of Argiri Alisandratos, 21 March 2023, 163 [786].

116. Witness Statement of Argiri Alisandratos, 21 March 2023, 69–70 [297]. See also the consequence, probability and decisions matrix in the Child Protection Manual for detailed guidance on how assessments are made: Department of Families, Fairness and Housing, *Child Protection Manual*, ‘Consequence, Probability and Decisions Matrix’ (online, 20 November 2021). <<https://www.cpmanual.vic.gov.au/advice-and-protocols/tools-checklists/substantiation-judgement-matrix>>.
117. *CYFA* (n 2) s 12(b).
118. Yoorrook notes that the Witness Statement of Argiri Alisandratos, 21 March 2023, 71 [306] states that a referral to the AFLDM program is required within 48 hours of substantiation, contrary to the AFLDM program guidelines which state the timeframe is one business day: Victorian Government, *Program Guidelines for Aboriginal Family-Led Decision Making (AFLDM)* (2019) 11 (‘*Program Guidelines for Aboriginal Family-Led Decision Making (AFLDM)*’).
119. *Program Guidelines for Aboriginal Family-Led Decision Making (AFLDM)* (n 118) 10. Note that the AFLDM program is not specifically legislated, but rather is the program response to the requirement in *CYFA*, s 12(1)(b) that a decision about the placement of an Aboriginal child or other significant decision in relation to an Aboriginal child should involve a meeting convened by an approved Aboriginal convenor and attended, where possible, by the child, the child’s parents, members of the child’s extended family and other appropriate members of the Aboriginal community as determined by the child’s parents: Transcript of Argiri Alisandratos, 27 April 2023, 89 [14]–[48]; Transcript of Argiri Alisandratos, 28 April 2023, 142 [34]–[47].
120. *CYFA* (n 2) s 12(c).
121. *Ibid* s 167.
122. *Ibid* ss 166, 168 and 176. See also Department of Families, Fairness and Housing, Child Protection Manual ‘Case Planning — Advice’ (online, 31 December 2021) <<https://www.cpmanual.vic.gov.au/advice-and-protocols/advice/case-planning/case-planning-advice>>.
123. Outline of Evidence of Aaron Wallace, 7 December 2022, 2 [10]–[11].
124. Department of Families, Fairness and Housing, ‘Response to NTP Item 002-001 — *Tranche 2 data response supplied by the Performance and Analysis, System Reform and Workforce Division*’, 9, produced by the Department of Families, Fairness and Housing in response to the Commission’s Notice to Produce dated 3 November 2022.
125. The latest review conducted by the Commission for Children and Young People on AFLDM compliance showed that as at 31 December 2018, 53 per cent of First Peoples children in out-of-home care for one year had attended one or more AFLDM meetings: Commission for Children and Young People, ‘*In Our Own Words: Systemic Inquiry into the Lived Experience of Children and Young People in the Victorian Out-of-Home Care System* (Report, 2019) 97 (‘*In Our Own Words*’).
126. *Always Was, Always Will Be Koori Children* (n 102) 67, Recommendation 6.7.
127. Department of Families, Fairness and Housing, ‘Response to NTP Item 002-002 — *Government response to the Always Was Always Will Be Recs*’, 6, produced by the State of Victoria in response to the Commission’s Notice to Produce dated 3 November 2022.
128. Victorian Aboriginal Legal Service, Submission 38 (Child Protection), 49, citing ‘*In Our Own Words*’ (n 125) 97; and Former Magistrate Richard Power for the Children’s Court of Victoria, *Research Materials, Chapter 5.1: Family Division - Child Protection* (2022) 170: ‘[r]egrettably, there have been many occasions when an AFLDM has not occurred when it should have e.g. a change in case plan from reunification to non-reunification, final orders being made which place a child in out of home care, conciliation conferences being adjourned because an AFLDM has not been conducted and occasions when an AFLDM has been scheduled to take place after the conclusion of a contested final hearing’.
129. Outline of Evidence of Sissy Austin, 2 March 2023, 5 [53(g)].
130. Outline of Evidence of Aunty Rieo Ellis, 7 December 2022, 4 [47].
131. AFLDM meetings are co-convened by child protection and an Aboriginal convenor. The AFLDM program guidelines note ‘[t]he success of AFLDM meetings is determined by the relationship between DHHS and ACCO convenors’: *Program Guidelines for Aboriginal Family-Led Decision Making (AFLDM)* (n 118) 27.
132. Witness Statement of Argiri Alisandratos, 21 March 2023, 71 [307].
133. It was further noted that the Statement of Recognition Bill will strengthen family decision making and input: Transcript of Argiri Alisandratos, 28 April 2023, 142 [34]–[38], 143 [11]–[16].
134. Outline of Evidence of Aaron Wallace, 7 December 2022, 2 [7].
135. The data provided by DFFH does not differentiate whether the consultation occurred during the investigation or where a decision has been made to substantiate. Consultation is required at both points: *Program Requirements for the Aboriginal Child Specialist Advice and Support Service* (n 14) 27.
136. Witness Statement of Argiri Alisandratos, 21 March 2023, 42 [150].
137. Department of Families, Fairness and Housing, ‘Response to NTP 002-001 — *Tranche 2 data response supplied by the Performance and Analysis, System Reform and Workforce Division*’, 9, produced by the State of Victoria in response to the Commission’s Notice to Produce dated 3 November 2022.
138. Outline of Evidence of Aaron Wallace, 6 December 2022, 3 [13]–[14]. See also Victorian Aboriginal Legal Service, Submission 38 (Child Protection), 53–55, noting non-compliance with the requirement to consult with ACSASS, as well as concerns that child protection workers do not always provide full information to ACSASS to enable it to make an informed decision.

139. Witness Statement of Argiri Alisandratos, 21 March 2023, 27 [72]. Government also notes that the demand modelling for ACSASS takes into account that the need for ACSASS will diminish as the Aboriginal Children in Aboriginal Care (ACAC) program expands: Witness Statement of Argiri Alisandratos, 21 March 2023, Attachment AA-4, 15, Table 1.
140. Outline of Evidence of Aunty Glenys Watts, 5 December 2022, 4 [57(e)].
141. Outline of Evidence of Karinda Taylor, 7 December 2022, 3 [27]–[28].
142. Outline of Evidence of Aunty Eva Jo Edwards, 4 December 2022, 5 [67]–[71].
143. Outline of Evidence of Aunty Eva Jo Edwards, 4 December 2022, 3 [43].
144. Transcript of Anne Lenton, 13 December 2022, 361 [5]–[17].
145. See, eg, case studies about the CEO of First Peoples' Health and Wellbeing taking a young mother with a disability into her own home over a period of ten days to conduct an assessment to prevent a child from being removed: Transcript of Karinda Taylor, 8 December 2022, 233 [6]–[16]; and holistic support provided to 'Charlie' and his family by Winda-Mara Aboriginal Corporation to prevent removal to out-of-home care: Victorian Aboriginal Children and Young Peoples' Alliance, Submission 42, 16.
146. Outline of Evidence of Aunty Rieo Ellis, 2 [16]–[18].
147. Witness Statement of Argiri Alisandratos, 21 March 2023, 63 [279]. Three Aboriginal Child Protection Diversion Trials were funded in 2021–22 through the Innovation and Learning Fund: the Aboriginal-led Case Conferencing Trial, the Garinga Bubup Trial and the Aboriginal-Led Family-Led Decision-Making Trial: Witness Statement of Argiri Alisandratos, 21 March 2023, Attachment AA-5, 21.
148. *CYFA* (n 2) s 10(3)(a).
149. *Ibid* s 10(3)(g).
150. *Ibid* s 10(3)(j).
151. Transcript of Commissioner Meena Singh, 12 May 2023, 786 [18]–[22].
152. Transcript of Commissioner Meena Singh, 5 December 2022, 56 [38]–[44]. Transcript of Jacyнта Krakouer, 8 December 2022, 246–247 [43]–[21].
153. Victorian Aboriginal Legal Service, Submission 38 (Child Protection), 28, citing *Secretary DHHS v Children's Court of Victoria & Emily Powell (a pseudonym)* [2020] VSC 144 [36] (Dixon J).
154. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7.
155. Victorian Aboriginal Legal Service, Submission 38 (Child Protection), 28, citing former Magistrate Richard Power (n 128) 50.
156. Transcript of Minister for Child Protection and Family Services, the Hon. Elizabeth (Lizzie) Blandthorn MLC, 12 May 2023, 839–840 [45]–[9].
157. Transcript of Minister for Child Protection and Family Services, the Hon. Elizabeth (Lizzie) Blandthorn MLC, 12 May 2023, 842 [27]–[33].
158. Transcript of Ashley Morris, 9 December 2022, 302 [25]–[30].
159. See Statement of Recognition Bill (n 74) cl 4 inserting new s 7AA (Amendments by the Legislative Council).
160. *Ibid*.
161. Victoria, *Parliamentary Debates*, Legislative Council, 1 June 2023, 56 (The Hon Elizabeth (Lizzie) Blandthorn MLC).
162. Victorian Aboriginal Legal Service, Submission 38 (Child Protection), 28.
163. Children and Young Persons (Care and Protection) Amendment (Family Is Culture Review) Bill 2022 (NSW) cl 12.
164. Outline of Evidence of Mikala, 23 February 2023, 3 [27]. See also Anonymous, Submission 45, 1, regarding access issues for Aboriginal fathers whose children are in contact with the child protection system.
165. *CYFA* (n 2) ss 553, 557 and 558.
166. *Ibid* s 276(2).
167. Transcript of Anne Lenton, 13 December 2022, 361 [41]–[43].
168. Transcript of Sissy Austin, 2 March 2023, 85 [16]–[23].
169. This dynamic is confirmed through the views of child protection practitioners that magistrates pay little attention to their assessments, saying that 'we have to fight to let them know what we are talking about': Sarah Wise et al, *Certainty for Children, Fairness for Families? Synthesised Research Findings from the Permanency Amendments Longitudinal Study* (University of Melbourne, Unpublished) 33, produced by the State of Victoria in response to the Commission's Notice to Produce dated 6 March 2023.
170. Department of Families, Fairness and Housing, Response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 6 May 2023, Attachment 2, 23 [133]–[138].
171. Victorian Aboriginal Legal Service, Submission 38 (Child Protection), 26.
172. Victorian Aboriginal Legal Service Submission 38 (Child Protection), 24.
173. Victorian Aboriginal Legal Service, Submission 38 (Child Protection), 24.
174. Victorian Aboriginal Legal Service, Submission 38 (Child Protection), 24–25.
175. Transcript of Aunty Muriel Bamblett, AO 6 December 2022, 108 [37]–[46].
176. Transcript of Shellee Strickland, 7 December 2022, 159 [8]–[10].
177. Victoria Legal Aid, Submission 39 (Child Protection), 10.
178. Victoria Legal Aid data shows, 'from 2020 to 2022, First Nations clients accounted for 21 per cent of child protection legal assistance files in regional courts, compared to only 10.6 per cent in metropolitan specialist courts': Victoria Legal Aid, Submission 39 (Child Protection), 10–11.
179. Outline of Evidence of Ashley Morris and Magistrate Kay MacPherson, 9 December 2022, 1 [10].
180. See, eg, Victorian Aboriginal Children and Young People's Alliance, Submission 243 (The case for systemic reform) 3, 17.

181. Only non-contested matters can be heard. Protection orders can be made under the *CYFA* (n 2) pt 4.9. The protection application can be listed on a Marram-Ngala Ganbu hearing day if the information form identifies a child as Aboriginal and/or Torres Strait Islander or where a child is subsequently identified as Aboriginal and/or Torres Strait Islander. If the parties cannot come to an agreement and the matter is likely to lead to contest, matters are adjourned for a conciliation conference. These conferences are facilitated by an Aboriginal convenor when required: Outline of Evidence of Ashley Morris and Magistrate Kay MacPherson, 9 December 2022, 3 [24]–[25].
182. Outline of Evidence of Ashley Morris and Magistrate Kay MacPherson, 9 December 2022, 1 [4].
183. The concept of Marram-Ngala Ganbu was first proposed in 2009 as a recommendation of the Aboriginal Justice Forum #23: K Arabena et al, *Evaluation of Marram-Ngala Ganbu, a Koori Family Hearing Day at the Children's Court of Victoria in Broadmeadows* (2019) 10.
184. Transcript of Magistrate Kay MacPherson, 9 December 2022, 297 [17]–[22].
185. Outline of Evidence of Ashley Morris and Magistrate Kay MacPherson, 9 December 2022, 4 [32].
186. Outline of Evidence of Ashley Morris and Magistrate Kay MacPherson, 9 December 2022, 4 [29].
187. Outline of Evidence of Ashley Morris and Magistrate Kay MacPherson, 9 December 2022, 1 [9].
188. Outline of Evidence of Ashley Morris and Magistrate Kay MacPherson, 9 December 2022, 2 [15].
189. Outline of Evidence of Ashley Morris and Magistrate Kay MacPherson, 9 December 2022, 4 [30]–[31].
190. Transcript of Ashley Morris, 9 December 2022, 302–303 [49]–[6].
191. Transcript of Ashley Morris and Magistrate Kay MacPherson, 9 December 2022, 301 [16]–[45]. See Arabena et al (n 183) 37.
192. Outline of Evidence of Ashley Morris and Magistrate Kay MacPherson, 9 December 2022, 2 [16].
193. Outline of Evidence of Ashley Morris and Magistrate Kay MacPherson, 9 December 2022, 2 [17]; citing Arabena et al (n 183) 3.
194. Victorian Aboriginal Legal Service, Submission 38 (Child Protection), 23–24.
195. Victorian Aboriginal Legal Service, Submission 38 (Child Protection), 24.
196. Supplementary statement of Commissioner Meena Singh, 10 May 2023, 51 [212].
197. Transcript of Argiri Alisandratos, 28 April 2023, 192, [42]–[43].
198. Outline of Evidence of Ashley Morris and Magistrate Kay MacPherson, 9 December 2022, 5 [38]–[42].
199. *Always Was, Always Will Be Koori Children* (n 102); *In the Child's Best Interests* (n 102); Commission for Children and Young People, '*... Safe and Wanted...: Inquiry into the Implementation of the Children Youth and Families Amendment (Permanent Care and Other Matters) Act 2014* (Inquiry Report, 2017).
200. Witness Statement of Argiri Alisandratos, 21 March 2023, 72 [309].
201. Transcript of Argiri Alisandratos, 27 April 2023, 45 [27]–[39].
202. Witness Statement of Argiri Alisandratos, 21 March 2023, 34 [115].
203. Transcript of Argiri Alisandratos, 28 April 2023, 110 [4]–[14].
204. Victorian Aboriginal Legal Service, Submission 38 (Child Protection), 24; Victoria Legal Aid, Submission 39 (Child Protection), 11; Outline of Evidence of Aunty Rieo Ellis, 7 December 2022, 6 [91].

7 OUT OF HOME CARE

Now that ... I have had direct experiences with the same Child Protection & removal systems that my Dad got an apology for his experiences with, it absolutely breaks his heart. There have been many points over the past few years where Dad has shut down and not been able to be there fighting these systems, because it is too hard for him to see Child Protection's involvement in our lives. It really signifies the lack of healing for him.¹ SISSY AUSTIN

Introduction

The State of Victoria has the highest rate of Aboriginal children in out of home care in Australia.² As at 31 March 2023, 29 per cent of children in care were Aboriginal.³ Yet, the litany of systemic failures in the State's performance of its duty towards these children indicate that the State, under the current system, is not a good parent.

The child protection system was an instrument of colonisation and still is. For most of Victoria's history, Aboriginal children were taken away from Aboriginal families for the express purpose of making them assimilate and making Aboriginal people disappear as peoples. The present system is not assimilationist in law. It has legal and policy protections which are intended to respect, protect and fulfill the rights of children in out of home care. However, there is evidence that these do not operate as they should. To avoid the child protection system operating as assimilationist in fact, this must change. Lack of resources is not an excuse for government failing to meet its human and cultural rights obligations.

Children in out of home care do not lose their right to culture and connection with their family and community. The matters discussed in this chapter involve nothing less than the rights of children in out of home care to have, develop and express their Aboriginal identity and history. That is, to understand themselves, to be themselves, to develop in ways they choose and to be connected with their own community as First Peoples. This is their fundamental human and cultural right.

This chapter outlines the evidence received by Yoorrook, from the State and other witnesses, on

the experiences of First Peoples and children when children are in out of home care. It also considers the experiences of First Peoples carers, including the barriers they face. The chapter examines evidence on the State's performance against the Aboriginal and Child Placement Principle (ACPP) and compliance with safeguards for cultural connection, including legal and policy obligations for cultural plans.

It also examines how well the State is meeting its legal obligations to act as a good parent would,⁴ and looks at the criminalisation of children in residential care settings.

The chapter concludes by looking at the work of Aboriginal Community Controlled Organisations (ACCOs) providing services to Aboriginal children in care and the benefits that can bring at an individual, family and system level.



The placement of children in out of home care



Where a decision is made that a child cannot safely stay with their parents, they are placed in out of home care.

They may be placed in the following types of care:

- kinship care: the placement is with the child's extended family, friends or existing social network
- home-based care: foster care or other placement options which occur within a family environment, but not from within the family kinship network
- residential care: paid staff provide care, usually in a community setting or group home.⁵

The Aboriginal Child Placement Principle (ACPP) requires that Aboriginal children should only be removed from their community and family environment as a matter of last resort. Where out of home placement is deemed necessary, all efforts must be made to place children in accordance with the following hierarchy:

- the Aboriginal extended family or relatives and, where this is not possible, other extended family or relatives
- an Aboriginal family from the local community and within close geographical proximity to the child's natural family
- an Aboriginal family from another Aboriginal community
- a non-Aboriginal family living in close proximity to the child's natural family.⁶

When placing a child away from their parents, the State must ensure that the child's best interests are paramount by providing for the child's physical, intellectual, emotional and spiritual development 'in the same way as a good parent would'.⁷ This includes ensuring non-Aboriginal carers, whether in kinship or other care arrangements, maintain the child's culture and identity by facilitating connection with culture (through implementing the child's cultural plan).⁸

What Yoorrook heard

The over-representation of Aboriginal children in Victorian out of home care is the worst in the country

Despite having a human rights Charter and having legislated for treaty-making to give effect to the right of First Peoples to self-determination, Victoria has the highest rate of Aboriginal children in out of home care in Australia at 102.2 children per 1000 (in 2021–22). This is a shameful truth that must be addressed urgently:

- The rate of Aboriginal children in out of home care has increased by 51 per cent since the landmark 2016 *Always Was, Always Will Be Koori Children* report and recommendations from the Commission for Children and Young People (CCYP).⁹
- As of June 2022, child protection was 22 times as likely to place an Aboriginal child into out of home care than a non-Aboriginal child.¹⁰ This

disparity had increased to 24 times as likely by 31 December 2022.¹¹

- Across the various stages of child protection involvement, the highest over-representation rate is for out of home care which has seen the most rapid growth in the last six years.¹²
- Figure 7-1 details the rates per 1000 of Aboriginal and non-Aboriginal children in out of home care by jurisdiction. As can be seen, at 30 June 2022, Victoria had the highest rate in the nation.

Many Aboriginal children do not live with siblings and Aboriginal carers

The ACPP aims to keep children connected to their families, communities, culture and country. Section 13 of the *Children, Youth and Families Act 2005* (Vic) (CYFA) requires the State to implement the ACPP when placing First Peoples children in out of home

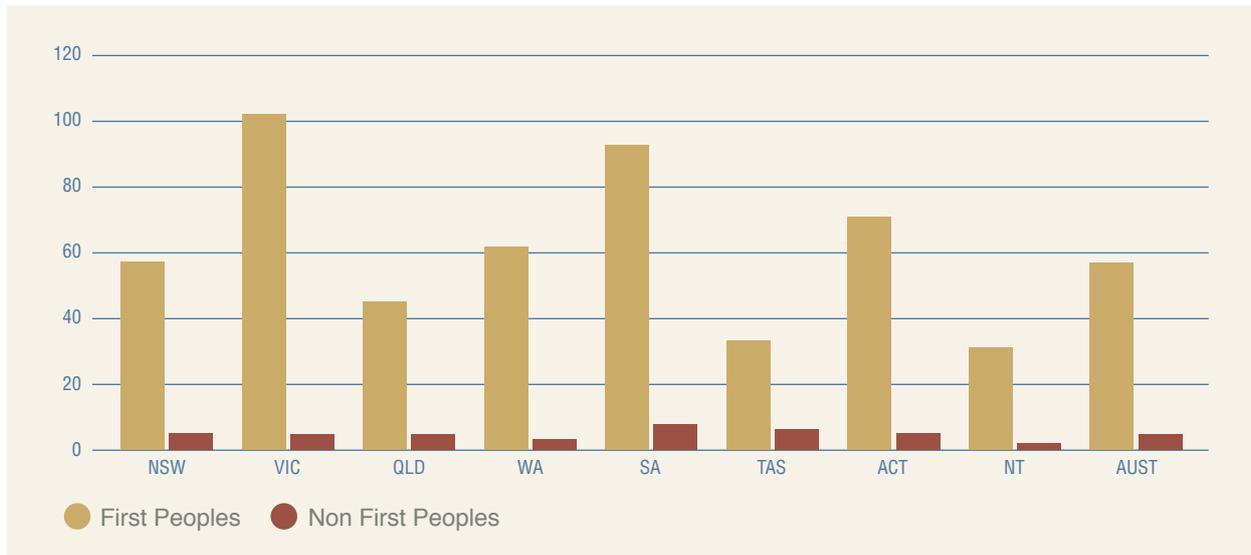


FIGURE 7-1: Aboriginal children in out of home care per 1000 as at 30 June 2022¹³

care. It prioritises placement with the child’s First Peoples extended family or relatives over other family or relatives and other placements.¹⁴ However, many ‘kinship’ placements are with non-Aboriginal family or kin. As Figure 7-2 shows, in Victoria, around six in 10 First Peoples children in out of home care do not live with First Peoples carers.¹⁵

The ‘best interests’ principle requires consideration of the desirability of siblings being placed together in out of home care.¹⁷ Siblings are an important source of cultural connection. Case law emphasises the fundamental importance of this consideration to Aboriginal children and families,¹⁸ for whom fundamental human rights are also at stake. Yet a significant proportion of First Peoples children in out of home care are not placed with siblings.

We see siblings from the same family all get allocated to different case workers. They are not working to keep the siblings together. There is no consistency in decision making or actions that could impact the children and family as a whole. Siblings with different case workers also then have varying access to their parents, based on the discretion of the individual case worker.¹⁹

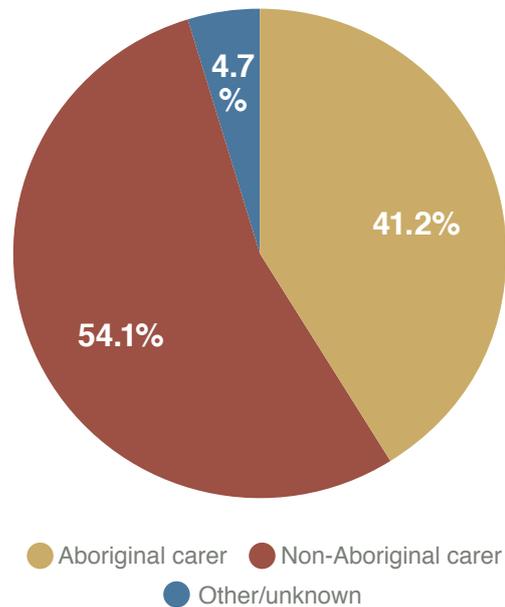


FIGURE 7-2: Aboriginal children in care by relationship with caregiver, 30 June 2022¹⁶

A 2019 evaluation commissioned by the Department of Families, Fairness and Housing (DFFH) found that

over half of First Peoples children in out of home care are separated from their siblings.²⁰ DFFH advised that as at 28 February 2023, of First Peoples children in out of home care, 57 per cent are placed with all siblings and a further 17 per cent are placed with some siblings.²¹

The government notes that despite funding and initiatives to increase siblings being placed together, ‘the availability of funded placement options to accommodate sibling groups, particularly large sibling groups, is limited and placing siblings together cannot always be achieved’.²² DFFH Acting Associate Secretary Argiri Alisandratos acknowledged that ‘this limitation is unsatisfactory’.²³ It also raises serious issues about whether DFFH and the State of Victoria fully appreciate and are doing enough to give effect to their human rights obligations to Aboriginal children and families.

Yoorrook also heard that some non-Aboriginal carers often do not make the effort to maintain contact with the child’s siblings.²⁴

Their foster carer was racist, and judgemental and did not want them near family. Multiple times during family contact visits, her siblings would announce that they were not Aboriginal and that she was not either. She would come home and tell us that she was not Aboriginal and that we were not her family. [The foster carer] also lived an hour away from family/community and this made things very hard for us to maintain a secure relationship with the kids.²⁵

Yoorrook heard from kinship carer, Sissy Austin, of the lengths she and two other women went to — without support from DFFH — to keep siblings connected:

I’ve been a part of a group where we’ve filled the gap of where the services don’t keep our kids connected, where we’ve seen that gap, and rather than waste time, you know, complaining about it all, you know, we just took it upon ... ourselves to find where ... kids were, siblings were and — and connected with carers, both Indigenous and non-Indigenous.²⁶

Recent legislative changes will place all five ACPPs into the CYFA. This was done by the Children and Health Legislation Amendment (Statement of Recognition, Aboriginal Self-Determination and Other Matters) Bill 2023 (Vic) (Statement of Recognition Bill) which at the time of writing this report was yet to be proclaimed. The ACPPs include the principle that ‘an Aboriginal child has a right to be brought up within the child’s family and community’.²⁷ This necessarily includes the child’s siblings. Yoorrook welcomes this development although it is unclear what impact it will have. The ACPPs have been part of DFFH policy for several years and the CYFA already required child protection practitioners to apply them.

What is clear is that sibling placement has not been given enough priority by the Victorian Government. Aboriginal children do not lose their human and cultural rights in out of home care. The Victorian Government continues to have legal obligations to ensure that these rights are respected, protected and fulfilled when those children are in their care. More must be done to keep First Peoples children in out of home care together with their siblings.

ATTITUDES OF CHILD PROTECTION STAFF CAN LEAD TO FIRST PEOPLES CHILDREN NOT BEING PLACED WITH ABORIGINAL CARERS

The 2020 SNAICC review of Victoria’s implementation of the Aboriginal and Torres Strait Islander Child Placement Principle described the factors that lead to First Peoples children being placed with non-Aboriginal carers.²⁸ These include:

- child protection practitioners not understanding the Aboriginal kinship system (for example, a non-Aboriginal foster carer being assessed as a kinship carer over a non-Aboriginal grandmother caring for the child’s Aboriginal cousins)
- practitioners not understanding Aboriginal child rearing practices (for example, not placing a child with Aboriginal family members because they think there are too many people in the home)
- placement decisions being made too quickly without exploring all options (for example, immediately placing a child with a non-Aboriginal person because they have their hand up first). There is little revisiting with Aboriginal

family members or revisiting Aboriginal family placement options

- practitioners not considering socioeconomic inequity and its influence on Aboriginal families not volunteering straight away to look after a child
- practitioners accepting minimal information from families who do not trust child protection rather than engaging ACCO and Aboriginal Child Specialist Advice and Support Service (ACSASS) programs to support the families to engage
- rejecting applications for kinship placements on arbitrary grounds, such as size of the carer's family, or not gaining a Working with Children Check (WWCC) in time.²⁹

Many of these factors were confirmed in evidence to Yoorrook. All raise issues about the failure to give proper consideration to human and cultural rights. These are discussed further below, before considering compliance with cultural planning obligations.

First Peoples still face barriers to becoming carers

The 2016 CCYP report *In the Child's Best Interests* found that 'the most significant barrier to complying with the [Aboriginal and Torres Strait Islander Child Placement Principle] placement hierarchy is a lack of Aboriginal carers'.³⁰ That report made recommendations to improve the recruitment and retention of First Peoples carers.³¹ The government accepted all of the recommendations in full or in part.³² However, Yoorrook heard evidence that many of these barriers remain. This raises issues of systemic indirect discrimination.³³

For example, prospective carers feel the assessment process is too onerous. One witness stated: 'People are scared to apply because the assessment is so invasive'.³⁴ Another told of how this process felt: 'We met with a social worker from child protection... and they arranged a visit to our home. I recall my husband feeling uncomfortable with them being in our house, but it was something we were required to do'.³⁵

A witness also spoke of having to be assessed as a carer even though she had been caring for another

child for five years. As part of the process, she was asked about her views on DFFH: 'They say, if you've got negative views about child protection, then you really need to consider the fact that you'll have child protection in your life. They're trying to turn you off taking the kids'.³⁶

The application process for carers (both kinship and foster carers) includes a national police check and WWCC for all household members over the age of 18. Yoorrook understands the importance of these requirements to ensure the safety of children being placed in out of home care. However, Yoorrook heard this may deter Aboriginal carers from applying out of concern they will be rejected due to previous minor offences.³⁷

As noted throughout this report, First Peoples are grossly over-represented in the criminal justice system because of systemic injustices. This means that criminal record screening disproportionately affects First Peoples. The government notes that only the most serious offences identified through a WWCC or police check will automatically disqualify a person as a carer. Where other less serious offences are identified, a further assessment is undertaken on the likely impacts of offences on the person's ability to provide care.³⁸

Yoorrook notes that DFFH does not keep data on the number of prospective carers whose background checks result in either further assessment or an assessment that they are unsuitable to provide care.³⁹ This means that it cannot monitor how this requirement is affecting prospective First Peoples carers.

Yoorrook heard that screening processes can impede or interrupt placements. For example, new carers have 21 days from the date that the child is placed in their care to apply for a WWCC.⁴⁰ Yoorrook heard of a case where the delayed return of a WWCC would have led to removal of a child from a successful kinship placement had it not been for the intervention of Aunty Rieo Ellis from Grandmothers Against Removals Victoria:

[The] baby was placed in her care when he was two weeks and then later on [when] he was six months, she said 'Aunty Rieo, [they] are trying to take him,' and I said 'Well, what for?' 'Because I haven't got my Working

With Children Check yet.' I said, 'But they placed him in your care without a Working With Children Check', and she goes 'Yeah, but they have come back now' ... I said [to the Child Protection worker] 'Well, what's your concerns?' ... 'Well, her Working With Children hasn't come back yet'. I said, 'That's not her fault, that doesn't make her a bad carer'.⁴¹

Issues linked to poverty and lack of services also affect First Peoples' ability to become carers.⁴² Yoorrook received a case study of how grandmother 'Marlene' had to wait a year for suitable housing before she could become the carer for her two granddaughters because her one-bedroom unit was deemed too small. This wait time was on top of an initial delay of 12 months in child protection approaching Marlene as a potential carer. Yoorrook heard that these delays exacerbated the children's trauma and resulted in significant behavioural difficulties that led to removal of one of the children from Marlene's care.⁴³

Yoorrook also heard that the process to become an accredited foster carer⁴⁴ does not cater for people with low literacy or low socioeconomic backgrounds and takes a long time.⁴⁵ Yoorrook was told at a round table with Barengi Gadgin Land Council, 'to become a foster carer there is so much — red tape and bureaucracy just to get through'.⁴⁶

Evidence also indicated that changing aspirations of First Peoples families may be affecting their availability as carers:

[I]f a family has their kids in school and are managing okay, they may be unwilling to bring other kids into the home as they are worried it will traumatise their own kids. That's different to our attitude 50 years ago — where we hid each other's kids from welfare, or looked after family without even thinking about it.⁴⁷

THERE ARE INEQUITIES IN HOW FIRST PEOPLES CARERS ARE SUPPORTED

Where Aboriginal family members do take on caring responsibilities for children who cannot live with their parents, often they are not properly supported. In 2016, CCYP found that '[k]inship carers require increased advocacy, support, assistance, training and education to provide culturally safe and trauma-informed care to Aboriginal children requiring out-of-home care'.⁴⁸

The overwhelming majority of First Peoples carers (96 per cent as at 30 June 2022) are kinship carers.⁴⁹ Many First Peoples families are already struggling and providing care can come at a significant cost:

Aboriginal kinship carers typically take on responsibility for children not because they have abundant time and resources, but because they feel a deep obligation to help Aboriginal families avoid the harms of removal and the residential care system. Taking on these responsibilities can come at a significant cost: carers can lose opportunities for education and employment, with consequences for the stability of their own lives. These burdens are only partly compensated by the inadequate financial support given to kinship carers.⁵⁰



Ian Hamm, Chair, Connecting Home

Despite changes following CCYP's 2016 report, CCYP found again in 2019 that many kinship carers do not receive adequate levels of support.⁵¹ Similarly, recent surveys of First Peoples carers found that:

- three in 10 were borrowing money from other lenders (e.g. banks or cash loans) to help meet their caring responsibilities⁵²
- a fifth had been unable to pay rent or mortgage repayments on time⁵³
- one in 10 had accessed emergency relief.⁵⁴

Although there are no differences in the care allowances available to kinship, foster and permanent carers,⁵⁵ recent reviews by EY Sweeney and the Victorian Auditor General's Office (VAGO) have established that kinship carers do in fact receive lower payments than foster carers.⁵⁶ For example, as at June 2021, 96 per cent of kinship carers received the lowest level of care allowance compared to only 32 per cent of foster carers.⁵⁷

This is despite the fact that foster carers are generally better off than kinship carers. A survey of Victorian carers, summarised in Table 7-1 below shows the educational and income disparity between kinship carers and foster carers and the proportion who used their own personal savings to support the child in their care.⁵⁸

This means that even though the system has formal equality between payment rates, the carers who are financially the worst off are being paid the least. This corroborates the evidence received by Yoorook that '[t]he kinship care allowance... does not ensure that those kinship carers can care really at that same rate [as] foster carers.'⁶¹

A 2017 Victorian Ombudsman review found that the main reason for the carer allowance disparity was that at the beginning of a placement, kinship carers are automatically eligible for the lowest care allowance level and must apply for a higher-level allowance based on an assessment of support needs. By contrast, foster carers are eligible for an allowance based on the child's needs at the beginning of a placement.⁶² The Victorian Ombudsman recommended that DFFH change its processes for assessing kinship carers' support needs.⁶³

Five years later in 2022, and despite a new model introduced in 2018, VAGO found kinship carers still receive lower payments than foster carers. This is because of the automatic starting rate for kinship carers and the lengthy and bureaucratic process for applying for higher level allowances.⁶⁴ VAGO also found that between June 2019 and March 2021, DFFH referred only 37 per cent of eligible placements to the new financial brokerage model, the First Supports program.⁶⁵

DFFH agrees that the disparity in income between kinship and foster carers places a very significant burden on those who are asked to take up kinship care for family members.⁶⁶ Yet DFFH has failed to effectively address it in a systematic way by altering existing policy.

DFFH Acting Associate Secretary Alisandratos acknowledged the challenges kinship carers face navigating the Department's process for accessing a higher allowance:

You're right: often carers find that process difficult and because the large proportion of kinship care placements are managed by Child Protection, historically, we haven't undertaken and paid the right attention to that.⁶⁷

TABLE 7-1: Educational and household income disparities between kinship and foster carers⁵⁹

	HOLDS EDUCATIONAL DEGREE ⁶⁰	INCOME BRACKET OF MOST CARERS	PROPORTION THAT USED PERSONAL SAVINGS
Kinship carers	25%	Under \$40,000 (40%)	72%
Foster carers	46%	Over \$100,00 (32%)	58%

He also acknowledged that 98 per cent of kinship carers' allowance applications are not being assessed within six weeks, leaving carers under further financial strain.⁶⁸

The government told Yoorrook that information and help is provided through carer peak bodies, as well as a recently introduced Care Support Help Desk. The help desk, run by the government, includes a phone support line to 'support carers with requests such as assisting with Care Allowance issues and the need for key documents... through to more general support in understanding child protection and court processes'.⁶⁹

Nevertheless, evidence shows that many carers are confused about or not aware of financial support available.⁷⁰ This indicates that DFFH is not making enough effort to provide information about available support. These findings are corroborated by evidence to Yoorrook. For example, early year education providers are providing kinship carers with basic support such as food, clothing and making appointments for children that should be provided by DFFH.⁷¹

First Peoples carers in Victoria's child protection system are overwhelmingly kinship carers, not foster carers. It is clear that the current support system discriminates against kinship carers. This is contrary to DFFH and the State of Victoria's human rights obligations to ensure that government decisions and programs are non-discriminatory in both terms and result.⁷² This must be urgently addressed.

FIRST PEOPLES CARERS ARE NOT GIVEN THE INFORMATION THEY NEED TO SUPPORT CHILDREN

*We were blindsided and promised so many supports, but when they dropped her off at our house three years ago, they left us alone and never supported us at all. It was like they did not care about her; they just wanted the bare minimum for her, just a house and food and did not care about her wellbeing.*⁷³

If a placement is likely to exceed six weeks, child protection (or, in some cases, a Community Service Organisation (CSO) or an ACCO)⁷⁴ must undertake a comprehensive assessment. This is to identify support needs for the child and the suitability of continuing the placement.⁷⁵

The 2022 VAGO *Kinship Care* review found that, of the cases it audited:

- assessments were not completed for 56 per cent of cases
- 98 per cent of assessments were not completed within DFFH's target timeframe
- at least 17 per cent of assessments were not completed to a sufficient standard.⁷⁶

These findings align with evidence received by Yoorrook from carers and advocates that the needs of First Peoples children in out of home care were not assessed and carers were not given critical information they need to support children in their care.⁷⁷ This causes enormous stress for Aboriginal carers who are often caring for their own family, alongside kin.⁷⁸ In some cases, this leads to placement break down:

*The teenager was dumped on him, and there was no information provided about the issues that the teenager had. The [carer] ended up having to give the teenager back to keep his family safe, because child protection did not set anything up properly. How awful for that child.*⁷⁹

One carer told Yoorrook that she had complained about the delay in assessing a child in her care when he was nine years old. He has recently started high school and has still not been assessed.⁸⁰

Additionally, Yoorrook heard that new carers often have no knowledge of the services available to First Peoples children such as free annual health checks from the Victorian Aboriginal Health Service. This means that services are missed or carers often end up incurring unnecessary out-of-pocket expenses paying for these things.⁸¹

System failures regarding health and disability assessments for Aboriginal children in care are discussed in detail later in this chapter.

Deficient cultural planning risks disconnection from culture and family

The high numbers of Aboriginal children in out of home care living with non-Aboriginal carers highlights the critical importance of keeping children connected to culture through cultural plans. The right to culture is recognised in various human rights laws, including the Charter.⁸⁶ Other human rights are also important in this context including the rights to personal identity and development.⁸⁷

Cultural plans



A key tool used to keep Aboriginal children in out of home care connected to their culture is a cultural plan (sometimes called a 'cultural support plan'). A cultural plan is required for every Aboriginal child in out of home care and must align with their case plan.⁸² This is an indispensable mechanism for giving effect to DFFH and the State of Victoria's human and cultural rights obligations.

DFFH told Yoorrook that 'within three working days from when a First Peoples child enters out of home care, the care team leader must make a referral to the Senior Advisor — Aboriginal Cultural Planning employed by a local ACCO to seek advice and ensure the care team includes Aboriginal people. Child protection or the care team is responsible for developing the Cultural Support Plan.'⁸³ It is a DFFH requirement that all Aboriginal children in out of home care must have a cultural plan approved within 19 weeks of the child entering care.⁸⁴

All relevant members of the child and family's network should be included in developing the plan. Once prepared, approval of the plan must be sought from the CEO of the local ACCO within three weeks. The ACCO CEO will set the date for review. VACCA currently holds the statewide Cultural Planning Co-ordinator position, which is tasked with developing training, working with ACCOs to ensure the agreed processes are followed and supporting ACCOs with guidance when issues arise.⁸⁵

A HIGH PROPORTION OF ABORIGINAL CHILDREN DO NOT HAVE A CULTURAL PLAN

Despite the legislated requirement for cultural plans, DFFH advised that as at the end of March 2023, only 67 per cent of Aboriginal children in care for over 19 weeks had one in line with Departmental policy.⁸⁸ A significantly higher proportion (90 per cent) of children placed in the Aboriginal Children in Aboriginal Care (ACAC) program had a cultural plan.⁸⁹

While the percentage of completed plans is increasing,⁹⁰ it is still unacceptably low. Cultural plans are a legislative requirement. They are a primary means for the State to meet its CYFA obligations as well as its Charter obligation to protect, promote and fulfil the cultural rights of Aboriginal children.⁹¹ The Minister for Child Protection and Family Services agreed that not having a cultural plan restricts an Aboriginal child's human rights.⁹²

Yoorrook was disturbed to hear that Victoria Legal Aid (VLA) lawyers 'routinely see protection applications reaching later stage hearings without a cultural plan being prepared or filed with the court, or plans being prepared without critical information, including not identifying a child's community.' VLA noted a case where DFFH had not provided a cultural plan or consulted with the child about their cultural support needs despite legal proceedings being on foot for more than 18 months.⁹³

The continuing low rate of compliance with cultural plan requirements demands much stronger accountability. VALS points out gaps in the CYFA that leave a lack of clarity about when a court can insist a cultural plan is made before it makes an order. VALS notes the CYFA only appears to require cultural plans at the time the court becomes satisfied that a child needs protection, but not for other applications, such as applications to extend orders. VALS recommends that the Children's Court is given greater powers to require development and implementation of cultural plans.⁹⁴

POOR QUALITY CULTURAL PLANS REMAIN A SIGNIFICANT ISSUE

The cultural support plan falsely states that the child's mother is an Aboriginal woman, and states that the child's father is an Aboriginal man but notes that he cannot be identified. There is no connection or link made to Country or mob. The information set out in the cultural support plan is patronising, useless and seems like it has come straight out of Wikipedia.⁹⁵

The quality of cultural plans is an issue. Yoorrook heard that '[c]ultural plans are being developed by predominantly white, female and middle-class Departmental staff, with little cultural knowledge or understanding' and without involvement of the child and their family.⁹⁶

Kinship carer Sissy Austin told Yoorrook,

we received a really gammin Case Plan ... the Plan says is that Tinjani's mob and traditional country is 'Currently Not Known'. All they need to do is look up Tinjani's last name, or talk to Tinjani or me. She knows exactly who she is.⁹⁷

Yoorrook heard that some cultural plans sent to ACCO cultural advisors for review include content copied and pasted from another child's cultural plan.⁹⁸ Plans often contain 'generic and tokenistic activities' due to a lack of understanding of how to connect to culture.⁹⁹ This includes child protection workers enrolling children in Aboriginal services as a superficial way of connecting them to culture.¹⁰⁰

They have ticked that box and they go, 'You go to Lulla's [Children and Family Centre], there's the Aboriginal part taken care of'.¹⁰¹

Following criticisms of the low rate and quality of cultural plans, multiple initiatives have been introduced. In 2016, a new model of Aboriginal cultural planning commenced. In 2017, a statewide coordinator for Aboriginal Cultural Planning was appointed. The 2019–20 budget included funding to establish cultural planning positions in ACCOs.¹⁰²

Despite this investment, Yoorrook heard there is still not enough support provided: 'The cultural plans are often handballed to the ACCOs to write up and (because of resourcing restraints and resultant backlogs) are often filed away rather than being fully integrated and acted on'.¹⁰³

The government noted that high-quality planning takes 'time, research, cultural knowledge and connections with Aboriginal community.' DFFH acknowledged that:

As a Department we need to review how this work is best supported and whether the model developed around 2017 is still serving us well. A review of a sample of cultural support plans is underway which will also inform how these plans can be improved and what additional supports the workforce might need to support robust plans.¹⁰⁴

DFFH Executive Director Adam Reilly noted a trial of cultural planning in his area (Wimmera South West) where the cultural plan remained the property of the family and young person and was brought along and referred to at every meeting by everyone involved in the care of the young person.¹⁰⁵ The trial was underpinned by a memorandum of understanding. Yoorrook welcomes this type of innovation which ensures cultural plans are living documents and which engages all parties in developing and implementing them.

Acting ‘as a good parent would’



Where the government makes the decision to remove a child, it must provide for the child’s development ‘as a good parent would’.¹⁰⁷ This requires enacting and monitoring the ‘case plan’, including the cultural plan.

The case plan, developed at substantiation, must contain all decisions made by DFFH that are significant decisions and relate to the present and future care and wellbeing of the child, including placement, contact and cultural needs.¹⁰⁸ All case plans must include a permanency objective (the goal for where the child will ultimately be placed).¹⁰⁹ Child protection may contract a CSO or ACCO to coordinate the delivery of services provided as part of the case plan.¹¹⁰

Each child in out of home care is allocated a child protection worker, who is ultimately responsible for case management. They are supported by a care team.¹¹¹ The care team uses the *Looking after Children Framework* to guide decision-making and document what the care team has agreed to do and achieve.¹¹² DFFH is required to review a case plan within 12 months of its original date¹¹³ and whenever there is a significant change in circumstances for the child.¹¹⁴

Child protection policy states that ‘[e]nacting a case plan is not a desktop activity. Supporting, coordinating, partnering, advocating and monitoring the actions associated ... with a case plan requires face-to-face contact ... with children and families.’¹¹⁵ The child protection manual states that ‘generally, for an allocated case, a fortnightly client visit is a reasonable minimum’.¹¹⁶

PROPORTION OF ASSESSMENTS COMPLETED WITHIN TARGET TIMEFRAMES: 2018-2020

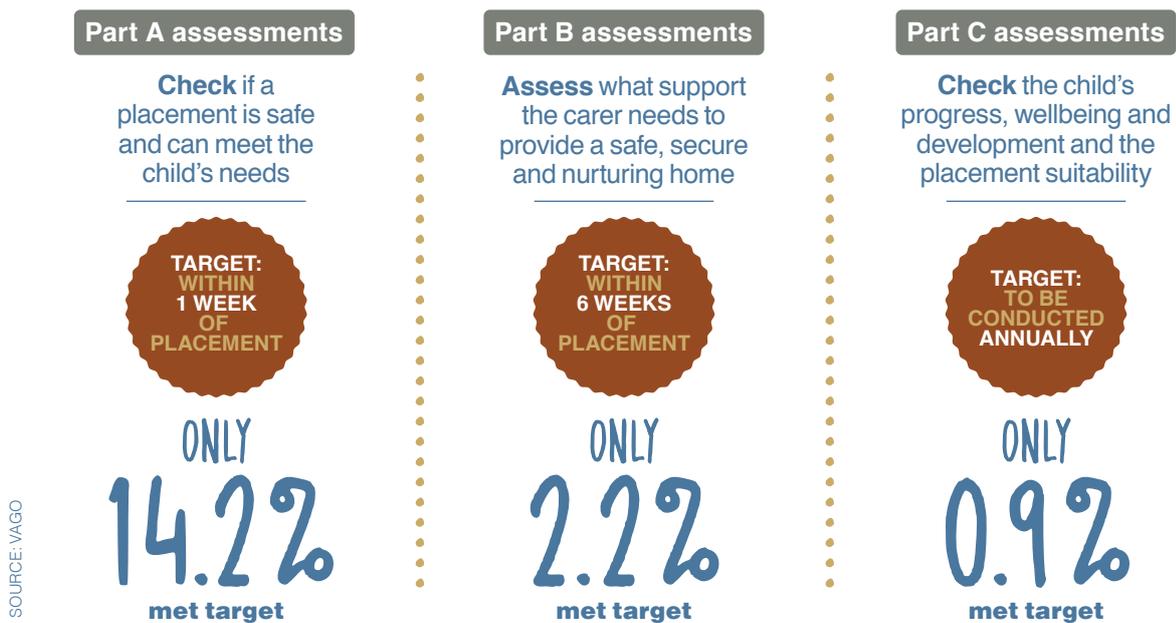


FIGURE 7-3: DFFH assessments completed within timeframes, including annual assessments¹¹⁹

The State is not acting 'as a good parent would'

The involvement with child protection traumatised me, and it traumatised my children. We deal with this trauma on a daily basis — my three-year-old wonders where he might be going next, and who is going to come to take him away. There are days where my baby just wants to cry — he doesn't understand his feelings and emotions after the trauma the Department put him through.¹⁰⁶

Yoorrook heard disturbing evidence that child protection makes little effort to actively monitor the health, wellbeing and cultural connections of Aboriginal children in care. For example, VAGO found that from 1 January 2018 to 31 December 2020, *less than one per cent* of assessments of the child's wellbeing and progress met the target to be conducted annually.¹¹⁷ When this was put to government during Yoorrook's hearings, the government witness had nothing to say.¹¹⁸

This is an extremely concerning situation. The cultural and human rights of the child do not terminate when a child is in out of home care. Nor is lack of resources an excuse for failing to even check on their wellbeing once in a year.

Early years provider witnesses noted instances where child protection workers sighted a sleeping child without having any engagement,¹²⁰ and cases where there was no contact for long periods of time:

[S]o the Department have placed the baby with the foster carer. She's Aboriginal. And nothing else. No-one's been back. Over 12 months. Nobody's been there to visit that baby. Nothing.¹²¹

VACCA told of a case they took over from DFFH, where a child had been neglected and was seriously malnourished. Child protection had only spoken to the carer, not visited or sighted the child.¹²² Similarly, a CCYP investigation in 2021 found child protection did not carry out essential tasks to ensure the child's safety, such as home visits, direct engagement, and following up on concerns repeatedly expressed by the local Aboriginal community.¹²³

Evidence provided by the Commissioner for Aboriginal Children and Young People on reported incidents in out of home care show that between 2019 and 2022, an average of 20 per cent of incidents related to Aboriginal children and young people.¹²⁴ Over that time, of the reported incidents, Aboriginal children accounted for:

- 24 per cent of reports of deaths (10 deaths)
- 23 per cent of reports of inappropriate physical treatment (439 reports) and 23 per cent of reports of physical abuse (400 reports)
- 18 per cent of reports of self-harm or attempted suicide (578 reports)
- 24 per cent of reports of sexual abuse (232 reports) and 22 per cent of reports of sexual exploitation (173 reports).¹²⁵

Independent reviews, such as CCYP's 2019 *In Our Own Words* report, found that high staff turnover and vacancies had a significant impact on how children in out of home care are supported.¹²⁶ Evidence to Yoorrook shows this remains a significant problem and compounds trauma for First Peoples children:

We have seen a case of a three-year-old who has had five different case workers since she was removed at Christmas last year.¹²⁷

The changeover and turnover of their case managers is something that young people report often being a barrier, a challenge, because they're having to retell their story so many times.¹²⁸

As at 31 January 2023, the turnover rate of DFFH child protection staff was 22 per cent.¹²⁹ In other words, around one in five DFFH child protection staff left employment in the previous year. The government concedes that staff turnover increases the risk of children and families having to retell their story and disrupts continuity of knowledge. It tries to minimise this impact through good record keeping.¹³⁰ However, a 2022 audit by VAGO found that 'DFFH does not have adequate controls to ensure its child protection data is of high quality'.¹³¹

The system is too often a placement system, instead of a child wellbeing system.¹³²

A lack of active monitoring may also mean children cannot access services they need. This may be because a service has changed¹³³ or because the child has changed placements. As explained by Shellee Strickland, CEO of the Gippsland and East Gippsland Aboriginal Cooperative:

The problems are exacerbated when Aboriginal children are moved through several care placements. It can be challenging for a carer or child protection practitioner who is newly introduced to a child to connect them with appropriate services, and the disruption of placement changes may make a child less willing to engage even if the services are more necessary than ever. Failure to engage children with appropriate services is a fundamental failure of the state's parental responsibility.¹³⁴

FAILURE TO MONITOR CULTURAL PLANS AND CONNECTIONS

The Department placed me with my [non-Indigenous] Nan and then stepped out of the picture — there were no ongoing check-ins, or assessments on whether the placement was appropriate. I faced significant trauma from being kept apart from my [Aboriginal] Dad and his side of the family.¹³⁵

A cultural plan will not in itself maintain cultural connections. Connecting to culture requires carers to be culturally aware and dedicated. Government has developed practice guides and incorporated cultural safety into the assessment process for carers.¹³⁶ However, Yoorrook heard that many non-Aboriginal carers are not culturally aware.¹³⁷ Some were described as racist:¹³⁸

They want the child, but they don't want an Aboriginal child. They want a perfect little child but they don't want anything to do with the Aboriginal family or any — because, you know, a lot of racism. We have seen some families that have wanted to change the name of the child, have fought us in court to change the identity of the child, and have brainwashed the child to say the child is not Aboriginal.¹³⁹

Cultural connection also requires funding to support cultural activities. The Victorian Aboriginal Children and Young People's Alliance recommended that DFFH increase brokerage for cultural activities so they align with the child's cultural needs as decided by the local ACCO and carers are given greater responsibility and accountability to see that cultural plans are followed. The Alliance also recommended that DFFH invest in cultural and language programs at local ACCOs and return to country camps.¹⁴⁰ Yoorrook draws attention again to the central role of these plans in ensuring the cultural rights of Aboriginal children.

The government told Yoorrook about different initiatives, program requirements and funding sources to assist in supporting First Peoples children and families' cultural identity and connection.¹⁴¹ This includes \$800,000 per annum to ACCOs for flexible brokerage to support implementation of cultural plans and the availability of client expenses and placement support grants for this purpose.¹⁴² However, the government acknowledges that this brokerage is inadequate.¹⁴³

Health, development and wellbeing needs are not being consistently met

NEEDS CANNOT BE MET IF THEY ARE NOT IDENTIFIED

It is inexcusable that children who have been through the Child Protection system can get to the Justice System without having their developmental needs assessed and support put in place through NDIS as needed.¹⁴⁴

As noted earlier, child protection must conduct an initial assessment of children's needs when they are placed in out of home care. Child protection must



Dr Mick Creati, Royal Children's Hospital and Professor Stuart Kinner, Murdoch Children's Research Institute

also continuously monitor the health, development and wellbeing needs of children in care under the *Looking After Children* framework. Failure to conduct assessments and monitor children's needs can have profound consequences, denying them opportunities for early intervention and support.

Evidence to Yoorrook suggests that very high proportions of Aboriginal children in out of home care have a disability. But DFFH's records do not reflect this.

The results of a study conducted by witness Dr Mick Creati and colleagues on the health of Aboriginal children in out of home care seen by the Victorian Aboriginal Health Service showed that:

- 46 per cent had a developmental delay
- 66 per cent had a mental health diagnosis
- 60 per cent were identified as having behavioural difficulties
- 63 per cent had school difficulties.¹⁴⁵

The 2016 *Always Was, Always Will Be* report found that more than one in five children in the Taskforce 1000 investigation experienced mental illness.¹⁴⁶ A 2019 VAGO report found that children in out of home care had more than five times the rate of mental health problems and double the rate of suicide attempts compared to the general population.¹⁴⁷ In addition, a recent VACCA client audit found that over 50 per cent of children under seven years who were engaging

with its service had a global or developmental delay or disability.¹⁴⁸

During Yoorrook's hearings, Acting Associate Secretary of DFFH Argiri Alisandratos estimated that 'somewhere in the vicinity of 30 to 40 per cent of children have some form of disability through the course of their journey in child protection and out of home care'. He added that this estimate is similar for Aboriginal children.¹⁴⁹

Yet these numbers are in stark contrast to low numbers reported by DFFH which states that, of Aboriginal children in out of home care in 2021–22, only:

- 14.4 per cent had a disability and just over half (52 per cent) of these children had an NDIS plan
- four per cent have a mental health concern (defined as mental health issue or conduct or behaviour disorder)
- one per cent were recorded as having 'substance use' (defined as current or historical alcohol or substance use, born drug dependent or substance misuse).¹⁵⁰

Yoorrook believes that DFFH's records are likely to significantly under-represent the proportion of First Peoples children in out of home care with disability, particularly mental health issues.¹⁵¹ Disturbingly, recording of mental health status on the child protection case management system (CRIS) is not

mandatory and recording disability status only became mandatory in December 2018.¹⁵²

VAGO found that disability status was not recorded for children in out of home care in 19 per cent of cases.¹⁵³ CEO of First Peoples Disability Network Australia Damian Griffis confirmed, ‘there is no reliable data about First Nations people with a disability in out of home care’.¹⁵⁴

Inaccurate data on disability has serious implications for the State’s responsibility to provide for the needs of children in its care.¹⁵⁵ If case records are not including information about disability, then how can the State be certain these children’s needs are being met or that their rights are being observed?

VACCA noted the difficulty in accessing disability assessments or diagnosis (and therefore NDIS support) for children in both the child protection and justice systems.¹⁵⁶ To address this issue, VACCA recommended a legal requirement that all children in child protection receive a developmental disability assessment.¹⁵⁷ Yoorrook supports this.

NEEDS ARE NOT BEING MET

The National Standards for Out of Home Care provide that: ‘Children and young people have their physical, developmental, psychosocial and mental health needs assessed and attended to in a timely way’.¹⁵⁸ These standards reflect several applicable human rights including rights relating to physical and mental health and to the child’s best interests.¹⁵⁹ They also reflect the positive duties governments have to ensure these rights.

Child protection policy requires a medical assessment be completed within 30 days of a child entering care.¹⁶⁰ Research cited in the CCYP Annual Report 2021 found an extremely small number of Victorian children in care receive all their recommended health assessments and services after entering care.¹⁶¹ A 2019 VAGO audit found that only one in five audited health services prioritised children in out of home care as required by a 2011 Chief Psychiatrist guideline. It also found the Department had failed to monitor implementation of protocols between child protection and child and youth mental health services.¹⁶²

Yoorrook also heard that child protection fails to assess and monitor the health needs of First Peoples children in out of home care, with VALS submitting that ‘the provision of culturally appropriate counselling, trauma services or mental health support for Aboriginal children in care is practically non-existent’.¹⁶³ As noted earlier, one reason for this is because DFFH do not provide carers with the information they need about the availability of services and support to access them.¹⁶⁴

DFFH records provided to Yoorrook for First Peoples children in out of home care show very low rates of engagement with health services. In 2021–22:

- 13 per cent had one or more immunisation records uploaded to the DFFH system
- four per cent had one or more visits to the dentist
- eight per cent had one or more consultations with a health professional
- 76 per cent have their Medicare number recorded on the DFFH system.¹⁶⁵

Yoorrook heard that lack of care for children’s health is exacerbated by the way health records are managed by child protection. There is no single system for recording previous assessments for children in out of home care and health care professionals do not have direct access to previous assessments. Instead, they must rely on child protection workers, often with low health literacy, to provide the information. This results in health professionals not having information they need, and children and carers having to repeat medical histories, potentially retraumatising children.¹⁶⁶

The government told Yoorrook that all children placed in care have a Commonwealth Government My Health Record unless they were opted out of the system or had their record cancelled by a parent before they entered care. Child protection usually accesses a child’s My Health Record through a link embedded in the DFFH Client Relationship Information System (CRIS). Child protection also records health information and alerts in the CRIS file which is visible to all practitioners and contracted/authorised agencies. There is comprehensive practice guidance in the child protection manual regarding accessing a child’s My Health Record account and the importance of sharing health information in the best interests of the child.¹⁶⁷

This does not align with the evidence of medical witnesses attesting to the continued lack of access to a child's health record. Dr Mick Creati told Yoorrook:

The current system for information-sharing is ad hoc, inadequate, relies on managers from DFFH, VACCA, CSOs and even carers to email assessments to me or other workers. The system is clunky and relies on people with good intentions updating the system. I have been on hold for hours trying to get information about one child. These children have assessments and recommendations that get stuck in the system.¹⁶⁸

Individual witnesses also gave evidence on the frustration experienced when they do not have key items such as a Medicare card for the child:

When children go into kinship care arrangements, carers aren't given the documents they'll need to care for the children, like birth certificates and Medicare cards. This means that you don't have those documents when you need them, and you have to apply for them. It's just a nightmare ... Even if you have a kid coming for respite care, and they need to go to a doctor, you can't take them, because you don't have a Medicare card. You have to ring up and ask how much it will cost. Then the doctors are saying, 'Where's the Medicare card? Who is this child?' ... There's obviously a reason for carers asking for those documents. It should be a priority for every child. This is a pretty basic thing. It's not hard. It should be easy for VACCA to organise.¹⁶⁹

Further, in 2022 VAGO found that child protection staff frequently do not complete required health and other personal information. For example, in their audit, no information was recorded on:

- disability status in 19 per cent of cases
- complex medical needs status in 77 per cent of cases
- where disability was recorded, disability type in 32 per cent of cases
- COVID vaccination status in 69 per cent of cases.¹⁷⁰

These findings undermine any existing and enhanced systems for recording and sharing of health information. If the child's health information is not in the system, it cannot be transferred with them if they move between out of home care placements.

The evidence referred to above paints a disturbing picture of failures to adequately monitor the health needs of children in out of home care. This means that the Victorian Government cannot know whether those needs are being met and cannot properly take action to address them and give effect to its human rights obligations.

Life outcomes for children in care are not systematically measured



Yoorrook believes that as well as ensuring immediate safety and wellbeing needs are met, system success should also be measured by examining life outcomes for children. Yoorrook notes that the 2020 *Keep Caring* report found that the 'absence of monitoring means that the true state of the challenges facing care leavers remains largely hidden from the public and policy makers'. CCYP therefore recommended that the government 'develop a mechanism to track the life outcomes (at a population level) of people who have left care between the ages of 16 to 18 and publish this data every two years'.¹⁷¹ Yoorrook understands that this recommendation is 'planned for implementation'.¹⁷² Yoorrook strongly encourages government to expedite this process and implement CCYP's recommendation without delay.

Failure to protect children in residential care

[T]hese children behave in ways that workers aren't equipped to deal with, particularly in residential care. We hear about police being called in to respond to those behaviours. It's just trauma upon trauma upon trauma for these children and such a low age of criminal responsibility just means that our children are set up to be criminals earlier and earlier.¹⁷³

Residential care and other non-home-based settings¹⁷⁴ are used as a last resort for children where another out of home care placement cannot be found.¹⁷⁵

As noted by DFFH in evidence, there are around 450 children at any point in time in residential care: 'They are, by their very nature, some of the most complex children who have complex needs because of their trauma histories'.¹⁷⁶

In 2021–22, nearly one fifth of all children and young people in non-home-based settings (176 children or 19.7 per cent) were Aboriginal.¹⁷⁷ Of these, 122 were in residential care, six were in lead tenant care and 48 were in contingency placements (such as hotels).¹⁷⁸ Of the 176 Aboriginal children in non-home-based placements:

- 82 per cent were aged 13 to 18 years old, 14 per cent were seven to 12 years old, two per cent were less than six years old, and three per cent were older than 19 years¹⁷⁹
- 51 per cent identified as male and 48 per cent identified as female and 2 per cent identified as 'other'¹⁸⁰
- 36 per cent had a recorded disability.¹⁸¹

In 2019, CCYP found that '[b]ased on available data and advice from children and young people, residential care in its current form is unsafe for children and young people and currently places them at an unacceptable risk of harm'.¹⁸² It recommended redesign of the residential care system including a therapeutically trained, culturally aware and adequately resourced workforce, consideration of the individual needs and experiences of children placed in residential care,

physical environments that provide a sense of home and improved access to supports.¹⁸³ Four years later, Yoorrook heard that residential care is not culturally appropriate, still does not support the needs of children and continues to lead to the criminalisation of children.¹⁸⁴

Yoorrook notes that the most recent State budget included \$548 million over four years to improve outcomes for children in residential care, including increased therapeutic supports.¹⁸⁵ This is welcome. In advance of that investment being rolled out, Yoorrook sets out below its findings regarding residential care.

RESIDENTIAL CARE IS NOT CULTURALLY APPROPRIATE

I'll never forget one of the first kids I worked with — a 14-year-old girl who had been taken from her family at two years old. I went to a care meeting with residential care workers, and I remember all they did was say she was lazy and dirty. That made me so angry — how dare they talk about her like that and put her down like that? She had been in their care since she was two years-old. What were they doing to teach her?¹⁸⁶

Residential care is mainly provided by CSOs, with two ACCOs currently delivering residential care to a small number of First Peoples children. Several other ACCOs have raised concerns about the cultural appropriateness of the current residential care model and advised their unwillingness to deliver residential care until a more culturally appropriate model is developed.¹⁸⁷

RESIDENTIAL CARE IS NOT EQUIPPED TO MEET COMPLEX NEEDS OF CHILDREN

And in resi, like, no one really told me what to do. Like, obviously if I did something wrong they wouldn't say, 'Can you, please, stop that?' you know, they would just sit and just watch and laugh, and think it's all fun and jokes.¹⁸⁸

CCYP's *Out of Sight: Systemic Inquiry into Children and Young People Who Are Absent or Missing from Residential Care* report noted 'limited relationship building because of low levels of staff training and experience (due in part to high turnover and reliance

on casual staff) ... mean[s] staff are often ill-equipped to respond to the complex needs of children and young people with a history of trauma'.¹⁸⁹ The Commissioner for Aboriginal Children and Young People noted the extended and repeated placement in secure welfare of Aboriginal children and young people perceived as becoming 'too difficult' in residential care. Similarly, VALS noted that residential care staff

are underqualified and can struggle to deal with persistently challenging behaviour from children with complex needs. Related to this, the remuneration and work conditions for residential care staff currently cannot attract qualified professionals, and the workforce instead is subject to a high level of turnover and reliance on agency contract staff. This limits the chance for children to build trusting relationships with staff, and the capacity for staff to consistently implement tailored support plans.¹⁹⁰

CHILDREN MISSING FROM RESIDENTIAL CARE ARE UNSAFE

Out of Sight also casts a spotlight on the high rates of children who are absent or missing from residential care, the harm that often comes to them while they are missing, and the lack of urgent action to keep children in residential care safe. It found that 'reporting of children going missing from care is inconsistent and that, as a result, no-one knows the full extent of the problem'. However, 'while Aboriginal children are over-represented in out of home care overall [including in residential care], the rate at which they are reported absent or missing from residential care is lower than for non-Aboriginal children'.¹⁹¹

Out of Sight found that one of the reasons Aboriginal children may go missing is to try to connect with family and culture.¹⁹² However, as these attempts are unsupported, they may disrupt efforts within the child protection system to support children to connect to culture.¹⁹³

CHILDREN IN RESIDENTIAL CARE ARE BEING CRIMINALISED

Once police are activated, they very rarely pull back on their responses.¹⁹⁴

Residential care is the most common placement type for 'crossover children' — those who have contact with both the child protection and the youth justice systems.¹⁹⁵ CCYP's 2021 *Our Youth Our Way* report extensively documented this dynamic for First Peoples children.¹⁹⁶

DDFH data shows the increased risk of criminal justice contact for children placed in non-home-based settings when compared to home-based settings. For example:

- the proportion of children in residential care that the criminal justice system will have subsequent contact with is particularly high for children aged 10 to 14 (67 per cent of First Peoples children and 66 per cent of non-First Peoples children)¹⁹⁷
- 41 per cent of First Peoples children in residential care aged 11 to 14 have had prior contact with the criminal justice system and are 2.4 times as likely as children in family-based settings to have had criminal justice contact
- 54 per cent of First Peoples children in residential care aged 15 to 19 have had prior contact with the criminal justice system and are 1.6 times more likely than children in family-based settings to have had criminal justice contact.¹⁹⁸

Police involvement in residential care settings increases the risk of criminalisation. For example, VACCA noted that police are 'embedded in care teams for many of the young people VACCA works with, and whilst this can help with proactive planning, it also means that young people are actively being profiled and surveyed'.¹⁹⁹ VACCA also noted that DFFH's requirement to lodge a missing persons report triggers a warrant that requires attendance at a police station for it to be lifted. Yoorrook was told this typically occurs multiple times per week.²⁰⁰

[Y]ou have a certain time to get home and if you don't get home then they'll just call the police and call — say, 'Cast your lines out' and they're missing persons, and, yeah. They'll just go from there and put you in, like, secure welfare and that.²⁰¹

Police may also be called to deal with 'challenging' behaviour of children in residential care, which leads to an escalation in behaviour and further charges, such as assaulting police or resisting arrest.²⁰² These are often for trivial behaviours. Yoorrook received evidence that children in residential care were being charged for 'throwing a sponge, breaking a plate or "theft" of food from communal kitchens'.²⁰³ DFFH is aware that residential carers are calling the police not because a child's behaviour was severe but because of its frequency.²⁰⁴ As noted by co-Chair of the Aboriginal Justice Caucus, Chris Harrison:

[Y]ou see kids too many times where once they go into the system, resi care houses and stuff, even foster care with non-Aboriginal people, they're coming out with charges. Like, the amount of kids that are coming out with charges in that system, like, they turn around and they might be playing around outside and they break a window or they have thrown a rock through a window or they've broken a window. It's a window.²⁰⁵

Aboriginal children and young people have expressed that they feel targeted by police in residential settings.²⁰⁶ Multiple organisations also raised concerns about the way police handle these incidents, with VALS suggesting that antagonistic behaviour of some police is intentional.²⁰⁷ VACCA provided the example of the use of handcuffs and transporting children in a divvy van, despite their cooperation.²⁰⁸

THE STATE IS FAILING TO IMPLEMENT ITS FRAMEWORK TO REDUCE CRIMINALISATION OF YOUNG PEOPLE IN RESIDENTIAL CARE

In evidence, DFFH stated that given the history of trauma that children in out of home care have experienced, contact with the criminal justice system is 'the last thing we want children exposed to'.²⁰⁹ The government submission to Yoorrook also acknowledges that there is 'more to be done' to prevent Aboriginal children involved in the child protection system from entering the youth justice system.²¹⁰ Yet steps that could have been actioned three years ago have not occurred.

The 2020 *Framework to Reduce Criminalisation of Young People in Residential Care* is a shared commitment between DFFH, Department of Justice and Community Safety (DJCS), Victoria Police and residential care service providers to 'reduce unnecessary and inappropriate contact of young people in residential care arising from behaviours manifesting



Bonnie Dukakis and Chris Harrison, Co-Chairs, Aboriginal Justice Caucus

from childhood traumatic experiences and resultant involvement with the criminal justice system²¹¹

However, Yoorrook heard that the Framework has not been implemented.²¹² VLA noted there is no implementation guide or mechanism for accountability and review of the Framework.²¹³ Further, VALS found no evidence that the Framework has been implemented or that there is awareness of it:

The Framework puts in place very specific instructions for police and for the Department to not proceed with arrests as a matter of first resort for police. The carers are not to contact police for behaviour management issues but instead to engage in de-escalation. While the Framework is a positive document and looks great on paper, there's absolutely no implementation and no one on the ground seems to be applying it. It seems to have been taken as a broad — it seems to be seen by both the Department and Victoria Police as some pie in the sky objective that they are working towards at some stage.²¹⁴

The same view was expressed by representatives from the Aboriginal Justice Caucus and the Koorie Youth Council,²¹⁵ VLA²¹⁶ and VACCA.²¹⁷ Nerita Waight, CEO of VALS, expressed frustration at the lack of accountability for the criminalisation of children in care. She characterised the attitude of authorities as one of 'just blam[ing] individual officers or label[ing] our service as dogmatic'.²¹⁸

Having received that evidence, Yoorrook asked the government about the status of the Framework. Yoorrook was informed that:

- after the signing of the Framework in 2020, production of the action plan was delayed due to the COVID-19 pandemic, and work recommenced in early 2022
- the action plan was signed by DFFH, DJCS, Victoria Police, The Centre for Excellence in Child and Family Welfare and VACCA in March 2023
- development of data indicators to support monitoring and review of the plan is 'in progress'

- review of the Framework is planned to commence after the completion of the 18-month action plan in mid-2024.²¹⁹

The long delay on developing the action plan is concerning. Evidence to Yoorrook shows that urgent attention is needed to bring the Framework to life and improve outcomes for these vulnerable and often traumatised young people in the State's care.

Aboriginal-led services provide better care

This chapter has highlighted serious and consistent failings in the assessment and provision of care and connection for First Peoples children in out of home care. One of the ways that Aboriginal-led organisations have mitigated the harms of child removal is to provide the care themselves.

This has been facilitated through the transfer of children from the care of the State to the care of an authorised ACCO under the ACAC program.²²⁰ ACCOs have also been contracted to deliver limited case management services for First Peoples children.²²¹

The *Wungurilwil Gapgapduir* agreement aimed to transition all case management and care of Aboriginal children to ACCOs by the end of 2021. At the end of 2022, 47 per cent of First Peoples children on final orders and in out of home care were either supported through the ACAC program or by an ACCO through contracted case management.²²² Excluding those on permanent care orders, there were 198 Aboriginal children in ACAC which represents 7.5 per cent of all First Peoples children in care and 2.2 per cent of all children in care.²²³

As detailed in this report, Aboriginal providers of services to children and families are frustrated by inadequate resourcing and barriers imposed through funding streams and bureaucratic processes. Despite those limitations, Yoorrook heard that ACCOs get better outcomes for children in out of home care. They provide them with holistic services to meet all their needs, including health, education and housing within a culturally safe framework.²²⁴

A 2019 evaluation of VACCA's ACAC program, Nugel, found that 'a significant number of children and young people had increased contact with their parents and the majority saw an increase in their connection to culture and community'.²²⁵ This evaluation (discussed further in Chapter 8: Permanency and reunification) is unsurprising given Aboriginal services have a high stake in improving the lives of their community members. ACAC providers spoke of being part of the village that steps in when a community member needs help:

When I talk about the village, I talk about a responsibility of all community members that have around looking after children... You know, years ago ...when we walked down the street as kids, and if an Elder seen us or another older person seen us misbehaving or getting into trouble, they had permission from our parents to swiftly kick us up the bum and send us home. And by the time we got home, our parents usually knew that we'd been up to mischief and gotten into trouble ... The other part of it is about, you know, if your family were struggling, if there was a death in the family or if there was an illness in the family, the community surrounded [you] and helped you care for your children. So that you could heal yourself or you could do what you need to do knowing that those children were being — they were safe within culture, they were safe within that family. So, it's a wraparound support.²²⁶



Auntie Hazel Hudson, Njernda

Yoorrook heard that ACCOs can be more proactive and creative in their responses to problems that could disrupt or terminate an out of home care placement with an Aboriginal caregiver.²²⁷ Yoorrook also heard of innovation within DFFH instigated by DFFH Executive and Murrawarri man Adam Reilly who organised a three-day cultural camp for 15 Aboriginal children in out of home care who have frequent incident reports. There was not one incident report at the camp:

[T]he kids were kids again. Their eyes were just wide open, listening to Elders' stories, participating in cultural activities, just having the best time, and they walked away with a strong sense of pride.²²⁸

This shows the value of culture, of government departments doing things differently.

Ultimately, more First Peoples' children in the ACAC program are reunified with their parents than children managed by DFFH child protection. Between January and June 2021, 83 per cent of First Peoples children in the ACAC program were reunified with parents or family compared with 64 per cent managed by DFFH child protection.²²⁹

The Statement of Recognition Bill will extend the ACAC program²³⁰ by allowing authorised ACCOs to conduct investigations of reports made to child protection.²³¹ Funding of \$11.6 million over four years was provided in the 2020–21 budget for a pilot of this function, called the 'Community Protecting Boorais pilot'. This will fund a team at both VACCA and the Bendigo and District Aboriginal Cooperative with capacity to respond to up to 174 child protection reports that require investigation per year. The 2023–24 budget also provided funding to expand the Community Protecting Boorais trial for 348 Aboriginal children.

Yoorrook acknowledges there are competing views on whether it is appropriate for the ACAC program to undertake child protection investigations. Providers of the program strongly support it.²³² Others are more critical and state 'that the law itself needs to change rather than who exercises it'.²³³ Other criticisms include the potential for a conflict of interest between investigation and service-provision, particularly in regional Victoria, with the consequence that this may deter First Peoples, particularly women, accessing

services.²³⁴ This was acknowledged by DFFH Acting Associate Secretary Argiri Alisandratos when he stated: ‘Less of them want to do the more statutory parts of the system, which is understandable given the backdrop, given the decision making that will inevitably have to be undertaken by those communities’.²³⁵

The way forward

Although Victoria has the highest rate of compliance with the ACPP in Australia,²³⁶ most First Peoples children in out of home care do not live with First Peoples carers. A high proportion also do not live with some or all siblings.

Barriers to First Peoples being carers continue to include the intrusive and judgemental nature of the assessment process, the operation of screening processes and the long and involved process for becoming a foster carer.

Where First Peoples families do step into a caring role, overwhelmingly as kinship carers, they are not properly supported. Despite the availability of equivalent payments for kinship and foster carers, in practice nearly all (96 per cent) kinship carers continue to receive the lowest level of payment.²³⁷ Many families are not told of the services and supports that are available or are not told about them until late. Carers are often not provided with the basic information they need to allow them to properly care for children.

More must be done to remove barriers and support Aboriginal carers so that Aboriginal children who must be removed can be placed with Aboriginal kin. It is unacceptable that issues like the poor transfer of information about entitlements or the needs of children continue to affect the ability of Aboriginal families to effectively care for their kin.

Where the State makes the decision to remove a child, it must provide for the child’s needs ‘as a good parent would’.²³⁸ Yet, as other inquiries have heard, Aboriginal children in out of home care do not have their health, wellbeing and other needs, including cultural needs, consistently assessed, met or monitored.

The evidence heard by Yoorrook regarding failures in the child protection system indicates widespread breaches of human rights regarding the protection of families and children.²³⁹ DFFH cannot say it is being a good parent when that level of failure is occurring. Nor can it say that it is meeting its human and cultural rights obligations under the Charter.

Required health and disability assessments must be conducted and shared with relevant health providers. These system failures breach the equality rights of children with disabilities.²⁴⁰ Similarly, a child’s right to development cannot be met if annual assessments of their placement are not being completed 99 per cent of the time.

In addition to these very serious human and cultural rights concerns, what we also know is that there is strong correlation between child protection involvement and contact with the criminal justice system. This applies particularly for children placed in residential care.

Aboriginal children in residential care services continue to be criminalised through the over-reliance of the system on police to deal with ‘challenging behaviours’. The State has delayed in ensuring its agencies, including DHHS and Victoria Police, apply the *Framework to Reduce Criminalisation of Young People in Residential Care*. An accountability mechanism, including a way of escalating non-compliance with the Framework, is urgently needed.

During this inquiry, Yoorrook has heard much from government about commitments to self-determination, to the rights of children and that ‘we know we must improve’. But this rings hollow in the face of data that shows continued non-compliance with the requirement for First Peoples children in out of home care to have a cultural plan, and that cultural plans are often poor quality.

This matters because First Peoples children are searching for their identity and searching for themselves because they have been taken and have lost contact with their country and their family. If cultural plans were in place, of good quality, and constantly monitored, that might not happen. They would not be searching. They would know who they are and what

their connection is with their people and their country. Their human right to culture would be respected.²⁴¹

Recent legislative reforms have inserted recognition principles into the CYFA to give guidance in the administration of the Act, with the aim of 'ensuring the distinct cultural rights of Aboriginal children and Aboriginal families are recognised, respected and supported'. This is a very welcome reform.²⁴² However, given the current, persistent failure of DFFH to ensure cultural plans are made, implemented and monitored for all children in out of home care, Yoorrook considers stronger accountability is needed through monitoring by the Children's Court. As discussed in the next chapter, mechanisms must also be put in place to monitor cultural plans when a child has been placed in permanent care.

The ACAC program and the transfer of care to ACCOs' programs have shown that Aboriginal children fare better when their care is overseen by ACCOs. However, these programs are under-resourced and the number of Aboriginal children in out of home care under these arrangements remains too low. Currently, Victoria is less than halfway towards meeting the *Wungurilwil Gapgapduir* 2021 target for all First Peoples children in care to be transferred to the ACAC program.

To address this, ACCOs need the workforce and resources to scale up. This becomes more urgent as ACAC organisations also take on the role of the State in investigating child protection cases. While investment has occurred in recent State budgets, if ACCOs are to become simultaneous investigator, case manager and carer, significant resources will need to flow to ensure the sector does not take on the State's broken child protection system without the resources to deliver better outcomes. Further, as discussed in Chapter 2, transferring State responsibility in a failing system to ACCOs is not self-determination. ■

RECOMMENDATIONS

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.

Endnotes

1. Outline of Evidence of Sissy Austin, 2 March 2023, 14.
2. Australian Government Productivity Commission, *Report on Government Services 2023* (2023) 'Part F, Section 16 Child Protection Services', Table 16A.2 ('*Report on Government Services 2023*').
3. Department of Families, Fairness and Housing, Response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 6 May 2023, Attachment 1, 7 [16.4].
4. *Children, Youth and Families Act 2005* (Vic) ('CYFA') s 174(b).
5. Department of Families, Fairness and Housing, *Child Protection Manual* (20 June 2019) 'Principles, Roles and Responsibilities for Placement — Advice' <<https://www.cpmanual.vic.gov.au/advice-and-protocols/advice/out-home-care/principles-roles-responsibilities-for-placement>>.
6. CYFA (n 4) s 13.
7. *Ibid* s 174(1)(b).
8. Department of Families, Fairness and Housing, *Child Protection Manual* (20 June 2019) 'Principles, Roles and Responsibilities for Placement — Advice' <<https://www.cpmanual.vic.gov.au/advice-and-protocols/advice/out-home-care/principles-roles-responsibilities-for-placement>>, noting 'the child protection practitioner or contracted case manager has ongoing responsibilities including leading the implementation the case plan and ... the cultural plan.'
9. Witness Statement of Argiri Alisandratos, 21 March 2023, Attachment AA-10, 26.
10. Witness Statement of Argiri Alisandratos, 21 March 2023, 30 [89].
11. Department of Families, Fairness and Housing, Supplementary response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 6 May 2023, Attachment 1, 7 [16.8].
12. Witness Statement of Argiri Alisandratos, 21 March 2023, 30 [89].
13. *Report on Government Services 2023* (n 2) Table 16A.2.
14. There is case law confirming that where the Secretary has exclusive parental responsibility for a child (e.g. Family Reunification Order or a Custody to Secretary Order) the Children's Court has no power to include a condition that siblings be placed together. These are entirely decisions for DFFH: see *DOHS v B*; *DOHS v H* [2009] VChC 4 [14]–[16].
15. As at 30 June 2022, 41.2 per cent of First Peoples children in out-of-home care were living with First Peoples relatives, kin or other carer: *Report on Government Services 2023* (n 2) Table 16A.22. Data provided by DFFH says as at 31 December 2022, 32 per cent were placed with a non-Aboriginal primary carer, 26 per cent were placed with an Aboriginal primary carer and 42 per cent were placed with a carer whose Aboriginal status is unknown: Witness Statement of Argiri Alisandratos, 21 March 2023, Attachment AA-17, 33.
16. Witness Statement of Argiri Alisandratos, 21 March 2023, Attachment AA-17, 33.
17. CYFA (n 4) s 10(q).
18. *Secretary, Department of Human Services v Sanding* (2011) 36 VR 221, [18], [22], [249]–[250] (Bell J).
19. Outline of Evidence of Aunty Rieo Ellis, 7 December 2022, 4 [44]–[45].
20. See Victorian Auditor-General's Office, *Kinship Care* (Independent Assurance Report to Parliament, 2022) 5 ('*Kinship Care*').
21. Department of Families, Fairness and Housing, Supplementary response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 6 May 2023, Attachment 1, 7 [16.2]. Note that other data provided by DFFH showed that in 2021–22, 36 per cent were placed with all siblings and 34 per cent were placed with some siblings: Department of Families, Fairness and Housing, 'Response to NTP Item 002-001 – *Tranche 2 data response supplied by the Performance and Analysis, System Reform and Workforce Division*', 12, produced by the State of Victoria in response to the Commission's Notice to Produce dated 3 November 2022.
22. Witness Statement of Argiri Alisandratos, 21 March 2023, 97–98 [415]–[417].
23. Witness Statement of Argiri Alisandratos, 21 March 2023, 98 [417].
24. Outline of Evidence of Sissy Austin, 2 March 2023, 7–8 [92].
25. Anonymous, Submission 54.
26. Transcript of Sissy Austin, 2 March 2023, 82 [30]–[34].
27. Children and Health Legislation Amendment (Statement of Recognition, Aboriginal Self-Determination and Other Matters) Bill 2023 (Vic) cl 5(2) inserting new s 14(1A) ('Statement of Recognition Bill').
28. The term used nationally is 'Aboriginal Torres Strait Islander Child Placement Principle'. Yoorrook uses the term 'Aboriginal Child Placement Principle' as this is the term used in the CYFA.
29. SNAICC — National Voice for our Children, *Reviewing Implementation of the Aboriginal and Torres Strait Islander Child Placement Principle: Victoria 2020* (Report, 2021) 18–19 ('*Reviewing Implementation of the Aboriginal and Torres Strait Islander Child Placement Principle*').

30. Commission for Children and Young People, *In the Child's Best Interests: Inquiry into Compliance with the Intent of the Aboriginal Child Placement Principle in Victoria* (Inquiry Report, 2016) 22.
31. *Ibid* 32–33, recommendations 40–45.
32. Responses to these recommendations include the establishment of an Aboriginal Kinship Finding Service, which aims to identify kinship networks early and better support for carers through the Kinship Support program: Witness Statement of Argiri Alisandratos, 21 March 2023, 36 [125], 38 [131] and Attachment AA-4, 9–20.
33. Indirect discrimination occurs when there is an unreasonable rule or policy that on its face is the same for everyone but when applied has an unfair effect on people who share a particular characteristic (attribute) such as race or gender: see *Equal Opportunity Act 2010* (Vic) s 9.
34. Outline of Evidence of Felicia Dean, 6 December 2022, 3 [21].
35. Anonymous, Submission 54.
36. Outline of Evidence of Sissy Austin, 2 March 2023, 16 [213].
37. Victorian Aboriginal Legal Service, Submission 38 (Child Protection), 44; Victorian Aboriginal Child Care Agency, Submission 77, 62.
38. Witness Statement of Argiri Alisandratos, 21 March 2023, 152–153 [717]–[720].
39. Witness Statement of Argiri Alisandratos, 21 March 2023, 152 [716].
40. Witness Statement of Argiri Alisandratos, 21 March 2023, 150 [701].
41. Transcript of Aunty Rieo Ellis, 7 December 2022, 187 [9]–[18].
42. Also see discussion later in this chapter regarding DFFH failing to undertake assessments to determine what supports the carer needs. Only 2.2 per cent of assessments of carers needs are met within the six week target timeframe: see Victorian Auditor-General's Office, *Kinship Care* (n 20) Figure C: Percentage of part A, B and C mandatory assessments completed and completed within timeframes between 2018 and 2020.
43. Karen Jackson, Submission 57, Attachment 4 (case study of Marlene).
44. The decision to accredit a foster carer is made by a foster care panel. Before any assessment is done, prospective foster carers must attend 15 hours of training delivered over two days to ensure they understand the requirements and what is involved. In addition to the background checks for kinship carers, foster carers must also provide three referees: Witness Statement of Argiri Alisandratos, 21 March 2023, 149 [694]–[697].
45. The government advises that, on average, foster care assessment takes between six and nine months: Witness Statement of Argiri Alisandratos, 21 March 2023, 152 [715].
46. Summary of Community Evidence (De-identified Direct Quotes) Obtained at Roundtables and Prison Visits, 14 June 2023, 1 [4]. See also Outline of Evidence of Shellee Strickland, 6 December 2022, 3 [18]; Transcript of Aunty Hazel Hudson, 7 December 2022, 179 [10]–[13].
47. Outline of Evidence of Ian Hamm, 7 December 2022, 7 [38].
48. Commission for Children and Young People, *Always Was, Always Will Be Koori Children: Systemic Inquiry into Services Provided to Aboriginal Children and Young People in out-of-Home Care in Victoria* (Inquiry Report, 2016) 13, Finding 7 ('*Always Was, Always Will Be Koori Children*').
49. *Report on Government Services 2023* (n 2) Table 16A.22.
50. Victorian Aboriginal Legal Service, Submission 38 (Child Protection), 81. See also Outline of Evidence of Shellee Strickland, 6 December 2022, 3–4 [19]. See also Summary Report—Winda-Mara Aboriginal Corporation and Dhauwurd Wurrung Elderly & Community Health Service On Country visit, 16 February 2023, 1.
51. Commission for Children and Young People, '*In Our Own Words: Systemic Inquiry into the Lived Experience of Children and Young People in the Victorian out-of-Home Care System*' (Report, 2019) 44, Finding 31 ('*In Our Own Words*').
52. EY Sweeney, *Strong Carers, Stronger Children – Victorian Carer Strategy Findings of the Home-Based Carer Census* (Final Report to the Department of Families, Fairness and Housing, 2021) 13 ('*Strong Carers, Stronger Children*').
53. *Ibid*.
54. Victorian Aboriginal Child Care Agency, Submission 77, 77.
55. Witness Statement of Argiri Alisandratos, 21 March 2023, 119 [529].
56. *Strong Carers, Stronger Children* (n 52) 10, 23, 104; *Kinship Care* (n 20).
57. *Kinship Care* (n 20) 9.
58. *Strong Carers, Stronger Children* (n 52) 19–20, 23–24, 36.
59. The data in this table is drawn from the profiles of kinship and foster carers: *ibid* 25–26, 29–30.
60. This reflects the survey's highest category of education described as '[m]ore than Dip/Cert III up to Bachelor's degree and above': *ibid* 25, 29.
61. Transcript of Aunty Geraldine Atkinson, 13 December 2022, 326 [24]–[25]. See also Outline of Evidence of Shellee Strickland, 6 December 2022, 3 [18]; Outline of Evidence of Sissy Austin, 2 March 2023, 6 [74], [77]; and recommendations made by Victorian Aboriginal Child Care Agency, Submission 77, 78 (Recommendation 26); Victorian Aboriginal Legal Service, Submission 38 (Child Protection), 8 (Recommendation 9).
62. Transcript of Argiri Alisandratos, 28 April 2022, 182 [1]–[6].

63. Victorian Ombudsman, *Investigation into the Financial Support Provided to Kinship Carers* (Report, 2017) 9.
64. *Kinship Care* (n 20) 35.
65. Ibid 34. First Supports brokerage is intended to support stabilisation of the placement early and placement support brokerage to prevent placement breakdown throughout the placement: Witness Statement of Argiri Alisandratos, 21 March 2023, 116 [516].
66. Transcript of Argiri Alisandratos, 28 April 2022, 180 [28]–[33].
67. Transcript of Argiri Alisandratos, 28 April 2022, 182 [10]–[12].
68. Transcript of Argiri Alisandratos, 28 April 2022, 184 [28]–[34].
69. Witness Statement of Argiri Alisandratos, 21 March 2023, 119 [526]–[528].
70. *Kinship Care* (n 20) 37.
71. Outline of Evidence of Stacey Brown and Kimberley Do, 8 December 2022, 2 [6].
72. *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 8, 38 ('Charter').
73. Anonymous, Submission 54.
74. These assessments are completed by DFFH or one of the ACCOs authorised under the Aboriginal Children in Aboriginal Care Program. CSO or ACCO case workers only complete these assessments if DFFH has referred the placement to them for either the First Supports program or case contracting. In these instances, DFFH needs to endorse the assessments done by CSOs and ACCOs before they are considered completed: *Kinship Care* (n 20) 7.
75. Witness Statement of Argiri Alisandratos, 21 March 2023, 151 [707]–[708].
76. *Kinship Care* (n 20) 7–8. Note rounding from 97.8 to 98 per cent; others were not rounded as were not fractional percentages.
77. See, eg, Transcript of Dr Jacyнта Krakouer, 8 December 2022, 231–232 [47]–[3].
78. See, eg, Outline of Evidence of Shayne and Aimee Potter, 8 March 2023, 1–2 [1]–[21].
79. Outline of Evidence of Aunty Glenys Watts, 5 December 2022, 6 [87]–[89].
80. Outline of Evidence of Sissy Austin, 2 March 2023, 6 [75]–[76].
81. Subsidised medications, \$10 glasses and free dental care are also available for Aboriginal children from Victorian Aboriginal Health Service: Outline of Evidence of Dr Mick Creati, 16 December 2022, 5 [48]–[51], 8 [100].
82. *CYFA* (n 4) ss 166(3)(b), 176.
83. Witness Statement of Argiri Alisandratos, 21 March 2023, 165–166 [796].
84. Department of Families, Fairness and Housing, Response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 6 May 2023, Attachment 2, 12 [39].
85. Witness Statement of Argiri Alisandratos, 21 March 2023, 166 [797]–[799]. In 2022–23, DFFH provided \$3.18 million per annum to ACCOs to support cultural plan development: Department of Families, Fairness and Housing, Response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 6 May 2023, Attachment 2, 14 [62].
86. *Charter* (n 72) s 19.
87. *Charter* (n 72) s 13(a); *PBU & NJE v Mental Health Tribunal* (2018) 56 VR 141, 178 [124]–[126].
88. The 19-week policy is not legislated, however the requirement that an Aboriginal child in care has a cultural plan is legislated under s 176 of the *CYFA*: Department of Families, Fairness and Housing, Response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 6 May 2023, Attachment 2, 12 [40], 14 [58]–[59]. Yoorrook received other information stating that, as at 31 December 2022, 52 per cent of Aboriginal children had cultural plans (Witness Statement of Argiri Alisandratos, 21 March 2023, 51 [204]) and that in 2021–22, 52 per cent of Aboriginal children had a cultural plan (Witness Statement of Argiri Alisandratos, 21 March 2023, Attachment AA-17, 33; Department of Families, Fairness and Housing, 'Response to NTP Item 002-001 — *Tranche 2 data response, supplied by the Performance and Analysis, System Reform and Workforce Division*' 13, produced by the State of Victoria in response to the Commission's Notice to Produce dated 3 November 2022).
89. Department of Families, Fairness and Housing, Response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 6 May 2023, Attachment 2, 14 [59].
90. DFFH data provided to Yoorrook shows that 18 per cent of children had a cultural plan in 2016–17. That proportion had increased to 52 per cent in 2021–22 (but note the different information set out in n 88, on the proportion of children with completed cultural plans). DFFH reports that a cultural plan tracker tool was implemented in 2020 to track cultural plans that are under development: Department of Families, Fairness and Housing, 'Response to NTP Item 002-001 — *Tranche 2 data response supplied by the Performance and Analysis, System Reform and Workforce Division*', 13, produced by the State of Victoria in response to the Commission's Notice to Produce dated 3 November 2022.
91. *CYFA* (n 4) ss 10(3)(m), 13(1)–(2), 14, 176, 321(1)(ca)(i), 321(1B)(b); *Charter* (n 72) s 19(2).

92. Transcript of the Minister for Child Protection and Families, the Hon. Elizabeth (Lizzie) Blandthorn MLC, 12 May 2023, 838 [6]–[7].
93. Victoria Legal Aid, Submission 39 (Child Protection), 8.
94. Victorian Aboriginal Legal Service, Submission 38 (Child Protection), 47–48, 55, Recommendation 20.
95. Outline of Evidence of Lisa Thorpe, 9 December 2022, 5 [24].
96. Victorian Aboriginal Children and Young People’s Alliance, Submission 42, 10.
97. Outline of Evidence of Sissy Austin, 3 March 2023, 3 [32]–[34].
98. Victorian Aboriginal Children and Young People’s Alliance, Submission 42, 10.
99. Victorian Aboriginal Children and Young People’s Alliance, Submission 42, 10.
100. Outline of Evidence of Stacey Brown and Kimberley Do, 8 December 2022, 3 [15].
101. Summary of Community Evidence (De-Identified Direct Quotes) Obtained at Roundtables and Prison Visits, 14 June 2023, 1 [5].
102. *Reviewing Implementation of the Aboriginal and Torres Strait Islander Child Placement Principle* (n 29) 21.
103. Outline of Evidence of Aunty Charmaine Clarke, 7 December 2022, 4 [20a].
104. Witness Statement of Argiri Alisandratos, 21 March 2023, 166 [800]–[801].
105. Transcript of Adam Reilly, 15 March 2023, 961–962 [38]–[9].
106. Outline of Evidence of Mikala, 23 February 2023, 4 [40].
107. *CYFA* (n 4) s 174.
108. *Ibid* s 166.
109. *Ibid*.
110. Witness Statement of Argiri Alisandratos, 21 March 2023, 29 [82].
111. Witness Statement of Argiri Alisandratos, 21 March 2023, 92 [387]–[388].
112. Witness Statement of Argiri Alisandratos, 21 March 2023, 99 [423].
113. *CYFA* (n 4) s 169(1).
114. Department of Families, Fairness and Housing, *Child Protection Manual* (31 December 2021) ‘Case Plan Preparation and Review Following the Making of a Protection Order’ <<https://www.cpmanual.vic.gov.au/policies-and-procedures/case-planning/case-plan-preparation-and-review-following-making-protection>>.
115. Department of Families, Fairness and Housing, Victorian Government, *SAFER Children Framework Guide: The Five Practice Activities of Risk Assessment in Child Protection* (2021) 83.
116. Department of Families, Fairness and Housing, *Child Protection Manual* (31 December 2021) ‘Case Planning — Advice’ <<https://www.cpmanual.vic.gov.au/advice-and-protocols/advice/case-planning/case-planning-advice>>.
117. *Kinship Care* (n 20) 31.
118. Transcript of Argiri Alisandratos, 28 April 2023, 180 [18]–[26].
119. *Kinship Care* (n 20) 1.
120. Outline of Evidence of Stacey Brown and Kimberley Do, 8 December 2022, 2 [6].
121. Transcript of Felicia Dean, 7 December 2022, 164 [32]–[34].
122. Transcript of Aunty Muriel Bamblett AO, 6 December 2022, 110 [39]–[50].
123. Witness Statement of Commissioner Meena Singh, 2 December 2022, 29 [95].
124. Section 60A of the *Commission for Children and Young People Act 2012* (Vic) states: ‘The Secretary must disclose to the Commission [for Children and Young People] any information about an adverse event relating to a child in out of home care or a person detained in a youth justice centre or a youth residential centre if the information is relevant to the Commission’s functions.’ This data relates to those reports: Supplementary Statement of Commissioner Meena Singh, 10 May 2023, Annexure 4, 66.
125. Supplementary Statement of Commissioner Meena Singh, 10 May 2023, Annexure 4, 66.
126. *‘In Our Own Words’* (n 51) 110–112.
127. Outline of Evidence of Aunty Rieo Ellis, 7 December 2022, 4 [43].
128. Transcript of Bonnie Dukakis, 3 March 2023, 133,[37]–[386]. See also Outline of Evidence of Dr Mick Creati, 16 December 2022, 2 [23]; Transcript of Felicia Dean, 7 December 2022, 148–149 [47]–[1].
129. Witness Statement of Argiri Alisandratos, 21 March 2023, 91 [381].
130. Witness Statement of Argiri Alisandratos, 21 March 2023, 92 [385].
131. Victorian Auditor-General’s Office, *Quality of Child Protection Data* (Independent Assurance Report to Parliament, September 2022) 1.
132. Outline of Evidence of Shellee Strickland, 6 December 2022, 2 [10].
133. Karen Jackson, Submission 57, Attachment 4, 3.
134. Victorian Aboriginal Legal Service, Submission 38 (Child Protection), 79.
135. Outline of Evidence of Mikala, 23 February 2023, 1 [10].
136. Witness Statement of Argiri Alisandratos, 21 March 2023, 154 [727]–[733].
137. Outline of Evidence of Stacey Brown and Kimberley Do, 8 December 2022, 3 [16].
138. Outline of Evidence of Aunty Charmaine Clarke, 7 December 2022, 5 [20(d)]. See also Outline of Evidence of Sissy Austin, 2 March 2023, 7–8 [90]–[99].
139. Transcript of Aunty Muriel Bamblett AO, 6 December 2022, 108 [14]–[19].
140. Victorian Aboriginal Children and Young People’s Alliance, Submission 42, 12, Recommendations 3–5. Yoorrook notes that, in 2018, 100 children and young people participated in Cultural Camps across Melbourne. Camps were also held in areas such as Queenscliff, Camp Jungai, the You Yangs and Bunjilaka. Feedback from the camps was very positive, with one child describing it as ‘the best day of their life’, while a staff member noted that ‘our youth have been searching for an opportunity like this to show leadership in our Community’: Report to Aboriginal Children’s Forum, 26 June 2018.

141. Witness Statement of Argiri Alisandratos, 21 March 2023, 167 [804]–[810].
142. Witness Statement of Argiri Alisandratos, 21 March 2023, 167 [809].
143. Witness Statement of Argiri Alisandratos, 21 March 2023, 168 [815].
144. Outline of Evidence of Dr Mick Creati, 16 December 2022, 5 [57].
145. Eli Shmerling et al, 'The Health Needs of Aboriginal and Torres Strait Islander Children in Out-of-Home Care' (2020) 56 *Journal of Paediatrics and Child Health* 384, 386.
146. *Always Was, Always Will Be Koori Children* (n 48) 94.
147. Victorian Auditor-General's Office, *Child and Youth Mental Health* (June 2019) 15.
148. Victorian Aboriginal Child Care Agency, Submission 77, 100.
149. Transcript of Argiri Alisandratos, 27 April 2023, 12 [30]–[32]; 13 [8]–[16].
150. Department of Families, Fairness and Housing, 'Response to NTP Item 002-001 – *Tranches 1 and 2 data responses supplied by the Performance and Analysis, System Reform and Workforce Division*', 14–15, 24, produced by the State of Victoria in response to the Commission's Notice to Produce dated 3 November 2022.
151. The Victorian Aboriginal Child Care Agency noted the same concern about under-reporting because of barriers to accessing the NDIS: Victorian Aboriginal Child Care Agency, Submission 77, 130.
152. Department of Families, Fairness and Housing, Response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 11 May 2023, 23 May 2023, Attachment 1.
153. Victorian Auditor-General's Office, *Quality of Child Protection Data* (n 131) 24–25.
154. Outline of Evidence of Damian Griffiths, 2 March 2023, 2 [13].
155. *The Convention on the Rights of Persons with Disabilities*, to which Australia is a party, requires countries to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children (arts 3 and 7), including that they have access to a range of supports necessary to be included in the community (art 19): *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('CRPD').
156. Victorian Aboriginal Child Care Agency, Submission 77, 124.
157. Victorian Aboriginal Child Care Agency, Submission 77, 100, Recommendation 34.
158. Commonwealth of Australia, 'An Outline of National Standards for Out-of-Home Care: A Priority Project under the National Framework for Protecting Australia's Children 2009–2020' (2011), Standard 5.
159. *Charter* (n 72) s 17(2); *CRPD* (n 154) art 25. See also *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 12.
160. Department of Families, Fairness and Housing, *Child Protection Manual* (17 February 2021) 'Health and Wellbeing of Child Protection Clients — Advice' <https://www.cpmanual.vic.gov.au/advice-and-protocols/advice/health-medical-and-disability/health-and-wellbeing-child-protection#h3_9>.
161. K McLean, H Hiscock and S Goldfeld, 'Timeliness and Extent of Health Service Use by Victorian (Australian) Children within First Year after Entry to Out-of-Home Care: Retrospective Data Linkage Cohort Study' (2022) 134 *Children and Youth Services Review*, cited in Commission for Children and Young People, *Annual Report 2021–2022* (2022) 44.
162. *Child and Youth Mental Health* (n 146) 84.
163. Victorian Aboriginal Legal Service, Submission 38 (Child Protection), 79.
164. Outline of Evidence of Dr Mick Creati, 16 December 2022, 8 [98]–[101].
165. Department of Families, Fairness and Housing, 'Response to NTP Item 002-001 – *Tranche 3 data response supplied by the Performance and Analysis, System Reform and Workforce Division*', 5, produced by the State of Victoria in response to the Commission's Notice to Produce dated 3 November 2022.
166. Outline of Evidence of Dr Mick Creati, 16 December 2022, 6–7 [73]–[83].
167. The government also notes that it 'intends to undertake system enhancements to improve CRIS, with a particular focus on ensuring health and education records best serve the child's needs': Witness Statement of Argiri Alisandratos, 21 March 2023, 156–157 [738]–[744].
168. Outline of Evidence of Dr Mick Creati, 16 December 2022, 6 [73].
169. Outline of Evidence of Shane and Aimee Potter, 7 [126]–[133].
170. The Auditor-General identified a range of reasons for poor data quality, including standards and systems, but also workload issues: *Quality of Child Protection Data* (n 131) 24–25, 38–42. The Commissioner for Aboriginal Children and Young People also stated '[t]he importance of accurate data collection practices and systems cannot be understated' and recommended reform of the way data is captured and published: Supplementary Statement of Commissioner Meena Singh, 10 May 2023, 54 [219]–[220].
171. Commission for Children and Young People, *Keep Caring: Systemic Inquiry into Services for Young People Transitioning from out of Home Care* (2020) 23, Finding 22, 30, Recommendation 25.
172. Supplementary Statement of Commissioner Meena Singh, 10 May 2023, 45 [193].
173. Transcript of Commissioner Meena Singh, 5 December 2022, 71 [44]–[48].

174. There are three types of non-home based care: residential care (community-based houses where trained residential care workers care for children and young people 24 hours a day), lead tenant accommodation (medium-term accommodation and support for young people aged 16 to 18 years), and contingency placements (temporary placements which may include the placement of a child or young person in a department house, motel or serviced apartment): Witness Statement of Argiri Alisandratos, 21 March 2023, 102 [435]–[436]. A child on certain types of orders may be placed in a service with lock up facilities such as a secure welfare service for up to 21 days (with one further extension of up to 21 days in exceptional circumstances) if the Secretary is satisfied that there is a substantial and immediate risk of harm to the child: *CYFA* (n 4) s 173(2)(b).
175. In 2015, the government introduced ‘targeted care packages’ in response to stated policy to move children out of residential care into home-based care: See Commission for Children and Young People, “... As a Good Parent Would...” *Inquiry into the Adequacy of Provision of Residential Care Services to Victorian Children and Young People Who Have Been Subject to Sexual Abuse or Sexual Exploitation Whilst Residing in Residential Care* (Inquiry Report, 2015) 29.
176. Transcript of Argiri Alisandratos, 28 April 2023, 186, [31]–[32].
177. ‘23.6 per cent of children and young people in residential care were Aboriginal or Torres Strait Islander’: Witness Statement of Argiri Alisandratos, 21 March 2023, 104 [443]. However, this does not match the data on children in non-home-based settings provided in the Attachment which shows that at 30 June 2021–22, 19.6 per cent of children in residential care were Aboriginal and 19.7 per cent of all children in non-home based settings were Aboriginal: Witness Statement of Argiri Alisandratos, 21 March 2023, Attachment AA-22, 46.
178. Witness Statement of Argiri Alisandratos, 21 March 2023, Attachment AA-22, 46.
179. Witness Statement of Argiri Alisandratos, 21 March 2023, Attachment AA-24, 48.
180. Witness Statement of Argiri Alisandratos, 21 March 2023, Attachment AA-23, 47.
181. Witness Statement of Argiri Alisandratos, 21 March 2023, 104 [443]. Note data on disability in non-home-based settings referred to in the statement was not provided in the Attachments.
182. ‘*In Our Own Words*’ (n 51) 181, Finding 124.
183. Ibid 48–49, Recommendations 13–16.
184. Yoorrook notes the evidence of DFFH that in response to findings of CCYP, DFFH has been undertaking reform of residential care models in order to provide smaller, more therapeutic environments: see, eg, Transcript of Argiri Alisandratos, 28 April 2023, 187 [34]–[45].
185. \$171.1 million in 2023–24 and \$548 million over four years to ‘respond to demand for residential care placements to support children and young people. Funding is also provided to increase therapeutic supports in residential care homes and address child sexual exploitation. Funding will also be continued for targeted care packages to support children and young people to live in suitable care arrangements and to prevent entry into residential care’: Department of Treasury and Finance, Victorian Government, *Victorian Budget 2023–24: Service Delivery* (Budget Paper No. 3, 2023) 40–41 (‘*Victorian Budget 2023–24: Service Delivery*’).
186. Transcript of Aunty Karin Williams, 14 December 2022, 4 [27].
187. Witness Statement of Argiri Alisandratos, 21 March 2023, 105 [453].
188. Summary of Community Evidence (De-Identified Direct Quotes) Obtained at Roundtables and Prison Visits 14 June 2023, 2[9].
189. Commission for Children and Young People, *Out of Sight: Systemic Inquiry into Children and Young People Who Are Absent or Missing from Residential Care* (Report, 2021) 94 (‘*Out of Sight*’).
190. Victorian Aboriginal Legal Service, Submission 38 (Child Protection), 70. MacKillop Family Services, a provider of residential care, provided information about initiatives underway to ensure it understands and addresses the needs of children in its residential care services. These include a review panel process, a survey, and the pilot of a Residential Care Cultural Resource: see MacKillop Family Services, Submission 69, 6–7.
191. Statement of Commissioner Meena Singh, 2 December 2022, 26 [78].
192. *Out of Sight* (n 188) 31, Finding 14.
193. Ibid 33, Finding 26.
194. Victorian Aboriginal Child Care Agency, Submission 77, 70.
195. Victorian Aboriginal Legal Service, Submission 38 (Child Protection), 68, citing Sentencing Advisory Council, *Crossover Kids: Vulnerable Children in the Youth Justice System* (Report, April 2020) vol 2, xvi.
196. Commission for Children and Young People, *Our Youth, Our Way: Inquiry into the over-Representation of Aboriginal Children and Young People in the Victorian Youth Justice System* (Report, 2021).
197. Witness Statement of Argiri Alisandratos, 21 March 2023, 105 [452].
198. Witness Statement of Argiri Alisandratos, 21 March 2023, Attachment AA-25(a), 49.
199. Victorian Aboriginal Child Care Agency, Submission 77, 70.
200. Victorian Aboriginal Child Care Agency, Submission 77, 70.
201. Summary of Community Evidence (De-Identified Direct Quotes) Obtained at Roundtables and Prison Visits, 14 June 2023, 2 [8].
202. Victorian Aboriginal Child Care Agency, Submission 77, 70; Victorian Aboriginal Legal Service, Submission 38 (Child Protection), 70; Aboriginal Justice Caucus, Submission 74, 63.
203. Victoria Legal Aid, Submission 39 (Child Protection), 14.
204. Referring to findings of the Sentencing Advisory Council’s *Crossover Kids* report: Transcript of Argiri Alisandratos, 28 April 2023, 190, [23]–[26].

205. Transcript of Chris Harrison, 3 March 2023, 117 [5]–[10].
206. Supplementary Statement of Commissioner Meena Singh, 10 May 2023, 35 [148].
207. Victorian Aboriginal Legal Service, Submission 38 (Child Protection), 71.
208. Victorian Aboriginal Child Care Agency, Submission 77, 70.
209. Transcript of Argiri Alisandratos, 27 April 2023, 22 [23]–[26].
210. State of Victoria, Response to Issues Paper 1: Call for Submissions on Systemic Injustice in the Criminal Justice System, [69].
211. Department of Health and Human Services, Victorian Government, *Framework to Reduce Criminalisation of Young People in Residential Care* (2020) 8.
212. In its 2021–2022 Annual Report, CCYP noted that ‘[i]n particular there has been slow progress on the recommendations of *Out of Sight* ... though engagement on implementation improved towards the end of the reporting period’: Commission for Children and Young People, *Annual Report 2021–2022* (n 160) 15.
213. Victoria Legal Aid, Submission 39 (Child Protection), 15.
214. Transcript of Sarah Schwartz, 14 December 2022, 431 [9]–[15].
215. Transcript of Chris Harrison, Transcript of Bonnie Dukakis, 3 March 2023, 118 [1]–[27].
216. Victoria Legal Aid, Submission 39 (Child Protection), 15.
217. Victorian Aboriginal Child Care Agency, Submission 77, 70.
218. Transcript of Nerita Waight, 14 December 2022, 431 [30]–[46].
219. Witness Statement of Argiri Alisandratos, 21 March 2023, 169 [817]–[820]. See also Witness Statement of the Chief Commissioner of Police Shane Patton, 14 March 2023, 51 [154].
220. As at 31 December 2022, there were 198 Aboriginal children in ACAC which represents 7.5 per cent of all Aboriginal children in care (excluding those on Permanent Care Orders): Department of Families, Fairness and Housing, Response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 6 May 2023, Attachment 1, 10 [31].
221. For detail of the commitment to do this and how it is to be done, see Department of Health and Human Services, Victorian Government, *Transitioning Aboriginal Children to Community Controlled Organisations: Transition Guidelines* (2018).
222. State of Victoria, Response to Issues Paper 2: Call for Submissions on Systemic Injustice in the Child Protection System, [44]. Note that the government provided other data stating that in 2021–22, 68 per cent of Aboriginal children in care were case managed by child protection or a non-ACCO community organisation: Department of Families, Fairness and Housing, Response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 6 May 2023, Attachment 1, 7 [16.3], 10 [31]. Note also that the 2023–24 budget provided funding to transfer an additional 774 Aboriginal children to the ACAC program: *Victorian Budget 2023-24: Service Delivery* (n 184) 5.
223. Department of Families, Fairness and Housing, Response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 6 May 2023, Attachment 1, 10 [31].
224. See, eg, Transcript of Felicia Dean, 7 December 2022, 148 [44]–[49].
225. Victorian Aboriginal Child Care Agency, Submission 77, 74.
226. Transcript of Aunty Hazel Hudson, 7 December 2022, 144 [41]–[50], 145 [1]–[4]. See also Summary Report - On Country Visit, Goolum-Goolum, 3 February 2023, 1[2].
227. See, eg, Transcript of Aunty Hazel Hudson, 7 December 2022, 160 [22]–[30].
228. Transcript of Adam Reilly, 15 May 2023, 969 [3]–[17].
229. State of Victoria, Response to Issues Paper 2: Call for Submissions on Systemic Injustice in the Child Protection System, [46]. Government provided further data stating that 28 per cent of ACAC clients who exited to reunifications between January to June 2021 re-entered care within the following 12 months (July 2021 to June 2022) compared to 22 per cent of Aboriginal child protection clients and 16 per cent for non-Aboriginal child protection clients: Department of Families, Fairness and Housing, Response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing by Argiri Alisandratos on 27 and 28 April 2023, 6 May 2023, Attachment 1, 10 [30].
230. The ACAC providers are the Victorian Aboriginal Child Care Agency and the Bendigo and District Aboriginal Cooperative. Ballarat and District Aboriginal Cooperative and Njernda Aboriginal Corporation are in the process of becoming ACAC providers and are funded to operate ‘as-if’ authorised (the ‘pre-authorisation stage’). Rumbalara Aboriginal Cooperative and Gippsland & East Gippsland Aboriginal Cooperative are preparing for pre-authorisation: Department of Families, Fairness and Housing, Response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 10 May 2023, Attachment 1, 9 [37], [42]. A 2021 media release states that Gippsland & East Gippsland Aboriginal Cooperative are also preparing for pre-authorisation: The Hon Luke Donnellan, ‘Strengthening Connection to Culture Country and Family’ (Media release, 10 September 2021) <<https://www.premier.vic.gov.au/strengthening-connection-culture-country-and-family>>.

231. Children and Health Legislation Amendment (Statement of Recognition, Aboriginal Self-Determination and Other Matters) Bill 2023 (Vic) ('Statement of Recognition Bill').
232. For example, Aunty Hazel Hudson told Yoorrook, 'I am aware that there are lots of community that ... don't want to go into that space because of the Stolen Generations ... but for me, section 18 is the fundamental definition of self-determination': Transcript of Aunty Hazel Hudson, 7 December 2022, 145 [36]–[41].
233. Victorian Aboriginal Legal Service (VALS), 'VALS Welcomes Commitment to Better Consultation, Despite Ongoing Concerns with Proposed Legislation' (Media release, 21 February 2023) <<https://www.vals.org.au/vals-welcomes-commitment-to-better-consultation-despite-ongoing-concerns-with-proposed-legislation/>>.
234. As Djirra stated to Yoorrook, '[I] ack of safety and anonymity for Aboriginal and Torres Strait Islander women... [means] that women will be less likely to disclose family violence and seek out assistance for safety. These unintended consequences do not appear to have been adequately considered. We must be satisfied that Aboriginal and Torres Strait Islander women will be safe and supported in accessing these services, which should also prioritise women being referred to Djirra as a specialist in this area': Djirra, Submission 44, 18–19.
235. Transcript of Argiri Alisandratos, 27 April 2023, 49, [27]–[29].
236. At 30 June 2022, 78.7 per cent of children in out-of-home care were living with Indigenous or non-Indigenous relatives or kin or other Indigenous caregivers, the top hierarchy in the Aboriginal and Torres Strait Islander Child Placement Principle. The national average is 53.9 per cent: *Report on Government Services 2023* (n 2) Table 16A.22.
237. *Kinship Care* (n 20) 1, also noting that 2.2 per cent of assessments of carers needs are met within the six week target timeframe: Transcript of Argiri Alisandratos, 27 April 2023, 180 [18]–[33].
238. *CYFA* (n 4) s 174(1)(b).
239. *Charter* (n 72) ss 17(1) and 17(2).
240. *Ibid* s 8.
241. *Ibid* s 19(2).
242. Statement of Recognition Bill (n 230) cl 4 inserting in new ss 7E(2)–(4), 7H(1).



8 PERMANENCY AND FAMILY REUNIFICATION

The language of reform and social justice is too often deployed to disguise the reality of initiatives that perpetuate these challenges. Key recent changes — including the imposition of arbitrary short timeframes for reunification, and streamlined pathways to permanent care orders — further entrench many of the problems, while framing them as solutions. They minimise state responsibility and accountability, artificially removing from view the children who in fact most deserve our focus.¹ SNAICC — NATIONAL VOICE FOR OUR CHILDREN

Introduction

Under current Victorian legislation, strict reunification timelines mean that children can be permanently removed from their families after 12 months of entering out of home care.² This policy disproportionately affects First Peoples children, families and communities — denying cultural and human rights. Further, while permanency provisions end the possibility of family reunification, they do not necessarily result in permanent placement of the child.³

In 2014, changes were made to the *Children, Youth and Families Act 2005* (Vic) (CYFA) to reduce the amount of time children spend in out of home care before non-reunification care arrangements are made.⁴ As a result, a parent whose child is removed by child protection services only has 12 months to meet protective concerns and be reunified with their child. In exceptional circumstances this may be extended to two years (the 12/24-month reunification rule).⁵ These changes, referred to as the ‘permanency reforms’, commenced in 2016.⁶

The reforms were introduced in response to the 2012 Protecting Victoria’s Vulnerable Children Inquiry, which raised concerns about the time children were in the child protection system before they were permanently placed. A particular concern was the risk of ‘drift’ — where a child moves between multiple, unstable out of home care arrangements.⁷ At the of the inquiry, the average time between a child’s first report and their ultimate permanent care order was more than five years.⁸



Leaving children in out of home care for many years is unacceptable. However, Yoorrook is concerned that the permanency reforms are not working well for many First Peoples children and families.

Multi-generational trauma via the brutality of colonisation and the unremitting legacy of ongoing discrimination, social marginalisation and poverty has led to First Peoples having higher rates of drug and alcohol issues, family violence, housing instability and homelessness. Given the time needed to address these issues and the long waitlists for culturally appropriate support, many First Peoples families cannot meet the

reduced timeframes for reunification because of the complex and entrenched disadvantage they face. This in turn means that First Peoples children are at higher risk of being permanently disconnected from their culture through the 12/24 rule.

The evidence set out in this chapter shows that while the permanency reforms are neutral on their face, they discriminate against First Peoples families in two ways. First, the reforms do not take account of the continued impact of colonisation on Aboriginal families and the extent to which they can meet the 12/24 reunification rule. Second, the reforms do not take account of the differing access of First Peoples families to support services. In effect, the 12/24 reunification rule places First Peoples families facing permanent separation from their children at the mercy of the services which they might not be able to access

because they are simply not available or because they are not culturally safe.

This chapter explores these concerns and makes recommendations to better balance the need for permanency with giving First Peoples families a reasonable chance of addressing protective concerns. It draws attention to human rights considerations which lift the need for urgent reform in this area well above matters of pure policy.

This chapter also examines reunification of First Peoples children with their families and identifies the factors that can support Aboriginal children coming back to their parents, siblings, community and culture.

How Permanent Care Orders work in Victoria



Permanent Care Orders give parental responsibility for a child to a person other than the child's parent. In effect, these orders permanently separate a child from their parents until adulthood.⁹

The Secretary of Department of Families, Fairness and Housing (DFFH) applies for these orders. To make the order, the Children's Court must be satisfied that:

- the parent is unable or unwilling to resume parental responsibility for the child or it would not be in the best interests of the child for the parent to resume responsibility for the child, and
- the people named in the application are willing, able and suitable to assume the permanent care of the child by assuming parental responsibility.¹⁰

The court must consider a range of factors, including the wishes expressed by the parent and the child (if possible, given the age and understanding of the child),¹¹ and be satisfied that making the order is in the best interests of the child.¹²

Generally, Permanent Care Orders must include a condition that the carer preserve the child's identity, connection to their culture of origin and relationship with their birth family.¹³ Permanent Care Orders may include conditions for contact with the child's parent, siblings and other significant people, including that contact is prohibited.¹⁴ The Court may only order a maximum of four contacts per year for birth parents, with additional contact to be solely at the discretion of the permanent carer.¹⁵

The court must not make a Permanent Care Order for an Aboriginal child unless it has received a report from an Aboriginal agency that recommends the order be made and a cultural plan has been prepared.¹⁶

The court must not make a Permanent Care Order to place an Aboriginal child solely with a non-Aboriginal person(s) unless no suitable placement can be found with an Aboriginal person(s), the decision to seek the order has been made in consultation with the child, and the Secretary is satisfied that the order will meet the Aboriginal Child Placement Principle.¹⁷ If the court decides not to make a Permanent Care Order it can make other orders such as orders for undertakings, a family preservation order, reunification order or long term care order. It can also extend an existing protection order.¹⁸

What Yoorrook heard

Permanency reforms have had a devastating impact on First Peoples

Aboriginal Community Controlled Organisations (ACCOs), legal organisations and community members strongly criticised the permanency reforms as having a devastating impact on First Peoples because

they ignore the reality that deep-seated intergenerational trauma cannot be resolved quickly under arbitrary and abbreviated timelines. The time limits can punish our women for delays, which are often outside their control. The provisions are harsh for mothers who are healing from family violence or incarceration-related trauma, substance abuse or mental illness.¹⁹

The Victorian Aboriginal Child Care Agency (VACCA) was scathing:

VACCA is deeply concerned about the trajectory of Aboriginal children and young people towards permanent care, which we believe is a direct result of the permanency reforms, and the continuation of discriminatory practices within the child protection system. For as long as published data has been available Aboriginal families in Victoria have been provided with significantly lower levels of access than non-Aboriginal families to the main service offering from the State intended to prevent child removal or minimise time spent in OOHC. In VACCA's view this is a clear example of systemic racism and discrimination.²⁰

Yoorrook asked the government about the consultation undertaken before introducing the permanency reforms to understand the extent to which it was aware

The permanency reforms



The permanency reforms introduced the following changes to the CYFA:

- a hierarchy of five permanency objectives in order of preference, as appropriate in the best interests of the child:
 - family preservation: the objective of ensuring a child who is in the care of a parent remains in the care of a parent
 - family reunification: the objective of ensuring a child who has been removed from the care of a parents of the child is returned to the care of a parent
 - adoption: the objective of placing the child who is unable to safely return to the care of a parent for adoption under the Adoption Act
 - permanent care: the objective of placing the child who is unable to safely return to the care of a parent with a permanent carer or carers
- long-term out of home care: the objective of placing the child who is unable to safely return to the care of a parent in a stable, long-term care arrangement with a specified carer, or carers, or if this is not possible, another suitable long-term care arrangement
- a new suite of Children's Court orders that aligned with the permanency hierarchy, which significantly restricted the discretion of the Children's Court to determine when a protection order can be made, the length of some protection orders, who the child lives with and the length of time for which the Court may extend orders that include conditions
- a new Child Protection Case Planning Framework, which required the first case plan to be developed following substantiation and to include one of the five permanency objectives. Also introduced was the requirement that a case plan for all Aboriginal children in out of home care include a cultural plan.

of First Peoples' concerns. The government stated there was no consultation during the drafting of the amendments, but the legislation was 'significantly informed' by the findings and recommendations of the Vulnerable Children's Inquiry and the 2013–14 Stability Planning and Permanent Care project that did include stakeholder consultation.²¹

Yoorrook notes there were consultations as part of a further review of the permanency amendments by the Standing Committee on Legal and Social Issues of the Victorian Parliament in 2015, which raised the same issues from First Peoples.²²

This evidence indicates that the government was aware of stakeholder concerns about the impact of the reforms on First Peoples families but chose to go ahead with them anyway. Yoorrook finds disingenuous the government's statement that 'it has *become apparent* that [Permanent Care Orders] are often considered to be culturally unsafe'.²³ As the evidence in this report shows, these issues and concerns persist and should have been properly considered in the drafting of the amendments.

Indigenous peoples possess the human right which requires the State to seek to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them. Yoorrook understands that the State of Victoria accepts and supports this right, stipulated in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) which Australia has endorsed.²⁴

The introduction of the 12/24 reunification rule vitally affected First Peoples in Victoria. Indeed, it placed their human rights at risk in several respects. There is no evidence that the State sought to obtain their free, prior and informed consent to the permanency reforms. This underscores the importance of adopting procedures, mechanism and institutions for ensuring this right is always fulfilled.

THERE ARE STRICT TIME LIMITS ON REUNIFICATION

The desirability of reunification of a child with their parent(s) is an important feature of the 'best interests' principle which guides all decision-making in Victorian child protection.²⁵ Family reunification is one of the permanency objectives in Victorian child

protection law.²⁶ In that hierarchy of objectives, family preservation ranks highest, with family reunification second, followed by adoption, permanent care and long-term out of home care.²⁷

Following the permanency reforms, however, if a child has been in care for more than a year the family reunification objective is unlikely to come into play.²⁸ An exception to this is where the Children's Court extends a family reunification order for a further 12 months if there is compelling evidence that it is likely that a parent of the child will permanently resume care of the child during the period of the extension; or if, in exceptional circumstances, a child has been in care for more than two years and is subject to a care by Secretary order.

Otherwise, the law says that adoption, permanent care and long-term out of home care are the appropriate objectives. For example, in circumstances where a child has been in care for more than 12 months and their safe reunification with a parent is not likely in the next 12 months.

The court cannot extend a family reunification order except where there is compelling evidence that a parent will permanently resume care during the period of the extension, and the extension will not result in the child being in out of home care for a cumulative period of greater than 24 months.²⁹

These strict time limits are not able to be overridden, even by the Children's Court.³⁰ Previously the Children's Court could make orders in the best interests of children without time limits on reunification.³¹

Aboriginal families are set up to fail

Given the well-established wait times and significant barriers to accessing public housing and rental affordability, AOD support, counselling and so on, the ability of parents to be able to address protective concerns within two years is unreasonable and unjust given the impact this has on reconnection.³²

The government must do more to invest in adequate, culturally appropriate support services to assist reunification, not rely on legislative blunt instruments that take away the discretion of the Children's Court and favour permanent removal.³³

Evidence given to Yoorrook painted a disturbing picture of the impacts of the permanency reforms. Of particular concern is the short time that First Peoples families have to 'prove themselves' even when services and supports that can help them do so are unavailable or have long waiting lists.

[I]t's actually very difficult to get families the services that they need to enable them to be reunified with their children or their children to be reunified with them ... the two-year timeframe actually only applies if you can show at 12 months that there is a compelling case that the child will be reunified. If you

have someone who is struggling with drug addiction or mental health issues, or homelessness, family violence, those things take a long time to address and, as I said, the key thing really is the absence of services during that period.³⁴

This evidence is at odds with the clear Departmental policy on the importance of adequate supports. The Reunification Assessment Tool in the DFFH Child Protection Manual states 'the nature of the supports consistently available to the family is of crucial significance ... It is important that we do not become blinkered in our expectations of the family's future prospects, no matter how bleak they may seem'.³⁵

Family reunification advice in the Child Protection Manual also states that a major component of child protection staff practice is 'identifying and coordinating services and supports that are responsive to the child and family's particular needs'. It further instructs that 'services should be practical and comprehensive so as to address all relevant aspects of family life... [they] should be timely, targeted and culturally competent'.³⁶

The policy intention of Family Reunification Orders was that all efforts would be made to support parents to resume permanent care of their child within the new, more restrictive time limits.³⁷ However in 2017, after the new law had operated for six months, the Commission for Children and Young People (CCYP)



Victoria Legal Aid panel L-R Dan Nicholson, Joanna Fletcher, Lawrence Moser, Louise Glanville

reported this was not happening. In over half of the cases managed by the (then) DHHS, there was no evidence to suggest that families were being actively engaged with services.³⁸ Similarly, the Permanency Amendments Longitudinal Study (PALS) report discussed below found that a lack of services, particularly for families in rural areas, was affecting timely reunification.

Yoorrook heard that support to families remains inadequate.³⁹ The government is aware of these continuing concerns. DFFH Acting Associate Secretary Argiri Alisandratos noted:

ACCOs report that First People experience difficulties accessing support services such as family services, family violence services, drug and alcohol services, in a timely manner, particularly at crisis points. They also report that many services are not holistic or culturally safe, resulting in a lack of engagement and First Peoples being reluctant to seek help early. Many services are siloed, and families struggle to access, connect and then stay engaged when they are experiencing intergenerational trauma and poverty. Homelessness and insecure housing, and the interface with family violence, also play a key role in preventing reunification of children.⁴⁰

Government advised Yoorrook that the health system prioritises access to alcohol and other drug services for those subject to Family Reunification Orders, but conceded there is no guarantee that families can access those services within the two-year time frame.⁴¹

Without adequate resources to expand access to family violence, housing, drug and alcohol services, parenting support, mental health and other services to support parents to reunify with their children safely and quickly,⁴² the current permanency order legislation will lead to more First Peoples children being denied their family, culture, country and identity. This breaches children's cultural and human rights and causes ongoing trauma and harm to First Peoples families and communities.

Western notions of permanency do not reflect the needs and rights of Aboriginal children

[S]tability should never trump a child's right to maintain their culture or their connection to their parents, siblings and extended family and community. On the contrary, stability for Aboriginal children is dependent on maintaining the continuity of this connection as it is fundamental to their identity ...⁴³

Evidence to Yoorrook questioned whether a permanent placement is in the best interests of the child if it does not reflect their identity as First Peoples.⁴⁴ Scholars and advocates have criticised a sole focus on the legal concept of permanency, arguing that cultural connection and the child's human rights to family and culture should also be protected and promoted.⁴⁵ If the policy and practice focus is on legal permanency 'at the expense of children's cultural rights and connections, and without adequate focus on children's social and emotional wellbeing', then the protection that culture provides is lost.⁴⁶

Yoorrook heard that permanency decisions are typically based on the Western construct of 'attachment theory'.⁴⁷ This rationale has been criticised by the Secretariat of National Aboriginal and Islander Child Care (SNAICC) for pursuing a 'singular attachment for a child to their carer and does not recognise the importance of kinship relationships and cultural identity development to achieving permanence and belonging for children'.⁴⁸ The SNAICC guide to implementation of the Aboriginal and Torres Strait Islander Child Placement Principle makes it very clear that:

While placements should provide a sense of permanency and stability for children, decisions relating to permanency of care should not cause harm by failing to guarantee family and cultural connections for Aboriginal and Torres Strait Islander children. For Aboriginal and Torres Strait Islander children, stability is grounded in the permanence of their identity in connection with family, kin, culture, and country ... It is crucial to avoid permanency planning that would remove a child from their culture and family. As such, where permanency planning

does take place, plans should prioritise the maintenance of relationships with family and cultural networks, and be developed by Aboriginal Community Controlled Organisations.⁴⁹

Several human rights in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) are engaged here and child protection practitioners must take proper account of First Peoples culture. Failing to do so risks violating rights to equality and non-discrimination, the right to family and personal (Aboriginal) identity and the right to protection of the family and children, among other rights.⁵⁰ The human rights at stake for Aboriginal families and children in this situation are very high. A child who is permanently placed may lose their culture forever. In the case of the child, this can amount to assimilation in effect, even accepting this is not the intended purpose.

Yoorrook is not satisfied that these rights and those stakes are systemically understood and appropriately valued and applied in the administration of the permanency provisions.

Yoorrook again draws attention to the issue of cultural competence, which has a human rights dimension as well as an administrative dimension.

Fulfilling the right of Aboriginal children in permanent care to culture

Yoorrook accepts that where it is in their best interests, as a last resort when other options are exhausted, Aboriginal children may have to be placed permanently with a non-Aboriginal family. This acutely raises the issues discussed throughout this report about the racist colonial origins of the child protection system and the justified fears and anxieties of First Peoples about the present system.

As noted throughout this report, the human and cultural rights of a First Peoples child are not extinguished when they are in out of home care. Nor does a child lose their rights when they enter permanent care. Indeed, the importance of connection to family, culture and country is absolutely critical to the child maintaining their identity when in permanent care.

Without that connection they cannot fully be who they are as First Peoples.

To some extent this is accepted in the reformed provisions. To strengthen the connection to culture for children in out of home care, the permanency amendments expanded the requirement for cultural plans for all Aboriginal children in out of home care, not just certain types of orders.⁵¹ The Victorian Aboriginal Legal Service told Yoorrook that the expansion of legislative requirements for cultural plans was

intended as a mitigation measure ... the permanency amendments strongly prioritised stability over maintaining connection with family and expanded cultural support planning was intended to help maintain connection with culture when the connection to family is disrupted.⁵²

Evidence discussed in Chapter 7: Out of home care reveals that cultural plans can be cursory (if done at all). Yoorrook is also mindful that a cultural plan cannot replace the role of family as the source of culture for First Peoples children.⁵³

I think the worst permanent care plan I saw written was that a child from a very big Aboriginal family in Victoria was going to be permanently put into a family and they were moving to South Australia. In a report to the court they wrote they would take the child to the museum as part of the child's exposure to culture... thinking if you just take them to the museum that that would fulfil the cultural obligations. Clearly, I think white Australia doesn't have an understanding of cultural obligations and what they mean to Aboriginal people.⁵⁴



A 2017 CCYP inquiry into the implementation of the reforms at the request of the then Minister for Families and Children, *Safe and Wanted*, reported that ‘the early evidence clearly showed that the permanency amendments have failed to strengthen cultural support planning for Aboriginal children’.⁵⁵ Similarly, Yoorrook was told at a community roundtable:

But if they take on a Koorie kid, and they get permanent care for that Koorie kid, that Koorie kid is out ... out of culture, out of touch of culture ... There is no cultural support or community support ... I see a lot of young kids that have been adopted by non-Indigenous families, and that’s, you know, no good. It’s not — you know, once they get that permanent care they don’t have to — they don’t have to keep them — or adhere to cultural awareness plan or a cultural support plan. You know, so a lot of our kids are getting lost in the system that way and falling through the net and ending up in the justice system. You know, by the time they are 13, 14, they are looking for their mobs ...⁵⁶

Aboriginal service providers and Yoorrook witnesses confirmed continual problems with cultural plans. A major concern is the lack of effective monitoring of compliance with plans after a child leaves the out of home care system when placed under a Permanent Care Order. This is because once a Permanent Care Order is made, DFFH no longer ‘has parental responsibility and as a consequence doesn’t have any case management responsibilities’.⁵⁷ In other words, no one has responsibility for overseeing implementation of the plan:

There’s no capacity to review and there’s no capacity to follow up with those conditions — when those conditions are applied. That means that anybody who ... permanently takes a child doesn’t have to comply with any cultural obligations. They don’t have to return the child to country, they don’t have to do any language immersion, they don’t have to have anything to do with siblings, they can completely cut off complete links with the child’s Aboriginal culture.⁵⁸

These findings on cultural plans were confirmed by the PALS report discussed below. This evidence, which was supported by other evidence to Yoorrook, establishes that Aboriginal children placed in permanent care in Victoria are at serious risk of losing contact with their country, family, culture and language. This violates their human rights and their cultural rights which DFFH and the State of Victoria are responsible for ensuring. Permanent care orders must not be allowed to be, in effect, a path to State-sanctioned assimilation.

While mechanisms that encourage and support the involvement of permanent carers with ACCOs and Aboriginal communities are helpful and potentially could be strengthened — the missing piece of monitoring compliance must be addressed. Yoorrook makes recommendations in this regard below.

LOSING CONTACT WITH SIBLINGS RISKS FURTHER TRAUMA

In Victoria, Permanent Care Orders may (rather than must) require contact with siblings.⁵⁹ This is despite evidence that ‘positive sibling relationships can bolster resilience for children facing adversity and mitigate the impacts of traumatic situations’.⁶⁰ Resilience can include improved mental health, fewer behavioural problems and better socio-emotional wellbeing.⁶¹

Under best interests considerations, the CYFA recognises the ‘desirability of siblings being placed together when they are placed in out of home care’.⁶² The government has now also amended the CYFA to incorporate all five Aboriginal Child Placement Principles, including the right to be brought up within the child’s family and community’.⁶³

This is welcome, however this falls short of provisions in Queensland, where it is legislated that co-placement of siblings should be the norm.⁶⁴

There is little transparency about how Aboriginal children are doing under Permanent Care Orders

The number of Aboriginal children on Permanent Care Orders is proportionally lower than for non-Aboriginal children, so there are fewer Aboriginal children 'exiting' the out of home care system via these orders. As at 31 January 2023, of the 3593 children in permanent care placements, 461 were Aboriginal children and 3123 were non-Aboriginal children. This represents 15 per cent of all Aboriginal children in out of home care and 33 per cent of non-Aboriginal children in out of home care.⁶⁵ For the 12 months ending 31 January 2023, there were 128 permanent care placements for Aboriginal children and 705 for non-Aboriginal children.⁶⁶

DFFH Acting Associate Secretary Argiri Alisandratos stated that:

When you compare the pathways for children into permanent care, we have significantly less [Aboriginal] children going into permanent care because of some of the concerns about the suitability of those arrangements ... which is why we have more children captured in our data here in Victoria, because they generally remain on long term care orders for a longer period of time.⁶⁷

Yoorrook is concerned that because children on Permanent Care Orders are not formally counted as being in out of home care, there is little transparency about how they are faring.⁶⁸ A comparative analysis of permanency orders legislation in Australia found that '[t]here is no requirement to monitor whether contact visits between children and their family members, including siblings, take place, or to offer mediation in case of relationship breakdown'.⁶⁹ Likewise, 'permanent carers are responsible for carrying out cultural plans for the children in their care, with little accountability or support'.⁷⁰

Placement of a child under a third-party order does not erase the child's experiences of disadvantage, abuse or neglect, or the special needs of a child, some of which may not be evident until the child is older; nor should it eliminate the state's responsibility to promote positive outcomes for the child in an on-going way into adulthood.⁷¹

In other words, we do not know if the permanency reforms are achieving the policy aim of a better life for these children.⁷² Yoorrook heard, '[t]here is no research on the short or longer term outcomes and little monitoring and data available to indicate how stable and emotionally secure permanency placements are for children and what challenges their carers are facing'.⁷³

Reviews of the permanency reforms raise concerns

THE 2017 CCYP REVIEW

The CCYP *Safe and Wanted* review found that:

- as intended, the number of permanent orders (and applications) increased overall, but not for Aboriginal children⁷⁴
- the number of children reunited with their families decreased (by 11 per cent in the first six months)⁷⁵
- there was a 260 per cent increase in orders where the government assumed exclusive parental responsibility (Care by Secretary Orders) — Aboriginal children were significantly over-represented in this group.⁷⁶

CCYP noted the government's steps to support implementation of the reforms, including by creating temporary permanency teams in DFFH and VACCA, and increased resourcing to support the cultural needs of Aboriginal children.⁷⁷ Nevertheless, it still found 'significant evidence that the child protection system [was] under such strain that it cannot support an adequate level of work with children, families and carers to ensure timely progress towards permanent outcomes'.⁷⁸

The review further found that delays in achieving permanent care for Aboriginal children were evident as a 'result of systemic factors including:

- VACCA's inability to meet demand
- a lack of early preparatory work by the Department, including inadequate searching for and assessment of Aboriginal family
- inadequate cultural competence training, assessment and preparation of prospective carers
- poor cultural support planning, and poor compliance with consultation with ACSASS and AFLDM requirements'.⁷⁹

CCYP said, 'it is unacceptable that this situation is imposed on Aboriginal children'.⁸⁰ CCYP also reported the 'potential for the Department and the child protection workforce to take a rigid approach to the permanency objectives hierarchy at the expense of considering the best interests of the child'.⁸¹

Safe and Wanted also identified unintended consequences of the legislative amendments. A large proportion of Family Reunification Orders operated for less than six months. This is because the Children's Court is not allowed to make a reunification order (on the first occasion) which would lead to a child being in care for more than 12 months. Hence the length of orders must be kept short to avoid hitting the time limit. This in practice 'impacts on achieving reunification for children, as activity is focused on court-related matters at the expense of case work to support reunification'.⁸²

THE PERMANENCY AMENDMENTS LONGITUDINAL STUDY (PALS)

The *Safe and Wanted* report recommended a longitudinal study be conducted, which would then inform another review after two years. PALS was commissioned in 2018.

Stakeholders informed Yoorrook of this study and were concerned that although completed, it had never been publicly released. In evidence, DFFH stated that the report has not been publicly released because 'the department considers it to be a draft report and any findings and recommendations remain preliminary'.⁸³ Yoorrook issued a Notice to Produce to obtain the

PALS report. The report has now been published as tendered evidence on Yoorrook's website.

The PALS report should have been immediately publicly released. Yoorrook urges the Victorian Government to promote the availability of important research like this in the interests of transparency and good policy making.

The PALS research found that the amendments had achieved their primary aim as more Permanent Care Orders were made and because the time from child protection intake to a Permanent Care Order had reduced. It also found that permanent/long-term care contributed to children's sense of belonging, safety and wellbeing. Younger children, non-Aboriginal children and those already living with their intended permanent carer (typically kin) are more likely to achieve timely permanent care.⁸⁴

However, the research also found that in some cases, parents and magistrates pushed for Permanent Care Orders to avoid the alternative Care by Secretary order, which lacks the ability to attach conditions, and is not subject to court oversight. In these cases, kinship carers can feel rushed into agreeing to a Permanent Care Order without full appreciation of the implications, in particular that case management for the child will stop when a Permanent Care Order is made.⁸⁵

The research also found there was insufficient support for permanent carers, or carers were not aware of support available. A permanent carer interviewed in the study stated, 'when [the child] transitioned from foster care to permanent care, all of the services go away. It's just you and them. That is horrendous'.⁸⁶ There were also barriers to lasting family connections, including a reduction in parent-child contact.⁸⁷

For Aboriginal children and families, the review found that compliance with the requirement to have a cultural plan improved off a low base and varied between DFFH regions. Corroborating other evidence to Yoorrook, the report found considerable variability in the quality of cultural plans, noting that DHHS practitioners 'did not have sufficient cultural knowledge to prepare high quality Cultural Plans'.⁸⁸

Additionally, Aboriginal children experienced a substantially greater increase in average length of time from protection application to first protection order than non-Aboriginal children.⁸⁹ This related to ‘a longer pursuit of family reunification, and lengthy delays in completing processes for an application for a Permanent Care Order’.⁹⁰

The PALS report identified that DFFH has different values regarding the importance of family and culture than First Peoples families and services, legal services and some magistrates. This concern, coupled with the view that courts are best placed to oversee DFFH efforts to achieve reunification, was leading to increased use of interim accommodation orders⁹¹ and adjournments to provide families with the maximum time to address protective concerns.⁹²

This is perhaps unsurprising given the court has no discretion to override the strict time limits for reunification. It is also likely a reaction to the significant and ongoing barriers that parents face gaining access to the services they need to help address the protective concerns.

The PALS report described the timeliness of service access as a ‘much-cited problem... given the reunification timelines’, particularly in regional areas and for supports including mental health, drug and alcohol and housing services. Departmental respondents to a PALS survey said that access to services to address housing issues was the most significant barrier to timely reunification.⁹³ This is consistent with evidence from community and expert witnesses to Yoorrook on the unfairness for families struggling to get services still being subject to the strict reunification time limits.

Once families are in a system that’s driven by time, it doesn’t fit ... So people just end up feeling like I can’t do anything that I need to do in that amount of time, so they end up giving up on themselves.⁹⁴

2020 VICTORIA LEGAL AID RESEARCH

In 2020, Victoria Legal Aid reviewed all legally-aided child protection grants of assistance between 2014–15 to 2019–20, where they had represented the child or parent.⁹⁵ Child protection lawyers across Victoria were also interviewed to understand their experiences of the permanency amendments.

The study found, in common with previous inquiries, that cultural plans showed positive results when complied with, but there were often delays to cultural planning or inadequate plans made.⁹⁶ The study also found:

- a slight increase in the use of orders which place children on a pathway to remaining in or returning to the care of their parents, or to another permanent care arrangement
- a 50 per cent increase in the proportion of Care by Secretary orders, with a disproportionate number of Aboriginal children on this type of order compared to non-Aboriginal children.⁹⁷

CARE BY SECRETARY ORDERS ARE INCREASING

Care by Secretary orders are two-year fixed orders that may be made when a child cannot return home, but when no permanent carer is available. Conditions cannot be attached by the court and decisions about the care of the child are managed through the child protection case planning process. Under these orders, the Secretary has parental responsibility to the exclusion of all others, including in respect of major long-term issues.⁹⁸ These orders are the least certain and permanent outcome for a child who needs to be in out of home care.⁹⁹

At the end of that two-year period, if a child can’t return home — and there isn’t a permanent carer available — they end up with parental responsibility being held by Child Protection. So obviously this is an issue for all children but it’s particularly acute for First Nations children.¹⁰⁰

The PALS research described strong concerns among legal stakeholders ‘to have no ability, even in limited circumstances, for independent oversight of a significant administrative or executive function’.¹⁰¹ A legal representative for parents said:

The reality is for a lot of kids being in State care under Care by Secretary orders ..., that it doesn’t provide them with any stability of permanency. In fact, often it’s the opposite. That kids get moved around from placement to placement and there is no oversight of the Court at all in any of that process.¹⁰²

In the PALS research, the former President of the Children’s Court highlighted a significant increase in the number of warrants issued for children who are missing from placements under Care by Secretary orders, often when placed in residential care:

These are the State’s most vulnerable children. In 2017/18 the Court issued around 6505 warrants ... and in 2019/20 that number had increased to 8439. This is a most concerning trend.¹⁰³

Yoorrook shares these concerns. Yoorrook also agrees with CCYP that when DFFH has exclusive parental responsibility, the principle of Aboriginal self-management and self-determination, recognised in the CYFA, and the government’s stated commitment to self-determination is undermined.¹⁰⁴

The rate of reunification within two years is declining

I have an intellectual disability, and got wrongly accused of certain things because of my situation of domestic violence. Because of this, my child was taken away from me when he shouldn’t have been. The Department needs to listen to families and their needs, and take these into consideration. In many cases, offering support will be sufficient to prevent the need for removal ... I worked my heart out to get where we are now, and now my baby is home. He is safe and is where he needs to be. My message to other families going through this is that no matter how much the system tries to kick you in the guts, it is achievable.¹⁰⁵

In 2020–21 in Victoria, despite having the second highest reunification rate for Aboriginal children in Australia, less than a third (32 per cent) of Aboriginal children were reunified from out of home care.¹⁰⁶

DFFH data shows that the proportion of Aboriginal children in care who are reunified with their parents within two years declined from 18.7 per cent in 2016 to 16.6 per cent in 2022.¹⁰⁷ Aboriginal children are also spending longer than ever in care before being reunified, and longer than non-Aboriginal children:

- in 2016, reunified Aboriginal children had been in care for an average of 13.6 months and by 2022 the time had grown to 19.9 months
- in 2016, reunified non-Aboriginal children had been in care for an average of 10.8 months and by 2022 the time had grown to 16 months.¹⁰⁸

The rates of reunification from children who were clients of the Aboriginal Children in Aboriginal Care (ACAC) program compared with those who were clients of child protection is discussed later in this chapter.

In 2019–20, Victoria had Australia’s highest rate of return to care (18.4 per cent of those reunified) within 12 months.¹⁰⁹ The reasons some children return to care within 12 months of reunification are unknown, as only children’s ages and time spent in out of home care are publicly reported. Little is known about the factors that enable successful reunifications and most research on reunification barriers has not been focused on First Peoples. That said, research shows that structural barriers such as poverty and homelessness impede reunification occurring within a short timeframe.¹¹⁰ Evidence received by Yoorrook confirms this. One witness noted:

The Department had only given me three months to meet their requirements. I was in the process at the time of trying to prove to the Department that I was complying with all requirements and engaging with my supports, attending a program at Berry Street, but this wasn’t enough. Following the non-reunification decision, I put in an appeal. The Department had 28 days to respond, and they took 8 months to get back to me, only to tell me no. Following this, my support network all had my back and helped me take it to court, where we ended up getting 50:50 custody. The Department couldn’t justify their non-reunification decision.¹¹¹

Another witness spoke of the judgmental attitude child protection staff have towards Aboriginal mothers and how this affects reunification:

I want DFFH to see our mothers as mothers, not as drug addicts or something else. Every single child I have ever cared for loves their mother so deeply. I want those that judge our mums for the trauma they're experiencing to get a wake-up call. So many kinship carers that I know, DFFH try to get you on side with them and make it an 'us' versus 'them' situation with the mum. I continuously reminded DFFH during the care team meetings that these kids have a mum.¹¹²

DFFH acknowledges there continue to be systemic barriers that affect reunification rates:

These barriers include the ability of parents and professionals who support families to access the services they need including family services, family reunification services, family violence, alcohol and drug, mental health and housing services. Often services cannot be provided immediately or at a time that parents are seeking support. Wait times for these services vary and can impact on the rate at which families can address protective concerns.¹¹³

Aboriginal Family Preservation and Reunification Response

In 2020, DFFH established the Family Preservation and Reunification Response (the Response) to support children and their families to remain together safely and enable children in care to return home safely through evidence-informed practices.¹¹⁴ The Response commenced in April 2020 with a budget of \$39.6 million.¹¹⁵ ACCOs across Victoria received \$15.9 million per annum to support 436 families through the Response in 2021–22.¹¹⁶ DFFH advises that 35 per cent of funding for the Response is recurrent and 65 per cent of funding ends in 2023–24 (although it did not state the proportion of recurrent funding provided to ACCOs).¹¹⁷

DFFH stated that

the Response was developed in close consultation with ACCOs and has provided the opportunity to significantly progress work towards developing an Aboriginal evidence-based model that is designed, developed and owned by Aboriginal organisations and community. Aboriginal children and families connected to the program have access to culturally safe and inclusive practices, delivered by practitioners, trained and coached in implementing Aboriginal cultural practice elements.¹¹⁸

DFFH advised that the rollout of the Response, together with additional intensive support funding, was planned to target areas and groups most in need, with consideration given to the needs of Aboriginal communities. This has resulted in 24 per cent of DFFH's most intensive program funding being allocated to ACCOs across the State, 'proportional to the rate First Peoples children are entering care'.¹¹⁹

As of November 2022, 12 ACCOs are involved in delivering the Response and 855 Aboriginal families have been connected to the program.¹²⁰

When a permanency objective of family reunification is determined, practitioners must consider connecting the family to the Response.¹²¹ While the program is not just for reunification, DFFH reports that in 2021–22, 33 per cent of cases involving Aboriginal children were to support reunification.¹²²

Aboriginal-led services result in more reunifications

[W]e had four Care by Secretary orders, so kids in the care of the Department, all converted to family preservation orders. That's children returned home. Three of these matters were case managed by VACCAs Nugel program, section 18. Again, Aboriginal mob looking after Aboriginal mob.¹²³

As noted in Chapter 7: Out of home care, more children in the ACAC program are reunified with their parents than children case managed by DFFH child protection.¹²⁴

The comparative high rates of reunification achieved by the ACAC program were also confirmed by an earlier independent evaluation of VACCA's Nugel program in 2019.¹²⁵

The government acknowledges the success of ACCOs in improving reunification, stating that '[t]hrough efforts to transition children to ACCOs, we are seeing some early indicators of improved reunification efforts and engagement'.¹²⁶

The way forward

The permanency reforms are not working for many Aboriginal children and families. They have created unnecessary harm. This is because:

- strict time limits on reunification are unfair because Aboriginal parents are less likely to be able to access supports needed to address protective concerns within those timeframes
- the time limits are inflexible and cannot be overridden by the Children's Court.

Yoorrook is particularly concerned that the operation of the current law can deny opportunities for Aboriginal children to enjoy their cultural and human rights to personal identity and development, family and culture protected under UNDRIP, international law and the Charter, including where children are separated from their siblings.¹²⁷

Yoorrook commends increased efforts to fund Aboriginal-led programs to support reunification. These types of programs can provide culturally safe support to children and families to help them get back on the road to living together as a family. The law also needs the flexibility to allow families that are nearly there to achieve reunification.

Balance must be restored

Yoorrook supports the policy intention of reducing 'drift' in out of home care and providing children with permanency. However, the strict time limits for reunification have led to consequences that are unfair and harshly felt in First Peoples communities.

The 12/24-month reunification rule introduced by the permanency reforms raises fundamental human rights issues. As the Minister for Child Protection and Family Services conceded, the rule is a blunt instrument that applies to all families regardless of the difficulties they may individually encounter in achieving reunification.¹²⁸ Aboriginal families can encounter greater difficulties in achieving reunification than other families. A rule that is neutral on its face that applies across the board without regard to individual circumstances can operate in a discriminatory way against particular groups.¹²⁹

The evidence establishes that this has happened with the 12/24 reunification rule for many Aboriginal families. This is contrary to the right in the Charter to be equal before the law, to the equal protection of the law and to equal and effective protection against discrimination.¹³⁰

In her evidence before the Commission, the Minister for Child Protection and Family Services also advised that she has asked DFFH to conduct a review of the permanency amendments and their consequences and provide her with options.¹³¹ The evidence presented to this Commission, as well as the evidence presented by First Peoples through past inquiries and review processes, provides clear guidance about what needs to happen — which is to bring balance in the law and provide the flexibility necessary to avoid the harmful impacts of the current 12/24 rule.

Yoorrook considers that an appropriate balance can be achieved by reinstating the power of the Children's Court to override reunification time limits where necessary. This should support appropriate consideration of children's rights, including their best interests, without undermining the policy aims of the reforms.

Providing some judicial discretion may also help end the legal contortions to stop the reunification clock from ticking when families are unable to access services in time to help them address protective concerns. It may also reduce the use of Care by Secretary orders that would not otherwise be the only option left to the court when the statutory time limit has been reached.

Cultural rights of the child must be observed on an ongoing basis

Currently there is no effective mechanism for monitoring compliance with cultural plans once an Aboriginal child is placed under a Permanent Care Order.¹³² This risks a child's permanent placement becoming culturally unsafe with no-one to check on what is happening.

If the legal framework does not guarantee continuing access to an Aboriginal child's culture, and so the realisation of their cultural and human rights, there is a danger that the law can operate in an assimilationist fashion which the system and legislation must do everything possible to avoid.

Yoorrook therefore recommends that a mechanism be developed to ensure oversight of cultural plans for children in permanent care. This function should be undertaken by ACCOs. This avoids DFFH or the court staying in the child's life and will help the child or young person to maintain a relationship with an ACCO for appropriate support. Importantly, permanent carers can be supported to deliver on the cultural plan in a meaningful way, the child or young person can have a proper say in how they want to maintain and grow their cultural connection, and the actions under the plan can be adapted to suit the age and stage of the child's development. ■

RECOMMENDATIONS

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.

Endnotes

1. SNAICC — National Voice for our Children, *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, 2021) 3 (*'The Family Matters Report 2021'*).
2. The *Children, Youth and Families Act 2005* (Vic) (*'CYFA'*) provides that a Permanent Care Order may be made after six months of court ordered out-of-home care: s 319(1). However, in most cases, reunification will be attempted at first instance, via a Family Reunification Order. The reunification timelines ensure a child is not placed away from parental care for a period totalling 12 months.
3. For example, if they are left in long term out-of-home care when there is no permanent carer available.
4. The amendments were contained in the *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014* (Vic). The permanency amendments were accompanied by \$2 million in flexible funding to support new and existing permanent carers, and \$600,000 to establish a telephone helpline for permanent carers. The 2016–17 state budget then provided \$3.6 million over two years to expand ACSASS: see Commission for Children and Young People, *'... Safe and Wanted...': Inquiry into the Implementation of the Children Youth and Families Amendment (Permanent Care and Other Matters) Act 2014* (Inquiry Report, 2017) 12, 24 (*'...Safe and Wanted...'*).
5. Family reunification is appropriate if a child has been in out-of-home care for a cumulative period of less than 12 months and safe reunion is likely to be achieved. A family reunification order may only be extended for a cumulative period of up to 24 months: *CYFA* (n 2) ss 167(1)(b), 167(3) and 294A(1) (b). DFFH guidelines state that exceptional circumstances 'may arise if a parent who is otherwise capable of providing adequate care is incarcerated for a crime unrelated to their parenting capacity and on release from prison will resume care, or where a parent is expected to recover from an illness that has prevented them from caring for their child.': Department of Families, Fairness and Housing, *Child Protection Manual* (20 November 2021) 'Identifying and Achieving the Permanency Objective: Family Reunification' <<https://www.cpmanual.vic.gov.au/advice-and-protocols/advice/case-planning/identifying-and-achieving-permanency-objective>>.
6. *'...Safe and Wanted...'* (n 4) 12.
7. Drifting can cause further psychological harm to a child through living in a state of uncertainty and losing connections with family, community, and culture: Sarah Wise et al, *Certainty for Children, Fairness for Families? Synthesised Research Findings from the Permanency Amendments Longitudinal Study* (University of Melbourne, Unpublished), in Department of Families, Fairness and Housing, 'Response to NTP item 002-009', 4, produced by the State of Victoria in response to the Commission's Notice to Produce dated 6 March 2023 (*'Longitudinal Study'*).
8. Phillip Cummins, Dorothy Scott and Bill Scales, *Report of the Protecting Victoria's Vulnerable Children Inquiry* (2012) 229. See also Transcript of Argiri Alisandratos, 27 April 2023, 82 [19]–[25]. Mr Alisandratos states: 'One of the key drivers of the 2015–16 amendments where it was taking five years to resolve children's permanency and stability, and what children and young people did and continue to tell us is, "Why did you put us through multiple periods of reunification, failed reunification?" And they tell us that now as young adults when we seek their voice to try and understand their experience, and one of their clear messages is, "You should have made the decision earlier"'.
9. Applications for Permanent Care Orders are made to the Children's Court by the Secretary of the Department of Families, Fairness and Housing. When an application is made, the Secretary must inform the child, parent of the child, and the person who the Secretary proposes to become the permanent carer (and so will assume parental responsibility for the child): *CYFA* (n 2) s 320. Under s 320(6), any protection order for a child in force when the Secretary's application is made stays in force until the court makes its decision on the Permanent Care Order application.
10. *Ibid* s 319(1)(b)–(d).
11. *Ibid* s 319(1)(c)(ii), (e).
12. *Ibid* s 319(f). See Chapter 6 for a discussion of best interests principles.
13. *Ibid* s 321(1)(ca).
14. *Ibid* ss 321(1)(d)–(e), 321(1C). Parental contact is limited to four times a year unless by agreement in the child's best interests (*ibid* s 321(1A)) or if the order is varied after 12 months (*ibid* s 326).
15. *Ibid* s 321(1)(d).

16. Ibid s 323. The DFFH Child Protection Manual instructs staff that if 'if a decision has been made to seek a permanent care order (PCO), liaise with the Adoption and Permanent Care Team (APCT) to organise a meeting with the VACCA permanent care program to discuss the development of a permanent care cultural assessment report and preparation of a cultural plan': see Department of Families, Fairness and Housing, *Child Protection Manual* (20 November 2021) 'Case Planning for Aboriginal Children' <<https://www.cpmanual.vic.gov.au/policies-and-procedures/aboriginal-children/case-planning-aboriginal-children>>. Orders available to the court when it decides not to make a PCO are set out s 320(7) of the *CYFA* (n 2).
17. *CYFA* (n 2) s 323(1). See Chapter 7 for discussion of the Aboriginal Child Placement Principle.
18. Ibid s 319(7).
19. Djirra, Submission 44, 18.
20. Victorian Aboriginal Child Care Agency, Submission 77, 98.
21. Witness Statement of Argiri Alisandratos, 21 March 2023, 172 [828], [830]. The concerns identified through the Stability Planning and Permanent Care project are detailed at Department of Health and Human Services, *Stability Planning and Permanent Care Project Final Report 2013–14* (2014) 33–38.
22. *Longitudinal Study* (n 7) 11.
23. Witness Statement of Argiri Alisandratos, 21 March 2023, 34 [113] (emphasis added).
24. *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) art 19.
25. See *CYFA* (n 2) s 10(3)(i).
26. Ibid s 167(1)(b).
27. Ibid s 167(1): this describes the permanency objectives and requires that a child's case plan include one of the objectives.
28. Ibid s 167(3).
29. Ibid s 294A(1).
30. See, eg, Ibid s 287A (20)-(3).
31. Permanent care orders can be contested. However, permission of the court is required to make an application to vary the order. Even then, such applications are not allowed in the first year of the order unless a contact condition has been broken: *CYFA* (n 2) s 326(1B).
32. Victorian Aboriginal Child Care Agency, Submission 77, 73.
33. Djirra, Submission 44, 18.
34. Transcript of Joanna Fletcher, 15 December 2022, 473 [40]–[45]
35. Department of Families, Fairness and Housing, *Child Protection Manual* (Undated) 'Reunification Assessment Tool' <<https://www.cpmanual.vic.gov.au/advice-and-protocols/tools-checklists/assessment-tools/reunification-assessment-tool>>.
36. Department of Families, Fairness and Housing, *Child Protection Manual* (20 November 2021) 'Family Reunification Advice' <<https://www.cpmanual.vic.gov.au/advice-and-protocols/advice/case-planning/family-reunification-advice>>.
37. The second reading speech for the Children, Youth and Families Amendment (Permanent Care and Other Matters) Bill 2014 (Vic) states 'the focus of family reunification orders will be to mobilise supports and services to assist parents to resume permanent care of their child within one year, if possible, and at most within two years': Victoria, *Parliamentary Debates*, Legislative Council, 7 August 2014, 2659 (Mary Wooldridge, Minister for Community Services).
38. '...Safe and Wanted...' (n 4) 18.
39. The Family Matters report notes that although Victoria had the highest proportional expenditure on family support in 2020–21, it had the lowest level of First Peoples families commencing intensive family support services. The report notes that given the high levels of First Peoples children in out-of-home care in Victoria, this low percentage of access to services 'suggests that the level of culturally safe and accessible services is not aligned to the level of support needs for Aboriginal and Torres Strait Islander families': SNAICC — National Voice for our Children, *The Family Matters Report 2022: 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, 2022) 41 ('*The Family Matters Report 2022*'). See also Djirra, Submission 44, 16.
40. Witness Statement of Argiri Alisandratos, 21 March 2023, 54 [217]–[218]; see also 57 [253]. The PALS report also notes that children in out-of-home care on Interim Accommodation Orders — which can be used by the court to stop the clock starting on time limits for family reunification — are not eligible for funding that attaches to family reunification orders: *Longitudinal Study* (n 7) 35.
41. Transcript of Katherine Whetton, 1 May 2023, 204, [41]–[45].
42. Victoria Legal Aid, *Achieving Safe and Certain Homes for Children: Recommendations to Improve the Permanency Amendments to the Children, Youth and Families Act 2005 Based on the Experience of Our Clients* (October 2020) 27, Recommendation 24 ('*Achieving Safe and Certain Homes for Children*').
43. Victorian Aboriginal Legal Service, Submission 38 (Child Protection), 33.
44. Victorian Aboriginal Legal Service, citing SNAICC, note that a policy position that prioritises long term care is 'in complete opposition to the position of ACCOs across Australia': Victorian Aboriginal Legal Service, Submission 38 (Child Protection), 36.

45. The cultural dimension of permanency recognises culture as both a protective factor and a human right (to family and culture). For a discussion of different concepts of permanency (relational, physical, cultural and legal), see Amy Conley Wright et al, 'Comparative Analysis of Third-Party Permanency Orders Legislation in Australia' (2022) *Australian Journal of Social Issues* 1.
46. *The Family Matters Report 2021* (n 1) 12. The PALS report also documented a lack of 'consensus surrounding the values or principles underlying the [permanency amendment] rules': *Longitudinal Study* (n 7) 5.
47. For discussion of attachment and its connection to stability, see Transcript of Argiri Alisandratos, 27 April 2023, 77 [33]–[48].
48. *The Family Matters Report 2021* (n 1) 31.
49. SNAICC — National Voice for our Children, *The Aboriginal and Torres Strait Islander Child Placement Principle: A Guide to Support Implementation* (2019) 8.
50. *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 8, 13, 17, 19(2) ('*Charter*').
51. *CYFA* (n 2) s 176. Prior to the amendments, cultural plans were only required for Aboriginal children on guardianship to Secretary orders or long-term guardianship to Secretary orders.
52. Victorian Aboriginal Legal Service, Submission 38 (Child Protection), 45.
53. 'There is even some evidence that suggests that where an Indigenous child is disconnected from their Indigenous family and community, attempts to connect that child with their Indigenous culture in the absence of family can do more harm than good': Victorian Aboriginal Legal Service, Submission 38 (Child Protection), 45–46, citing Kenn Richard, 'A Commentary against Aboriginal to Non-Aboriginal Adoption' (2004) 1(1) *First Peoples Child & Family Review* 101–109.
54. Transcript of Aunty Muriel Bamblett, AO 6 December 2022, 107 [32]–[41].
55. '*...Safe and Wanted...*' (n 4) 15.
56. Summary of Community Evidence (De-Identified Direct Quotes) Obtained at Roundtables and Prison Visits, 14 June 2023, 1 [3].
57. Transcript of Argiri Alisandratos, 28 April 2023, 132 [18]–[20]. Note the safeguard contained in s 323(2) (b) of the *CYFA* which prevents the Children's Court from making a permanent care order unless a cultural plan has been prepared for the child.
58. Transcript of Aunty Muriel Bamblett, AO 6 December 2022, 104 [29]–[34].
59. *CYFA* (n 2) s 321(1)(e).
60. Wright et al (n 45) 7.
61. *Ibid*.
62. *CYFA* (n 2) s 10(3)(q).
63. Children and Health Legislation Amendment (Statement of Recognition, Aboriginal Self-Determination and Other Matters) Bill 2023 (Vic) cl 5 inserting new s 14(1A).
64. Wright et al (n 45) 7. The relevant Queensland provision states that a child who is removed from their family 'should be placed with the child's siblings, to the extent that is possible': *Child Protection Act 1999* (Qld) s 5B(i).
65. Department of Families, Fairness and Housing, Response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 6 May 2023, Attachment 2, 19 [107]–[109].
66. Department of Families, Fairness and Housing, Supplementary response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 10 May 2023, Attachment 1, 6 [16]–[17].
67. Transcript of Argiri Alisandratos, 28 April 2023, 139 [6]–[12].
68. Out-of-home care counting rules changed for all states and territories from 2018–19 and now exclude children on third-party parental responsibility orders: *The Family Matters Report 2021* (n 1) 27.
69. Wright et al (n 45) 8–9.
70. *Ibid* 9.
71. *Ibid* 6.
72. The PALS report noted that due to the short follow-up period it is unclear what the future holds for the growing number of children who achieve timely permanent care orders: *Longitudinal Study* (n 7) 68.
73. Overseas research is not directly transferrable, especially for First Nations children, but does point to some overall positive outcomes but also concerns regarding long-term stability and re-entry to care, lack of support and services, and difficulties managing birth family contact: Wright et al (n 45) 6.
74. '*...Safe and Wanted...*' (n 4) 17–18.
75. *Ibid* 19.
76. *Ibid* 5–6. Aboriginal children continue to be significantly over-represented in this cohort. Data supplied by DFFH shows 27 per cent of Aboriginal children on orders are on Care by Secretary Orders, compared with 19 per cent of all children on orders: Department of Families, Fairness and Housing, 'Response to NTP item 002-003', 6, produced by the State of Victoria in response to the Commission's Notice to Produce dated 6 March 2023.
77. '*...Safe and Wanted...*' (n 4) 21.
78. *Ibid* 23.
79. *Ibid* 31, Finding 29.
80. *Ibid*.
81. *Ibid* 23.
82. *Ibid* 28.
83. Witness Statement of Argiri Alisandratos, 21 March 2023, 175 [844].
84. *Longitudinal Study* (n 7) 4.
85. *Ibid* 5.
86. *Ibid* 62.
87. *Ibid* 64.
88. *Ibid* 28, 30.
89. *Ibid* 37.
90. Witness Statement of Argiri Alisandratos, 21 March 2023, 176 [846].

91. The PALS report states that ‘judicial case management through Interim Accommodation Orders is an attempt to retain judicial oversight over decisions and actions of the Department before making a final order, specifically to ensure the reunification case plan has been activated’: *Longitudinal Study* (n 7) 37.
92. *Ibid* 47.
93. *Ibid* 41.
94. *Ibid* 49.
95. *Achieving Safe and Certain Homes for Children* (n 42) 5.
96. *Ibid* 18.
97. *Ibid* 8.
98. *CYFA* (n 2) s 289.
99. *Achieving Safe and Certain Homes for Children* (n 42) 8.
100. Transcript of Joanna Fletcher, 15 December 2022, 473 [27]–[30].
101. Executive Director, Victoria Legal Aid quoted in *Longitudinal Study* (n 7) 51.
102. Quoted in *Longitudinal Study* (n 7) 53.
103. The former President of the Children’s Court of Victoria, quoted in *Longitudinal Study* (n 7) 53.
104. ‘...*Safe and Wanted...*’ (n 4) 18.
105. Outline of Evidence of Mikala, 23 February 2023, 5 [48], [51].
106. The highest rate is in the ACT with 33.3 per cent reunified: Australian Institute of Health and Welfare, *Aboriginal and Torres Strait Islander Child Placement Principle Indicators Supplementary Data Tables* (Australian Government, 2022) Table S2.3a (*‘Aboriginal and Torres Strait Islander Child Placement Principle Indicators’*).
107. This compares to a decline from 19.3 per cent to 17.8 per cent for non-Aboriginal children. Witness Statement of Argiri Alisandratos, 21 March 2023, 34, Attachment AA-18 in ‘Key points’ box. Note that data in the table Attachment AA-18 and in witness statement of Argiri Alisandratos states that the decline was from 18.7 per cent in 2016 to 16.6 per cent in 2020: Witness Statement of Argiri Alisandratos, 21 March 2023, 54 [214]. Further data provided by DFFH from 1 May 2021 to 7 May 2023 shows that 22 per cent of Aboriginal children exited to parents within 12 months of entry into placement, compared to 29 per cent for non-Aboriginal children: Department of Families, Fairness and Housing, Supplementary response responding to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 10 May 2023, Attachment 1, 1. This compares to a decline from 19.3 per cent to 17.8 per cent for non-Aboriginal children: Witness Statement of Argiri Alisandratos, 21 March 2023, 34, Attachment AA-18 in ‘Key Points’ box. Note that data in the table Attachment AA-18 and in Witness Statement of Argiri Alisandratos states that the decline was from 18.7 per cent in 2016 to 16.6 per cent in 2020: Witness Statement of Argiri Alisandratos, 21 March 2023, 54 [214].
108. Witness Statement of Argiri Alisandratos, 21 March 2023, 57 [252].
109. *Aboriginal and Torres Strait Islander Child Placement Principle Indicators* (n 106) Table S2.4a.
110. *The Family Matters Report 2021* (n 1) 38.
111. Outline of Evidence of Mikala, 23 February 2023, 4 [38]–[39].
112. Outline of Evidence of Sissy Eileen Austin, 2 March 2023, 16 [215]–[218].
113. Witness Statement of Argiri Alisandratos, 21 March 2023, 57 [253].
114. Witness Statement of Argiri Alisandratos, 21 March 2023, 39 [139].
115. Victorian Government, *Roadmap for Reform: Pathways to Support for Children and Families – Priority Setting Plan 2021–2024* (2021) 20. Information provided by the government shows that approximately 35 per cent of this funding is recurrent, but 65 per cent ends in 2023–24. The information does not identify how much of the recurrent funding is for ACCOs: Witness Statement of Argiri Alisandratos, 21 March 2023, 65, Table 6.
116. Witness Statement of Argiri Alisandratos, 21 March 2023, 56 [246].
117. Witness Statement of Argiri Alisandratos, 21 March 2023, 65, Table 6.
118. Witness Statement of Argiri Alisandratos, 21 March 2023, 39 [139].
119. Witness Statement of Argiri Alisandratos, 21 March 2023, 40 [140].
120. Witness Statement of Argiri Alisandratos, 21 March 2023, 45 [169].
121. Department of Families, Fairness and Housing, *Child Protection Manual* (20 November 2021) ‘Family Reunification – Advice’ <<https://www.cpmmanual.vic.gov.au/advice-and-protocols/advice/case-planning/family-reunification-advice>>.
122. Witness Statement of Argiri Alisandratos, 21 March 2023, 56 [246].
123. Transcript of Ashleigh Morris, 9 December 2022, 302 [22]–[25]. See also Transcript of Joanna Fletcher, 15 December 2022, 476 [4]–[27].

124. Between January and June 2021, 83 per cent of children in the ACAC program were reunified with parents or family compared with 64 per cent case managed by DFFH child protection: State of Victoria, Response to Issues Paper 2: Call for Submissions on Systemic Injustice in the Child Protection System, [46]. Government provided further data stating that 28 per cent of ACAC clients who exited to reunifications between January to June 2021, re-entered care within the following 12 months (July 2021 to June 2022) compared to 22 per cent of Aboriginal child protection clients and 16 per cent of non-Aboriginal child protection clients: Department of Families, Fairness and Housing, Response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 6 May 2023, Attachment 1, 10 [30].
125. That evaluation found that ‘based on the actual reunification rates from 2017–2019, from an indicative sample of 100 children, the reunification rate was higher for VACCA (22%) than for [DFFH] (5%)’: cited in Victorian Aboriginal Child Care Agency, Submission 77, 74.
126. Witness Statement of Argiri Alisandratos, 21 March 2023, 18 [24].
127. *Charter* (n 50) ss 13(a) 17(1) and 19(2).
128. Transcript of Minister for Child Protection and Family Services, the Hon. Elizabeth (Lizzie) Blandthorn MLC, 12 May 2023, 828 [1]–[3].
129. Indirect discrimination occurs when there is an unreasonable rule or policy that on its face is the same for everyone but when applied has an unfair effect on people who share a particular characteristic (attribute) such as race or gender: see *Equal Opportunity Act 2010* (Vic) s 9.
130. *Charter* (n 50) s 8(3).
131. Transcript of Minister for Child Protection and Family Services, the Hon. Elizabeth (Lizzie) Blandthorn MLC, 12 May 2023, 824 [36]–[39].
132. See discussion of cultural plans generally in Chapter 7: Out of home care. Note that once a child is placed under a Permanent Care Order, there is currently no mechanism for the Children’s Court or DFFH to monitor compliance with cultural plans. ‘The onus is on the permanent carers who take on that responsibility. And if there is non-compliance with the conditions, there is capacity for birth applicants to bring an application to court’: Transcript of Argiri Alisandratos, 28 April, 133 [1]–[3].



E

Criminal justice





Alan Thorpe, Dardi Munwurro, Nakia Firebrace, VACCA,
Karin Williams, VACSAL, and Coree Thorpe, Dardi Munwurro

9 OVERVIEW OF THE CRIMINAL JUSTICE SYSTEM

Each death has left families and communities grieving.
Each death was preventable and should not have happened.¹

ABORIGINAL JUSTICE CAUCUS

Introduction

Part E focuses on systemic injustice experienced by First Peoples in Victoria's criminal justice system. These injustices are demonstrated in the racism First Peoples face, the continued over-representation of First Peoples in the system, and ongoing Aboriginal deaths in custody.² Yoorrook heard of the systemic failures that drive this injustice and its consequences for Aboriginal people's human rights, cultural rights, wellbeing and safety. Evidence from First Peoples, the State and Aboriginal Community Controlled Organisations (ACCOs) outlined the conduct of criminal justice institutions including the courts, Victoria Police, Youth Justice and Corrections Victoria.

This chapter provides an overview of the criminal justice system to give context to the analysis in the chapters that follow.

The Attorney-General admitted that Victoria has 'a crisis when it comes to justice outcomes for Aboriginal people'. She acknowledged five Aboriginal deaths in custody since January 2020.³ One week after that evidence, another First Nations man died in the custody of Corrections Victoria.⁴

The failings of the system can be broadly attributed to factors including:

- entrenched systemic racism, acknowledged by the Aboriginal Justice Agreement (AJA) Phase 4 *Burra Lotjpa Dunguludja*⁵, expressed through community evidence and by government officials and ministers during hearings⁶
- a lack of understanding of the unique experiences and needs of First Peoples, including the impact of ongoing, intergenerational trauma⁷

- failure to adequately uphold First Peoples' right to self-determination⁸ as committed to in *Burra Lotjpa Dunguludja* and the *Victorian Aboriginal Affairs Framework 2018–2023* (VAAF) — this is underscored by the government, judiciary, Victoria Police and those working in the criminal justice system not understanding what self-determination means for First Peoples
- lack of evaluation and accountability for commitments made under government policies and major agreements such as the VAAF and *Burra Lotjpa Dunguludja* discussed further in Chapter 3: Accountability, capability and compliance with cultural and human rights obligations.

[These failures, alongside the legacy of colonialism, perpetuate mistrust in government, the justice system and institutions such as Victoria Police.](#) The criminal justice system was and is an institution of colonisation. As discussed in Chapter 1, from the earliest days of colonisation the criminal justice system has been used against First Peoples in the interests of the colonisers. The various elements of the criminal justice system have each played a role in this process — police, courts and the judiciary and prisons. Five of the first nine men executed in Victoria were Aboriginal men, whose crimes were directly linked to the frontier wars.⁹ Systemic injustice, including criminalisation of resistance to dispossession, was therefore built into the Victorian criminal justice system. This endures.

Royal Commission into Aboriginal Deaths in Custody

The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) brought to national attention the inexcusable rate at which governments in Australia were arresting, prosecuting and imprisoning Aboriginal people. It found that Aboriginal people were dying in custody at high rates, not because they were more likely to die once in custody, but because of the high rates at which governments were taking them into custody.¹⁰

Nationally, more than 540 Aboriginal people have died in custody since RCIADIC.¹¹

In Victoria, there have been 24 First Peoples deaths in the adult corrections system and 10 in police custody and police operations since RCIADIC.¹² This includes six First Peoples deaths since January 2020.¹³

RCIADIC concluded that the most significant contributing factor bringing Aboriginal people into contact with the criminal justice system was their disadvantaged and unequal position in the wider society.¹⁴

RCIADIC also identified aspects of the criminal justice system where legislative, policy and programmatic reforms would result in more immediate and direct outcomes. Most recommendations made by the RCIADIC therefore related to policing, criminal justice, imprisonment and deaths in custody.¹⁵

Government failure to implement RCIADIC recommendations

The Commonwealth Government's 2018 Deloitte Review of the implementation of RCIADIC's recommendations determined that Victoria had not implemented (either fully or in part) only 13 of 326 applicable recommendations.¹⁶ ACCOs, First Peoples' advocacy groups, and policy and professional experts who were not involved in the review, have a different perspective.¹⁷ For example, the Victorian Aboriginal Legal Service (VALS) and other organisations maintain that key recommendations, such as using imprisonment as a sanction of last resort, and improving processes

for dealing with complaints against police, have not been appropriately implemented.¹⁸

Given community disappointment at previous reports on implementing RCIADIC recommendations,¹⁹ the Aboriginal Justice Caucus is currently undertaking an Aboriginal-led review of Victoria's progress against implementation of RCIADIC recommendations.²⁰ The Aboriginal Justice Caucus anticipates incorporating findings from this project into further submissions to Yoorrook.²¹

The Department of Justice and Community Safety (DJCS) maintains that key strategies and initiatives underway in Victoria broadly respond to the themes of RCIADIC recommendations.²² These strategies, which are discussed below, include *Burra Lotjpa Dungaludja*, the VAAF, *Wirkara Kulpa* Aboriginal Youth Justice Strategy 2022–2032, and the *Youth Justice Strategic Plan 2020–2030*.²³

DJCS's position is that some recommendations were not implemented as they are nationally focused or are no longer relevant due to changes in laws, policies, and institutions since the report was published in 1991.²⁴

The Victorian Parliament Legal and Social Issues Committee Inquiry into Victoria's Criminal Justice System (Legal and Social Issues Committee Inquiry) tabled its report in March 2022. More than a year on, the government has not formally responded to the report's more than 100 recommendations.²⁵ These recommendations call for wide-ranging reform to address rising rates of imprisonment and reoffending, building on many of RCIADIC's recommendations. The Legal and Social Issues Committee Inquiry findings and recommendations echo many of the submissions and other evidence put to Yoorrook during this inquiry.

There is clear consensus about what needs to be done to drive down First Peoples' over-representation in the criminal justice system and to make the system more humane, fair and effective. What has been lacking is the political will to implement known solutions. At times, governments have changed laws and policies against the direct advice of First Peoples leaders and organisations, and directly contradicted previous recommendations and commitments.²⁶ Changes to

make Victoria's bail laws harsher are just one prominent example of this.

Aboriginal community and representative organisations continue to be frustrated with government failures to implement recommendations made over many years and by many inquiries. First Peoples see the lack of accountability as a key reason why so many inquiries have not had the desired impact.²⁷ First Peoples continue to suffer these failures.

Policy failures continue to drive over-representation

A key theme in this part of the report is that legislative and policy changes continue to contribute to over-representation, rather than reduce it. Figure 9-1 shows the correlation between policy and legislative changes, and increased numbers of people in custody over the ten years to 2019. As can be seen, these legal changes have led to increases in Victoria's prison population. These changes have had a disproportionate effect on First Peoples.

Government invests in the wrong end of the system

Victorian Government funding priorities continue to frustrate First Peoples. Despite knowing the imperative to keep First Peoples out of the criminal justice system, government spending has consistently prioritised policing and imprisonment.²⁹ Billions have been spent on building and operating new adult and youth prisons.³⁰ As noted by the First Peoples' Assembly of Victoria:

[S]uccessive Victorian Governments have expanded and funded policing and imprisonment at the expense of vital and far more effective socio-economic reform.³¹

It is indefensible that government is willing to invest on this scale in prisons and police when there is a desperate need for greater investment in early intervention programs and services and therapeutic and diversionary programs. That investment will help end systemic injustice faced by First Peoples in the criminal justice system, not more prisons and police.

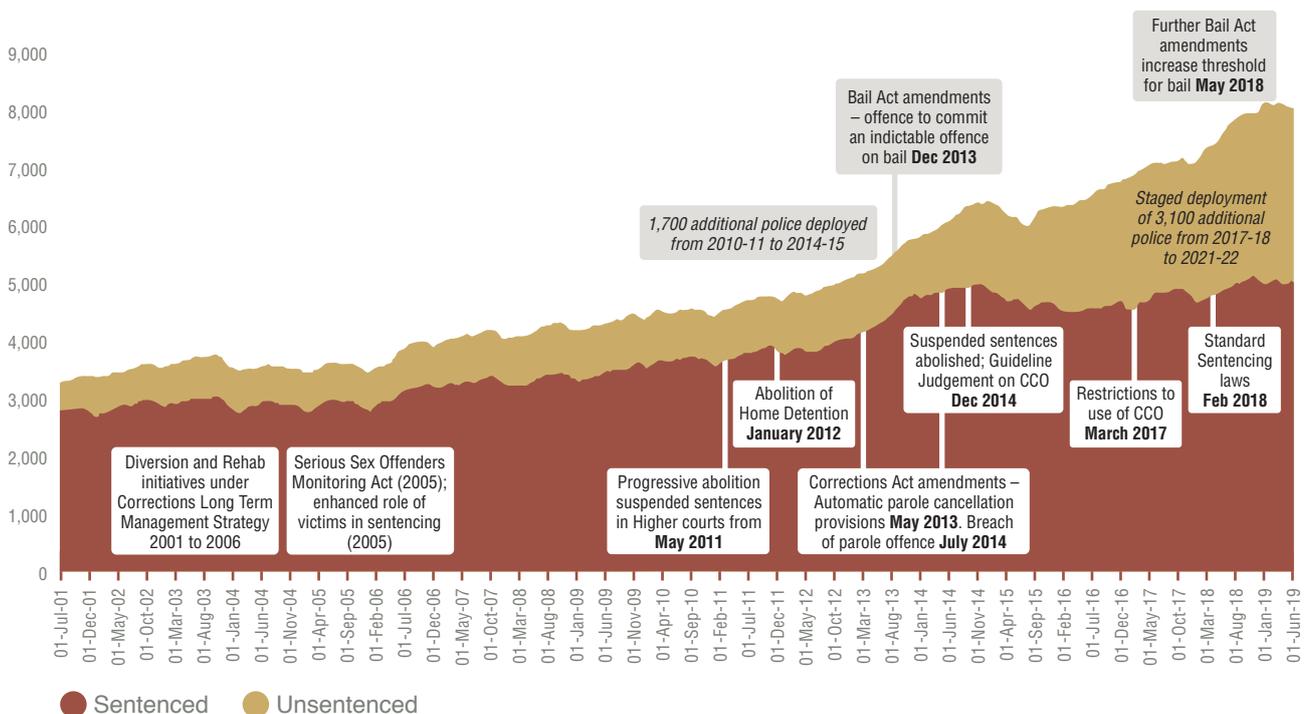


FIGURE 9-1: Legislative factors attributable to prison population growth²⁸

Relevant cultural and human rights protections

For systemic injustices that First Peoples experience in the criminal justice system to end, the State must stop breaching Aboriginal people's human rights. Victoria Police and Corrections Victoria, and the youth justice system are failing this most basic test.

Relevant human and cultural rights are listed in Table 9-1. Some of these are particularly important for understanding how human rights must be observed in the Victorian justice system and are discussed further below.

The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) outlines the rights of Indigenous peoples and serves as a framework for promoting and protecting their cultural and human rights. UNDRIP recognises the inherent rights of Indigenous peoples and affirms their rights to self-determination, culture, language, lands, territories and resources. It sets out principles that guide the relationship between states and Indigenous peoples, emphasising respect for their distinct identities, traditions, and customs.³³

The *International Covenant on Civil and Political Rights* (ICCPR) is a legally binding international treaty to which Australia is a signatory.³⁴ It sets out a comprehensive range of civil and political rights recognising the inherent dignity and equal rights of all people. These include the right to equality before the law, right to family, best interests of the child, and the prohibition of torture and cruel, inhuman or degrading treatment or punishment. It also contains specific rights regarding the criminal justice process, including the right to a fair trial.³⁵ Children's rights in the criminal justice process are also protected in the *Convention on the Rights of the Child* (CRC) which Australia has also ratified.³⁶

Australia has also ratified the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)³⁷ which protects rights such as health, education, social security and housing. If governments fail to uphold these rights, it is more likely that people will become involved in the criminal justice system.

Impacts of imprisonment on First Peoples



One of the most significant impacts of Aboriginal over-representation in the justice system is the disruption of families and communities when people are imprisoned in youth or adult prisons. Aboriginal people have strong cultural ties to family and community. Removing them from their community can have devastating effects on their personal and social wellbeing, with many families experiencing ongoing trauma and grief as a result.

The impact of imprisonment on First Peoples is profound, far-reaching and intergenerational. It contributes to disempowerment and marginalisation, which in turn harms physical, emotional, social, economic and cultural wellbeing. It also engages both human and cultural rights as First Peoples.

Victoria has incorporated many ICCPR rights into its *Charter of Human Rights and Responsibilities Act 2006* (the Charter), making them expressly part of Victorian law. The Charter also specifically protects cultural rights, including the distinct cultural rights of Aboriginal people.³⁸

The Charter has specific safeguards for people in the criminal justice system. These include protection from torture and cruel, inhuman or degrading treatment³⁹ and ensuring humane treatment when deprived of liberty.⁴⁰ Children also have specific rights under the Charter when in contact with the criminal justice system.⁴¹

Under the Charter, it is unlawful for public authorities (including privately operated prisons) to act in a way that is incompatible with human rights or, when making a decision, to fail to give proper consideration to a relevant human right.⁴²

The Charter also requires that, so far as possible, relevant laws be interpreted in a way that is compatible with human rights, including cultural rights.⁴³ International law and decisions of international and foreign courts and tribunals may be considered when interpreting this legislation.⁴⁴ In the criminal justice system, examples of these laws include the *Bail Act*

TABLE 9-1: Key human and cultural rights relevant to the criminal justice system

RIGHT	PROTECTED IN
Self-determination	UNDRIP (articles 3, 4, 23, 33, 35) ICCPR (article 1) ICESCR (article 1) ³²
Non-discrimination and equality before the law	UNDRIP (article 1-2, 27) ICCPR (article 2.1, 3, 26) CRC (article 2) Charter (section 8)
Enjoyment of culture, to practice religion and to maintain and use language	UNDRIP (articles 8, 11, 12, and 13) ICCPR (article 18, 27) CRC (article 30) Charter (sections 14,19)
Preserve identity, including nationality, name and family relations	UNDRIP (article 9) CRC (article 8)
Non-interference with privacy, family and home	UNDRIP (article 9) ICCPR (article 17, 23.1) CRC (article 16, 18) Charter (section 13, 17)
Freedom from torture and cruel, inhuman, or degrading treatment or punishment	ICCPCR (article 7) CRC (article 37(a)) Charter (section 10)
Prohibition of arbitrary arrest and detention	ICCPCR (article 9) CRC (article 37(b)) Charter (section 21)
Humane treatment in detention	ICCPR (article 10) CRC (article 37(c)) Charter (section 22)
A fair trial	ICCPCR (article 14) CRC (article 12, 40(2)(b)(iii)) Charter (section 24)
Rights in criminal proceedings	ICCPR (article 14) CRC (article 12.2, 37(d),40) Charter (section 23, 25)
Right to housing	ICESCR (article 11)
Right to health	ICESCR (article 12)
Right to education	ICESCR (article 13)

1997 (Vic), the *Children, Youth and Families Act 2005* (Vic) (which covers youth justice), the *Corrections Act 2006* (Vic) and its associated regulations, the *Sentencing Act 1991* (Vic) and the *Criminal Procedure Act 2009* (Vic).

Other international laws and domestic standards

The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) is an international human rights treaty that was ratified by Australia in 1989.⁴⁵ Under this treaty, Australia (and so Victoria) is obligated to take measures to prevent and prohibit torture, including to those in custody.

The *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT)⁴⁶ was ratified by Australia in 2017. Australia committed to establishing and maintaining a National Preventive Mechanism (NPM) to conduct regular visits to places of detention to prevent torture and other forms of ill-treatment by monitoring and ensuring the proper treatment and conditions of people in custody.

Australia committed to establishing an NPM by January 2022, but later extended this to January 2023. Victoria is yet to nominate an NPM to monitor places of detention within the state.⁴⁷ However, it is important to note that CAT, OPCAT and the NPM cover all places of detention, including secure care in the child protection system, prisons, youth justice detention, police vehicles, police custody suites (including cells) and Protective Service Officer pods on transport stations.⁴⁸

There are also internationally agreed minimum standards for the treatment and care of people in custody. These include:

- United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)⁴⁹
- United Nations Rules for the Treatment of Women Prisoners (the Bangkok Rules).⁵⁰

There are also specific international standards for children and young people in detention. These include:

- United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)⁵¹
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules).⁵²

These international standards have informed Australian policies such as the *Guiding Principles for Corrections* in Australia (2018).⁵³ These in turn inform standards for Victorian prisons.⁵⁴

Key legislation governing criminal justice in Victoria

Victorian laws provide the legal foundation for the operation of the criminal justice system and define the rights and responsibilities of individuals and agencies involved in it. They encompass legislation, regulations and policies that guide the actions of institutions and decision makers involved in administering the criminal justice system.

Table 9-2 sets out the main legislation associated with the adult criminal justice system. Table 9-3 set outs legislation relating to the youth criminal justice system.

There are also policies, guidelines, and codes of practice that govern criminal justice in Victoria, such as the Victoria Police Manual, the Office of Public Prosecutions Guidelines, and the Victorian Equal Opportunity and Human Rights Commission's (VEOHRC) Guidelines for the Criminal Justice System.

Youth justice in Victoria is also governed by the Youth Justice Strategic Plan 2020–2030, the Youth Justice Practice Manual, and the VEOHRC Guidelines for the Criminal Justice System.

These policies and guidelines provide further guidance on the administration of youth justice in Victoria, including the principles of diversion, restorative justice, and the primacy and best interests of the child.

Key policy frameworks in the adult and youth justice criminal justice systems are discussed below.

TABLE 9-2: Key criminal justice legislation — adults

CRIMINAL JUSTICE LEGISLATION	FOCUS
Crimes Act 1958 (Vic)	Defines various criminal offences, sets out the penalties for those offences, and outlines various procedures for the prosecution and punishment of offenders.
Summary Offences Act 1966 (Vic)	Governs a range of minor criminal offences, which are typically heard in the Magistrates' Court.
Bail Act 1977 (Vic)	Sets out the guiding principles, rules and procedures for granting or denying bail to accused persons.
Criminal Procedure Act 2009 (Vic)	Consolidates the laws relating to criminal procedure in the Magistrates' Court, the County Court and the Supreme Court of Victoria.
Sentencing Act 1991 (Vic)	Sets out the principles of sentencing, the considerations a court must take into account when sentencing people and the types of sentences that can be imposed.
Corrections Act 1986 (Vic)	Governs the administration and operation of prisons and the welfare of prisoners in Victoria.
Victoria Police Act 2013 (Vic)	Sets out the powers and functions of Victoria Police and the relationship between Victoria Police and the government (Minister for Police).
Crimes (Mental Impairment and Unfitness to be Tried Act) 1997	Sets out the criteria and procedures for determining if a person is unfit to stand trial or not guilty because of mental impairment.

TABLE 9-3: Key legislation — youth justice

YOUTH JUSTICE LEGISLATION	KEY FOCUS
Children, Youth and Families Act 2005 (Vic)	Contains youth justice and child protection system legislation, setting out the principles and objectives for the care and protection of children and young people in Victoria, including those accused of a crime. It also establishes the Children's Court of Victoria as the jurisdiction for criminal matters relating to children.
Sentencing Act	Sets out the principles of sentencing, the considerations a court must take into account when sentencing people and the types of sentences that can be imposed.
Bail Act	Sets out the guiding principles, rules and procedures for granting or denying bail to accused persons.

Key policy frameworks

Burra Lotjpa Dunguludja

Burra Lotjpa Dunguludja is the fourth phase of the AJA, a formal long-term partnership between the Victorian Government and Aboriginal communities. It aims to address Aboriginal over-representation in the justice system, improve family and community safety, and strengthen Aboriginal self-determination. The first AJA was developed in 2000 in response to RCIADIC recommendations. The Victorian AJA remains the longest running agreement of its kind in Australia.⁵⁵

In 2012, the Victorian Government introduced Aboriginal justice targets committing to reducing over-representation of Aboriginal people in contact with the justice system. *Burra Lotjpa Dunguludja* is the primary vehicle for achieving these targets, which are:

- closing the gap in the rate of Aboriginal and non-Aboriginal people under adult justice supervision by 2031
- closing the gap in the rate of Aboriginal and non-Aboriginal people under youth justice supervision by 2031.⁵⁶

Funding to support implementation of *Burra Lotjpa Dunguludja* has exceeded \$100 million since its launch in 2018.⁵⁷ Of this, around \$48 million was allocated in the 2021–22 and 2022–23 State Budgets to continue and expand programs aimed at reducing Aboriginal over-representation in the justice system. This includes community-based initiatives delivered by ACCOs.

All signatories and partners to *Burra Lotjpa Dunguludja* are accountable for implementation.⁵⁸ This includes the government and Victoria Police. The Aboriginal Justice Forum oversees the development, implementation, monitoring and direction of *Burra Lotjpa Dunguludja*. Ministers and relevant senior government officials are expected to attend Aboriginal Justice Forum meetings. Progress on actions must be provided to the Aboriginal Justice Forum which meets three times a year.

First Peoples representatives who are members of the Aboriginal Justice Forum form the Aboriginal Justice

Caucus. The Aboriginal Justice Caucus provides statewide representation and leadership to amplify community voices in all areas relating to justice. It comprises the Aboriginal signatories to *Burra Lotjpa Dunguludja*, Aboriginal community members of the Aboriginal Justice Forum, chairpersons of each of the nine Regional Aboriginal Justice Advisory Committees, representatives from statewide Aboriginal justice programs, Aboriginal peak bodies and ACCOs.⁵⁹ DJCS provides funding support to the Aboriginal Justice Caucus for an independent secretariat and two support staff, sitting fees and funding for specific projects on an ad hoc basis.⁶⁰ However the Aboriginal Justice Caucus does not have any power to formally sanction government departments or agencies if they do not meet actions or objectives in *Burra Lotjpa Dunguludja*.

The Aboriginal Justice Caucus made a submission to Yoorrook's inquiry and Bonnie Dukakis and Chris Harrison from the Aboriginal Justice Caucus gave evidence at hearings.⁶¹ They provided compelling evidence of the systemic racism in the criminal justice system, and the trauma and harm it causes. This included the system's failures to respect the cultural and human rights of Aboriginal people who are victims of crime or are accused of crime.

The Aboriginal Justice Caucus has long advocated for reforms to improve the criminal justice system. Despite the government's stated commitment to self-determination, too often the voices of First Peoples leaders have been ignored by government because of the political imperatives of a 'tough on crime' agenda. Examples include failures in police oversight discussed in Chapter 10, the introduction of harsh bail laws discussed in Chapter 11 and raising the age of criminal responsibility discussed in Chapter 12.

Wirkara Kulpa

Wirkara Kulpa, Victoria's first Aboriginal Youth Justice Strategy, launched in 2022, was developed in response to the 2017 *Youth Justice Review*.⁶² The strategy sits under the umbrella of *Burra Lotjpa Dunguludja*. It is a key initiative of that agreement and the Youth Justice Strategic Plan 2020–2030.

Wirkara Kulpa was developed with the Aboriginal Justice Caucus and its subgroup, the Aboriginal Youth Justice Collective Working Group, to support Aboriginal children and young people to remain outside the youth justice system.⁶³ The stated vision of *Wirkara Kulpa* is that:

Aboriginal children and young people are not in the youth justice system. This is because they are strong in their culture, connected to families and communities, and living healthy, safe, resilient, thriving and culturally rich lives.⁶⁴

Wirkara Kulpa contains actions to meet outcomes across five priorities:

- empowering Aboriginal children and young people, and families to uphold change
- protecting cultural rights and increasing connection to family, community, and culture
- diverting young people and addressing over-representation
- working towards Aboriginal-led justice responses
- creating a fair and equitable system for Aboriginal children and young people.

The strategy includes specific actions such as embedding Aboriginal-specific principles in a new Youth Justice Act,⁶⁵ monitoring cultural safety in health care delivery⁶⁶ and reducing the use of isolation in youth justice custody.⁶⁷

Yoorrook welcomes *Wirkara Kulpa* and values the efforts made to take Aboriginal voices, including those of young people, on board in its development.

Concerns remain that children are being unnecessarily traumatised through criminalisation. The government could act today to prevent this, by implementing a range of reforms the Aboriginal community and the Aboriginal Justice Caucus have called for over many years. This includes immediately introducing legislation to raise the age of criminal responsibility to 14, and to prevent children under 16 years being imprisoned. Additional systemic failings in the youth justice system are explored in Chapter 12: Youth justice.

The Victorian Aboriginal Affairs Framework

The VAAF is the Victorian Government's overarching framework for working with Aboriginal Victorians, organisations and the wider community to drive action and improve outcomes.⁶⁸ The VAAF includes goals, indicators and measures across six domains, including Domain 5 — Justice and Safety. It also commits government to advancing self-determination through systemic and structural transformation.⁶⁹

Goal 15 of the VAAF is to eliminate Aboriginal over-representation in the justice system, through objectives and measures that directly contribute to implementation of RCIADIC recommendations.

The government reports progress against the VAAF annually through the Victorian Government Aboriginal Affairs Report. The report also includes government's annual report against the Self-Determination Reform Framework and the National Agreement on Closing the Gap (discussed below). The 2022 report is yet to be tabled in Parliament and published.

The National Agreement on Closing the Gap

The National Agreement on Closing the Gap was developed in partnership between Australian governments and Aboriginal and Torres Strait Islander organisations, represented by the Coalition of Aboriginal and Torres Strait Islander Peak Organisations.⁷⁰ It includes two justice targets aimed at lowering the over-representation of Aboriginal and Torres Strait Islander adults and young people in the criminal justice system. These are:

- Target 10: to reduce the rate of Aboriginal and Torres Strait Islander adults held in incarceration by at least 15 per cent by 2031
- Target 11: to reduce the rate of Aboriginal and Torres Strait Islander young people (10 to 17 years) in detention by at least 30 per cent by 2031.⁷¹

The Victorian Government told Yoorrook that

in recent years, significant progress has been made towards reducing the over-representation of young Aboriginal people in Victoria's justice system and Victoria is on track to meet Closing the Gap Target 11. However, progress against Target 10 has been slow and over-representation in the adult criminal justice system has worsened.⁷²

The Victorian Government reported that the lack of progress in meeting these targets reflects the need to move away from a reform approach focusing on incremental change to existing systems, to one characterised by transformation through self-determination and treaty.⁷³ Yoorrook agrees.

Oversight bodies relating to criminal justice

Table 9-4 lists the main regulatory and oversight bodies relating to criminal justice in Victoria. Some of these are independent, such as the Victorian Ombudsman and the Independent Broad-based Anti-corruption Commission (IBAC). Others are internal to government, such as the Justice Assurance and Review Office (JARO) which sits within DJCS, and the Professional Standards Command which sits within Victoria Police and investigates complaints against police. Others are judicial, such as the Coroners Court of Victoria.

Lack of transparency, oversight and accountability were key themes identified in evidence to Yoorrook. This is discussed in detail in the following chapters, with recommendations made.

A number of First Peoples leaders and organisations, including the Aboriginal Justice Caucus, Victorian Aboriginal Legal Service and Djirra have recommended the establishment of an Aboriginal Social Justice Commissioner.⁷⁴ Yoorrook notes that governance and oversight bodies will be an important matter for treaty negotiated by the First Peoples' Assembly. ■

TABLE 9-4: Main criminal justice complaints mechanisms and oversight bodies

AGENCY	ROLE
EXTERNAL BODIES	
<p>Victorian Ombudsman</p>	<p>Has jurisdiction to investigate certain types of complaints about some government agencies and providers of government funded services. Cannot investigate exempt bodies including Victoria Police and courts.</p> <p>Primarily enquires into and investigates complaints related to administrative action, including compliance with the Charter, and public interest complaints.</p> <p>Tries to resolve complaints informally, including by conciliation.</p> <p>Has powers to conduct own motion enquiries and investigations and report on them.</p> <p>For example, its thematic investigation of practices relating to solitary confinement of children and young people⁷⁵.</p> <p>Governing legislation is the <i>Ombudsman Act 1973</i> (Vic).</p>
<p>Independent Broad-based Anti-corruption Commission</p>	<p>Responsible for preventing and exposing public sector corruption and police misconduct in Victoria.</p> <p>Governing legislation is the <i>Independent Broad-based Anti-corruption Commission Act 2011</i> (IBAC Act).</p> <p>Section 15(1A) of the IBAC Act requires IBAC to prioritise the investigation of serious corrupt conduct or systemic corrupt conduct.</p> <p>Can investigate complaints of police conduct and public interest disclosures about police wrongdoing.⁷⁶ IBAC is not required to prioritise the investigation of police misconduct.</p> <p>Has a power to investigate incidents it identifies on its own motion.⁷⁷</p> <p>Oversees critical incidents arising from police conduct, including an incident that results in the death of a person in police custody.⁷⁸</p> <p>For legal and operational reasons, most of its investigations are conducted in private and are not commented or reported on publicly until the matter is finalised.</p>
<p>Commission for Children and Young People</p>	<p>Monitors the safety and wellbeing of children and young people in the youth justice system by:</p> <ul style="list-style-type: none"> • examining serious incidents in youth justice custody • engaging with the Minister for Youth Justice and senior DJCS staff • operating a monthly Independent Visitor Program at Parkville and Malmsbury Youth Justice Precincts • conducting independent exit interviews with children and young people leaving youth justice custody • conducting on-site inspections, including direct engagement with children and young people in youth justice centres • responding to consultations, policy issues and legislative amendments relating to youth justice. <p>Governing legislation is the <i>Commission for Children and Young People Act 2012</i> (Vic).</p>

AGENCY	ROLE
Victorian Auditor General	Audits the performance of government agencies. Governing legislation is the <i>Audit Act 1994</i> (Vic).
State Coroner	Investigates particular categories of deaths and can make recommendations to reduce preventable deaths. Governing legislation is the <i>Coroners Act 2008</i> (Vic).
Other external bodies	These include the Victorian Inspectorate (monitors integrity bodies), the Public Interest Monitor (tests the content and sufficiency of information in applications by law enforcement and integrity agencies for the use of telephone intercepts and other covert and coercive powers) and the Judicial Commission of Victoria (investigates complaints regarding judicial officers and Victorian Civil and Administrative Tribunal members).
INTERNAL BODIES	
Victoria Police Professional Standards Command	Undertakes the following reviews and investigations of police conduct: <ul style="list-style-type: none"> receives and responds to complaints made directly to Victoria Police by members of the community or their representatives receives and responds to complaints referred to Victoria Police by external agencies such as IBAC manages discipline investigations of individual police officers reviews critical incidents involving police, together with Victoria Police's Operational Safety Critical Incident Reviews team.⁷⁹
Justice Assurance and Review Office	Business unit within DJCS which operates as an internal assurance and review function to advise the Secretary of the DJCS. Conducts reviews, monitoring and analysis into areas of risk and significant incidents within the youth justice and adult corrections systems. Examines critical incidents and the circumstances and management of deaths in custody and deaths where an offender dies in the community within three months of release while being supervised by Community Correctional Services at the time, and additionally reviews select cases where a person who has left prison on straight-release dies proximate to their release from custody. At the request of the Coroner, also looks into other death events to help determine the facts and circumstances relating to a death and, where appropriate, to make recommendations to prevent similar deaths. ⁸⁰ Manages the Independent Visitors Scheme, including the Aboriginal Independent Prison Visitor Scheme until this was transitioned to the Aboriginal Justice Group (in DJCS) on 1 February 2023. ⁸¹

Endnotes

1. Aboriginal Justice Caucus, Submission 74, 46.
2. Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 31.
3. Transcript of Attorney-General, the Hon Jaclyn Symes, 5 May 2023, 429 [26]–[27].
4. Transcript of Minister for Corrections, Youth Justice and Victim Support, the Hon Enver Erdogan, 15 May 2023, 857 [30]–[32].
5. Victorian Government and Victorian Aboriginal Community, *Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement Phase 4* (Partnership Agreement, 2018) 19, 28 ('*Burra Lotjpa Dunguludja*').
6. Transcript of Attorney-General, the Hon Jaclyn Symes, 5 May 2023, 429–430 [44]–[6]; Transcript of Kate Houghton, Secretary, Department of Justice and Community Safety, 2 May 2023, 255 [32]–[46]; Transcript of Commissioner Larissa Strong, 3 May 2023, 411 [1]–[5].
7. Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 35–63. This submission makes recommendations for the unique systemic and background factors affecting Aboriginal peoples to be taken into account across relevant legislation, pre-charge cautions, courts and sentencing, and parole.
8. Transcript of Attorney-General, the Hon Jaclyn Symes, 5 May 2023, 430 [9]–[16].
9. Clare Land, *Tunnerminnerwait and Maulboyheener: The Involvement of Aboriginal People from Tasmania in Key Events of Early Melbourne* (City of Melbourne, 2014) 10. See also Jan Critchett, 'Making Them Feel That They Shall Not Murder and Plunder with Impunity', *A Distant Field of Murder: Western District Frontiers 1834–1848* (Melbourne University Press, 1990) 157–174.
10. Australian Law Reform Commission, Australian Government, *Pathways to Justice — an Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report, December 2017) 21–23.
11. As at 31 December 2022, there were 540 deaths. Since that time there has been at least one further death: Australian Institute of Criminology, 'National Deaths in Custody Program: Deaths in Custody in Australia quarterly dashboard', Quarter 4 2022 update. For the latest quarterly figures, see Australian Government Institute of Criminology, 'Quarterly Dashboard', *Deaths in Custody in Australia* (Web page, 30 May 2023) <<https://www.aic.gov.au/statistics/deaths-custody-australia>>. The *Guardian's* ongoing monitoring project database will also be updated in 2023: Caitlin Cassidy and Marni Cordell, 'The Staggering Omission That Led to Deaths Inside, the Tally Tracking Indigenous Deaths in Custody', *Guardian Australia* (Online, 17 May 2023). <<https://www.theguardian.com/media/2023/may/17/the-staggering-omission-that-led-to-deaths-inside-the-tally-tracking-indigenous-deaths-in-custody>>.
12. The Department advised that one passing in 1998 had been reclassified as a death in custody: see Department of Justice and Community Safety, 'Response to NTP-002-014 — *Supplement to the DJCS Agency Response to the Yoorook Justice Commission's 71 Questions*', 16 n 37, produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
13. Department of Justice and Community Safety, 'Response to NTP-002-014 — *Agency response to the Yoorook Justice Commission*', 55 [211], produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023. This document refers to five passings since 2020. Another First Person died in custody in May 2023, bringing the total to six.
14. Victorian Department of Justice, *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody* (2005) 79.
15. Deloitte Access Economics, *Review of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody* (Department of the Prime Minister and Cabinet, 2018) viii.
16. Recommendations 216, 217, 218, 232, 233, 241, 267, 275, 280, 281, 293, 315, and 316 do not apply to Victoria: Deloitte Access Economics, *Review of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody* (Department of the Prime Minister and Cabinet, 2018).
17. Aboriginal Justice Caucus, Submission 74, 27.
18. Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 39–40.
19. 'The 2018 Commonwealth Review conducted by Deloitte Access Economics was informed only by government self-assessments of implementation progress. Implementation progress was assessed based on actions taken rather than outcomes achieved': Aboriginal Justice Caucus, Submission 74, 27.
20. Department of Justice and Community Safety, 'Response to NTP-002-014 — *Agency response to the Yoorook Justice Commission*', 57 [211], produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023. DJCS provided funding for this review in 2022: see also Transcript of Chris Harrison, 3 March 2023, 100 [42]–[45].
21. Aboriginal Justice Caucus, Submission 74, 8.
22. Witness statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 19. See also Witness statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, Appendix A – Table of activity in response to RCIADIC recommendations, 1–2.
23. Witness statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, Appendix A – Table of activity in response to RCIADIC recommendations, 1–2.

24. Witness statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 19 [93].
25. The Committee's report was tabled in Parliament on 24 March 2022. The government had six months to respond, however this fell within the caretaker period. The government has not indicated if it intends to respond in this new Parliament: see Parliament of Victoria, 'Inquiry into Victoria's Criminal Justice System', *Legislative Council Legal and Social Issues Committee* (Web page, 2023) <<https://new.parliament.vic.gov.au/get-involved/inquiries/inquiry-into-victorias-criminal-justice-system/>>.
26. See, eg, Department of Justice and Community Safety, 'Response to NTP 002-004', Aboriginal Justice Forum (AJF) meeting 47 (16–17 March 2017); AJF 52 (18–19 October 2018); AJF 53 (March 2019), AJF 59 (22–23 July 2021); AJF 61 (24–25 March 2022) produced by the State of Victoria in response to the Commission's Notice to Produce dated 3 November 2022.
27. Aboriginal Justice Caucus, Submission 74, 26–27; Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System) 39–40, 44–45.
28. Department of Justice and Community Safety, 'Response to NTP 002-014 — *Supplement to the DJCS Agency Response to the Yoorrook Justice Commission's 71 Questions*', 5 n 37, produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
29. 'The Andrews Labor Government has made a record investment in police resources, delivering 3,135 new police officers between 2016 and 2022. This includes 396 frontline officers deployed between May 2021–April 2022': Premier of Victoria, The Hon Daniel Andrews, 'Delivering Even More Police to Keep the Community Safe' (Media release, 3 May 2021) <<https://www.premier.vic.gov.au/sites/default/files/2021-04/210503%20-%20Delivering%20Even%20More%20Police%20To%20Keep%20The%20Community%20Safe.pdf>>.
30. Transcript of Commissioner Larissa Strong, 3 May 2023, 389 [45]–[47]; Transcript of Minister for Corrections, the Hon Enver Erdogan, 15 May 2023, 886 [15]–[23].
31. First Peoples' Assembly of Victoria, Submission 43, 7.
32. The right to self-determination of peoples is specified in common art 1 of both the ICCPR (n 34) and the ICESCR (n 37).
33. *United Nations Declaration on the Rights of Indigenous People*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) ('*UNDRIP*'). For example, see arts 2, 3, 4, 5, 11, 13, 23, 26, 32, 38. The UN General Assembly adopted the UNDRIP in 2007. Australia initially voted against adopting the UNDRIP, but in 2009 changed its position and endorsed it.
34. *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 99 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').
35. *Ibid* arts 2(1), 3, 7, 10, 14, 15, 23(1), 26.
36. *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*CRC*').
37. *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*').
38. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 19(2) ('*Charter*').
39. *Ibid* s 10.
40. *Ibid* s 22.
41. *Ibid* s 23.
42. *Ibid* ss 4, 38.
43. *Ibid* s 32(1). The distinct specific cultural rights of Aboriginal people are protected by s 19(2) of the Charter.
44. *Ibid* s 32(2).
45. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).
46. *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature on 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006) ('*OPCAT*').
47. Commonwealth Ombudsman, 'Monitoring Places of Detention – OPCAT', *Industry and Agency Oversight* (Web page, 2023) <<https://www.ombudsman.gov.au/industry-and-agency-oversight/monitoring-places-of-detention-opcat>>.
48. Liberty Victoria, Submission 52, 16 (c)(ii).
49. *United Nations Standard Minimum Rules for the Treatment of Prisoners*, GA Res 70/175, UN Doc A/RES/70/175 (8 January 2016, adopted 17 December 2015) ('*Mandela Rules*').
50. *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders*, GA Res 65/229, UN Doc A/RES/65/229 (6 October 2010, adopted 21 December 2010) ('*Bangkok Rules*').
51. *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, GA Res 40/33, UN Doc A/RES/40/33 (adopted 29 November 1985) ('*Beijing Rules*').
52. *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, GA Res 45/113, UN Doc A/RES/45/113 (2 April 1991, adopted 14 December 1990) ('*Havana Rules*').
53. Department of Justice and Community Safety, Victorian Government, 'Guiding Principles for Corrections in Australia', *Corrections, Prisons & Parole*, 16 May 2022 <<https://www.corrections.vic.gov.au/guiding-principles-for-corrections-in-australia>>.
54. Corrections Victoria, *Correctional Management Standards for Men's Prisons in Victoria* (2014); Corrections Victoria, *Standards for the Management of Women Prisoners in Victoria* (2014).
55. Victorian Government, 'Our History', *Victorian Aboriginal Justice Agreement* (Web page, 13 April 2023) <<https://www.aboriginaljustice.vic.gov.au/our-history>>.

56. *Burra Lotjpa Dunguludja* (n 5) 30.
57. Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 14 [73]–[74].
58. See summaries on implementation against actions in the agreement provided on the AJA website: Victorian Government, ‘The AJA in Action’, *Victorian Aboriginal Justice Agreement* (Web page, 6 May 2023) <www.aboriginaljustice.vic.gov.au/the-aja-in-action>.
59. Aboriginal Justice Caucus, Submission 74, 6.
60. Transcript of Chris Harrison, 3 March 2023, 100 [39]–[46].
61. Aboriginal Justice Caucus, Submission 74; Transcript of Chris Harrison and Bonnie Dukakis, 3 March 2023.
62. See Department of Justice and Community Safety, Peggy Armytage and Professor James Ogloff AM, *Youth Justice Review and Strategy: Meeting Needs and Reducing Offending — Executive Summary* (July 2017).
63. Transcript of Josh Smith, 3 May 2023, 336 [23]–[27].
64. Department of Justice and Community Safety, *Wirkara Kulpa: Aboriginal Youth Justice Strategy 2022–2032* (2022) 26.
65. *Ibid* 37, Domain 4.
66. *Ibid* 36, Domain 2.
67. *Ibid* 37, Domain 5.
68. Victorian Government, *Victorian Aboriginal Affairs Framework 2018–2023* (2018).
69. Victorian Government, *Victorian Government Self-Determination Reform Framework* (2019) 4–7.
70. Australian Government, Attorney-General’s Department, ‘Closing the Gap’ (Web page, Undated) <<https://www.ag.gov.au/legal-system/closing-the-gap>>.
71. Closing the Gap, ‘Closing the Gap Targets and Outcomes’ (Web page, Undated) <<https://www.closingthegap.gov.au/national-agreement/targets>>.
72. State of Victoria, Response to Issues Paper 1: Call for Submissions on Systemic Injustice in the Criminal Justice System, 13–14 [46]–[48].
73. State of Victoria, Response to Issues Paper 1: Call for Submissions on Systemic Injustice in the Criminal Justice System, 14 [49].
74. ‘The 2018 ALP Election Platform included a commitment to the ASJC, which is also identified under *Burra Lotjpa Dunguludja* as a future possibility. Although some work has taken place under the framework of *Burra Lotjpa Dunguludja*, the ASJC has still not been established’: Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 45. See also Aboriginal Justice Caucus, Submission 74, 28–29; Djirra, Submission 44, 2 [11].
75. Victorian Ombudsman, OPCAT in Victoria: *A Thematic Investigation of Practices Related to Solitary Confinement of Children and Young People* (Report, 2017).
76. Independent Broad-based Anti-corruption Commission Act 2011 (Vic) ss 52, 57, 58. Public Interest Disclosures Act 2012 (Vic) ss 13, 26.
77. Independent Broad-based Anti-corruption Commission Act 2011 (Vic) s 64(1)(c).
78. Independent Broad-based Anti-corruption Commission, Submission 204, 6.
79. Witness Statement of the Chief Commissioner of Police, Shane Patton, 31 March 2023, 7 [25]–[26].
80. Department of Justice and Community Safety, Victorian Government, Justice Assurance and Review Office (JARO) (Web page, 22 May 2023) <<https://www.justice.vic.gov.au/contact-us/justice-assurance-and-review-office-jaro>>.
81. Department of Justice and Community Safety, ‘Response to NTP-002-014 — *Supplement to the Agency response to the Yoorrook Justice Commission’s 71 Questions*’, 46], produced by the State of Victoria in response to the Commission’s Notice to Produce dated 14 April 2023.

Dights Falls



10 POLICE

Systemic racism across the criminal justice system, and a lack of transparency and accountability, remain endemic, including in policing.¹ FIRST PEOPLES' ASSEMBLY OF VICTORIA

Introduction

Policing was a central tool of colonisation. Police were active agents of colonisation, criminalising First Peoples' resistance against the theft of their land and the destruction of their culture and way of life. Police enforced assimilationist child removal policies, taking First Peoples children from families and communities. From the very beginning of colonisation, the experience of First Peoples was that the law and policing were brutal forces used to harm them and benefit the colonisers. A negative pattern of interaction between First Peoples and police has continued to the present.

Today, police are the gatekeepers to the criminal justice system.² First Peoples enter the criminal justice system through the exercise by police of broad discretionary powers.³ The values and attitudes of police towards First Peoples strongly influence how they exercise these powers.⁴ Police in Victoria are bound by the *Charter of Human Rights and Responsibilities Act (2006)* (Vic) (the Charter) to respect and protect the human and cultural rights of First Peoples.⁵ This obligation applies both to victims of crime and people accused of committing a crime. However, evidence before Yoorrook set out in this chapter establishes that violation of these rights by police is far too frequent. There is a yawning compliance gap between what the law requires of police and how they exercise their powers.

The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) laid bare the link between systemic racism and the over-representation of Aboriginal people in the criminal justice system.⁶ Thirty years since they concluded that 'far too much police intervention in the lives of Aboriginal people throughout Australia has been arbitrary, discriminatory, racist and violent',⁷ little seems to have changed.

In 2023 First Peoples are still grossly over-represented in Victoria's police cells, remand centres and prisons.⁸

First Peoples continue to suffer inexcusable harm in these places, including deaths in custody. Given the long history of often violent and racist policing since invasion, it is not surprising that First Peoples have a deep and ongoing mistrust of police.

Yoorrook acknowledges the important apologies made by the Chief Commissioner of Police, and the Attorney-General for past and ongoing harms inflicted by police and the criminal justice system on First Peoples.⁹ Urgent action must follow these apologies to render them meaningful. Yoorrook also acknowledges Victoria Police has sought to improve its operations over recent years.¹⁰ However, the predominant message heard by Yoorrook from First Peoples was that these efforts have not changed policing enough to turn around the mistrust First Peoples have in Victoria Police.

This chapter looks at the evidence Yoorrook received on the unequal treatment of First Peoples by police and of problems around police accountability. It includes disturbing evidence from witnesses of over-policing, police brutality, and a culture of impunity that allows violations of human and cultural rights to continue. The concerns raised by this evidence are not new and have been canvassed in multiple reviews and inquiries going back RCIADIC. The same themes emerge from these reviews: lack of accountability and oversight, lack of transparency in decision making, violations of human and cultural rights, and the need to address systemic racism and violence.¹¹

What Yoorrook heard

Racist over-policing is systemic and prevalent

Over-policing is the unjustified, disproportionate and unreasonable use of police powers against First Peoples or other racial groups.¹² It is a form of systemic racism¹³ and therefore a human rights violation. VALS explained to Yoorrook how this is experienced in Victoria:

Racism is particularly prevalent in Victoria Police, manifesting in denial of Aboriginality, over-policing of Aboriginal Communities, over-representation of Aboriginal people in police custody, arresting Aboriginal children and young people rather than issuing a summons, use of force and explicit racial abuse against Aboriginal people.¹⁴

As outlined in Chapter 1: The past is the present, the over-policing of First Peoples has its roots in colonial laws, policies and practices. The State accepts that 'the significant historic roles of police in Aboriginal lives established an early pattern of frequent contact'.¹⁵ There is broad agreement among those who gave evidence that these intrusive police practices, and their detrimental impact on First Peoples communities, persist to this day.¹⁶ The First Peoples' Assembly of Victoria (FPAV) noted the 'direct line between structural conditions of colonisation, including policing practices, and the contemporary criminal justice system'.¹⁷ The Chief Commissioner of Victoria Police, Shane Patton, acknowledged that:

Frequent, intrusive and detrimental contact between police and Aboriginal communities, families and individuals has been a pattern for 170 years, the effects of which continue to be felt today ... as a result of systemic racism, racist attitudes and discriminatory actions of police have gone undetected, unchecked, unpunished or without appropriate sanctions and have caused significant harm across generations of Aboriginal families.¹⁸

Yoorrook also heard that over-policing is a consequence of factors including a 'tough on crime' political agenda and the power of the Police Association of



Shane Patton APM, Chief Commissioner of Victoria Police

Victoria, the union representing police and protective services officers.¹⁹ Dr Michael Maguire and Emeritus Professor Jude McCulloch referred to a number of factors that lead to First Peoples being 'disproportionately policed, coerced and punished'.²⁰

Data on police contact with First Peoples is limited. However, the Crime Statistics Agency provides some police data comparing Aboriginal and non-Indigenous alleged offenders.²¹ That data shows that Victoria Police is more likely to arrest Aboriginal alleged offenders across every high-level offence category, as shown in Figure 10-1.

Over-policing of First Peoples manifests in various ways. It includes:

- racial profiling: police seeking out, stopping, questioning, searching or detaining a person because of their Aboriginality
- misuse of police discretion: choosing to charge and prosecute an Aboriginal person instead of cautioning or supporting diversion, choosing to arrest instead of charging via summons or choosing to remand people in custody instead of supporting bail
- inappropriate use of police as first responders: using the criminal law and police to respond to conduct associated with social inequality such as intoxication, drug use and mental illness.

These over-policing scenarios are each discussed below.

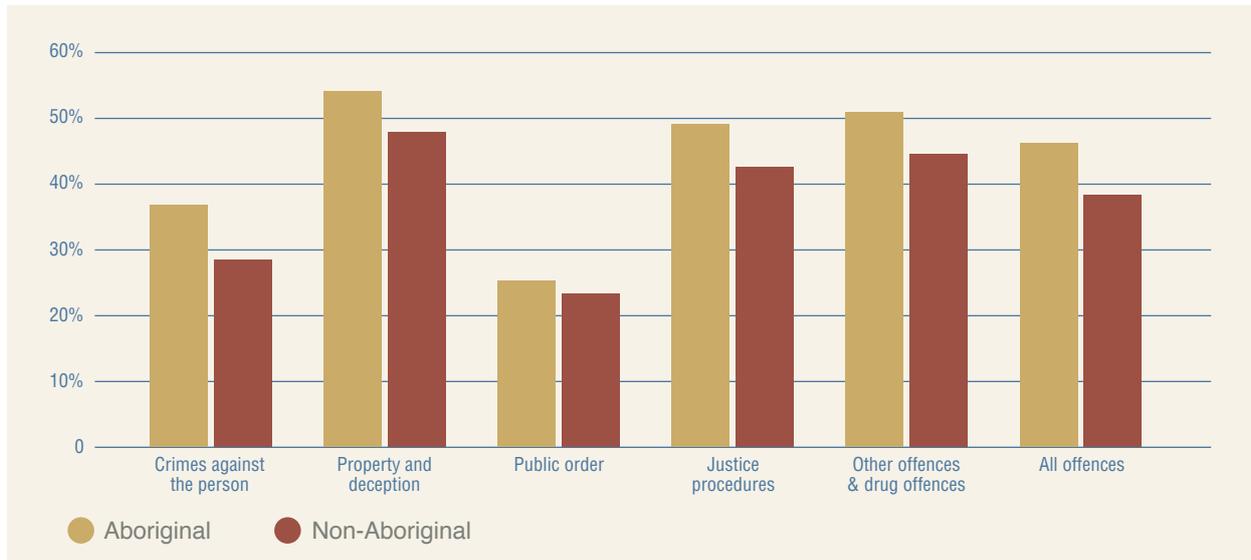


FIGURE 10-1: Arrest as outcome of alleged offender incident, year ending December 2022²²

RACIAL PROFILING

There is no other explanation for the difference in treatment. It just occurs constantly and all the time.²³

In evidence to Yoorrook, the Minister for Police agreed that racial profiling of Aboriginal people continues. He also accepted that many police are abusive to Aboriginal people.²⁴

Racial profiling occurs when police stop, question, search or detain a person because of their race.²⁵ It targets groups based on stereotypes and racist assumptions and violates a person’s right to equal treatment before the law and the right of Aboriginal people to enjoy and maintain their cultural rights under the Charter.²⁶

Racial profiling causes alienation, exclusion, unnecessary criminalisation, disengagement and detrimental health and socio-economic impacts.²⁷ It also increases distrust of police.

Yoorrook heard of police singling out First Peoples because of race.²⁸ Uncle Ross Morgan told Yoorrook it was common for Aboriginal people to be targeted and harassed and that this has been happening for many years:

I remember 20 years ago my sons and my nephews were walking in front of me to the swimming pool, minding their own business. Next minute the divvy van is driving really slowly (on the wrong side of the road) next to them, more or less harassing them, and asking them what they’re doing. I bolted up and told them to leave the kids alone — they’re just going to the pool. If you’re not Aboriginal it doesn’t happen.²⁹

Nakia Firebrace, Team Leader of the juvenile justice program at the Victorian Aboriginal Child Care Agency (VACCA), described how even as a young child something as innocuous as waiting for a school bus can make you a target for police:

As a worker in the juvenile custody space, I see the high rate of incarceration of our people as a product of systematic racism. I have experienced that systemic racism personally. For example, when I was a kid going to school, I was harassed on a weekly basis. I distinctly remember standing at a bus stop simply going to school. I had my bag searched by police, as a kid, simply standing at that bus stop. There was no other reason. It was simply because I was black going to school. As a First Nation’s



Panel hearing with First Peoples-led organisations working with people in the criminal justice system. L-R Nakia Firebrace, VACCA, Karin Williams, VACSAL, Coree Thorpe, Dardi Munwurro, and Alan Thorpe, Dardi Munwurro.

kid growing up in the northern suburbs of Melbourne, you get to know procedures of police before you know the bus routes.³⁰

Dr Eddie Cubillo, academic, lawyer and Director of the Indigenous Law and Justice Hub at Melbourne Law School,³¹ spoke of his own experience:

Recently, I was pulled over by the police while driving in a wealthy eastern suburb of Melbourne. I heard this described as the offence of ‘driving while black’. The police searched my car while I was sitting on the sidewalk in the rain. During the search they asked me what I was doing in this suburb and asked me how I afforded my car. I would have challenged the police’s behaviour if I haven’t had the experience I’ve had, but I know that, as a black man, you have to act a certain way to protect your safety. Throughout all this ordeal my anxiety was really high, even though I know I had done nothing wrong.³²

The Victoria Police Manual makes it clear to police members that ‘discrimination is unlawful, and racial profiling is not tolerated’.³³ [However, as noted above, the Minister for Police accepts that racial profiling of First Peoples in Victoria continues.](#)³⁴ Racial profiling is inconsistent with the obligations of police under the Charter to ensure the human and cultural rights of First Peoples, including the rights to be equal before the law, to equal protection of the law without



Dr Eddie Cubillo, Director of the Indigenous Law and Justice Hub, University of Melbourne Law School

discrimination and to equal and effective protection against discrimination.³⁵ That it persists demonstrates that those obligations are not sufficiently understood and applied by Victoria Police.

Research based on a public survey conducted over 2018 and 2019 confirmed that racial profiling continues to occur.³⁶ In particular, it found that race is associated with decision-making by Victoria Police about who will be subject to high-discretion stops and unjustified post-stop conduct.³⁷ Dr Tamar Hopkins, who conducted the research, told Yoorrook that the survey produced very statistically strong findings that ‘there is a dual system of policing in Victoria at the moment. So, the experience that white people have when they are policed is very different from the experience of

racialised people. And that difference is even more acute to a particular subset of racialised people'.³⁸

The subset which Dr Hopkins refers to as targeted racialised people includes Aboriginal people. Her research found that this group were:

- 3.6 times more likely to be stopped for no reason than white people (including three times more likely to be stopped for looking away)
- 7.4 times more likely to be subject to unjustified post-stop conduct (including 11 times more likely for an inappropriate racialised comment to be made).³⁹

Dr Hopkins told Yoorrook:

My conclusion is that the [Victoria Police] policy [of prohibiting racial profiling] has been absolutely ineffective at dealing with this issue and that it's an ongoing problem ... it doesn't matter what you have in your police manual. You need to set up operational changes to the way the police do their business.⁴⁰

MISUSE OF POLICE DISCRETION TO CHARGE AND PROSECUTE

Cautions and diversion programs offer a pathway away from criminalisation and access to treatment and other therapeutic supports to address underlying causes. ... 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.⁴¹

CAUTIONS

In Victoria, police can issue verbal warnings or recorded cautions to young people and adults who are alleged to have committed an offence. Unlike in other Australian jurisdictions, Victorian legislation does not provide specific parameters for issuing a caution. Instead, police members have broad discretion on whether to caution, instead of pursuing formal criminal justice processes like issuing an infringement notice or prosecuting a crime in court.



Under the Victoria Police Manual, police officers may issue cautions in relation to children, and in relation to three adult offence types: shop steal offences, cannabis cautions and drug diversions.⁴² Yoorrook notes improvements in police cautioning following projects undertaken in partnership with local community organisations.⁴³ These include expanding the Aboriginal Youth Cautioning Program, discussed in Chapter 12: Youth justice.⁴⁴

More effective use of police discretion in responding to low level offending, including greater use of formal warnings and cautions, can reduce the number of Aboriginal people being propelled into the criminal justice system.⁴⁵ Yet Yoorrook heard from multiple witnesses that Victoria Police remains less likely to caution Aboriginal people.⁴⁶ Victoria Legal Aid told Yoorrook:

[W]hat we see in court every day is the unreasonable exercise of discretion. There's a lot of discretion in the criminal justice system, from whether you help someone in the street, or when you stop them, if you detect some offending whether you just warn or caution them, when you charge them, whether you offer them diversion, when you charge them, whether you bail or summons them ... We see all these exercises of discretion and we consistently continue to see First Nations clients where we see unreasonable exercises of discretion ...⁴⁷

This evidence is consistent with findings of the 2022 Parliamentary Inquiry into Victoria’s Criminal Justice System (Legal and Social Issues Committee Inquiry). That inquiry found:

Victoria Police’s use of cautions for both children and adults has declined over the past decade and remains inconsistent across the community. Young Aboriginal people and young people in lower socio-economic communities are less likely to receive a caution... than other Victorians.⁴⁸

Police cautioning rates for Aboriginal people in Victoria have historically been lower than for non-Aboriginal people.⁴⁹ Figure 10-2 shows this was still the case in the year to December 2022, although the proportion of Aboriginal people cautioned did increase in those 12 months.

DIVERSION

Diversion is another powerful tool to reduce First Peoples’ entrenchment in the criminal justice system. Diversion enables a person charged with low-level offences to deal with their charges outside of the traditional or formal court system. It can involve participating in a treatment program, counselling or community work. Successful completion of a court diversion plan results in the charges being dismissed with no finding of guilt and no criminal record.⁵¹

Victoria Police exercises significant influence over the availability of court-based diversion. Courts can only order diversion with the consent of the prosecutor who is usually a police officer, and the accused.⁵² Bias, whether conscious or unconscious, may affect the police member’s exercise of discretion. This can disproportionately prevent court-ordered diversion for Aboriginal people, as explained by the Federation of Community Legal Centres:

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 ... This disproportionately impacts Aboriginal people in contact with the criminal legal system. 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.⁵³

The Chief Commissioner of Police told Yoorrook that ‘[p]olice consent [to diversion] wherever possible and appropriate’ but was not able to produce any data to demonstrate the number or types of cases in which consent is provided.⁵⁴

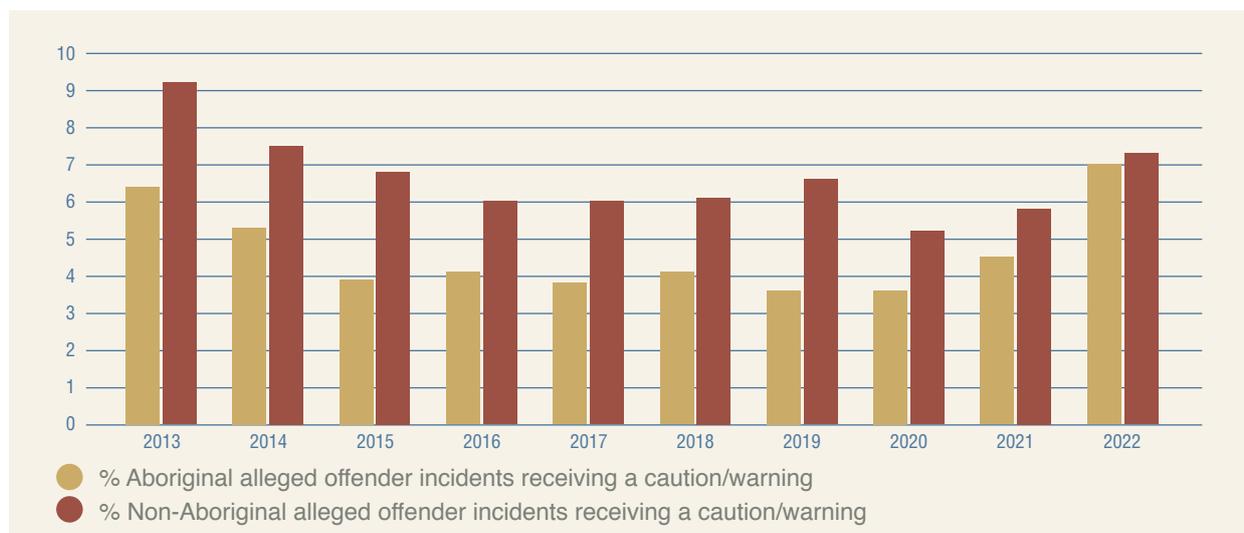


FIGURE 10-2: Proportion of Victoria Police recorded Aboriginal and non-Aboriginal alleged offender incidents that received a caution/warning, year ending December 2013 to 2022⁵⁰

The Legal and Social Issues Committee Inquiry found that Victoria Police consents to diversion inconsistently, contributing to inequalities in the criminal justice system.⁵⁵ The inquiry also found that Victoria Police's policies and decision-making tools 'poorly reflect the legislative basis for diversion programs and offer vague guidance, leaving it to the discretion of individual officers to grant or reject access to a diversion program.'⁵⁶

The importance of diversion and its role in driving down the over-representation of First Peoples progressing further into the criminal justice system is discussed further in Chapter 13: Courts, sentencing and classification of criminal offences. In that chapter, Yoorrook recommends removing the requirement for prosecution consent before a court can order diversion.

Police also have discretion about whether to grant bail to someone charged with an offence, noting that where bail is refused by police, the person must be brought before a court or bail justice to apply for bail, should they wish.⁵⁷ This is discussed further in Chapter 11: Bail.

INAPPROPRIATE USE OF POLICE AS FIRST RESPONDERS

In many instances, the mere presence of Victoria Police can escalate rather than de-escalate a situation. This means that police should never be First Responders in health responses, including in relation to public intoxication, mental health crises and drug use.⁵⁸

Victoria Police is often the first responder to incidents involving people experiencing significant health and social crisis, including mental health episodes, or who are intoxicated by alcohol or other drugs.⁵⁹

Police have powers under the *Mental Health Act 2014* to apprehend a person who appears to have a mental illness if they present a serious risk of harm to themselves or others.⁶⁰ Police are then required to seek medical care or examination of the person but failures in the Victorian mental health system mean care is not always available, or available in a timely way.⁶¹

In its submission to the Legal and Social Issues Committee Inquiry, Fitzroy Legal Service noted that the lack of specialist training for police was leading to increasingly punitive responses to people who need specialist care and a public health response.⁶² They reported that criminalising people with mental health or other forms of disability was contributing to the alarming increase in First Peoples women being imprisoned.⁶³

Yoorrook heard similar concerns about the impact of policing on Aboriginal women:

Given the circumstances under which women experience mental health crises, the involvement of police in these circumstances can be humiliating and traumatic. This is especially true for women who have previously had negative interactions with police or have been subject to over-policing, like First Nations women.⁶⁴

In evidence to Yoorrook, Acting Associate Secretary of the Department of Justice and Community Safety (DJCS) Ryan Phillips said that 92 per cent of First Nations women and 72 per cent of First Nations men in Victorian prisons had a mental health disability.⁶⁵

Decriminalisation of public drunkenness is overdue

Our Mum — Tanya Louise Day — would still be here with us if the Victorian Government had implemented the Royal Commission's recommendations and abolished the offence of public drunkenness ... Please let our family be the last to endure the pain, suffering and heartache of losing a loved one in these circumstances. The time for change is now.⁶⁶

The coronial inquest into the death of Aunty Tanya Day brought to public attention inhumane laws criminalising people for being drunk in a public place. Ms Day was arrested and locked in a police cell after falling asleep on a train. She passed away after falling and hitting her head in a cell at Castlemaine Police Station. She was not properly monitored by police officers responsible for her welfare.

Yoorrook pays its deep respects to Aunty Tanya Day's family and offers its condolences for the loss they have endured. Her death, like that of so many others in police custody before and after RCIADIC should not have occurred. These deaths must stop.

Deputy State Coroner Caitlin English found that Aunty Tanya Day had not been treated with humanity and respect as required by the Charter. She referred to the offence of negligent manslaughter and said that an indictable (serious) offence may have been committed.⁶⁷ The Deputy State Coroner said that Ms Day's death 'was clearly preventable had she not been arrested and taken into custody'.⁶⁸ The Deputy State Coroner also said there was no justification for the offence of public drunkenness to remain in force 30 years after RCIADIC had recommended its abolition — and recommended its repeal in Victoria.⁶⁹

In 2019, following years of advocacy by the family of Aunty Tanya Day, and many advocates and community members since RCIADIC recommendations, the Victorian Government finally committed to decriminalising public drunkenness and establishing a health-led service model. This offence had already been repealed in almost every other state. However, those states had introduced replacement 'protective custody' powers which enabled police to detain drunk people in police cells in certain circumstances.

The Attorney-General told Yoorrook that the disproportionate effect on First Peoples of the public drunkenness laws was 'undeniable'. She further stated in evidence that reform was 'long sought after and overdue' and that the underlying reason for the reform was 'to avoid Aboriginal people dying in cells'.⁷⁰

In February 2021, the Victorian Parliament passed a law to decriminalise public intoxication. Decriminalisation was due to come into effect in November 2022, but the Victorian Government then delayed the reform until November 2023. The Government attributes the delay to the impacts of COVID-19 on the health system.⁷¹ This further delay has been a source of great disappointment to the First Peoples, especially when the community has been waiting for more than 30 years. It also leaves Aboriginal people at greater risk of death in custody given the current law's disproportionate effect. Witnesses from the

Department of Health confirmed that the government knew this when they deferred commencement.⁷²

The main elements of the reform, which will now commence on 7 November 2023 are:

- public drunkenness will be repealed as an offence⁷³
- there will be no use of police cells and no new police powers to respond to intoxication⁷⁴
- a health-based model will be the new default response and will involve outreach services, sobering facilities and clinical support
- the new model will be supported by general and Aboriginal-specific service systems
- new training and procedures will be put in place for Victoria Police, as police are still likely to be called to attend incidents⁷⁵
- a public education program will be rolled out to support a greater understanding of people's rights in a decriminalised environment⁷⁶
- specific arrangements will be made for young people under 18 years of age who are intoxicated or with someone who is intoxicated⁷⁷
- an independent evaluator will be appointed to oversee reform implementation and review the outcomes and findings of the reform, including in consultation with Aboriginal communities and with a view to considering how police respond to public intoxication following decriminalisation.⁷⁸

Yoorrook understands that the health-led service model will provide coverage to approximately 82 per cent of Victoria's Aboriginal population and 98 per cent of the regions where public drunkenness offences by Aboriginal people have occurred in previous years.⁷⁹

The government committed \$16 million in the 2021–22 State Budget and a further \$50 million over two years in the 2022–23 Budget to implement the public intoxication reforms.⁸⁰ The Department of Health told the Commission that the First Peoples' Public Intoxication Services response includes:

- a 24/7 outreach and sobering service in Metropolitan Melbourne
- outreach and transport services in two outer metropolitan locations: Frankston and Wyndham

- 24/7 on-demand outreach and access to places of safety in eight regional locations: East Gippsland, Bendigo, Greater Shepparton, Swan Hill, Ballarat, Geelong, Latrobe, and Mildura.⁸¹

The health response is being trialled at four sites. The first was established in the City of Yarra and evaluated in October 2022. A further three trial sites are now operational.⁸² The Department of Health advised that as of December 2022, 76 First Peoples’ clients had been assisted — ‘people who, otherwise, without the operational trial sites may have been placed in custody’. They added, ‘the number of assisted people across all cohorts is increasing as more services scale up their offerings and the impact of the Police Chief Commissioner’s instruction is progressively realised.’⁸³ The Chief Commissioner’s instruction is discussed below.

When asked if the reforms could be delayed even further given some trial site evaluations will be completed in August 2023, the Attorney-General said, ‘I have a firm commitment to you and the Aboriginal community that have been long advocates of this reform that it will be enacted by November of this year’.⁸⁴

RISKS REMAIN THAT POLICE WILL TAKE PEOPLE INTO CUSTODY DESPITE DECRIMINALISATION

Ambulance Victoria and Victoria Police will still need to engage with people who are intoxicated in public in certain circumstances, such as in areas where there is no service or where a service is at capacity. Victoria Police and Ambulance Victoria may also respond where the person does not consent to receiving the health-led service model and intervention is required because of an emergency health or community safety risk.

The government has further advised that if Ambulance Victoria or Victoria Police attend and the person does not want support, ‘responders should leave the person in place (if safe to do so); monitor and manage health or safety risks; de-escalate and promote behaviour change and provide assistance, including contacting family, arranging transport or referrals’.⁸⁵

The Chief Commissioner told Yoorrook that Victoria Police is readying itself with ‘appropriate advice, training and instructions’ on how police should respond to

intoxicated people who are not committing an offence but ‘are not compliant or who pose a risk to themselves or to others’.⁸⁶ This includes directions from the Chief Commissioner to Victoria Police members operating within the trial sites about how their duties should be performed during the trial period.⁸⁷ Training will ‘focus on de-escalation and diversion of intoxicated people to friends, family and support services’.⁸⁸

Importantly, unlike other jurisdictions, the Victorian reform does not give police replacement ‘protective custody’ powers to arrest, detain or move intoxicated people on when they are not committing any offence. The Police Association of Victoria criticised this move,⁸⁹ but experience from other jurisdictions shows that where replacement protective custody powers have been introduced, police custody is unsafe for people who are intoxicated. As noted by VALS, people have died in Western Australia, New South Wales and the Northern Territory when detained under replacement powers.⁹⁰

Yoorrook supports the Victorian Government’s decision to decriminalise public drunkenness without providing police with any alternative or extra powers. However, Yoorrook notes concerns that police may use other existing powers to detain intoxicated people after the public drunkenness offence is repealed.⁹¹ In her evidence, the Attorney-General agreed this is a risk, telling Yoorrook:

We are aware that there could be unintended consequences or we hope there’s not the consequences of upcharging, for instance. I don’t want to see people ordinarily charged with being intoxicated in public get a more serious charge to deal with that behaviour. We don’t want to see that happen, and that’s an ongoing conversation with the police and the agencies on the ground and, indeed, people with lived experience.⁹²

The Chief Commissioner also accepted this risk of ‘upcharging’.⁹³ He nonetheless stated, ‘Victoria Police fully supports decriminalisation of public drunkenness and moving to a health-based response model’.⁹⁴

Government officials told Yoorrook that there would be an independent evaluation of the reforms, including monitoring of police conduct during implementation.⁹⁵



The Hon. Jaclyn Symes MLC, Attorney General

The government has not yet committed to ensuring the evaluator of the reforms will report publicly on key findings, although the Attorney-General has indicated her priority ‘is ensuring that we are as transparent as possible with the Victorian community’.⁹⁶ The Attorney-General also indicated there will be an oversight mechanism beyond evaluation, stating:

[R]ather than have a review of this legislation in a year or two, which is often what happens, we’ve made the decision to have an implementation monitor, for example, so someone that can oversee the legislation, speak to the stakeholders ... effectively, a guardian of the legislation. We want somebody that in real time can report to government about how it’s working.⁹⁷

Yoorrook agrees with the need for close evaluation and monitoring of the reforms. Regardless of the model chosen, monitoring must be independent, publicly reported and most importantly, Aboriginal-led.

Yoorrook will also continue to monitor the reforms as part of its ongoing work.

Over-policing leads to mistrust and under-reporting from victims

Aboriginal people are over-represented as victims of crime, but the number of reports that are recorded (by Police) are merely the tip of the iceberg. The criminalisation of Aboriginal people, distrust and fear of police are significant barriers to reporting experiences of victimisation. Tragically, for those who are a witness to or victim of crime at a young age, the more likely they are to be involved with the criminal legal system as a victim and/or offender in future.⁹⁸

Aboriginal people are over-represented as victims of crime. They need the best of policing and yet too often receive the worst. The 2020 Victim Services Review, commissioned by DJCS, found that while Aboriginal people are over-represented as victims of crime, they are significantly under-represented in the take up of victim services in Victoria.⁹⁹ For example, Aboriginal people are estimated to be at least two to five times more likely to experience violence than non-Aboriginal people. Yet only three per cent of victims accessing Victorian victim support services from 2014 to 2019 were Aboriginal.¹⁰⁰

The problem of First Peoples not accessing victim services was acknowledged by the Victorian Government in 2021, when the then Minister for Victim Support, Natalie Hutchins committed to developing a dedicated Aboriginal Victims of Crime Strategy.¹⁰¹ Yoorrook understands that consultations, including with Aboriginal victims of crime were completed in late 2022.¹⁰²

The consultations found:

- many Aboriginal victims of crime do not report crime or seek assistance because they have high levels of distrust and fear of police
- under-reporting is further compounded by systemic issues, fuelled by the legacy of colonisation, intergenerational trauma and ongoing racism
- some of the most significant harm Aboriginal people experience is at the hands of the State, including at the hands of police.¹⁰³

Aboriginal people who had reported crimes to police also described being ignored, treated as if they were wasting police time, and in some cases sent away without being allowed to make a report.¹⁰⁴ Similarly, in a submission to Yoorrook, a survivor of family violence said:

It has become very apparent that being an Aboriginal Victorian has played a massive part in the continued mismanagement, lack of care, investigation and follow through of over [redacted] statements and charges being laid against a non indigenous perpetrator towards myself and my children.¹⁰⁵

The Minister for Victim Support acknowledged that ‘general distrust of law enforcement’ is a reason for ‘a gross understatement of the level of victimisation of Aboriginal people in our state’.¹⁰⁶

All victims, including First Peoples, have the right to be free of discrimination in the operation of the law and the legal system, including policing. Police have the obligation to recognise and ensure the cultural rights of First Peoples when doing so. Children who are victims of crime have specific needs that must also be met.¹⁰⁷

Police have a legal obligation to respect, protect and fulfil these rights without discrimination against First Peoples. None of this is disputed or indeed disputable. It should be bedrock knowledge and universal practice for police. Appallingly, it is not. The problem also has a gender dimension. This can have fatal consequences. Dr Michael Maguire and Emeritus Professor Jude McCulloch noted a 2022 study which found that many First Nations women who were killed by their male partner had negative experiences of contact with police in the years prior.¹⁰⁸

MISIDENTIFICATION OF FAMILY VIOLENCE PERPETRATORS INCREASES DISTRUST OF POLICE

Aboriginal women are frequently misidentified as the perpetrator, not the victim, of family violence by Victoria Police.¹⁰⁹ This problem has been identified by organisations like Djirra, and non-Aboriginal family violence services.¹¹⁰ Berry Street told Yoorrook:

Our staff continue to observe a common tendency for some police to wrongly respond to Aboriginal women as though they are the aggressors rather than victim survivors. ‘Mutual abuse’ is a misapplied phrase used more frequently by police when Aboriginal women seek a police response. We hear from our service users and observe instances in practice where there is still an attitude among some police of not responding to the family violence experiences of Aboriginal women because it is deemed an Aboriginal problem.¹¹¹

When victims are mistakenly identified as the perpetrator of the violence, they are placed at risk of further violence.¹¹² This misidentification also risks further criminalisation — for example, if the woman is subject to a Family Violence Intervention Order and inadvertently breaches it, she can be prosecuted. Information wrongly listing the woman as a perpetrator on the Victoria Police Law Enforcement Assistance Program database can also be shared across agencies under family violence and child wellbeing information sharing laws. This can lead to the woman’s children being removed from her care and perhaps placed with the perpetrator. She may also become homeless if she is excluded from the home and not prioritised for social housing assistance because she is not recognised as the victim.¹¹³

Australia’s National Research Organisation for Women’s Safety found that these consequences contribute ‘to a profound sense of injustice and distrust of the police and legal system, meaning victims/survivors came to view the legal system as an extension of violence rather than a protective resource’.¹¹⁴

Cultural awareness training for police is inadequate

The Aboriginal Justice Caucus and Victorian Aboriginal Justice Agreements have been advocating for changes to cultural awareness training for Victoria Police for more than 20 years.¹¹⁵ As far back as 1991, RCIADIC first recommended Aboriginal cultural understanding training for police, recognising that police culture contributes to over-policing and the subsequent disproportionate incarceration of Aboriginal people.¹¹⁶ The 2018 Australian Law Reform Commission *Pathways to Justice* report also recommended changes to ‘ensure police practices and procedures do not contribute to the disproportionate incarceration of Aboriginal and Torres Strait Islander peoples’.¹¹⁷

Despite this, Aboriginal cultural awareness training (ACAT) was only made mandatory for all sworn Victoria Police employees (police members and Protective Services Officers) in July 2022,¹¹⁸ following endorsement by the Aboriginal Justice Caucus in May 2022.¹¹⁹ Delivery of this training across the organisation has been slow, with 29 per cent of police members and 21 per cent of Protective Services Officers having completed it as of February 2023. In the Southern Region only one in 10 police members had completed the training.¹²⁰ The recently released Victoria Police *Aboriginal and Torres Strait Islander Inclusion Action Plan 2023–25* (the Action Plan),¹²¹ indicates that take-up of ACAT was approximately 36 per cent as of 30 April 2023.¹²²

The Action Plan also describes the transition to a new model of delivery by the Divisional Training Officer Network with the assistance of Victoria Police Aboriginal employees. It further states that ‘ACAT content is strengthened by truth telling videos provided by Aboriginal Elders and stakeholders from across Victoria who give their perspectives on the themes of the package’.¹²³

Although the Chief Commissioner has now vowed to finalise the rollout of training by the end of 2024,¹²⁴ Yoorrook considers its slow uptake reflects that Victoria Police is failing to grasp the importance of culture to First Peoples or to understand the systemic causes of over-representation. This is also demonstrated by the training only being a one-off course of 3.5 hours.¹²⁵ Yoorrook believes that regular and ongoing adequate

cultural awareness training is critical to addressing systemic racism in Victoria Police.

Chief Commissioner Patton further conceded that cultural awareness training for police custody officers did not become mandatory until 2023 when he discovered its voluntary status in preparation for participation in Yoorrook’s Inquiry. In evidence he stated that of 400 police custody officers, only 44 had voluntarily undertaken the training. Describing this as a ‘glaring oversight’, Chief Commissioner Patton has now required that all custody officers complete cultural awareness training by October 2023.¹²⁶

Even more disturbing was the evidence Yoorrook received regarding cultural awareness training for all police recruits delivered as part of their Police Foundational Training. This training was not developed by a registered Aboriginal training provider or endorsed by the Aboriginal Justice Caucus.¹²⁷ Rather, it was developed by the Centre for Professional Policing which is part of Victoria Police.¹²⁸

Some of the content in this training module indicated a deep lack of knowledge of Victorian First Peoples and culture. In some cases, the outcome was highly offensive. For example, the training talks about ‘pay-back’, a concept not associated with First Peoples in Victoria. The training also contains highly inappropriate references to the Stolen Generations as ‘the best thing that happened to them’. It also invites police recruits to ‘have some fun with this, let your bias show here when describing each person’.¹²⁹

The training illustrates a defective appreciation of Aboriginal history and culture that does not respect First Peoples’ cultural rights. Rather, it denigrates them. During his evidence, Chief Commissioner Patton agreed that the recruit training was ‘not only inadequate but offensive’ and he apologised for it.¹³⁰

Yoorrook was also concerned to hear there is an expectation within Victoria Police that Aboriginal employees and Aboriginal Community Liaison Officers share their personal experiences. It is inappropriate to expect Aboriginal staff to open up on their personal histories to what might frequently be hostile or ignorant audiences. Such expectation on staff to do so indicates the pervasiveness of systemic racism. Any expectation that Aboriginal staff will take on the

cultural load¹³¹ of ‘educating’ other staff is inappropriate, offensive and retraumatising.

Victoria Police is bound by the Charter which includes the obligation to observe, respect and promote the cultural rights of First Peoples in Victoria.¹³² Cultural awareness training should be an opportunity for police recruits to learn about First Peoples culture, the role of Elders and of the strengths drawn from culture and family. It should support them to be effective and respectful in their dealings with First Peoples, whether as victims of crime, people suspected of crimes or witnesses to crimes.

Yoorrook is deeply concerned that a service which has existed for 170 years with unquestionable power over the lives of First Peoples has failed to support and deliver basic appropriate cultural awareness training. However, Yoorrook acknowledges the Police Commissioner’s commitment to immediately review all training material.¹³³

Police continue to harm First Peoples and violate their rights

Aboriginal people still experience human and cultural rights violations, harm, violence, serious injury and death from police contact. These outcomes continue despite repeated recommendations for reform to policies, procedures and practice.

USE OF FORCE AND POLICE BRUTALITY

Yoorrook received the following evidence:

There was a recent arrest of a young intellectually disabled Indigenous man in South West Victoria. The young man was tiny, would have only weighed around 40 kilograms, wringing wet. The police pulled him over in a car and almost immediately tasered him, without warning. His mother, who was also in the car, was screaming because she thought her son had been shot. The police swore at her and told the young man to get out of the car as they repeatedly tasered him. After they arrested him, the way that the police officers were interacting with each other was really troubling. They were asking each other if they were alright

and almost congratulating each other, while the young man was barely breathing and the mother was screaming, thinking they had killed him.¹³⁴

For me, the brutality wasn’t as bad in prisons as it was in police stations. The worst violence came from being chucked in the back of a divvy van or police cell.¹³⁵

Yoorrook received evidence of Victoria Police using excessive force against First Peoples.¹³⁶ Victoria Police internal complaints data shows that Aboriginal people made 191 allegations of assault by police in the period 2017–22.¹³⁷ Accounts of police brutality frequently included racist slurs and psychological abuse. This section describes some of those cases. Yoorrook acknowledges that these are only a handful of cases. The issue of use of force is more widespread. Yoorrook does not accept that the unlawful use of force by police is a purely individualised action. It is not a matter of a ‘few rogue police’ or ‘bad apples’. This behaviour is supported by the systemic racism that continues to pervade the organisation.¹³⁸ Police members who inflict unlawful violence do it because they think they can get away with it. Except in circumstances of serious and wilful misconduct, Victoria Police is responsible for the conduct of its members in the course of their duties.¹³⁹

THE LOVETT FAMILY’S EXPERIENCE

Aunty Doreen Lovett spoke on behalf of her son, Tommy, aged 18 when he was arrested after being wrongly suspected of ramming a police vehicle.¹⁴⁰ She told the Commission:

The police officers assaulted and battered Tommy on multiple occasions. They slammed him into the ground, handcuffed him, stood on his wrists, his ankles, his arms. They threw him into a fence. They tightened the handcuffs so that his wrist was fractured. They had him there for a while. Tommy told them he had to go to the toilet. They left him handcuffed, pulled his pants down and told him to urinate at the neighbouring house, in front of the whole street and in full view of the neighbours. They used capsicum spray, he was bleeding everywhere. They tried to wash his face with a

dog's water bowl. What they did to him was so degrading. All the other officers watched An Aboriginal girl in the house next door heard Tommy crying out. [redacted] told her to 'get the fuck inside'.¹⁴¹

This level of violence was confirmed in a statement from one of the police members at the Lovett home during the arrest:

One of the detectives then picked the male up by both legs, lifting them to waist height. While this one happened, one after the other detectives told the male to stand up. The male under arrest called the detective an idiot as his legs are in the air and was unable to stand. The detective with his arm across the neck of the male then picked the male up by his upper body and with the aid of both detectives threw the male into the brown wooden fence next to a footpath.¹⁴²

The Victoria Police Manual requires that VALS is notified whenever an Aboriginal person is arrested.¹⁴³ However, Yoorrook was told this did not occur. Aunty Doreen was told the police did not contact VALS because 'they didn't technically "arrest" him, but rather took him to the back part of the police station because there was so much blood. They tried to hose him down'.¹⁴⁴ Aunty Doreen went to the police station but was told her son was not there. She then went to the hospital, where 'they were treating Tommy like a criminal. The nurses were horrible to him. I said I would take him to Victorian Aboriginal Health Service instead'.¹⁴⁵

Even though he was the victim that day, Tommy was charged with assault police (indictable), resist police (indictable), assault police (summary) and common law assault. This was because he spat on an officers' foot when he was on the ground ... trying to spit blood out of his mouth. We spent a good year in the courts. Tommy's matter kept getting adjourned. Eventually all charges were withdrawn.¹⁴⁶

Aunty Doreen told Yoorrook that 'police showed great reluctance to deliver the relevant evidence to Tommy's defence lawyers. We...kept digging, including using

Freedom of Information requests. This is how we got access to the police statements and found out that even some of the police were shocked with what they saw that day'.¹⁴⁷ Chief Commissioner Patton confirmed in evidence that Victoria Police withdrew the charges due to insufficient evidence, including that some police present at the arrest could not corroborate some evidence of the arresting officers.¹⁴⁸

Tommy's family complained to Victoria Police and raised the issue at the Aboriginal Justice Forum in mid-2016 with Shane Patton who was then Acting Chief Commissioner of Police. The matter was referred to Victoria Police's internal investigation unit, the Professional Services Command. The family was told that the complaint could not proceed unless Tommy made a formal statement. Tommy did not feel he was able to do this because of the trauma he had experienced. He was also advised by his lawyers not to make a statement while the criminal proceedings were on foot. As noted by Chief Commissioner Patton during Yoorrook's hearings, this is not unusual advice.¹⁴⁹ Victoria Police refused to accept a statement from Aunty Doreen on Tommy's behalf. It treated the complaint as 'not proceeded with' and concluded that no human rights breaches were identified.¹⁵⁰

The Chief Commissioner conceded that this policy of requiring a written statement from the complainant 'clearly disadvantaged' Mr Lovett and would 'disadvantage a vast majority of the Aboriginal community who don't ... to a large degree have faith in our complaints mechanism'. He stated that Victoria Police has now changed that policy.¹⁵¹

The Chief Commissioner also conceded that Victoria Police wrote to Mr Lovett and informed him that the officers' conduct was in accordance with law and policy, even though this was 'misleading, inaccurate' given that no investigation had been undertaken by Professional Standards Command. The letter also did not inform Mr Lovett that he could reopen the complaint if he made a statement. Instead, it said that 'no further action is proposed at this time'.¹⁵²

A review of the Professional Standards Command file undertaken in 2019 following media reports of Tommy Lovett's case found several deficiencies. These include that:

- statements that should have been obtained were not
- statements attached to the investigation file did not depict Tommy's injuries
- no use of force forms were included
- Victoria Police did not advise VALS of Mr Lovett being taken into custody
- there was 'overzealous' use of OC (pepper) spray during the arrest.¹⁵³

Yet in 2020, having made another complaint to Professional Standards Command, Tommy's lawyers were again told he must make a statement for the complaint to proceed. The investigation was closed by Victoria Police.¹⁵⁴

Tommy commenced legal action against the State for compensation for the misconduct of Victoria Police. Four years after his traumatic experience, his claim was settled. Aunty Doreen explained, '[t]he settlement didn't change what had happened, the damage done to Tommy'.¹⁵⁵

The Minister for Police told Yoorrook that Aunty Doreen's evidence, and others that he had heard from, was harrowing.¹⁵⁶

THE CRUSE FAMILY'S EXPERIENCE

The Cruse family also gave evidence to Yoorrook about the 'brutality and racism' they experienced at the hands of Victoria Police.¹⁵⁷ Eathan Cruse spoke of police breaking into his family home and his parents and siblings screaming while men dressed all in black held what 'looked like an assault rifle' at his head. Eathan immediately complied with the order to get on the floor, where he was handcuffed. Despite this, he was beaten. He described the trail of blood all over several rooms in the house and the significant injuries and bruising he sustained. Eathan told Yoorrook that the excessive violence used was motivated by racism. Since the incident Eathan has suffered post-traumatic stress and depression.¹⁵⁸

Eathan's father and mother were similarly subjected to violence from police, with David and Anja describing

the terror they and their children suffered.¹⁵⁹ After Eathan was taken away and the family were allowed back inside their home, David described attempts by police to clean up the blood, ignoring his question 'are you trying to hide the evidence?'¹⁶⁰

In 2015, IBAC referred the Cruse family's complaint to Victoria Police for their investigation. The complaint was investigated by Victoria Police, which did not substantiate the allegations.

In 2019 Eathan Cruse brought legal action against the State.¹⁶¹ The Supreme Court found that the arrest was unlawful, and that 'the police officers conduct was a "cowardly and brutal attack"'.¹⁶² The Court awarded him \$400,000 in compensation and damages.

The court also referred the case to IBAC,¹⁶³ who conducted a review of Victoria Police's investigation. In around December 2020 IBAC gave notice of its findings, namely that Victoria Police should have substantiated the complaint of excessive use of force and recommended that Victoria Police reconsider its finding. IBAC also set out procedural changes that Victoria Police should introduce.¹⁶⁴ Two years later, when contacted by the media, Victoria Police said that it conducted a review following the IBAC recommendation, however it was determined that insufficient evidence existed, and the findings of the initial investigation were not changed.¹⁶⁵

In their truth telling to Yoorrook, the Cruse family expressed their deep frustration at the lack of police accountability.¹⁶⁶ Their experience of racism and brutal violence continues to cause trauma to the whole family, including Eathan¹⁶⁷ and his younger brothers and sisters. They continue to call for systemic change in the police complaints system.

The police practice outlined in these two case studies highlights why the Aboriginal community mistrusts Victoria Police, despite the efforts of some senior police to address this misuse of power. The poor accountability responses highlight how the current system of police investigating polices with limited independent oversight enables a culture of impunity. Before examining that issue, this chapter looks at deaths and serious injuries of Aboriginal people in police custody.

DEATHS AND SERIOUS INJURY IN POLICE CUSTODY

Yoorrook heard that Aboriginal people continue to fear police contact because of the risk of dying or suffering serious harm while in their custody.¹⁶⁸ Families remain traumatised about the deaths of their loved ones.

Deaths in police custody made up two-thirds of the deaths investigated by RCIADIC, with the remainder occurring in prisons and juvenile detention centres.¹⁶⁹ Of the 34 deaths in custody in Victoria since that Commission, 10 have been in police custody or related to police operations (police contact deaths).¹⁷⁰

Victoria Police provided Yoorrook with information about each of the ten deaths since RCIADIC:

- one occurred in a police cell in 1991
- one occurred in a police divisional van in 1992
- one occurred from injuries sustained after being shot by police in 1994
- one occurred by drowning, while being pursued by police in 2003
- one occurred from epileptic seizure, over two months after sustaining a head injury during arrest in 2004
- one occurred from injuries suffered after being struck by a motor vehicle in 2006
- one occurred in hospital from injuries sustained in police cells in 2017
- two occurred in connection with police pursuits in 2006 and 2017
- one occurred in hospital, following arrest under section 351 of the *Mental Health Act* in 2017.¹⁷⁴

Victoria Police also provided Yoorrook with details about 'serious incidents' involving an Aboriginal person in police custody.¹⁷⁵ Each incident involved an Aboriginal person suffering a serious injury or medical condition in connection with their contact with police.

As RCIADIC found, and as First Peoples have consistently told government, preventing deaths and serious injuries in police custody (and in prison) relies primarily on diverting people from the criminal justice system. It also requires measures that ensure people in custody receive proper care and attention and are always treated with dignity and respect. The Charter also creates a clear obligation to treat people in custody with humanity and with respect for the inherent dignity of the human person.¹⁷⁶ The Minister for Police made



Raymond Thomas was a proud Gunnai, Gunditjmara and Wiradjuri man, the son of Uncle Ray and Auntie Debbie Thomas. He died in a car

accident following a police pursuit on 25 June 2017. Mr Thomas had driven to the supermarket to buy chocolate. Despite there being nothing 'untoward' about the way he was driving, police decided to intercept his car because they thought it looked 'dodgy'.¹⁷¹

The Coroner found that the police pursuit which followed was not in accordance with police policy and was not justified. The Coroner recommended significant changes to police pursuit policy.¹⁷² While the Coroner found that the police interception of Raymond Thomas was not racially motivated, he commented on the impact that Raymond's adverse experiences with police may have had on what happened. The Coroner referred to the findings of RCIADIC and noted that 'many Aboriginal people in our community bear the scars of adverse interactions with police'.¹⁷³

this point during Yoorrook's hearings.¹⁷⁷ Yet evidence to Yoorrook and to coronial inquests confirms that this obligation is not consistently being met.

Further, the right to life in the Charter¹⁷⁸ includes the right not to have your life arbitrarily taken, including by police. The right includes an obligation to ensure that the health and wellbeing of people in police custody are adequately ensured by providing requisite medical assistance, prompt and accurate diagnoses and care and regular supervision.¹⁷⁹ It also creates a positive procedural obligation on the State to investigate death.¹⁸⁰

INVESTIGATION OF DEATHS AND SERIOUS INJURIES

The Coroners Court investigates all deaths in police custody. Victoria Police and IBAC also have roles in the investigation and oversight of critical and serious incidents (where police contact results in death or serious injury to a person).

In response to Questions on Notice, the Minister for Police stated that for eight of the 10 Aboriginal deaths in police custody or police related custody since RCIADIC, the Coroners Court made no adverse findings

regarding the actions of Victoria Police members.¹⁸¹ The Minister’s response added that based on an internal review of relevant discipline files, five police officers have been reprimanded in connection to two Aboriginal deaths in custody. In relation to one death, a police member received workplace guidance for duty failure. In relation to another death, four police members received adverse findings including:

- one member faced a discipline hearing for duty failure and was placed on a 12- month good behaviour bond
- one member faced a discipline hearing for duty failure and was transferred
- one member was formally counselled
- one member was performance managed for duty failure.¹⁸²

Victoria Police can conduct Operational Safety Critical Incident Reviews of critical incidents, including incidents involving police where a person dies or suffers serious injury, where deemed appropriate by the Deputy Commissioner (Capability). These reviews are not automatic. They are conducted for internal disciplinary and operational improvement purposes. They are overseen by Professional Standards Command.¹⁸⁶ Victoria Police also reports deaths in police custody to the Australian Institute of Criminology, which publishes deaths in custody quarterly data at the national level.¹⁸⁷

Coroners Court investigation of deaths in police custody



A death in police custody must be reported to the Coroners Court.¹⁸³ The court must hold an inquest into the death unless satisfied it was the result of natural causes.¹⁸⁴ A team of police officers located within the Coroners Court (the Police Coronial Support Unit, PCSU) usually gathers evidence to help the coroner’s investigation into deaths. In police contact death cases, however, a practice direction now requires the court’s In-House Legal Service (IHLS) to take carriage of the investigation and prohibits the PCSU having substantive involvement in the investigation.¹⁸⁵ This practice direction is not legislated.



Shane Patton APM, Chief Commissioner of Victoria Police

IBAC can review Victoria Police oversight files.¹⁸⁸ A 2018 IBAC audit of Victoria Police’s serious incident oversight files found a range of deficiencies in how these investigations were conducted. IBAC’s findings included poorly managed conflicts of interest, failure to obtain statements from independent non-police witnesses, failure to accurately record findings and actions, and inadequate consideration of human rights issues.¹⁸⁹ These are all matters of serious concern.

In the 2021 inquest into the death of Raymond Thomas, Coroner John Olle found there had been ‘an alarming lack of internal rigour [by police] in reviewing the circumstances of the pursuit’ that led to Mr Thomas’ death.¹⁹⁰ Yoorrook also heard concerns about the processes that follow a death or serious injury in police custody.¹⁹¹ Chief Commissioner Patton stated in evidence that work is underway:

What we’ve seen in the past over previous years was an inconsistent approach to reviews of deaths in custody and/or injuries in custody and we have matured markedly since then, and we now have a very consistent approach to how deaths or injuries in custody are dealt with. But the delivery of an automated system which we are on the cusp of delivering that will allow analysis — transparent and clear analysis about any incident and — that occurs in custody will ensure it’s captured, so there can be no, if you like, doubt or lack of transparency in relation to what occurs in our cells.¹⁹²

The concerns raised by legal organisations, Aboriginal Community Controlled Organisations and community members who have lost loved ones go deeper than issues that new technology can fix. The overriding concern is the lack of a genuinely independent police accountability system. The current system sees involvement of police in the investigation of police contact deaths and serious incidents, regardless of whether investigations are conducted for internal police purposes or overseen by IBAC or Professional Standards Command. Even if the IHLS takes carriage of a coronial investigation, it is likely to rely on evidence gathered by police immediately following the incident.¹⁹³

VALS pointed out that not only does police involvement severely compromise the integrity of investigations, but it also gives rise to deep mistrust and distress for grieving family members.¹⁹⁴

GOVERNMENT AND VICTORIA POLICE POSITIONS ON POLICE CONTACT DEATHS

The Attorney-General, Minister for Police and Chief Commissioner of Police each expressed sadness and regret that Aboriginal people have died in the custody or care of police in Victoria, and committed to working in partnership with Aboriginal communities to prevent Aboriginal deaths in custody.¹⁹⁵ The Attorney-General said that the disproportionately high rate of Aboriginal deaths in custody is ‘shameful and preventable, and the Victorian Government recognises change must be delivered without delay’.¹⁹⁶

The Attorney-General and Chief Commissioner of Police both acknowledged more work was needed to implement RCIADIC recommendations and referred to the review of their implementation being undertaken by the Aboriginal Justice Caucus.¹⁹⁷

In response to calls for an independent body to investigate deaths in police custody, the Attorney-General noted the role of the Coroners Court and referred to the government’s systemic review of police oversight (discussed below).¹⁹⁸ The Attorney-General also said work was underway to empower coroners to direct police investigating deaths on behalf of a coroner, as recommended by the inquest into the death of Tanya Day.¹⁹⁹

In relation to the death of Tanya Day, Chief Commissioner Patton acknowledged, ‘there were completely unacceptable elements in Victoria Police’s practice and procedures at the time of these events and that they do not meet community expectations of Victoria Police.’²⁰⁰ The Chief Commissioner reported on progress in implementing the coroner’s recommendations directed to Victoria Police.²⁰¹

The Minister for Police noted that he has the power to direct the Chief Commissioner of Police about operational police matters if he is of the opinion Victoria Police has not adequately responded to a recommendation of an agency such as IBAC or the Coroners Court.²⁰² The Minister indicated he was open to exercising this power in relation to the recommendations made in the inquest into the death of Tanya Day, specifically those relating to the training of police about care and custody requirements.²⁰³

HARMS CAUSED BY POLICE ARE A CONSEQUENCE OF SYSTEMIC RACISM

The examples examined above show that police are harming First Peoples and violating their human and cultural rights. These examples are part of a broader pattern of systemically racist policing, set at colonisation. It does not characterise the whole of policing in Victoria, but it is widespread and ingrained.

There is a relationship between discriminatory policing, over-representation of First Peoples in contact with police, and continuing deaths in police custody. This has been well understood for more than 30 years, since RCIADIC. Deaths in custody can be reduced by structural reform of policing to end systemic racism and instil respect for human and cultural rights. Current approaches to achieve this are not working. The structural reform that is needed includes independent oversight of police. It is to this issue that Yoorrook now turns.

Only independent oversight can deliver confidence and accountability

One of the most high-profile perpetrators of violence in the criminal legal system is Victoria Police, which continues to operate with minimal oversight and accountability.²⁰⁴

First Peoples do not have confidence in Victoria's police complaints system because it is not independent of police. First Peoples are frightened of police and frightened of the ramifications if they complain.²⁰⁵ Their mistrust of police is a product of human and cultural rights violations, systemic racism and discrimination and brutality which the community has endured since invasion and continues to experience. It is made worse by a failing and structurally flawed police complaints and oversight system which routinely denies or justifies police misconduct and fails to hold officers or management to account.

In Victoria, the system for receiving and investigating complaints against police is complex.²⁰⁶ This system has long been the subject of criticism, review and adjustment.²⁰⁷

Yoorrook heard directly about the profound lack of confidence First Peoples have in existing police oversight measures, and the failure of past reforms to improve police attitudes and conduct towards Aboriginal people.²⁰⁸

[Law and Advocacy Centre for Women] clients who report police misconduct to their lawyers or support workers frequently do not make complaints, or choose to discontinue complaints about police because they do not trust police to investigate the matter thoroughly and fairly.²⁰⁹

At the heart of the problems with the current system is the fact that it is based on police investigating complaints against police. In other words, conflict of interest is baked into Victoria's police accountability system.

The issue of the conflict of interest involved in police investigating police, and the mistrust it generates, was repeatedly raised and acknowledged by multiple people and agencies in their evidence to Yoorrook.

IBAC recognised 'there is an inherent risk of conflict of interest where a Victoria Police officer investigates a complaint about another police officer'.²¹⁰ The Law Institute of Victoria described the current model of police oversight as 'poorly regulated and ineffective' and pointed to the mistrust it creates for First Peoples.²¹¹ These views were also consistently put by Aboriginal community members and organisations, including FPAV.²¹²

The Minister for Police told Yoorrook he accepts 'overrepresentation and limited police accountability fosters continued trauma, anger and mistrust of law enforcement within Aboriginal communities'.²¹³ He added:

Where there's no consequences, behaviour continues. Behaviour gets worse.²¹⁴

MOST COMPLAINTS ABOUT POLICE ARE INVESTIGATED BY POLICE THEMSELVES

There is some independence in Victoria's model of police oversight given the existence and powers of IBAC. In practice however, IBAC's role is limited and the vast majority of complaints about police are investigated internally by police.

In 2018, a Parliamentary committee inquiry into police oversight in Victoria noted that IBAC investigated only around two per cent of the allegations that it determines warrant investigation, referring the remainder back to police. IBAC's role is limited by legislative and resourcing constraints, and the vast majority of



The Hon. Anthony Carbines MP,
Minister for Police

complaints about police are investigated internally by police. Victoria Police's internal investigation unit, Professional Standards Command, in turn investigated only 10 per cent of the complaints it receives, referring the rest to regions, departments or commands.²¹⁵

The Attorney-General in her evidence to Yoorrook said: 'We want a system that is more accommodating of vulnerable cohorts making complaints, and I don't want them to fear that making a complaint is going to have repercussion because ... the local police officer knowing about it and that kind of thing'.²¹⁶

In 2021–22, IBAC referred just under one third of the police misconduct allegations it had assessed to other entities (noting that IBAC is, in certain circumstances, required to refer allegations to other entities).²¹⁷ Most police misconduct allegations were referred to Victoria Police. In the same year around two thirds of allegations of police conduct complaints assessed by IBAC were dismissed.²¹⁸

Between 2017 and 2022, Victoria Police received 186 complaints from Aboriginal people.²¹⁹ Those complaints covered 502 separate allegations, with the largest categories relating to assaults by police and failure to exercise duties in accordance with Victoria Police values, policies, procedures and practices.²²⁰

At Yoorrook's hearing, Chief Commissioner Patton stated that in the last five years there have been 188 complaints of racism made against 175 police officers. He did not indicate how many of these were from First Peoples. Of these complaints:

One police officer has been dismissed for racism-related matters. Another is being transferred, and others have received — one, I think, one or two received good behaviour bonds, ... and a number of others have received lower level sanctions, as well as a number of police officers resigning prior to the matters being heard in a discipline forum.²²¹

As of 24 March 2023, there were no First Peoples investigators employed in Professional Standards Command.²²² Sixteen per cent of public servants and 66 per cent of police in Professional Standards Command had completed Aboriginal cultural awareness

training, with the remainder of investigators scheduled to complete the training by September 2023.²²³

IBAC AUDIT CONFIRMS ENDURING PROBLEMS WITH POLICE INVESTIGATIONS

In 2022, IBAC published an important audit report which revealed consistent problems in the police handling of complaints made by Aboriginal people and serious incidents involving Aboriginal people, which were finalised in 2018. The audit examined how Victoria Police handled 41 complaints made by Aboriginal people and its oversight of 13 serious incidents involving an Aboriginal person.²²⁴ Among many matters of concern, IBAC found very low substantiation rates, a substantial proportion of files containing indications of bias or a lack of impartiality, poorly managed conflicts of interest, and insufficient understanding and analysis of human rights. This is further evidence of the compliance gap between what laws and policies require of police and how they exercise their powers in relation to First Peoples.

IBAC found deficiencies in how Victoria Police identified and managed conflicts of interest in 42 per cent per cent of files where conflict of interest forms were attached. In 16 per cent of cases a conflict of interest form had not even been completed.²²⁵ This situation is untenable.

The Minister for Police accepted that a conflict of interest rate of this magnitude undermines community confidence. He also accepted that when Professional Standards Command fails to complete conflict of interest forms, the arm of police in charge of investigating misconduct is itself non-compliant.²²⁶

IBAC concluded Victoria Police had 'considerable work to do to ensure that it investigates complaints and serious incidents involving Aboriginal people thoroughly and impartially'.²²⁷ This is a damning finding. However, Yoorrook's view is that a system in which police investigate complaints against police will not be thorough and cannot be impartial.

IBAC'S POLICE OVERSIGHT FUNCTION

In recent years, IBAC has established a Deputy Commissioner dedicated to police oversight, increased its engagement work and increased the number of reviews it conducts of Victoria Police investigations. It has also begun to undertake thematic reviews. This

includes a thematic review currently exploring serious incidents involving excessive use of force against people at risk. This will be published later in 2023.²²⁸

In its submission to Yoorrook, IBAC identified additional powers that it considers would improve its effectiveness. These include powers of arrest, power to compel a person to assist in accessing electronic devices (for example, passwords) and the power to search a person at premises where IBAC is executing a search warrant. Other gaps identified by IBAC in its governing legislation include:

- police are able to continue investigating a complaint after IBAC has determined that it will investigate the matter
- there are no offences in the IBAC Act for the destruction and concealment of evidence relevant to an IBAC investigation
- there are no offences for engaging in conduct to undermine an IBAC investigation, procure false testimony or bribery of a witness.²²⁹

IBAC acknowledges that it generally operates with limited public transparency, which is largely the product of its governing legislation and its strict confidentiality obligations.²³⁰ It also acknowledges that the complaints process can be confronting and overwhelming. IBAC has recently established a dedicated Witness Liaison Team so witnesses are better able to access necessary support.²³¹

CALLS FOR A NEW INDEPENDENT ENTITY TO ENSURE EFFECTIVE OVERSIGHT AND ACCOUNTABILITY

Against this background, stakeholders have called for the establishment of an entirely new, independent police oversight system.²³² This system would be:

- independent of and external to Victoria Police
- culturally appropriate and gender-responsive
- complainant-centred
- human and cultural rights centred
- robust, thorough and prompt
- transparent
- properly resourced.



The new entity established to oversee police would be empowered to:

- investigate deaths in police custody and custody-related operations, and all other critical incidents
- investigate complaints about misconduct
- investigate breaches of the law and human and cultural rights violations
- investigate systemic racism
- on its own initiative (without requiring an individual complaint) monitor, audit and systemically review the exercise of police powers and interactions with the public, including customer service matters, and undertake public interest investigations.

It would also need to be supported by transparent record-keeping and reporting by Victoria Police. There was strong support among community, academic and community organisations for the establishment of a new Police Ombudsman as a mechanism for achieving these objectives.²³³

Critically, such a body would need to be accountable to First Peoples in Victoria and include First Peoples-led authoritative oversight. This is not simply a matter of employing Aboriginal staff. The history of non-Indigenous institutions failing to take proper account of the specific injustices that accrue to First Peoples is long in Victoria. Any new body must include an authoritative First Peoples division, led by a First Person.

Yoorrook heard evidence from Dr Michael Maguire, a former Police Ombudsman of Northern Ireland (PONI), and Emeritus Professor Jude McCulloch. They told Yoorrook that PONI is widely recognised as having fulfilled its mandate of re-establishing trust in the police and criminal justice system in Northern Ireland. They told Yoorrook that PONI is now regarded as the international ‘gold standard’ model of independent police oversight.²³⁴ In evidence they stated:

Attention to and reform of the police oversight system in Victoria should be seen as a critical contribution to acknowledging, addressing and remedying systemic injustice in policing and criminal justice more broadly as part of the treaty making process with Victorian First Peoples.²³⁵

IBAC submitted that comparisons between PONI and IBAC are ‘flawed due to a number of key differences’. These include the size of population and the size of the police force, with Northern Ireland being much smaller on both counts. PONI also does not have some of the powers of IBAC such as the power to bring criminal charges and being able to investigate off duty police members and unsworn police staff (which in Victoria would mean Custody Officers).²³⁶

Yoorrook recognises that the PONI model has significant learnings for Victoria. Any issues in relation to police numbers, population, oversight scope and powers can be addressed by legislating appropriate powers and scaling up resources to match the size of the Victorian jurisdiction. It would also be important to ensure that any oversight body was entirely independent of government, not subject to guidance from DJCS, and reports directly to parliament.²³⁷

Consistent with submissions to Yoorrook, Marian Chapman, DJCS Deputy Secretary, Courts, Civil and Criminal Law, confirmed in evidence that the strong view of the Aboriginal Justice Caucus is that independent oversight is needed, with reference often made to the PONI model.²³⁸

GOVERNMENT AND VICTORIA POLICE POSITIONS ON INDEPENDENT OVERSIGHT

The government told Yoorrook it acknowledges ‘the impact that limited police accountability has in perpetuating mistrust of law enforcement within Aboriginal

communities’.²³⁹ It said it was ‘currently considering consultation to inform the policy development for reform’ and that it ‘will continue to work with Aboriginal stakeholders along with IBAC and Victoria Police to strengthen the mechanisms for police oversight and accountability’.²⁴⁰

The consultation process it referred to is part of the government’s systemic review of police oversight.²⁴¹ VALS told Yoorrook it believes this review is too limited in scope and is ‘unlikely to lead to strong accountability mechanisms to address systemic racism within Victoria Police’.²⁴²

The Victorian Government and Victoria Police both appear to accept that independent oversight and investigation of police is needed if First Peoples are to trust police.²⁴³ But the government appears unwilling to take the steps necessary to achieve the structural change that meets community expectations for full independence.

In evidence, when discussing the PONI model asked for by community, the Attorney-General said that any change needs to fit within the current structures:

We haven’t landed a model. I think it’s fair to say there’s an aspirational model of independence. There is what we have now, and somewhere in between of what it looks like. I’ll be upfront with you: I know that a lot of people want a PONI model, and it’s not that that’s not attractive but it’s not realistic right now. You couldn’t flip to and create an entire new Police Ombudsman model because of not just resources but, frankly, the people, like who would service that. You would be creating just another body. And I don’t think that we necessarily shut down that as an idea, but how do we start moving towards that? How do we build public confidence. How do we ensure that complaints are dealt with appropriately and people have confidence in the system, within the confines of what — the system that we have.²⁴⁴

The Minister for Police said he recognises that independent oversight of police is ‘key to building Aboriginal people’s trust and ensuring fairness in policing for Aboriginal people’.²⁴⁵ He admitted that

the current oversight system ‘is not adequate, it’s not fit for purpose, and it needs to change’.²⁴⁶

As part of the government’s systemic review of police oversight, Victoria Police has advocated for the current police complaints system to be amended to allow people other than sworn police officers to take complaints.²⁴⁷ This would give Aboriginal people the option of making a complaint about police conduct to, for example, an Aboriginal Community Liaison Officer. In and of itself, however, such a small change will not overcome the current overwhelming trust deficit of police by Victorian First Peoples.

In relation to the cultural safety of its complaints system, the Chief Commissioner told Yoorrook that Victoria Police has accepted all 10 of the recommendations made in IBAC’s 2022 review and committed to implement them by 1 June 2023.²⁴⁸ IBAC subsequently advised Yoorrook that Victoria Police did not implement all the recommendations within that time frame and a number of recommendations are still in progress. The Chief Commissioner also outlined the new complaints system to be implemented in June 2023.²⁴⁹ This will introduce a Police Aboriginal Liaison Network across Professional Standards Command to ‘provide subject matter expertise and improve understanding and response to complaints involving Aboriginal people’.²⁵⁰ Again this is a welcome small change, but insufficient to the need.

The Chief Commissioner told Yoorrook he now accepts that police oversight arrangements and police accountability are central to assuring the community that racism and discrimination are not being perpetuated.²⁵¹ During Yoorrook’s hearings the Chief Commissioner reflected on how his views had developed in recent months. He said:

[T]he fact of the matter is the Aboriginal community and other members within the community, irrespective of how well conducted the investigation is or how poorly it’s conducted, they will never have the confidence that it’s been impartially conducted. So my view is I’m completely open to any framework of oversight or investigation that government wishes to bring in, in which we operate within.²⁵²

When asked in Yoorrook’s hearings if he thought a police oversight system would be strengthened if there was independent investigation of police complaints, the Chief Commissioner stated, ‘I do now’ and that he would be ‘very much open to that’.²⁵³ This is an important concession for the Chief Commissioner to make. It suggests that the Victorian Government has an historic opportunity to introduce an independent police oversight system.

LEGAL BARRIERS RESTRICT DISCRIMINATION COMPLAINTS AGAINST POLICE AND GOVERNMENT AGENCIES

A related police accountability problem arises under Victoria’s discrimination laws. The Victorian Equal Opportunity and Human Rights Commission (VEOHRC), in its submission to Yoorrook, explained that the protections against racial discrimination in the *Equal Opportunity Act 2010* (Vic) do not adequately cover activities of public authorities such as Victoria Police and Corrections Victoria.²⁵⁴ They only apply when these agencies are providing ‘services’ to individuals. The courts have ruled that only limited Victoria Police activities constitute the provision of services. Accordingly, much police conduct falls outside the scope of anti-discrimination laws.

To put this plainly, this means that if an Aboriginal person is stopped, searched, arrested, beaten or abused by a police officer because of their race, it is unlikely that they could successfully bring a complaint under Victoria’s discrimination laws. Similarly, if an Aboriginal person is strip searched, beaten or abused by a prison officer because of their race, it is unlikely that they could successfully bring a complaint under Victoria’s discrimination laws.

This is a serious gap. It is compounded by the historic and ongoing injustice against First Peoples in the criminal justice system.

If an Aboriginal person wants to bring a race discrimination claim against Victoria Police or Corrections Victoria, they can avoid Victoria’s discrimination laws and bring the complaint under Federal discrimination laws, which provide wider protection. However, a problem with Federal discrimination laws is that the person bringing the complaint risks having a huge bill for legal costs if their complaint proceeds to court and

they are unsuccessful. This is a major disincentive to bringing complaints.

One high profile race discrimination case against Victoria Police was brought by 17 young people in 2008 in the Federal jurisdiction. The case, *Haile-Michael v Konstantinidis*, went to the Federal Court. This meant that the complainants faced significant financial risk. Their lawyer explained:

[S]o we ended up putting in a protective costs order. But to apply for a protective costs order, we were advised that the young people needed to be running this for public interest purposes and not private compensation purposes, and so they had to remove their claims for seeking compensation as part of the claim. And that was very upsetting and distressing for a lot of young people, who withdrew at that point.²⁵⁵

VEOHRC has pointed to anti-discrimination legislation in Queensland, Tasmania and the Northern Territory as a way of fixing this problem. Legislation in these jurisdictions prohibits race and other discrimination in the ‘administration of State [or Territory] laws and programs.’²⁵⁶ This gives people in those jurisdictions clear and broad legal protections against racist police conduct, and pathways for individuals to make complaints to independent authorities.

In evidence before Yoorrook, the Attorney-General committed to considering VEOHRC’s submission towards prohibiting discrimination in the government’s current round of anti-vilification reforms.²⁵⁷ Yoorrook recommends that this reform be prioritised.

IMPROVING ACCOUNTABILITY THROUGH BODY-WORN CAMERAS

Lawyers told Yoorrook that access to Victoria Police officers’ body-worn camera (BWC) footage has enabled them to see clear evidence of racist treatment, including racist slurs.²⁵⁸ However in 2022, the Victorian Auditor-General’s Office (VAGO) found that police did not turn on these cameras where they should in around one in seven cases.²⁵⁹ VAGO also found that Victoria Police does not:

- have a consistent way to track all police members’ use of BWCs
- know how compliant police members are with activation requirements overall
- have an efficient way to track when footage has been used in a complaint investigation
- measure the impact that BWCs have had on complaints.²⁶⁰

The Minister for Police told Yoorrook that he was open to police members being disciplined if they failed to activate the BWC in accordance with policies.²⁶¹ The failure of a police officer to activate their BWC in accordance with the requirements of the Victoria Police Manual is a breach of discipline under section 125(c) of the *Victoria Police Act 2014* (Vic).

The Minister confirmed the accountability role BWCs play and agreed that footage should be retrieved and used as necessary, for example if there was a complaint about police conduct.²⁶²

When asked during Yoorrook’s hearings, the Minister for Police agreed that there should be no great difficulty in developing a system for tracking and producing BWC footage.²⁶³ If this system was developed, BWC footage could be routinely provided to defence lawyers and people making complaints about police treatment. The Minister, in response to Questions on Notice, told Yoorrook that Victoria Police considers that ‘the current legislative framework is sufficient, as the sharing of body worn camera footage that is subject to [Public Interest Immunity] could put people, including witnesses to crimes, in danger’.²⁶⁴

The Victorian Auditor-General has previously recommended that Victoria Police establish ‘a policy for regularly and consistently reviewing audit logs to reduce the risk of mishandling body-worn camera footage’.²⁶⁵ Victoria Police has not accepted this recommendation.

Liberty Victoria, in its 2022 report on BWCs in Victoria, also made recommendations to improve laws and policies governing police use of BWCs. This included amending evidence laws to provide that if a police officer fails to activate their BWC as required by policy, or tampers with the footage, evidence introduced by the prosecution relating to the relevant period of time in which the breach occurred is presumed to be

improperly obtained.²⁶⁶ This would provide courts with discretion to exclude the evidence.²⁶⁷ An alternative approach, which was put to the Minister for Police, is that a police officer's failure to turn on, or keep turned on, or produce, BWC footage ought to be a basis for a judge to make an adverse inference in relation to the evidence that that footage ought to have captured.²⁶⁸

Yoorrook believes that BWCs can be an important accountability tool to prevent and respond to misconduct by police officers. Police failures to turn on cameras when required, and the lack of effective monitoring systems, are concerning and must be addressed. Yoorrook also notes evidence of concerning failures to turn on cameras in prisons where BWCs are also used in certain operations. IBAC, the Victorian Ombudsman, the Cultural Review of the Adult Corrections System and the Commission for Children and Young People have criticised BWC misuse including failures to turn on BWCs in incidents where young people and adults in prisons were alleged to have been assaulted.²⁶⁹ These incidents underscore the need for improved laws and policies governing BWCs.²⁷⁰

The way forward

Victoria Police's motto is to 'uphold the right'. The disturbing, yet unsurprising, evidence before Yoorrook is that Victoria Police too often fails to uphold the cultural and human rights of First Peoples. The evidence illustrates ongoing systemic racism, enabled by a culture of police impunity. First Peoples, the first law makers on this land, have been, and continue to be, subjected to abuse, violence and mistreatment by the very organisation that is supposed to serve and protect them.

If the Victorian Government is truly committed to driving down the over-representation of Aboriginal people in the criminal justice system, it must address the over-policing of Aboriginal people and communities. Victoria Police must take system changing steps to eliminate racial profiling and apply cautions, warnings and consent to court-diversion more fairly.

Positive results of expanded use of police cautions to reduce First Peoples contact with the youth justice

system (described in Chapter 12: Youth justice) show this can be done. The same effort needs to be made in the adult system if Victoria Police and the government's commitments to tackling systemic injustice are to have real meaning.

Recommendations to ensure greater use of diversion are made in Chapter 13: Courts, sentencing and classification of criminal offences. This includes removing the prosecutor's current veto over diversion and instead having their views considered by the court. Youth-specific recommendations about cautioning and diversion are made in Chapter 12: Youth justice.

Yoorrook also recommends strengthening the monitoring of police practice following the decriminalisation of public intoxication in November 2023, a reform that has been more than 30 years in the making. Robust, transparent, independent and First Peoples-led monitoring will help ensure the policy intent of the reforms is realised — that people are no longer locked in a police cell for being drunk in public. It should also help ensure that the reforms are not undermined by police 'upcharging' — a risk accepted by both the Attorney-General and the Chief Commissioner of Police. Experience has taught First Peoples that changing police culture is elusive, and frequently deeply resisted within Victoria Police. The decriminalisation of public intoxication gives Victoria Police a chance to demonstrate its ability to change.

The Victorian Government also accepts that police contact deaths or serious injuries must be rigorously examined to expose misconduct, hold wrongdoers to account and identify required systemic reforms. There have been 10 Aboriginal deaths in police custody or following police contact in Victoria since RCIADIC, with Coroners highlighting failures in many cases.

In June 2023 Victoria Police released its *Keeping You Safe Strategy 2023–2028*. A key priority in that strategy is 'to build greater trust and stronger relationships between Aboriginal people and Victoria Police, in line with the commitments we have made through the Yoorrook Justice Commission. We will focus on continuing to build strong community trust, confidence and connection'. The strategy also recognises that the confidence in how Victoria Police operates and the exercise of discretionary powers 'is central to building trust and cultural safety'.²⁷¹ It says:

Victoria Police is committed at all levels to supporting self-determination; working with the community to achieve better outcomes for Aboriginal people in Victoria; working with partners and community to reduce over-representation of Aboriginal people in the criminal justice system.²⁷²

At Yoorrook, Chief Commissioner Patton made an important apology to First Peoples in Victoria. He acknowledged that systemic racism, racist attitudes and discriminatory action have gone unchecked, causing significant harm across generations.²⁷³ He said:

I know Victoria Police has caused harm in the past and, unfortunately, continues to do so in the present ... I consider it is necessary and appropriate to face up and accept responsibility for the times when Victoria Police has failed and done wrong. As Chief Commissioner, and on behalf of Victoria Police, I formally and unreservedly apologise for police actions that have caused or contributed to the trauma experienced by so many Aboriginal families in our jurisdiction.²⁷⁴

The Chief Commissioner also admitted that the police uniform 'can be a symbol of fear ... [and] evidence given at commission illustrates that fear of police'.²⁷⁵ Similarly, the Minister for Police stated that '[Victoria Police] should always be culturally safe. I accept that it's not'.²⁷⁶

Yoorrook has considered the evidence and heard from First Peoples and communities directly affected by the daily over-policing, misuse of power, police brutality and by deaths in custody. It has heard from ministers, IBAC and the Chief Commissioner of Police. All recognise that systemic injustices are still inflicted on Aboriginal people and communities across Victoria. Yet Victoria Police, unlike other public bodies, continues to be allowed to investigate itself. First Peoples do not have confidence in this system, and they never will.

This mistrust has real life consequences for Aboriginal victims of crime's willingness to come forward to report crime or access victim support services. It stops Aboriginal people considering becoming police

officers — 95 of Victoria's 16,000 police members are First Peoples.²⁷⁷ It stops Aboriginal people complaining about police misconduct, violations of human and cultural rights and racism and brutality.

While the Chief Commissioner of Police has made a clear commitment to change through his evidence to Yoorrook,²⁷⁸ there must be a fundamental shift in the relationship between Victoria Police and the Aboriginal community. There must be respect and protection of the human and cultural rights of First Peoples. These rights must be properly understood and applied like all laws that are administered by police. Police cannot be allowed to pick and choose between the law that they will apply and the law they will not.

Yoorrook finds that the level of mistrust in Victoria Police among First Peoples can only begin to be reset with the establishment of a genuinely independent, and culturally safe system for police oversight and accountability. Only then will there be accountability to First Peoples. Victoria Police is seeking to improve its internal complaints system, and the Attorney-General, when asked what self-determination looks like in the context of police complaints, said she would welcome having a stream for complaints by Aboriginal people to IBAC dealt with by Aboriginal people employed at IBAC and having a Commissioner who is Aboriginal.²⁷⁹ These measures are not enough to repair the fundamental flaws in the police oversight and accountability system and restore trust. Tokenistic, incremental change and tweaking existing systems of oversight will not solve the problem.

Yoorrook agrees with the calls from community, human rights and legal bodies for the creation of a fully independent police oversight body, headed by a statutory officer with comprehensive powers to investigate police contact deaths and complaints about police, and monitor the use of police powers. This independent body should be modelled on the successful PONI and tailored to the Victorian jurisdiction.

To ensure community confidence, the new body must not be headed by former police from any jurisdiction. While evidence shows that it can be helpful to have some staff with previous police experience, these personnel must not dominate the new body and must only be employed following rigorous screening.²⁸⁰ Critically, the new body should include an

authoritative Aboriginal division that is First Peoples led and staffed. Only then will First Peoples be able to have any confidence that their complaints will be appropriately handled.

The new body should investigate and determine all complaints about police except for minor customer service complaints. Yoorrook recognises that the 'customer service' classification can mask racist conduct and there are risks of police wrongly classifying matters as customer service complaints when they are more serious.²⁸¹ For this reason, it is critical that customer service complaints are carefully defined and that the new body has the powers to monitor and audit customer service complaints including to determine whether they are being misclassified.

Yoorrook believes that transition to a PONI-style oversight mechanism must happen now. First Peoples, and others who have been subject to police misconduct, over-policing and brutality, deserve better.

Yoorrook also supports calls to amend the Equal Opportunity Act to ensure its protections apply when people are in contact with Victoria Police and other agencies involved in the administration of state laws and programs including prisons.

The Commission urges the government to adopt and proceed with police oversight and anti-discrimination reforms without delay. They are critical for driving the cultural change needed to reset the relationship between First Peoples and Victoria Police.

In his apology, the first of its kind by Victoria Police, Chief Commissioner Patton said:

For all this, I genuinely and formally apologise as Chief Commissioner and on behalf of Victoria Police. I am sincerely sorry that this has occurred to Aboriginal people. It should not have happened. I cannot undo past actions and decisions of Victoria Police. What I can, and will do, is ensure that we proactively review our policies and processes with community to address systemic racism, unconscious bias or unequal use of discretionary power in outcomes.²⁸²

Now is the time to make good on that promise through action. ■

RECOMMENDATIONS

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 in its Annual Report to Parliament, 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.

Endnotes

1. First Peoples' Assembly of Victoria, Submission 43, 7.
2. Dr Michael Maguire and Emeritus Professor Jude McCulloch, Submission 26, 5.
3. Legislative Council, Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Parliamentary Paper No 326, March 2022) vol 1, 211 ('*Inquiry into Victoria's Criminal Justice System*').
4. Dr Michael Maguire and Emeritus Professor Jude McCulloch, Submission 26, 3.
5. *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 4, 38 ('*Charter*').
6. See, eg, *Royal Commission into Aboriginal Deaths in Custody* (National Report, April 1991) vol 2, 212 [13.4.17], 228 [13.5.12], 253 [14.2.2], 254 [14.3.1], 257 ('*RCIADIC vol 2*').
7. *Ibid* 195 [13.2.3].
8. Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 31.
9. Transcript of Attorney-General, the Hon Jaclyn Symes, 5 May 2023, 490 [30]–[32]; Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 496 [44]–[46]–497 [1]–[2]. See also Witness Statement of Minister for Police, the Hon Anthony Carabines, 31 March 2023, 1 [6] expressing sadness and regret for deaths in custody.
10. Witness Statement of Chief Commissioner of Police, Shane Patton, 31 March 2023, 7–9 [27]–[31], 14–16 [49]–[55], 20–21 [74]–[76], 22–24 [81]–[82], 29 [107], 30 [110], 31–37 [116]–[121.4], 42–50 [133]–[149], 53–54 [161]–[162].
11. *RCIADIC vol 2* (n 6); Australian Law Reform Commission, Australian Government, *Pathways to Justice – an Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report, December 2017); *Royal Commission into Family Violence* (Final Report, 2006) vol V, chapter 26: Aboriginal and Torres Strait Islander Peoples; Independent Broad-based Anti-corruption Commission Committee, Parliament of Victoria, *Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria* (Parliamentary Paper No 432, September 2018) vol 1; Independent Broad-based Anti-corruption Commission, *Victoria Police Handling of Complaints Made by Aboriginal People: Audit Report* (May 2022) ('*Victoria Police Handling of Complaints Made by Aboriginal People*').
12. Transcript of Dr Tamar Hopkins, 2 May 2023, 318 [32]–[46].
13. Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 31.
14. Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 31, citations including *Koori Complaints Project 2006-2008: Final Report* (2008), 17–18; Commission for Children and Young People, *Our Youth, Our Way: Inquiry into the Over-Representation of Aboriginal Children and Young People in the Victorian Youth Justice System* (Report, 2021) 432–433; *Inquest into the Death of Tanya Louise Day* (Coroners Court Victoria, Coroner English, 9 April 2020) ('*Inquest into the Death of Tanya Louise Day*').
15. State of Victoria, Response to Issues Paper 1: Call for Submissions on Systemic Injustice in the Criminal Justice System, 6–11.
16. State of Victoria, Response to Issues Paper 1: Call for Submissions on Systemic Injustice in the Criminal Justice System, 6–11. See also Anonymous, Submission 33, 1, regarding police treatment during First Peoples defence of the Djab Wurrung Trees (the Djab Wurrung Heritage Protection Embassy).
17. First Peoples' Assembly of Victoria, Submission 43, 8.
18. Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 496 [40]–[46].
19. Human Rights Law Centre, Submission 60, 8–10; Law and Advocacy Centre for Women, Submission 29, 16–17; Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 39–43; Jesuit Social Services, Submission 51, 5.
20. Dr Michael Maguire and Emeritus Professor Jude McCulloch, Submission 26, 5.
21. Aboriginal or Torres Strait Islander status for alleged offender incidents are based on the most frequent recording of the Indigenous status for each offender. Under this counting rule, a person has either a yes or no response to the Standard Indigenous Question (SIQ) on their record, then the most frequent recorded response is taken as correct. See Crime Statistics Agency, 'Alleged Offender Incidents by Aboriginal and Torres Strait Islander Status' (Web Page, March 2023) <<https://www.crimestatistics.vic.gov.au/crime-statistics/latest-aboriginal-crime-data/alleged-offender-incidents-by-aboriginal-and-torres>>.
22. Crime Statistics Agency, 'Indigenous Data Tables' (Data release, December 2022) Table 06 <https://files.crimestatistics.vic.gov.au/2023-03/Indigenous_Data_Tables_Alleged_Offender_Incidents_Visualisation_Year_Ending_December_2022.xlsx>.
23. Transcript of Tessa Theocharous, 14 December 2022, 380 [27]–[28].
24. Transcript of Minister for Police, the Hon Anthony Carabines, 8 May 2023, 527 [43]–[45], 528 [1]–[4].
25. Police Accountability Project, 'What Is Racial Profiling?', *Racial Profiling* (Web Page, 2023) <<https://policeaccountability.org.au/issues-and-cases/racial-profiling/>>.
26. *Charter* (n 5) s 8.

27. Police Accountability Project, 'What Is Racial Profiling?', *Racial Profiling* (Web Page, 2023) <<https://policeaccountability.org.au/issues-and-cases/racial-profiling/>>, citing Lorie Fridell, Robert Lunney, Drew Diamond, Bruce Kubu, *Racially Biased Policing: A Principled Response* (Police Executive Research Forum, 2001) 49.
28. Summary Report – Barengi Gadjin On Country Visit, 2 February 2023, [3]; Summary Report – Goolum Goolum On Country Visit, 3 February 2023, [3]; Summary Report – Dardi Munwurro Site Visit, 6 February 2023, [3]; Berry Street, Submission 27, 3.
29. Outline of Evidence Uncle Ross Morgan, 5 March 2023, 2–3 [16].
30. Outline of Evidence of Nakia Firebrace (Victorian Aboriginal Child Care Agency), 13 December 2022, 3 [14]–[15].
31. Dr Cubillo is a descendant of the Larrakia, Wadjigan and Central Arrente peoples of the Northern Territory. He is Senior Indigenous Fellow, University of Melbourne Law School, Associate Dean of Indigenous programs, Director of the Indigenous Law and Justice Hub and is admitted as a legal practitioner in the Northern Territory.
32. Outline of Evidence of Dr Eddie Cubillo, 15 December 2022, 5 [23].
33. Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 572 [6]–[7].
34. Transcript of Minister for Police, the Hon Anthony Carabines, 8 May 2023, 527 [43]–[45].
35. *Charter* (n 5) s 8. These rights are explained in *PBU and NJE v Mental Health Tribunal* (2018) 56 VR 141, 174–177 [112]–[121]. Because police are bound by the *Charter*, they must not act in a way that is incompatible with these rights or fail to give them proper consideration in making decisions: *Director of Public Prosecutions v Natale (Ruling)* [2018] VSC 339, [86]. In that case, evidence of an admission was excluded in a criminal trial because investigating police violated this and other human rights in the *Charter*.
36. Transcript of Dr Tamar Hopkins, 2 May 2023, 325–326 [43]–[2].
37. Tamar Katherine Hopkins, 'Understanding Racial Profiling in Australia' (PhD Thesis, University of New South Wales, 2022) 227. Dr Hopkin's PhD thesis was submitted as an attachment to her submission: Transcript of Dr Tamar Hopkins, 2 May 2023, 325–326 [43]–[2].
38. Transcript of Dr Tamar Hopkins, 2 May 2023, 324 [30]–[37].
39. Transcript of Dr Tamar Hopkins, 2 May 2023, 324 [5]–[46], 325 [20]–[24].
40. Transcript of Dr Tamar Hopkins, 2 May 2023, 326 [4]–[23].
41. Federation of Community Legal Centres, Submission 61, 17.
42. Witness Statement of Chief Commissioner of Police, Shane Patton, 31 March 2023, 55 [164].
43. Previously, a young person accused of an offence was required to admit their guilt in order to be eligible for a police caution, and the number of cautions police could issue to a young person was limited. The policy has now changed so that an accused person may consent to receiving a police caution without any reference to whether they are guilty of the offence and there is no longer a limit on the number of cautions a young person can receive. See *Inquiry into Victoria's Criminal Justice System* (n 3) 212. See also Tammy Mills, 'Criminal Charges over Minor Offences Prod Police to Change Tack on Youth Cautions', *The Age* (online, 9 September 2021) <<https://www.theage.com.au/national/victoria/criminal-charges-over-minor-offences-prod-police-to-change-tack-on-youth-cautions-20210908-p58pum.html>>.
44. Victoria Police, *Victoria Police Annual Plan 2021–2022* (2021) 10.
45. Victoria Legal Aid, Submission 28 (Criminal Justice System), 5.
46. Jesuit Social Services, Submission 51, 6. See also *Inquiry into Victoria's Criminal Justice System* (n 3).
47. Transcript of Dan Nicholson, 15 December 2022, 494 [40]–[48].
48. *Inquiry into Victoria's Criminal Justice System* (n 3) 217, Finding 219.
49. Department of Justice and Community Safety, 'Response to NTP-002-014 — Agency response to the Yoorrook Justice Commission', 22 [65], produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
50. Figure 4 from Supplement to the Department of Justice and Community Safety, Agency response to the Yoorrook Justice Commission's 71 Questions, 22 May 2023, 18. Updated to December 2022 using Crime Statistics Agency, 'Indigenous Data Tables' (Data release, December 2022) Table 06 <https://files.crimestatistics.vic.gov.au/2023-03/Indigenous_Data_Tables_Alleged_Offender_Incidents_Visualisation_Year_Ending_December_2022.xlsx>.
51. Diversion programs for First Peoples in Victoria include the Koori Women's Diversion Program, Koori Court and Dardi Munwurro's Ngarrja Jarranounith program. These programs and current barriers to diversion are discussed in more detail in Chapter 13: Courts, sentencing and classification of criminal offences. See Department of Justice and Community Safety, 'Response to NTP-002-014 — Agency response to the Yoorrook Justice Commission', 23–24 [68], produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
52. *Criminal Procedure Act 2009* (Vic) s 59(2)(c).
53. Federation of Community Legal Centres, Submission 61, 18.
54. Witness Statement of Chief Commissioner of Police, Shane Patton, 31 March 2023, 58 [171]–[172].
55. *Inquiry into Victoria's Criminal Justice System* (n 3) 227.
56. Ibid 220, 227, Finding 20. See also Tammy Mills, 'Criminal Charges Over Minor Offences Prod Police to Change Tack on Youth Cautions', *The Age* (Online, 9 September 2021) <<https://www.theage.com.au/national/victoria/criminal-charges-over-minor-offences-prod-police-to-change-tack-on-youth-cautions-20210908-p58pum.html>>.
57. *Bail Act 1977* (Vic) s 10(6).

58. Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 38.
59. *Inquiry into Victoria's Criminal Justice System* (n 3) 198.
60. Law and Advocacy Centre for Women, Submission 29, 18; *Mental Health Act 2014* (Vic) s 351. Yoorrook notes the 'Police and Clinician Emergency Response (PACER) units comprising a police member and a mental health clinician, provide a secondary response to incidents involving a person believed to have mental health issues. The PACER units assess the needs of the individual and make the appropriate referrals to mental health and other services to reduce the risk of them harming themselves or others. The units respond to children, young people and adults in need': Witness Statement of Chief Commissioner of Police, Shane Patton, 31 March 2023, 53 [161.4].
61. *Inquiry into Victoria's Criminal Justice System* (n 3) 199.
62. Fitzroy Legal Service, *Fitzroy Legal Service Submission to the Parliamentary Inquiry into Victoria's Criminal Justice System* (September 2021) 25–26.
63. *Ibid* 25.
64. Law and Advocacy Centre for Women, Submission 29, 18–19.
65. Transcript of Ryan Phillips, 3 May 2023, 398 [41]–[42].
66. Belinda, Warren, Apryl and Kimberly Day, *Open Letter Calling for the Offence of Public Drunkenness to be Abolished*, cited in Aboriginal Justice Caucus, Submission 74, 33.
67. Ultimately, whilst the matter was referred, the Director of Public Prosecutions confirmed that no criminal charges would be brought against the police officers involved in the case.
68. *Inquest into the Death of Tanya Louise Day* (n 14) 101.
69. *Ibid* 14.
70. Transcript of Attorney-General, the Hon Jaclyn Symes, 5 May 2023, 449 [36]–[37], 450 [36], [41].
71. Department of Justice and Community Safety, Agency response to the Yoorrook Justice Commission, 15 March 2023, 67 [262]; Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 28 [153].
72. Transcript of Katherine Whetton, 1 May 2023, 209 [5]–[10].
73. This will mean the repeal of ss 13, 14 and 16 of the *Summary Offences Act 1966* (Vic).
74. Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 27 [149].
75. Witness Statement of Chief Commissioner of Police, Shane Patton, 31 March 2023, 25–26 [90].
76. Department of Justice and Community Safety, 'Response to NTP-002-014 — *Agency response to the Yoorrook Justice Commission*', 68 [267], produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
77. If a young person does not have a safe residence, place to go or have their parent or guardian contacted they can be taken to a sobering centre or on demand place of safety provided that facility can provide a space for the young person which is separate to adults. Department of Justice and Community Safety, Response to questions taken on notice by Kate Houghton, Secretary, Department of Justice and Community Safety and Marian Chapman, Deputy Secretary, Courts, Civil and Criminal Law on 2 May 2023, 5 May 2023, 3.
78. Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 28–29 [155]–[159]; Department of Justice and Community Safety, 'Response to NTP-002-014 — *Agency response to the Yoorrook Justice Commission*', 67–68 [264], produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023. The Centre for Evaluation and Research within the Department of Health is leading the evaluation of the four trial sites, with input from the Crime Statistics Agency and Victoria Police.
79. Victorian Government Solicitor's Office, *Yoorrook Justice Commission: Public Intoxication Reforms*, 2 [11]. Yoorrook further notes that Crime Statistics Agency data shows that in Victoria, Police arrested 21,898 people for public drunkenness in 2009. In 2019, it was 6598 arrests, and 3860 in 2022 (a reduction in the rate of arrest of 23 per cent). The rate of reduction of arrests of Aboriginal people over the same period (from 2019 to 2022) was 31 per cent, with 503 Aboriginal people arrested for public drunkenness offences in 2019 and 349 in 2022: Witness Statement of Chief Commissioner of Police, Shane Patton, 31 March 2023, 26 [93] (footnotes omitted).
80. Department of Health, 'Response to NTP-002-015 — *Response to Yoorrook Justice Commission*', 16 [70], produced by the State of Victoria in response to the Commission's Notice to Produce dated 21 March 2023.
81. Department of Health, 'Response to NTP-002-015 — *Response to Yoorrook Justice Commission*', 19 [86], produced by the State of Victoria in response to the Commission's Notice to Produce dated 21 March 2023.
82. Sites are located in the City of Yarra, Greater Shepparton, Greater Dandenong and Castlemaine: Transcript of Eleanor Williams, 1 May 2023, 209 [21]–[47].
83. Department of Health, 'Response to NTP-002-015 — *Response to Yoorrook Justice Commission*', 24 [119], produced by the State of Victoria in response to the Commission's Notice to Produce dated 21 March 2023.
84. Transcript of Attorney-General, the Hon Jaclyn Symes, 5 May 2023, 451 [16]–[19].
85. Victorian Government Solicitor's Office, *Yoorrook Justice Commission: Public Intoxication Reforms*, 3 [19]; Department of Health, *Public Intoxication Reform — Overview of Work*, 19 January 2023, slide 16.
86. Witness Statement of Chief Commissioner of Police, Shane Patton, 31 March 2023, 24–25 [85].

87. Instruction CCI 04/22. See Witness Statement of Chief Commissioner of Police, Shane Patton, 31 March 2023, 25 [90.1].
88. Witness Statement of Chief Commissioner of Police, Shane Patton, 31 March 2023, 25 [90.2]. Chief Commissioner Patton also gave evidence that he sought input from the Victoria Police Human Rights Strategic Advisory Group (which includes the Victorian Aboriginal Legal Service) on the approach Victoria Police will take to public drunkenness following decriminalisation: Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 510 [41]–[45].
89. David Escourt, ‘Government Firm on Public Drunkenness Laws Despite Police Union Outrage’, *The Age* (online, 17 January 2023) <<https://www.theage.com.au/national/victoria/government-firm-on-public-drunkenness-reforms-despite-police-union-outrage-20230117-p5cd20.html>>.
90. Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 50, Footnote 152. In 2012, Maureen Mandijarra passed away in a police cell in Broome, after being arrested and detained in connection with street drinking. In 2015, Kumanjayi Langdon passed away in a police cell in Darwin, after being detained for public drinking pursuant to the ‘paperless arrest’ scheme in the Northern Territory. In 2016, Rebecca Maher passed away in a police cell in Maitland, NSW, after being detained under protective custody powers.
91. See, eg, Summary Report — Goolum Goolum On Country Visit, 3 February 2023, [3].
92. Transcript of Attorney-General, the Hon Jaclyn Symes, 5 May 2023, 453 [11]–[17].
93. Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 596 [6]–[8].
94. Witness Statement of Chief Commissioner of Police, Shane Patton, 31 March 2023, 24 [83].
95. Department of Health, *Public Intoxication Reform — Overview of Work*, 19 January 2023, slide 14.
96. Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 29 [159].
97. Transcript of Attorney-General, the Hon Jaclyn Symes, 5 May 2023, 453 [19]–[21], [41]–[43].
98. Aboriginal Justice Caucus, Submission 74, 37.
99. Centre for Innovative Justice, *Strengthening Victoria’s Victim Support System: Victim Services Review* (Final Report, November 2020) 11, 73.
100. *Ibid* 73.
101. See Victorian Government, ‘A Dedicated Strategy for Aboriginal Victims of Crime’, *Reforms We Will Deliver to Support Victims of Crime* (Web Page, 15 June 2022) <<https://www.vic.gov.au/victim-support-update/reforms-we-will-deliver-support-victims-crime#a-dedicated-strategy-for-aboriginal-victims-of-crime>>. The Minister for Victim Support gave evidence that the Strategy would be produced in 2024: Transcript of Minister for Victim Support, the Hon Enver Erdogan, 15 May 2023, 930 [34]–[38].
102. Centre for Innovative Justice, Djirra, Elizabeth Morgan House and Dardi Munwurro, *Ensuring that Aboriginal Perspectives Inform Responses to Aboriginal Victims of Crime* (December 2022) 6, 17, produced by the State of Victoria in response to the Commission’s Notice to Produce dated 15 March 2023.
103. Centre for Innovative Justice, Djirra, Elizabeth Morgan House and Dardi Munwurro, *Ensuring that Aboriginal Perspectives Inform Responses to Aboriginal Victims of Crime* (December 2022) 6–7, 17, 25–34 produced by the State of Victoria in response to the Commission’s Notice to Produce dated 15 March 2023.
104. Centre for Innovative Justice, Djirra, Elizabeth Morgan House and Dardi Munwurro, *Ensuring that Aboriginal Perspectives Inform Responses to Aboriginal Victims of Crime* (December 2022) 29–32, produced by the State of Victoria in response to the Commission’s Notice to Produce dated 15 March 2023. See also Anonymous, Submission 36, 1.
105. Anonymous, Submission 36, 1.
106. Transcript of Minister for Victim Support, the Hon Enver Erdogan, 15 May 2023, 870 [9]–[15].
107. Alannah and Madeline Foundation, Submission 21, 1–2.
108. Dr Michael Maguire and Emeritus Professor Jude McCulloch, Submission 26, 6, citing Emma Buxton-Namisnyk, ‘Domestic Violence Policing of First Nations Women in Australia: “Settler” frameworks, Consequential Harms and the Promise of Meaningful Self-Determination’ (2022) 62(6) *The British Journal of Criminology*.
109. Anonymous, Submission 36, 1.
110. Djirra, Submission 44, 5, 13–14.
111. Berry Street, Submission 27, 3.
112. The Family Violence Implementation Monitor recently found that the number of Aboriginal women classified as perpetrators by police grew by 44 per cent between 2016 and 2020. Nearly 80 per cent of Aboriginal women identified by police as the perpetrator had been recorded as a victim in the past five years: Family Violence Reform Implementation Monitor, Victorian Government, *Monitoring Victoria’s Family Violence Reforms: Accurate Identification of the Predominant Aggressor* (Report, December 2021) 10–11, Figure 2.
113. *Ibid* 14, 28; Djirra, Submission 44, 5, 13–14. Yoorrook acknowledges that misidentification of the perpetrator also occurs in same-sex relationships and that men can be victims of family violence.
114. Australia’s National Research Organisation for Women’s Safety (ANROWS), *Research Report: Accurately Identifying the ‘Person Most in Need of Protection’ in Domestic and Family Violence* (2020), 86.
115. Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 560 [4]–[6].
116. *Royal Commission into Aboriginal Deaths in Custody* (National Report, April 1991) vol 5, Recommendations 96, 133, 145, 228 (*‘RCIADIC vol 5’*).
117. Australian Law Reform Commission, Australian Government, *Pathways to Justice — an Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report, December 2017) Recommendation 14-4.
118. Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 564–565 [46]–[1].

119. Victorian Government and Victorian Aboriginal Community, *Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement Phase 4* (Partnership Agreement, 2018). See Victorian Government, 'Expand Police Cautioning and Diversion Programs', *Victorian Aboriginal Justice Agreement* (Web Page, 9 February 2023) <<https://www.aboriginaljustice.vic.gov.au/the-agreement/aboriginal-justice-outcomes-framework/goal-22-fewer-aboriginal-people-enter-the-4>>.
120. Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 565 [8]–[15].
121. The Plan includes a series of activities, outputs and outcomes in its program logic: Victoria Police, *Aboriginal and Torres Strait Islander Inclusion Action Plan 2023-25* (2023) 26.
122. That is 6615 participants: Victoria Police, *Aboriginal and Torres Strait Islander Inclusion Action Plan 2023-25* (2023) 12. Calculation of 36.3 per cent is based on 16,450 police officers, 1470 Protective Services Officers and 400 Police Custody Officers (less 33 PCO positions that are vacant): Witness Statement of Chief Commissioner of Police, Shane Patton, 4 [11], 16 [56].
123. Victoria Police, *Aboriginal and Torres Strait Islander Inclusion Action Plan 2023-25*, 12.
124. Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 564 [15]–[17].
125. Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 511 [25]–[29].
126. Police Custody Officers are not sworn officers (police members). They are public servants but wear a uniform. At the time of giving his evidence, Chief Commissioner Patton indicated that of 400 positions, 33 were vacant. This means that approximately 12 per cent had completed cultural awareness training voluntarily. Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 504–505 [47]–[10].
127. Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 561–562 [45]–[43].
128. Transcript of Chief Commissioner of Police Shane Patton, 8 May 2023, 560 [41]–[47].
129. Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 554 [19]–[21], 557 [26], 558–559 [18]–[16].
130. Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 559 [25]–[26].
131. Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 511 [31]–[44].
132. *Charter* (n 5) s 19(2).
133. Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 556 [1]–[17].
134. Outline of Evidence of Peter Hood and Tessa Theocharous, 14 December 2022, 4 [52]–[54]. The State has advised the Yoorook Justice Commission that it has searched its records based on the limited information available and has been unable to locate any reference to this incident occurring.
135. Outline of Evidence of Uncle Ross Morgan, 2 [16].
136. See, eg, Summary Report – Goolum Goolum On Country Visit, 3 February 2023, [3]; Summary Report – Barengi Gadjin On Country Visit, 2 February 2023, [3]; Outline of Evidence of Uncle Ross Morgan, 2 [14]–3 [18]; Witness Statement of Uncle Jack Charles, 26 April 2022, 10 [66]–11 [69]; Transcript of Uncle Larry Walsh and Isobel Paipadjerook Morphy-Walsh, 20 May 2022, 155 [5]–[35]; Witness Statement of Alma Beryl Thorpe, 3 May 2022, 6 [23]–[24], 7 [30].
137. Witness Statement of Chief Commissioner of Police, Shane Patton, 31 March 2023, 38, Table 4.
138. As described by the Aboriginal Justice Caucus, 'Systemic racism impacts Aboriginal communities daily and manifests itself in various ways. Aboriginal people are over-policed, over-represented in police custody and under-served when they seek assistance from police': Aboriginal Justice Caucus, Submission 74, 57.
139. *Victoria Police Act 2013* (Vic) s 74(1)-(2).
140. The police description for the male driving the car was Aboriginal, black jacket, light coloured trackpants, red cap, approximately 40 years old, with a goatee. Tommy Lovett was described by the police as 'an Aboriginal male in his early 20s wearing a black cap, black hoodie and with light pants on'. See Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 574 [16]–[39]. See also Outline of Evidence of Aunty Doreen Lovett, 6 March 2023, 2 [19]–[26].
141. Outline of Evidence of Aunty Doreen Lovett, 6 March 2023, 3 [31]–[32].
142. Senior Counsel Assisting Tony McAvoy SC made this point – see Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 576–577 [42]–[1].
143. Victoria Police Manual — Policy Rules, Persons in Care or Custody, 5–6 [3.4].
144. Outline of Evidence of Aunty Doreen Lovett, 6 March 2023, 3 [33]–[34].
145. Outline of Evidence of Aunty Doreen Lovett, 6 March 2023, 3 [35].
146. Outline of Evidence of Aunty Doreen Lovett, 6 March 2023, 4 [39]–[40].
147. Outline of Evidence of Aunty Doreen Lovett, 6 March 2023, 4 [41].
148. Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 577 [32]–[37].
149. Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 578 [19]–[24].
150. Outline of Evidence of Aunty Doreen Lovett, 6 March 2023, 4-5 [47]–[49]. See also Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 578–579 [42]–[5].
151. Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 579 [19]–[24].
152. Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 580 [6]–[45].
153. Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 581 [30]–[46], 582–583 [39]–[14].
154. Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 583 [33]–[39].
155. Outline of Evidence of Aunty Doreen Lovett, 6 March 2023, 4 [43]–[44].

156. Transcript of Minister for Police, the Hon Anthony Carbines, 8 May 2023, 550 [13]–[14].
157. Outline of Expected Evidence of Eathan, David and Anja Cruse, 28 March 2023, 1–2 [1]–[14].
158. Outline of Expected Evidence of Eathan, David and Anja Cruse, 28 March 2023, 2 [10]–[14].
159. Outline of Expected Evidence of Eathan, David and Anja Cruse, 28 March 2023, 3 [20]–[22], 4 [38]–[43].
160. Outline of Expected Evidence of Eathan, David and Anja Cruse, 28 March 2023, 3 [22].
161. *Cruse v State of Victoria* [2019] VSC 574.
162. Outline of Expected Evidence of Eathan, David and Anja Cruse, 28 March 2023, 5 [48].
163. Outline of Expected Evidence of Eathan, David and Anja Cruse, 28 March 2023, 6 [53].
164. Outline of Expected Evidence of Eathan, David and Anja Cruse, 28 March 2023, 6 [56]–[57].
165. Outline of Expected Evidence of Eathan, David and Anja Cruse, 28 March 2023, 7 [61].
166. Outline of Expected Evidence of Eathan, David and Anja Cruse, 28 March 2023, 7 [62]–[65].
167. Outline of Expected Evidence of Eathan, David and Anja Cruse, 28 March 2023, 4 [36]. See also in *Cruse v State of Victoria* (2019) 59 VR 241, [195].
168. Victoria Legal Aid, Submission 28 (Criminal Justice System), 5; Summary of Community Evidence (De-Identified Direct Quotes) Obtained at Roundtables and Prison Visits, 14 June 2023, 3 [13].
169. *Royal Commission into Aboriginal Deaths in Custody* (National Report, April 1991) vol 1, [1.2.9], [1.2.9] ('*RCIADIC vol 1*').
170. Transcript of Kate Houghton, Secretary of Department of Justice and Community Safety, 2 May 2023, 248 [18]–[20]. Following Ms Houghton's evidence there was another death of an Aboriginal person in custody, bringing the total to 34.
171. *Inquest into the Death of Raymond Noel Thomas* (Coroners Court Victoria, Coroner Olle, 20 September 2021) 12 [50] ('*Inquest into the Death of Raymond Noel Thomas*').
172. *Ibid* 31–32.
173. *Ibid* 29.
174. Witness Statement of Chief Commissioner of Police, Shane Patton, 31 March 2023, 18–19 [68].
175. Victoria Police, DSII Data Category 2, produced by Victoria Police in response to the Commission's Notice to Produce dated 26 January 2023.
176. *Charter* (n 5) ss 22(1), 10.
177. Transcript of Minister for Police, the Hon Anthony Carbines, 8 May 2023, 530 [20]–[32].
178. *Charter* (n 5) s 9.
179. *Inquest into the Passing of Veronica Nelson* (Coroners Court of Victoria, Coroner McGregor, 30 January 2023) 29–30 [91].
180. *PBU and NJE v Mental Health Tribunal* (2018) 56 VR 141, [98].
181. Minister for Police, the Hon. Anthony Carbines, Response to questions taken on notice on 8 May 2023, 6 July 2023, Attachment 1, 1[1].
182. Minister for Police, the Hon. Anthony Carbines, Response to questions taken on notice on 8 May 2023, 6 July 2023, Attachment 1, 1 [1.(a)-(b)].
183. *Coroners Act 2008* (Vic) s 11(1).
184. *Coroners Act 2008* (Vic) ss 52(2)(b), 52(3A) or if it falls into an exception listed in s 52(3).
185. Coroners Court of Victoria, *Practice Direction 3 of 2021: Police Contact Deaths*, 26 May 2021, [3.1]–[3.2].
186. Witness Statement of Chief Commissioner of Police, Shane Patton, 31 March 2023, 7 [25].
187. Australian Government, Australian Institute of Criminology, 'Deaths in Custody in Australia', *National Deaths in Custody Program* (Web Page, 30 May 2023) <<https://www.aic.gov.au/statistics/deaths-custody-australia>>.
188. Independent Broad-based Anti-Corruption Commission, *Audit of Victoria Police's Oversight of Serious Incidents* (March 2018) 13.
189. *Ibid* 6.
190. *Inquest into the Death of Raymond Noel Thomas* (n 171) 30 [148].
191. Human Rights Law Centre, Submission 60, 24 [7.8]; Law Institute of Victoria, Submission 31, 4–5; Victorian Aboriginal Legal Service Submission 34, (Criminal Legal System), 67–68.
192. Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 509–510 [42]–[4].
193. Victorian Aboriginal Legal Service (VALS), *Reforming Police Oversight in Victoria* (August 2022) 84.
194. *Ibid* 79–85. Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 67–68.
195. Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 19 [96]; Witness Statement of Minister for Police, the Hon Anthony Carbines, 31 March 2023, 1 [6], 8–9 [41]–[44]; Witness Statement of Chief Commissioner of Police, Shane Patton, 31 March 2023, 3 [6], 18 [65].
196. Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 18 [88].
197. Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 19–20 [97]–[101]; Witness Statement of Chief Commissioner of Police, Shane Patton, 31 March 2023, 20 [75]–[76].
198. Witness Statement Attorney-General, of the Hon Jaclyn Symes, 31 March 2023, 21–22 [108]–[110].
199. Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 21 [105]–[106].
200. Witness Statement of Chief Commissioner of Police, Shane Patton, 31 March 2023, 21 [80].
201. Witness Statement of Chief Commissioner of Police, Shane Patton, 31 March 2023, 21–24 [81].

202. Witness Statement of Minister for Police, Hon Anthony Carbines, 31 March 2023, 5 [27.4]; *Victoria Police Act 2013* (Vic) ss 10(3), 10(4). Yoorrook notes that the *Victoria Police Act 2013* allows for the Minister for Police to give written directions to the Chief Commissioner, after consultation with the Chief Commissioner, in relation to the policy and priorities to be pursued in the performance of the functions of Victoria Police (Division 2, section 10, subsection 1). The Minister may give a direction if they are of the opinion that the Chief Commissioner has not responded adequately to a report or recommendation, including from IBAC or the Coroners Court (subsection 3 and 4). However, the operational independence of Victoria Police is maintained by providing that, generally speaking, the Minister for Police may not direct the Chief Commissioner on operational matters.
203. Witness Statement of Minister for Police, the Hon Anthony Carbines, 31 March 2023, 12 [60].
204. Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 37.
205. In 2022, IBAC conducted interviews with organisations and individuals representing vulnerable communities in Victoria, including with First Peoples. Common themes raised included a fear of interacting with police due to power imbalances, fear of repercussion and perceptions of unfair targeting, and fears regarding personal ramifications and safety and concerns for their personal welfare should they make a report: Independent Broad -Based Anti-Corruption Commission, Submission 204, 9.
206. For an outline of this system, see, eg, Independent Broad-based Anti-corruption Commission Committee, Parliament of Victoria, *Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria* (Parliamentary Paper No 432, September 2018) vol 1, 55–103; Department of Justice and Community Safety, Consultation paper — Systemic Review of Police Oversight, 25 November 2021, 3–4 <<https://engage.vic.gov.au/systemic-review-police-oversight>>.
207. Jude McCulloch and Michael Maguire, 'Reforming Police Oversight in Victoria: Lessons from Northern Ireland' (2022) 34(1) *Current Issues in Criminal Justice*, 40–41.
208. First Peoples' Assembly of Victoria, Submission 43, 17–18; Human Rights Law Centre, Submission 60, 23; Law and Advocacy Centre for Women, Submission 29, 20; Law Institute of Victoria, Submission 31, 3; Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 65; Victoria Legal Aid, Submission 28 (Criminal Justice System), 7.
209. Law and Advocacy Centre for Women, Submission 29, 20.
210. Independent Broad-based Anti-Corruption Commission, Submission 204, 7.
211. Law Institute of Victoria, Submission 31, 3.
212. First People's Assembly of Victoria, Submission 43, 17.
213. Witness Statement of Minister for Police, the Hon Anthony Carbines, 31 March 2023, 17 [87].
214. Transcript of Minister for Police, the Hon Anthony Carbines, 8 May 2023, 545 [8]–[9].
215. *Inquiry into Victoria's Criminal Justice System* (n 3) 217, Finding 219.
216. Transcript of Attorney-General, the Hon Jaclyn Symes, 5 May 2023, 487 [10]–[14].
217. Section 73 of the Independent Broad-based Anti-corruption Commission Act 2011 (Vic) requires IBAC to refer ('must refer') to a person or body a complaint if, at any time, IBAC considers that the subject matter of the complaint is 'relevant to the performance of the duties and functions or the exercise of powers of that person or body, or it would be 'more appropriate' for the complaint to be investigated by that body.
218. Independent Broad-based Anti-corruption Commission, Submission 204, 6. Yoorrook notes that IBAC may dismiss a complaint for a number of reasons, including that a complaint: does not provide sufficient information or lacks substance or credibility; does not fall within IBAC's jurisdiction, for example allegations about service-level complaints that do not meet the threshold for either police personnel conduct or police personnel misconduct; or is already the subject of an investigation.
219. Witness Statement of Chief Commissioner of Police, Shane Patton, 31 March 2023, 38, Table 3, [122]. The Chief Commissioner of Police acknowledged these figures may not capture all complaints that relate to Aboriginal people, for example, where complaints relating to the treatment of Aboriginal people are made by non-Aboriginal people: Witness Statement of Chief Commissioner of Police, Shane Patton, 31 March 2023, 37, [122].
220. Witness Statement of Chief Commissioner of Police, Shane Patton, 31 March 2023, 38, Table 4 [122].
221. Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 511 [19]–[23].
222. Witness Statement of Chief Commissioner of Police, Shane Patton, 31 March 2023, 40 [126].
223. Witness Statement of Chief Commissioner of Police, Shane Patton, 31 March 2023, 41 [129].
224. *Victoria Police Handling of Complaints Made by Aboriginal People* (n 11) 8.
225. *Ibid* 11, 42.
226. Transcript of Minister for Police, the Hon Anthony Carbines, 8 May 2023, 544 [12]–[25].
227. *Victoria Police Handling of Complaints Made by Aboriginal People* (n 11) 80.
228. Independent Broad-based Anti-corruption Commission, Submission 204, 7, 14.
229. Independent Broad-based Anti-corruption Commission, Submission 204, 12.
230. Independent Broad-based Anti-corruption Commission, Submission 204, 14.

231. Independent Broad-based Anti-corruption Commission, Submission 204, 15.
232. Aboriginal Justice Caucus, Submission 74, 58; First People's Assembly of Victoria, Submission 43, 17–18; Human Rights Law Centre, Submission 60, 23; Law and Advocacy Centre for Women, Submission 29, 20–21; Law Institute of Victoria, Submission 31, 2–4; Dr Michael Maguire and Emeritus Professor Jude McCulloch, Submission 26, 3; Victorian Aboriginal Legal Service, Submission 34, 65–6; Victoria Legal Aid, Submission 28 (Criminal Justice System), 7.
233. Human Rights Law Centre, Submission 60, 23–24; Law and Advocacy Centre for Women, Submission 29, 20–21; Law Institute of Victoria, Submission 31, 3; Dr Michael Maguire and Emeritus Professor Jude McCulloch, Submission 26, 3; Victorian Aboriginal Legal Service, Submission 34, 65; Westjustice, Submission 91, 11–12. See also Transcript of Nick Espie, 15 December 2022, 503 [21]–[26].
234. Dr Michael Maguire and Emeritus Professor Jude McCulloch, Submission 26, 27–28.
235. Dr Michael Maguire and Emeritus Professor Jude McCulloch, Submission 26, 4.
236. Independent Broad-based Anti-Corruption Commission, Submission 204, 15–16.
237. Yoorrook notes that IBAC is independent of the Victorian Government. IBAC submitted that the PONI is required to have regard to any guidance from the Department of Justice (DOJ), reports to that department (which is accountable to the Northern Ireland Assembly), operates with a policy and resources framework determined by the Minister for Justice and the DOJ, and operates under a Management Statement and Financial Memorandum with the DOJ, subject to the PONI's legislation: Independent Broad-based Anti-corruption Commission, Submission 204, 16, citing Police Ombudsman of Northern Ireland, *Annual Report and Accounts for the year ended 31 March 2022*, 11, 44–45.
238. Transcript of Marian Chapman, 2 May 2023, 300 [1]–[5].
239. State of Victoria, Response to Issues Paper 1: Call for Submissions on Systemic Injustice in the Criminal Justice System, 25 [93].
240. State of Victoria, Response to Issues Paper 1: Call for Submissions on Systemic Injustice in the Criminal Justice System, 28, [108].
241. Royal Commission into the Management of Police Informants, Final Report, 234–235, Recommendation 61.
242. Victorian Aboriginal Legal Service, Submission 34, 65.
243. For example, the Minister for Police agreed that confidence in police is not likely to be restored unless the complaints system is structurally and operationally independent of police: Transcript of Minister for Police, the Hon Anthony Carbines, 8 May 2023, 547 [25]–[38].
244. Transcript of Attorney-General, the Hon Jaclyn Symes, 5 March 2023, 487 [15]–[26].
245. Witness Statement of Minister for Police, the Hon Anthony Carbines, 31 March 2023, 17 [88].
246. Transcript of Minister for Police, the Hon Anthony Carbines, 8 May 2023, 544 [1]–[2].
247. Witness Statement of Chief Commissioner of Police, Shane Patton, 31 March 2023, 31 [116].
248. Witness Statement of Chief Commissioner of Police, Shane Patton, 31 March 2023, 43 [133.3].
249. He stated that Victoria Police consulted with Aboriginal stakeholders including the Koori Complaints Project, the Regional Aboriginal Justice Advisory Committees and Local Aboriginal Justice Advisory Committees Network, and the Aboriginal Portfolio Reference Group in developing the new system: Witness Statement of Chief Commissioner of Police, Shane Patton, 31 March 2023, 42–43 [133]–[134].
250. Witness Statement of Chief Commissioner of Police, Shane Patton, 31 March 2023, 43 [133.5].
251. Witness Statement of Chief Commissioner of Police, Shane Patton, 31 March 2023, 28 [101].
252. Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 584–585 [44]–[2].
253. Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 585 [23]–[29].
254. Victorian Equal Opportunity & Human Rights Commission, Submission 102, 2–5.
255. Transcript of Dr Tamar Hopkins, 2 May 2023, 319 [25]–[29].
256. *Anti-Discrimination Act 1991* (Qld) s 101; *Anti-Discrimination Act 1998* (Tas) s 22(1)(f); *Anti-Discrimination Act 1992* (NT) s 49A.
257. Transcript of Attorney-General, the Hon Jaclyn Symes, 5 May 2023, 457 [10]–[23].
258. Outline of Evidence of Peter Hood and Tessa Theocharous, 14 December 2022, 4 [50]–[51].
259. Based on VAGO analysis of data from March 2021, BWCs were turned on 83.6 per cent of the time when needed: Victorian Auditor-General's Office, *Managing Body-Worn Cameras* (Report, 2022) 1 ('*Managing Body-Worn Cameras*').
260. *Ibid* 2-6.
261. The Minister for Police, in answering questions on notice, stated that 'Since 2018 Victoria Police has identified seven disciplinary charges issued relating to body worn camera usage, involving three different employees. As a result of those disciplinary charges: one employee resigned prior to the disciplinary inquiry, one employee was reprimanded, one employee was ruled ineligible for promotion for 12 months. There are many more cases where local management has taken action (such as workplace guidance, training or admonishment) against an employee in relation to body worn camera compliance'. Minister for Police, the Hon. Anthony Carbines, Response to questions taken on notice on 8 May 2023, 6 July 2023, Attachment 1, 2[2].
262. For example, if there was a legitimate reason to not turn on the BWC (such as a camera malfunction): Transcript of Minister of Police, the Hon Anthony Carbines, 8 May 2023, 540 [10]–[14], [35]–[46], 541 [38]–[45].
263. Transcript of Minister of Police, the Hon Anthony Carbines, 8 May 2023, 542 [31].

264. Minister for Police, the Hon. Anthony Carbinés, Response to questions taken on notice on 8 May 2023, 6 July 2023, Attachment 1, 3[3].
265. *Managing Body-Worn Cameras* (n 259) 4, Recommendation 5.
266. Liberty Victoria's Rights Advocacy Project Criminal Justice Team et al, *Police Panopticon: Zooming in on the Use of Body Worn Cameras by Victoria Police Officers* (Report, July 2022) 30.
267. See *Evidence Act 2008* (Vic) s 138(1), which provides that evidence that is obtained improperly should not be admitted if the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.
268. Transcript of Minister of Police, the Hon Anthony Carbinés, 8 May 2023, 543 [6]–[9]. In the Minister's response to questions on notice, he noted, amongst other things, that police officers who did not turn on their BWCs could be cross-examined in court proceedings about why this was the case. Minister for Police, the Hon. Anthony Carbinés, Response to questions taken on notice on 8 May 2023, 6 July 2023, Attachment 1, 3[4].
269. Independent Broad-based Anti-corruption Commission (IBAC) Victoria, *Special Report on Corrections: IBAC Operations Rous, Caparra, Nisidia and Molar* (June 2021) 10, 34; Farrah Tomazin, 'Call for Overhaul: Police Can Deactivate Body Cameras, Edit Footage' *The Age* (online, 10 November 2019) <<https://www.theage.com.au/national/victoria/call-for-overhaul-police-can-deactivate-body-cameras-edit-footage-20191108-p538vg.html>>; Kristen Hilton et al, *Safer Prisons, Safer People, Safer Communities: Final Report of the Cultural Review of the Adult Custodial Corrections System* (December 2022) 368; Victorian Ombudsman, *Report on Investigations into the Use of Force at the Metropolitan Remand Centre and the Melbourne Assessment Prison* (June 2022) 33.
270. See also recommendations made in Jeremy King and Peggy Lee, 'Body Worn Cameras: The All-Seeing Eye?' (2020) 94(10) *Law Institute Journal* 22.
271. Victoria Police, *Keeping You Safe: Victoria Police Strategy 2023-2028* (2023) 1, 4.
272. *Ibid*, 'Our commitment to the Aboriginal community'.
273. Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 496 [44]–[46].
274. Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 496 [7]–[18].
275. Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 495 [37]–[39].
276. Transcript of Minister for Police, the Hon Anthony Carbinés, 8 May 2023, 525 [20]–[21].
277. As at 8 May 2023. Transcript of Minister for Police, the Hon Anthony Carbinés, 8 May 2023, 549 [19]–[21]. See also Victoria Police, *Aboriginal and Torres Strait Islander Inclusion Action Plan 2023–25* (2023) 10.
278. Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 495, [10]–[11].
279. 'I would love to have Aboriginal people employed in IBAC, be a Commissioner, have a stream for Aboriginal people to make complaints that can be dealt with by Aboriginal people': Transcript of Attorney-General, the Hon Jaclyn Symes, 5 May 2023, 487 [31]–[33].
280. The PONI allows the employment of former police under strict conflict of interest controls. Tim Prenzler and Michael Maquire, *Models of Police Oversight and Complaints Handling Process*, (Report for the Independent Commission of Inquiry into Queensland Police Service Responses to Domestic and Family Violence, COI.094.0001, 22 August 2022) 14. <final-report-prenzler-and-maquire.pdf> (qpsdfvinquiry.qld.gov.au). Yoorrook notes that an extensive 2017 review by Justice Michael H. Tulloch of independent investigative models in Canada found a civilian-led body is enhanced by including team members with ex-police experience. Justice Tulloch found that as long as former police did not dominate staff levels – their contribution in criminal investigations of police behaviours was valuable. The Honourable Michael H. Tulloch, *Report of the Independent Policy Oversight Review* (Queen's Printer for Ontario, 2017) 81-82. <<http://www.policeoversightreview.ca/policereport.html>>.
281. See Victorian Aboriginal Legal Service, *Policy Brief: Reforming Police Oversight in Victoria* (2022) 43; Parliament of Victoria, *Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria* (Parliamentary Paper No 432, September 2018) 127-8.
282. Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 497 [1]–[5].

11 BAIL

To the law makers, I want you to sit and listen to Veronica's final hours. I want her voice to ring in your ears until you realise that our justice system is broken. Veronica should never have been locked up. You were supposed to change bail laws to stop a white male monster from killing people, but instead you filled our prisons with non-violent Aboriginal women like my daughter Veronica. Our bail laws need to change now ... My Poccum should not have been locked up. She should not have begged for her life. She should be here with me today. If we do not change bail laws today, it will be someone else's daughter tomorrow.¹ AUNTY DONNA NELSON

Introduction

Yoorrook heard repeatedly how Victoria's bail laws are harming First Peoples. When someone is charged with an offence and bail is denied, they are imprisoned on remand waiting for their trial or sentence. Loss of liberty is just one of the harms imposed. Imprisonment on remand creates risks of the person losing their housing, employment, family and community supports, and their children to the child protection system. It also risks deaths in custody.

Accordingly, the denial of bail and consequent imprisonment on remand should only occur where strictly necessary — recognising, as recommended by the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), that imprisonment should be a last resort.

Despite this context, the Victorian Government has implemented bail reforms over the past decade which have [driven unprecedented and disproportionate growth in the number of Aboriginal men, women and children held on remand](#) in Victoria's prisons and youth detention centres. The number of Aboriginal men in prison on remand increased by 598 per cent in the decade to 30 June 2019, and by 475 per cent for Aboriginal women.²

These laws led to the imprisonment of Veronica Nelson, a proud and much loved Gunditjmarra, Dja Dja Wurrung, Wiradjuri and Yorta Yorta woman, who died at a maximum-security prison while imprisoned on remand for shoplifting offences.

Yoorrook expresses its deep condolences to Ms Nelson's family for their loss and grief and expresses its thanks to Ms Nelson's family for sharing their experience with the Commission.

As a result of these laws, in May 2023, 48 per cent of Aboriginal adults in Victorian prisons and 82 per cent of Aboriginal children and young people in detention were on remand.³ That is around 400 Aboriginal people locked up in prison waiting for their trial or sentence. Half of all Aboriginal prisoners discharged from Victorian prisons in 2021–22 did so were unsentenced.⁴

This is a shocking indictment on the Victorian Government's stated commitment to addressing the high rates of imprisonment of Aboriginal people. It highlights how little has been done to achieve the RCIADIC vision for a justice system that only uses imprisonment as a last resort.

Victoria's bail laws have been the subject of detailed examination and criticism by recent inquiries, notably in the Coroners Court of Victoria Finding in the Inquest into the Passing of Veronica Nelson (Veronica Nelson Inquest).⁵ The laws were also criticised in the 2022 Inquiry into Victoria's Criminal Justice System by the Legal and Social Issues Committee of the Legislative Council of the Parliament of Victoria (Legal and Social Issues Committee Inquiry).⁶

These inquiries found that Victoria's bail system operates discriminatorily, is incompatible with human rights

and contributes to the over-imprisonment of First People.⁷ The inquiries recommended a fundamental rewriting of the *Bail Act 1977* (Vic) to rebalance the objectives of maintaining community safety with fairness to people accused of an offence, as well as introducing measures to ensure bail and remand processes are culturally safe.⁸

Restoring balance and fairness to Victoria's bail system is an urgent imperative. So too is ensuring the bail and remand systems are culturally safe. These changes will have immediate benefits for First Peoples and their families and communities. They are also essential for generating confidence in the justice system. A properly balanced bail system can

appropriately manage relevant community safety risks without unnecessarily imprisoning and harming vulnerable people.

During Yoorrook's inquiry, the government finally announced its intention to amend the *Bail Act*. Yoorrook has recommended that the government go further than the announced changes. If the government is truly committed to truth telling and to justice for First Peoples, it will adopt these broader recommendations.

Yoorrook will be monitoring these developments closely, in particular to assess how far reforms shift the criminal justice system's deep-set and system-embedded bias towards imprisonment of First Peoples.

How Victoria's bail system works



Bail is the process by which a person charged with a crime is permitted to remain in the community in the period between being charged and having those charges determined by a court. Bail reflects the presumption of innocence on which our criminal justice system is founded. If an accused person is not granted bail, they are imprisoned on 'remand' until the charges are determined by a court. A person is imprisoned on remand even though they have not been found guilty of any offence.

Depending on several factors, including the type of offence and point of time in the court process, decisions whether to grant bail may be made by police, bail justices or judicial officers (collectively referred to as 'bail decision makers').

There are restrictions on how many bail applications a person may make. Section 18AA of the *Bail Act* states that if a person has made an application with legal representation and is refused bail, they are only entitled to apply for bail again if they can show that 'new facts or circumstances have arisen' since bail was refused.

The *Bail Act* contains several provisions requiring bail decision makers to take an accused person's personal circumstances into account when considering bail. Section 3A requires the decision maker to consider an Aboriginal person's cultural background, ties to extended family or place, and other cultural

issues or obligations. Section 3AAA requires the decision maker to consider the 'surrounding circumstances' relevant to the matter, which may include 'any special vulnerability of the accused, including being ... an Aboriginal person'.⁹

When a person is granted bail, they must give an undertaking to attend court for their hearing and may also have to pay a cash deposit. Bail decision makers can also impose conditions to reduce the likelihood that an accused person may endanger the safety of a person, commit an offence while on bail, or fail to turn up to court. Conditions can include reporting to a police station, residing at a particular address or attending a bail support service such as substance abuse or homelessness services.

Police have some discretion in deciding what process to use when first charging someone with an offence. The most frequently used process is to charge someone on summons, requiring them to attend court for their hearing. This is the process that 'triggers' the bail and remand system. However, in some circumstances police can also commence a charge using a Notice to Appear.¹⁰ If they do so, there is no requirement to consider bail or remand, because the court is ultimately able to determine the charges even if the accused does not turn up to the hearing.¹¹ A 2017 analysis undertaken by Justice Coghlan revealed the Notice to Appear process is rarely used.¹²

What Yoorrook heard

Bail laws are punitive, unjust and harmful to First Nations people

Organisations that have first-hand experience of the impact of bail laws or play a role in monitoring Aboriginal justice issues all called out the dramatic rise in remand rates for Aboriginal people, particularly Aboriginal women.¹³

Yoorrook received overwhelming evidence that Victoria's bail laws are 'punitive', 'harsh' and harmful.¹⁴ These laws hold people who 'are accused of engaging in repeat, low-level wrongdoing ... to the same bail standard as people accused of the most violent crimes'.¹⁵

An Aboriginal man at the Dardi Munwurro roundtable explained that navigating changes to bail laws and discrimination can result in lengthy prison time on remand for low-level offending which would not receive lengthy prison sentences:

To be judged when you — when you walk into a police station and — and you get arrested on allegations, I'm guilty straight up. But then to drop those charges nine months later, well, why didn't you drop them to start off with? Why didn't you do your research first instead of putting me nine months in gaol ... Remand for nine months.¹⁶

Over the last decade, Victorian law has changed to severely restrict access to bail. This came in the aftermath of high-profile crimes committed by a person on bail for other offences.

There has been a distinct, significant shift from viewing bail decision-making as a procedural mechanism for ensuring attendance at trial to viewing refusal of bail as a crime prevention tool, with bail decision-making increasingly representing 'a moment where accusation, guilt and punishment are conflated'.¹⁷

Yoorrook heard that these bail reforms have led to the mass imprisonment of First Peoples charged with offences that are generally associated with poverty, homelessness and being a victim of crime.¹⁸

More people — particularly women — are being denied bail, not because they pose a risk to the community, but because they themselves are at risk — of family violence, homelessness, economic disadvantage and mental illness.¹⁹

Many Aboriginal women facing relatively minor charges have been caught by these reforms, in particular the 'reverse onus' and 'double uplift' provisions of the *Bail Act*. For example, an Aboriginal woman was

charged with the theft of essential grocery items during a period of homelessness and was remanded in custody for allegedly offending on bail despite the fact that the charges would not have resulted in a term of imprisonment being imposed as a penalty.²⁰

The new bail offences are also resulting in much harsher treatment of people who commit minor or technical breaches of bail conditions due to their social disadvantage.²¹ This can be a particular issue for women who have been misidentified as family violence perpetrators.²²

Victorian prisons have rapidly filled with people on remand

Unsurprisingly, restricting access to bail has led to a rapid increase in the numbers of people entering prison on remand, as shown in Figure 11-1. A flattening of the trend occurred during the COVID pandemic.³⁰

First Peoples, and particularly First Peoples women, were hit hardest by the bail law changes. Between 2009–10 and 2019–20, there was a 560 per cent increase in First Peoples entering prisons unsentenced (i.e., on remand).³² Between 2012–13 and 2018–19, the number of Aboriginal people entering

The bail reforms explained



Reverse onus and the ‘double uplift’

Historically in Victoria, only those considered at particular risk of not turning up to court were remanded in custody.²³

Legally, this was achieved by having a presumption *in favour* of a person being granted bail, with prosecuting authorities having to prove why bail should not be granted. A presumption *against* bail applied only to a handful of very serious offences, including murder, treason, commercial drug trafficking and terrorism offences.

Bail reforms between 2013 and 2018²⁴ widened the range of offences for which the presumption in favour of bail does not apply.²⁵ Instead, the accused person must prove why bail should be granted. For these offences, bail must be refused unless the person can prove there are ‘exceptional circumstances’ or a ‘compelling reason’ to justify bail, depending on the offence. This is called the ‘reverse onus’ test.

Some offences, if committed while the accused person was on bail, parole or subject to a community corrections order, attract the highest ‘exceptional circumstances’ test.²⁶ This means that a person charged with multiple low-level offences must meet

the highest threshold for bail — the same threshold as a person charged with very serious offences like murder or terrorism. This is called the ‘double uplift’.

New breach of bail offences

Further reforms created two new offences of contravening a conduct condition of bail and committing an indictable offence while on bail.²⁷ In addition to being grounds for revoking bail, it is now an offence for an accused person to contravene a bail conduct condition (not including a requirement to attend and participate in bail support services). In addition to being an offence in its own right, it is now a separate offence to commit an indictable offence while on bail.²⁸

New unacceptable risk test

A requirement has been introduced for bail decision makers to refuse bail if satisfied there is an ‘unacceptable risk’ that the accused person would endanger the safety or welfare of any person, commit an offence while on bail, interfere with a witness or the administration of justice, or fail to surrender into custody in accordance with their bail conditions.²⁹ This test applies to all bail decisions.

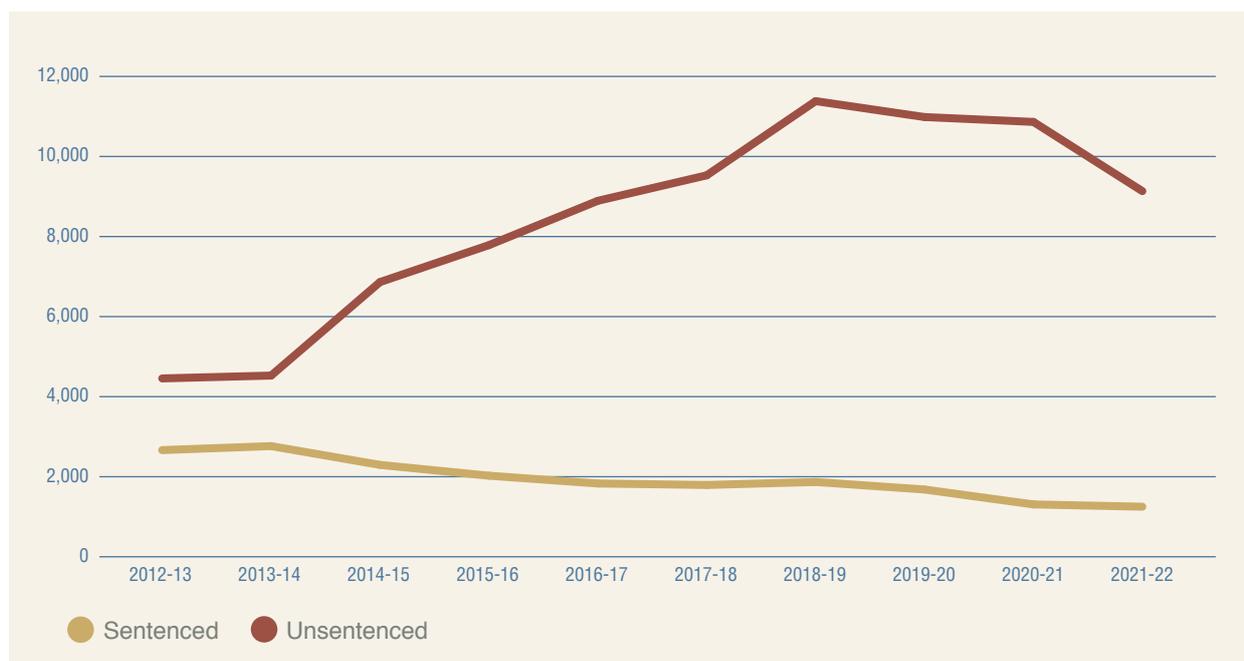


FIGURE 11-1: Number of prisoner receptions³¹

prison unsentenced increased from 379 per year to 1490 per year.³³

Recent data provided to Yoorrook shows that the problem continues to be dire for Aboriginal people. On 1 May 2023, 48 per cent of the 822 Aboriginal men and women in prison in Victoria were unsentenced.³⁴ On 9 May 2023, there were 11 Aboriginal young people in detention, nine of whom were on remand.³⁵

The trend of increases in the Aboriginal remand population is shown in Figure 11-2.

Between June 2010 and June 2022, the proportion of Aboriginal people in prison who had not been sentenced increased from 20 per cent to 49 per cent.³⁷ This was higher than the overall unsentenced prisoner rate of 42 per cent at the time.³⁸ The actual number of unsentenced Aboriginal prisoners increased from 59 to 339 in that period.³⁹

In the year ending June 2022, 150 Aboriginal people were received into prison under sentence compared with 1190 (89 per cent) received unsentenced. In the same year, 735 Aboriginal people were discharged

from prison having spent no time under sentence, representing 52 per cent of all discharges of Aboriginal people.⁴⁰

The impact on Aboriginal women has been even more dramatic. The proportion of Aboriginal women arriving in prison on remand increased from approximately 61 per cent of all arrivals in 2010–11 to 87 per cent in 2021–22.⁴¹ Analysis by the Crime Statistics Agency shows that the new reverse onus, uplift and bail offence provisions were responsible for the sharp rise in remand rates for women:

- in 2012, 37 per cent of unsentenced women would have been subject to a reverse onus test, but this increased to 74 per cent in 2015 and 79 per cent in 2018
- in 2012, 16 per cent of sentenced women would have been subject to a reverse onus test when being considered for bail, but this increased to 34 per cent in 2015 and 60 per cent in 2018
- a large proportion of the increase in proportions of women subject to a reverse onus test was related to the two new bail offences added

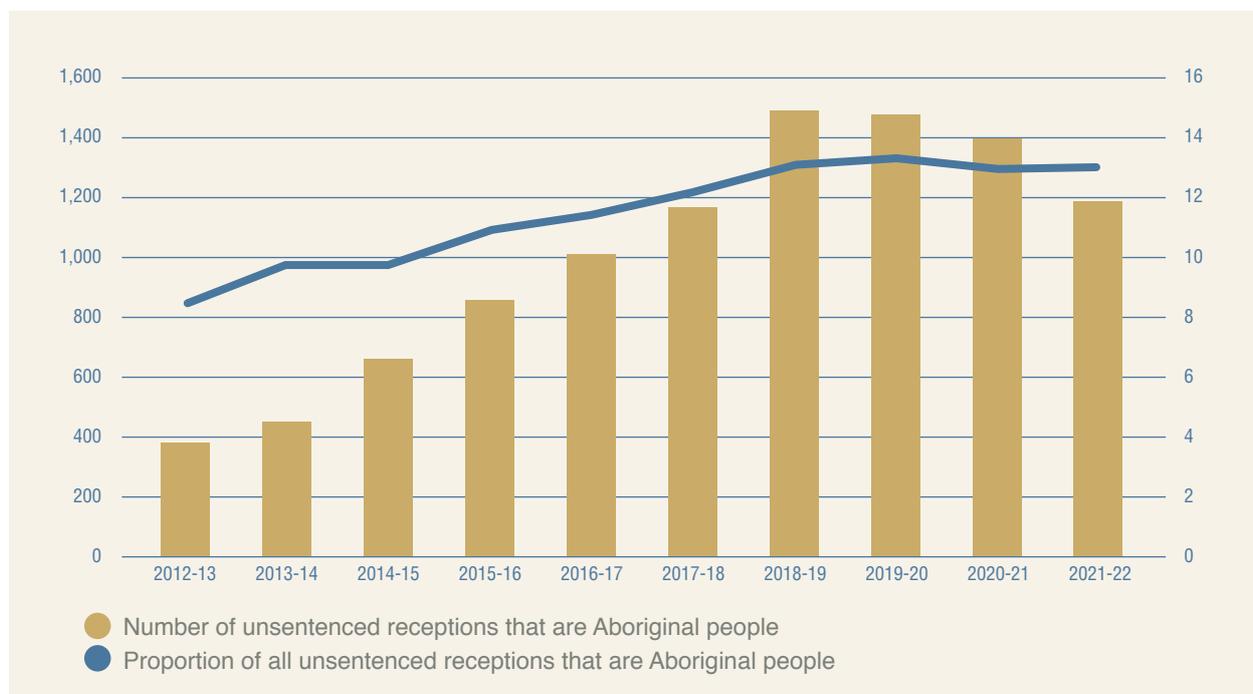


FIGURE 11-2: Number and proportion of Aboriginal unsentenced prisoner receptions, 2012–13 to 2021–22³⁶

to the ‘show cause’ test of the *Bail Act* in 2013 (contravention of a conduct condition of bail and commitment of an indictable offence whilst on bail).⁴²

Disturbingly, Aboriginal people (particularly women) imprisoned on remand have frequently been charged with low-level, non-violent offences, including offences relating to breaching bail conditions. A Crime Statistics Agency analysis of data from 2012 to 2018 found:

- in 2018, the most recorded charge for women entering prison on remand was a breach of order, with almost three-quarters of women recorded for this type of offence (74 per cent)⁴³
- half the women who entered prison on remand during 2018 had been charged with one of two new breach of bail offences first introduced during December 2013.⁴⁴

Remand time often exceeds the ultimate sentence

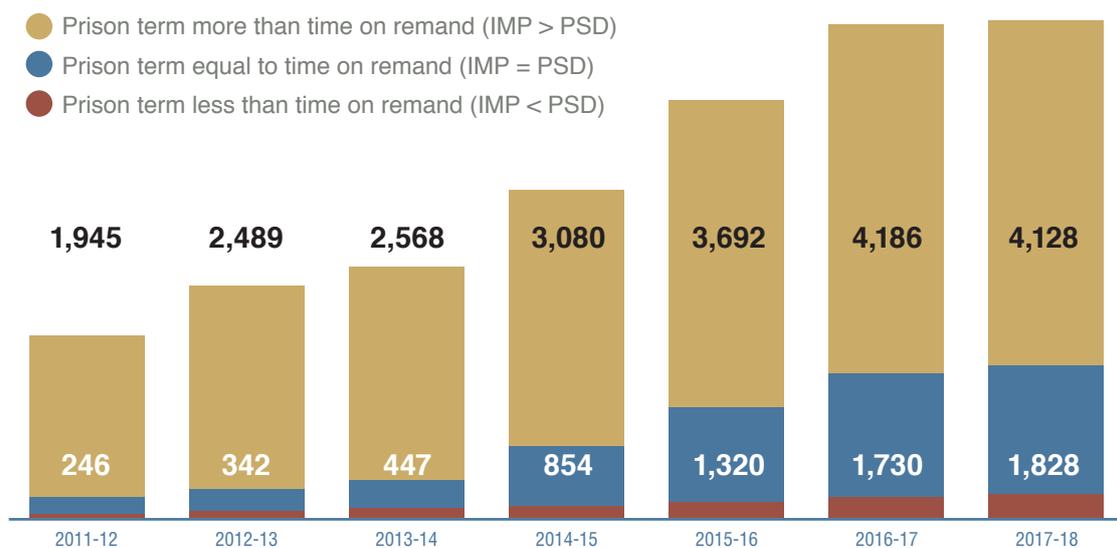
Legal services told Yoorrook that the period a person spends on remand often exceeds the term of imprisonment they ultimately receive when sentenced, if any.⁴⁵ Djirra identified that many of their clients do

not receive a prison sentence, or if they do, it is less than the prison time served on remand.⁴⁶ Similarly, Victoria Legal Aid reported that over 85 per cent of their cases which resolved with a plea of guilty in the Bail and Remand Court in 2018–19 did not result in a sentence of imprisonment.⁴⁷

In other words, people are receiving a harsher punishment by reason of being *charged with* a crime than they are receiving on being *found guilty* of the crime. This is manifestly unjust. Further, it undermines the integrity of the court system. It perversely encourages people who have a defence to charges to plead guilty in the hope of spending less time in prison than if they waited, locked up on remand, for the chance to defend the charges at their trial.⁴⁸

As noted above, 52 per cent of Aboriginal people who were released from prison in the year ending June 2022 had not been sentenced to any time in prison.⁴⁹ The equivalent rate for Aboriginal children and young people was 88 per cent.⁵⁰

In 2020, the Sentencing Advisory Council documented the large increase in the use of ‘time served’ sentences, shown in Figure 3.⁵¹ Time served sentences are sentences for a term of imprisonment equal to that already served on remand. The Council found



Source: Sentencing Advisory Council, *Time Served Prison Sentences in Victoria*, Sentencing Advisory Council, Melbourne, Victoria.

FIGURE 11-3: Prison terms imposed by all Victorian adult courts, 2011–12 to 2017–18

that the rise in Victoria's remand population was likely affecting the increased use of these sentences. The Council commented that 'courts are more frequently being put in the position of having to impose sentences on people who have, for all intents and purposes, already been punished'.⁵²

The Australian Law Reform Commission found that time served sentences, which are most often less than six months, are ineffective in reducing offending and particularly damaging to Aboriginal offenders.⁵³ This is because they:

- expose minor offenders to more serious offenders in prison
- have significant negative impacts on the offender's family, employment, housing and income
- potentially increase the likelihood of recidivism through stigmatisation and the flow on effects of having served time in prison.⁵⁴

Time served sentences and remand more generally can result in unfairness and undermine rehabilitation through inappropriate guilty pleas, the lack of post-release support, compromised employment prospects, and an increased likelihood of a prison sentence on a return.⁵⁵

A case example from the Law and Advocacy Centre for Women (LACW) illustrates these effects:

One First Nations woman was referred to LACW when she was in custody. She had been using methamphetamine for approximately a year before she was remanded, and accrued several criminal charges during that period. An application for bail was made seeking her release to a culturally appropriate residential rehabilitation program. The Magistrate refused bail because they considered that she posed an unacceptable risk of reoffending. Our client then instructed that she wanted to plead guilty instead. She was sentenced to 'time served' and released into the community without any drug and alcohol support.⁵⁶

Remand causes extreme harm

[T]he 'complete and unmitigated disaster' of the 2018 changes to the Bail Act is most obviously inflicted on the accused who are incarcerated, often for short periods and for unproven offending of a type that often ought not result in imprisonment if proven. Short periods in custody are destabilising and often serve to exacerbate issues underlying the person's alleged offending by producing loss of housing, work or income, the breakdown of relationships and support networks, and disrupted access to treatment and other services. These outcomes are plainly antithetical to rehabilitation and adversely affect the underlying social issues that drive offending.⁵⁷

Djirra told the Commission that many of the women it assists 'are from regional Victoria and have little to no contact with their children while they are incarcerated. One day in prison can destroy a woman's life — she may lose employment, housing and her children'.⁵⁸ Djirra also noted that prisons are inherently violent and harmful places, and that Aboriginal women belong with their families and in their communities, not behind bars.⁵⁹

Numerous submissions emphasised the significant harms caused by being remanded in custody.⁶⁰ Imprisonment for any length of time damages families and prevents parents from being able to provide stable homes for their children, disconnects Aboriginal people from their culture, causes housing and employment instability, interrupts recovery and rehabilitation efforts, and leads to cycles of further imprisonment.⁶¹

The most harmful outcome is a needless and preventable death in custody. Several submissions drew attention to the tragic and preventable passing of Veronica Nelson, who died while remanded in prison at the Dame Phyllis Frost Centre.⁶² Veronica passed away alone in a prison cell after 'begging for assistance for several of the last hours of her life'.⁶³



Antoinette Braybrook AM, CEO, Djirra



Marian Chapman, Deputy Secretary, Courts, Civil and Criminal Law, Department of Justice and Community Safety and Kate Houghton, Secretary, Department of Justice and Community Safety

That Veronica was separated from her family, community, culture, and Country at the time of her passing is a devastating and demoralising circumstance.⁶⁴

Yoorrook spoke directly to First Peoples in prison who described the harsh and alienating environment inside. An Aboriginal woman who had been on remand for more than 12 months at Dame Phyllis Frost Centre told Yoorrook that she had not been able to access the drug rehabilitation programs she needed.⁶⁵ Male prisoners spoke of ‘being slotted’ (put in isolation) for long periods while on remand, and according to some prisoners, for years.⁶⁶

The Victorian Government acknowledged the detrimental impacts of remand on Aboriginal people in its evidence to Yoorrook.⁶⁷ In 2021–22 the median length of prison stay for Aboriginal women at Dame Phyllis Frost Centre on remand was 38 days, and half of all Aboriginal men on remand spent less than three months in prison.⁶⁸ Of course, many people spend much longer than this on remand. Because of their relatively short stays in prison, people on remand are generally unable to access the programs and services available to other prisoners in the Victorian corrections system.⁶⁹ This means they miss out on the rehabilitation and transition support they may need.⁷⁰ These issues are discussed further in Chapter 14: Prisons.

The bail system is racist in its outcomes and application

The evidence presented in numerous submissions demonstrated that Victoria’s bail laws operate in a discriminatory way against First Peoples.⁷¹ The evidence suggests this is a result of myriad factors, including the over-policing of Aboriginal communities, police misidentification of family violence perpetrators, the economic and social disadvantage experienced by First Peoples, and discriminatory attitudes of police and judicial officers.⁷²

The Victorian Aboriginal Legal Service (VALS) called out the racism that permeates all aspects of the criminal justice system and is ‘a key factor contributing to the overrepresentation of Aboriginal people across all aspects of this system, including in custody’.⁷³ Aboriginal Housing Victoria said that the bail reforms, along with other criminal justice policies ‘amount to structural racism’ given the unsurprising increase in the number of Aboriginal people in prison.⁷⁴

The Secretary of the Department of Justice and Community Safety (DJCS), Kate Houghton, acknowledged that the high rates of remand population for Aboriginal people compared to non-Aboriginal people is evidence of systemic racism.⁷⁵ She also accepted that these high remand rates were also the result of bias and decision-making discretion exercised to the disadvantage of First Peoples.⁷⁶

Housing shortages and housing instability both contribute to the likelihood of offending and are a major barrier to Aboriginal women being granted bail.⁷⁷ Although it is not an express requirement of the *Bail Act*, bail decision makers usually regard a lack of stable housing as a reason to deny bail. The Law and Advocacy Centre for Women reported that:

Rising rates of homelessness, affordability challenges in the private rental market and insufficient supply of social housing, and in particular public housing... increase the number of First Nations women in custody because stable housing is a crucial element of satisfying tests for bail. Women who do not have an address to be bailed to or who are in insecure housing circumstances are unlikely to be granted bail and can often be remanded purportedly for their 'safety' as they have nowhere else to go.⁷⁸

Even if an accused person can nominate an address where they will live while on bail, they may not be able to continue living there. Djirra told Yoorrook that some of its clients have been forced to breach bail because their bail address was unsafe due to family violence.⁷⁹

Organisations also pointed to the interconnectedness of unjust bail practices and the experiences First Peoples have of high imprisonment and deaths in custody rates, child removal, drug and alcohol use, mental health issues and intergenerational trauma.⁸⁰ Djirra said, 'High incarceration rates of Aboriginal women directly impact on child removal rates, the rights of Aboriginal children and have ongoing devastating impacts on Aboriginal families and communities'.⁸¹

Yoorrook also heard evidence from a criminal lawyer from Kurnai Legal, that over the last five or six years the police have not once granted her clients' bail applications, whereas previously police often granted bail of their own accord or after negotiation with the lawyer.⁸² In evidence she stated, 'When police are confronted with an Aboriginal person, they often remand them for trivial reasons, rather than bailing them'.⁸³

Yoorrook heard from Tess Theocharous at Kurnai Legal about an Aboriginal woman who was arrested together with her partner, a non-Aboriginal man. The

Currently available bail support services



Some services are available to support people in their applications for bail. For Aboriginal people, these include health and wellbeing checks and legal advice through the VALS Custody Notification System. In 2021–22, VALS processed over 11,800 individual notifications from police stations regarding Aboriginal people in custody.⁸⁵ VALS also auspices the Aboriginal Community Justice Panels a program staffed by volunteers which provides broader support to individuals and families.⁸⁶

To manage demand following the 2018 Bail reforms, the Magistrates' Court of Victoria established the Bail and Remand Court. It hears after-hours applications from across the Melbourne metropolitan area.⁸⁷ There is also now a Weekend Online Remand Court so that children and young people are not automatically remanded over the weekend.⁸⁸ The Youth Justice After Hours Bail Service (which is run by DJCS) provides support for children charged with an offence after hours.⁸⁹

The Magistrates' Court operates a program to assist people to comply with bail — the Court Integrated Services Program (CISP).⁹⁰ CISP coordinates referrals to health, housing and other services, and to Aboriginal-specific services. There are Koori CISP officers at some Magistrates' Court locations, at the Melbourne, Heidelberg, Latrobe Valley and Shepparton Magistrates' Courts.⁹¹

Other targeted bail-related initiatives include Koori Women's Place, Family Centred Approaches, Baggarrook residential facility and the Local Justice Worker program.⁹²

woman had fewer prior offences than her partner. At the police station, her partner was granted bail, but she was held and interviewed for a further six hours and police remanded her and brought her before court the following day. Ms Theocharous explained that despite being in a position of exceptional circumstances that in her view should have been grounds for bail, the magistrate refused bail.⁸⁴

The bail system is not culturally safe

In 2010, section 3A was inserted into the *Bail Act* to recognise historical disadvantage leading to the over-representation of Aboriginal people imprisoned on remand.⁹³ Section 3A requires bail decision makers to take into account ‘any issues that arise due to the bail applicant’s Aboriginality, including their cultural background, ties to extended family or place, and any other relevant cultural issue or obligation’.⁹⁴

Yoorrook heard that these provisions are not routinely or substantively applied, nor are adequate cultural supports provided to Aboriginal people facing the prospect of remand.⁹⁵

[T]here is a lack of understanding regarding the scope and content of this obligation and it appears that the obligation is either not being complied with, or if it is, a person’s Aboriginality is regularly being considered as a deficit rather than a strength.⁹⁶

This was confirmed by the Coroner in the Veronica Nelson inquest who found that the provision and application of section 3A ‘in practice is not well understood by police, the legal profession, and members of the judiciary’.⁹⁷

Stakeholders told Yoorrook that judicial decision makers should receive training on the drivers of First Peoples women’s criminalisation to promote more equitable bail decision-making. LACW submitted that all bail decision makers should be trained on the recommendations of RCIADIC and the need to reduce the shameful over-representation of First Peoples in the prison and justice systems.⁹⁸

Yoorrook was informed about the cultural awareness training offered to bail justices, police and judicial officers to support appropriate decision-making under the *Bail Act*.

Bail Justices are legislatively required to undertake Aboriginal cultural awareness training.⁹⁹ The government told Yoorrook that bail justices undertook mandatory Koori Cultural Awareness Training between May and September 2018.¹⁰⁰ As of 2 May 2023, all except two bail justices had completed additional mandatory Aboriginal cultural awareness training.¹⁰¹

Four bail justice volunteers were suspended for not having undertaken this training.¹⁰² The training is predominantly delivered online.¹⁰³ A planned evaluation will assess whether there is any correlation between the current training for bail justices and remand rates of Aboriginal peoples.¹⁰⁴

The Attorney-General told Yoorrook that government is actively seeking to recruit Aboriginal people to become bail justices to increase the diversity of bail decision makers.¹⁰⁵ The Attorney-General also accepted that cultural awareness programs have their limitations:

[Y]ou can attend an hour’s session and tick a box to say you’ve undertaken cultural awareness training. That doesn’t actually mean your behaviour is going to change. I think there’s a number of ways of changing culture. It’s promoting good practices and having good mentors and having a diverse workforce. I would love to have more and more people of Aboriginal background working in the justice system, because I think that that lifts ... everybody’s ability to be aware of ... the factors that they should be in relation to interactions with Aboriginal people in the justice system.¹⁰⁶

The Chief Commissioner of Police told Yoorrook that police bail decision makers receive mandatory training about their obligations under the *Bail Act*, including about the application and effect of section 3A.¹⁰⁷

The Judicial College of Victoria provides a range of Aboriginal cultural awareness training programs for judges and magistrates. These are not mandatory but judicial officers are ‘strongly recommended’ to attend.¹⁰⁸ Courts also offer internal cultural awareness training and guidance about the application of section 3A. In response to a recommendation in the Veronica Nelson Inquest, the College has committed to working with Aboriginal legal service providers and community groups to create and run a training program focused on the application of section 3A.¹⁰⁹

In addition to seeking enhanced cultural awareness training for bail decision makers, many submissions called for increased cultural resources and supports for Aboriginal people involved in bail applications, on

bail and on remand. For example, the Federation of Community Legal Centres noted the lack of culturally safe bail support and accommodation for Aboriginal people.¹¹⁰ Having bail refused because of lack of accommodation is also an issue for young people, as discussed in Chapter 12: Youth Justice.

Yoorrook heard of the positive benefits to defendants when bail support services are delivered by Aboriginal Community Controlled Organisations such as Dardi Munwurro, rather than through generalist court-based programs.

Behavioural change and family violence, it's something we need to speak about more, but often black fellas too, so it's getting bail — I got bail. ... I got bail to Dardi. And then having that opportunity — I had two opportunities, either come and do this program or get CISP. I chose to do Dardi because I needed that. I needed that help. I needed that helping hand. It was something that — acknowledging things weren't right in life. You know, 20 years of addiction. I'm clean and the sober today, and it's thanks to Dardi too. Like, the things that they offer here, I didn't know about — there was a parenting program I didn't know about. I'm in the system at the moment trying to get my son in my life. It's an uphill battle. But I'm learning to go through it the right way, not the wrong way.¹¹¹

DJCS told Yoorrook it is working with the Aboriginal community through the Aboriginal Justice Agreements to 'deliver culturally appropriate programs and initiatives to support Aboriginal people on bail to reduce the likelihood of re-offending or breaching their bail conditions'.¹¹²

Government is knowingly responsible for the harm caused by the bail laws

A strong theme in evidence submitted to Yoorrook was that the Victorian Government introduced its harsh bail reforms despite expert advice about the inevitable consequences and maintained the new laws despite clear evidence of harmful impacts.¹¹³

Appalling increases in the incarceration of unsentenced Aboriginal prisoners are a grim and avoidable fact of life in Victoria over the past decade. This statistic speaks to perhaps the most serious failure in Victorian public policy of the past decade. Knowing everything we do about the legacy of past injustice and the intergenerational trauma caused by punitive colonial practices, to be escalating the imprisonment of unsentenced Aboriginal people at this rate in Victoria at this time is completely unacceptable. For a 431 per cent increase in the number of Aboriginal prisoners on remand to be called 'significant' is an egregious understatement of the evidence ... Nothing can excuse this level of systemic public policy failure and the core drivers must be exposed and addressed to urgently turn this trend into reverse. They are not difficult to find.¹¹⁴

Stakeholders were dismayed that the government would prioritise inflexible 'tough on crime' policies at the expense of the wellbeing of Aboriginal people and communities. This was particularly so given the government's pre-existing stated commitments to address the over-imprisonment of Aboriginal people and unacceptable rates of deaths in custody.¹¹⁵

Concerns about rapidly rising remand rates for Aboriginal people, in particular women, were raised repeatedly with government representatives including Ministers at successive Aboriginal Justice Forum meetings between 2017 and 2022.¹¹⁶

The Commission heard evidence that the government constructed an entirely new prison, the Western Plains Correctional Centre, to house the projected significant increase in remand prisoners driven by the bail reforms.¹¹⁷ The cost of construction was \$1.1 billion.¹¹⁸ The facility now sits empty due to the decline

in the overall rate of prison receptions as a result of the COVID-19 pandemic.¹¹⁹ Worse than that, it will cost \$39.5 million in this financial year to maintain the prison even though it is empty.¹²⁰ The Commission finds it unfathomable — to say the least — that this scale of investment can so readily be applied to a prison facility built to respond to a politically motivated policy decision rather than any evidence-based community safety concerns. This level of expenditure is more than the entire funding for all the community programs under the *Burra Lotjpa Dunguludja* (Aboriginal Justice Agreement 4).¹²¹

The Attorney-General spoke to these criticisms in her evidence to Yoorrook.¹²² She conceded the government knew in advance that the bail reforms would lead to more Aboriginal people being held on remand.¹²³ The likely negative impacts of the 2018 bail reforms on Aboriginal people had been raised by stakeholders during consultation and identified in two sets of advice provided to government in 2017.¹²⁴ That advice was from former Supreme Court judge Paul Coghlan who had been commissioned by the government to review Victoria's bail laws.

It was also apparent to government that the rates of Aboriginal people on remand had already grown significantly in the years prior to 2017 — that data was collected and released publicly.¹²⁵

Nevertheless, the government was determined to pass strict new bail laws in response to the Bourke Street tragedy and other high-profile offences committed by people while on bail.¹²⁶

The Attorney-General also admitted the government chose not to implement Justice Coghlan's recommended measures to minimise the harm the reforms would cause to Aboriginal people, as its 'focus was on ensuring the bail laws were as stringent as possible'.¹²⁷ These recommended measures are discussed below.

The Attorney-General conceded that the safeguards in the bail system (such as section 3A, cultural awareness programs for bail decision makers and bail support programs) 'did not do enough to offset and mitigate the disproportionate outcomes'.¹²⁸

The Attorney-General told Yoorrook that as soon as the 2018 bail reforms came into effect it became

obvious that Victoria's remand population was increasing, the laws were capturing people who should not have been captured by the remand system, and Aboriginal women were particularly disproportionately impacted.¹²⁹ At that point the government 'began considering reforms, programs or initiatives to address the negative impacts of the 2018 bail reforms on Aboriginal people'.¹³⁰ While some court and support programs were funded, legislative reform was disrupted between 2019 and 2022, which the Attorney-General attributed in part to the disruptions caused by the COVID-19 pandemic.¹³¹

Urgent bail reforms are needed

Yoorrook has listened to frontline organisations and First Peoples directly affected by Victoria's bail laws. It has also taken into account the findings and recommendations of the coroner in the Veronica Nelson Inquest, and the Legal and Social Affairs Committee Inquiry. These are discussed below.

RECOMMENDATIONS FROM PREVIOUS MAJOR INQUIRIES AND REVIEWS

In the Veronica Nelson Inquest, Coroner Simon McGregor concluded that 'the *Bail Act* has a discriminatory impact on First Nations people resulting in grossly disproportionate rates of remand in custody',¹³² and that sections 4AA(2)(c), 4A, 4C and Clauses 1 and 30 of Schedule 2 of the *Bail Act* 'are incompatible with the Charter of Human Rights and Responsibilities.' He found that 'had the [Royal Commission into Aboriginal Deaths in Custody] recommendations been successfully implemented by the Government and its agencies, Veronica's passing would have been prevented'.¹³³

Coroner McGregor made detailed recommendations to address these issues, including urgent amendments to the *Bail Act* to repeal the reverse onus, double uplift and bail offence provisions introduced in the 2013, 2017 and 2018 bail reforms.¹³⁴

He also recommended that measures be adopted to ensure proper and substantive application of section 3A to give 'effect to the purposes for which it was inserted, including to address the persistent over-representation of Aboriginal people in the criminal justice system'.¹³⁵

The Coroner directed several recommendations to Victoria Police, including that it correct any misunderstanding that there is an informal policy of opposing all applications for bail, capture more detailed data about decisions made by police bail decision makers, and update the human rights and cultural awareness training provided to police.¹³⁶

Veronica Nelson's family has since called for urgent changes to bail laws and has asked that these reforms be referred to as 'Poccum's Law' to honour Veronica's memory.¹³⁷ 'Poccum' was the nickname Veronica received from her family; as a child they took Veronica out to see a possum in the tree, and she would pronounce possum as 'poccum'. Poccum's Law would:

- remove the presumption against bail
- grant access to bail unless the prosecution shows that there is a specific and immediate risk to the safety of another person, a serious risk of interfering with a witness or a demonstrable risk that the person will flee the jurisdiction
- explicitly require that a person must not be remanded for an offence that is unlikely to result in a sentence of imprisonment
- remove all bail offences (committing an indictable offence while on bail, breaching bail conditions and failure to answer bail).¹³⁸

The 2022 Legal and Social Issues Committee Inquiry found that:

Victoria's bail system must balance the maintenance of community safety with the presumption of innocence for people accused of an offence. Victoria's criminal justice system does not currently appropriately or fairly balance these objectives.¹³⁹

The Committee also found that 'women, particularly Aboriginal women and women experiencing poverty, are disproportionately remanded under current bail legislation'.¹⁴⁰ It further found that section 3A is 'poorly understood and underutilised'.¹⁴¹

The Committee recommended that the *Bail Act* be amended to better target presumptions against bail to serious offending and serious risk and ensure that

bail decision makers have discretion to consider a person's circumstances.¹⁴²

It also recommended the Victorian Government identify and remove barriers to culturally appropriate bail processes, including by supporting the development of guidelines on the application of section 3A of the *Bail Act*. The Committee made clear that these guidelines should be developed in partnership with Aboriginal organisations and peak legal bodies, to ensure appropriate consideration of a person's Aboriginality during bail processes.¹⁴³

As mentioned above, when Justice Coghlan reviewed the *Bail Act* in 2017, he advised government on measures to minimise the harm the proposed reforms would cause to Aboriginal people. Those measures were to remove minor non-violent offences from the bail system entirely, given people charged with those offences do not normally pose a risk to community safety and are not ordinarily given a sentence of imprisonment.¹⁴⁴

Justice Coghlan suggested a different approach to dealing with these types of cases, as an alternative to the standard charge and summons procedure, which is the process in which bail is available.¹⁴⁵ He recommended greater use of the existing 'Notice to Appear' procedure and a new 'Notice of Charge' process — processes that would enable a court to deal with a person's charges even if they did not turn up for their hearing. This would avoid the need to remand someone in prison to ensure they would attend court. In turn, these alternative procedures would avoid the harms associated with criminalising bail breaches and time spent on remand.

GOVERNMENT AND VICTORIA POLICE POSITIONS ON BAIL

As discussed above, the harmful consequences of the bail reforms have been drawn to the Victorian Government's attention consistently both before and since the laws came into force. This has been through direct advocacy from service providers and stakeholders, expert advice, and findings from inquiries.

More than 30 years ago, RCIADIC highlighted the urgent need to reduce Aboriginal imprisonment rates including by reforming unjust bail laws. The Victorian Government, in *Burra Lotjpa Dungaludja* and in

previous Aboriginal Justice Agreements, committed to reduce the number of Aboriginal people in prison.¹⁴⁶ It also committed to reduce Aboriginal imprisonment rates under the National Closing the Gap Agreement.¹⁴⁷ Yet, in the face of strong evidence of the harm it would cause Aboriginal people, the Victorian Government insulted these commitments by severely restricting access to bail and steadfastly refusing to wind back the changes until this year.

PROPOSED AMENDMENTS TO THE BAIL ACT ANNOUNCED IN 2023

It was not until just after Coroner McGregor released his scathing findings in the Veronica Nelson Inquest, and shortly before Yoorrook's government accountability hearings, that the government indicated any willingness to amend the *Bail Act*.¹⁴⁸ On 7 February 2023, Premier Daniel Andrews informed parliament that changes to the *Bail Act* were being drafted 'to better reflect the fact that there are key differences between violent offenders ... and those who are alleged to have committed non-violent crimes'.¹⁴⁹ The Premier indicated, however, that the changes would not result in the removal of all circumstances in which a presumption against bail would apply.¹⁵⁰

On 5 March 2023, the Attorney-General announced that the laws, which had almost doubled the number of Aboriginal women in custody, would be wound back.¹⁵¹

The 2018 bail reforms should have been designed to avoid the disproportionate and harmful impacts on Aboriginal people and other overrepresented groups... The net cast by the new bail laws was too wide. The strict, 'reverse onus' elements of Victoria's bail laws have captured people who have committed repeat offending for which they are unlikely to receive a custodial sentence and do not pose an unacceptable risk to community safety.¹⁵²

The government told Yoorrook that its proposed reforms will likely:

- limit the application of the reverse onus test to those charged with serious offences and who are a terrorism risk¹⁵³
- refine the unacceptable risk test so it relates to the risk of endangering the safety or welfare of any person, rather than a risk of committing minor offences while on bail¹⁵⁴
- redress the impact of the uplift provisions¹⁵⁵
- update the principles in section 3A of the *Bail Act* that bail decision makers must take into account when considering bail for an Aboriginal person¹⁵⁶
- require bail decision makers to consider whether there is 'no real prospect' that the defendant will be sentenced to time in prison if they are found guilty¹⁵⁷
- remove the requirement in section 18AA of the *Bail Act* to satisfy the court of new facts and circumstances when making a second application for bail.¹⁵⁸

As discussed in Chapter 12: Youth justice, the amendments will also revise the bail process for children and young people by removing the reverse onus test, show compelling reason and exceptional circumstances tests for children (save for those charged with homicide or terrorism offences).¹⁵⁹

The Attorney-General has acknowledged the proposed reforms will not go as far as those sought by many stakeholders or recommended by Coroner McGregor.¹⁶⁰ She told Yoorrook she believes they are a 'significant step in the right direction' and that 'consideration of further reform will continue'.¹⁶¹

The Victorian Government introduced the Bail Amendment Bill 2023 (Vic) into Parliament on 15 August 2023 as this report was being finalised and after the Commission had formulated its recommendations. The Bill contains significant and welcome reforms. These include a provision that bail cannot be refused for anyone charged solely with a summary offence (although this would not apply to certain summary offences), removal of the 'double uplift', the repeal of two bail offences, and an expanded set of considerations bail decision makers must take into

account when deciding whether to grant bail for an Aboriginal person.

Yoorrook remains concerned that the reforms in the Bill do not go far enough. In particular, the Bill does not repeal the bail offence in section 30 of the *Bail Act* and retains (with some modifications) the reverse onus provisions for a range of offences.

STEPS TAKEN BY VICTORIA POLICE

The Chief Commissioner of Police told Yoorrook that ‘Victoria Police must follow and comply with the provisions of the *Bail Act* as they exist and as amended if that occurs’.¹⁶² Pending the foreshadowed amendments to the *Bail Act*, Victoria Police told Yoorrook it has taken several steps to implement the recommendations of Coroner McGregor.¹⁶³

On 24 March 2023, the Chief Commissioner sent an email to all officers of the rank of sergeant and above to ‘correct any misunderstanding’ that there is an informal policy encouraging members to oppose all bail applications or discouraging them from using their discretion under the law.¹⁶⁴ The email reminded police bail decision makers they have the power to grant bail to Aboriginal people accused of crimes, and that they must apply section 3A of the *Bail Act* when considering whether to exercise that power.

Victoria Police will also update the Victorian Police Manual and training content to ensure this message is ‘unequivocal’.¹⁶⁵ Victoria Police has accepted in principle to collect data on the bail decisions being made by police as outlined in the Chief Commissioner’s letter to Coroner McGregor of 30 January 2023.¹⁶⁶ Training programs on human rights, cultural awareness and bail decision-making and section 3A will also be updated.¹⁶⁷ Yoorrook’s concerns about

current training for Victoria Police are discussed in Chapter 10: Police.

In response to the Chief Commissioner’s email mentioned above, VALS and Victoria Legal Aid expressed concern that it would take more than an instruction from police leadership to change the prevailing police culture of refusing bail to Aboriginal people charged with low-level offences.¹⁶⁸

The way forward

Yoorrook finds that Victoria’s bail laws and the way in which they are administered are punitive, unjust, violate cultural and human rights and entrench disadvantage. They are racist in their application and consequences. They were rolled out by the Victorian Government in the full knowledge and acceptance of their harmful consequences for First Peoples.

Yoorrook is dismayed that the government introduced and maintained its harsh bail laws in the face of the obvious consequences for First Peoples. Policies like these undermine government’s apparent commitment to closing the gap and addressing the over-imprisonment of Aboriginal people. It suggests that the many government strategies, agreements and frameworks are merely paying lip-service to the goals of addressing deaths in custody and over-imprisonment of First Peoples in this state.

When government ignored the concerns and advice of First Peoples about the inevitable impact of its bail reforms, it also eroded the trust that had been generated through the justice-related forums established to listen to and consult with Aboriginal people. What eventuated was a stark reminder that the State retains power and control over the fate of First Peoples, even when it adopts the language of ‘partnership’, ‘working together’, ‘respect’ and ‘self-determination’.

Bail laws must be reformed urgently. Yoorrook agrees with the First Peoples’ Assembly and others that such changes should not await treaty and should not be the subject of any further reviews.¹⁶⁹

The Commission makes a suite of recommendations which aim to radically reduce the pre-trial

imprisonment of First Peoples in Victoria. Together, these recommendations call for fundamental reform of Victoria's bail system. It is important that foreshadowed changes do not just unwind the 2013 and 2018 bail reforms — change must dismantle the systemic racism that underpins the bail and remand system.

Changes to the *Bail Act* itself, while critically important, will be insufficient for achieving fairness for First Peoples facing the prospect of remand. Yoorrook acknowledges the different cultural awareness training programs that are provided to bail decision makers. While these are important for laying the groundwork for fair decision-making, Yoorrook is concerned that training modules by themselves, particularly those delivered online and at disparate intervals, risk becoming a routine 'tick a box' exercise. What is required is a fundamental and system-wide shift in attitudes to the acceptability of imprisoning Aboriginal people. This should be particularly applied to those charged with minor offences and who are waiting for their trial or sentence.

More work is needed to make the bail and remand system culturally safe. It should ensure bail decision makers understand and take seriously their obligation to consider a person's Aboriginality. This will involve leadership, prioritisation, accountability, transparency, modelling positive practices and calling out bad practice, real-time monitoring, workforce changes and transfer of power and resources to First Peoples communities.

The Commission notes that the government intends to implement *Bail Act* amendments in stages. This provides no certainty or accountability to First Peoples. The government needs to publicly announce a detailed plan for rolling out the entirety of the proposed reforms as a matter of urgency. ■

RECOMMENDATIONS

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.

Endnotes

1. Aunty Donna Nelson, 'Statement by Aunty Donna Nelson, Veronica's mother' (Victorian Aboriginal Legal Service: Statements from Veronica Nelson's family, 30 January 2023) <<https://www.vals.org.au/statements-from-veronica-nelsons-family/>>.
2. Department of Justice and Community Safety, Corrections Victoria, 'Annual Prisons Statistical Profile 2009–10 to 2019–2020: Table 1.9', *Corrections, Prisons & Parole* (Web Page, Undated) https://files.corrections.vic.gov.au/2021-06/Annual_Prisoner_Stats_profile_2009%2010_%20to_2019%2020.xlsx.
3. As at 1 May 2023, there were 822 Aboriginal men and women in prison in Victoria, 48 per cent of whom were unsentenced: Transcript of Commissioner Larissa Strong, 3 May 2023, 387 [2]–[9]. As at 3 May, there were 11 young Aboriginal people in detention in Victoria, nine of whom were unsentenced: Transcript of Josh Smith, 3 May 2023, 369 [18]–[19].
4. Fifty-two per cent of Aboriginal prisoners were discharged from prison without being sentenced in 2021–22: Department of Justice and Community Safety, Corrections Victoria, 'Annual Prisons Statistical Profile 2012–13 to 2021–22: Table 3.3', *Corrections, Prisons & Parole* (Web Page, 5 May 2021) <<https://www.corrections.vic.gov.au/annual-prisons-statistical-profile>>.
5. *Inquest into the Passing of Veronica Nelson* (Coroners Court of Victoria, Coroner McGregor, 30 January 2023) ('*Inquest into the Passing of Veronica Nelson*').
6. Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Parliamentary Paper No 326, March 2022) vol 1, ii–iii, vol 2, 433–78 ('*Inquiry into Victoria's Criminal Justice System*').
7. *Inquest into the Passing of Veronica Nelson* (n 5) 86–95, 304 [880], Appendix B, 2–3 [11], [14]–[15]; *Inquiry into Victoria's Criminal Justice System* (n 6) 433–78.
8. *Inquest into the Passing of Veronica Nelson* (n 5) Appendix C 1–3 [3]–[4.13]; *Inquiry into Victoria's Criminal Justice System* (n 6) 434–435, 460, 473, Recommendations 452, 458.
9. *Bail Act 1977* (Vic) s 3AAA(1)(h).
10. *Criminal Procedure Act 2009* (Vic) s 21.
11. *Criminal Procedure Act 2009* (Vic) s 25(1)(b).
12. The Hon Paul Coghlan QC, *Bail Review: Second Advice to the Victorian Government* (1 May 2017), 19 [2.16].
13. See, eg, Aboriginal Housing Victoria, Submission 25; Victoria Legal Aid, Submission 28 (Criminal Justice), 4–5; Law and Advocacy Centre for Women, Submission 29, 6; Law Institute of Victoria, Submission 31, 5–6; Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 46–47; Victorian Aboriginal Community Controlled Health Organisation, Submission 41, 9; First Peoples' Assembly of Victoria, Submission 43, 20–21; Djirra, Submission 44, 6–7; Jesuit Social Services, Submission 51, 5; Liberty Victoria, Submission 52, 5–8; Centre for Innovative Justice, Submission 56, 2; Human Rights Law Centre, Submission 60; Aboriginal Justice Caucus, Submission 74, 39–40; Victorian Aboriginal Child Care Agency, Submission 77, 118–119; Federation of Community Legal Centres, Submission 61, 13–14.
14. Aboriginal Housing Victoria, Submission 25, 3; Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 46–47; First Peoples' Assembly of Victoria, Submission 43, 20–21; Djirra, Submission 44, 6–7; Liberty Victoria, Submission 52, 5; Human Rights Law Centre, Submission 60, 16 [6.4]–[6.5]; Aboriginal Justice Caucus, Submission 74, 39.
15. Human Rights Law Centre, Submission 60, 16 [6.6].
16. Summary of Community Evidence (De-Identified Direct Quotes) Obtained at Roundtables and Prison Visits, 14 June 2023, 3 [14].
17. Human Rights Law Centre, Submission 60, 8 [3.5], citing David Brown, 'Looking Behind the Increase in Custodial Remand Populations' (2013) 2(2) *International Journal for Crime, Justice and Social Democracy* 80, 85; David Brown and Julia Quilter, 'Speaking Too Soon: the Sabotage of Bail Reform in New South Wales' (2014) 3(3) *International Journal for Crime, Justice and Social Democracy* 73.
18. Aboriginal Housing Victoria, Submission 25, 4; Law and Advocacy Centre for Women, Submission 29, 7; First Peoples' Assembly of Victoria, Submission 43, 20–21; Djirra, Submission 44, 6–7; Liberty Victoria, Submission 52, 5; Human Rights Law Centre, Submission 60, 15–16; Aboriginal Justice Caucus, Submission 74, 40.
19. Human Rights Law Centre, Submission 60, 16 [6.8], citing Emma Russell et al, *A Constellation of Circumstances: The Drivers of Women's Increasing Rates of Remand in Victoria* (Report, July 2020).
20. Law and Advocacy Centre for Women, Submission 29, 8.
21. Human Rights Law Centre, Submission 60, 18 [6.26], 19 [6.31]; Law and Advocacy Centre for Women, Submission 29, 7.
22. Human Rights Law Centre, Submission 60, 17 [6.16]–[6.18].
23. Marilyn McMahon, 'No Bail, More Jail? Breaking the Nexus Between Community Protection and Escalating Pre-trial Detention' (Research Paper No 3, Parliamentary Library and Information Service, August 2019) 2–3 <<https://apo.org.au/sites/default/files/resource-files/2019-08/apo-nid253906.pdf>>.
24. *Bail Amendment Act 2013* (Vic); *Bail (Stage One) Amendment Act 2017* (Vic); *Bail (Stage Two) Amendment Act 2018* (Vic).

25. These now include any indictable offence alleged to have been committed while the accused is on bail, subject to a summons, at large awaiting trial or during the operational period of a community corrections order imposed for another indictable offence (Sch 2, cl 1), and an offence against the Bail Act (Sch 2, cl 30): *Bail Act 1977* (Vic).
26. *Bail Act 1977* (Vic) s 4AA(2)(c).
27. *Bail Act 1977* (Vic) ss 30A, 30B.
28. In addition, it is already an offence for an accused person on bail to fail to attend court for their trial: *Bail Act 1977* (Vic) s 30.
29. *Bail Act 1977* (Vic) s 4E.
30. Government sources acknowledge the ‘unique impact’ of the COVID-19 pandemic on prisoner numbers. Department of Justice and Community Safety, ‘Response to NTP-002-01, Agency Response – *Additional Written Evidence*’, 4, produced by the State of Victoria in response to the Commission’s Notice to Produce dated 15 March 2023. This was due to ‘disruption to the usual patterns of crime and criminal justice system operations’, 15. Impacts on bail decisions have been discussed by commentators including Mihal Greener, ‘COVID Bail’: The Response of Victorian Courts and Prisons in Navigating the Impact of COVID-19’ (2021) 33(1) *Current Issues in Criminal Justice* 89. See also Brendon Murphy and Tahlia Ferrari, ‘Bail in the Time of COVID-19’ (2020) 44(4) *Criminal Law Journal* 247.
31. Department of Justice and Community Safety, Corrections Victoria, ‘Annual Prisons Statistical Profile 2012–13 to 2021–22: Table 2.2’, *Corrections, Prisons & Parole* (Web Page, 5 May 2021) <<https://www.corrections.vic.gov.au/annual-prisons-statistical-profile>>.
32. State of Victoria, Response to Issues Paper 1: Call for Submissions on Systemic Injustice in the Criminal Justice System, 21 [73].
33. Department of Justice and Community Safety, ‘Response to NTP-002-014 — *Agency response to the Yoorrook Justice Commission*’ 70–1, produced by the State of Victoria in response to the Commission’s Notice to Produce dated 15 March 2023.
34. Transcript of Commissioner Larissa Strong, 3 May 2023, 387 [2]–[9].
35. Transcript of Josh Smith, 3 May 2023, 369 [18]–[19].
36. Department of Justice and Community Safety, ‘Response to NTP-002-014 — *Supplement to the DJCS Agency Response to the Yoorrook Justice Commission’s 71 Questions*’, 12, Figure 6: Number and proportion of Aboriginal unsentenced prisoner receptions, 2012/13 to 2021/22, produced by the State of Victoria in response to the Commission’s Notice to Produce dated 15 March 2023.
37. Department of Justice and Community Safety, Corrections Victoria, ‘Annual Prisons Statistical Profile 2009–10 to 2019–2020: Table 1.9’, *Corrections, Prisons & Parole* (Web Page, Undated) <https://files.corrections.vic.gov.au/2021-06/Annual_Prisoner_Stats_profile_2009%2010_%20to_2019%2020.xlsx>; Department of Justice and Community Safety, Corrections Victoria, ‘Annual Prisons Statistical Profile 2012–13 to 2021–22: Table 1.9’, *Corrections, Prisons & Parole* (Web Page, 5 May 2021) <<https://www.corrections.vic.gov.au/annual-prisons-statistical-profile>>.
38. Department of Justice and Community Safety, Corrections Victoria, ‘Annual Prisons Statistical Profile 2009–10 to 2019–2020: Table 1.9’, *Corrections, Prisons & Parole* (Web Page, Undated) <https://files.corrections.vic.gov.au/2021-06/Annual_Prisoner_Stats_profile_2009%2010_%20to_2019%2020.xlsx>; Department of Justice and Community Safety, Corrections Victoria, ‘Annual Prisons Statistical Profile 2012–13 to 2021–22: Table 1.9’, *Corrections, Prisons & Parole* (Web Page, 5 May 2021) <<https://www.corrections.vic.gov.au/annual-prisons-statistical-profile>>.
39. Department of Justice and Community Safety, Corrections Victoria, ‘Annual Prisons Statistical Profile 2009–10 to 2019–2020: Table 1.9’, *Corrections, Prisons & Parole* (Web Page, Undated) <https://files.corrections.vic.gov.au/2021-06/Annual_Prisoner_Stats_profile_2009%2010_%20to_2019%2020.xlsx>; Department of Justice and Community Safety, Corrections Victoria, ‘Annual Prisons Statistical Profile 2012–13 to 2021–22: Table 1.9’, *Corrections, Prisons & Parole* (Web Page, 5 May 2021) <<https://www.corrections.vic.gov.au/annual-prisons-statistical-profile>>.
40. Department of Justice and Community Safety, ‘Response to NTP-002-014 — *Supplement to the DJCS Agency Response to the Yoorrook Justice Commission’s 71 Questions*’, 1, produced by the State of Victoria in response to the Commission’s Notice to Produce dated 15 March 2023.
41. Department of Justice and Community Safety, Corrections Victoria, ‘Annual Prisons Statistical Profile 2009–10 to 2019–2020: Table 2.3’, *Corrections, Prisons & Parole* (Web Page, Undated) <https://files.corrections.vic.gov.au/2021-06/Annual_Prisoner_Stats_profile_2009%2010_%20to_2019%2020.xlsx>; Department of Justice and Community Safety, Corrections Victoria, ‘Annual Prisons Statistical Profile 2012–13 to 2021–22: Table 2.3’, *Corrections, Prisons & Parole* (Web Page, 5 May 2021) <<https://www.corrections.vic.gov.au/annual-prisons-statistical-profile>>.
42. Department of Justice and Community Safety, ‘Response to NTP-002-014 — *Supplement to the DJCS Agency Response to the Yoorrook Justice Commission’s 71 Questions*’, 12, produced by the State of Victoria in response to the Commission’s Notice to Produce dated 15 March 2023.
43. Samantha Walker, Paul Sutherland and Melanie Millstead, ‘Characteristics and Offending of Women in Prison in Victoria, 2012–2018’ (Research Paper, Crime Statistics Agency, November 2019) 21–22.
44. *Ibid* 23.

45. Victoria Legal Aid, Submission 28 (Criminal Justice), 5; Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 46; Djirra, Submission 44, 6; Liberty Victoria, Submission 52, 7.
46. Djirra, Submission 44, 6.
47. Victoria Legal Aid, Submission 28 (Criminal Justice), 4.
48. Liberty Victoria, Submission 52, 6–7; Human Rights Law Centre, Submission 60, 16 [6.7], citing Sentencing Advisory Council, *Time Served Prison Sentences in Victoria* (Report, February 2020) 13 (*'Time Served Prison Sentences in Victoria'*).
49. Department of Justice and Community Safety, 'Response to NTP-002-014 — *Supplement to the DJCS Agency Response to the Yoorrook Justice Commission's 71 Questions'*, 1, produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
50. Transcript of Josh Smith, 3 May 2023, 372 [32]–[33]; Department of Justice and Community Safety, 'Response to NTP-002-014 — *Supplement to the DJCS Agency Response to the Yoorrook Justice Commission's 71 Questions'*, 14, produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
51. *Inquiry into Victoria's Criminal Justice System* (n 6) 546.
52. *Time Served Prison Sentences in Victoria* (n 48) 9, 18.
53. Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report, December 2017) 268.
54. *Ibid* 268.
55. Law and Advocacy Centre for Women, Submission 29, 14–15.
56. Law and Advocacy Centre for Women, Submission 29, 15.
57. *Inquest into the Passing of Veronica Nelson* (n 5) 132 [377] n 475–476.
58. Djirra, Submission 44, 7.
59. Djirra, Submission 44, 7.
60. Victoria Legal Aid, Submission 28 (Criminal Justice), 5; First Peoples' Assembly of Victoria, Submission 43, 20–21; Victorian Aboriginal Child Care Agency, Submission 77, 118–119.
61. Law and Advocacy Centre for Women, Submission 29, 8; Victorian Aboriginal Community Controlled Health Organisation, Submission 41, 9; Djirra, Submission 44, 7; Federation of Community Legal Centres, Submission 61, 14.
62. Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 47; Human Rights Law Centre, Submission 60, 17 [6.15].
63. *Inquest into the Passing of Veronica Nelson* (n 5) 2 [5].
64. *Ibid* 2 [6].
65. Summary Report – Dame Phyllis Frost Centre Site Visit, 20 February 2023, [2].
66. Summary Report – Barwon Prison Site Visit, 23 February 2023, [2].
67. Witness Statement of Attorney-General, the Hon Jaclyn Symes, 5 May 2023, 5 [26]; Department of Justice and Community Safety, 'Response to NTP-002-014 — *Supplement to the DJCS Agency Response to the Yoorrook Justice Commission's 71 Questions'*, 13, produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
68. Department of Justice and Community Safety, 'Response to NTP-002-014 — *Supplement to the DJCS Agency Response to the Yoorrook Justice Commission's 71 Questions'*, 13, produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
69. Department of Justice and Community Safety, 'Response to NTP-002-014 — *Supplement to the DJCS Agency Response to the Yoorrook Justice Commission's 71 Questions'*, 13, produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
70. Some limited services may still be available to people on remand: Department of Justice and Community Safety, 'Response to NTP-002-014 — *Supplement to the DJCS Agency Response to the Yoorrook Justice Commission's 71 Questions'*, 138–142, produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023. See also Transcript of Commissioner Larissa Strong, 3 May 2023, 396 [21]–[35].
71. Law and Advocacy Centre for Women, Submission 29, 6–7; Law Institute of Victoria, Submission 31, 5–6; Jesuit Social Services, Submission 51, 5; Liberty Victoria, Submission 52, 5; Human Rights Law Centre, Submission 60, 16–18; Aboriginal Justice Caucus, Submission 74, 39–40; Federation of Community Legal Centres, Submission 61, 13.
72. Victoria Legal Aid, Submission 28 (Criminal Justice), 4–5; Law and Advocacy Centre for Women, Submission 29, 5; Law Institute of Victoria, Submission 31, 5–6; Human Rights Law Centre, Submission 60, 16–18.
73. Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 30–31.
74. Aboriginal Housing Victoria, Submission 25, 3.
75. Transcript of Kate Houghton, 2 May 2023, 256 [28]–[30].
76. Transcript of Kate Houghton, 2 May 2023, 257 [14]–[34].
77. Aboriginal Housing Victoria, Submission 25, 5; Law and Advocacy Centre for Women, Submission 29, 11; Djirra, Submission 44, 6–7.
78. Law and Advocacy Centre for Women, Submission 29, 11.
79. Djirra, Submission 44, 6.
80. First Peoples' Assembly of Victoria, Submission 43, 7; Djirra, Submission 44, 11.
81. Djirra, Submission 44, 11.
82. Transcript of Tessa Theocharous, 14 December 2022, 377–378 [37]–[2].
83. Outline of Evidence of Peter Hood and Tessa Theocharous, 14 December 2022, 5 [71].
84. Transcript of Tessa Theocharous, 14 December 2022, 377 [17]–[25].

85. See Victorian Aboriginal Legal Service (VALS), *Custody Notification Officers* (Web page, Undated) <www.vals.org.au/custody-notification-officers>.
86. See Victorian Aboriginal Legal Service (VALS), *Aboriginal Community Justice Panels (ACJP) Program* (Web page, Undated) <<https://www.vals.org.au/aboriginal-community-justice-panels-acjp-program/>>.
87. The Bail and Remand Court (BARC) operates from 10am to 9pm seven days a week: see Magistrates' Court of Victoria, *Bail and Remand Court (BARC)* (Web page, 13 February 2023) <<https://www.mcv.vic.gov.au/bail-and-remand-court-barc>>.
88. It commenced on 3 September 2002: see Children's Court of Victoria, *New State-wide Weekend Children's Court* (Web page, 1 September 2022) <www.childrenscourt.vic.gov.au/news/new-state-wide-weekend-childrens-court>.
89. Department of Justice and Community Safety, 'Youth Justice Bail After-hours Service (YJBAS)', *Justice System: Youth Justice* (Web page, 24 April 2023) <<https://www.mcv.vic.gov.au/find-support/bail-support-cisp>>.
90. Magistrates' Court of Victoria, *Bail Support (CISP)* (Web page, 6 June 2023) <<https://www.mcv.vic.gov.au/find-support/bail-support-cisp>>. As of 30 April 2023, this replaced the Central After Hours and Bail Placement Service previously run by the Department of Fairness, Families and Housing.
91. Magistrates' Court of Victoria, *Aboriginal and Torres Strait Islander Support Services and Programs are Available to Help Aboriginal and Torres Strait Islander Persons with Legal Problems and Court Matters* (Web page, 2 September 2022) <<https://www.mcv.vic.gov.au/find-support/aboriginal-and-torres-strait-islander>>.
92. Department of Justice and Community Safety, 'Response to NTP-002-014 — Agency response to the Yoorook Justice Commission', 25, produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
93. See Statement of Compatibility for Bail Amendment Bill 2010 (Vic): Victoria, *Parliamentary Debates*, Legislative Council, 29 July 2010, 3495 (Justin Madden).
94. *Inquest into the Passing of Veronica Nelson* (n 5) 20 [66].
95. Law and Advocacy Centre for Women, Submission 29, 6; Human Rights Law Centre, Submission 60, 16 [6.13].
96. Human Rights Law Centre, Submission 60, 17 [6.13], citing Victorian Aboriginal Legal Service, *Submission to the United Nations Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (August 2022).
97. *Inquest into the Passing of Veronica Nelson* (n 5) 304 [880].
98. Law and Advocacy Centre for Women, Submission 29, 16.
99. See *Honorary Justices Act 2014* (Vic) s 23; Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 39–40 [214].
100. Department of Justice and Community Safety, 'Response to NTP-002-014 — Supplement to the DJCS Agency Response to the Yoorook Justice Commission's 71 Questions', 86, produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
101. Transcript of Marian Chapman, 2 May 2023, 291 [6]–[7].
102. Transcript of Attorney-General, the Hon Jaclyn Symes, 5 May 2023, 477 [7]–[9].
103. The Department of Justice and Community Safety said that online training was preferred because it minimises disruption to volunteer bail justices' work and family commitments, and because it supports delivery to groups, allowing peer learning and discussion: Department of Justice and Community Safety, Supplementary response to questions taken on notice by Marian Chapman, Deputy Secretary, Courts, Civil and Criminal Law and Kate Houghton PSM, Secretary, Department of Justice and Community Safety on 2 May 2023, 5.
104. Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 40 [218].
105. Transcript of Attorney-General, the Hon Jaclyn Symes, 5 May 2023, 476–477 [46]–[2].
106. Transcript of Attorney-General, the Hon Jaclyn Symes, 5 May 2023, 439 [23]–[29].
107. Witness Statement of Chief Commissioner of Police, Shane Patton, 31 March 2023, 45 [144.1].
108. Department of Justice and Community Safety, Supplementary response to questions taken on notice by Marian Chapman, Deputy Secretary, Courts, Civil and Criminal Law and Kate Houghton PSM, Secretary, Department of Justice and Community Safety on 2 May 2023, 6.
109. Department of Justice and Community Safety, Supplementary response to questions taken on notice by Marian Chapman, Deputy Secretary, Courts, Civil and Criminal Law and Kate Houghton PSM, Secretary, Department of Justice and Community Safety on 2 May 2023, 6.
110. Federation of Community Legal Centres, Submission 61, 14.
111. Summary of Community Evidence (De-Identified Direct Quotes) Obtained at Roundtables and Prison Visits, 14 June 2023, 3 [15].
112. Department of Justice and Community Safety, 'Response to NTP-002-014 — Supplement to the DJCS Agency Response to the Yoorook Justice Commission's 71 Questions', 86, produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
113. First Peoples' Assembly of Victoria, Submission 43, 21; Djirra, Submission 44, 6–7; Aboriginal Justice Caucus, Submission 74, 39. See also Lee-Anne Carter and Andreea Lachs, 'OPINION: Victoria's bail laws are harming Aboriginal women and Aboriginal families', *National Indigenous Times* (Online, 1 October 2021) <<https://nit.com.au/01-10-2021/2389/opinion-victorias-bail-laws-are-harming-aboriginal-women-and-aboriginal-families>>; First Peoples' Assembly of Victoria, Submission 43, 21; Djirra, Submission 44, 6–7; Aboriginal Justice Caucus, Submission 74, 39.
114. Aboriginal Housing Victoria, Submission 25, 3.

115. Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 40–41; Human Rights Law Centre, Submission 60, 8–9 [3.6]–[3.7]; Aboriginal Justice Caucus, Submission 74, 39.
116. See, eg, Department of Justice and Community Safety, ‘Response to NTP-002-004 — Aboriginal Justice Forum (AJF) meeting 47 (16–17 March 2017); AJF 52 (18–19 October 2018); AJF 53 (March 2019), AJF 59 (22–23 July 2021); AJF 61 (24–25 March 2022)’; produced by the State of Victoria in response to the Commission’s Notice to Produce dated 3 November 2022.
117. Transcript of Commissioner Larissa Strong, 3 May 2023, 389 [14]–[15], [28]–[29].
118. Transcript of Commissioner Larissa Strong, 3 May 2023, 389 [47].
119. Transcript of Commissioner Larissa Strong, 3 May 2023, 390 [45]–[47].
120. Department of Justice and Community Safety, Response to questions taken on notice by Larissa Strong, Commissioner, Corrections Victoria on 3 May 2023, 6 July 2023, 17. Yoorrook notes that \$36 million was allocated in the 2023–24 budget: Department of Treasury and Finance, Victorian Government, *Victorian Budget 2023–24: Service Delivery* (Budget Paper No 3, 2023) 82, 88.
121. Department of Justice and Community Safety, Agency Response to the Yoorrook Justice Commission, 15 March 2023, Appendix B: Summary of Aboriginal Justice Agreement Community Grant Initiatives.
122. Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 30–35; Transcript of Attorney-General, the Hon Jaclyn Symes, 5 May 2023, 478–479.
123. Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 34 [185].
124. Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 32 [167], [170].
125. Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 32 [171].
126. Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 31 [162]–[165], 35 [190].
127. Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 32 [167].
128. Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 35 [188].
129. Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 34–35 [186]–[187].
130. Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 35 [192].
131. Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 36 [193]–[194], [196].
132. *Inquest into the Passing of Veronica Nelson* (n 5) Appendix B, Finding 14, 2 [14].
133. *Ibid* Appendix B, Finding 51, 8 [51].
134. *Ibid* Appendix C, Recommendation 4, 2–3 [4]–[4.13].
135. *Ibid* Appendix C, Recommendation 4, 2–3 [4.9]–[4.12].
136. *Ibid* Appendix C, Recommendations 7–12, 4–7 [7]–[12].
137. Human Rights Law Centre, ‘Poccum’s Law: the Blueprint to Fix the Andrews Government’s Discriminatory Bail Laws’ (Media release, 22 March 2023) <<https://www.hrlc.org.au/news/2023/3/21/poccums-law>>.
138. *Ibid*.
139. *Inquiry into Victoria’s Criminal Justice System* (n 6) 459, Finding 39.
140. *Ibid* 449, Finding 37.
141. *Ibid* 450, Finding 38.
142. *Ibid* 460, Recommendation 52.
143. *Ibid* 473, Recommendation 58.
144. Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 32 [169].
145. The Hon Paul Coghlan QC (n 12) 14–27.
146. Victorian Government and Victorian Aboriginal Community, *Burra Lotjpa Dungaludja: Victorian Aboriginal Justice Agreement Phase 4* (Partnership Agreement, 2018).
147. *Ibid* 30.
148. The Attorney-General gave evidence that work in relation to amending Victoria’s bail laws was underway prior to the Coroner’s finding in relation to the death of Ms Nelson: Transcript of Attorney-General, the Hon Jaclyn Symes, 5 May 2023, 472 [13]–[15].
149. Victoria, *Parliamentary Debates*, Legislative Assembly, 7 February 2023, 85 (Daniel Andrews, Premier).
150. Victoria, *Parliamentary Debates*, Legislative Assembly, 7 February 2023, 85 (Daniel Andrews, Premier).
151. Annika Smethurst, ‘Bail Law Reforms Unveiled as Attorney-General Concedes State ‘Cast the Net Too Wide’’, *The Age* (Online, 5 March 2023) <<https://www.theage.com.au/politics/victoria/bail-law-reforms-unveiled-as-attorney-general-concedes-state-cast-the-net-too-wide-20230304-p5cpd8.html>>.
152. Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 35 [190]–[191].
153. Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 37 [199].
154. Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 37 [199], 38 [207].
155. Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 38 [206].
156. Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 38 [208].
157. Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 38–39 [209].
158. Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 39 [210].
159. Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 37 [203]–[204]; Transcript of Attorney-General, the Hon Jaclyn Symes, 5 May 2023, 474 [20].
160. Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 39 [212].
161. Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 39 [212].

162. Witness Statement of Chief Commissioner of Police, Shane Patton, 31 March 2023, 18 [64].
163. Witness Statement of Chief Commissioner of Police, Shane Patton, 31 March 2023, 16 [58].
164. Witness Statement of Chief Commissioner of Police, Shane Patton, 31 March 2023, 65–66.
165. Witness Statement of Chief Commissioner of Police, Shane Patton, 31 March 2023, 63. The training for bail decision makers will also be updated to reflect the foreshadowed amendments to the Bail Act once there is more certainty about them: 45, [144.1].
166. Collection of these datasets will depend in part on whether Victoria Police's current systems can be modified to fully capture all of the data modifications to the subject to Coroner McGregor's recommendation: Witness Statement of Chief Commissioner of Police, Shane Patton, 31 March 2023, 60, 64.
167. Witness Statement of Chief Commissioner of Police, Shane Patton, 31 March 2023, 61–63.
168. Joseph Dunstan, 'Victorian Police Chief Issues Bail Direction in Wake of Veronica Nelson Inquest Findings', *ABC News* (Online, 15 April 2023) <<https://www.abc.net.au/news/2023-04-15/police-bail-remand-veronica-nelson-coroner-inquest-response/102212802>>.
169. Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 47; First Peoples' Assembly of Victoria, Submission 43, 15; Federation of Community Legal Centres, Submission 61, 14.

12 YOUTH JUSTICE

Children in this State can be locked up before they lose all their baby teeth... Our children shouldn't graduate from primary school to prison.¹ MARCUS STEWART

Introduction

The youth justice system is the most significant staging post in the pipeline of First Peoples children and young people from the child protection system to the adult criminal justice system. The youth justice system has long harmed children and continues to do so, inflicting further trauma on the most vulnerable and disadvantaged First Peoples children.² Hundreds of these children are funnelled through the youth justice system each year.³ Children who have experienced abuse, neglect or involvement in child protection are over-represented among those in custody.⁴

Above all, these children should receive care and support. Instead, they are being criminalised for inheriting the trauma, marginalisation and systemic racism that descends directly from colonisation and pervades the lives of themselves and their families.⁵ Criminalising children creates a vicious cycle of disadvantage and trauma. This entrenches them in the criminal legal system.⁶

In the last decade a plethora of inquiries have highlighted widespread and systematic deficiencies in the youth justice system.⁷ These failures violate Aboriginal children's human and cultural rights and put their health, safety and wellbeing at serious risk. These inquiries have found that the justice system compounds the disadvantage and trauma already experienced by First Peoples children and increases the likelihood of further offending.⁸

The 2021 Commission for Children and Young People (CCYP) *Our Youth, Our Way* report provides the most recent analysis of the experiences of Aboriginal children and young people in the youth justice system. It found that the youth justice system is disproportionately focused on late, crisis-driven, punitive responses. This comes at the expense of effective early interventions and support to meet the unique experiences of Aboriginal children.⁹ Yoorrook

has drawn on that inquiry in analysing evidence of injustice and in formulating responses. In doing so, Yoorrook considers that, like the adult criminal justice system, the youth justice system is built on colonial foundations.

For Aboriginal children and young people in contact with the youth justice system, these historical injustices are not a thing of the past; they are an everyday reality. Recognising the operation of structural racism allows us to better understand the lived experiences of Aboriginal children and young people in the youth justice system, and what we can do to support them to thrive.¹⁰

In this chapter, Yoorrook looks at the systemic injustices experienced by Aboriginal children and young people in the youth justice system. This includes the harmful, traumatising and counterproductive effects of embedding these children and young people in the criminal justice system from a young age. Yoorrook examines the causes of over-representation of Aboriginal young people in this system before advocating for the simplest and most urgent reform to keep children out of the system in the first place — raising the age of criminal responsibility to 14 years now, and with no exceptions.

Yoorrook acknowledges *Wirkara Kulpa* (the Aboriginal Youth Justice Strategy) developed by government in partnership with the Aboriginal Justice Caucus.¹¹ Yoorrook also acknowledges the initiatives that prioritise diversion and early intervention and partnerships to support rehabilitation. Changes to police policy and guidance materials have increased cautioning rates for first-time offenders and pathways to culturally relevant supports for Aboriginal young people.¹² It is critical that these efforts are sustained to build on this early promise.

Victoria currently has the lowest rate of youth detention in the country, with the average daily number for 2021–22 at 78 young people (aged 10 to 17 years), 10 of whom were First Peoples children.¹³ On 3 May 2023, there were 11 First Peoples children in youth detention. Of these, nine were on remand (82 per cent).¹⁴ There were none under 14 years in custody.¹⁵

If these figures are repeated in coming years, then Victoria is on track to meet and exceed its Closing the Gap and Aboriginal Justice Agreement targets to reduce Aboriginal youth detention.¹⁶ Yet despite this low overall detention rate, First Peoples children are still grossly overrepresented in the youth justice system. In 2021–22, First Peoples children (aged 10 to 17 years) in Victoria were still nearly nine times as likely to be in youth detention than non-First Peoples children.¹⁷

Reducing the number of Aboriginal children in the youth justice system is an important achievement. It shows what can be done if government, courts and police focus on keeping children out, rather than in, the youth justice system. It also shows that when Aboriginal young people and their representative groups are involved in developing solutions, success is much more likely.

It is critical that this effort is sustained.

The government's stated target of zero Aboriginal children (aged 10 to 17 years) in youth justice is attainable¹⁸ if the necessary, First Peoples-led and self-determined changes to this flawed system are fully enacted.

What Yoorrook heard

Locking children up is harmful and counterproductive

Victoria builds systems that tear children from their families, force them into prison and turn them away from school. Victoria chooses not to support the services that keep our children safe.¹⁹

When a child is in custody, they are removed from their home, family and other social supports. Losing their liberty, personal and cultural, identity and protective factors available to them in the community places great stress on a child, impairs their development and compounds trauma.²⁰ Children locked away in custodial facilities are particularly susceptible to victimisation, stigmatisation and negative peer influence.²¹

For First Peoples children in particular, the social isolation and alienation from family, community and country can be more intense, especially for younger children and those from regional areas.²² Flow-on effects include family and community disharmony and impaired connections to trusted and positive family members, kin and Elders.

Much offending by children is impulsive and transient, rather than planned and habitual. Unlike adults, children tend to offend in small groups in public areas, close to where they live. Offending tends to be attention-seeking, public, episodic, unplanned and opportunistic.²³

The Victorian Government accepts that contact with the youth justice causes harm. Josh Smith, Deputy Secretary, Youth Justice in the Department of Justice and Community Safety (DJCS), stated in evidence, 'We absolutely acknowledge that any contact with the Youth Justice system, let alone custody, is a problem'.²⁴

During Yoorrook's hearings, the Minister for Youth Justice was asked whether he would design a system that locked up children where they were exposed to trauma and deprivation of rights. The Minister agreed that he would not.²⁵ He also agreed, as did the Attorney-General, that most children 'age out' of offending; that is, they grow out of offending as they mature.²⁶

Over-representation in the youth justice system is a government failure

In 2021–22, First Peoples children in Victoria were 11 times as likely as their non-Aboriginal counterparts aged 10 to 17 years to be under youth justice supervision (in custody or under community supervision).²⁷

CCYP found that '[i]t continues to be an everyday reality that Aboriginal children and young people in Victoria are disproportionately targeted by the police, sentenced by the courts, and removed from their families and communities'.²⁸ Data highlights the inequality and discrimination experienced by Aboriginal children and young people across the youth justice system:

- Victoria Police are more likely to arrest and detain, and less likely to caution, Aboriginal children and young people than their non-Aboriginal peers²⁹
- Aboriginal children and young people are more likely to be refused bail, and those who are granted bail are more likely to be recorded for breaching bail conditions than their non-Aboriginal peers³⁰
- Aboriginal children and young people are detained (on sentence and remand) for more days on average than non-Aboriginal children and young people³¹
- Aboriginal children and young people enter youth justice supervision at a younger age than their non-Aboriginal peers.³²

VULNERABLE CHILDREN ARE ENTERING THE YOUTH JUSTICE SYSTEM

Our Youth, Our Way found that marginalised and vulnerable children, including far too many Aboriginal children, are at greater risk of entering the criminal justice system at a young age. This is due to a complex combination of factors, including a legacy of dispossession and intergenerational trauma, and ongoing marginalisation and inequality. The report observed:

For many Aboriginal children, their experiences of trauma, family violence, placement in out-of-home care, mental illness, substance misuse and poverty — compounded by an ongoing failure by government to address their unmet needs in these areas — also make them vulnerable to contact with police and criminalisation at a young age ... Aboriginal children's early contact with the youth justice system increases the likelihood of their long-term involvement in the system and their eventual incarceration in an adult prison.³³

Many vulnerable children are channelled into the criminal legal system due to a failure to identify and support their health and disability needs or to understand the link between challenging behaviours and trauma. The most recent survey of Aboriginal children and young people in the Victorian youth justice system found that on 31 December 2019:

- 81 per cent were victims of abuse, trauma or neglect
- 78 per cent had experienced family violence
- 94 per cent had a history of alcohol or drug misuse
- 72 per cent had been subject to a child protection report
- 55 per cent were not living with parents, relatives or kin
- 49 per cent presented with cognitive difficulties
- 66 per cent presented with mental health issues
- 18 per cent had a primary school level of education
- 65 per cent were not participating in education.³⁴

Where children and young people have ongoing contact with the justice system, this is largely linked to difficulties in their personal and home environment, unmet health and disability needs, and social factors. The younger a child is at their first youth justice contact, the more likely they are to have come from disadvantaged communities and have higher rates of missed maternal and child health appointments and developmental vulnerabilities.³⁵

Aboriginal children or young people who have been charged at a young age usually have mental health issues and needs or have suffered due to trauma within the home life. . . because of colonisation—in some of our parents and our grandparents, it leads into the young people—there is this trauma that they carry for years and generations to come.³⁶

Yoorrook also received evidence that another factor increasing the likelihood of further offending is the nature of a child's interactions and experiences with the youth justice system itself. CCYP found that the more youth justice contact there is, and the more 'restrictive and/or intensive' that contact is, the more likely is reoffending.³⁷ Government data shows that, in 2021, 22 per cent of all adult male prisoners had previously been in youth justice custody, as had 16 per cent of adult women in prison. Given limitations in the data, this is likely to be a significant underestimate.³⁸

THE CHILD PROTECTION TO PRISON PIPELINE AND 'CROSSOVER KIDS'

The term 'crossover kids' has been used to describe children who become involved in both the child protection and youth justice systems.³⁹ The Sentencing Advisory Council notes that the factors that can lead a child or young person into the justice system are largely the same as those that lead them into the child protection system.⁴⁰ The Victorian Government concedes that 'early contact with the justice system, particularly among children and young people in out of home care, is also a predictor of more frequent contact and entrenchment in the justice system over a person's life'.⁴¹

The vast majority (64 per cent) of First Peoples children subject to Victorian youth justice supervision have also had child protection involvement.⁴² Those with a child protection history are disproportionately represented in the more severe sentence types, like detention.⁴³

Yoorrook heard evidence from DJCS representatives that in 2020–21 Victoria had the highest proportion of crossover kids who were First Peoples.⁴⁴ This is living proof that Victoria's justice and child protection systems are failing First Peoples children, their families and communities.

The Sentencing Advisory Council research showed that the overwhelming majority of crossover kids in their study were involved in the child protection system *before* the youth justice system.⁴⁵ The Council noted:

For these children, there may have been more opportunities for concerted and coordinated action across service systems before the child started offending. Further, more than half of children experiencing out-of-home care or residential care only offended during or after being placed in care. This finding suggests that, while the experience of trauma and maltreatment is likely to be a causal factor in children's offending behaviour, the experience of care itself may be a contributing factor for many children.⁴⁶

Residential care is particularly known for its over-representation of children who have had contact with both systems.⁴⁷ Research confirms that children in residential care are grossly over-represented in the justice system.⁴⁸ The criminalisation of children in residential care has been extensively documented, including comprehensively in the *Care Not Custody* report published by Victoria Legal Aid in 2016,⁴⁹ and again in *Our Youth, Our Way*.⁵⁰ Yoorrook heard further evidence from legal services and child and family services of ongoing instances of criminalisation in residential protection care.⁵¹

Pre-care trauma will be exacerbated if children's behaviour is viewed by carers or staff as challenging, and is responded to with police involvement. An over-reliance by poorly trained staff on police invariably results in the escalation of behavioural matters or minor offending that did not warrant this level of response.⁵²

Government data shows that the proportion of children in residential care that will have subsequent contact with that the criminal justice system is particularly high for children aged 10 to 14 years (67 per cent of First Peoples children) in residential care.⁵³ This is important given the current minimum age of criminal responsibility is 10 years, rather than the internationally accepted minimum standard of 14 years.

In addition, children in residential care often present with complex mental health and behavioural needs linked to previous trauma, mental health issues and intellectual disability.⁵⁴ Strong evidence suggests that carers and residential care workers are more likely than parents to call police to manage behaviour

in out-of-home care settings.⁵⁵ Failure to provide appropriate therapeutic and mental health services or equipping residential care staff with alternative strategies to manage challenging behaviours drives this over-reliance on police.

In 2020 Victoria followed both New South Wales and Queensland by adopting inter-agency protocols to reduce unnecessary police involvement in residential care.⁵⁶ This *Framework to reduce criminalisation of young people in residential care* intends to provide a clear and consistent framework for responding to behavioural incidents and increase the capability of staff to positively manage behaviour, without involving police.

Yoorrook received evidence that the framework is not being implemented effectively.⁵⁷ This failure must immediately be remedied, as discussed in Chapter 7: Out of home care.

Police are driving Aboriginal kids deeper into the system

Evidence received by Yoorrook confirms the findings of the *Our Youth, Our Way* inquiry which raised significant concerns about police systems, practice and culture, and violations by police of human and cultural rights. This includes allegations of racism, mistreatment by police during arrest, and a lack of faith in the police complaints process.⁵⁸ These are discussed in detail in Chapter 10: Police. The following section focuses on the use of cautions and diversion to keep First Peoples children out of the criminal justice system.

Discretionary powers of police to issue a caution, the lack of legislative basis for pre-charge cautions and the ability for police to veto on court-based diversion, detract away from a rehabilitative approach, leading to harmful contact with the courts system. Insufficient implementation of court-based diversion is further amplified for Aboriginal children and young people who are less likely to be cautioned than non-Aboriginal young people and who face the added barrier of a lack of culturally safe diversion programs, particularly in regional Victoria.⁵⁹

How a child is treated by police has a profound impact on their wellbeing and future. Police decisions to take no action, caution or divert a child from the formal criminal legal system can be a circuit breaker from further offending, especially when linked to social supports that address the causes of offending.⁶⁰ Conversely, evidence shows the more intensive the response and further into the system a child goes, the higher the likelihood of ongoing involvement, more serious offending and poor life outcomes.⁶¹

Evidence provided to Yoorrook and the 2022 Victorian Parliamentary Inquiry into the Criminal Justice System (Legal and Social Issues Committee Inquiry) shows police are more likely to arrest and detain, and less likely to caution, First Peoples children than their non-Aboriginal peers.⁶²

In 2020–21, just 13.8 per cent of Aboriginal children and young people aged 10 to 17 years (alleged offenders) were issued cautions or warnings in comparison to 20 per cent of non-Aboriginal children and young people aged 10 to 17 years.⁶³ Twelve per cent of Children’s Court diversions under the *Children, Youth and Families Act 2005* (Vic) (CYFA) were ordered for Aboriginal children and young people.⁶⁴ At that time, Aboriginal children and young people made up 15 per cent of those children and young people aged 10 to 17 years under youth justice supervision.⁶⁵

The Minister for Police conceded that inconsistency in cautioning is a problem:

There are elements that we’ve been able to bring to light where that systemic racism and bias is occurring... it’s great to have a youth cautioning program, but it’s not applied appropriately; it’s still disadvantaging Aboriginal young people... there’s still this overlay of a more harsh treatment of Aboriginal people.⁶⁶

Aboriginal leaders, organisations, mainstream community, and legal organisations have also highlighted issues with police practice. These include inconsistent application, lack of transparency and the barrier created by the legal requirement for the prosecutor to consent to court-based diversion.⁶⁷



The Hon. Anthony Carbines MP,
Minister for Police

Yoorrook notes the value of cautioning projects undertaken in partnership with local community organisations and improvements in the police cautioning system following regional trials in recent years.⁶⁸ These include the Aboriginal Youth Cautioning Program.⁶⁹ As noted by Victoria Legal Aid:

The Aboriginal Youth Justice Cautioning Scheme that Victoria Police is working on now is positive. A lot of hard work is being done. Again, it's not to criticise individual pieces of work, but we think that some of these decisions require oversight, because... we frequently see irrational or unreasonable refusal to give someone a caution or diversion. We think those things should be properly overseen by courts.⁷⁰

Yoorrook also acknowledges recent improvements to Victoria Police cautioning policy and practice through changes to the Victoria Police Manual to increase the opportunities for police to issue cautions to young people. These changes include removing the requirement for the young person to admit the offence, prior criminal history no longer being a barrier to eligibility for a caution, the ability for a young person to be cautioned on more than one occasion and no limit to the number of cautions a young person can receive.⁷¹

Further reforms to laws, policies and police education are still clearly needed to prevent inconsistency and bias in exercise of police discretion. *Our Youth, Our Way* recommends law reforms requiring decision makers to prioritise early intervention and diversion

at all points of the youth justice system and to use the least intrusive intervention necessary in the circumstances, including no formal action.⁷² Yoorrook supports those recommendations.

During evidence, the Minister for Police stated that he would support legislating cautioning programs to help drive more cautions, subject to the Attorney-General's views.⁷³ Yoorrook makes recommendations in this regard at the end of this chapter. Josh Smith, Deputy Secretary of Youth Justice, suggested the law could be amended to mandate pre-charge diversion to reduce Aboriginal over-representation.⁷⁴ Yoorrook would also welcome such a legislative change.

Diversion works better than a punitive system

Once a child enters the formal criminal legal system, they are more likely to return, particularly if detained.⁷⁵ Diversion pathways, which operate outside the formal court system, are effective in helping children to get back on track and reduce the risk of further offending.⁷⁶ Diversion aims to avoid the stigma of the formal legal system and can create opportunities to identify and respond to family, behavioural and health problems contributing to offending behaviour.⁷⁷ Given the risk of harm through imprisonment, offering multiple opportunities for Aboriginal-led diversionary programs is crucial, particularly prior to charge.⁷⁸

The 2017 Youth Justice Review (the Armytage and Ogloff Review) stressed the importance of diverting children from custody:

Depriving a child or young person of their liberty is detrimental to adolescent development, dislocates young people from any protective factors they may have, and must only be an option of last resort. No evidence shows that a custodial order reduces offending — in fact, the Sentencing Advisory Council (2016) found that more than 80 per cent of young people on a custodial order reoffended, reflecting among the highest rates of recidivism of all young offenders.⁷⁹

International human rights law requires that:

- the arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time, and
- governments should establish ways to deal with children who offend without resorting to judicial proceedings whenever appropriate.⁸⁰

Consistent with this, The United Nations Committee on the Rights of the Child has stated that governments should scale up the diversion of children and young people away from formal police and court processes towards effective community-based options.⁸¹

Both CCYP⁸² and the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory⁸³ also stressed that successful diversion programs are fundamental to a good youth legal system. That Royal Commission found that key features of successful diversion programs include:

- timely referral, assessment and participation
- availability without admission of guilt
- availability for repeated referrals
- inclusion of a conference with the victim or family
- a diversion plan and a specialist case manager
- ‘wraparound’ services for the young person
- engagement with the young person’s family
- built-in education, rehabilitative programs, cultural activities, employment pathways, mentoring and community service (with services such as mental health services and substance abuse services available through the diversion program)
- community input and control of programs, and
- measurable and evaluated outcomes.⁸⁴

Most Victorian diversion programs fail to embody these essential criteria for success.⁸⁵ Aboriginal children are most disadvantaged by this. They are less likely to be referred to a diversion program. If they are referred, it may be to a diversion program that is not culturally appropriate or is based in mainstream or government agencies.⁸⁶ As the evidence in other chapters indicates, First Peoples are (rightly) distrustful of mainstream programs fearing exposure to systemic racism, bias and a lack of cultural safety.

SUCCESSFUL PROGRAMS LED BY FIRST PEOPLES

Many diversion and other youth programs are producing excellent results, some of which Yoorrook had the privilege to observe firsthand. Successful programs share traits in that they are First Peoples designed, led and delivered and focus on providing culturally aligned supports.

Yoorrook notes the legislated Statewide Children’s Court Youth Diversion Service and community based intensive diversion programs which target Aboriginal children and young people.⁸⁷ Other diversion programs and supports funded by the DJCS and delivered by Aboriginal organisations are listed at Appendix D.⁸⁸ This includes the Aboriginal Youth Justice Program which is delivered across Victoria by 13 Aboriginal Community Controlled Organisations (ACCOs). Youth Justice Commissioner Andrea Davidson said of that program:

[O]ne of the things, I think, that’s particularly successful about that service is the continuity of care that it provides, the place-based response. So Aboriginal young people having Aboriginal workers that are there to walk alongside them from that first point of contact with the system, but also Aboriginal workers who can remain with them, no matter where their trajectory heads, so that if a young person becomes involved in the system, that they’re not having to go through changes of workers and the like, which we know can be disruptive to the gains they’re making.⁸⁹



Andrea Davidson, Commissioner, Youth Justice and Josh Smith, Deputy Secretary, Youth Justice, Department of Justice and Community Safety

Other examples include the Aboriginal Early School Leavers Program, Bramung Jaarn and Aboriginal Youth Support Service. As Josh Smith noted, Aboriginal community programs ‘are better equipped to work with Aboriginal families and communities to maintain strong connection to culture and family, which are preventive factors for coming into contact with the Youth Justice system’.⁹⁰

The Minister for Youth Justice told Yoorrook that Aboriginal-led programs are seeing better outcomes.⁹¹ Government should continue to increase the capacity of ACCOs to develop and implement culturally safe programs for children and young people.⁹² In line with recommendations from the Legal and Social Issues Committee Inquiry,⁹³ Yoorrook endorses the call for long-term funding of social, health, forensic and legal services provided by ACCOs. Similarly, Yoorrook supports *Our Youth, Our Way* recommendations to prioritise early intervention and prevention strategies led by community and greater investment in Aboriginal-led diversion programs across Victoria.⁹⁴

Too many children are being imprisoned on remand

On any given day, most children imprisoned in Victoria are on remand, waiting for their trial or sentence. When government officials gave evidence in May 2023, 82 per cent of Aboriginal children and young people in detention were on remand.⁹⁵

The Charter provides that every child has the right to such protection as is in the child’s best interests and that a child accused of an offence must be brought to trial as quickly as possible.⁹⁶ Evidence to Yoorrook shows that these legal obligations are not being met.

Detaining children on remand is harmful. Children on remand have limited access to therapeutic and rehabilitation services or supports. This is because they are either ineligible or the period in custody is uncertain or short.⁹⁷ Detention on remand also disrupts supports and services, including education, that a child or young person was accessing in the community.⁹⁸ In evidence to Yoorrook, the Minister for Youth Justice stated that children and young people in custodial settings such as Cherry Creek should be able to access programs regardless of the length of time they are imprisoned.⁹⁹

In the first half of 2022–23, 67 per cent of remand detention periods for Aboriginal children and young people were for one month or less. Thirty per cent were for one week or less.¹⁰⁰ This raises the obvious question of why these children have been put in youth prison in the first place, given the harm custody causes.

In addition, 88 per cent of remand periods for Aboriginal children and young people ended with them being released rather than sentenced to a further period of detention on top of the period already spent on remand.¹⁰¹

The extremely high rate of children and young people being imprisoned on remand has been attributed to changes to Victoria’s bail laws over recent years.¹⁰² The government now concedes these changes went too far and have had a disproportionate effect on Aboriginal people.¹⁰³ The Human Rights Law Centre explained the impact of the laws:

Aboriginal and Torres Strait Islander children are overrepresented amongst young people on remand not because they commit more crimes, but because discriminatory laws — like the bail laws — result in Aboriginal and Torres Strait Islander children being targeted by police, harmed by contact with the criminal legal system and denied culturally appropriate supports.¹⁰⁴

As powerfully told to Yoorrook, children should never have been subject to harsh reverse onus bail provisions that make time behind bars the default. This exposes children to the harms of youth detention when the overwhelming majority will not receive a custodial sentence if they are found guilty of the crime they are accused of.¹⁰⁵ The DJCS acknowledged:

Despite recent initiatives and a focus on diversion in youth justice, current bail settings are having an adverse impact on children and young people. For example, children charged with minor repeat offending are being remanded for very short periods of time before being granted bail by a court, with many of these children not ultimately receiving a custodial sentence.¹⁰⁶

Yoorrook considers that children and young people should be exempt from certain offences related to bail and from presumptions against bail and reverse-onus provisions. This applies particularly to the application of ‘show compelling reasons’ and ‘exceptional circumstances’ provisions.¹⁰⁷ The Attorney-General has now agreed to remove these for children and young people with two exceptions (for homicide and terrorism offences).¹⁰⁸ This is a positive step.¹⁰⁹ However, there are further legislative reforms needed to reset the balance in Victoria’s bail laws for children and adults. These are discussed further in Chapter 11: Bail.

REMAND DUE TO WELFARE CONCERNS

Detention is a criminal sanction: not a ‘placement’ for children in need of care ... It is clear and predictable that young people at risk of entry to the criminal justice system will come from homes where it is unsafe for them to be. The need to provide accommodation, other than police cells or detention centres, is chronic.¹¹⁰

Children are often being remanded in custody because of welfare concerns, health concerns, substance misuse and because of a lack of suitable accommodation.¹¹¹

The 2018 Victorian Parliamentary Inquiry into Youth Justice Centres and CCYP in 2021 both highlighted the lack of safe and stable accommodation as a key factor in failing to obtain bail or comply with bail conditions.¹¹² In 2021–22, 970 Aboriginal young people aged 16 to 24 (17 per cent of all young people aged 16 to 24) presented alone to specialist homelessness services and were homeless on presentation.¹¹³ Lack of support and programs has also been a key factor in decisions refusing bail to First Peoples children.¹¹⁴

Where there are concerns about a home environment or inadequate accommodation, a supported bail program should be available to undertake timely assessments, provide advice, arrange accommodation and refer to support services.¹¹⁵ There are bail support programs operating in Victoria,¹¹⁶ but more culturally safe support is needed, including bail support and accommodation designed and delivered by Aboriginal organisations.¹¹⁷

There is currently a lack of culturally safe youth-specific accommodation and residential substance misuse services, including in regional Victoria.¹¹⁸ In addition, there are limited gender-specific programs and healing services that are available to First Peoples girls.¹¹⁹ These services are needed to ensure those most at risk are not funnelled into custody and to address the unique circumstances and holistic needs of First Peoples children.

Greater investment is also needed in Aboriginal community-controlled programs that reconnect children with culture, family and community and are equipped to address the individual risk factors and personal needs of each child.¹²⁰ As stated in evidence by Nakia Firebrace:

Cultural safety and stability is the first thing that is needed to help young people in custody. There is nothing better for rehabilitating a kid who has been in custody to be able to learn about their roots, find connection in that with their family and kin, and return to Country once they are released.¹²¹

Aboriginal children are being subjected to cruel, inhuman and degrading treatment in custody

For me, those places are cold, steel cages for our kids — and I don’t think that’s how we should treat children¹²²

Yoorrook visited a youth justice detention centre during this inquiry to speak to Aboriginal young people detained there. Commissioners were disturbed to hear from those young people about conditions in the centre including violence by staff and prolonged confinement in cells due to staff shortages.¹²³

Child rights standards confirm that detention of children must be a last resort and for the shortest appropriate period of time.¹²⁴ If a child is detained, they must be treated with humanity and respect for the inherent dignity of the human person, and in a manner which is appropriate for their age.¹²⁵ They must not be subjected to cruel, inhuman or degrading treatment.¹²⁶ Where the child is Aboriginal, their distinct cultural rights must be respected.¹²⁷ The UN

Standard Minimum Rules for the Treatment of Prisoners, known as the Mandela Rules, define solitary confinement as the confinement of people in prison for 22 hours or more a day without meaningful human contact.¹²⁸ Child rights standards prohibit the use of solitary confinement on children.¹²⁹

There are a range of protections in legislation governing youth justice detention in Victoria which limit the use of solitary confinement, but which do not expressly ban it. The term ‘solitary confinement’ is not used in the CYFA. Instead, the CYFA refers to the use of ‘isolation’ which is defined as placing a person in a locked room separate from others and from the normal routine of the centre.¹³⁰ The CYFA prohibits the use of isolation as a punishment but allows it as a last resort, where all other reasonable steps have been taken and where the safety of staff and young people in custody would be compromised.¹³¹

The Human Rights Law Centre noted that solitary confinement

is used in Victorian prisons under a number of different labels: isolation, separation, seclusion, segregation and lockdowns. While the words ‘solitary confinement’ are not used explicitly in Victorian legislation, the practice should be banned in law, regardless of how it is labelled.¹³²

The Victorian Ombudsman has recommended legislative change to ban solitary confinement.¹³³ Yoorrook supports this recommendation.

Yoorrook Commissioners were told that children and young people in one side of the detention centre they visited had, in the previous two months, only 30 minutes out of their room each day to do everything they needed, such as exercise, doing their washing and making phone calls.

This is not new. Recent media reports from March 2023 suggest that young people are being locked down in their cells for up to 22 hours a day.¹³⁴ A May 2023 media report quoting a Youth Justice whistleblower stated that ‘one of the most devastating daily breaches of human rights is the extended use of lockdowns’.¹³⁵

Data confirms that in 2021–22 there were 3187 instances where Aboriginal detainees were isolated in the interest of the security of the facility, including staff shortages.¹³⁶ In that year there were 75 Aboriginal children and young people under youth justice custodial supervision.¹³⁷ Isolations also occurred due to COVID but those are counted separately.¹³⁸

When the rate of excessive lockdowns and the human rights breaches it represents was put to the government, the Minister for Youth Justice acknowledged that this was a longstanding issue that had been raised with him by the Aboriginal community.¹³⁹ The Youth Justice Commissioner confirmed that staff shortage related lockdowns were continuing. She said:

We know it can have detrimental impacts... [W]e absolutely want to avoid it and wherever we have to, due to staffing pressures, engage in isolation practices, we do everything we can to ensure that we’re wrapping around that young person and protecting their human rights in so much is possible within that setting... an Aboriginal Liaison Officer¹⁴⁰ is advised of that isolation and is providing services to that young person, so coming and supporting them during that time, and particularly supporting them when they’re coming out of isolation as well. The approach that we take to isolation also aims to minimise the period of time. So rather than young people, for example, spending four continuous hours in their room, if that’s a requirement because of a staffing pressure on that day, we would look to split that isolation to different points in the day so that we are minimising the continuous isolation.¹⁴¹

In response to Questions on Notice, DJCS told Yoorrook that 16 of the 20 recommendations made by CCYP in their *Same Four Walls* report have been implemented. Four remain outstanding. These include that the CYFA be amended to ensure that all young people in youth justice are provided with at least one hour of fresh hour a day. DJCS said that this, along with other legislative changes relating to isolation, are being considered as part of its development of a new Youth Justice Act.¹⁴² Yoorrook notes that guaranteeing one hour of fresh hour a day would mean that children

could still be held in solitary confinement (which, as set out above, is defined under international standards as confinement for 22 hours or more a day without meaningful human contact).

Yoorrook was also told of Security and Emergency Response Team (SERT) staff mistreating young people at the detention centre they visited. This included reports of being choked by SERT staff in a cell, having a knee put to their neck and having their head smashed against a wall. The young people said that this kind of mistreatment was targeted towards Aboriginal young people but not others.¹⁴³

Data shows that while Aboriginal children made up 14 per cent of the Youth Justice detention population in 2021–22, they were subjected to 20 per cent of episodes of use of force involving handcuffs and physical force (33 episodes).¹⁴⁴

The State confirmed in subsequent correspondence to Yoorrook that excessive use of force is prohibited by law and by Youth Justice policies. It said it takes any allegations of mistreatment by young people extremely seriously and follows established reporting and disciplinary protocols to address these allegations.¹⁴⁵

Excessive use of force and the use of solitary confinement on children, however described and regardless of the reason for it, constitute clear human rights violations. Yoorrook condemns this treatment and the harm it is doing to these children’s mental and physical health. Lack of resources is not an excuse for human rights violations. The government has a responsibility for ensuring that violations of human rights do not occur. These circumstances make an even stronger case for prohibiting detention of any child under 16 years consistent with child rights standards.¹⁴⁶



Dr Mick Creati, Royal Children's Hospital

Children’s health and wellbeing must be protected when in custody

We are locking up children for behaviours which are largely explained by disability. So rather than supporting their disability, we are locking them up.¹⁴⁷

First Peoples children caught in the criminal justice system have significantly higher rates of mental health conditions and cognitive disabilities compared to the general youth population.¹⁴⁸

Government data shows that in 2021–22 while Aboriginal children and young people made up 15 per cent of the youth justice population, they had made 37 per cent of self-harm or suicide attempts. This proportion was higher than the year before (six per cent of incidents of self-harm or suicide attempts).¹⁴⁹

First Peoples children in youth justice are also likely to experience co-occurring mental health disorders or cognitive disability. In 2021–22 there were 17 Aboriginal children and young people with disability in youth justice custody. Of these young people:

- 70 per cent had an intellectual disability
- 12 per cent had a language disorder
- six per cent had Autism Spectrum Disorder
- six per cent had been identified as having Foetal Alcohol Spectrum Disorder (FASD).¹⁵⁰

The failure to identify and support children with cognitive disabilities like FASD is common among youth justice systems across Australia.¹⁵¹ *Our Youth, Our Way* identified ongoing concerns with screening, assessments and referral processes, particularly for Aboriginal children and young people.¹⁵² The failure to assess health needs and address the link between challenging behaviours and the traumatic impact of abuse and neglect can lead to children being re-traumatised and pushed into detention.¹⁵³

Yoorrook has heard that work has been done to improve the provision of health care and support to children in youth custody in recent years. Aboriginal children are screened for general health, wellbeing and mental health needs within 12 hours of coming into Youth Justice custody. There is no specific screening for FASD. This is dealt with by a specialist disability advisor ‘if there are concerns raised’.¹⁵⁴ A multidisciplinary team is available to provide a specialist mental health response for young people with complex mental health needs.¹⁵⁵

In addition, the new Cherry Creek Youth Justice Precinct (Cherry Creek) facility, due to open in August 2023,¹⁵⁶ is expected to provide:

- public health delivery through a partnership between Barwon Health and Wathaurong Aboriginal Co-operative¹⁵⁷
- a specialised health care facility, including mental health units (currently a child needs to be in an acute state to be moved to the youth mental health beds at Footscray Hospital)¹⁵⁸
- an enhanced primary health care model including dedicated Aboriginal health workers
- an enhanced custodial forensic youth mental health service
- operation of two four-room mental health units
- an in-house rehabilitation services model responsible for delivering rehabilitation and psychosocial programs.¹⁵⁹

Yoorrook recognises that having a more modern facility at Cherry Creek will help improve conditions and acknowledges the government’s intention to improve mental health support by having dedicated health beds and better programs. The Commission agrees that Cherry Creek staff must, at a minimum have a

Certificate 4 in Youth Justice. This includes a national standard unit called ‘Culturally Strong and Safe’.¹⁶⁰

However, investing \$419 million¹⁶¹ in a new prison for children is not the best way to achieve the government’s stated purpose to reduce, and end, First Peoples children entering the youth justice system. There are now 333 beds in youth justice detention including 56 at Cherry Creek (once it opens).¹⁶²

This was acknowledged by the Youth Justice Commissioner when she said, ‘your point is not lost that custody is not a place for young people and we openly acknowledge that’.¹⁶³ DJCS also acknowledged that the Aboriginal Justice Forum has made its concerns ‘abundantly clear’ about investment in new youth and adult prisons versus investment in other services based in the community.

The current government response is inadequate

The Victorian Government has taken important steps to reduce the over-representation of First Peoples children. Building on recommendations from the 2017 Youth Justice Review,¹⁶⁴ it has developed a new vision for the youth justice system in the *Youth Justice Strategic Plan 2020–2030*, which includes a new Youth Justice Case Management Framework, practice guidelines and custodial operating philosophy.

The government has also partnered with the Aboriginal Justice Caucus and the Aboriginal community to develop the Aboriginal Youth Justice Strategy, *Wirikara Kulpa*. This provides a roadmap that, if properly implemented, will ‘make sure Aboriginal children and young people live culturally rich lives with family and community away from the justice system’.¹⁶⁵ *Wirikara Kulpa* is the primary vehicle for responding to *Our Youth Our Way*’s recommendations.¹⁶⁶

In recent years Victoria has seen some improvements. The average daily number of Aboriginal people aged 10 to 17 under Youth Justice supervision reduced significantly from 122 in 2016–17 to 55 in 2021–22.¹⁶⁹ As noted previously, by 3 May 2023 there were 11 Aboriginal children and young people in detention.¹⁷⁰

New programs being delivered through Wirkara Kulpa



Work is underway to develop and implement a number of new programs to deliver on *Wirkara Kulpa* and address the continued over-representation of Aboriginal children and young people in the youth justice system. These initiatives include:

- establishing an Aboriginal youth justice hub model to provide place-based Aboriginal-led services to children and young people (in development)
- amplifying the voices of Aboriginal children and young people in the design and delivery of youth justice services (in development)
- enhancing and expanding the Community Based Aboriginal Youth Justice Worker program to assist young people to complete diversion and community supervision orders and provide gender specific responses (underway)
- re-establishing Balit Ngulu, a specialist youth legal service to provide a holistic legal service for Aboriginal young people (underway)
- establishing case management review panels to support Aboriginal young people with complex needs (underway)
- early intervention family services to keep Aboriginal children under 14 out of the criminal justice system (in development)¹⁶⁷
- residential diversion for young people.¹⁶⁸

If sustained, this reduction will mean the *Burra Lotjpa Dunguludja* goal of reducing the number of Aboriginal young people under Youth Justice supervision on an average day from 132 in 2016–17 to 89 by 2023 is achieved.¹⁷¹ Victoria is also currently ahead of its Closing the Gap target.¹⁷²

While these efforts should be commended, more must be done to achieve the *Wirkara Kulpa* goal of no Aboriginal children and young people in the youth justice system.¹⁷³

Victoria must raise the age of criminal responsibility to 14 now

The age of criminal responsibility in Victoria is currently just 10 years.¹⁷⁴ This is when a child can be exposed to the harmful and stigmatising justice system, including being investigated for an offence, arrested by police, charged and locked up in detention.¹⁷⁵

As discussed throughout this report, it is often the most vulnerable and disadvantaged children who come into contact with the criminal legal system.¹⁷⁶ First Peoples children are disproportionately affected by the low age of criminal responsibility, as they are more likely than non-First Peoples children to have contact with the youth justice system at an early age.¹⁷⁷ They are also less likely to be cautioned by police, and more likely to be charged with a criminal offence.¹⁷⁸

DOLI INCAPAX IS NOT AN ADEQUATE SAFEGUARD

When a child is over the age of 10 but under 14, the common law presumes that the child lacks the capacity to be criminally responsible for their actions. This rule is known as *doli incapax* (incapable of crime). To rebut the presumption, the prosecution must prove that at the time of the offence the child knew that their actions were seriously wrong in the moral sense.¹⁷⁹ In all cases the prosecution can choose to attempt to prove that the presumption should not apply to the child concerned.

There are significant problems with the application of the *doli incapax* rule. The Australian Law Reform Commission noted that:

Doli incapax can be problematic for a number of reasons. For example, it is often difficult to determine whether a child knew that the relevant act was wrong unless he or she states this during police interview or in court. Therefore, to rebut the presumption, the prosecution has sometimes been permitted to lead highly prejudicial evidence that would ordinarily be inadmissible. In these circumstances, the principle may not protect children but be to their disadvantage.¹⁸⁰

The United Nations Committee on the Rights of the Child has also raised concerns, observing that rules of this type ‘leaves much to the discretion of the court and results in discriminatory practices’.¹⁸¹

Dan Nicholson, Executive Director of Criminal Law at Victoria Legal Aid, stated in evidence:

I just say that, in our strong practice experience, that doesn’t provide sufficient protection because we still see people arrested and remanded in custody, even if they are *doli* — like, you know, if they should be covered by the presumption of *doli*. That’s particularly apparent once you get outside Melbourne, outside of the specialist Children’s Court... where it is very inconsistently applied and not often applied in the way it should be.¹⁸²

The *doli incapax* rule routinely fails to safeguard children. It is applied inconsistently, and it can be difficult for children to access or resource quality expert assessments or evidence, particularly in regional and remote areas.¹⁸³ Because the rule contemplates children aged 10 to 13 years being criminally responsible for their actions, the presumption does not reflect contemporary medical knowledge of childhood brain development, social science, long-term health effects or human rights law.¹⁸⁴ Even if a child is successful in relying on the rule or in resisting an application by the prosecution that it should not apply, they will still have been exposed to harm by way of being arrested, charged, prosecuted and potentially handcuffed and detained on remand while waiting for their trial — and potentially having to participate in a hearing of the application by the prosecution that the rule does not apply

The Attorney-General accepted in her evidence at Yoorrook that the *doli incapax* principle is problematic and has committed to codifying it in legislation.¹⁸⁵ However, codifying a failing common law rule in legislation will not solve the problem. Yoorrook believes that children aged 10 to 13 years should not be in the criminal justice system at all.

The current minimum age is inconsistent with international human rights standards

The median minimum age of criminal responsibility worldwide is 14 years. The United Nations Committee on the Rights of the Child has confirmed that the minimum age should be no lower than 14 years and laws should ensure children under 16 are not deprived of their liberty.¹⁸⁶ Australia has been repeatedly criticised by the United Nations, including by the Committee on the Rights of the Child in 2019, for failing to reform the minimum age.¹⁸⁷

CURRENT LAWS ARE INCONSISTENT WITH MEDICAL SCIENCE

The current minimum age in Victoria of 10 years defies medical evidence that children aged 10 to 13 years lack mental, emotional and intellectual maturity. Contemporary research shows that these children’s brains are still developing, and they have limited capacity for reflection before action.¹⁸⁸ Primary school or early high school age children are not at a cognitive level of development where they can appreciate the criminality of their actions or the lifelong consequences of being labelled a criminal.¹⁸⁹

The Australian Medical Association states that the effects of youth detention ‘contribute to, and exacerbate, the poor health of Aboriginal and Torres Strait Islander peoples’.¹⁹⁰

Many involved in the youth justice system present with cognitive difficulties, disability and mental health issues, which can be exacerbated by the detention environment.¹⁹¹

Social science affirms the dangers of early contact with the criminal legal system

Criminalising the behaviour of children creates a vicious cycle of disadvantage and entrenches them in the criminal legal system.¹⁹² Compelling evidence shows that early contact with the system increases the likelihood of poorer outcomes, further offending and potential lifelong involvement with the criminal legal system.¹⁹³ Criminal legal systems can themselves be criminogenic, with early contact a predictor of future offending.¹⁹⁴

THE COMMUNITY SUPPORTS REFORM

Yoorrook received submissions from a wide range of organisations calling for change to raise the age of criminal responsibility to at least 14 years.¹⁹⁵ This reflects the widespread support for reform across Australia evidenced by a national Raise the Age Coalition petition with over 211,670 signatures, including 65,799 from Victoria.¹⁹⁶ This coalition campaigning for change involves over 100 First Nations, legal, medical and human rights groups including the Law Council of Australia, Australian Medical Association, Australian Indigenous Doctors' Association and Royal Australasian College of Physicians.¹⁹⁷

Other state and territory inquiries have also recommended raising the age.¹⁹⁸ In Victoria these include the *Our Youth, Our Way* inquiry¹⁹⁹ and the recent Legal and Social Issues Committee Inquiry.²⁰⁰

GOVERNMENT POSITION ON RAISING THE AGE

In 2018, the then Council of Attorneys-General — now the Standing Council of Attorneys General — agreed 'to examine whether to raise the age of criminal responsibility from 10 years of age.'²⁰¹ While the Council was unable to agree on findings and recommendations, its draft report found disproportionate entry of Aboriginal children into the youth justice system and that most children are from disadvantaged backgrounds. The draft report further recommended raising the minimum age of criminal responsibility to 14 years of age, without exception.²⁰²

The Victorian Government has recently announced that it intends to raise the age of criminal responsibility from 10 years to 12 years by the middle of 2024. In addition, following work on an alternative

service model and an independent review, in 2027 the Government intends to then raise the age to 14 years with carve outs for certain offences yet to be specified.²⁰³ The Secretary of DJCS told Yoorrook that government has been working on an alternative service model for some years though at present it is not 'operationally ready'.²⁰⁴

The Victorian Government's stated rationale for its proposed staged approach is that an alternative service model can be put in place for 10 and 11 year olds within the next 12 months, but there is no such model for 12 and 13 year olds.²⁰⁵ This will need to be developed over the next four years.²⁰⁶

While the commitment of the Victorian Government to raise the minimum age from 10 years is a start, Yoorrook is deeply concerned that it is not being immediately raised to 14 years. This decision goes against the overwhelming medical and scientific evidence of child development and breaches international child rights law. It also flies in the face of clear and consistent advice from First Peoples leaders including the First Peoples' Assembly and the Aboriginal Justice Caucus directly communicated to Ministers,²⁰⁷ undermining the government's stated commitment to self-determination.

The Royal Australasian College of Physicians, among others, criticised the Victorian Government's two-stage approach to raising the age. It wrote to the Attorney-General urging the government to raise the age to 14 years with 'no exceptions — no carve outs'. It noted:

Many children in the youth justice system have significant neurodevelopmental disabilities, and other physical and mental health needs, which are compounded by contact with the youth justice system and incarceration. Children under 14 years may not have the level of maturity and cognitive function to be considered criminally responsible... Raising the age of criminal responsibility to 14 years is critical to protecting the health and wellbeing of children and young people at risk of incarceration, especially Aboriginal and Torres Strait Islander children and children with developmental disabilities.²⁰⁸

The government's present two-stage approach, which is dependent on future government support after the 2026 election, also begs the question as to why government has not yet developed and invested in an alternative service model for 12 and 13 year olds. It has been working on raising the age through national processes since 2018. Children aged 12 and 13 years are still children, often traumatised and vulnerable, and too often in contact with the child protection system. Surely, they are worth that investment.

In early May 2023, there were no 12-year-olds and only one 13-year-old in the entire youth justice system (custodial and community supervision).²⁰⁹ Even allowing for some fluctuations, the investment and time needed to develop an alternative service model for 12 and 13 years olds should not take four years, especially when keeping them in custody causes the child harm and costs the community \$5,000 per day.²¹⁰

The minimum age of detention should be raised to 16 years

The evidence of significant and detrimental impacts of custody outlined in this report and in previous inquiries provides a compelling reason to raise the minimum age of detention to at least 16 years of age. As noted above, this would be consistent with international human rights standards.

Youth detention increases risk of suicide and psychiatric disorders, depression, substance use and behavioural disorders.²¹¹ Aboriginal children and young people are at higher risk of serious injury or death by self-harm or suicide than others in Victoria's youth justice centres.²¹²

Modelling undertaken for the *Our Youth, Our Way* report indicates that based on 2010 to 2019 custody rates, increasing the minimum age at which a child can be remanded or sentenced to youth justice custody to 16 would remove an average of 32 Aboriginal children aged 14 and 15 years from youth prisons each year.²¹³ That is 32 Aboriginal children each year who would be kept out of a harmful environment that breaches their rights and too often sets them on the path towards the adult criminal justice system.

The way forward

The *Our Youth, Our Way* report clearly set out the failures of Victoria's youth justice system and reforms needed to reduce the over-representation of Aboriginal children.²¹⁴ It showed that listening to the voices of Aboriginal children and young people and factoring them into decision-making should be an essential component of all service responses and legislation — policy and services must be driven by their lived experiences. It also clearly showed that services designed, controlled and delivered by the Aboriginal community have the greatest potential to produce the best outcomes for Aboriginal children and young people.²¹⁵

Yoorrook notes the progress made in implementing the *Our Youth, Our Way* recommendations, and those of other inquiries, and that the over-representation of Aboriginal children in youth justice is currently dropping.

However, Aboriginal children are still grossly over-represented in the youth justice system and more needs to be done to address this inequality and the harm that flows from it. Yoorrook will continue to monitor the implementation of *Wirkara Kulpa* and the remaining recommendations of *Our Youth, Our Way*.²¹⁶

Yoorrook strongly recommends that Victoria abandon its two-stage approach to raising the age of criminal responsibility and instead raise it to 14 years as an immediate priority without exceptions (and also raise the minimum age of detention to 16 years).

Yoorrook has heard evidence of practices that are not consistent with human rights and considers that the standard of human and cultural rights awareness and practice in the youth justice system is low, notwithstanding the training, policies and standards in place. This is evident in the practice of excessive lockdowns, among other things. The government is responsible for ensuring that human and cultural rights are understood and applied. It is failing to do so, and this must be addressed as a matter of urgency.

Work must also be progressed to modernise Victoria's youth justice system through a standalone, contemporary Youth Justice Bill, informed by the 2017 Youth Justice Review, *Our Youth, Our Way* and

this Commission.²¹⁷ The 2017 Youth Justice Review recommends that the new legislative model for youth justice be shaped by guiding youth justice principles designed to minimise and reduce offending by children, support rehabilitation and positive development, and promote community safety. It is understood that priorities for potential inclusion in the Bill include:

- a more nuanced diversionary framework
- a revised sentencing framework that prioritises rehabilitation
- a more robust and efficient custodial framework, and
- clearer provisions to uphold the rights to Aboriginal self-determination.²¹⁸

The new Youth Justice Bill is an opportunity to establish a legislative prohibition on routine strip searching in youth prisons.²¹⁹ The State currently has a policy position that prohibits routine strip searching, and body scanners have been introduced at Parkville and Malmsbury, which is welcome.²²⁰ However routine strip searching is not expressly prohibited by law. Yoorrook considers that this protection should be legislated (see recommendation 39(a)). In the period January to March 2023 the monthly average number of unclothed searches in youth prisons was 29.²²¹

The Minister for Youth Justice told Yoorrook that he intends to introduce the Youth Justice Bill into Parliament in October 2023.²²² ■

Recommendations

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.

Endnotes

1. Witness Statement of Marcus Stewart, 29 April 2022, 50 [141]–[142]. See also First Peoples' Assembly of Victoria, Submission 43, 16.
2. For example, Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 27–29, 52–56, 60–63; Aboriginal Justice Caucus, Submission 74, 11–15, 62–63.
3. In 2021–22 there were 182 unique Aboriginal children and young people involved with the youth justice system in Victoria (community, custody or both): Department of Justice and Community Safety, 'Response to NTP-002-004 — *Aboriginal Youth Justice, Youth Justice Data Report to the Aboriginal Justice Forum 63*', 4, 20 & 21 October 2022, produced by the State of Victoria in response to the Commission's Notice to Produce dated 3 November 2022.
4. Sentencing Advisory Council, *Reoffending by Children and Young People in Victoria* (Report 2016) 6, 26 ('*Reoffending by Children and Young People in Victoria*'). See also Commission for Children and Young People, *Our Youth, Our Way: Inquiry into the Over-Representation of Aboriginal Children and Young People in the Victorian Youth Justice System* (Report, 2021) 133–135 ('*Our Youth, Our Way*').
5. Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 27–29, 52–56. See also Victoria Legal Aid, *Submission to the Statutory Review of the Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017* (2022) 4–5.
6. *Ibid* 4, 12.
7. These are listed in Chapter 9: Overview of the Criminal Justice System.
8. See *Our Youth, Our Way* (n 4) 91; Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Youth Justice Centres in Victoria* (Parliamentary Paper No 372, Final Report, March 2018) ('*Inquiry into Youth Justice Centres in Victoria*'); Victorian Auditor-General's Office, *Managing Rehabilitation Services in Youth Detention* (2018); Department of Justice and Community Safety, Peggy Armytage and Professor James Ogloff AM, *Youth Justice Review and Strategy: Meeting Needs and Reducing Offending* (July 2017) vol 1 ('*The Armytage and Ogloff Review*').
9. *Our Youth, Our Way* (n 4) 41; Jesuit Social Services, Submission 51, 4–5; Victorian Aboriginal Community Controlled Health Organisation, Submission 41, 6–7.
10. *Our Youth, Our Way* (n 4) 39.
11. Yoorrook acknowledges the work of the Aboriginal Youth Justice Collective Working Group, a subgroup of the Aboriginal Justice Caucus. See further Victorian Government, 'Wirkara Kulpa', *Victorian Aboriginal Justice Agreement* (Web page, 2 June 2022).
12. Witness Statement of Chief Commissioner of Police, Shane Patton, 56–57 [168]–[169].
13. This fell from a high in 2017–18 when the daily average number was 119 young people, 19 First Peoples children (around 16 per cent): Australian Government Productivity Commission, 'Part F Community Services, Section 17 Youth Justice Services', *Report on Government Services 2023* (2023) Data table 17A.5, Young people aged 10–17 years in detention, by Indigenous status.
14. Transcript of Josh Smith, 3 May 2023, 369 [18]–[20].
15. Department of Justice and Community Safety, Supplementary response to questions taken on notice by Marian Chapman, Deputy Secretary, Courts, Civil and Criminal Law and Kate Houghton, Secretary, Department of Justice and Community Safety on 2 May 2023, Table 2.
16. Transcript of Commissioner Andrea Davidson, 3 May 2023, 341 [3]–[6].
17. Australian Institute of Health and Welfare, 'State and Territory Fact Sheets: Victoria', *Youth Justice in Australia 2021–2022* (Online, 7 March 2023) Tables S130b and S130c <<https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2021-22/contents/state-and-territory-fact-sheets/victoria>> ('*Youth Justice in Australia 2020–2021*').
18. Transcript of Commissioner Andrea Davidson, 3 May 2023, 341 [6]. See also Transcript of Minister for Youth Justice, the Hon Enver Erdogan, 15 May 2023, 867 [18]–[19].
19. Koorie Youth Council, Submission 95, 6.
20. Department of Justice and Community Safety, Peggy Armytage and Professor James Ogloff AM, *Youth Justice Review and Strategy: Meeting Needs and Reducing Offending — Executive Summary* (July 2017) 20 ('*The Armytage and Ogloff Review — Executive Summary*').
21. Kelly Richards, *What Makes Juvenile Offenders Different from Adult Offenders?* (Australian Institute of Criminology, 2011) 6–7.
22. *Our Youth, Our Way* (n 4) 166, 365–266.
23. *Reoffending by Children and Young People in Victoria* (n 4) 5, citing Chris Cunneen, Rob White and Kelly Richards, *Juvenile Justice in Australia* (Oxford University Press, 5th ed, 2015) 55.
24. Transcript of Josh Smith, 3 May 2023, 369 [20]–[23].
25. Transcript of Minister for Youth Justice, the Hon. Enver Erdogan, 15 May 2023, 872 [43]–873 [7].
26. Transcript of the Attorney-General, the Hon. Jaclyn Symes, 5 May 2023, 458 [17]–[21]; Transcript of Minister for Youth Justice, the Hon. Enver Erdogan, 15 May 2023, 904 [38]–[45].

27. That is 53 per 10,000 compared with five per 10,000: *Youth Justice in Australia 2021–2022* (n 17) 19, Table S130a. From 1 July 2022 to 31 December 2022, there were 42 Aboriginal children and young people aged 10–17 under youth justice supervision on an average day: Department of Justice and Community Safety, ‘Client Relationship Information System (DJCS CRIS)’, cited in Department of Justice and Community Safety, ‘First Nations Facts and Figures’, May 2023.
28. *Our Youth, Our Way* (n 4) 78.
29. Witness Statement of Chief Commissioner of Police, Shane Patton, 57 [170]; Witness Statement of Commissioner Meena Singh, 2 December 2022, 18 [44]; Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 54; Federation of Community Legal Centres, Submission 61, 18; Jesuit Social Services, Submission 51, 5; Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria’s Criminal Justice System* (Parliamentary Paper No 326, March 2022) vol 1, 217–228 (*‘Inquiry into Victoria’s Criminal Justice System’*).
30. *Our Youth, Our Way* (n 4) 21; Statement of Commissioner Meena Singh, 2 December 2022, 18 [44].
31. Witness Statement of Commissioner Meena Singh, 2 December 2022, 18 [44]. From 1 July 2022 to 31 December 22, on average, Aboriginal children and young people spent more time on orders: remand (25 days), sentenced custodial orders (68 days) and sentenced community-based orders (133 days) compared with non-Aboriginal children and young people: Department of Justice and Community Safety, ‘First Nations Facts and Figures’, May 2023.
32. *Our Youth, Our Way* (n 4) 21.
33. *Ibid* 150–151.
34. In evidence to Yoorrook, Youth Justice officials stated that at 2021–2022 approximately 45 per cent of Aboriginal young people in custody had an active mental health diagnosis and 70 per cent had an intellectual disability: Transcript of Josh Smith, 3 May 2023, 374 [13]–[15], 376 [32]–[33]. For other data (based on a 2019 survey), see Department of Justice and Community Safety, *Wirkara Kulpa: Aboriginal Youth Justice Strategy 2022–2032* (2022) (*‘Wirkara Kulpa’*).
35. *Reoffending by Children and Young People in Victoria* (n 4) 6.
36. Aboriginal Justice Caucus, Submission 74, 62, quoting Aboriginal Justice Caucus member Robert (Bobby) Nicholls.
37. *Our Youth, Our Way* (n 4) 433.
38. Only includes individuals born in 1990 or later for whom a full Youth Justice historical data set is available: Department of Justice and Community Safety, Evidence and Insights Unit, ‘Corrections Victoria prison data set’ (unpublished) cited in Department of Justice and Community Safety, ‘Response to NTP-002-014 - *Agency response to the Yoorrook Justice Commission*’, 12 [25] n 11, produced by the State of Victoria in response to the Commission’s Notice to Produce dated 15 March 2023.
39. As of 1 June 2022, there were 31 dual system clients in Victoria (First Peoples children and young people with an open child protection case). Of those 31 dual clients, two were 14 years old, nine were 15, seven were 16, and 13 were 17 years old: Department of Families, Fairness and Housing, Response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 6 May 2023, Attachment 1, 10 [26]–[27].
40. Sentencing Advisory Council, *Crossover Kids: Vulnerable Children in the Youth Justice System* (Report June 2019) vol 1, 33–39 (*‘Crossover Kids vol 1’*).
41. Department of Justice and Community Safety, ‘Response to NTP-002-014 — *Agency response to the Yoorrook Justice Commission*’, 12 [25], produced by the State of Victoria in response to the Commission’s Notice to Produce dated 15 March 2023.
42. Australian Institute of Health and Welfare, *Young People under Youth Justice Supervision and Their Interaction with the Child Protection System 2020–2021* (Report, 2022) Table S4 (*‘Young People under Youth Justice Supervision’*). Young people who were under youth justice supervision during 2016–17 to 2020–21 and young people who had an interaction with the child protection system between 1 July 2013 and 30 June 2021 were included in the analysis. Note further the disproportionate over-representation of Aboriginal children involved in both systems (76 per cent) in contrast to non-Indigenous children involved in both systems at 52.3 per cent. Young people who had been under youth justice supervision in 2020–21 and who had an interaction with the child protection system in the five years from 1 July 2016 to 30 June 2021 were included in the analysis: *ibid* Table S2.
43. *Crossover Kids vol 1* (n 40) 79–80.
44. Australian Institute of Health and Welfare, *Young People under Youth Justice Supervision and Their Interaction with the Child Protection System 2020–2021* (Report, 2022).
45. Sentencing Advisory Council, *Crossover Kids: Vulnerable Children in the Youth Justice System Report 2: Children at the Intersection of Child Protection and Youth Justice across Victoria* (Report, April 2020) xvi.
46. *Ibid* xvi.

47. Residential care provides 'temporary, short-term and long-term care and support to children and young people who have been removed from their family and are unable to be cared for in a home-based care setting': Department of Health and Human Services, Victorian Government, *Framework to Reduce Criminalisation of Young People in Residential Care* (2020) 5 ('*Framework to Reduce Criminalisation of Young People in Residential Care*').
48. *Crossover Kids vol 1* (n 40) 37 [4.21].
49. Victoria Legal Aid, *Care Not Custody: A New Approach to Keep Kids in Residential Care out of the Criminal Justice System* (Report, 2016) ('*Care Not Custody*').
50. *Our Youth, Our Way* (n 4) 294–302. See also Berry Street, Submission 27, 3.
51. Victoria Legal Aid, Submission 39 (Child Protection), 14–15; Victorian Aboriginal Child Care Agency, Submission 77, 68–71.
52. Victorian Aboriginal Child Care Agency, Submission 77, 69, citing McFarlane, Kath et al, "Just Another Policy Document? Can a Protocol End the Criminalisation of Kids in Care?" (2019) 44(1) *Alternative Law Journal* 37–38.
53. Witness Statement of Argiri Alisandratos, 21 March 2023, 105 [452].
54. *Care Not Custody* (n 49) 11.
55. *Our Youth, Our Way* (n 4) 294–302.
56. See, eg, Joint Protocol to Reduce Contact of Young People in Residential Care with the Criminal Justice System (New South Wales, 2019); Joint Agency Protocol to Reduce Preventable Police Call-outs to Residential Care Services (Queensland, 2018); *Framework to Reduce Criminalisation of Young People in Residential Care* (n 47).
57. Transcript of Nerita Waight and Sarah Schwartz, 16 December 2022, 430–431 [36]–[46]. See also Victoria Legal Aid, Submission 39, 15–16; Victorian Aboriginal Child Care Agency, Submission 77, 70–71.
58. *Our Youth, Our Way* (n 4) 420–423.
59. Victorian Aboriginal Child Care Agency, Submission 77, 123.
60. *Inquiry into Victoria's Criminal Justice System* (n 29) 211–212.
61. *Our Youth, Our Way* (n 4) 152–154.
62. Ibid 21. See also Witness Statement of Commissioner Meena Singh, 2 December 2022, 18 [44]; Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 54; Federation of Community Legal Centres, Submission 61, 18; Jesuit Social Services, Submission 51, 5; *Inquiry into Victoria's Criminal Justice System* (n 29) 217.
63. Aboriginal alleged offenders aged 10 to 17 years are less likely to receive a police caution or official warning than their non-Aboriginal peers. In 2020–21, 13.8 per cent of Aboriginal offenders aged 10–17 years were issued cautions or warnings as alleged offenders in comparison to 20 per cent of non-Aboriginal alleged offenders: Witness Statement of Chief Commissioner of Police, Shane Patton, 57, Table 7.
64. In 2020–21, 1544 diversions occurred through the Children's Court Youth Diversion service, with a 99 per cent success rate. In 2021–22, 12 per cent of CCYD diversions were ordered to Aboriginal children and young people: Department of Justice and Community Safety, 'First Nations Facts and Figures', May 2023.
65. On an average day in 2021–22, in Victoria, Indigenous young people made up 1.7 per cent of those aged 10–17 in the general population, but 15 per cent (or 55) of those of the same age under supervision: *Youth Justice in Australia 2020–2021* (n 17) Tables S129a and S144.
66. Transcript of Minister for Police, the Hon Anthony Carbines, 8 May 2023, 523 [10]–[15].
67. Prosecution must consent to a youth diversion: *Children, Youth and Families Act 2005* (Vic) s 356D(3)(a) ('CYFA'); Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 31, 53–55; *Inquiry into Victoria's Criminal Justice System* (n 29) 209–217.
68. Previously, a young person accused of an offence 'was required to admit their guilt in order to be eligible for a police caution, and the number of cautions police could issue to a young person was limited'. The policy has now changed so that an accused person may consent to receiving a police caution without any reference to whether they are guilty of the offence and there is no longer a limit on the number of cautions a young person can receive: *Inquiry into Victoria's Criminal Justice System* (n 29) 212. See also Tammy Mills, 'Criminal Charges over Minor Offences Prod Police to Change Tack on Youth Cautions', *The Age* (Online, 9 September 2021).
69. Victoria Police, *Victoria Police Annual Plan 2021–2022* (2022), 10. The 2023–24 State Budget includes a line item of: 'Reducing future justice demand and keeping the community safe'. This includes a variety of initiatives across the adult and youth systems, including 'enhancing [Victoria Police's] Aboriginal Youth Cautioning Program'. The specific amount for the Aboriginal Youth Cautioning Program is not specified. The State Budget also included \$13.7 million over three years to continue the Youth Crime Prevention Program: Department of Treasury and Finance, Victorian Government, *Victorian Budget 2023–24: Service Delivery* (Budget Paper No 3, 2023) 40, 44, 51, 82, 86 ('*Victorian Budget 2023–24: Service Delivery*').
70. Transcript of Dan Nicholson, 15 December 2022, 495 [19]–[23].
71. Witness Statement of Chief Commissioner of Police, Shane Patton, 56 [167]. Note also the issuance of the Chief Commissioner's Instruction (CCI 05/22) 'to ensure police are making effective use of our cautions policy and greater oversight of police actions in respect of all Aboriginal children who come into police custody' at 35 [118.7], 57 [169].
72. *Our Youth, Our Way* (n 4) 41, Recommendation 11.
73. Transcript of Minister for Police, the Hon Anthony Carbines, 8 May 2023, 539 [23]–[28].
74. Transcript of Josh Smith, 3 May 2023, 345 [10]–[14].

75. *Reoffending by Children and Young People in Victoria* (n 4) 4–8, 52.
76. *Our Youth, Our Way* (n 4) 167–168. See further Kaye McLaren, *Alternative Actions That Work: A Review of the Research on Police Warnings and Alternative Action* (Police Youth Services Group, New Zealand Police, 2010). This report provides a review of research into NZ police warnings and diversionary practices but also international models. It identifies 23 principles, starting with overarching principles, followed by principles that relate to the various stages of the youth diversion process. These principles have then been distilled into 11 key findings, outlined in the report.
77. *Our Youth, Our Way* (n 4) 445.
78. *Ibid* 450.
79. *The Armytage and Ogloff Review – Executive Summary* (n 20) 14.
80. *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 37(b), 40(3)(b) ('*CRC*').
81. Committee on the Rights of the Child, *General Comment No 24 (2019): Children's Rights in the Criminal Justice System*, UN Doc CRC/C/GC/24 (18 September 2019) [15]–[18], which notes that diversion provides 'good results for children and is in the interests of public safety and has proven to be more cost-effective... [and] should be the preferred manner of dealing with child offenders in the majority of cases'.
82. *Our Youth, Our Way* (n 4) 445.
83. *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (Final Report, November 2017) vol 2B, chap 25, 250 ('*Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*').
84. *Ibid* vol 2B, chap 25, 250–251.
85. *Our Youth, Our Way* (n 4) 445.
86. *Ibid* 447–449.
87. Providers include Massive Murray Paddle, Baarum Jarn (Youth Journeys) — Dardi Munwurrow and Wathaurong Aboriginal Cooperative.
88. Department of Justice and Community Safety, 'Response to NTP-002-014 — *Agency response to the Yoorrook Justice Commission*', 36–37 [122], produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
89. Transcript of Commissioner Andrea Davidson, 3 May 2023, 343 [21]–[27].
90. Transcript of Josh Smith, 3 May 2023, 341 [27]–[29]. See also case study on successful programs in Outline of Evidence of Aunty Karin Williams, 14 December 2022, 8-9 [75].
91. Transcript of Minister for Youth Justice, the Hon Enver Erdogan, 15 May 2023, 866 [16]–[17].
92. Victorian Aboriginal Legal Service, Submission 34, (Criminal Legal System) 53–56.
93. *Inquiry into Victoria's Criminal Justice System* (n 29) 165, Recommendation 114.
94. *Our Youth, Our Way* (n 4) 147–149, Recommendation 6, 450, Recommendation 55.
95. Transcript of Josh Smith, 3 May 2023, 369, [18]–[20].
96. *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 17(2), 23(2) ('*Charter*').
97. Department of Justice and Community Safety, 'Response to NTP-002-014 — *Agency response to the Yoorrook Justice Commission*', 15 [37], produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
98. Department of Justice and Community Safety, Peggy Armytage and Professor James Ogloff AM, *Youth Justice Review and Strategy: Meeting Needs and Reducing Offending* (July 2017) vol 2, 53, 82 ('*The Armytage and Ogloff Review vol 2*').
99. Transcript of Minister for Youth Justice, the Hon Enver Erdogan, 15 May 2023, 902 [27]–[35].
100. Department of Justice and Community Safety, 'Response to NTP-002-014 — *Supplement to the DJCS Agency response to the Yoorrook Justice Commission's 71 Questions*', 14 and 85, produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
101. Department of Justice and Community Safety, 'Response to NTP-002-014 — *Supplement to the DJCS Agency response to the Yoorrook Justice Commission's 71 Questions*', 14 and 85, produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
102. Changes to the *Bail Act 1997* (Vic) since December 2013 have restricted applications for bail and led to an increase in the targeted policing of bail compliance. While reforms in 2016 attempted to remedy the application of these laws to children, further changes to bail laws in 2018 made the situation worse — with the remand population in adult prisons and youth detention escalating rapidly following the changes. See *Our Youth, Our Way* (n 4) 454–455.
103. Transcript of Attorney-General, the Hon Jaclyn Symes, 5 May 2023, 478 [44]–[45].
104. Human Rights Law Centre, Submission 60, 17.
105. See, eg. Human Rights Law Centre, Submission 60, 17; Sentencing Advisory Council, *Children Held on Remand in Victoria: A Report on Sentencing Outcomes* (Report, September 2020) 42.
106. Department of Justice and Community Safety, 'Response to NTP-002-014 — *Supplement to the DJCS Agency response to the Yoorrook Justice Commission's 71 Questions*', 13, produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
107. See *Bail Act 1977* (Vic) ss 4AA, 4A, 4C, 4D, schedules 1, 2. See further *Our Youth, Our Way* (n 4) 464, Recommendations 457 and 458.

108. 'The first proposed amendment is a differentiated child bail test where the reverse onuses no longer apply to children, with limited exceptions. The Bail Act would be amended to exclude children from the application of the show compelling reason test and exceptional circumstances test (with two exceptions): Witness Statement of Attorney-General, the Hon Jaclyn Symes, 5 May 2023, 37 [203]. The exceptions are homicide and terrorism: Transcript of Attorney-General, the Hon Jaclyn Symes, 5 May 2023, 474 [18]–[20].
109. Yoorrook also welcomes amendments to the *Children, Youth and Families Act 2005* (Vic), which require a court or a bail justice to have regard to the Aboriginal Child Placement Principle when making any decision in respect of a child in need of protection. See Children and Health Legislation Amendment (Statement of Recognition, Aboriginal Self-Determination and Other Matters) Bill 2023 (Vic) cl 4 A.]
110. Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of the Commonwealth of Australia, *Doing Time — Time for Doing: Indigenous Youth in the Criminal Justice System* (2011) 226, citing a joint submission from Aboriginal Legal Services of NSW, ACT, Queensland and the Northern Territory ('*Doing Time — Time for Doing*').
111. *Our Youth, Our Way* (n 4) 457–458.
112. *Ibid*; *Inquiry into Youth Justice Centres in Victoria* (n 8) 73–74; *Doing Time — Time for Doing* (n 110) 222.
113. Department of Families, Fairness and Housing, Supplementary response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 11 May 2023, 23 May 2023, 19–20.
114. *Inquiry into Youth Justice Centres in Victoria* (n 8) 73–75; *Doing Time — Time for Doing* (n 110) 229.
115. It is also important to note that homelessness is also an issue for Aboriginal children leaving youth detention either following a period on remand or having completed their sentence. Deputy Secretary Smith told Yoorrook that finding 'suitable placement options post release is a continuing challenge for Youth Justice': Transcript of Josh Smith, 3 May 2023, 347 [7]–[9].
116. *Our Youth, Our Way* (n 4) 458–464.
117. Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 46–48; Aboriginal Justice Caucus, Submission 74, 52–53.
118. *Our Youth, Our Way* (n 4) 359–361, 458–464.
119. Koorie Youth Council, Submission 95, 18.
120. Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 58, 64–65; Victorian Aboriginal Child Care Agency, Submission 77, 123; Aboriginal Justice Caucus, Submission 74, 53; Koorie Youth Council, Submission 95, 15.
121. Outline of Evidence of Nakia Firebrace (Victorian Aboriginal Child Care Agency) 13 December 2022, 3 [18].
122. Outline of Evidence of Aunty Karin Williams, 14 December 2022, 4 [23].
123. Summary Report – Malmsbury Youth Detention Centre Site Visit, 21 February 2023, 1 [2], 3 [8].
124. *CRC* (n 80) art 37(b).
125. *Charter* (n 96) ss 8, 17(2), 22, 23(3).
126. *Ibid* s 10.
127. *Ibid* s 19(2).
128. *United Nations Standard Minimum Rules for the Treatment of Prisoners*, GA Res 70/175, UN Doc A/RES/70/175 (8 January 2016, adopted 17 December 2015) Rule 44 ('*Mandela Rules*').
129. *Ibid* Rule 45(2). See also *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, GA Res 45/113, UN Doc A/RES/45/113 (2 April 1991, adopted 14 December 1990) Rule 67 ('*Havana Rules*').
130. CYFA (n 67): s 488 For an analysis of the use of isolation, separation and lockdowns in the Victorian youth justice system, see Commission for Children and Young People, *The Same Four Walls: Inquiry into the Use of Isolation, Separation and Lockdowns in the Victorian Youth Justice System* (Inquiry Report, 2017) 45.
131. CYFA (n 67): s 487 and s 488. When a young person is placed in isolation, DJCS advises that 'engagement, support and ongoing interaction with education, health and programs continues to ensure that young people remain supported and cared for, consistent with all legislative, Charter requirements and the UN Standard Minimum Rules for the Treatment of Prisoners. This is in line with OPCAT standards'. Confirmed by the State of Victoria in subsequent correspondence, 6 July 2023, Annexure A, 34.
132. Human Rights Law Centre, Submission 60, 24.
133. Victorian Ombudsman, *OPCAT in Victoria: A Thematic Investigation of Practices Related to Solitary Confinement of Children and Young People* (Report, 2017) 254. See also at 246 for observations regarding Malmsbury.
134. Nick McKenzie, 'Outrage at Children Locked in Solitary Confinement for 22 Hours a Day', *The Age* (Online, 6 March 2023) <<https://www.theage.com.au/national/victoria/outrage-at-children-locked-in-solitary-confinement-for-22-hours-a-day-20230306-p5cpni.html>>.
135. Anonymous, 'Failing Our Duty of Care in Youth Detention', *The Saturday Paper* (Online, 5 May 2023) <<https://www.thesaturdaypaper.com.au/opinion/topic/2023/05/13/failing-our-duty-care-youth-detention#hrd>>.
136. Supplementary Statement of Commissioner Meena Singh, 10 May 2023, 69, Table 8.
137. Confirmed by the State of Victoria in subsequent correspondence, 6 July 2023, Annexure A, 34.

138. When a young person is placed in isolation, DJCS advises that 'engagement, support and ongoing interaction with education, health and programs continues to ensure that young people remain supported and cared for, consistent with all legislative, Charter requirements and the UN Standard Minimum Rules for the Treatment of Prisoners. This is in line with OPCAT standards'. Confirmed by the State of Victoria in subsequent correspondence, 6 July 2023, Annexure A, 34.
139. Transcript of Minister for Youth Justice, the Hon Enver Erdogan, 15 May 2023, 926 [16]–[19].
140. As at May 2023 there were four Aboriginal Liaison Officers (ALOs) within the youth justice system. This is being expanded to six. From the child's admission to custody, the role of the ALO is 'to walk alongside young people to particularly ensure that their cultural needs are met, insofar as they can be, within [the] custodial environment while they are dislocated from family, community and the like': Transcript of Commissioner Andrea Davidson, 3 May 2023, 367 [19]–[20], [33]–[35].
141. Transcript of Commissioner Andrea Davidson, 3 May 2023, 355 [35]–[47].
142. Department of Justice and Community Safety, response to questions taken on notice by Andrea Davidson, Commissioner Youth Justice, and Josh Smith, Deputy Secretary, Department of Justice and Community Safety on 3 May 2023, 6 July 2023, Attachment 1, 3–4.
143. Summary Report of Malmsbury Youth Detention Centre Site Visit, 21 February 2023, 3 [8]. Also note CCYP data shows that while Aboriginal children made up 14 per cent of the youth justice detention population in 2021–22, they were subjected to 20 per cent of episodes of use of force involving handcuffs and physical force (that is 33 episodes): Supplementary Statement of Commissioner Meena Singh, 10 May 2023, 68, Table 6.
144. Supplementary Statement of Commissioner Meena Singh, 10 May 2023, 68, Table 6.
145. Confirmed by the State of Victoria in subsequent correspondence, 6 July 2023, Annexure A, 35.
146. See Committee on the Rights of the Child, *General Comment No 24 (2019): Children's Rights in the Criminal Justice System*, UN Doc CRC/C/GC/24 (18 September 2019) [89].
147. Transcript of Professor Stuart Kinner and Dr Mick Creati, 16 December 2022, 539 [9]–[11].
148. Victorian Aboriginal Community Controlled Health Organisation, Submission 41, 7; Transcript of Professor Stuart Kinner and Dr Mick Creati, 16 December 2022, 539 [9]–[49].
149. Supplementary Statement of Commissioner Meena Singh, 10 May 2023, 68, Table 4.
150. Transcript of Josh Smith, 3 May 2023, 374 [13]–[15], 376 [32]–[33].
151. Transcript of Professor Stuart Kinner, 16 December 2022, 539 [1]–[11]. See also a Western Australian study of young people in detention, where 74 per cent of the children assessed were Aboriginal, and found that 36 per cent met the criteria for FASD and 89 per cent had at least one form of severe neurodevelopmental impairment: see Carol Bower et al, 'Fetal Alcohol Spectrum Disorder and Youth Justice: A Prevalence Study among Young People Sentenced to Detention in Western Australia' (2018) 8(2) *BMJ Open* 1.
152. *Our Youth, Our Way* (n 4) 138–139. See further in Chapter 6.1 'Collaboration'.
153. Sentencing Advisory Council, *Crossover Kids: Vulnerable Children in the Youth Justice System* (Report, June 2020) vol 3, 12–25; Transcript of Dr Mick Creati, 16 December 2022, 553 [34]–[49]; Victorian Aboriginal Child Care Agency, Submission 77, 124.
154. Transcript of Josh Smith and Commissioner Andrea Davidson, 3 May 2023, 373 [30]–[43].
155. Department of Justice and Community Safety, 'Response to NTP-002-014 — Agency response to the Yoorrook Justice Commission', 53 [198], produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
156. On 13 June 2023, the government announced that 'Cherry Creek will take on the first cohort of males aged between 15 and 18 by August'. The Malmsbury precinct will close by the end of 2023. Parkville will continue to operate: Premier of Victoria, 'New Era for Victoria's New Youth Justice System' (Media release, 13 June 2023) 1 <<https://www.premier.vic.gov.au/sites/default/files/2023-06/230613-New-Era-For-Victoria%E2%80%99s-New-Youth-Justice-System.pdf>>.
157. Transcript of Josh Smith, 3 May 2023, 374 [21]–[27].
158. Transcript of Josh Smith, 3 May 2023, 375, [14]–[16]; Department of Justice and Community Safety, Response to NTP Item 002-004 - Agency response to the Yoorrook Justice Commission, 53 [195], produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
159. In addition, young people with a disability will be supported by a team of Specialist Disability Advisors operating across community and custody to provide support, including access to disability services. Department of Justice and Community Safety, Response to NTP Item 002-0-4 - Agency response to the Yoorrook Justice Commission, 53 [194], produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
160. Transcript of Josh Smith, 3 May 2023, 349 [25]–[26]. All Custodial staff are required to have a Certificate 4, which includes this unit. In addition, all youth justice staff (including youth justice community staff employed by DJCS) must complete mandatory cultural awareness training which is delivered through an Aboriginal consultant: Transcript of Commissioner Andrea Davidson, 3 May 2023, 365 [34]–[43].

161. Community Safety Building Authority, Victorian Government, 'Cherry Creek Youth Justice Centre: Kangaroo Drive, Cherry Creek', *Our Projects* <<https://csba.vic.gov.au/our-projects/cherry-creek-youth-justice-centre>>. See also Department of Justice and Community Safety, Victorian Government, 'Cherry Creek', *Youth Justice Precincts* <<https://www.justice.vic.gov.au/youth-justice-precincts-0#cherry-creek>>.
162. Transcript of Josh Smith, 3 May 2023, 363–364 [42]–[2]. Note however the government website states there will be 140 beds at Cherry Creek: Community Safety Building Authority (n 161).
163. Transcript of Commissioner Andrea Davidson, 3 May 2023, 352 [24]–[25].
164. *The Armytage and Ogloff Review — Executive Summary* (n 20) 29–54.
165. *Wirkara Kulpa* (n 34) 6.
166. Department of Justice and Community Safety, Response to NTP Item 002-0-4 - *Agency response to the Yoorrook Justice Commission*, 20 [59], produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
167. The 2023–24 State Budget includes \$5 million for one year for: 'Supporting progressive reform in Youth Justice'. Funding is provided for early 'for early intervention, diversion and family therapy programs for 10–11 year old young people in contact, or at risk of contact, with the justice system': *Victorian Budget 2023-24: Service Delivery* (n 69) 40, 43.
168. Department of Justice and Community Safety, Response to NTP Item 002-0-4 - *Agency response to the Yoorrook Justice Commission*, 39 [124], produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
169. Department of Justice and Community Safety, 'First Nations Facts and Figures', May 2023, quoting AIHW Youth Justice in Australia 2021–22 — Data Table S10a: Young people aged 10–17 under supervision on an average day(a) by Indigenous status, states and territories, 2012–13 to 2021–22.
170. Transcript of Josh Smith, 3 May 2023, 369, [18]–[20].
171. Department of Justice and Community Safety, Response to NTP Item 002-0-4 - *Agency response to the Yoorrook Justice Commission*, 16 [39], produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
172. Closing the Gap target 11 is 'to reduce the rate of Aboriginal and Torres Strait Islander young people (10–17 years) in detention by at least 30 per cent by 2031. In Victoria, this target is 12.3 per 10,000. In 2021–22, Victoria was 'sitting at 9.3 per 10,000': Transcript of Commissioner Andrea Davidson, 3 May 2023, 341 [3]–[6]. See also Closing the Gap, 'Closing the Gap Targets and Outcomes' (Web page, Undated) <<https://www.closingthegap.gov.au/national-agreement/targets>>.
173. *Wirkara Kulpa* (n 34) 26.
174. 'It is conclusively presumed that a child under the age of 10 years cannot commit an offence': *CYFA* (n 67) s 344.
175. National Legal Aid, *Submission to Council of Attorneys-General — Age of Criminal Responsibility Working Group Review* (February 2020) 8–11 ('*National Legal Aid Age of Criminal Responsibility Submission*'); *Inquiry into Victoria's Criminal Justice System* (n 29) 126–134.
176. Australian Institute of Health and Welfare, *Young People in Child Protection and under Youth Justice Supervision: 1 July 2014 to 30 June 2018* (Australian Government, 2019) 2, stating: '... those who were younger at their first youth justice supervision were more likely to have also received child protection, compared with those who were older at their first youth justice supervision.' Over two thirds (62 per cent) of those aged 10 at their first youth justice supervision were also in child protection, compared with 27 per cent of those aged 17. See further Jesuit Social Services, *Too Much Too Young: Raise the Age of Criminal Responsibility to 12* (October 2015) 3.
177. *Youth Justice in Australia 2020–2021* (n 17) 31. Note on average, nationally, Indigenous young people entered youth justice supervision at a younger age than non-Indigenous young people. More than a third (37 per cent) of Indigenous young people under supervision in 2020–21 were first supervised when aged 10–13 compared with about one in seven (14 per cent) non-Indigenous young people.
178. Victorian Aboriginal Legal Service (VALS), *Policy Brief: Raising the Age of Criminal Responsibility* (2022) 3.
179. *RP v The Queen* (2016) 259 CLR 641.
180. Australian Law Reform Commission, Australian Government, *Seen and Heard: Priority for Children in the Legal Process* (1997) 18, 19.
181. Committee on the Rights of the Child, *General Comment No 24 (2019): Children's Rights in the Criminal Justice System*, UN Doc CRC/C/GC/24 (18 September 2019) [25]–[27].
182. Transcript of Dan Nicholson, 15 December 2022, 492 [24]–[33].
183. See further Wendy O'Brien and Kate Fitz-Gibbon, 'The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform' (2017) 17(2) *Youth Justice* 134; Chris Cunneen, *Arguments for Raising the Minimum Age of Criminal Responsibility* (Research Report, Comparative Youth Penalty Project, University of New South Wales, 2017).
184. See, eg, Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Australia*, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) [44].
185. Transcript of the Hon Jaclyn Symes, Attorney-General, 5 May 2023, 460 [17]–[23].
186. 'States parties are encouraged to take note of recent scientific findings, and to increase their minimum age accordingly, to at least 14 years of age': Committee on the Rights of the Child, *General Comment No 24 (2019): Children's Rights in the Criminal Justice System*, UN Doc CRC/C/GC/24 (18 September 2019) [22].

187. Committee on the Rights of the Child, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia*, UN Doc CRC/C/AUS/CO/5-6 (1 November 2019) [47]–[48].
188. Outline of Evidence of Dr Mick Creati, 16 December 2022, 1, [11]; *Our Youth, Our Way* (n 4) 134. See also Richards (n 21) 3–4; Laurence Steinberg, ‘Risk Taking in Adolescence: New Perspectives from Brain and Behavioural Science’ (2007) 16(2) *Current Directions in Psychological Science*, 55–59.
189. Outline of Evidence of Dr Mick Creati, 16 December 2022, 1, [11]; *Our Youth, Our Way* (n 4) 134. See also Richards (n 21) 4; Steinberg (n 188) 56.
190. Australian Medical Association, *Position Statement on Health and the Criminal Justice System* (Position statement, 2012) 10.
191. *Our Youth, Our Way* (n 4) 166, 139–340; Transcript of Professor Stuart Kinner, 16 December 2022, 537 [1]–[9].
192. *Our Youth, Our Way* (n 4) 134.
193. *National Legal Aid Age of Criminal Responsibility Submission* (n 175) 8–11; Jesuit Social Services, *Thinking Outside, Alternatives to Remand for Children (Research Report)* (2013) 38–41. See further *Reoffending by Children and Young People in Victoria* (n 4) 6–8.; Australian Institute of Health and Welfare, *Young People Returning to Sentenced Youth Justice Supervision 2019–20* (Australian Government, 2021) 6–7.
194. *Crossover Kids vol 1* (n 40) 1, 28.
195. See, eg, Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 48–49; Victoria Legal Aid, Submission 28 (Criminal Justice System), 4; Aboriginal Justice Caucus, Submission 74, 31–32; Victorian Aboriginal Child Care Agency, Submission 77, 121–122; Djirra, Submission 44, 8; Liberty Victoria, Submission 52, 3–4; Human Rights Law Centre, Submission 60, 5; Jesuit Social Services, Submission 51, 4–5; Law Institute of Victoria, Submission 31, 6–7; Catholic Social Services Victoria, Submission 78, 6–7; First Peoples’ Assembly Victoria, Submission 43, 13–17; Law & Advocacy Centre for Women, Submission 29, 22–23; Victorian Aboriginal Community Controlled Health Organisation, Submission 41, 8.
196. Cited in Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 49.
197. See Raise the Age (Web page, Undated) <<https://raisetheage.org.au/>>.
198. See, eg, New South Wales Parliament, Legislative Council, Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody, *The High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody* (Report, April 2021) xii, Recommendation 11.
199. *Our Youth, Our Way* (n 4) 164, Recommendation 168.
200. *Inquiry into Victoria’s Criminal Justice System* (n 29) 134.
201. Council of Attorneys-General, Age of Criminal Responsibility Working Group, *Draft Final Report* (Report, 2020) 5.
202. *Ibid* 7.
203. Transcript of Kate Houghton, 2 May 2023, 283 [42]–[45], 284 [1]–[2].
204. Transcript of Kate Houghton, 2 May 2023, 285 [43]–[47].
205. The 2023–24 State Budget includes \$5 million for one year for ‘[s]upporting progressive reform in Youth Justice’. Funding is provided ‘for early intervention, diversion and family therapy programs for 10–11-year-old young people in contact, or at risk of contact, with the justice system’: *Victorian Budget 2023–24: Service Delivery* (n 69) 40, 43.
206. Transcript of Attorney-General, the Hon. Jaclyn Symes, 5 May 2023, 460 [28]–[33]; Transcript of Kate Houghton, 2 May 2023, 285 [35]–[47]; Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 592 [33] – 593 [5].
207. The Minister for Youth Justice stated in evidence, ‘[t]hey would like to see the age raised to 14 immediately. That was communicated by First Peoples’ Assembly, Justice Caucus and Djirra and many organisations I have spoken to’: Transcript of Minister for Youth Justice, the Hon Enver Erdogan, 15 May 2023, 905 [35]–[38]. See also First Peoples’ Assembly Victoria, Submission 43, 15–17; Aboriginal Justice Caucus, Submission 74, 32; Djirra, Submission 44, 2.
208. Royal Australasian College of Physicians, ‘Listen to the Experts’ Paediatricians Urge Victorian Government Not to Back Down on Decision to Raise the Age of Criminal Responsibility’ (Media release, 24 April 2023). <<https://www.racp.edu.au/news-and-events/media-releases/listen-to-the-experts-paediatricians-urge-victorian-government-not-to-back-down-on-decision-to-raise-the-age-of-criminal-responsibility>>.
209. As at 11 May 2023: Transcript of Minister for Youth Justice, the Hon Enver Erdogan, 15 May 2023, 907 [40]–[44].
210. Transcript of Minister for Youth Justice, the Hon Enver Erdogan, 15 May 2023, 915 [4]–[6].
211. *Our Youth, Our Way* (n 4) 340; Transcript of Professor Stuart Kinner, 16 December 2022, 535 [22]–[50].
212. *Our Youth, Our Way* (n 4) 54. See also data on self-harm and suicide attempts in Supplementary Statement of Commissioner Meena Singh, 10 May 2023, 68, Table 4.

213. Supplementary Statement of Commissioner Meena Singh, 10 May 2023, 21 [86].
214. *Our Youth, Our Way* (n 4) 21–39.
215. Yoorrook notes that a self-determined youth justice system would be enhanced by the recommendations made in that report.
216. These include recommendations to resource Aboriginal organisations to provide in-reach mental health support for Aboriginal children and young people in youth justice custody and facilitate transitional and post release mental health treatment (recommendation 46) and that DJCS work with Aboriginal communities to establish a community steering committee to guide and monitor the design and implementation of cultural services and program in youth justice centres; that risk assessment tools are validated for use with Aboriginal children and young people; that all Aboriginal children and young people have access to culturally safe youth offending programs in custody, preferably delivered by Aboriginal organisations; evaluate the recent improvements to cultural spaces in youth justice centres and continue to improve these spaces to provide access to culturally enriching environments; ensure that custodial placement decisions prioritise, where possible, placing Aboriginal children and young people with at least one other Aboriginal child or young person; give every Aboriginal child or young person remanded or sentenced to custody a cultural connection package, preferably tailored to their needs and cultural connection. This care package should not be connected with behaviour management and incentive programs (recommendation 68). *Our Youth, Our Way* (n 4) 48, 53.
217. Witness Statement of Minister for Corrections, Youth Justice and Victim Support, the Hon Enver Erdogan, 31 March 2023, 18 [94]–[96].
218. Witness Statement of Minister for Corrections, Youth Justice and Victim Support, the Hon Enver Erdogan, 31 March 2023, 18 [97].
219. See recommendation 39 (a) in Chapter 14 (Victorian Prisons).
220. Youth justice has ended the use of routine strip searches in custodial facilities since the introduction of body scanner technology (August 2020 — Parkville and February 2021 — Malmsbury). An unclothed search is only considered when less intrusive searches have failed to mitigate the risk of contraband that could risk harm to young people or others. For any Aboriginal young person subject to an unclothed search, an Aboriginal Liaison Officer is advised and wellbeing support is provided.
221. In the three-month period there were 577 body scanner searches and 87 unclothed searches completed. State of Victoria, Department of Justice and Community Safety, ‘Youth Justice Unclothed Searches Quarterly Reporting (1 January 2023 to 31 March 2023)’ (Web Page, 23 June 2023) <<https://www.justice.vic.gov.au/youth-justice-unclothed-searches-quarterly-reporting-1-january-2023-to-31-march-2023>>.
222. Transcript of Minister for Youth Justice, the Hon Enver Erdogan, 15 May 2023, 906 [28]–[29].

COURTS, SENTENCING AND CLASSIFICATION OF CRIMINAL OFFENCES

One of the problems that keeps me awake at night is the overrepresentation of Aboriginal people in custody, and others. There are so many people in prison that shouldn't be there, whether it's remand or sentence. So fixing bail laws is one way of addressing it. And I see the other avenue of fixing that problem is the Sentencing Act.¹ ATTORNEY-GENERAL THE HON. JACLYN SYMES

Introduction

In June 2022, although only making up one per cent of the Victorian population, one in 10 sentenced prisoners and one in 12 of those on Community Corrections Orders (CCOs) identified as Aboriginal.² Even though the crime rate has remained relatively stable or declined in recent years, the proportion of court cases leading to prison sentences has increased for Aboriginal people.³

Limited sentencing options, inflexibility of CCOs and an increasing use of 'time-served' sentences fuelled by harsh bail laws are all contributing to this pipeline of Aboriginal people entering Victoria's prisons, with evidence indicating that too many Aboriginal people are being imprisoned for low-level offences.⁴ Over recent years governments have increasingly limited the ability for courts to use alternatives to imprisonment and there continues to be inadequate consideration in sentencing of contemporary and historic systemic disadvantage and discrimination affecting Aboriginal people.

In this chapter, Yoorrook examines evidence on First Peoples' experiences at court and the disproportionate impacts of court practices, sentencing laws and classification of criminal offences.⁵ Yoorrook also considers the findings and recommendations of the 2022 Victorian Parliamentary Inquiry into the Criminal Justice System (Legal and Social Issues Committee Inquiry).⁶ That inquiry looked comprehensively at the criminal justice system with a strong focus on what is needed to address the over-representation of marginalised communities, including First Peoples.⁷ In addition to evidence from people with lived

experience and other experts, Yoorrook has drawn on the findings and recommendations of that inquiry to identify critical reforms.

Evidence before the Commission is clear. Current sentencing options do not adequately address the causes of offending. In addition, some lower-level offences linked to mental health, homelessness and poverty are being inappropriately dealt with by the criminal law as indictable (serious) offences. This disproportionately affects First Peoples, who live with the trauma caused by generations of injustice. Barriers to support and healing only exacerbate these failures.

What Yoorrook heard

Courts lack cultural awareness and competence

Cultural competence in relation to First Peoples should be a requirement for everyone working in the criminal justice system. Yet evidence presented to Yoorrook raises concerns about the impact of systemic racism and the level and consistency of cultural understanding among judicial officers.⁸ Legal services and advocates described gaps in knowledge about the unequal position of First Peoples in Victoria, historical and contemporary causal factors contributing to offending, and what works to meet First Peoples' needs.⁹ In addition, racist stereotypes about First Peoples are widespread in the broader community

and can affect the way judicial officers approach bail applications or sentencing decisions.¹⁰

The Judicial College of Victoria (JCV) provides a number of training opportunities and events, including an immersive Back to Country program that takes judicial officers and tribunal members onto country to meet Elders and Respected Persons. There is also internal cultural awareness training in some jurisdictions.

JCV has also committed to adding a one-day First Nations cultural awareness program twice a year, particularly for new appointees. Following the Inquest into the Passing of Veronica Nelson, JCV has also committed to working with Aboriginal community members and organisations to develop and run training on applying section 3A of the *Bail Act 1977* (Vic) which requires decision makers to take into account any issues that arise due to a person's Aboriginality when making bail decisions. However, apart from judicial officers sitting in the Koori Court who must have cultural awareness training, none of these learning opportunities are compulsory.¹¹

Yoorrook heard that cultural awareness training only reaches those who are already invested in the issues.¹² This also applies to specialist training in other areas such as addiction, brain injuries and trauma, and family violence — all of which affect Aboriginal people at high rates.¹³ Important knowledge often becomes concentrated in a handful of judicial officers, often those sitting in the Koori Court, the Assessment and Referral Court, and the Drug Court. Lawyers from Kurnai Legal Practice told Yoorrook:

[W]e were representing a young Indigenous client going before a Magistrate in regional Victoria, regarding their application for bail. [The lawyer] had done some great work on the matter, including organising referrals to support services, which effectively forced the Magistrate to grant bail. Despite the positive outcome, we were shocked when the Magistrate warned our client 'next time you come before me, you won't be able to play the Indigenous card'.¹⁴

Submissions to Yoorrook called for mandatory training in contemporary and historic systemic racism, unconscious bias and cultural awareness, not only for members of the judiciary, but for all professions working in the criminal justice system.¹⁵ Dr Eddie Cubillo, Senior Indigenous Fellow at Melbourne Law School, recommended the development of an Aboriginal history and law unit to be incorporated into the core curriculum of law degrees. He also suggested ongoing professional education to develop cultural capability among lawyers.¹⁶

Coroner Simon McGregor made similar recommendations in the inquest findings into the passing of Veronica Nelson, including for compulsory Aboriginal and Torres Strait Islander cultural awareness training for members of the Victorian legal profession and its mandatory inclusion in continuing professional development.¹⁷ The Coroner noted:

It is incumbent upon the legal profession to ensure that lawyers who work with clients in Veronica's position are alert to the range of challenges faced by an Aboriginal woman with a drug dependency in the criminal justice system and equipped to manage the barriers that might impede her capacity to provide instructions. In my view, legal practitioners would be aided by relevant training when they commence legal practice and refresher training at regular intervals throughout their careers.¹⁸

In its response to Coroner McGregor's recommendation, the Victorian Legal Services Board (LSB) noted that it cannot mandate cultural awareness as a continuing professional development for lawyers. It will however, in consultation with the Victorian Bar, direct barristers to undertake First Nations cultural capability training in their first three years, as training of this kind becomes available. LSB will work with the Victorian Bar to ensure any mandated training 'is informed by the needs of First Nations clients in the justice system and designed and delivered by First Nations controlled organisations'.¹⁹

Culturally safe processes are available to some, but not all

For Aboriginal people, mainstream courts can be inaccessible and alienating.²⁰ The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) noted 'the sense of powerlessness and alienation felt by many Aboriginal people caught up in the criminal justice system'.²¹ Yoorrook also heard that Victoria's court system can be both difficult to navigate and culturally unsafe for First Peoples:

Because sometimes you have no idea what is going on... there was one girl not long ago who thought she was getting bail because the judge said something similar to that ... so she got packed her cell and everything and she wasn't going home ...²²

Specialist sentencing courts, including the Koori Court, were established to help address these issues. The Aboriginal Justice Caucus explained in its submission:

The Koori Court model, established in 2001, exclusively sentences Aboriginal and Torres Strait Islander peoples and operates in a more culturally safe manner in comparison to mainstream court hearings. The Koori Court puts culture and healing at the forefront through the participation of Aboriginal Elders in the hearing and ultimately aims to reduce reoffending and avoid incarceration.²³

Koori Court objectives include reducing reoffending and improving participation of Aboriginal communities in sentencing processes.²⁴ The Koori Court seeks to ensure that sentencing outcomes are culturally appropriate and facilitated through the presence and cultural advice of Elders and Respected Persons.²⁵

Our Elders have a wealth of knowledge in cultural practices, protocols and lore, they are the connection between our ancestors that have come before us, to impart cultural knowledge to the next generation. It is through the strength and wisdom of our Elders that we will enable families and communities the healing needed to break the cycle of inter-generational trauma which affects so many victims and offenders in this space.²⁶

At the Koori Court, Elders and Respected Persons provide information on the background of the accused person and possible reasons for the offending behaviour. They may also explain relevant kinship connections, how particular crimes have affected the community and provide advice on cultural practices, protocols and perspectives relevant to sentencing.²⁷

A 2011 evaluation found that the County Koori Court 'had reduced rates of reoffending and improved awareness of justice processes in Aboriginal communities'.²⁸ The Legal and Social Issues Committee Inquiry also found that 'Koori Courts have provided culturally safe and accessible criminal justice processes for Aboriginal Victorians'.²⁹

Despite strong demand, access to the Koori Court is limited. To have a matter dealt with in a Koori Court, the accused must first plead guilty and live within the geographical boundaries of the relevant Koori Court.³⁰ In addition, the offence must be within the accepted range of offences that can be heard. For example, Magistrate Koori Courts cannot deal with family violence or sexual offences.

In visits to several Victorian prisons, Yoorrook heard disparate experiences of the Koori Court from Aboriginal men. A few participants shared personal recollections of poor outcomes and having been shamed during the process.³¹ One man spoke of 'humiliation, out of everything from Elders, that could be detrimental to one's confidence, to one's identity'.³² A number were in favour of changes to the Koori Court that would ensure a greater focus on rehabilitation and supporting people to reconnect with their families, communities and Culture.³³

Let's — let's lift up their confidence, let's give them something to look forward to, help them to, ... to rehabilitate themselves, to get back to society, so they can be with their kids ... So they can be with their families, their mob ...³⁴

In addition to creating an inclusive and culturally safe process, the Koori Court may also provide a mechanism to address the underlying factors contributing to offending. The Victorian Aboriginal Legal Service (VALS) has noted that Koori Courts often use section 83A of the *Sentencing Act 1991* (Vic)



Victorian Aboriginal Legal Service panel L-R Anna Gibson, Sarah Schwartz, Kin Leong, Nerita Waight

to defer sentencing for rehabilitative and therapeutic purposes, including engagement with culturally appropriate services and programs.³⁵ While not a mandated feature of the Koori Court, deferred sentencing to enable individualised case management and wraparound services can help reduce the likelihood of reoffending.³⁶

Multiple submissions to Yoorrook called for the expansion in scope and geographical reach of the Koori Court across Victoria.³⁷ In particular, in their submissions to the Legal and Social Issues Inquiry, Victoria Legal Aid, VALS and the Aboriginal Justice Caucus all recommended expanding the model to all courts and removing the requirement to plead guilty so that more Aboriginal people have access to appropriate and culturally safe alternatives to mainstream courts.³⁸ The Legal and Social Issues Committee Inquiry recommended expanding Koori Court locations and that government consider extending the Koori Courts' jurisdiction to hear additional types of criminal matters.³⁹

Courts should take systemic factors into account when sentencing

The criminal legal system exerts significant control over the lives of Aboriginal people through legislation and process that rarely include the voices of Aboriginal people in creating these decision-making processes.⁴⁰

The Department of Justice and Community Safety (DJCS) notes that the *Sentencing Act* 'does not require courts to specifically consider factors unique to Aboriginal communities when deciding the appropriate sentence'.⁴¹ Submissions may be made on relevant personal circumstances, such as childhood disadvantage that reduces culpability or a cultural background that makes imprisonment more onerous. But there are otherwise no formal mechanisms for recognising the systemic racism and disadvantage that accrue to Aboriginal people and their individual circumstances in the sentencing exercise.⁴²

Echoing evidence provided to the Legal and Social Issues Committee Inquiry,⁴³ Aboriginal leaders and legal services told Yoorrook of the need for legislative reforms to require judicial officers to consider unique systemic factors affecting First Peoples when sentencing.⁴⁴

Currently, judicial officers have discretion as to whether, and how, they take into account contemporary and historic systemic discrimination and

disadvantage experienced by First Peoples and its contribution to offending. This issue was considered in the Australian Law Reform Commission (ALRC) *Pathways to Justice* inquiry. ALRC found the current approach insufficient given the unique and often destructive circumstances that only Aboriginal and Torres Strait Islander peoples have experienced in this country.⁴⁵ As noted by the Human Rights Law Centre, a specific legislative provision on taking systemic factors into account would promote ‘consistency in how the judiciary considers impacts of colonisation, discrimination and disadvantage’.⁴⁶

Victoria could draw on international examples to craft such a provision. For example, Canadian legislation⁴⁷ mandates that sanctions other than imprisonment be considered ‘for all offenders, with particular attention to the circumstances of Aboriginal offenders’.⁴⁸ The legislation has been interpreted as requiring courts to consider the history of colonialism, displacement and forced removal of children, and how that history continues to translate into lower educational attainment and incomes, higher rates of substance abuse and suicide, and higher imprisonment rates.⁴⁹ Canadian courts must consider the types of sentencing procedures and sanctions which are appropriate for the circumstances of the person in light of their particular Aboriginal heritage or connection.⁵⁰

Yoorrook is encouraged that the Victorian Government is considering such a proposal as part of reforms to the *Sentencing Act*.⁵¹

Aboriginal Community Justice Reports may assist courts

Courts need First Peoples-led information and perspectives to properly consider unique systemic and background factors for First Peoples. Current mainstream mechanisms, including pre-sentence reports, are limited in their capacity to do this.⁵² As noted by the Attorney-General, ‘clearly this is inadequate’.⁵³

In Canada, ‘*Gladue* reports’ have become an important mechanism to inform courts of these factors and to better involve Aboriginal people in sentencing processes.⁵⁴ Qualified Aboriginal staff investigate and report on the unique experiences of an Aboriginal person who has offended. They identify historical and

systemic factors that have contributed to offending and recommend culturally appropriate rehabilitative options and supports.⁵⁵ This locates the individual’s experience within the collective Aboriginal experience in order to deliver equitable and culturally tailored options in sentencing.⁵⁶

Evaluation of a pilot found that in comparison to pre-sentence reports, *Gladue* reports were ‘more comprehensive, including more information about resources in rural and remote communities’, and provided ‘options tailored to the specific needs of each person’.⁵⁷ The evaluation found that the greatest contribution *Gladue* reports made was ‘their potential to draw concrete connections between the intergenerational impacts of colonialism ... and the person in court for sentencing’.⁵⁸

Burra Lotjpa Dunguludja (Aboriginal Justice Agreement 4) includes a Victorian government commitment ‘to work with Aboriginal people to consider amending the *Sentencing Act* to take into account a person’s Aboriginal status, and the use of Canada’s “*Gladue*” style pre-sentence reports’.⁵⁹

VALS is currently piloting Aboriginal Community Justice Reports to support people to tell their life stories on their own terms during the sentencing process. For this 2020–2023 pilot, VALS will produce 20 Aboriginal Community Justice Reports modelled on *Gladue* reports and adapted for the Victorian context.⁶⁰

Aboriginal community justice reports seek to provide a more complete picture of a person’s life and circumstances. They endeavour to amplify the aspirations, interests, strengths, connections, culture, and supports of the individual, as well as the adverse impact of colonial and carceral systems on their life.⁶¹

Gladue reports and Aboriginal Community Justice Reports are examples of ways to equip courts with relevant information to make fair sentencing decisions. Yoorrook heard strong support for the current pilot and the use of these reports among legal and community organisations given their potential to improve court processes and sentencing decisions for First Peoples.⁶²

Diversion and alternative responses can and do work

We can stop criminalising the symptom and start treating the cause.⁶³

Diversion allows people to have criminal matters dealt with outside of more formal police or court processes. The Legal and Social Issues Committee Inquiry found that diversion options are an ‘important and effective’ means of supporting people to address the causes of their offending and ‘avoid further, harmful contact with the criminal justice system’.⁶⁴ Diversion programs may include ‘treatment, healing, family support, education and training programs that target the root causes of offending’ as well as ‘restorative justice processes ... that aim to directly engage the offender with the consequences of their offending and repairing the harm’.⁶⁵

In partnership with Aboriginal organisations, DJCS oversees community-based programs to divert Aboriginal people from the justice system and reduce further contact (see Table 13-1).⁶⁶

Diversion can occur at the pre-charge or pre-sentencing stage, through Victoria Police or court-based programs. Court diversion operates in the Magistrates’ Court and the Children’s Court under the *Criminal Procedure Act 2009* and the *Children, Youth and Families Act 2005* respectively. These programs allow judicial officers to adjourn matters while defendants meet the conditions of the diversion plan which might include apologising or undertaking community work, counselling or an educational course. If the conditions are met, the matter is ended with no finding of guilt or criminal record. Importantly, diversion is only available under these programs if the prosecution consents to the diversion.

Yoorrook heard that despite the benefits of diversion, it is only available in limited circumstances. Yoorrook was told that when available, it is inadequate to meet the needs and experiences of Aboriginal people.⁷⁴ Challenges and barriers include:

- expectations to cooperate with police, including admissions of guilt in a record of interview
- the prosecution refusing consent for court-based diversion

- diversion not generally being available for subsequent offending (it is largely used for first offences only)
- lack of culturally appropriate diversion programs, particularly in rural and regional Victoria.⁷⁵

Many organisations called for reforms to prioritise diversion at all stages of the criminal justice system and for the expansion of culturally appropriate programs across the state, including pre-charge as well as court-based diversion.⁷⁶ Yoorrook supports calls for changes to legislation and policy that will achieve this.

Yoorrook notes that, in relation to court-based diversion, the Legal and Social Issues Committee Inquiry found that:

Victoria Police’s provision of prosecutorial consent for a courtbased diversion varies between offences and across courts. This is because its policies and decisionmaking tools poorly reflect the legislative basis for diversion programs and offer vague guidance, leaving it to the discretion of individual officers to grant or reject access to a diversion program.⁷⁷

Yoorrook is of the strong view that while the prosecution should have a say in whether a person can access a court-based diversion program, prosecution consent should not be required in order for a person to access diversion. Rather, a judicial officer should have the power to enable a person to participate in a diversion program even if the prosecution does not support it.

Decriminalising and reclassifying offences is an important reform

Yoorrook heard that many Aboriginal people end up in Victorian prisons for offences linked to poverty, disadvantage, disability and poor health. These include low-level drug offences, theft and property offences.⁷⁸ Multiple submissions to Yoorrook called for the decriminalisation of minor offending and the implementation of non-punitive, therapeutic responses.⁷⁹ This is consistent with recommendations made by RCIADIC.⁸⁰

TABLE 13-1: DJCS community-based diversion programs for Aboriginal people (including post-release and on bail supports)

PROGRAM	DESCRIPTION
<p>Koori Women’s Diversion Program (KWDP)</p>	<p>The KWDP aims to divert Aboriginal women from initial and deepening contact with the criminal justice system through an intensive and holistic case management approach. The program facilitates referral pathways to address the drivers of offending behaviour and supports women to navigate the justice and broader service systems. The program connects people with housing, material aid, mental health services, drug and alcohol support services, education, and employment — providing a wraparound service.</p> <p>The KWDP began in 2013 as a residential program at Odyssey House Victoria. It has since expanded to include non-residential intensive case management support for Aboriginal women by Mallee District Aboriginal Services in Mildura and the Victorian Aboriginal Child Care Agency (VACCA) in Morwell, as well as a site in the Northern Metropolitan region delivered by VACCA.⁶⁷</p>
<p>Dardi Munwurro’s Ngarra Jarranounith program</p>	<p>The Ngarra Jarranounith program provides a 16-week intensive residential program to support at-risk men to adopt positive behaviours and strengthen culture. The program is available to men on Family Violence Intervention Orders, men charged with family violence offences in the previous 12 months, court-ordered referrals and self-referrals from Dardi Munwurro’s prison program.</p> <p>In 2021, Deloitte undertook a cost-benefit analysis of Dardi Munwurro’s men’s healing program and found that its programs help to address the drivers of contact with the criminal justice system including poor mental health and trauma.⁶⁸</p>
<p>Aboriginal Community Justice Panels (ACJP)</p>	<p>ACJP volunteers check on Aboriginal people in police custody to assess their wellbeing, identify their immediate needs and report any acute health and wellbeing needs to the custody officers. ACJPs also play a critical early intervention role when a person is released from custody into their care. Volunteers also undertake community call-outs as a preventative measure to reduce risk of contact with the justice system. As a place-based program, the ACJP is also a critical safety net to the mandated Custodial Notification Scheme operated by VALS, which provides 24/7 legal advice and assistance to Aboriginal people in custody.⁶⁹</p>
<p>Koori Women’s Place</p>	<p>Delivered by Djirra, the Koori Women’s Place provides culturally appropriate legal and holistic support, early intervention programs and other post-release services to Aboriginal women on bail.⁷⁰</p>
<p>Family Centred Approaches</p>	<p>Family Centred Approaches focus on holistic case management to work with Aboriginal families with complex needs who are in contact with multiple service systems, including criminal justice.⁷¹</p>
<p>Baggarrook residential facility</p>	<p>Delivered by VALS, the Baggarrook program provides culturally appropriate wrap-around support for Aboriginal women released from prison, on bail or parole.⁷²</p>
<p>Local Justice Worker Program</p>	<p>The Local Justice Worker Program supports Aboriginal people to meet the conditions of their orders, by sourcing supervised community work opportunities and linking participants into relevant programs and services available in the community. This often includes establishing community worksites at Aboriginal Community Organisations or at culturally significant places.⁷³</p>

The Legal and Social Issues Committee Inquiry called for a review of all offences, with a view to minimising the criminalisation of low-level offending linked to underlying forms of disadvantage, such as income stress or alcohol and other drug issues.⁸¹ This review should be prioritised. The decriminalisation and reclassification of minor offences are important reforms that will help to ensure that Aboriginal people are not imprisoned for low level offending. The review should focus on the repeal or amendment of offences such as begging and on reclassifying indictable (serious) offences linked to disadvantage as summary offences such as low-level theft and property damage.⁸²

Current sentencing limitations have a disproportionate effect

[J]udicial officers need more, not fewer, sentencing options. With a greater set of options, judges and magistrates are better equipped to do justice in an individual case.⁸³

MANDATORY SENTENCING

'Mandatory sentencing' refers to sentencing laws that require courts to impose a fixed or minimum penalty for particular offences. In Victoria, there has been a trend towards different types of mandatory sentencing laws, including laws requiring jail terms, minimum jail terms or minimum non-parole periods for particular offences, with exceptions available in some circumstances. Victoria also has presumptive or default sentencing laws for particular offences.⁸⁴ An example of mandatory sentencing legislation is section 10AA of the *Sentencing Act* which requires mandatory minimum prison sentences and non-parole periods for assaults against emergency workers on duty.

The Victorian Court of Appeal has observed:

Mandatory minimum sentences are wrong in principle. They require judges to be instruments of injustice: to inflict more severe punishment than a proper application of sentencing principle could justify, to imprison when imprisonment is not warranted and

may well be harmful, and to treat as identical offenders whose circumstances and culpability may be very different.⁸⁵

Mandatory sentencing limits the ability of a court to ensure that a sentence responds appropriately to the particular circumstances of a crime and the person who commits it. It can remove a court's ability to consider mitigating factors or to use alternative sentencing options. This can lead to unjust sentencing outcomes.⁸⁶ Evidence also suggests that mandatory sentencing is costly and is not an effective deterrent.⁸⁷ Of particular concern to Yoorrook is the contribution mandatory sentencing makes to the disproportionate imprisonment rates of First Peoples.⁸⁸

Several legal organisations including VALS, the Federation of Community Legal Centres, Liberty Victoria, the Human Rights Law Centre and Victoria Legal Aid have either called for the outright repeal of mandatory sentencing laws or a review of the *Sentencing Act* to investigate the operation, effectiveness and impacts of the Act's minimum sentencing provisions.⁸⁹ The latter was also recommended by the Legal and Social Issues Committee Inquiry.⁹⁰ Yoorrook supports this recommendation which is discussed further at the end of this chapter.

REDUCTIONS IN INTERMEDIARY SENTENCING OPTIONS

[T]here is only one community-based sentencing option: the Community Corrections Order (CCO). The jump from a CCO to imprisonment leaves little room for other rehabilitative options that may be appropriate, particularly where a previous CCO has not been complied with. Where the Court will not impose a CCO due to previous non-compliance or an adverse assessment by Corrections, the next step up the 'hierarchy' is, by design, imprisonment.⁹¹

There are currently four main sentencing options available:

- adjourned undertakings (often referred to as a 'good behaviour bond')
- fines
- CCOs
- imprisonment.



Monique Hurley and Nick Espie, Human Rights Law Centre and Stan Winford, Centre for Innovative Justice

The Victorian Government has abolished the ability of courts to impose suspended sentences⁹² and home detention orders.⁹³ Former chairperson of the Sentencing Advisory Council Professor Arie Freiberg told the Legal and Social Issues Inquiry that ‘the phasing out of suspended sentences and the use of orders combining imprisonment with community corrections’ are factors in the growth of Victoria’s remand and prison populations.⁹⁴ Liberty Victoria asserts that the abolition of suspended sentences and home detention orders has compounded the impact of increasingly restricted judicial discretion.⁹⁵

The Attorney-General also told Yoorrook:

The current sentencing settings do not sufficiently provide for adequate and accessible community-based sentencing options that offer genuine options to keep Aboriginal people out of the custodial system.⁹⁶

CCOs were introduced to ‘provide an alternative sentencing option for offenders who are at risk of being sent to jail’. They effectively replaced Community Based Orders, Intensive Correction Orders and suspended sentences. They are not available as a sentencing option for a number of offences, and only in restricted circumstances for certain other offences.⁹⁷ In addition, a CCO cannot be combined with a sentence of imprisonment of more than 12 months.

Community Corrections Orders



A CCO is a sentencing order served in the community. The conditions of a CCO depend on the circumstances and nature of the offence and needs and situation of the offender. A CCO includes basic conditions such as not reoffending and not leaving Victoria without permission. It also includes at least one condition based on the risk and needs of the offender and the severity of the offence.

CCO conditions may include supervision, unpaid community work, treatment and rehabilitation, curfews, bans on attendance or association with certain places or people, residential restrictions or exclusions and bond requiring monetary payment upon contravention. Around two-thirds of CCOs imposed by courts require offenders to undertake unpaid community work.

Organisations have identified several challenges with CCOs that mean Aboriginal people are less likely to receive a community-based sentence than non-Aboriginal people, and more likely to breach an order.⁹⁸ In 2021–22, 40 per cent of Aboriginal people on CCOs in Victoria completed the order, compared to 54 per cent of non-Indigenous people.⁹⁹ VALS explained that CCOs are also not culturally appropriate because they are not tailored to Aboriginal people.¹⁰⁰ This may explain poorer completion rates.

Yoorrook sees a critical need for legislative and policy reforms to increase opportunities for, and availability of, community-based sentencing options. Yoorrook notes that the Aboriginal Justice Caucus has called for the reintroduction of suspended sentences and an increase in community-based sentencing options.¹⁰¹ Victoria Legal Aid has recommended a presumption against short sentences in favour of community-based sentences or other therapeutic alternatives, reflecting the recommendation of the Legal and Social Issues Committee Inquiry.¹⁰² VALS has also called for amendments that will increase community-based sentencing options, including options between a CCO and an adjourned undertaking.¹⁰³

Additional investment in, and availability of, culturally appropriate programs and services is required to support those on CCOs.¹⁰⁴ This includes holistic and trauma informed support to address underlying causal factors for offending.¹⁰⁵ Investment must also be directed to the creation and expansion of services and supports that are gender specific and culturally appropriate to First Peoples men, women and LGBTQI+ people.

Sentencing Act reform is needed now

Yoorrook understands that before the 2022 state election, the Victorian Government was undertaking a sentencing project to develop proposals for new sentencing legislation. This was a two-stage project. The first stage focused on reforming the principles of the Act, the broad sentencing framework and consolidating sentencing guidance implemented through previous legislative changes.¹⁰⁶

The Attorney-General informed Yoorrook that this project was looking at:

- introducing a presumption against short sentences
- requiring courts to take into account the unique systemic and background factors affecting Aboriginal people
- developing, in partnership with Aboriginal communities, schemes that would facilitate the preparation of Gladue-style reports
- examining the range of non-custodial sentencing options available to ensure that an appropriate range of options is available
- if necessary, expanding the range of community-based sentencing options available to the court, to ensure that imprisonment genuinely is an option of last resort
- parole reforms and early release, and
- introducing home detention.¹⁰⁷

These potential reforms closely align with the evidence Yoorrook received, as discussed in this chapter.

The Attorney-General also told the Commission that, having received submissions and working with the Aboriginal Justice Caucus, the following proposals

had been developed to include in new sentencing legislation:

- a statement of recognition ‘as a formal recognition of the historical laws, policies and practices that have led to the over-representation of Aboriginal people in the criminal justice system, and to acknowledge the harm done and continues to be done to Aboriginal people by colonisation’
- a purpose of the legislation to promote progress towards Aboriginal self-determination, and legislative principles of self-determination to support that purpose
- a sentencing factor ‘that requires courts to take into account the unique background and systemic factors affecting First Peoples’.¹⁰⁸

However, following the election in November 2022, the Attorney-General is ‘yet to progress the outcome of this work to Cabinet and reauthorise its progress during this term’, noting that ‘[t]his is important work and it is incumbent on me and the department to work in partnership with the community to get it right’.¹⁰⁹ While Yoorrook recognises that there can be competing perspectives on sentencing reform in the broader community, the evidence received by Yoorrook shows there is a compelling case for urgent change.

The way forward

Whether sentencing reform occurs under the sentencing project or another vehicle, the evidence before Yoorrook clearly supports introducing *Gladue*-style reports to provide a mechanism for courts to consider the unique systemic and background factors affecting First Peoples. Similarly, including a legislative purpose and principles that recognise systemic harm and the importance of self-determination would be valuable. Requiring courts to consider alternatives to imprisonment when sentencing would also likely make a difference in reducing the over-imprisonment of Aboriginal people.

There is no reason for government to delay these reforms. DJCS has been considering these reforms for around four years and has consulted with the

Aboriginal Justice Caucus as part of this project.¹¹⁰ The Attorney-General spoke with enthusiasm of her desire to reform the *Sentencing Act* during Yoorrook hearings.¹¹¹

Yoorrook also understands that a key issue raised by Aboriginal stakeholders during consultations for the sentencing project has been ‘statutory minimum sentencing law and their disproportionate impact on Aboriginal people.’ However, according to DJCS ‘the sentencing project to date is focused on transparency, clarity and consistency of the sentencing process and the range of sentencing options available to the courts ... this work did not include revisiting current sentencing policy settings’. If this remains the policy, ‘the Project will not be considering removing statutory minimum sentences’.¹¹²

This is a lost opportunity to resolve the unfair impacts of current sentencing laws. Yoorrook supports the Legal and Social Issues Committee Inquiry recommendation that the Victorian Government investigate the operation, effectiveness and impacts of mandatory sentencing provisions, with a view to these being repealed.

Yoorrook also supports that Committee’s recommendation that the requirement for prosecution consent to court-based diversion is removed.¹¹³ Yoorrook believes this will help strengthen opportunities for diversion.

Yoorrook also shares concerns that low-level offences often driven by poverty, mental health, disability and homelessness remain indictable (serious) offences. The decriminalisation and reclassification of minor offences are critical reforms that could help to reduce the over-representation of First Peoples in Victorian prisons. Reforms in this area can and should be done now. ■

RECOMMENDATIONS

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.

Endnotes

1. Transcript of Attorney-General, the Hon Jaclyn Symes, 5 May 2023, 490 [6]–[9].
2. That is 9.6 per cent and 8.2 per cent respectively: Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 54 [306].
3. Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 54 [300].
4. Law and Advocacy Centre for Women, Submission 29, 9–11, 13. Time served sentences are discussed in Chapter 12: Bail.
5. Responsibility for issues discussed in this chapter falls across multiple ministries. For example, sentencing legislation and the courts falls within the Attorney-General's portfolio whilst implementation and administration are within the Corrections portfolio.
6. Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Parliamentary Paper No 326, March 2022) ('*Inquiry into Victoria's Criminal Justice System*').
7. 'The comprehensive inquiry examined all aspects of the criminal justice framework with a particular focus on early intervention, the overrepresentation of vulnerable cohorts, policing, victims of crime, bail and remand, courts and sentencing, prisons and rehabilitation, and the judiciary'. The Inquiry made 73 findings and 100 recommendations: Parliament of Victoria, 'Justice Inquiry Makes 100 Recommendations for Change' (Media Release, 24 March 2022). <https://new.parliament.vic.gov.au/492a4a/contentassets/303157aad4024e93880788b5219859c4/24_mar_2022_justice_inquiry_makes_100_recommendations_for_change.pdf>.
8. Outline of Evidence of Dr Eddie Cubillo, 15 December 2022, 6–8 [30]–[41]; Transcript of Dr Eddie Cubillo, 15 December 2022, 520–522 [10]–[19]; Outline of Evidence of Peter Hood and Tessa Theocharous, 14 December 2022, 6–7 [93]–[99]; Transcript of Peter Hood and Tessa Theocharous, 14 December 2022, 384–385 [31]–[12]; Human Rights Law Centre, Submission 60, 16–17; Victorian Aboriginal Legal Service (VALS), *Submission to the Inquiry into Victoria's Criminal Justice System* (2021) 257–261 ('*VALS Inquiry Submission*').
9. *VALS Inquiry Submission* (n 8) 257–261. See also Outline of Evidence of Dr Eddie Cubillo, 15 December 2022, 6–8 [30]–[41]; Transcript of Dr Eddie Cubillo, 16 December 2022, 520–522 [10]–[19]; Outline of Evidence of Peter Hood and Tessa Theocharous, 14 December 2022, 6–7 [93]–[99]; Transcript of Peter Hood and Tessa Theocharous, 14 December 2022, 384–385 [31]–[12]; Human Rights Law Centre, Submission 60, 16–17; Aboriginal Justice Caucus, Submission 74, 41–42.
10. *VALS Inquiry Submission* (n 8) 257–261.
11. Department of Justice and Community Safety, Supplementary response to questions taken on notice by Marian Chapman, Deputy Secretary, Courts, Civil and Criminal Law and Kate Houghton PSM, Secretary, Department of Justice and Community Safety on 2 May 2023.
12. VALS noted the availability of judicial training and education on Aboriginal cultural issues through the Judicial College of Victoria, the Victorian Judicial Officers' Aboriginal Cultural Awareness Committee (JOACAC) and Aboriginal organisations like VACSAL. VALS endorsed earlier recommendations of the Judicial College of Victoria on the nature and scope of cultural awareness training for judicial officers: First, cultural awareness training must incorporate a strong focus on the ongoing impacts of colonisation, intergenerational trauma, and racism. Second, training should include up-to-date, practical information on culturally appropriate programs and services for Aboriginal people: *VALS Inquiry Submission* (n 8) 259–261, Recommendation 272.
13. *VALS Inquiry Submission* (n 8).
14. Outline of Evidence of Peter Hood and Tessa Theocharous, 14 December 2022, 6 [81]–[83].
15. Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 32, Recommendation 18; Law and Advocacy Centre for Women, Submission 29, 15; Aboriginal Justice Caucus, Submission 74, 19–20, 40.
16. Outline of Evidence of Dr Eddie Cubillo, 15 December 2022, 6–8 [30]–[41].
17. *Inquest into the Passing of Veronica Nelson* (Coroners Court of Victoria, Coroner McGregor, 23 January 2023) 106 [316] ('*Inquest into the Passing of Veronica Nelson*').
18. *Ibid.*

19. Under Rule 11 of the Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015. Further, '[t]he Bar has indicated in principle support for this approach, in recognition that junior members of the Bar are more likely to be undertaking appearance work in the Bail and Remand Court and engaging with First Nations clients in the types of circumstances that arose in Ms Nelson's case: Letter from Victorian Legal Services Board and Commissioner to Coroner McGregor, 'Investigation into the death of Veronica Nelson — Response to Recommendation 17' (Letter, 28 April 2023) 2. <https://www.coronerscourt.vic.gov.au/sites/default/files/2023-05/2020%200021%20Response%20to%20recommendations%20from%20Victorian%20Legal%20Services%20Board%20%2B%20Commissioner%20%28VLSB%2BC%29_NELSON_Redacted.pdf>. See also The Victorian Bar Incorporated, *Submission to His Honour Simon McGregor: Response to the Recommendations in the Coronial Inquest into the Death in Custody of Veronica Nelson* (Ref: COR 2020 000021, 2020).
20. Australian Law Reform Commission, *Pathways to Justice — an Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report, December 2017) 328 ('*Pathways to Justice*').
21. *Ibid*, quoting Justice Jenny Blokland, 'Foreword' in Paul Bennett, *Specialist Courts for Sentencing Aboriginal Offenders — Aboriginal Courts in Australia* (Federation Press, 2016) v.
22. Summary of Community Evidence (De-Identified Direct Quotes) Obtained at Roundtables and Prison Visits, 14 June 2023, 3 [10].
23. Aboriginal Justice Caucus, Submission 74, 41.
24. *Inquiry into Victoria's Criminal Justice System* (n 6) vol 2, 519.
25. See further, County Court Victoria, *County Koori Court* (Web Page, 22 May 2023) <<https://www.countycourt.vic.gov.au/learn-about-court/court-divisions/court-county-koori-court>>.
26. Victorian Aboriginal Child Care Agency, Submission 77, 131.
27. See further, County Court Victoria (n 25).
28. *Inquiry into Victoria's Criminal Justice System* (n 6) vol 2, 521. The evaluation was commissioned by the County Court of Victoria and undertaken by Clear Horizon Consulting: County Court of Victoria and the Department of Justice, *County Koori Court: Final Evaluation Report* (Report, 2011).
29. *Inquiry into Victoria's Criminal Justice System* (n 6) vol 2, 523.
30. *Ibid* 519–524.
31. Summary Report — Barwon Prison Site Visit (23 February 2032), [3]; Summary Report — Marngoneet Correctional Centre Site Visit (24 February 2023), 1 [2].
32. Summary of Community Evidence (De-Identified Direct Quotes) Obtained at Roundtables and Prison Visits, 14 June 2023, 3 [11].
33. Summary Report — Marngoneet Correctional Centre Site Visit (24 February 2023), 1 [2]; Summary of Community Evidence (De-Identified Direct Quotes) Obtained at Roundtables and Prison Visits, 14 June 2023, 3 [12].
34. Summary of Community Evidence (De-Identified Direct Quotes) Obtained at Roundtables and Prison Visits, 14 June 2023, 3 [12].
35. *Sentencing Act 1991* (Vic) s 83A; Victorian Aboriginal Legal Service (VALS), *Submission to Sentencing Act Reform Project* (April 2020) 8.
36. See further, *Pathways to Justice* (n 20) 328–333. Ipsos Aboriginal and Torres Strait Islander Research Unit, *Evaluation of the Murri Court: Prepared for the Queensland Department of Justice and Attorney-General* (Report, 2019) 5–9.
37. Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 48, 55–6, Recommendations 42, 43 and 59; Law and Advocacy Centre for Women, Submission 29, 16; Aboriginal Justice Caucus, Submission 74, 40–1; Victoria Legal Aid, Submission 28 (Criminal Justice), 3.
38. *Inquiry into Victoria's Criminal Justice System* (n 6) vol 2, 519–524.
39. *Inquiry into Victoria's Criminal Justice System* (n 6) vol 2, 524, Recommendation 565.
40. Aboriginal Justice Caucus, Submission 74, 41.
41. Department of Justice and Community Safety, 'Response to NTP-002-014 — Agency response to the Yoorrook Justice Commission', 74, produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
42. The Aboriginal Justice Agreement 4 includes a government commitment to work with Aboriginal people to consider amending the Sentencing Act to take into account a person's Aboriginal status, and the use of Canada's 'Gladue' style pre-sentence reports: Department of Justice and Community Safety, 'Response to NTP-002-014 — Agency response to the Yoorrook Justice Commission', 74, produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
43. *Inquiry into Victoria's Criminal Justice System* (n 6) vol 2, 563–565.
44. Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 57, Recommendation 60; Law and Advocacy Centre for Women, Submission 29, 15; Aboriginal Justice Caucus, Submission 74, 41–42.
45. *Pathways to Justice* (n 20) 204.
46. *Ibid* 209 [6.93].
47. *Criminal Code*, RSC 1985, c C–46, s 718.2(e).
48. *R v Ipeelee* [2012] 1 SCR 433, 468–9 [59]–[60].
49. *R v Ipeelee* [2012] 1 SCR 433, 468–9 [59]–[60]. Further at [60]: 'These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary context for understanding and evaluating the case-specific information presented by counsel. Counsel have a duty to bring that individualized information before the court in every case, unless the offender expressly waives his right to have it considered'.
50. *R v Ipeelee* [2012] 1 SCR 433, 468–9 [59]–[60]; *R v Gladue* [1999] 1 SCR 688, 708 [37], 731–2 [83]–[84].

51. The proposed legislation will include a sentencing factor that allows the court to take into account the unique systemic and background factors that affect Aboriginal peoples. This additional factor would allow courts to consider the historical laws, policies and practices that have informed the drivers of over-representation and how that history may have ongoing effects on individuals, allowing a more complete picture of an Aboriginal person to be presented to a sentencing court: Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 55–56 [311].
52. *Pathways to Justice* (n 20) 214 [6.115], 217–220 [6.129]–[6.137]; Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 56–7.
53. Witness Statement of Attorney-General, the Hon Jaclyn Symes, March 2023, 55 [310].
54. The reports are named after the Canadian Supreme Court case, *R v Gladue*, which recommended that attention be given in pre-sentencing reports to an offender's Aboriginal status: *R v Gladue* [1999] 1 SCR 688, 725–8 [70]–[74].
55. *Pathways to Justice* (n 20) 202–204 [6.68]–[6.76]; Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 56–7.
56. *Pathways to Justice* (n 20) 208 [6.88].
57. *Ibid* 203 [6.72]. See also Legal Services Society of British Columbia, *Gladue Report Disbursement: Final Evaluation Report* (2013) 3 ('*Gladue Report Disbursement*').
58. *Gladue Report Disbursement* (n 57) 3.
59. Department of Justice and Community Safety, 'Response to NTP-002-014 — *Agency response to the Yoorrook Justice Commission*', 74, produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023; Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 54 [305].
60. Department of Justice and Community Safety, 'Response to NTP-002-014 — *Agency response to the Yoorrook Justice Commission*', 74, produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
61. Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 34–5, quoting Thalia Anthony, Andreea Lachs and Nerita Waight, 'The Role of 'Re-Storying' in Addressing Over-Incarceration of Aboriginal and Torres Strait Islander Peoples', *The Conversation* (Online, 17 August 2021) <<https://theconversation.com/the-role-of-re-storying-in-addressing-over-incarceration-of-aboriginal-and-torres-strait-islander-peoples-163577#>>.
62. The Aboriginal Community Justice Reports Project has received wide support from the courts, including a recommendation from the Supreme Court of Victoria which said 'we note that a project has recently commenced to trial Aboriginal Community Justice Reports. As this case has demonstrated, the provision of such reports in appropriate cases will constitute an important step in ensuring the just sentencing of offenders in this State': cited in Aboriginal Justice Caucus, Submission 74, 42. See further discussion of the Reports Project in Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 57.
63. *Inquiry into Victoria's Criminal Justice System* (n 6) 498, quoting ermha365, 'Submission 84', Submission in *Inquiry into Victoria's Criminal Justice System*, 6.
64. *Ibid* 501.
65. *Pathways to Justice* (n 20) 368 [11.80], citing Human Rights Law Centre and Change the Record Coalition, *Over-Represented and Overlooked: The Crisis of Aboriginal and Torres Strait Islander Women's Growing Over-Imprisonment* (Report, 2017) 35.
66. Department of Justice and Community Safety, 'Response to NTP-002-014 — *Agency response to the Yoorrook Justice Commission*', 23–25, produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
67. Department of Justice and Community Safety, 'Response to NTP-002-014 — *Agency response to the Yoorrook Justice Commission*', 23–24, produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
68. Department of Justice and Community Safety, 'Response to NTP-002-014 — *Agency response to the Yoorrook Justice Commission*', 23–24, produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
69. Department of Justice and Community Safety, 'Response to NTP-002-014 — *Agency response to the Yoorrook Justice Commission*', 23–24, produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
70. Department of Justice and Community Safety, 'Response to NTP-002-014 — *Agency response to the Yoorrook Justice Commission*', 25, produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
71. Department of Justice and Community Safety, 'Response to NTP-002-014 — *Agency response to the Yoorrook Justice Commission*', 25, produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
72. Department of Justice and Community Safety, 'Response to NTP-002-014 — *Agency response to the Yoorrook Justice Commission*', 24, produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.

73. Department of Justice and Community Safety, 'Response to NTP-002-014 — *Agency response to the Yoorrook Justice Commission*', 24, produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
74. *VALS Inquiry Submission* (n 8) 158–160.
75. *Ibid* 159–160.
76. Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 53–5; Law and Advocacy Centre for Women, Submission 29, 19, 24; Victoria Legal Aid, Submission 28 (Criminal Justice), 5–6; Aboriginal Justice Caucus, Submission 74, 42–44; Human Rights Law Centre, Submission 60, 5–6.
77. *Inquiry into Victoria's Criminal Justice System* (n 6).
78. Federation of Community Legal Centres, Submission 61, 16; Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 49–53; Victoria Legal Aid, Submission 28 (Criminal Justice), 3–4; Law and Advocacy Centre for Women, Submission 29, 9–11; Human Rights Law Centre, Submission 60, 21–22; Aboriginal Justice Caucus, Submission 74, 24, 33–35, 52. See also *ibid* 98–104.
79. Federation of Community Legal Centres, Submission 61, 16; Victoria Legal Aid, Submission 28 (Criminal Justice), 5; Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 49–53; Law and Advocacy Centre for Women, Submission 29, 9; Human Rights Law Centre, Submission 60, 21–22; Aboriginal Justice Caucus, Submission 74, 24, 33–35, 52.
80. Federation of Community Legal Centres, Submission 61, 16.
81. *Inquiry into Victoria's Criminal Justice System* (n 6) vol 2, 435, Recommendation 60.
82. Victoria Legal Aid, Submission 28 (Criminal Justice), 5.
83. Liberty Victoria, Submission 52, 12 [45].
84. See further in relation to the categories of offences and relevant provisions of Victorian sentencing laws at *Inquiry into Victoria's Criminal Justice System* (n 6) vol 2, 540–544.
85. *Buckley v The Queen* [2022] VSCA 138, [5].
86. *Pathways to Justice* (n 20) 273–277; Federation of Community Legal Centres, Submission 61, 15; Liberty Victoria, Submission 52, 10–11.
87. *Inquiry into Victoria's Criminal Justice System* (n 6) vol 1, 30.
88. See *ibid* 273–277.
89. *VALS Inquiry Submission* (n 8) 127–128, Recommendation 102; Federation of Community Legal Centres, Submission 61, 15; Liberty Victoria, Submission 52, 10–11; Law and Advocacy Centre for Women, Submission 29, 15–16; Human Rights Law Centre, Submission 60, 7.
90. *Inquiry into Victoria's Criminal Justice System* (n 6) vol 2, 543, Recommendation 67.
91. Law and Advocacy Centre for Women, Submission 29, 13.
92. *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013* (Vic).
93. *Sentencing Amendment (Community Correction Reform) Act 2011* (Vic).
94. *Inquiry into Victoria's Criminal Justice System* (n 6) vol 2, 553.
95. Liberty Victoria, Submission 52, 11 [40].
96. Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 55 [308].
97. Liberty Victoria, Submission 52, 12 [43]. *Sentencing Act 1991* (Vic) ss 5(2G)–5(2H).
98. See nn 194 and 195 in Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 58.
99. Department of Justice and Community Safety, *Supplement to the DJCS Agency Response to the Yoorrook Justice Commission's 71 Questions*, 100.
100. Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 58.
101. Aboriginal Justice Caucus, Submission 74, 41–42.
102. Victoria Legal Aid, Submission 28 (Criminal Justice), 6.
103. Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 14, 58.
104. Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 58; Law and Advocacy Centre for Women, Submission 29, 23–24.
105. Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 13; Law and Advocacy Centre for Women, Submission 29, 23.
106. Department of Justice and Community Safety, 'Response to Notice to Produce 002-004 — *Secretary Fact Sheet, Aboriginal Justice Forum 63*', December 2022, 21, produced by the State of Victoria in response to the Commission's Notice to Produce dated 3 November 2022.
107. Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 55 [309].
108. Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 55–56 [311].
109. Witness Statement of the Hon Jaclyn Symes, Attorney-General, 31 March 2023, 56 [312].

110. Department of Justice and Community Safety, 'Response to Notice to Produce 002-004 — *Q&A Hot Topics prepared for Secretary Falkingham for the Aboriginal Justice Forum 56, 25–26 June 2020*', 23 [147] produced by the State of Victoria in response to the Commission's Notice to Produce dated 3 November 2022; Department of Justice and Community Safety, 'Response to Notice to Produce 002-004 — *Agenda Paper prepared for the Aboriginal Justice Forum 57, 21-22 October 2020*', 2 produced by the State of Victoria in response to the Commission's Notice to Produce dated 3 November 2022; Department of Justice and Community Safety, 'Response to Notice to Produce 002-004 — *Reforms for Aboriginal Victorians: Sentencing Act Reform Project prepared for the Aboriginal Justice Forum 58, 25-26 March 2021*', 111–112 produced by the State of Victoria in response to the Commission's Notice to Produce dated 3 November 2022.
111. 'This is an ambitious plan of mine ... So I've started. I want to finish it. It's not easy, and I'll need a lot of help to do it. But yeah, I'm committed...': Transcript of Attorney-General, the Hon Jaclyn Symes, 5 May 2023, 489 [13], 490 [11]–[12].
112. Department of Justice and Community Safety, 'Response to Notice to Produce 002-004 — *Secretary Fact Sheet, Aboriginal Justice Forum 63*', December 2022, 21, produced by the State of Victoria in response to the Commission's Notice to Produce dated 3 November 2022.
113. 'That the Victorian Government review the requirement for prosecutorial consent for a court-based diversion from s 59(2)(c) of the *Criminal Procedure Act 2009* (Vic) and s 356F of the *Children, Youth and Families Act 2005* (Vic) to consider whether these sections should be replaced with a requirement for the magistrate to consider the recommendation of the prosecutor and/or informant in relation to access to a court-based diversion (as opposed to seeking consent), and the provision of a right to reply for the accused person': *Inquiry into Victoria's Criminal Justice System* (n 6) vol 1, xl, Recommendation 24.

14 VICTORIAN PRISONS

I have spent three decades of my life going through the revolving doors of various prisons. Between 1976 and 2003, I had 125 convictions or guilty verdicts recorded against me (though this statistic seems conservative to me), primarily for petty crimes. Ninety-nine percent of my crimes I would classify as crimes of survival or disobedience. Survival because of drug dependence, and disobedience because I couldn't comply with the bureaucratic expectations of the Court.¹ AUNTY VICKI ROACH

Introduction

Being in prison means more than loss of liberty. Victoria's prisons are causing irreparable, lifelong harm to First Peoples. Yoorrook heard from prisoners, the community and organisations about the inhumane treatment of Aboriginal people in prison, including routine strip searching, excessive solitary confinement and the denial of adequate health care. First Peoples in Australia are said to be the most imprisoned people on the planet.² While Victoria has a lower rate of imprisoning Aboriginal people than other Australian states, the rate is still scandalously high and has grown substantially over the past decade.³

The prison system does not exist separately from the ongoing processes of colonisation. It is part of the criminal justice system which was and remains a tool of colonisation. The harm that Victoria's prisons are causing First Peoples is inextricably connected to colonisation.

Over the past 35 years, the over-representation of Aboriginal people in prison has been the subject of multiple inquiries, royal commissions and internal reviews. Most notably, the 1991 Royal Commission into Aboriginal Deaths in Custody (RCIADIC) exposed how disadvantage and discrimination leads to the over-imprisonment of First Peoples. It showed how each death in custody is caused by a dehumanising and punitive system. RCIADIC shone a spotlight on the harm done to people in prison and found a primary cause was the failure to provide proper care to First Peoples and respect for their fundamental human and cultural rights.⁴

Aboriginal people continue to die in Victorian prisons at high rates, not because they are more likely to die when imprisoned compared to other people, but because governments are locking First Peoples up at shockingly high rates. Since RCIADIC, 34 Aboriginal people have died in custody, 24 in the custody of Corrections Victoria.⁵ In the past the past four years alone, six Aboriginal people have died in the custody of Corrections Victoria.⁶

As Coroner Simon McGregor found in the *Inquest into the Passing of Veronica Nelson*, if the RCIADIC recommendations had been successfully implemented, 'Veronica's passing would have been prevented'.⁷ The Victorian Government also acknowledges that Veronica's passing 'could and should have been prevented'.⁸

The Minister for Corrections acknowledged that the justice system's colonial roots continue to have lasting implications for First Peoples, with 'no clearer or more devastating example than deaths in custody. There have been too many'. He has accepted that 'the State is responsible for Aboriginal deaths in custody and many of these deaths were a direct result of critical and unacceptable failings within our institutions'.⁹ He acknowledged that some prisoners have been subject to the 'old model' which is seen as purely punitive. He acknowledged the need to transition away from that model to focus on rehabilitation. The Minister also acknowledged that prisoners retain all their human and cultural rights except those necessarily limited by imprisonment itself, and that the State and prison authorities have legal obligations to respect and ensure these rights.¹⁰

The recent independent *Cultural Review of the Adult Custodial Corrections System* (Cultural Review), commissioned by the government and published in 2022, depicts a broken prison system that harms First Peoples and does not respect and ensure their human rights.¹¹ The government has accepted all of the review’s findings. It agreed that ‘long-term change and future investment will be required to ensure our prisons, people and communities are safe’.¹² The commissioning of the Cultural Review and the response by government shows that the government has some understanding that the system is antiquated, harmful and in need of radical transformation and reform. The fundamental change that the Cultural Review recommended, and that witnesses to Yoorrook have called for, must be implemented without delay.

In this chapter, Yoorrook considers these systemic issues as they have arisen through the voices of First Peoples who shared their personal experiences with Yoorrook. This chapter examines:

- the over-representation of First Peoples in the prison system
- systemic failures in prison health care
- poor access to rehabilitation programs
- cruel, inhuman and degrading treatment in prison and other human and cultural rights violations
- barriers to reporting abuse and misconduct
- lack of independent oversight
- non-compliance with human and cultural rights obligations

- non-compliance with inspection processes that Australia has agreed to under international treaties.

What Yoorrook heard

Over-representation of Aboriginal people is a defining feature of Victorian prisons

First Peoples, Aboriginal Community Controlled Organisations (ACCOs) and experts told Yoorrook that prisons cause irreparable, lifelong harm — they entrench disadvantage, they are punitive rather than rehabilitative, and they are dehumanising.¹⁵ Yoorrook accepts this, noting that individual experiences in prison may sometimes be different.

First Peoples continue to be dramatically over-represented in Victorian prisons as shown in Figure 14-1. Aboriginal men are 13.6 times as likely as non-Aboriginal men to be in prison¹⁶ and Aboriginal women are 13.2 times as likely to be in prison as non-Aboriginal women.¹⁷

The Aboriginal imprisonment rate almost doubled between 2011 and 2021 and is growing much faster than the non-Indigenous rate as shown in Figure 14-2.¹⁹ Victorian Government data shows that:

- in the six years to 30 June 2019, the number of Aboriginal people in prison increased from 388 to 843 (117 per cent)²⁰

The Victorian Prison System



Corrections Victoria oversees the administration, management, and security of prisons, including the welfare of prisoners under the *Corrections Act 1986* (Vic) and the associated *Corrections Regulations 2009*.

Across Victoria there are 15 prisons — comprising minimum, medium and maximum-security locations. Twelve are publicly operated and three are privately operated (Fulham Correctional Centre, Port Phillip Prison and Ravenhall Correctional Centre). There is one transitional centre, Judy Lazarus Transition

Centre.¹³ Of the 15 correctional facilities, two are women’s prisons — Dame Phyllis Frost Centre (DPFC) and Tarrengower Prison.

Melbourne Assessment Prison, DPFC and Ravenhall Correctional Centre have dedicated mental health units. Loddon Prison, DPFC and Port Phillip Prison have dedicated units for people with cognitive impairment.¹⁴ A full map of the Victorian prison system can be found at Appendix F. A summary of major reviews that have examined the criminal justice system including prisons can be found at Appendix D.

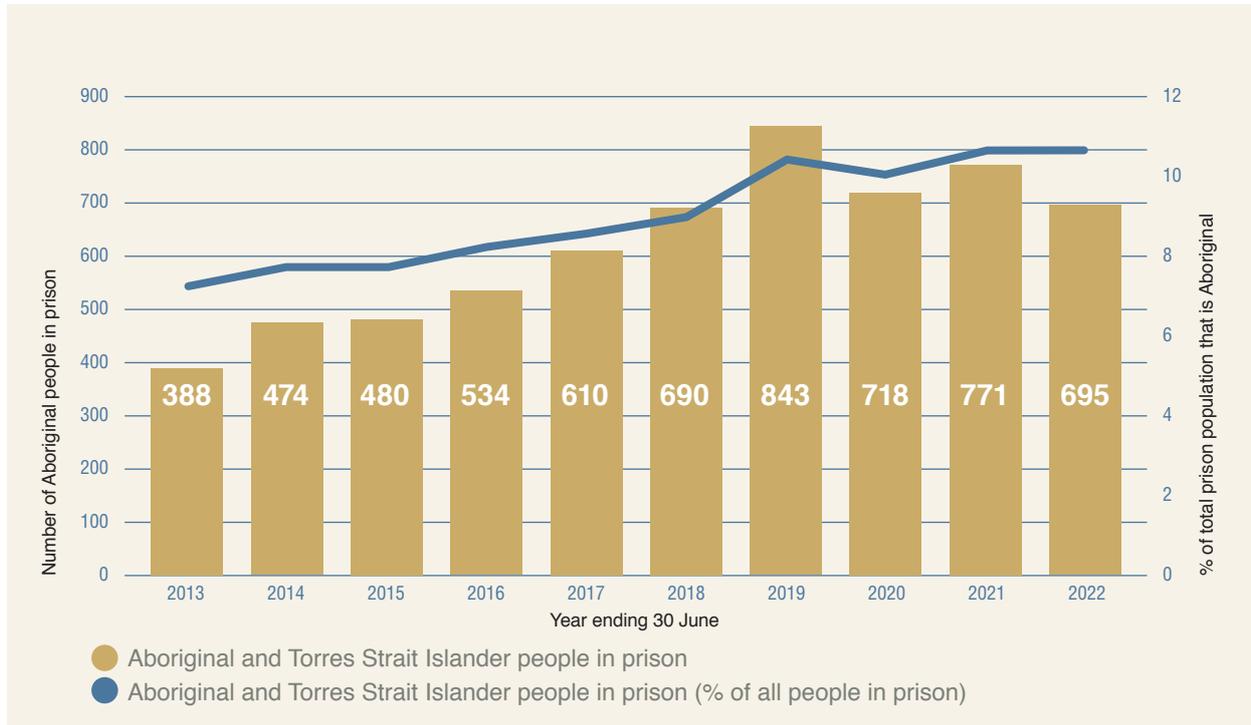


FIGURE 14-1: Number of First Peoples in Victorian prisons, and as a proportion of all Victorian prisoners, 2013–2022¹⁸

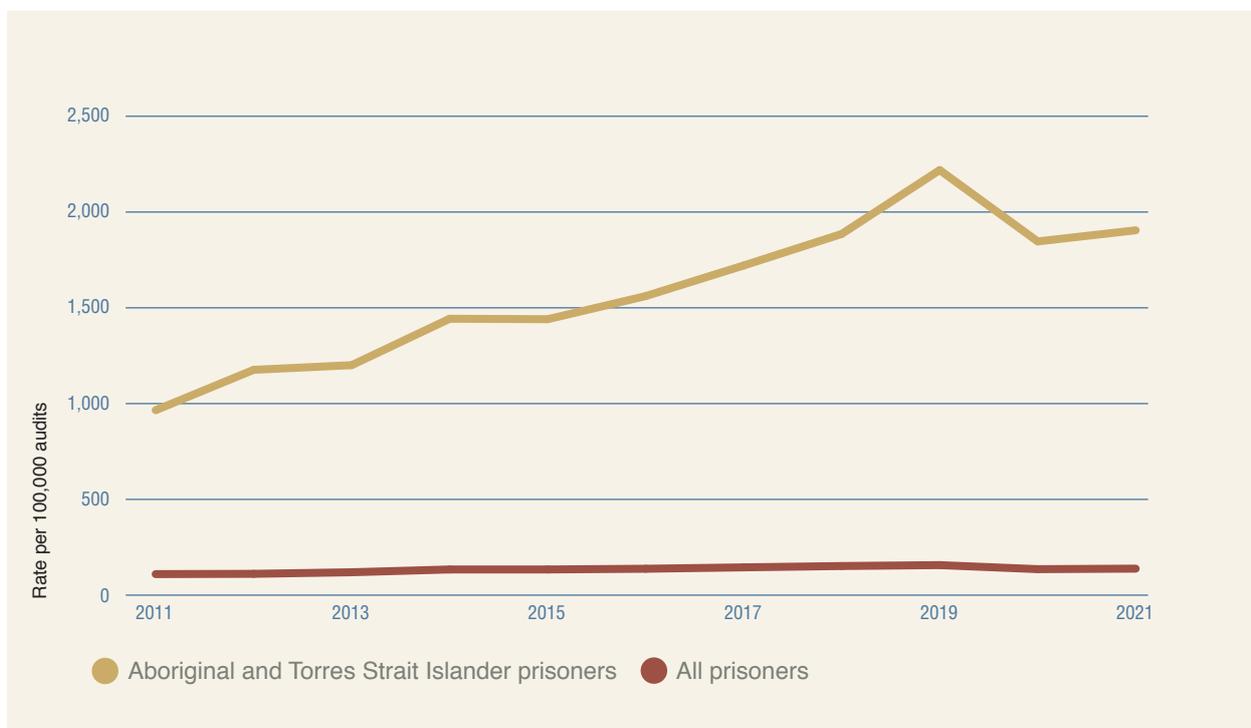


FIGURE 14-2: Imprisonment rate per 100,000 adults for Aboriginal and Torres Strait Islander Victorians and for Victorians overall²⁴

- the number of Aboriginal people in prison reached a record high of 904 on 14 March 2020²¹
- on 28 February 2023, 825 Aboriginal people were in prison representing 12.5 per cent of the adult prison population.²²

Aboriginal people are also over-represented among adults under the supervision of Community Correctional Services.²³

Evidence also shows that prisons are criminogenic and perpetuate cycles of offending. Over the last five years in Victoria there have been year-on-year increases in the number of Aboriginal people in prison who have previously been in prison.²⁵ The reoffending rate for Aboriginal people is also significantly higher than for non-Aboriginal people.²⁶

These statistics reveal a shocking picture that demands an urgent and fundamental response.

SKYROCKETING REMAND HAS PARTICULARLY AFFECTED FIRST PEOPLES

As discussed in Chapter 11: Bail, the number of Aboriginal people on remand (imprisoned waiting for their trial or sentence) has significantly increased over the past 10 years. In 2021–22, 89 per cent of Aboriginal people that went into prison were on remand.²⁷ In the same year, 52 per cent of Aboriginal people who left prison did so having spent no time under sentence.²⁸

Figure 14-1, which shows the median length of stay of sentenced and unsentenced people in Victorian prisons, highlights that many prisoners, and particularly those unsentenced (people imprisoned on remand), are detained for relatively short periods of time. The

TABLE 14-1: Sentenced and unsentenced prisoners median length of stay, 2021–22²⁹

ABORIGINAL STATUS	GENDER	SENTENCED/ UNSENTENCED	LENGTH OF STAY (DAYS)
Aboriginal	Female	Sentenced	66
		Unsentenced	33
	Female total		36
	Male	Sentenced	155
		Unsentenced	51
	Male Total		90
Aboriginal total			80
Non-Aboriginal	Female	Sentenced	103
		Unsentenced	29
	Female total		42
	Male	Sentenced	162
		Unsentenced	49
	Male total		93
Non-Aboriginal total			86
Grand total			82

disruptive and harmful impact of short prison stays is discussed further below.

OVER-REPRESENTATION IS CAUSED BY MULTIPLE SYSTEM FAILURES

The criminal justice system, for a variety of reasons, effectively filters and selects from our society the most marginalised, disadvantaged, unwell members of our community, and puts them in a place where we then arguably compound that marginalisation, trauma, disadvantage, and ill-health.³⁰

Unsurprisingly, research shows that being Indigenous and experiencing social and economic disadvantage are ‘social determinants for justice’ — that is, being at much higher risk of coming into contact with the criminal justice system and being imprisoned. Other social determinants include having unsupported mental health and cognitive disability.³¹

Yoorrook heard that prisons have become warehouses for people with complex needs who are trying to manage significant and often multi-generational trauma.³² A case study submitted by the Australian Community Support Organisation, drawn from consultations with Aboriginal prisoners shows the cycle of harm, trauma and imprisonment that too often becomes lifelong:

‘Y’ is 49 and has spent almost all his life in the prison system. He was born in prison and taken from his mother when he was 9 months old. Spent time in U’10s at Beltara. Estimates going in and out 30 times since 1988. Prison is his normal. He is very anxious on the outside, has never had a job, but does want to get out. Tired of prison life. His mum used to tell him she was pleased he was in prison — because he did better in there and was safe. He agrees.³³

Evidence showed that people are imprisoned after other systems have failed, such as ‘family support, education, housing, mental health, disability services’.³⁴ For example, only around three per cent of male prisoners and four per cent of female prisoners in Victoria have completed secondary education.³⁵ This was acknowledged by the Department of Justice and Community Safety (DJCS):

[A]ctions taken within the criminal justice system to improve outcomes typically involve tertiary-level prevention measures and occur after offending or alleged offending has occurred. Whole-of-government and community-led responses are necessary to address the underlying drivers of over-representation, and to intervene prior to entry into the criminal justice system.³⁶

Many of those who spoke to Yoorrook shared histories of intergenerational trauma and previous child protection involvement and had close family who were members of the Stolen Generation.

We were drinking that day. Things got out of control and once my head cleared I realised what I’d done. The rest is, I guess — I guess going to prison for two years ... In order for me to gain parole the clinicians come and visit you and so they came over to my yard where I was, and they turned around and said, ‘Thomas, what — what do you want?’ and my immediate response was that I wanted the life that I couldn’t have growing up with my family and my mum and dad, and — and in my culture.³⁷

Approximately one third of all people in Victorian prisons have a mental health diagnosis.³⁸ For Aboriginal people in prison, 72 per cent of men and 92 per cent of women have a mental health condition on entry into custody.³⁹ Aboriginal people with a disability are also 14 times more likely to be imprisoned than the general population.⁴⁰

Key facts



Aboriginal men released from prison are at a five times higher risk of death than the general male population.

Aboriginal women released from prison are at a 13 times higher risk of death than the general female population.⁴¹

Imprisonment of Aboriginal women is beyond crisis point

High incarceration rates of Aboriginal women directly impact on child removal rates, the rights of Aboriginal children and have ongoing devastating impacts on Aboriginal families and communities... Many of the women Djirra assist are from regional Victoria and have little to no contact with their children whilst they are incarcerated. One day in prison can destroy a woman's life — she may lose employment, housing and her children.⁴²

Women are the fastest growing population group in Australian prisons.⁴³ While the number of all women prisoners more than doubled over the last decade, the imprisonment rate for Aboriginal women more than tripled.⁴⁴ On 1 May 2023 there were 38 Aboriginal women in prison. That is one in eight of all women prisoners.⁴⁵

In 2013, the Victorian Equal Opportunity and Human Rights Commission investigated the unprecedented rise in the imprisonment rates of Aboriginal women and observed that:

These women are generally young. Many have grown up experiencing family violence, sexual abuse and intergenerational trauma. A significant number were removed from their families as children and placed in out-of-home care. Mental illness — including anxiety, depression and post-traumatic stress disorder — and drug and alcohol dependence are widespread among this group.⁴⁶

A decade later, the rate of Aboriginal women being imprisoned has continued to grow, driven by the increase in the number of Aboriginal women on remand due Victoria's unjust bail laws.⁴⁷ As at October 2022, 65 per cent of Aboriginal women in prison were on remand.⁴⁸

Yoorrook heard that Aboriginal women are more likely than non-Indigenous women to be imprisoned for low-level offences.⁴⁹ These offences are linked to poverty, disadvantage and trauma.⁵⁰

Many Aboriginal women in prison are also victim survivors of physical, sexual and family violence.⁵¹ Self-medication with legal and illegal drugs in response to their trauma is also common.⁵² Yoorrook heard that Aboriginal women in prison have higher rates of mental ill-health, substance use disorders and homelessness compared to other groups.⁵³ In line with this, Yoorrook was consistently told that Aboriginal women have vastly different rehabilitative needs.⁵⁴

The Victorian Government acknowledges that:

Women involved in the criminal justice system often experience complex and inter-related challenges, including: parenting and family responsibilities, homelessness and housing instability, substance use, trauma and victimisation, mental health concerns, and economic disadvantage. For Aboriginal women, these challenges are often compounded by significant histories of intergenerational trauma, loss of culture and land and ongoing experiences of racism and social dislocation. These unique needs require tailored and gender-responsive support services.⁵⁵

Requirement for differential treatment



The need for differential treatment for First Peoples women is reflected in the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules).⁵⁶ In Victorian prisons, the Standards for the Management of Women Prisoners require prison administrators to ensure that Aboriginal women are managed in a manner that is sensitive to their cultural needs and provide programs and services that reduce the likelihood of reoffending.⁵⁷

The Victorian Government provided information to Yoorrook about its strategy since 2019 to better meet the needs of Aboriginal women in prison. This includes initiatives such as Baggarrook, the Kaka Wangity Wangin-Mirrie Aboriginal cultural programs (for men and women) and the Djirra prison support program.⁵⁸ It also informed Yoorrook of a new Aboriginal Healing Unit due to open at DPFC in 2023.⁵⁹

Notwithstanding these initiatives, Yoorrook was told that, overall, the current system does not provide Aboriginal women with equal access to services or treatment.⁶⁰ The Cultural Review too found significant gaps in the level of cultural, health and transitional support provided to Aboriginal women.⁶¹

ABORIGINAL CHILDREN ARE PUNISHED WHEN THEIR MOTHER IS IN PRISON

Most of the women in Australian prisons are mothers, with 85 per cent having been pregnant at some point in their lives and 54 per cent per cent having at least one dependent child.⁶²

Yoorrook heard that locking up Aboriginal women, even for short periods on remand, can have profound consequences for their health and wellbeing, and that of their children and families.⁶³ The separation of a mother from her child due to her imprisonment is 'often permanent and can result in feelings of hopelessness that contribute to reoffending'.⁶⁴

Imprisonment causes harm across multiple generations. Having a parent in prison can interrupt childhood development and have detrimental impacts on social and emotional wellbeing.⁶⁵ Children with a parent in prison are at greater risk of adverse mental and physical health outcomes due to trauma, a lack of appropriate health care or both.⁶⁶ For Aboriginal children, the risk of removal from family, community, culture and country also increases.⁶⁷ Families are likely to become more socially excluded and experience financial difficulties.⁶⁸ They also face practical and emotional challenges associated with visiting prison, including stigma and grief.⁶⁹

During visits to DPFC, Yoorrook heard disturbing reports from Aboriginal women that they were not informed of the process to have contact with their children.⁷⁰ Yoorrook heard that women and men are

not getting access to their children, and some do not know where their children are after Permanent Care Orders. When this was put to the Minister for Corrections, he appeared unaware of this issue, and indicated that he had not heard that 'direct evidence' but admitted it was 'very confronting'.⁷¹

The exorbitant price of phone calls from prison limits the ability of people in prison to maintain contact with loved ones, which affects their wellbeing and their right to family and culture. This issue was raised with Yoorrook and in the Cultural Review.⁷² Each call a prisoner makes to a mobile costs as much as \$12.⁷³ While Zoom calls are free, Yoorrook heard that not all women are accessing this option⁷⁴ — whether this is due to it not being available, or due to a lack of information or awareness that it is available to them.⁷⁵ The Corrections Commissioner attributed the high cost of phone calls to the contract with the provider, which includes recording of calls and limiting calls to certain numbers, but accepted that the charges to prisoners do not reflect contemporary call costs to mobiles.⁷⁶ When asked about the issue in Yoorrook's hearing, the Minister for Corrections, noting the importance of prisoners maintaining family contact, stated the telephone charge is 'excessive and that's clear' and undertook to follow up on this matter.⁷⁷

KEEPING YOUNG CHILDREN WITH THEIR MOTHERS IS CRITICAL TO WELLBEING

If a mother with a baby or young child is imprisoned, where it is safe to do so, there must be a culturally safe process for women to keep their babies and young children with them in prison. Victorian Government policy is supposed to allow this under the Living with Mum program which operates at DPFC and Tarren-gower prisons. To be eligible, the woman must be the primary carer of their infant or pre-school child prior to their imprisonment, or be pregnant and due to give birth while in prison. Applications are assessed by a Steering Committee which makes a recommendation to the Deputy Commissioner, Custodial Operations who makes the final decision.⁷⁸

If accepted into the program, the mother and her child live in cottage-style prison accommodation. It is Corrections Victoria policy that women detained in cells at prison, and who cannot be accommodated in the cottage-style accommodation for a range of reasons, are generally not eligible for the program.⁷⁹

Djirra's Legal Team reported that in their experience 'over the last decade there have not been any successful applications for a pregnant mother to keep her baby with her in prison.' They stated the application process disproportionately impacts on Aboriginal women due to its high threshold. They further reported long delays in getting a decision because the woman must wait for a Steering Committee to sit.⁸⁰ In subsequent correspondence the State informed Yoorrook that over the last ten years there have been three babies born to Aboriginal mothers in prison who have been approved to remain with their mothers in prison under the Program.⁸¹

Djirra also reported instances where women were taken from prison to hospital to give birth, and the baby was taken away, so the women then returned to prison without their baby.⁸² Yoorrook agrees with Djirra that this a trauma that can and should be prevented.

When the status of the Living with Mum program was put to the Minister of Corrections during Yoorrook's hearings, he explained that while there is no cap on how many children can be accommodated, before COVID the maximum number of children in the program was 23. As of May 2023, however, there were only two children in the program.⁸³ The Minister indicated that the cottages used to house the mothers and their children were being used for other prisoners, and that some were empty at Tarrengower.⁸⁴

The Minister for Child Protection and Families stated that '[i]n part, it's a matter for Corrections' but that 'mothers and children should be united wherever possible'.⁸⁵ However, on the evidence provided to Yoorrook, this is not happening.

Racism drives over-representation and poor treatment in prison

For First Peoples, government institutions and systems have perpetuated racism, oppression and discrimination, including within the justice system, since invasion.⁸⁶ The government has acknowledged 'that the systems and processes within the adult corrections system continue to amplify the impacts of colonisation, intergenerational trauma and systemic racism'.⁸⁷ The Commissioner, Corrections Victoria, Larissa Strong, acknowledged that the way the Victorian corrections

system operates perpetuates systemic racism against Aboriginal people.⁸⁸ The Victorian Government also acknowledges that systemic racism is a primary driver of the over-representation of Aboriginal people in the criminal justice system.⁸⁹

Phase 4 of the Aboriginal Justice Agreement, *Burra Lotjpa Dunguludja*, recognises that systemic racism persists in the Victorian justice system with Principle 10 aiming to: 'Address unconscious bias: Identify and respond to systemic racism and discrimination that persists in the justice system'.⁹⁰

Nevertheless, Aboriginal people in prison told Yoorrook about experiences of racism from prison officers and Victoria Police. They also described the lack of cultural awareness and education of the staff working in prisons, and how this contributes to racism and poor treatment.⁹¹ The Cultural Review also found that racism persists in the Victorian corrections system.⁹²

Cultural awareness training is inadequate given the scale of racism in prisons

All new prison officers must complete cultural awareness training, delivered by the Koorie Heritage Trust as part of their pre-service training.⁹³ This runs for three and half hours, which the Minister for Corrections accepts is inadequate.⁹⁴ The Minister stated his 'number one priority is making that sure that ... prisoners are treated fairly and free from any discrimination... because clearly it's not the case at the moment'.⁹⁵

Additional training is being rolled out in one prison (DPFC) for all staff. This commenced on 8 February 2023, with around 80 of 500 staff trained by early May. This two-hour training is partly to support the new Healing Unit being established at that prison. Commissioner Strong said that some staff have queried why they should have to be trained, with one participant recently leaving the training and not returning. She stated that Corrections Victoria is 'managing and taking this seriously'.⁹⁶

Commissioner Strong explained that training had been kept to two hours to avoid having to lock down prisoners. Corrections Victoria is now planning to move the training off site, without uniforms, and to extend it to four hours.⁹⁷ All DPFC health staff have now also been



Larissa Strong, Commissioner, Corrections Victoria and Ryan Phillips, Acting Associate Secretary, Corrections and Justice Services, Department of Justice and Community Safety

provided with cultural awareness training, noting that the current health provider contract ends on 30 June (this is discussed further below).⁹⁸ Acting Associate Secretary of DJCS Ryan Phillips said:

Embedding cultural awareness training across the health system is clearly critical. We know that the failures that we have been seeing in health service provision are at the heart of many of the deaths in custody. Unless we can change our workforce, we're not going to get a different outcome. So immediate action has been taken, but there's a longer term strategy now with new healthcare providers.⁹⁹

Yoorrook endorses these remarks but would emphasise that it is not just cultural awareness but cultural competence that must be embedded, as well as respecting and ensuring all human and cultural rights. This goes well beyond cultural awareness. Cultural competence involves different ways of acting, not just being aware. It involves a relationship of respect between First Peoples and those working in the prison system, not simply ticking a box that you have completed a training module.

Systemic failures in prison health care have led to preventable deaths and widespread harm

The right to life necessarily includes the right to appropriate health care within a closed or custodial environment.¹⁰⁰

Yoorrook received extensive evidence pointing to widespread failures in providing adequate health care to people in prison. Yoorrook was told that inadequate prison health services have contributed to preventable deaths of Aboriginal people, including 37-year-old Gunditjmara, Dja Dja Wurrung, Wiradjuri and Yorta Yorta woman Veronica Nelson.

Coroner Simon McGregor identified multiple systemic failures and breaches of human rights in the provision of health care to Ms Nelson. The inadequacy of health care was identified as a fatal contributing factor in the preventable death of Ms Nelson, after her 49 calls for help were repeatedly ignored.¹⁰¹ He found that 'the treatment she received constituted cruel and inhumane treatment contrary to the Charter',¹⁰² and that Ms Nelson 'did not have access to health services equivalent to those available to her in the community'.¹⁰³

This mistreatment occurred despite the *Corrections Act* stating that prisoners have 'the right to have access to reasonable medical care and treatment necessary for the preservation of [their] health'.¹⁰⁴

Rules on standard of health care for prisoners



The *United Nations Standard Minimum Rules for the Treatment of Prisoners* (the Mandela Rules) are the main international standards for treatment of prisoners. They stipulate that imprisoned people should enjoy the same standards of health care that are available in the community and have access to necessary healthcare services free of charge.¹⁰⁵

PRISONERS SHOULD RECEIVE QUALITY HEALTH CARE EQUIVALENT TO COMMUNITY CARE

Imprisoned Aboriginal people typically have complex health needs.¹⁰⁶ They should be able to access quality health care that meets their needs without discrimination. The health care provided should be equivalent to that which is provided to people with the same needs in the community. The principle of equivalence is reflected in the Guiding Principles for Corrections in Australia, and was recommended by RCIADIC as a measure towards ending deaths in custody.¹⁰⁷ It is also protected by international standards. Yet it is not reflected in Victoria's corrections legislation.¹⁰⁸

PRISONERS DO NOT HAVE ACCESS TO MEDICARE

Once imprisoned, people lose their entitlements to Medicare¹⁰⁹ and the Pharmaceutical Benefits Scheme, both of which are run by the Commonwealth Government.¹¹⁰ Yoorrook heard that this undermines equivalency of care.¹¹¹

Acting Associate Secretary Phillips told Yoorrook that prisoner access to Medicare has been 'a matter of some advocacy by the Victorian Government with the Commonwealth over some time that has not yet been resolved. In the interim, under the new contract, the Medicare equivalent health check will now be available for Aboriginal people in prisons'.¹¹² While this health check is a step in the right direction, Yoorrook believes it is unlikely on its own to address the broader, ongoing issue of equivalency of care in Victorian prisons.¹¹³

THE VICTORIAN GOVERNMENT HAS PRIVATISED PRISON HEALTH CARE

Justice Health, a business unit of DJCS, is responsible for the delivery of health services to people detained in Victorian prisons.¹¹⁴ DCJS told Yoorrook that people in prison should have access to:

- primary health services¹¹⁵
- secondary and tertiary healthcare services provided through the public health system
- mental health professionals as required, with psychiatrists and voluntary mental health treatment available providing the person meets eligibility requirements.¹¹⁶

The Victorian Government has previously chosen to outsource health services delivered in prisons to private providers.¹¹⁷ Victoria is the only Australian jurisdiction that contracts private companies to deliver health care to people in prison.¹¹⁸

This private health care model is inconsistent with best practice and results in a lack of independence and oversight.¹¹⁹ Medical experts in the coronial inquiry into the death of Veronica Nelson criticised the model as a 'punitive' form of health care that is reluctant to provide appropriate treatment. Coroner McGregor also noted:

The evidence suggests that fundamental failings in Veronica's custodial healthcare were caused by the flaws in the current governance structure of healthcare at DPFC.¹²⁰

The government advised that from 1 July 2023, the following providers will deliver primary health services in public prisons:

- Western Health (including Wilim Berrbang, its Aboriginal Health unit at DPFC)
- Dhehkaya Health, Bendigo Health and Bendigo & District Aboriginal Co-operative in Tarren-gower Prison
- GEO Healthcare (a private provider) in men's public prisons.¹²¹

The following private providers will continue to deliver primary health services in private prisons:

- Correct Care Australasia in Ravenhall Correctional Centre
- GEO in Fulham Correctional Centre
- St Vincent's Correctional Health in Port Phillip Prison.¹²²

The inclusion of Aboriginal and public health service partnerships is welcome. However, this appears to only apply to women's prisons. Merely substituting one for-profit private provider for another in men's prisons is not good enough. All prisoners should have access to publicly delivered, quality health care in partnership with Aboriginal Community Controlled Health Organisations.

When asked about the disparity in approach to men's and women's prisons, Acting Associate Secretary Phillips indicated that this was because the decision was made at the end of a tender process that ran for several years. He added:

There was certainly discussion about the men's system and what the options would be for public service provision there. The feedback from our colleagues at the Department of Health was that in a post-COVID environment, the pressures on ... the public hospital system meant that they couldn't cope with the demand pressures from the Correctional settings and we were told that that wouldn't be supported by Health at this time.¹²³

THERE ARE WIDESPREAD FAILURES IN PROVIDING HEALTH CARE TO PEOPLE IN PRISON

It is clear that the current system of providing health care to people in prison is causing widespread harm and contributing to the risk of deaths in custody. This is plainly contrary to the human rights of First Peoples prisoners. It is one of many features of the prison system revealed by the evidence that suggests human and cultural rights compliance is poor across the board.

Yoorrook Commissioners spent time in several prisons to hear from Aboriginal people about their experiences. Poor health care was consistently raised as an

issue across all the sites the Commission visited.¹²⁴ Yoorrook Commissioners were told of the lack of cultural awareness and education of the medical staff and the need for healthcare staff who understand Aboriginal people and their cultures.¹²⁵ Yoorrook heard that health practitioners do not show compassion and are culturally inappropriate and insensitive.¹²⁶

Aboriginal women spoke of poor medical practice when in withdrawal from drug addiction on entry to prison. They described the treatment provided as degrading and inhumane.¹²⁷ Male Aboriginal prisoners told Yoorrook these health failings contribute to deaths in custody.¹²⁸ Women told Yoorrook that poor medical care is a daily feature of life in prison, but nothing happens until there is a death in custody. They spoke of their fear of being the next to pass.¹²⁹

Aboriginal prisoners told of significant delays in being able to see a doctor, a dentist or mental health practitioner, and of being denied medical care and medication, including pain relief like Panadol and Nurofen for acute pain.¹³⁰ They expressed frustration that health practitioners assume they want medication to get high, when they really need it to manage pain and address underlying health issues.¹³¹ Yoorrook heard that you 'needed to be "half-dead" to see a doctor ... prison officers should not determine whether or not prisoners see a doctor or nurse'.¹³²

Aboriginal prisoners also told Yoorrook about lack of mental health support and care provided and the importance of receiving proper mental health care. This includes access to well-trained psychologists in trauma and cultural awareness.¹³³

The data shows that more than seven out of 10 Aboriginal male prisoners, and nine out of 10 Aboriginal female prisoners have a mental health condition on entry into custody.¹³⁴ However, Aboriginal prisoners told Yoorrook 'the system does not look after mental health at all'.¹³⁵

Prisoners with mental ill-health who cannot access the care they need in prison in effect experience additional punishment because of that illness. Their illness increases the difficulty of enduring the harsh prison environment.

Experts told Yoorrook that prison responses to mental health (or psycho-social disability) focused on restrictive practices:

People with psycho-social disability usually receive heavy sedation, chemical restraints and different versions of solitary confinement. A lot of people in prisons have cognitive impairments or acquired brain injuries, but there's no support which focuses on your needs.¹³⁶

Women are often reluctant to be examined by male GPs, especially if they have a history of sexual abuse.¹³⁷ This is retraumatising for women because it makes health care unsafe and inaccessible to them. The issue has been raised multiple times in previous inquiries.¹³⁸ Despite this, women prisoners still often have no choice about who they see.

Aboriginal men also spoke to Yoorrook about gender barriers to health care:

I see other Aboriginal people having the same problems. There are Aboriginal Liaison Officers, but they are female and we can't talk to them about men's business. It is a traditional thing — I feel embarrassed talking with an Aboriginal woman about my medical problem. At the same time, I do not want to disrespect these women by telling them I do not want to discuss this issue with them.¹³⁹

Many organisations similarly told Yoorrook about prison health care failures.¹⁴⁰ The Aboriginal Justice Caucus also referred the Commission to analysis by The Guardian that identified that the most common cause of death in custody post-RCIADIC was medical problems, followed by self-harm.¹⁴¹ Aboriginal people were three times more likely not to receive all necessary medical care compared to non-Aboriginal people.¹⁴² For Aboriginal women, less than half received all required medical care prior to death.¹⁴³

The Cultural Review found that people in custody:¹⁴⁴

- do not receive equivalent health care or equal health outcomes
- experience multiple barriers and disruptions to health care including discrimination and bias



Damian Griffis, CEO, First Peoples Disability Network Australia

- are subject to management regimes and restrictive practices to respond to behaviours associated with disability and mental illness that undermines prisoner health and wellbeing.

The Cultural Review recommended that the Victorian Government include the right to equivalent healthcare and health outcomes as a minimum standard in the Corrections Act.¹⁴⁵ The review further recommended that a model of care for Aboriginal people in custody be developed that supports equivalent healthcare outcomes and continuity of care for Aboriginal people.¹⁴⁶ Yoorrook agrees.

First Peoples lack access to culturally appropriate rehabilitative programs and support services

Victoria's prisons are warehousing people with significant trauma and complex needs. Rather than supporting these individuals to heal through therapeutic approaches, they are punished and locked up in facilities that only serve to re-traumatise.¹⁴⁷

DJCS (including through Corrections Victoria and Justice Health) is responsible for the delivery of rehabilitation and reintegration services in prisons including:

- drug and alcohol programs
- specialised mental health services

- family violence and offending behaviour change programs
- cultural programs, family engagement and parenting programs
- pre- and post-release transition services
- case management to connect people in prison with activities to reduce recidivism.¹⁴⁸

The government acknowledges that ‘Aboriginal people need adequate and culturally safe support while in prison, and upon release, to mitigate their risk of reoffending’, but this support is ‘not always provided to the degree it is needed’.¹⁴⁹ Prisoners told Yoorrook:

There is no rehabilitation. There is no contact with family, no training or programs, no culture, and no healthcare.¹⁵⁰

People imprisoned on remand are unable to access many rehabilitation programs and services and short stay prisoners also face barriers in accessing programs due to time limitations.¹⁵¹ Given the significant increase in remand of Aboriginal people and the higher proportion serving short sentences, many people in prison cannot access appropriate programs. For example, a Yoorrook roundtable participant who had been on remand for more than 12 months told of being unable to access drug rehabilitation programs.¹⁵²

Aboriginal prisoners spoke about the importance of the programs in prison but also the need for more culturally informed programs and teachers who understand their cultures.¹⁵³

Access to programs also depends on what prison you are in. Table 14-2 outlines Aboriginal programs delivered in Victorian prisons.¹⁵⁴

Corrections Victoria admits that prisoners will have to wait for cultural programs or might not get them.¹⁵⁶ This means they cannot enjoy their cultural rights when imprisoned or gain strength from their culture to help rebuild their lives once released. This is a clear violation of the right to enjoy and maintain culture as protected by *the Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter).¹⁵⁷

The Legislative Council Legal and Social Issues Committee (Legal and Social Issues Committee) recommended that all prisoners, whether on remand

or sentenced, in public or privately-operated prisons, have access to forensic rehabilitation programs and supports.¹⁵⁸ It also recommended more resourcing to ensure prisoners can access programs, by scaling up funding to reflect growth in prison populations.¹⁵⁹ Similarly, the Cultural Review found additional funding was required for culturally safe, community-led programs to help people reintegrate back into their family and community.¹⁶⁰ Yoorrook agrees. Lack of resources is not an excuse for human and cultural rights violations.

BARRIERS TO PRE- AND POST-RELEASE SUPPORT AND PAROLE

We are losing a lot in gaol and we are not gaining anything. The little we are given is not enough to maintain our cultural strength. Wounds will heal, but scars will always remain.¹⁶¹

The lack of access to programs can also have significant impacts on whether a person is paroled.¹⁶² Parole is the release of people from prison under supervision by community corrections officers with conditions such as curfews, reporting and travel restrictions, and support such as drug and alcohol counselling and practical assistance.

When a judge hands down a prison sentence they normally specify a range — a minimum and a maximum term. A person cannot be released on parole until they have served the minimum prison sentence set by the court. Release before the end of a maximum prison term is not automatic. A person must apply for parole and the parole board decides if they are released and on what conditions. The parole board can cancel parole and re-imprison someone before their maximum term sentence expires.¹⁶³

The best evidence is that supervised and supported release on parole reduces the risk that someone will reoffend. This is when compared with the straight release of someone into the community at the end of the maximum term of their sentence with no supervision.¹⁶⁴

Yet, Aboriginal people are less likely to be granted parole than non-Aboriginal prisoners.¹⁶⁵ This outcome suggests that First Peoples experience indirect discrimination in the operation of the parole system. This

TABLE 14-2: Aboriginal specific programs delivered in Victorian prisons¹⁵⁵

PROGRAM	DESCRIPTION
<p>Kaka Wangity Wangin-Mirrie Aboriginal cultural programs</p>	<p>These are a suite of programs focusing on cultural strengthening and healing, and women’s programs. Current grant recipients include: Djirra (who deliver Sister’s Day in and Dilly Bag), VACCA (who deliver the women’s and men’s beyond survival cultural program) and Connecting Home (who deliver the Marumali Program).</p>
<p>Statewide Indigenous Arts in Prison and Community program (delivered by The Torch Aboriginal Arts Program)</p>	<p>The Torch promotes Indigenous arts in prison and in the community. The Torch assists artists to reconnect with culture, earn an income from art sales, foster new networks and to pursue educational and creative industry avenues upon release.</p> <p>Proceeds from sales go to the artist.</p>
<p>The Yawal Mugadjina Program (delivered by Corrections Victoria with Aboriginal Elders and Respected persons)</p>	<p>Culturally tailored mentoring to support Aboriginal people in custody, and their transition and reintegration back into their communities. Supports include the development of cultural plans, an Elders and respected persons program and cultural post release support packages.</p>
<p>Wadamba prison to work program (delivered by Wan Yaari)</p>	<p>This program supports people in custody and on remand to gain employment post-release.</p>
<p>Dardi Munwurro Pre- and Post-Release Case Management Program</p>	<p>Dardi Munwurro works with GEO to provide an intensive pre- and post-release case management program for Aboriginal men exiting prison from Ravenhall Correctional Centre.</p>
<p>Wayapa Wuurk Yarning Circles</p>	<p>This is a holistic cultural yarning circles program that builds on the cultural strength of participants and helps to maintain cultural connections and identity to reduce reoffending.</p>
<p>Djirra prison support program</p>	<p>Djirra provides Aboriginal women at DPFC and Tarrengower with access to legal support, case management support, post-release support and culturally appropriate services that address complex individual needs.</p> <p>An Aboriginal Justice Agreement initiative, the Prison Support Program, delivered by Djirra, also provides legal and non-legal support for Aboriginal women in prison who have experienced or are at risk of experiencing family violence.</p>

is contrary to the right to equality before the law and to be protected from and against discrimination in the Charter.¹⁶⁶ Over the last five years, while the proportion of eligible Aboriginal people applying for parole has been higher than that of the overall eligible population, the proportion of decisions to grant parole (of the total of all decisions) remains consistently lower for Aboriginal people. In 2021–22, the rate was 50.5 per cent compared to 65 per cent of decisions overall.¹⁶⁷ This denies Aboriginal people the benefits of parole, increases the risk of reoffending and contributes to over-imprisonment, as more Aboriginal people will be in prison for longer.

As a result of reforms in 2013 which made it harder to get parole, the number of people accessing parole has fallen significantly. The Legal and Social Issues Committee Inquiry reported that between 2009–10 and 2019–20 the proportion of people released from prison on parole declined from 30 per cent to six per cent of all discharges from custody. It recommended that the Victorian Government evaluate the impacts of parole reforms on community safety outcomes. It also recommended that the Victorian Government ensure the Adult Parole Board can appropriately determine applications for parole from people who have been unable to complete prerelease programs due to limited availability.¹⁶⁸ The Victorian Government has not yet formally responded to the inquiry's recommendations.

Submissions to Yoorrook identified many barriers to gaining parole. These include lack of timely access to offence-specific programs while in prison, as well as lack of adequate and secure accommodation in the community.¹⁶⁹ These challenges are even more acute for Aboriginal women, because they experience greater difficulty accessing pre-release programs deemed necessary to be considered for parole.¹⁷⁰

In evidence to Yoorrook, DJCS acknowledged the 'disparity between parole applications for Aboriginal prisoners compared to non-Aboriginal prisoners and that more could be done to support Aboriginal people to apply for parole'.¹⁷¹

Corrections Victoria also admitted there is unmet demand for post-release programs, and that in particular 'finding safe, sustainable housing for people getting out of prison is one of the biggest challenges'.¹⁷² Commissioner Strong stated in evidence that housing is a

'basic human need' and that it is critical in terms of risk of reoffending.¹⁷³ Yet some prisoners are released from imprisonment into homelessness, which is evidence of a system that fails to take human rights seriously. Housing is essential for people to enjoy other human rights, such as health, life, liberty and security of the person, connecting with children and family, privacy and safety.¹⁷⁴ Clearly, much more needs to be done to ensure transitional housing and other support for people exiting prison, not only because this is necessary for people to leave prison with dignity, but also to reduce the risk of reoffending.¹⁷⁵

Post release programs are also critical, as noted by Alan Thorpe:

One of the game changers, coming out of a program or prison, they have done some good work ... but we can open up opportunities for lived experience and for our mob to create them opportunities ... Because they become the best workers, because they are really hungry and their intentions are strong about wanting to give back.¹⁷⁶

Similarly, Shaun Braybrook said:

Resources hold us back. I'm a big believer in investing in community-led initiatives, programs, intervention programs ...¹⁷⁷

NEW GOVERNMENT SPENDING ON PRISONS DWARFS INVESTMENT IN SUPPORT PROGRAMS

It currently costs \$421 a day or \$154,000 a year to detain a person in an adult prison.¹⁷⁸ It is also extremely expensive to build prisons.

In recent years the government has spent huge sums on expanding the prison system. It built the new Western Plains prison primarily to house the significant increase in people imprisoned on remand because of the government's punitive bail law changes.¹⁷⁹ It cost \$1.1 billion to construct and has a total capacity of 1248 beds.¹⁸⁰ It also spent approximately \$800 million to expand capacity at existing male prisons in the 2022–23 State Budget.¹⁸¹

By contrast, the capital budget for Preventing Aboriginal Deaths in Custody in the same year was \$1.9 million. The capital budget for new metropolitan projects



Alan Thorpe, Dardi Munwurro

to divert children from youth justice projects was \$128,000. The capital budget for ‘Reducing future justice demand and keeping the community safe’ was \$1.5 million.¹⁸² This year’s service delivery budget funding for that is \$2 million.¹⁸³

The Corrections Commissioner told Yoorrook that despite spending over \$1 billion on the Western Plains prison, it has not opened because the beds are no longer as necessary.¹⁸⁴ In 2023–24 it will cost Victorian taxpayers over \$39 million to keep this empty prison secure.¹⁸⁵ Funding of this scale would make an enormous difference to keeping people out of prison in the first place.

Cruel, inhuman and degrading treatment in prison

We all know we’ve got to be here, but treat us like humans, you know?¹⁸⁶

Drawing on international human rights treaties, the Charter protects the rights of people in prison to humane treatment and to be free from torture and cruel, inhuman and degrading treatment.¹⁸⁷ Yoorrook heard evidence of routine strip searching, excessive use of solitary confinement and violence against prisoners in contravention of these protections.¹⁸⁸

The Victorian Aboriginal Legal Service (VALS) pointed to recent inquiries into Victorian prisons that highlight serious abuses, including excessive use of force, inappropriate strip searching, and excessive use of

solitary confinement.¹⁸⁹ Similarly, the Cultural Review catalogued numerous inquiries and investigations in recent years that uncovered ‘excessive use of force, inappropriate strip searching, and concerns about the transparency and fairness of prison disciplinary hearings and the treatment of people with cognitive impairment and disability in custody’.¹⁹⁰

The Minister for Corrections acknowledged bias in corrections officers’ decisions to use force.¹⁹¹ As noted above, the Victorian Government has accepted all the findings of the Cultural Review and Yoorrook also endorses those findings.

ROUTINE STRIP SEARCHING IS INHUMANE AND DEGRADING, PARTICULARLY FOR WOMEN

For a lot of women, just being strip searched in itself will trigger so much trauma. Even after they get dressed, they’re still sort of shaking and you know it’s a traumatising experience, particularly in custody cells, because they’re rough, they’re rude, they’re arrogant and they’re personal.¹⁹²

Being subjected to routine strip searching can be humiliating and degrading for any person and is particularly harmful for women in prison given many are victim survivors of family and sexual violence.¹⁹⁵ For some women, strip searching is experienced as state-sanctioned sexual assault.¹⁹⁶

In 2017 the Victorian Ombudsman recommended DPFC immediately cease routine strip searches before and after family visits, and that they should only be

Rules on strip searching



The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules) provide that strip searches 'shall be conducted in a

manner that is respectful of the inherent human dignity and privacy of the individual being searched'.¹⁹³ They further state that:

*Intrusive searches, including strip and body cavity searches, should be undertaken only if absolutely necessary. Prison administrations shall be encouraged to develop and use appropriate alternatives to intrusive searches. Intrusive searches shall be conducted in private and by trained staff of the same sex as the prisoner.*¹⁹⁴

used where intelligence and risk required it.¹⁹⁷ Routine strip searching was seen as incompatible with human rights obligations to prevent cruel, inhuman and degrading treatment.¹⁹⁸ The recommendation was initially rejected by the Department of Justice and Regulation (now DJCS), though as noted below this position has since changed.¹⁹⁹

The Legal and Social Issues Committee recommended introducing policies to regulate the use of strip searches, arguing they should only be used as a last resort. It also recommended that where they are used, it is reported to the Secretary of the DJCS.²⁰⁰

The Cultural Review found strip searching continues to be performed routinely, despite the availability of body scanner technology which is effective in identifying contraband. The review also concluded that 'there is a lack of central oversight of strip-searching data, presenting unnecessary integrity risks across system'.²⁰¹

DJCS told Yoorrook that in 2019 it introduced reforms in women's prisons, including training, a body scanner to minimise use of strip searching and 'trauma-informed, gender responsive case management'.²⁰² The Cultural Review noted that DPFC introduced body scanner technology, in tandem with reforms across the women's system and changes to strip-searching policies, which reduced the number of searches

being undertaken.²⁰³ The government response to the Cultural Review states that '[s]trip searching is currently used as a last resort as part of a suite of other mechanisms to limit contraband entering prisons'.²⁰⁴ Yoorrook also notes that body scanners are not used across all prisons in Victoria.

The fact that routine strip searches continue to be performed in Victorian prisons is unacceptable. Yoorrook agrees with VALS that routine strip searches should be banned in Victorian prisons and a strip search should only be permitted as a last resort after all other less intrusive search alternatives have been exhausted and based on a reasonable suspicion of dangerous contraband.²⁰⁵

EXCESSIVE USE OF SOLITARY CONFINEMENT CONTINUES TO CAUSE HARM

RCIADIC recommended that:

Corrective Services should recognise that it is undesirable in the highest degree that an Aboriginal prisoner should be placed in segregation or isolated detention. In any event, Corrective Services authorities should provide certain minimum standards for segregation including fresh air, lighting, daily exercise, adequate clothing and heating, adequate food, water and sanitation facilities and some access to visitors.²⁰⁶

The Mandela Rules define solitary confinement as the physical isolation of a person for 22 hours or more a day without any meaningful human contact.²⁰⁷ In Victoria, multiple terms are used to describe solitary confinement in given situations, including isolation, segregation, seclusion and separation.

A 2017 Victorian Ombudsman inspection of DPFC examined compliance with the *Optional Protocol to the International Convention Against Torture* (OPCAT), which requires independent monitoring of places of detention.²⁰⁸ The Ombudsman found that women held in management (separation) units, were sometimes kept in their cells for 22 to 23 hours a day and had 'little meaningful human contact'.²⁰⁹ The inspection team found that these women were at increased risk of self-harm because of being isolated, with 'the clinical psychologist on the inspection team not[ing] that conditions ... were likely to retraumatise women

who had been victims of sexual assault or other violence'.²¹⁰ It went on to find that long-term separation in such an environment may amount to cruel, inhuman or degrading treatment and is incompatible with the Mandela Rules.²¹¹

In 2019, a Victorian Ombudsman investigation at Port Phillip Prison found 77 young people had been subjected to prolonged solitary confinement of more than 15 days and two young people for more than 140 days.²¹² This review prompted the Victorian Ombudsman to recommend that the Victorian Government establish a legislative prohibition on solitary confinement.²¹³

The Government told Yoorrook that to minimise harm to women, upgrades to DPFC include new units 'designed based on trauma-informed design principles' which will replace the separation units 'in the first half of 2023'.²¹⁴ This is part of a 'Separations Project' referred to in the government response to the Cultural Review.²¹⁵

Despite the change at DPFC, Yoorrook heard from First Peoples in prisons across Victoria of continuing improper use of solitary confinement in adult prisons (solitary confinement of children in youth detention is discussed further in Chapter 12: Youth justice).²¹⁶

They transition from being alone in a cell for 23 hours a day to mainstream population with 70–90 men. This was described as the 'biggest cultural shock of your life'. Most of the time this results in prisoners returning to the slot because 'it's easier to go back to the slot once you've been there'.²¹⁷

Participants discussed some prisoners who spend years 'in the slot' but receive no support or help integrating into the mainstream prison population. Women subjected to solitary confinement described it to Yoorrook as 'inhumane, degrading, and traumatic'.²¹⁸

The Corrections Minister in his evidence to Yoorrook said that he expected Victoria's prison system to operate in accordance with the Mandela Rules²¹⁹. Yoorrook believes that the Mandela Rules prohibition on prolonged solitary confinement for adults, and a complete prohibition for children, should be established in legislation.²²⁰

Barriers to reporting abuse and misconduct in prison

It gets pushed under the carpet ... And then when something happens to a woman or multiple women then all of a sudden people want to take notice. And I think that's really unfair for their families and for other women because we could have prevented ... all these things from happening if there was just a bit of care. If there was just a bit of empathy. If there was just a bit of, you know, we are not all pieces of shit and we do deserve attention. And I don't know, I think everything — all of this could have been prevented if, yeah, if they treated us humanely.²²¹

Yoorrook heard from First Peoples in prisons that they have little trust in prison complaints processes and that their complaints have been ignored or swept under the carpet.²²²

The Cultural Review found that complaints processes differ between prisons, but the first step is always to make a complaint in writing that goes to custodial staff.²²³ This presents significant issues with accountability.²²⁴ The Cultural Review report reflected accounts from prisoners that their complaints have been ignored or dismissed, or not believed.²²⁵ A participant in that review said:

I made a complaint to the supervisor and another senior prison officer, and they also looked through my file notes and things like that, and there was nothing there. So, I ended up having a go at my case worker in front of the supervisor about it, and a couple of hours later I spoke to the prison officer that I also made a complaint to, and he turned around and he said they had a conversation with my case worker, and he said that my case worker told him that he didn't believe that it happened in the first place. So, nothing was documented.²²⁶

Yoorrook prison roundtable participants described their efforts to have complaints fairly and effectively dealt with, noting 'the complaints process outside prison (making complaints to the Ombudsman) often

doesn't lead to any resolution'.²²⁷ Overall, they had little, if any, confidence that they would be heard, believed and action would be taken.²²⁸

It was put to the Minister that prisoners had told Yoorrook they are subjected to racism and that the things that happened to Veronica Nelson happened every day but are only noticed when there is a death. The Minister responded, "[i]f that's the case, that's terrible".²²⁹ He stated that he agreed with the findings of the Cultural Review and evidence to Yoorrook that prisoners are fearful of punishment or mistreatment if they complain.²³⁰

Oversight is inadequate

A lack of transparency and accountability is also pervasive in prisons in Victoria. While IBAC highlighted a raft of systemic issues in 2021, many truths have not been told. The coronial inquest into the death of Veronica Nelson revealed serious concerns about the process for reviewing a death in Victorian prisons, which is currently carried out by the Justice Assurance and Review Office (JARO) (part of DJCS) and has been criticised by the Coroners Court. It is not until someone dies in custody that the scale of negligence, violence, racism and grossly deficient review processes is finally revealed.²³¹

Inadequate oversight of Victoria's prisons is a long-running issue.²³² While there are significant concerns about oversight of state-run prisons, these are often heightened for privately run prisons.²³³ A staff member participating in the Cultural Review shared that:

It is common occurrence ... to have senior managers ... pressure and coerce staff to under-report incidents to avoid a financial penalty and maximise profits. Unfortunately, the contract between corrections and [the provider] has bred this culture.²³⁴

Under the Corrections Act, the Secretary of DJCS has statutory responsibility 'for monitoring performance in the provision of all correctional services to achieve

the safe custody and welfare of prisoners and offenders'.²³⁵ Justice Health, a business unit within DJCS, is responsible for overseeing healthcare services which are outsourced to providers.

The Justice Assurance and Review Office (JARO), a business unit within DJCS, 'provides internal assurance and conducts reviews to support accountability and oversight of the adult custodial corrections system and the youth justice system'.²³⁶ It provides advice to the Secretary 'on ways to achieve higher performing, safer and more secure youth justice and adult corrections systems' and identify areas of risk, adequacy of existing controls and opportunities for improvement.²³⁷ JARO undertakes assessments of certain incidents, conducts reviews and investigations into deaths in custody to inform its advice to the Secretary.

The Cultural Review identified that 'JARO's capacity to provide an ongoing and comprehensive assurance and review function is subject to competing priorities within DJCS'.²³⁸ It also found that:

- JARO has limited capacity and ability to provide proper oversight
- there is a lack of transparency and accountability, as JARO's functions do not extend to public reporting on issues in the adult custodial corrections system.²³⁹

Multiple organisations, including the Aboriginal Justice Caucus told Yoorrook that oversight must be strengthened.²⁴⁰ Concerns about JARO and the quality of its analysis of custodial incidents have also been criticised by Coroner McGregor, who recommended that DJCS 'urgently redesign the Justice Assurance and Review Office and Justice Health Death In Custody reviews to ensure reviews ... are independent'.²⁴¹

The Attorney-General in her response to that recommendation stated that an alternative has been implemented. That response states:

In August 2022, several enhancements were also made to Justice Health and JARO processes to bolster the internal assurance function their reports play within DJCS. Many of these are discussed below. A key enhancement to ensure the independence of internal reviews is the establishment of

a Review Oversight Committee (consisting of Deputy Secretaries from relevant DJCS business units) which provides stronger executive oversight and guidance in relation to all reviews into Aboriginal deaths in custody. The new approach to reviewing any death in custody also ensures reviews support timely identification of actions necessary to prevent or reduce the likelihood of further deaths. This new approach adopts key aspects of Safer Care Victoria's adverse event process.

The reviews now consider the circumstances surrounding the person's death in custody, to identify anything that DJCS can change to prevent future deaths or harm. This includes consideration of:

- The intersection between the health and custodial systems.
- The circumstances preceding the death.
- The management of, and response to, the death.
- The direct cause of the death.
- Systemic factors that contributed to the death.
- The extent to which the person's human rights were protected and promoted.
- Opportunities for systemic improvement.
- Any other issues relevant to the review, such as the implementation of recommendations from previous reviews.²⁴²

The Minister for Corrections told Yoorrook that the new internal investigation process, which combines Justice Health and JARO reviews into one process, will consider operational and health perspectives in its recommendations in response to a death in custody.²⁴³ The Minister stated that the aim is to ensure timely and comprehensive investigations.²⁴⁴ Yoorrook considers that the new internal review model will still fail to provide adequate accountability, transparency or oversight because it will still lack independence.

Compliance with human rights obligations must be independently monitored and reported on

OPCAT requires states who are parties to the treaty to establish a system to inspect all places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.²⁴⁵ OPCAT recognises that unfettered independent access and monitoring of places of detention is critical to preventing and responding to mistreatment. In 2017, Australia ratified OPCAT and made a commitment to implement it by January 2022.²⁴⁶ However, this has not yet happened.²⁴⁷

Under OPCAT, Australia must establish an independent National Preventive Mechanism (NPM) to oversee and monitor places of detention. The NPM can be made up of one or more bodies. In the Australian context, as a federation, the NPM will be made up of multiple bodies at the state, territory and federal level, coordinated by a national body.²⁴⁸ By inspecting places of detention, the NPM will play a critical role in preventing mistreatment and will also examine systemic factors that increase risks of mistreatment or abuse.²⁴⁹

In submissions to Yoorrook, multiple stakeholders called on the Victorian Government to urgently implement its obligations establish, at the state level, culturally appropriate inspection and oversight mechanisms as part of the NPM.²⁵⁰ The government told Yoorrook that it is seeking Commonwealth funding to support the implementation of an NPM. It also acknowledged the need to do more to improve accountability processes.²⁵¹

The way forward

Aboriginal people continue to be shockingly over-represented in Victorian prisons. For decades successive governments have pursued so-called tough on crime approaches which have included harsher penalties, new offences and restrictions on bail and parole. All of this has led to the need to build more prisons to accommodate growing prison populations, with Aboriginal people being disproportionately jailed. These policies are said to promote community safety when evidence demonstrates that prisons often do the opposite.²⁵²

Prisons are punitive places that do little to rehabilitate people or safely prepare them to live back in the community.²⁵³ Prisons compound and exacerbate poor health, mental health and trauma, and ‘amplify the impacts of colonisation, intergenerational trauma and systemic racism’.²⁵⁴ Too many Aboriginal families have lost loved ones to a cycle of entering and exiting prisons with little prospects for employment, a home or a decent life.

Yoorrook has found widespread failings in Victorian prisons including: over-imprisonment; deaths in custody; racism and discrimination; lack of knowledge and implementation of human and cultural rights, and widespread violations of those rights; disconnection of First Peoples prisoners from family, kin and culture; a strong and disproportionate emphasis on punishment rather than rehabilitation and healing; lack of independent oversight; and lack of support on release (often into homelessness) leading to reoffending.

These persistent and ongoing features of the Victorian prison system are evidence of a structural problem demanding a structural solution to which First Peoples want to contribute, consistent with their right to self-determination.

A clear priority identified in this report is preventing Aboriginal people from entering the criminal justice system, including prisons. It is also clear to Yoorrook that urgent reform is needed to reform the prison system itself for those people that do end up there.

Reform is needed across multiple fronts including:

- ensuring that Aboriginal people can access quality and culturally appropriate health care of an equivalent standard to what they would access in the community
- ensuring access to culturally safe rehabilitation programs and supports
- providing gender-specific and tailored, culturally appropriate programs for Aboriginal women
- ending the routine use of strip searching and the overuse of solitary confinement and ensuring practices comply with human rights standards
- ensuring the independent oversight of Victorian prisons including by implementing OPCAT.

After conducting its extensive review of the prison system, which included hearing from more than 1700 people detained or working the system, the Cultural Review stated:

There is a growing understanding that punitive custodial conditions do not make prison environments, workplace conditions or the community safer. On the contrary, capricious decision making, inhumane treatment, harsh infrastructure and lack of adequate health support create more volatile places to work and to live and fail to support a safe re-entry into the general community.

Despite progress to elevate rehabilitation and reducing recidivism as primary objectives, cultural change across the Victorian adult custodial corrections system remains incomplete. There is a clear gap between the intention of policies and programs and their operational translation.²⁵⁵

The findings and recommendations of the review are extremely significant for First Peoples in the prison system in Victoria and their families, and for respecting the human and cultural rights of First Peoples. Yoorrook supports the findings of the review, which align closely with Yoorrook’s own investigation of the experience of First Peoples in the prison system and consideration of reform options. The government should urgently implement the recommendations of the review, alongside the recommendations Yoorrook makes below. ■



RECOMMENDATIONS

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 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.

Endnotes

1. Outline of Evidence of Aunty Vickie Roach, 15 December 2022, 4 [25].
2. Thalia Anthony, 'Fact Check: are First Australians the Most Imprisoned People on Earth?'; *The Conversation*, (Online, 6 June 2017) <<https://theconversation.com/factcheck-are-first-australians-the-most-imprisoned-people-on-earth-78528>>.
3. Australian Bureau of Statistics, 'Corrective Services, Australia' (Web page, 8 June 2023) 'Aboriginal and Torres Strait Islander Imprisonment Rates' <<https://www.abs.gov.au/statistics/people/crime-and-justice/corrective-services-australia/mar-quarter-2023>>.
4. *Royal Commission into Aboriginal Deaths in Custody* (Regional Report of Inquiry in New South Wales, Victoria and Tasmania, April 1991) 63–64.
5. Transcript of Minister for Corrections, Minister for Youth Justice and Minister for Victim Support the Hon Enver Erdogan, 15 May 2023, 857 [29]–[33].
6. Transcript of Ryan Phillips, 3 May 2023, 384 [43]–[45]. As at that date there had been five deaths since Mr Phillips became Deputy Secretary in mid-2019. Another death occurred subsequent to Mr Phillips giving evidence.
7. *Inquest into the Passing of Veronica Nelson* (Coroners Court of Victoria, Coroner McGregor, 30 January 2023), Appendix B, 8 ('*Inquest into the Passing of Veronica Nelson*').
8. Witness Statement of Minister for Corrections, the Hon Enver Erdogan, 31 March, 2023, 8 [40].
9. Transcript of Minister for Corrections, the Hon Enver Erdogan, 15 May 2023, 857 [37]–[39].
10. Transcript of Minister for Corrections, the Hon Enver Erdogan, 15 May 2023, 874 [17]–[25], 894 [29]–[46], 917 [28]–[37].
11. This report made 86 recommendations for reform: Kristen Hilton et al, *Safer Prisons, Safer People, Safer Communities: Final Report of the Cultural Review of the Adult Custodial Corrections System* (Final report, December 2022). The government has committed to implement 26 recommendations in the short-term. This includes the establishment of an Assistant Commissioner, Corrections Victoria, Aboriginal Services: Transcript of Minister for Corrections, the Hon Enver Erdogan, 15 May 2023, 872 [18]–[19], 918 [13]–[17], 921 [7]–[8].
12. Victorian Government, *Cultural Review of the Adult Custodial Corrections System: Victorian Government Response* (Response, March 2023). See also Transcript of Minister for Corrections, the Hon Enver Erdogan, 15 May 2023, 869 [2]–[5].
13. Hilton et al (n 11) 9.
14. Ibid.
15. Aboriginal Justice Caucus, Submission 74, 23; Human Rights Law Centre, Submission 60, 11; Victorian Aboriginal Legal Service, Submission 34 (Criminal Justice), 33.
16. Allowing for differences in structural age distributions between the Aboriginal community and non-Aboriginal Victorians, the age-standardised imprisonment rate for Aboriginal men at 30 June 2022 was 3048.9 per 100,000 compared to 223.5 per 100,000 for non-Aboriginal men. On 30 June 2022, Aboriginal men were 13.6 times more likely to have been held in prison custody than non-Aboriginal men in Victoria: Australian Bureau of Statistics (ABS), 'Prisoners in Australia: Table 17', *Crime and Justice* (Web page, 24 February 2023) <<https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release>>.
17. Allowing for differences in structural age distributions between the Aboriginal community and non-Aboriginal Victorians, the age standardised imprisonment rate for Aboriginal women was 162.4 per 100,000 compared to 12.3 per 100,000 for non-Aboriginal women': Department of Justice and Community Safety, 'Response to NTP-002-01 — *Agency Response: Additional Written Evidence*', 14, citing Australian Bureau of Statistics, 'Table 17' in 2023 *Prisoner Characteristics, States and Territories* (Tables 14 to 35), Prisoners in Australia, Australian Government, produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
18. Reproduced from Department of Justice and Community Safety, 'Response to NTP-002-014 — *Agency response to the Yoorrook Justice Commission*', 11, produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
19. Sentencing Advisory Council, 'Victoria's Indigenous Imprisonment Rates', *Sentencing Statistics* (Web page, 4 Nov 2022) <<https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/victorias-indigenous-imprisonment-rates>>; Australian Bureau of Statistics (ABS), 'Prisoners in Australia', *Crime and Justice* (Web page, 24 February 2023) <<https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release>>.
20. Note that the government materials contain a calculation error where they state the increase was 98 per cent (compared to a 45 per cent increase in the non-Aboriginal prisoner population): Department of Justice and Community Safety, 'Response to NTP-002-014 — *Agency response to the Yoorrook Justice Commission*', 11, produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.

21. Department of Justice and Community Safety, 'Response to NTP-002-014 — *Agency response to the Yoorrook Justice Commission*', 11 [18], produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
22. On 28 February 2023, there were 849 Aboriginal people under community supervision (including 34 on parole): Department of Justice and Community Safety, 'Response to NTP-002-014 — *Agency response to the Yoorrook Justice Commission*', 12–13, produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
23. On 28 February 2023, there were 849 Aboriginal people under community supervision (including 34 on parole): Department of Justice and Community Safety, 'Response to NTP-002-014 — *Agency response to the Yoorrook Justice Commission*', 12–13 [27], produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
24. Sentencing Advisory Council (n 19).
25. Increasing from 78 per cent on 30 June 2018 to 82 per cent on 30 June 2022: State of Victoria, Response to Issues Paper 1: Call for Submissions on Systemic Injustice in the Criminal Justice System, 23 [82].
26. In 2020–21, the rate of sentenced Aboriginal women and men returning to prison within two years of release was 46.2 per cent and 53.1 per cent respectively (compared to 34 per cent and 43.3 per cent for non-Aboriginal women and men): State of Victoria, Response to Issues Paper 1: Call for Submissions on Systemic Injustice in the Criminal Justice System, 23 [82].
27. That was 1190 Aboriginal prisoners, compared to 150 Aboriginal prisoners received in prison under sentence: Department of Justice and Community Safety, 'Response to NTP-002-014 — *Agency response to the Yoorrook Justice Commission*', 11 [20], produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
28. That is, 735 Aboriginal people: Department of Justice and Community Safety, 'Response to NTP-002-014 — *Agency response to the Yoorrook Justice Commission*', 11, produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
29. Reproduced from Department of Justice and Community Safety, 'Response to NTP-002-014 — *Agency response to the Yoorrook Justice Commission*', 28, produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
30. Transcript of Professor Stuart Kinner, 16 December 2022, 539 [36]–[39].
31. Ruth McCausland and Eileen Baldry, 'The Social Determinants of Justice: 8 Factors that Increased Risk of Imprisonment', *The Conversation* (Online, 17 April 2023) <<https://theconversation.com/the-social-determinants-of-justice-8-factors-that-increase-your-risk-of-imprisonment-203661>>. See also Australian Community Support Organisation, Submission 47, 5.
32. Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 33; Aboriginal Justice Caucus, Submission 74, 36.
33. Consultations with Aboriginal men and Fulham Corrections Centre as part of the Warrigunya Project: Australian Community Support Organisation, Submission 47, 7.
34. Outline of Evidence of Professor Stuart Kinner, 16 December 2022, 5 [26].
35. Data for 30 June 2022: Department of Justice and Community Safety, Corrections Victoria, 'Annual Prisons Statistical Profile 2012–13 to 2021–22: Table 1.14', *Corrections, Prisons & Parole* (Web Page, 5 May 2021) <<https://www.corrections.vic.gov.au/annual-prisons-statistical-profile>>.
36. Department of Justice and Community Safety, 'Response to NTP-002-014 — *Agency response to the Yoorrook Justice Commission*', 17 [44], produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
37. Thomas Marks, Submission 9.
38. Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Parliamentary Paper No 326, March 2022) vol 2, 582, quoting Victorian Government, Submission 93, 17 ('*Inquiry into Victoria's Criminal Justice System*').
39. Transcript of Ryan Phillips, 3 May 2023, 398 [41]–[42].
40. Victorian Aboriginal Legal Service, Submission 34 (Criminal Justice), 52; Aboriginal Justice Caucus, Submission 74, 36. The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability indicates that Aboriginal and/or Torres Strait Islander people with disability are about 14 times more likely to be imprisoned than the general population: see *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Issues Paper – Criminal Justice System, January 2020) 1.
41. Outline of Evidence of Professor Stuart Kinner, 16 December 2022, 2 [6]–[8].
42. Djirra, Submission 44, 7.
43. *Inquiry into Victoria's Criminal Justice System* (n 38) vol 1, 141.
44. *Ibid.*
45. 12 percent of the total female population were Aboriginal: Transcript of Commissioner Larissa Strong, 3 May 2023, 387 [8]–[9].
46. Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koorie Women and the Justice System* (Report, 2013) 3 ('*Unfinished Business*').
47. Aboriginal Justice Caucus, Submission 74, 39–40.
48. Hilton et al (n 11) 578.
49. Law and Advocacy Centre for Women, Submission 29, 17.
50. *Inquiry into Victoria's Criminal Justice System* (n 38) vol 2, 611–612.
51. Aboriginal Justice Caucus, Submission 74, 39–40.
52. Department of Justice and Community Safety, Corrections Victoria, *Women in the Victorian Prison System* (Report, 2019) 10.

53. Law and Advocacy Centre for Women, Submission 29, 23. See further Hilton et al (n 11) 531–532. This report noted: ‘A high number of Aboriginal women in custody have received a lifetime diagnosis of mental illness and almost half meet the criteria for PTSD. Many Aboriginal women in prison have a substance use disorder. Many of the health and wellbeing issues experienced by Aboriginal women in custody are connected to experiences of violence, trauma and abuse’.
54. Law and Advocacy Centre for Women, Submission 29, 23–24; Aboriginal Justice Caucus, Submission, 74, 43; Victorian Aboriginal Legal Service, *Submission to the Inquiry into Victoria’s Criminal Justice System* (2021) 232; *Unfinished Business* (n 46) 69–70.
55. Department of Justice and Community Safety, ‘Response to NTP-002-014 — *Agency response to the Yoorrook Justice Commission*’, 30 [98], produced by the State of Victoria in response to the Commission’s Notice to Produce dated 15 March 2023.
56. *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders*, GA Res 65/229, UN Doc A/RES/65/229 (6 October 2010, adopted 21 December 2010) Rules 54–55 (*‘Bangkok Rules’*).
57. Department of Justice, Corrections Victoria, *Standards for the Management of Women Prisoners in Victoria* (Report, 2014) 14.
58. The Department of Justice and Community Safety also provided information about 106 additional beds at DPFC and new units providing ‘close support (replacing separation regimes) [that are] due to open in the first half of 2023. All new infrastructure has been designed based on trauma-informed design principles and Victorian Ombudsman recommendations to increase access and engagement with rehabilitation and minimise harm to women in custody’: Department of Justice and Community Safety, ‘Response to NTP-002-014 — *Agency response to the Yoorrook Justice Commission*’, 31 [101], produced by the State of Victoria in response to the Commission’s Notice to Produce dated 15 March 2023.
59. Department of Justice and Community Safety, ‘Response to NTP-002-014 — *Agency response to the Yoorrook Justice Commission*’, 31 [102], produced by the State of Victoria in response to the Commission’s Notice to Produce dated 15 March 2023.
60. Djirra, Submission 44, 7; Law and Advocacy Centre for Women, Submission 29, 23–24.
61. Hilton et al (n 11) 29.
62. *Inquiry into Victoria’s Criminal Justice System* (n 38) vol 2, 614. See also Djirra, Submission 44, 11.
63. *Inquiry into Victoria’s Criminal Justice System* (n 38) vol 2, 450–453. See also Djirra, Submission 44, 11.
64. *Inquiry into Victoria’s Criminal Justice System* (n 38) vol 2, 614. See also Djirra, Submission 44, 11.
65. VACRO, Submission 70, 6; Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Children Affected by Parental Incarceration* (Parliamentary Paper No 360, August 2022), xix, Finding 1 (*‘Inquiry into Children Affected by Parental Incarceration’*).
66. *Inquiry into Children Affected by Parental Incarceration* (n 65) xix, Finding 2.
67. *Inquiry into Children Affected by Parental Incarceration* (n 65) Submission 29 (Victorian Aboriginal Child Care Agency), 29 April 2022, submitted as evidence by Victorian Aboriginal Child Care Agency to Yoorrook Justice Commission; *Inquiry into Children Affected by Parental Incarceration* (n 65) xix, Finding 4.
68. VACRO, Submission 70, 6.
69. VACRO, Submission 70, 6. See also *Inquiry into Children Affected by Parental Incarceration* (n 65) 26.
70. Summary Report – Dame Phyllis Frost Site Visit, 20 February 2023, 1.
71. Transcript of Minister for Corrections, the Hon Enver Erdogan, 15 May 2023, 883 [27].
72. Hilton et al (n 11) 34, 73, 627, 756.
73. This issue was also raised in the Cultural Review, where one participant stated, ‘I still don’t understand why — like in today’s society, when all the phone companies are on unlimited plans — our phone calls still cost \$12 to make a mobile phone call. Like we earn — top dollar [maximum amount] is \$8.95 a day. I don’t understand. I don’t get it’: Person in custody quoted in Hilton et al (n 11) 627.
74. Summary of Community Evidence (De-Identified Direct Quotes) Obtained at Roundtables and Prison Visits, 14 June 2023, 4 [20].
75. Data from the Prison Information Management System indicates that from 1 November 2022 to 30 April 2023 Aboriginal women at DPFC accessed personal video visits on 190 occasions. In the first week of May 2023 Aboriginal women in custody at DPFC accessed personal video visits on eight occasions. Department of Justice and Community Safety, Response to questions taken on notice by Larissa Strong, Commissioner, Corrections Victoria on 3 May 2023, 6 July 2023, 16.
76. Transcript of Commissioner Larissa Strong, 3 May 2023, 422 [28]–[33].
77. Transcript of Minister for Corrections, the Hon Enver Erdogan, 15 May 2023, 896 [26]–[32].

78. Department of Justice and Community Safety, 'Pregnancy and Childcare in Prison', *Corrections, Prisons & Parole* (Web page, 9 June 2023) <<https://www.corrections.vic.gov.au/prisons/going-to-prison/pregnancy-and-childcare-in-prison>>.
79. *Ibid.*
80. Djirra, Submission 44, 11.
81. Confirmed by the State of Victoria in subsequent correspondence, 6 July 2023, Annexure A, 39. Yoorook notes that the State's record keeping and transparency around statistical data in relation to the Living with Mum Program was criticised in the Victorian Aboriginal Legal Service submission to the Victorian Parliament Legal and Social Issues Committee the Inquiry into Victoria's Criminal Justice System, 35, Recommendation 246, 18 September 2021.
82. Djirra, Submission 44, 11.
83. Transcript of Minister for Corrections, the Hon Enver Erdogan, 15 May 2023, 880 [49]–[50].
84. Transcript of Minister for Corrections, the Hon Enver Erdogan, 15 May 2023, 885 [35]–[36], [47]–[48].
85. Transcript of Minister for Child Protection and Family Services, The Hon Elizabeth (Lizzie) Blandthorn MLC, 12 May 2023, 848 [44], 849 [1]–[2].
86. Hilton et al (n 11) 324.
87. Witness Statement of Minister for Corrections, the Hon Enver Erdogan, 31 March 2023, 35 [192].
88. Transcript of Commissioner Larissa Strong, 3 May 2023, 411 [1]–[5].
89. Department of Justice and Community Safety, 'Response to NTP-002-014 — *Agency response to the Yoorook Justice Commission*', 9 [12], produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
90. Victorian Government, *Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement Phase 4* (Agreement, August 2018) 28.
91. Summary Report – Marngoneet Correctional Centre Site Visit, 24 February 2023, [2].
92. Hilton et al (n 11) 455.
93. Transcript of Commissioner Larissa Strong, 3 May 2023, 394 [30]–[33].
94. Transcript of Minister for Corrections, the Hon Enver Erdogan, 15 May 2023, 920 [45]–[46].
95. Transcript of Minister for Corrections, the Hon Enver Erdogan, 15 May 2023, 930 [20]–[26].
96. Transcript of Commissioner Larissa Strong, 3 May 2023, 394 [33]–[47], 395 [1]–[15].
97. Transcript of Commissioner Larissa Strong, 3 May 2023, 395 [7]–[19].
98. Transcript of Ryan Phillips, 3 May 2023, 395 [23]–[27].
99. Transcript of Ryan Phillips, 3 May 2023, 395 [27]–[31].
100. *Inquest into the Passing of Veronica Nelson* (n 7) 262 [767].
101. Outline of Evidence of Aunty Donna Nelson, 9 March 2023, 1–2; Ali Besiroglu and Crystal McKinnon, 'Cover-Ups and Justice Failures in Veronica Nelson's Death', *The Sydney Morning Herald* (Online, 6 March 2023) <<https://www.smh.com.au/national/cover-ups-and-justice-failures-in-veronica-nelson-s-death-20230305-p5cpij.html>>.
102. *Inquest into the Passing of Veronica Nelson* (n 7) Appendix B, 3 [18].
103. *Ibid* Appendix B, 3 [19].
104. *Corrections Act 1986* (Vic) s 47(1) (f). This provision creates legal obligations on prison authorities which can be enforced in judicial review proceedings: see, eg. *Castles v Secretary to the Department of Justice* (2010) 28 VR 141.
105. United Nations Standard Minimum Rules for the Treatment of Prisoners, GA Res 70/175, UN Doc A/RES/70/175 (8 January 2016, adopted 17 December 2015) Rule 24(1) ('Mandela Rules').
106. Aboriginal Justice Caucus, Submission 74, 51; Human Rights Law Centre, Submission 60, 27.
107. Corrective Services Administrators' Council, *Guiding Principles for Corrections in Australia: Revised 2018* (2018); *Royal Commission into Aboriginal Deaths in Custody* (National Report, April 1991) vol 3, 278, Recommendation 150.
108. Hilton et al (n 11) 687.
109. Department of Justice and Community Safety, 'Response to NTP-002-014 — *Agency response to the Yoorook Justice Commission*', 49 [177], produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
110. Outline of Evidence of Professor Stuart Kinner, 16 December 2022, 4 [21]–[24]; Human Rights Law Centre, Submission 60, 27.
111. Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 59.
112. Transcript of Ryan Phillips, 3 May 2023, 414 [28]–[31]. There will also be a 'integrated care plan' for Aboriginal prisoners. Providers must also have a minimum proportion its workforce that is Aboriginal: at 414 [33]–[44].
113. Yoorook does not infer that the intention of introducing a Medicare equivalent health check was to address or achieve healthcare equivalency.
114. The Department of Justice and Community Safety has admitted that 'there has been some room for improvement with the quality of services that have been provided by Justice Health': Transcript of Ryan Phillips, 3 May 2023, 415 [46]–[47], 416 [1].
115. Department of Justice and Community Safety, 'Response to NTP-002-014 — *Agency response to the Yoorook Justice Commission*', 46–47, produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023. The primary services available in Victorian prisons include GP services, general and mental health nursing, pharmacotherapy, pathology, radiology, dentistry, audiology, optometry, podiatry, physiotherapy and health promotion: Department of Justice and Community Safety, 'Health Care', *Corrections, Prisons & Parole* (Web page, 2 May 2023) <<https://www.corrections.vic.gov.au/prisons/health-care>>.

116. Department of Justice and Community Safety, 'Response to NTP-002-014 — *Agency response to the Yoorrook Justice Commission*', 46–47, produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
117. Victorian Aboriginal Community Controlled Health Organisation, Submission 41, 10. For further information concerning contracted providers of healthcare in Victorian prisons, see Hilton et al (n 11) 689. The Cultural Review found that 'unlike public health services provided through the Department of Health, custodial healthcare services do not have the same default clinical oversight and standard settings that apply to other health services provided on behalf of the government... oversight of the quality and standard of custodial healthcare is largely the responsibility of DJCS'.
118. Victorian Aboriginal Community Controlled Health Organisation, Submission 41, 10. For further information concerning contracted providers of healthcare in Victorian prisons, see Department of Justice and Community Safety, 'Justice Health', *Corrections, Prisons & Parole* (Web page, 28 March 2023) <<https://www.corrections.vic.gov.au/justice-health>>.
119. Hilton et al (n 11) 689.
120. *Inquest into the Passing of Veronica Nelson* (n 7) 305 [881.2].
121. Department of Justice and Community Safety, 'Response to NTP-002-014 — *Agency response to the Yoorrook Justice Commission*', 46–47 [164], produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
122. Department of Justice and Community Safety, 'Response to NTP-002-014 — *Agency response to the Yoorrook Justice Commission*', 47 [165], produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
123. Transcript of Ryan Phillips, 3 May 2023, 418 [10]–[17].
124. Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 59; Aboriginal Justice Caucus, Submission 74, 50–51; Human Rights Law Centre, Submission 60, 27; Victorian Aboriginal Community Controlled Health Organisation, Submission 41, 9; Djirra, Submission 44, 10.
125. Summary Report – Marngoneet Correctional Centre Site Visit, 24 February 2023, [4].
126. Summary Report – Barwon Prison Site Visit, 23 February 2023, 2 [2].
127. Summary Report – Dame Phyllis Frost Centre Site Visit, 20 February 2023, [3]; Summary Report – Marngoneet Correctional Centre Site Visit, 24 February 2023, 2 [4].
128. Summary Report – Marngoneet Correctional Centre Site Visit, 24 February 2023, [4].
129. Summary of Community Evidence (De-Identified Direct Quotes) Obtained at Roundtables and Prison Visits, 14 June 2023, 4 [21].
130. Summary Report – Marngoneet Correctional Centre Site Visit, 24 February 2023, [4]; Summary Report – Barwon Prison Site Visit, 23 February 2023, [2].
131. Summary Report – Barwon Prison Site Visit, 23 February 2023, [2].
132. Summary Report – Barwon Prison Site Visit, 23 February 2023, 2.
133. Summary Report – Dame Phyllis Frost Centre Site Visit, 20 February 2023, 3.
134. 72 and 92 per cent respectively: Transcript of Ryan Phillips, 3 May 2023, 398 [41]–[42].
135. Summary Report – Barwon Prison Site Visit, 23 February 2023, 2.
136. Outline of Evidence of Damian Griffis, 2 March 2023, 4 [27].
137. Summary of Community Evidence (De-Identified Direct Quotes) Obtained at Roundtables and Prison Visits, 14 June 2023, 4 [22]. See also Summary Report – Dame Phyllis Frost Centre Site Visit, 21 April 2023, 1 [1] in which female prisoners spoke of the trauma of having mouth checks conducted by male prison officers.
138. Monique Hurley and Ruth Barson at the Human Rights Law Centre, with contributions from Andreea Laschz at the Victorian Aboriginal Legal Service, Megan Pearce at Fitzroy Legal Service and Karen Fletcher at FlatOut, *Ending Human Rights Abuses in Victorian Prisons: Submission to the Cultural Review of the Adult Custodial Corrections System*, (1 December 2021).
139. Thomas Beckhurst, Submission 68, 2 [11].
140. See for eg, Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 59; Aboriginal Justice Caucus, Submission 74, 50–51; Human Rights Law Centre, Submission 60, 27; Victorian Aboriginal Community Controlled Health Organisation, Submission 41, 9; Djirra, Submission 44, 10.
141. Aboriginal Justice Caucus, Submission 74, 50, referencing Lorena Allam, Calla Wahlquist and Nick Evershed, 'The Facts About Australia's Rising Toll of Indigenous Deaths in Custody', *The Guardian* (Online, 9 April 2021) <<https://www.theguardian.com/australia-news/2021/apr/09/the-facts-about-australias-rising-toll-of-indigenous-deaths-in-custody>>.
142. Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 59; Aboriginal Justice Caucus, Submission 74, 50.
143. Aboriginal Justice Caucus, Submission 74, 50.
144. Hilton et al (n 11) 689.
145. *Ibid* 694.
146. *Ibid* 67.
147. Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 33.
148. Department of Justice and Community Safety, 'Appendix A – Table of activity in response to RCIADIC recommendations', produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.

149. Department of Justice and Community Safety, 'Response to NTP-002-014 — *Agency response to the Yoorrook Justice Commission*', 12 [26], produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
150. Summary Report — Barwon Prison Site Visit, 23 February 2023, 4.
151. Department of Justice and Community Safety, 'Response to NTP-002-014 — *Agency response to the Yoorrook Justice Commission*', 12 [23], produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023. The Commissioner, Corrections Victoria, told Yoorrook that beyond not being eligible for offending behaviour programs if on remand, access to education, harm minimisation and cultural programs can be limited by excessive demand compared to places. There may also be practical barriers. For example, language, literacy and numeracy assessments are usually done three weeks after entering prison and many people on remand will have left custody by then: Transcript of Commissioner Larissa Strong, 3 May 2023, 396 [4]–[25].
152. Summary Report — Dame Phyllis Frost Centre Site Visit, 20 February 2023, 3.
153. Summary Report — Marngoneet Correctional Centre Site Visit, 2.
154. Department of Justice and Community Safety, 'Response to NTP-002-014 — *Supplement to the DJCS Agency Response to the Yoorrook Justice Commission's 71 Questions*', 119, produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
155. Department of Justice and Community Safety, 'Response to NTP-002-014 — *Supplement to the DJCS Agency Response to the Yoorrook Justice Commission's 71 Questions*', 119, produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
156. Transcript of Commissioner Larissa Strong, 3 May 2023, 396 [34]–[35].
157. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 19(2) ('*Charter*').
158. *Inquiry into Victoria's Criminal Justice System* (n 38) vol 2, 634, Recommendation 85.
159. *Ibid* 634, Recommendation 86.
160. Hilton et al (n 11) 34.
161. Thomas Beckhurst, Submission 68, 10.
162. VACRO, Submission 70, 5.
163. See Adult Parole Board Victoria, 'What Is Parole?', *Purpose and Benefits* (Web page, 2017) <<https://www.adultparoleboard.vic.gov.au/what-parole/purpose-and-benefits>>. Note there is an Adult Parole Board and Youth Parole Board.
164. See, eg, Evarn Ooi and Joanna Wang, 'The Effect of Parole Supervision on Recidivism' (2022) 245 *New South Wales Bureau of Crime Statistics and Research — Crime and Justice Bulletin*, 1.
165. Victorian Aboriginal Legal Aid Service, Submission 34 (Criminal Legal System), 62.
166. *Charter* (n 157) ss 8(1), 8(3). On the three elements of s 8(3), see *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624, 638–644 [47]–[61].
167. Department of Justice and Community Safety, 'Response to NTP-002-014 — *Agency response to the Yoorrook Justice Commission*', 34, produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
168. *Inquiry into Victoria's Criminal Justice System* (n 38) vol 1, 691–692.
169. Victorian Aboriginal Legal Service, *Submission to the Inquiry into Victoria's Criminal Justice System* (2021), 179–190; Federation of Community Legal Services, Submission 61, 23; Human Rights Law Centre, Submission 60, 18–20.
170. Victorian Aboriginal Legal Service, *Submission to the Inquiry into Victoria's Criminal Justice System* (2021), 179–190; Federation of Community Legal Services, Submission 61, 23; Human Rights Law Centre, Submission 60, 18–20.
171. Department of Justice and Community Safety, 'Response to NTP-002-014 — *Agency response to the Yoorrook Justice Commission*', 34 [115], produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
172. Transcript of Commissioner Larissa Strong, 3 May 2023, 413 [3]–[6], [26]–[37].
173. Transcript of Commissioner Larissa Strong, 3 May 2023, 413 [3]–[6], [26]–[37].
174. Kevin Bell and Jean Allain, 'Homelessness and Human Rights in Australia' in Paula Gerber and Melissa Castan, *Critical Perspectives on Human Rights Law in Australia* (Thomson Reuters, 2021) vol 2, chap 10.
175. For a general discussion on post-release options and barriers, see Australian Community Support Organisation, Submission 47, 8–9.
176. Transcript of Alan Thorpe, 14 December 2022, 410 [28]–[32].
177. Transcript of Shaun Braybrook, 14 December 2022, 401 [9]–[10].
178. Transcript of Minister for Corrections, the Hon Enver Erdogan, 915 [1]–[7], citing Productivity Commission, *Australia's Prison Dilemma* (Research Paper, October 2021) 59.
179. Transcript of Commissioner Larissa Strong, 3 May 2023, 389 [14]–[15], [28]–[29].
180. Department of Justice and Community Safety, Supplementary response to questions taken on notice by Marian Chapman, Deputy Secretary, Courts, Civil and Criminal Law and Kate Houghton PSM, Secretary, Department of Justice and Community Safety on 2 May 2023, 2.
181. That is \$795.678 million. The equivalent spend on expansion of capacity for women's prisons in the 2022–23 budget was \$188.9 million: Department of Treasury and Finance, Victorian Government, *Victorian Budget 2022–23: State Capital Program* (Budget Paper No 4, 2022) 76.
182. *Ibid* 75, 77.

183. Department of Treasury and Finance, Victorian Government, *Victorian Budget 2023–24: Service Delivery* (Budget Paper No 3, 2023) 40.
184. ‘We don’t have the funding to operate that prison, because our demand has dropped. So we don’t need to use those beds’: Transcript of Commissioner Larissa Strong, 3 May 2023, 389 [15]–[17].
185. Department of Justice and Community Safety, Response to questions taken on notice by Larissa Strong, Commissioner, Corrections Victoria on 3 May 2023, 6 July 2023, 17.
186. Summary of Community Evidence (De-Identified Direct Quotes) Obtained at Roundtables and Prison Visits, 14 June 2023, 3 [16].
187. *Charter* (n 157) ss 10, 22.
188. Summary Report – Dame Phyllis Frost Centre Site Visit, 20 February 2023, [4]; Summary Report – Malmsbury Youth Detention Centre Site Visit, 21 February 2023, [2]; Summary Report – Barwon Prison Site Visit, 23 February 2023, [3]; Victorian Ombudsman, *OPCAT in Victoria: A Thematic Investigation of Practices Related to Solitary Confinement of Children and Young People* (Report, 2017) 91 [449]–[450], 169 (*‘Solitary Confinement’*).
189. Victorian Aboriginal Legal Aid Service, Submission 34 (Criminal Legal System), 60.
190. Hilton et al (n 11) i.
191. ‘Bias plays out differently in different systems. You know, it can be the way, you know, judges use their discretion in sentencing. It can be in the Corrections system, some of the decisions are — there’s a lot of discretionary staff [sic] such as the use of force’: Transcript of Minister for Corrections, the Hon Enver Erdogan, 15 May 2023, 921 [30]–[33].
192. Outline of Evidence of Aunty Vickie Roach, 15 December 2022, 4–5, [29]–[33].
193. *Mandela Rules* (n 105) Rule 50.
194. *Mandela Rules* (n 105) Rule 52.
195. Human Rights Law Centre, Submission 60, 26.
196. Antoinette Radford, ‘Indigenous Prisoner Had Her Human Rights Breached During Attempted Forced Strip Search, Report Finds’, *ABC News* (Online, 16 September 2021) <<https://www.abc.net.au/news/2021-09-16/strip-search-breached-indigenous-prisoners-human-rights/100468574>>.
197. Victorian Ombudsman, *Implementing OPCAT in Victoria: Report and Inspection of Dame Phyllis Frost Centre* (Report, 2017) 103, Recommendation 5 (*‘Inspection of Dame Phyllis Frost’*)
198. *Ibid* 59–60.
199. *Ibid* 103.
200. *Inquiry into Victoria’s Criminal Justice System* (n 38) vol 1, 624, Recommendation 82.
201. Hilton et al (n 11) 335.
202. Department of Justice and Community Safety, ‘Response to NTP-002-014 — Agency response to the Yoorook Justice Commission’, 30–31, produced by the State of Victoria in response to the Commission’s Notice to Produce dated 15 March 2023.
203. Hilton et al (n 11) 23.
204. Victorian Government, *Cultural Review of the Adult Custodial Corrections System: Victorian Government Response* (Response, March 2023) 7 (*‘Cultural Review Response’*).
205. Victorian Aboriginal Legal Service, Submission 15, 62. See also Hilton et al (n 11) 375.
206. *Royal Commission into Aboriginal Deaths in Custody* (National Report, April 1991) vol 5, 109, Recommendation 181.
207. *Mandela Rules* (n 105) Rule 44.
208. *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006) (*‘OPCAT’*); *Inspection of Dame Phyllis Frost* (n 197).
209. *Inspection of Dame Phyllis Frost* (n 197) 52.
210. *Ibid* 53 [363].
211. *Ibid* 10 [44], 56 [380]–[386], 357 [394].
212. *Solitary Confinement* (n 188) 91 [449]–[450]. Note at 10 the definition of a ‘young person’ as being aged between 18 and 24 years.
213. *Ibid* 254, Recommendation 1.
214. Department of Justice and Community Safety, ‘Response to NTP-002-014 — Agency response to the Yoorook Justice Commission’, 31 [101], produced by the State of Victoria in response to the Commission’s Notice to Produce dated 15 March 2023.
215. Victorian Government, *Cultural Review Response* (n 200) 7.
216. Summary Report – Dame Phyllis Frost Centre Site Visit, 20 February 2023, 4; Summary Report – Malmsbury Youth Detention Centre Site Visit, 21 February 2023, 2; Summary Report – Barwon Prison Site Visit, 23 February 2023, 3.
217. Summary Report – Barwon Prison Site Visit, 23 February 2023, 3.
218. Summary Report – Dame Phyllis Frost Centre Site Visit, 20 February 2023, 4.
219. Transcript of Minister for Corrections, the Hon Enver Erdogan, 15 May 2023, 891 [16]–[21].
220. Yoorook notes that the Victorian Ombudsman has recommended a complete ban on any solitary confinement: *Solitary Confinement* (n 188) 254, Recommendation 1.
221. Summary of Community Evidence (De-Identified Direct Quotes) Obtained at Roundtables and Prison Visits, 14 June 2023, 3–4 [18].
222. Summary Report – Dame Phyllis Frost Centre Site Visit, 20 February 2023, [2].
223. Hilton et al (n 11) 685.
224. *Ibid*.
225. *Ibid*.
226. *Ibid*.
227. Summary Report – Dame Phyllis Frost Site Visit, 20 February 2023, 2.
228. Summary Report – Dame Phyllis Frost Centre Site Visit, 20 February 2023, 4.
229. Transcript of Minister for Corrections, the Hon Enver Erdogan, 15 May 2023, 923 [26]–[34].

230. Transcript of Minister for Corrections, the Hon Enver Erdogan, 15 May 2023, 923, [36]–[41].
231. Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 37. Yoorrook notes that Justice Health, a unit within DJCS, is responsible for overseeing healthcare services that are outsourced to providers.
232. Independent Broad-based Anti-corruption Commission, *Special Report on Corrections: IBAC Operations Rous, Caparra, Nisidia and Molara* (Report, June 2021).
233. Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Parliamentary Paper No 326, March 2022) vol 1, 578–581.
234. Hilton et al (n 11) 173.
235. *Corrections Act 1986* (Vic) s 7(1).
236. Hilton et al (n 11) 174.
237. Department of Justice and Community Safety, *Justice Assurance and Review Office (JARO)* (Web page, 22 May 2023) <<https://www.justice.vic.gov.au/contact-us/justice-assurance-and-review-office-jaro>>.
238. Hilton et al (n 11) 175.
239. *Ibid* 175–176.
240. Aboriginal Justice Caucus, Submission 74, 58–59. See also Victorian Aboriginal Legal Service, Submission 34 (Criminal Legal System), 70–71; Victoria Legal Aid Service, Submission 28, 7; Jesuit Social Services, Submission 51, 8; Human Rights Law Centre, Submission 60, 28–29; Law Institute of Victoria, Submission 31, 8–9.
241. *Inquest into the Passing of Veronica Nelson* (n 7) 17 [36]; Hilton et al (n 11) 176.
242. Attorney-General, the Hon Jaclyn Symes, *Victorian Government Response to the Coroner's Findings in the Inquest into the Passing of Veronica Nelson*, 23 April 2023, response to recommendation 36.1.
243. Witness Statement of Minister for Corrections, the Hon Enver Erdogan, 31 March 2023, 9 [45].
244. Witness Statement of Minister for Corrections, the Hon Enver Erdogan, 31 March 2023, 9 [45].
245. *The Monitoring of Places of Detention by the United Nations Subcommittee on Prevention of Torture (OPCAT) Act 2022* (Vic) was assented to on 27 September 2022 and came into operation on 11 October 2022: Victoria, *Special Gazette*, No 540, 11 October 2022, 1.
246. Australian Human Rights Commission, *Implementing OPCAT in Australia* (Report, 2020) 2 (*'Implementing OPCAT in Australia'*). The Australian Government subsequently sought an extension until January 2023: at 3.
247. Victoria Police facilitated an unannounced visit by the UN OPCAT Subcommittee for the Prevention of Torture at the Victoria Police Melbourne West Complex on 21 October 2022: Witness Statement of Chief Commissioner of Police, Shane Patton, 8 May 2023, 14.
248. Australian Government, Attorney General's Department, 'Recommendation 17: United Nations Human Rights Recommendations Database' (Web Page, Undated) <<https://www.ag.gov.au/recommendations/recommendation-17>>.
249. *Implementing OPCAT in Australia* (n 246) 7–9, 13–15. See also Liberty Victoria, Submission 52, 14–17; Aboriginal Justice Caucus, Submission 74, 58–59; Human Rights Law Centre, Submission 60, 28–29; Jesuit Social Services, Submission 51, 8.
250. Human Rights Law Centre, Submission 60, 28–29; Jesuit Social Services, Submission 51, 8; Aboriginal Justice Caucus, Submission 74, 58–59; Federation of Community Legal Centres, Submission 61, 22; Liberty Victoria, Submission 52, 14–17; Law Institute of Victoria, Submission 31, 6.
251. State of Victoria, Response to Issues Paper 1: Call for Submissions on Systemic Injustice in the Criminal Justice System, 28–29 [109].
252. Human Rights Law Centre, Submission 60, 10.
253. *Inquiry into Victoria's Criminal Justice System* (n 38) vol 2, 593–594, 633, Findings 60 and 61; Human Rights Law Centre, Submission 60, 10.
254. Hilton et al (n 11) 455.
255. *Ibid* 2.

F

Other matters



392



Sarah Schwartz, Nerita Waight,
Anna Gibson, Kin Leong, VALS

393

LAW REFORM TO ENABLE TRUTH TELLING

Introduction

This chapter considers legislative barriers to Yoorrook fulfilling its truth telling mandate. These include gaps in the *Inquiries Act 2014* (Vic), *Public Records Act 1973* (Vic) and *Freedom of Information Act 1982* (Vic) which mean that Yoorrook cannot guarantee that confidential information shared by First Peoples and others will be kept confidential once Yoorrook finishes its work and its records are archived. The risk of access to confidential archived records is remote, but it should not exist at all.

Yoorrook has also identified the need to reform overly broad legal barriers under the *Children, Youth and Families Act 2005* (Vic) (CYFA) that prevent adults that were once involved in Children’s Court proceedings from having their experiences published by Yoorrook or other bodies such as media organisations.

In this chapter, Yoorrook makes recommendations for legislative changes to resolve these problems.

Practical challenges for truth telling

Treatment of confidential Yoorrook records once they are archived

Yoorrook’s Letters Patent require it to uphold ‘the sovereignty of First Peoples over their knowledge and stories by consulting with them on how the information they provide should be treated and ensuring adequate information and data protection’.¹ Yoorrook has enacted this requirement through the implementation of Indigenous Data Sovereignty protocols. Indigenous Data Sovereignty asserts the rights of Indigenous Peoples to own, control and possess the data that derives from them.² These protocols recognise that the ownership of all First Peoples stories, data and knowledges shared with Yoorrook is retained by the

submission maker. The protocols are enacted by protecting First Peoples’ knowledge and stories to the level that they determine. Protections include submission makers nominating the level of confidentiality they want applied to their submission and whether they are willing for their submission to be published by Yoorrook.

Yet, under current Victorian law, where First Peoples and others share information with Yoorrook and want the information kept confidential, there is no mechanism for Yoorrook to guarantee that information will be kept confidential once Yoorrook finishes its work and its records are archived. This omission interferes with Yoorrook’s ability to adhere to a critical aspect of its Letters Patent. It also impacts the effectiveness of Yoorrook’s truth telling work if it cannot assure First Peoples participants that their choices around confidentiality will be respected once Yoorrook’s records are archived.

THE CURRENT LEGISLATIVE REGIME ONLY PROTECTS SENSITIVE RECORDS DURING YOORROOK’S TERM

Under current law, where someone shares information with Yoorrook and wants that information kept confidential, Yoorrook has a number of ways to do this including by making a non-publication order under section 26 of the *Inquiries Act*.³ This restricts the publication of that information during the Commission’s term of inquiry. Further, public access to Yoorrook’s records under the *Freedom of Information Act* is expressly prohibited while Yoorrook is operating, eliminating the risk that Yoorrook must disclose sensitive information to a member of the public under that legislation.⁴

However, difficulties arise after Yoorrook’s term ends in June 2025 and its records are archived. At Yoorrook’s conclusion, the *Inquiries Act* requires that its records are transferred to the Department of Premier and Cabinet (DPC) or another public office determined

by the Premier.⁵ DPC must then transfer the records to the Public Records Office of Victoria (PROV) as soon as practicable.⁶

PROV has legislative mechanisms to prevent public access to records which should be kept confidential in its archives. There are two provisions which allow the Minister for Government Services (Minister) to declare that certain records are not available for public inspection for a defined period of time:

- Under section 9 of the *Public Records Act* the Minister can declare that certain personal or private records are not to be made available for public inspection for a specified period of time, which in practice can be up to 75 years. However, this type of declaration can be revoked, or a Minister may decide to later permit inspection of some or all of the records the subject of the declaration.⁷
- Under section 10 of the *Public Records Act* the Minister can declare that any specified records are not to be made available for public inspection for up to 30 years. This type of declaration cannot be revoked.⁸

Further, PROV is not exempt from the Victorian *Freedom of Information Act*. This legislation creates a separate legally enforceable right to obtain access to a record of an agency in certain circumstances, while also setting out some exemptions to the right of access.⁹ These exemptions include Cabinet documents, documents affecting the public interest and documents obtained in confidence by a government agency.

The *Inquiries Act* provides that records transferred by a Royal Commission to PROV should be ‘held and dealt with on the same basis and in the same manner’ as the basis on which they were held and dealt with by the Royal Commission.¹⁰ In other words, if a Royal Commission like Yoorrook treats information as confidential because it was asked to do so by the person who shared the information, PROV should treat the information in the same way. However, it is not clear how this provision operates in practice and in law given the *Public Records Act* provisions set out above and the operation of freedom of information legislation.

Accordingly, under the legislative framework that applies once Yoorrook ends and its records are transferred to PROV, there are risks that:

- the Minister will not make a declaration under the *Public Records Act* to close confidential archived records to public access for the appropriate period of time
- the Minister, or a future Minister, will revoke a declaration made under section 9 of the *Public Records Act* to close confidential archived records to public access, and
- archived records which should be kept confidential will be accessed via freedom of information applications (which will be determined by a decision maker in DPC).

There are practical ways that these risks can be minimised but not eliminated. This is unsatisfactory. Yoorrook should be able to guarantee to First Peoples and others who share confidential information that their choice of confidentiality will be respected once Yoorrook’s records are transferred to PROV.

GOVERNMENT RESPONSE TO INTERIM REPORT RECOMMENDATION

In *Yoorrook with Purpose*, Yoorrook recommended:

- that the government urgently progress the necessary legislative changes to enable the implementation of First Peoples’ choices about how the information they provide to Yoorrook is to be stored, accessed and used in the future
- that any legislative changes commence before the end of 2023.¹¹

In May 2023 the government agreed to work with Yoorrook to develop the necessary legislative reforms. These reforms cannot wait. It is important that Yoorrook can uphold its Letters Patent and give effect to Indigenous Data Sovereignty principles during its term of operation and ensure that First Peoples’ records will enjoy permanent protections once Yoorrook’s term ends.

THE PROPOSED REFORM FOR PERMANENT PROTECTION OF CONFIDENTIAL YOORROOK RECORDS

Discrete legislative reforms are needed to ensure that confidential information shared by First Peoples and others with Yoorrook is kept confidential once Yoorrook ends. Similar reforms have happened at the Commonwealth level after several recent Commonwealth Royal Commissions faced difficulties with post-inquiry treatment of confidential and sensitive records.

For example, recent amendments to the *Royal Commissions Act 1902* (Cth) and the *Freedom of Information Act 1982* (Cth) have created additional protections for certain types of records submitted to the Royal Commission into Institutional Responses to Child Sexual Abuse, the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability and the Royal Commission into Defence and Veteran Suicide (RCDVS).

The most recent example is the Royal Commissions Amendment (Enhancing Engagement) Act 2023 (Cth) passed by the Australian Parliament in March 2023. The legislation limits the use and disclosure of certain information given to RCDVS and was made in response to Recommendation 6(1) of the RCDVS Interim Report handed down just seven months earlier in August 2022.¹² RCDVS recognised the need for greater protections to records to encourage participants to come forward and share their lived experience.

The new protections limit the use, disclosure and admissibility of the information both during and after that Royal Commission's inquiry.¹³ The protected information will only enter the open access period under the *Archives Act 1983* (Cth) 99 years after the record came into existence.¹⁴ Amendments to the federal *Freedom of Information Act* exempt the protected information from freedom of information access.¹⁵

These amendments came into effect in April 2023 during the RCDVS term of inquiry, which is due to conclude by June 2024. This enables RCDVS to assure potential witnesses that there are strong mechanisms in place to protect their confidential or sensitive information once RCDVS finishes.

The Victorian Government should urgently progress similar reforms to enable Yoorrook to ensure that confidential information shared by First Peoples and others will be kept confidential once Yoorrook finishes its work and its records are archived.

Yoorrook welcomes the Minister for Treaty and First Peoples' recent commitment to adopt these reforms. Yoorrook remains committed to ensuring that these protections are put in place as soon as possible so that Yoorrook can properly provide a trauma-informed and culturally safe environment for First Peoples to tell their truth.

Further Indigenous Data Sovereignty related reforms are needed

Yoorrook notes that the issue outlined above is a smaller subset of broader reforms which are needed for Yoorrook to fulfil its commitment to comply with Indigenous Data Sovereignty principles and ensure the trust and confidence of First Peoples sharing their truth with Yoorrook. For example, Yoorrook believes it is not appropriate for its archives to be transferred to PROV, a Victorian Government entity. Instead, Yoorrook's archives should be transferred to a First Peoples body. Yoorrook will continue to monitor and advocate for Indigenous Data Sovereignty reforms like this.

Restrictions on publishing child protection evidence

DIFFICULTIES SHARING THE LIVED EXPERIENCE OF THE CHILD PROTECTION SYSTEM

The CYFA prohibits reporting of child protection matters in certain circumstances to protect the child's right to privacy and their best interests. There are three main prohibitions that restrict the publication of:

- material concerning a proceeding in the Children's Court of Victoria, where the material is likely to lead to the identification of a child, the venue of the proceeding or a witness to the proceeding such as a parent, sibling or other family member¹⁶
- a photo that identifies a child, other party or witness to a Children's Court proceeding¹⁷

- material that is likely to lead to the identification of a child, where the Children’s Court has made an order about that child.¹⁸

These prohibitions are mainly used to prevent media reporting that would reveal the identity of a child in child protection cases and breach the child’s right to privacy. It is an offence to contravene these publication restrictions. Penalties include a fine or imprisonment for up to two years.¹⁹

It is possible to apply for an exemption from a prohibition. Depending on the circumstances, applications can be made to the President of the Children’s Court, a magistrate or the Secretary of the Department of Families, Fairness and Housing (DFFH).²⁰

The prohibitions apply regardless of whether the person who is being identified consents to the publication or if they themselves publish the material.

Further, because there are no express time limits in the prohibitions and they are drafted broadly, they appear to capture any historical and existing proceeding or order in the Children’s Court. This means that they can be interpreted as creating an indefinite restriction on publication, including information about historical Children’s Court matters, where all individuals involved in the proceeding are now adults.

This issue particularly applies to Stolen Generations survivors. As the law currently operates, an organisation such as a media organisation or an inquiry body like Yoorrook risks prosecution if they publish information willingly shared by a member of the Stolen Generations (who was once the subject of a Children’s Court order or proceedings) if that information is likely to identify them. This risk applies even though the person’s information relates to matters that occurred decades ago.

To protect against prosecution, the material has to be published in a deidentified, anonymous way, or the organisation has to go through the process of seeking permission from a court or the Secretary of DFFH to publish.

YOORROOK’S USUAL APPROACH TO PUBLICATION

For Yoorrook, these prohibitions created significant problems in this inquiry into the child protection system. Yoorrook’s Letters Patent require it to conduct its inquiry in a way that:

- recognises ‘First Peoples’ cultural and legal practices of story-telling and witnesses as legitimate and valid sources of evidence²¹, and
- accommodates to the extent possible, First Peoples choices in how they wish to participate including their rights to free, prior and informed consent at all stages of participation.²²

Where a person wanted to share their experiences of the child protection system confidentially, or anonymously, Yoorrook could easily accommodate this by holding a closed hearing or by publishing redacted or deidentified information.

Problems arose however when people wanted to share their experiences publicly and in an identified way, for example by giving evidence in an open hearing or by making a submission that was published on Yoorrook’s website. The prohibitions in the CYFA were often in tension with Yoorrook’s Letters Patent.

SEEKING EXEMPTIONS TO CONDUCT TRUTH TELLING

To conduct open truth telling about the child protection system, Yoorrook applied to the President of the Children’s Court to seek permission to publish certain evidence. The President acted swiftly to respond to Yoorrook’s truth telling mandate, and granted standing permission in the case of adult witnesses to give open evidence about their own experience and to give open evidence identifying other persons who are now adults who were the subject of the same proceedings or orders, provided that they too had given their full and informed consent.

Yoorrook was grateful for the proactive and timely cooperation and guidance provided by the Children’s Court, and the practical solution that was put in place for adult witnesses. Even then, in practical terms, the process of identifying every single adult that would be potentially identified in an individual’s evidence and then obtaining the free, prior and informed consent of each person meant that it was often impractical

to conduct an open hearing. Ultimately, the majority of First Peoples that shared their lived experience of the child protection system with Yoorrook did so in a closed hearing (in part or full) or in a deidentified way.

Permissions for child witnesses were not sought from the Children's Court on the basis that Yoorrook would have been required to make various individual applications to the Court with supporting evidence showing that each relevant child had provided their free, prior and informed consent and additional evidence demonstrating that the child understood the consequences of publication and losing anonymity.

LEGISLATIVE REFORM IS NEEDED

The publication restrictions under the CYFA create unintended limitations on truth telling by First Peoples and others. They remove agency from First Peoples in determining how they speak about their own lives. They also limit Yoorrook's ability to share critical evidence about the lived experience of the child protection system, to build better understanding of the systemic injustices faced by First Peoples.

The publication restrictions in section 534 of the CYFA should be reviewed to identify a more workable model that ensures the best interests of the child can be protected while also enabling sufficient agency for First Peoples to share their lived experience. When considering the impacts of the CYFA on First Peoples' truth telling, the policy review must be led by First Peoples.

Specific consideration should be given to placing clear time limits on the operation of section 534. Adults who were previously the subject of Children's Court proceedings as children should not be captured by the publication prohibitions where all other affected family members and witnesses are adults. They should be able to share their lived experience without facing the risk of substantial penalties under the CYFA. Yoorrook appreciates that situations where other parties, such as siblings, are still children, will need to be treated differently. ■

RECOMMENDATIONS

45. By 29 February 2024 the Victorian Government must legislate to create new statutory protections 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.

Endnotes

1. Victoria, *Yoorrook Justice Commission*, Letters Patent, para 4(f)(iv).
2. Tahu Kukutai and John Taylor, *Indigenous Data Sovereignty: Toward an Agenda* (ANU Press, 2016).
3. *Inquiries Act 2014* (Vic) s 26 ('*Inquiries Act*').
4. *Ibid* s 125(1)(a).
5. *Ibid* s 124(1).
6. *Ibid* s 124(2).
7. *Public Records Act 1973* (Vic) s 9(1)–(2).
8. *Ibid* s 10.
9. *Freedom of Information Act 1982* (Vic) s 13; for exemptions see pt 4.
10. *Inquiries Act* (n 3) s 124(3).
11. Yoorrook Justice Commission, *Yoorrook with Purpose* (Interim Report, June 2022) 73.
12. Royal Commission into Defence and Veteran Suicide, *Interim Report* (Interim Report, 2023) 263–264.
13. *Royal Commission Act 1902* (Cth) s 6OQ.
14. *Ibid* ss 6OQ(5), 60M.
15. *Freedom of Information Act 1982* (Cth) s 7(2E)(a)(vi).
16. *Children, Youth and Families Act 2005* (Vic) s 534(1)(a).
17. *Ibid* s 534(1)(b).
18. *Ibid* s 534(1)(c).
19. *Ibid* s 534(1).
20. *Ibid* sub-ss 534(1), (1A), (3).
21. Victoria, *Yoorrook Justice Commission*, Letters Patent, para 4(f)(ii).
22. *Ibid* para 4(f)(iii).

Appendices



Uncle Ross Morgan

401

APPENDIX A:

Witness list

WITNESS	ORGANISATION	DATE
Aunty Eva Jo Edwards		5 December 2022
Commissioner Meena Singh	Commission for Children and Young People	5 December 2022 & 12 May 2023
Aunty Glenys Watts		6 December 2022
Aunty Muriel Bamblett AO	Victorian Aboriginal Child Care Agency	6 December 2022
Sarah Gafforini	Victorian Aboriginal Child Care Agency	6 December 2022
Aunty Jill Gallagher AO	Victorian Aboriginal Community Controlled Health Organisation	6 December 2022
Shellee Strickland (panellist)	Gippsland & East Gippsland Aboriginal Cooperative	7 December 2022
Felicia Dean (panellist)	Rumbalara Aboriginal Cooperative	7 December 2022
Aunty Hazel Hudson (panellist)	Njernda Aboriginal Corporation	7 & 9 December 2022
Aaron Wallace (panellist)	Bendigo & District Aboriginal Co-operative	7 December 2022
Aunty Rieo Ellis	Grandmothers Against Removals Victoria	7 December 2022
Aunty Charmaine Clarke		8 December 2022
Dr Jacynta Krakouer (panellist)	The Supporting Aboriginal and Torres Strait Islander Families to Stay Together from the Start (SAFeST Start) Coalition	8 December 2022
Karinda Taylor (panellist)	First Peoples' Health and Wellbeing	8 December 2022
Ian Hamm	Connecting Home	8 December 2022
Lisa Thorpe (panellist)	Bubup Wilam	9 December 2022
Stacey Brown (panellist)	Yappera	9 December 2022
Kimberley Do (panellist)	Yappera	9 December 2022
Tracey Dillon (panellist)	Njernda Aboriginal Corporation	9 December 2022
Magistrate Kay Macpherson	Marram-Ngala Ganbu	9 December 2022
Ashley Morris	Marram-Ngala Ganbu	9 December 2022
Aunty Geraldine Atkinson	First Peoples' Assembly of Victoria	13 December 2022
Antoinette Braybrook AM	Djirra	13 December 2022
Anne Lenton	Djirra	13 December 2022
Peter Hood	Kurnai Legal Practice	14 December 2022
Tessa Theocharous	Kurnai Legal Practice	14 December 2022
Nerita Waight	Victoria Aboriginal Legal Service	14 December 2022
Kin Leong	Victoria Aboriginal Legal Service	14 December 2022

WITNESS	ORGANISATION	DATE
Anna Gibson	Victoria Aboriginal Legal Service	14 December 2022
Sarah Schwartz	Victoria Aboriginal Legal Service	14 December 2022
Shaun Braybrook ACM	Wulgunggo Ngala Learning Place	14 December 2022
Karin Williams	Victorian Aboriginal Community Services Association Ltd (Bert Williams Aboriginal Youth Services)	14 December 2022
Alan Thorpe	Dardi Munwurro	14 December 2022
Coree Thorpe	Dardi Munwurro	14 December 2022
Nakia Firebrace	Victorian Aboriginal Child Care Agency	14 December 2022
Aunty Vickie Roach	National Network of Incarcerated and Formerly Incarcerated Women and Girls	15 December 2022
Nick Espie	Human Rights Law Centre	15 December 2022
Monique Hurley	Human Rights Law Centre	15 December 2022
Stan Winford	Centre for Innovative Justice	15 December 2022
Louise Glanville	Victoria Legal Aid	15 December 2022
Joanna Fletcher	Victoria Legal Aid	15 December 2022
Lawrence Moser	Victoria Legal Aid	15 December 2022
Dan Nicholson	Victoria Legal Aid	15 December 2022
Dr Eddie Cubillo	University of Melbourne Law School	15 December 2022
Professor Stuart Kinner	Melbourne Children's Research Institute, University of Melbourne, Curtin University and Griffith Criminology Institute	16 December 2022
Dr Mick Creati	Royal Children's Hospital and Victorian Aboriginal Health Service	16 December 2022
Mikala*¹		1 March 2023
Aunty Donna Wright		1 March 2023
Tina Wright		1 March 2023
Joanne Wright		1 March 2023
John*		2 March 2023
Sissy Austin		2 March 2023
Anoushka Jeronimus	WEstjustice	3 March 2023
Melissa Hardham	WEstjustice	3 March 2023
Christopher Harrison	Aboriginal Justice Caucus	3 March 2023
Bonnie Dukakis	Aboriginal Justice Caucus (and separately in capacity as a representative of the Koorie Youth Council)	3 March 2023
Uncle Ross Morgan	Dardi Munwurro	6 March 2023
Eathan Cruse		7 March 2023
David Cruse		7 March 2023

WITNESS	ORGANISATION	DATE
Anja Cruse		7 March 2023
Emeritus Professor Jude McCulloch	Monash University	7 March 2023
Dr Michael Maguire		7 March 2023
Aunty Doreen Lovett		7 March 2023
Aunty Stephanie Charles		8 March 2023
Damian Griffis	First Peoples Disability Network Australia	9 March 2023
Aunty Debbie Thomas		9 March 2023
Uncle Ray Thomas		9 March 2023
Aunty Donna Nelson		10 March 2023
Argiri Alisandratos	Acting Associate Secretary, Department of Families, Fairness and Housing	27 & 28 April 2023, 11 May 2023
Katherine Whetton	Deputy Secretary, Mental Health and Wellbeing, Department of Health	1 May 2023
Eleanor Williams	Executive Director, Strategy and Policy, Department of Health	1 May 2023
Dr Tamar Hopkins		2 May 2023
Kate Houghton	Secretary, Department of Justice and Community Safety	2 May 2023
Marian Chapman	Deputy Secretary, Courts, Civil and Criminal Law, Department of Justice and Community Safety	2 May 2023
Andrea Davidson	Commissioner, Youth Justice, Department of Justice and Community Safety	3 May 2023
Joshua Smith	Deputy Secretary, Youth Justice, Department of Justice and Community Safety	3 May 2023
Larissa Strong	Commissioner, Corrections Victoria	3 May 2023
Ryan Phillips	Acting Associate Secretary, Department of Justice and Community Safety	3 May 2023
The Hon. Jaclyn Symes MLC	Attorney-General	5 May 2023
Shane Patton APM	Chief Commissioner of Victoria Police	8 May 2023
The Hon. Anthony Carbines MP	Minister for Police	8 May 2023
The Hon. Lizzie Blandthorn MP	Minister for Child Protection and Family Services	12 May 2023
The Hon. Enver Erdogan MLC	Minister for Corrections, Youth Justice and Victim Support	15 May 2023
Raylene Harradine PSM	Deputy Secretary, Aboriginal Self-Determination and Outcomes, Department of Families, Fairness and Housing	15 May 2023
Adam Reilly	Executive Director, Wimmera South Region Department of Families, Fairness and Housing	15 May 2023

1. *Pseudonym

APPENDIX B:

Glossary

TERM	EXPLANATION
Aboriginal Children in Aboriginal Care (ACAC)	An initiative enabled by Section 18 of the <i>Children, Youth and Families Act 2005 (Vic)</i> authorising certain Aboriginal organisations to undertake child protection investigations, case planning and case management.
Aboriginal Child Placement Principle (ACPP)	Principles contained in the <i>Children, Youth and Families Act 2005 (Vic)</i> that aim to ensure Aboriginal children have the right to be raised in their own family, culture and community and that removal of any Aboriginal child must be a last resort. Nationally these are referred to as Aboriginal and Torres Strait Islander Child Placement Principles.
Aboriginal Child Specialist Advice and Support Service (ACSASS)	Provides specialist advice and case consultation to ensure that a culturally appropriate and effective response is provided in the protection of Aboriginal children from harm. Child protection practitioners are required to consult with ACSASS when a report is received about an Aboriginal child and for all subsequent significant case decisions, across all phases of child protection involvement.
Aboriginal Community Controlled Organisations (ACCOs)	Incorporated, not-for-profit organisations that provide services and support to Aboriginal communities and that are Aboriginal controlled, and governed.
Aboriginal Community Justice Panels (ACJP)	Established in response to the Royal Commission into Aboriginal Deaths in Custody, the ACJP operates 24 hours a day, seven days a week across the state with volunteers providing cultural and practical support to Aboriginal people in police custody.
Aboriginal Community Justice Reports	Reports that provide a comprehensive account of an Aboriginal person's life and circumstances, including their aspirations, interests, strengths, connections, culture, supports, and the adverse impact on their lives of colonisation and contact with the justice system. Currently in a trial phase, these reports aim to inform sentencing decisions and improve court processes for Aboriginal individuals.
Aboriginal Family Led Decision Making (AFLDM)	A program where significant decisions about (including placement of) an Aboriginal child are made at a meeting called by an approved Aboriginal convenor and attended, where possible, by the child, the child's parents, members of the child's extended family and other appropriate members of the Aboriginal community as determined by the child's parents. Access to the service is through referral from the Department of Families, Fairness and Housing (DFFH).
Aboriginal Justice Agreement (AJA)	A long-term partnership between the Victorian Government and Aboriginal communities. It aims to address Aboriginal over-representation in the justice system, improve family and community safety and strengthen Aboriginal self-determination.
Adult Parole Board	If an adult prisoner is eligible for, and applies for parole, the board determines whether to grant, deny or defer parole and any conditions.
Assimilation policy	Government policy in place in states and territories across Australia until the 1960s proposing that Aboriginal and Torres Strait Islander peoples should die out or assimilate into the white community in order for the creation of a single, uniform white Australia. The forced removal of First Nations children was based on assimilation policies.
Bail	The temporary release of a person accused of a crime, often with certain conditions, while awaiting trial or sentence.

TERM	EXPLANATION
Bringing Them Home report	The 1997 report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families conducted by the Australian Human Rights and Equal Opportunity Commission.
Burra Lotjpa Dunguludja (AJA4)	The fourth and current phase of the Aboriginal Justice Agreement. Launched in 2018, <i>Burra Lotjpa Dunguludja</i> means 'Senior Leaders Talking Strong' in Yorta Yorta language.
Care by Secretary Orders (CBSOs)	A protection order made in the Children's Court that allows the Secretary, DFFH to assume exclusive parental responsibility for a child for two years when a child cannot return home, and no permanent carer is available.
Caution	A verbal or recorded warning issued by the police to an alleged offender, typically for low-level offences, as an alternative to formal criminal justice processes.
Child FIRST	The Child and Family Information, Referral and Support Team program which receives child wellbeing reports and notifications.
Child Protection Mandatory Reporting	A legislated scheme compelling certain professionals (such as doctors, nurses, midwives, teachers and psychologists) to report to DFFH where they form a belief on reasonable grounds that a child needs protection from physical injury or sexual abuse.
Children's Court of Victoria	Decides cases involving children and young people including criminal, child protection and intervention order matters.
Client Relationship Information System (CRIS)	The DFFH child protection case management system.
Cognitive disabilities	Includes intellectual disabilities and difficulties with memory, attention, problem-solving, and decision-making.
Commission for Children and Young People (CCYP)	An independent statutory body that promotes improvement in policies and practices affecting the safety and wellbeing of Victorian children and young people. Provides scrutiny and oversight of child protection and youth justice systems. The Commissioner for Aboriginal Children and Young People leads engagement with Aboriginal communities and works to address the over-representation of Aboriginal children and young people in the child protection and youth justice systems.
Community Correctional Services	Victorian Government services responsible for supervising people serving non-custodial sentences, or who are on parole.
Community Corrections Order (CCO)	Sentencing option that enables a person to serve their sentence in the community rather than in prison. The conditions attached to the order depend on the circumstances and nature of the offence and on the needs and situation of the offender.
Community Service Organisations (CSOs)	Organisations contracted or funded by the Victorian Government to deliver services. This can include family services, residential care, community health, family violence and various justice related programs including, diversion, pre and post release services.
Coroners Court of Victoria	Specialist court that investigates certain deaths, promotes public health and safety and aims to reduce preventable deaths.
Corrections Victoria	Business unit within the Department of Justice and Community Safety (DJCS) with oversight and responsibility for the Adult Custodial Corrections System and Community Correctional Services (including supervising people on parole).
County Court of Victoria	Main trial court in Victoria which hears civil and criminal matters and appeals from lower courts such as the Children's Court and the Magistrates' Court.
Court Integrated Services Program (CISP)	Magistrates' Court program which aims to reduce the likelihood of people re-offending by assisting them to access support services including drug and alcohol treatment, crisis accommodation, disability and mental health services.

TERM	EXPLANATION
Criminalisation	Process by which individuals or groups are treated as criminals or subjected to punitive measures by law enforcement and the criminal justice system.
Criminogenic	Something that causes or leads to crime or criminality.
Crossover children	Children who have contact with both the child protection system and the criminal justice system.
Cultural competence	Ability to effectively interact and communicate with people from different cultures, demonstrating knowledge, understanding and skills to address their cultural needs and ensure their rights and well-being are respected.
Cultural load	Burden or responsibility placed on First Peoples staff to educate others about their culture or be the source of knowledge in an organisation.
Cultural plan	Also called a Cultural Support Plan, and required under the <i>Children, Youth and Families Act 2005 (Vic)</i> , sets out means to maintain and develop the child's Aboriginal identity and encourage the child's connection to their Aboriginal community and culture when in out of home care or under a Permanent Care Order.
Cultural responsiveness	<p>Cultural responsiveness describes how a system or organisation, or individual, responds to the person in front of them.</p> <p>Indigenous Allied Health Australia, states that cultural responsiveness is about the centrality of culture to Aboriginal and Torres Strait Islander peoples identity, health and wellbeing; involves ongoing reflective practice; focusses on relationships and requires access to knowledge about Aboriginal and Torres Strait Islander peoples and cultures. It is a negotiated process of what constitutes a culturally safe service as decided by the recipient.</p>
Cultural safety (or culturally safe)	Cultural safety is where First Peoples feel safe, where there is no challenge or need for the denial of their identity, and where their needs are met. A culturally-responsive system is one in which non-Aboriginal people take responsibility to understand the importance of culture, country and community to Aboriginal health, wellbeing and safety and work with Aboriginal communities to design and deliver culturally-responsive services. Cultural safety requires recognition of past and current harm perpetrated against First Peoples and the elimination of racist or discriminatory behaviours.
Custody Notification System	System whereby the Victorian Aboriginal Legal Service (VALS) is notified when an Aboriginal or Torres Strait Islander person is taken into police custody. VALS responds in the interests of the person in custody by offering legal advice and support.
Decriminalisation	The process of stopping treating something as a criminal offence.
Department of Families, Fairness and Housing (DFFH) formerly the Department of Housing and Human Services	Responsible for child protection, prevention of family violence, housing, disability, multicultural affairs, LGBTIQ+ equality, veterans, and includes the offices for Women and Youth.
Department of Justice and Community Safety (DJCS)	Has oversight and responsibility for justice and community safety matters, including the criminal justice system in Victoria.
Department of Premier and Cabinet (DPC)	Leads whole-of-government policy and performance, with a particular responsibility for improving outcomes and services for First Peoples.
Diversion	Strategies or programs aimed at redirecting people away from the formal criminal justice system and towards rehabilitation or support services. Allows those charged with low-level offences to deal with their charges outside of the traditional court system, often through participation in treatment programs, counselling, or community work. Successful completion of a diversion program results in the dismissal of charges without a finding of guilt or a criminal record.

TERM	EXPLANATION
Doli incapax	Legal presumption that children between the ages of 10 and 14 are incapable of committing a crime unless it can be proven that the child knew what they did was seriously wrong.
Double uplift	Provision in bail law that allows for additional penalties or restrictions, including a higher threshold for bail, to be imposed on an accused person who has previously breached bail conditions.
Early intervention	Process of identifying and providing effective early support to at-risk people (including children and young people).
Elders	An Aboriginal Elder is someone who has gained recognition as a custodian of knowledge and lore and who has permission to disclose knowledge and beliefs. Often referred to as 'Aunty' or 'Uncle' they are highly respected and held in esteem by their communities for their wisdom, cultural knowledge and community service.
Family Reunification Order	Order made by the Children's Court to support parents to address protective concerns and resume permanent care of their child. The order may require parents to engage with services to address protective concerns.
Family violence	Any violent, threatening, coercive or controlling behaviour that occurs in current or past family, domestic or intimate relationships. Includes physical, emotional, sexual, social, spiritual, cultural, psychological and economic abuse.
Family Violence Intervention Order	Order issued by a court to protect a person from violence by a family member or a family like person (eg carer).
First Peoples	Refers to the Indigenous peoples or Aboriginal and Torres Strait Islander peoples of Australia. In this report the term First Peoples is to refer to First Peoples in Victoria which includes the Traditional Owners of a place in Victoria, including family and clan groups, and their ancestors. It also includes all Aboriginal and Torres Strait Islander people living in Victoria or who previously lived in Victoria.
First Peoples' Assembly of Victoria	The independent and democratically elected body to represent Traditional Owners and Aboriginal and Torres Strait Islander peoples in Victoria.
Foetal Alcohol Spectrum Disorder (FASD)	Group of conditions that occur in individuals whose mother consumed alcohol during pregnancy, resulting in physical, mental, behavioural, and cognitive disability.
Home-based care	Foster care or other child placement options which occur within a family environment, but not from within the family kinship network.
Independent Prison Visitors	Community members who volunteer their time on a monthly basis to observe how the state's prison system is operating.
Indigenous Data Sovereignty	The right of Indigenous Peoples to own, control, access and possess data that derive from them, and which pertain to their members, knowledge systems, customs, resources or territories. It is an Indigenous-led movement that seeks to change the way Indigenous data is understood and used through Indigenous data rights.
Inquest	A formal inquiry or investigation conducted by a coroner to determine the cause and circumstances of a person's death.
Intergenerational trauma	The transmission of trauma or adverse experiences across generations, particularly within communities or groups that have faced historical and ongoing injustices.
Intersectionality	Refers to the ways in which different aspects of a person's identity can expose them to overlapping forms of discrimination and marginalisation. For example, race, age, sex, religion, sexuality, gender identity or disability status.
Kinship care	A type of out of home care. Kinship carers can be family members or non-family members who are in the child or family's social network.

TERM	EXPLANATION
LEAP	Abbreviation for Law Enforcement Assistance Program, a database used by Victoria Police to store and share information.
Living With Mum program	A program that allows imprisoned mothers to keep their babies and young children with them in prison in a culturally safe manner.
Long Term Care Order	Order made where the Children’s Court has decided a child is in need of long-term care and there is a suitable carer available to raise the child. Under this order the Secretary, DFFH has exclusive parental responsibility for the child until the child’s 18th birthday. This means the department is responsible for supporting the child’s carer to look after the child until they grow up, and for all decisions concerning the child.
Magistrates’ Court of Victoria	Hears criminal, civil and family matters and intervention orders. There is no jury and each matter is decided by a judicial officer. Includes specialist and therapeutic courts such as the Koori Court, Drug Court, family violence courts and the Neighbourhood Justice Centre.
Mandatory sentencing	Laws that require courts to impose fixed or minimum penalties for specific offences.
Marginalisation	Also referred to as social exclusion, occurs when certain groups of people are denied access to power, opportunities, services and benefits in all areas of society. Marginalisation might be social, political and/or economic.
Minimum age of criminal responsibility	Age at which a person can be held criminally responsible for their actions, currently 10 years of age in Victoria.
National Agreement on Closing the Gap (or Closing the Gap)	Partnership between Australian governments and Aboriginal and Torres Strait Islander organisations, represented by the Coalition of Aboriginal and Torres Strait Islander Peak Organisations. It aims to improve outcomes for Aboriginal and Torres Strait Islander peoples in various areas, including justice, health, education, economic participation, early childhood development, housing, child protection, family safety, and culture. Each state and territory has their own Implementation Plan and must report annually on progress towards Closing the Gap targets.
National Disability Insurance Scheme (NDIS)	Provides individualised funding to eligible people with permanent and significant disability to support them to gain greater independence and improved economic and social participation.
Out of home care (OOHC)	When a decision is made that a child cannot safely stay with their parents they may be placed in the following types of out of home care: kinship care, home-based care or residential care.
Over-representation	The disproportionate presence or higher representation of a particular group within a specific context or system, such as the criminal justice or child protection system.
Parole	The conditional release of a person from prison to serve part of their sentence in the community under supervision, with conditions. The purpose of parole is to provide people with a supervised, structured and supported transition from prison to the community and reduce their risk of reoffending.
Permanent Care Order	Children’s Court order that gives parental responsibility for a child to a person other than the child’s parent. Under this order the carers are the permanent care parents of the child, and have all the duties, powers, responsibilities and authority that parents have in relation to the child until the child’s 18th birthday.
Pre-birth report (or unborn report)	Notification to child protection authorities regarding a pregnant woman where there is concern for the wellbeing of the child after their birth.
Pre-sentence reports	Reports prepared by professionals about a person accused of a crime including their personal circumstances, background and any relevant factors for consideration during the sentencing process.
Presumption against bail	A legal presumption that bail should not be granted unless certain conditions are met.

TERM	EXPLANATION
Private prison	Prison operated under a contract between the government and a private company.
Protective intervener	Under the <i>Children, Youth and Families Act 2005</i> (Vic) Victoria Police, the Secretary, DFFH and the principal officer of an Aboriginal agency authorised under section 18 of that Act are classed as protective interveners. They must, as soon as practicable after receiving a protective intervention report, investigate, or cause another protective intervener to investigate, the subject-matter of the report in a way that will be in the best interests of the child.
Public prison	Prison that is operated by the government.
Racial profiling	Practice of police singling out, stopping, questioning, searching, or detaining individuals based on their race or ethnicity, rather than reasonable suspicion of criminal activity.
Remand	Process under which a person accused of a crime is imprisoned while waiting for their trial or sentence. People imprisoned on remand are also referred to as unsentenced prisoners. Remand prisoners have not applied for bail or have been refused bail or are unwilling or unable to meet bail conditions. Remand prisoners are innocent until proven guilty.
Residential care (child protection)	Placement of a child in an out-of-home-care setting where paid staff provide care, usually in a community setting or group home.
SAFER Children Framework Guide (SAFER Guide)	Practice manual that provides child protection practitioners with direction in assessing risk and determining whether a child is in need of protection.
Self-determination	The right of First Peoples to freely determine their political status, participate in decisions that affect their lives, and control their economic, social and cultural development.
Solitary confinement	International human rights standards define solitary confinement as the confinement of people in prison or other detention for 22 hours or more a day without meaningful human contact.
Stolen Generations	The forcible removal of Aboriginal and Torres Strait Islander children from their families by Australian government authorities between the late 1800s and the 1970s. This policy aimed to assimilate Indigenous children into white society, resulting in immense trauma and loss of cultural identity.
Substantiated or substantiation	When, following a risk assessment the protective intervener decides that a child is ‘in need of protection’. Involves considering whether harm has or is likely to occur, and the consequence of such harm upon the child’s safety or development.
Supreme Court of Victoria	Hears the most serious criminal, and complex civil, cases, as well as some appeals from Victorian courts and tribunals.
Suspended sentences	Sentences that are not immediately imposed but can be activated if the person breaches certain conditions.
Systemic racism	Racial discrimination that occurs through systems and institutions and goes beyond individual racist acts. It refers to laws, policies or practices that may, on their face, look neutral and applied equally, but which in practice unfairly disadvantage certain racial groups and advantage others.
Truth telling	Act of sharing and acknowledging the historical and current experiences, perspectives, and truths of marginalised or oppressed groups including First Peoples.
Upcharging	Occurs when police charge someone with a more serious offence than warranted.

TERM	EXPLANATION
Universal services	Services that are targeted at the entire population, for example health, education, early childhood services.
Unsentenced prisoner	People imprisoned while waiting for their trial or sentence. See remand.
Victorian Auditor General's Office (VAGO)	Integrity body supporting the Auditor-General who is an independent officer of the Victorian Parliament. It examines how effectively public sector agencies are providing services and using public money.
Victorian Civil and Administrative Tribunal (VCAT)	Resolves disputes and makes decisions about a wide range of matters including rental disputes, guardianship, equal opportunity and traditional ownership.
Wirkara Kulpa	Victoria's first Aboriginal Youth Justice Strategy launched in 2022, developed under the umbrella of Burra Lotjpa Dunguludja and the Youth Justice Strategic Plan 2020-2030.
Working With Children Check	Screening process for assessing or re-assessing people who work with or care for children in Victoria. It involves looking at the criminal history and relevant professional conduct findings in order to protect children from sexual or physical harm.
Wungurilwil Gaggapduir Aboriginal Children and Families Agreement	A partnership agreement between Aboriginal communities (represented by the Victorian Aboriginal Children and Young People's Alliance and the Victorian Aboriginal Child Care Agency), the Victorian Government, and the child and family services sector (represented by the Centre for Excellence in Child and Family Welfare). It aims to reduce the number of Aboriginal children in out-of-home care by building their connection to culture, country and community. Wungurilwil Gaggapduir means 'strong families' in Latji Latji.
Youth detention	Imprisonment of children and young people either on remand or sentenced.
Youth justice supervision	Monitoring and management of children and young people who are subject to supervision in the community as part of their criminal sentence.
Youth Parole Board	Makes decisions concerning parole and other matters for children and young people. See parole.

APPENDIX C:

Child protection policy frameworks, oversight bodies and previous reviews

TABLE 1: Key policies specific to Aboriginal children and families

POLICY	LEAD AGENCY	KEY FOCUS	ACCOUNTABILITY / GOVERNANCE
<u>Victorian Aboriginal Affairs Framework (2018-2023) (VAAF)</u>	Department of Premier and Cabinet (DPC)	<p>Government’s overarching framework for working with Aboriginal Victorians, organisations and the wider community to drive actions, with self-determination its guiding principle.</p> <p>Children, family and home is one of six ‘domains’ under the VAAF. Key objectives in this domain include eliminating the over-representation of Aboriginal children and young people in care, increasing Aboriginal care, guardianship and management of Aboriginal children and young people in care, and increasing family reunifications for Aboriginal children and young people in care.</p>	<p>Victorian Government Aboriginal Affairs Report reviewed by Aboriginal Executive Council. This is an annual report tabled in Parliament.</p> <p>VAAF Dashboard.</p>
<p><u>Roadmap for reform: Strong Families, safe children (2016)</u></p> <p><u>Roadmap for reform: children and families (2018)</u></p> <p><u>Pathways to support for children and families: Priority Setting Plan 2021-2024</u></p>	Department of Families, Fairness and Housing (DFFH)	<p>Strategy to transform the child protection and family services system by focusing on earlier intervention and prevention to reduce vulnerability.</p> <p>Includes a commitment to Aboriginal self-determination, decision-making and care for vulnerable Aboriginal children and young people.</p>	<p>12-month action plans.</p> <p>Roadmap Implementation Ministerial Advisory Group.</p> <p>Membership includes lived experience members, peak bodies and sector organisations, and subject matter experts.</p>

POLICY	LEAD AGENCY	KEY FOCUS	ACCOUNTABILITY / GOVERNANCE
<p><u>Wungurilwil Gagapduir: Aboriginal Children and Families Agreement (2018)</u></p> <p><u>Wungurilwil Gagapduir Strategic Action Plan</u></p>	DFFH	<p>A tripartite agreement between Victorian Aboriginal communities, families and children as represented by the Children and Young People's Alliance, the Victorian Aboriginal Child Care Agency the government and community service organisations to improve outcomes for Victorian children and families.</p> <p>The agreement focuses on five objectives stated to be based on the overarching principle of self-determination. Objectives aim to strengthen culture, resource and support Aboriginal organisations, increase culturally safe services, build and share Aboriginal-led knowledge and solutions, and prioritise Aboriginal workforce capability.</p>	<p>Aboriginal Children's Forum. Members include Aboriginal Community Controlled Organisations (ACCOs) who provide children and family services, Community Service Organisations (CSOs), the Commission for Children and Young People (CCYP), Children's Court of Victoria representatives, government representatives and the Minister for Child Protection and Family Services.</p> <p>There are government and ACCO co-chairs. There is a Koorie Caucus of Aboriginal members and various working groups.</p>
<p><u>Korin Korin Balit-Djak: Aboriginal health, wellbeing and safety strategic plan (2017-2027)</u></p>	DFFH	<p>Overarching framework for action to improve the health, wellbeing and safety of Aboriginal Victorians with self-determination stated to be a guiding principle.</p> <p>The plan focuses on five priority domains, including system reform across the health and human services sector.</p> <p>Includes a number of actions specific to child protection, notably implementation of s 18 of the <i>Children, Youth and Families Act 2005</i> (Vic), increasing the cultural competency of child protection workers and increasing the number of Aboriginal staff.</p>	<p>Aboriginal Strategic Governance Forum (ASGF).</p> <p>'The ASGF was established in 2017 and consists of representatives from around the State who collectively, act as an advisory and decision-making forum used to set DFFH's strategic directions on relevant portfolios'.¹</p> <p>Membership includes DFFH Aboriginal Governance committee heads, a range of ACCOs, Deputy Secretaries from across DFFH, and other heads of Aboriginal areas across government.</p> <p>There are government and ACCO co-chairs. There is a Koorie Caucus of Aboriginal members.</p>
<p><u>Aboriginal and Torres Strait Islander cultural framework (2019)</u></p> <p><u>Aboriginal and Torres Strait Islander Cultural Safety Framework guidelines (2020)</u></p>	DFFH	<p>Key commitment in Korin Korin Balit Djak.</p> <p>The framework and guidelines help DFFH and mainstream health and community services to strengthen their cultural safety by participating in a process of continuous learning and practice improvement.</p>	

POLICY	LEAD AGENCY	KEY FOCUS	ACCOUNTABILITY / GOVERNANCE
<u>Dhelk Dja: Safe Our Way – Strong Culture, Strong Peoples, Strong Families (2018-2028)</u>	Family Safety Victoria / DFFH	An Aboriginal-led Victorian Agreement that commits Aboriginal communities, Aboriginal services and government to work together to shift family violence reform including policy and program development, services and initiatives for Aboriginal people to Aboriginal people.	Three-year rolling action plan. Dhelk Dja Partnership Forum meets three times per year to monitor progress against the agreement.
<u>Strong carers, stronger children: Supporting kinship, foster and permanent carers to achieve the best outcomes for children and young people in care (2019)</u>	DFFH	A strategic framework that aims to improve the experience of carers and support them to provide appropriate care to vulnerable children. It features six goals: finding children a home; preparing carers for their role; valuing, informing and empowering carers; training; support; and fostering stability and permanency.	This strategy will be implemented over the next five years to 2025 through a series of three rolling action plans at fixed intervals of 12 to 18 months. The Roadmap Implementation Ministerial Advisory Group. Membership includes lived experience members, peak bodies, sector organisations and subject matter experts. Carer Strategy Working Group. Membership includes carer peak bodies, ACCOs, CSOs and departmental representatives.
<u>Victorian Closing the Gap implementation plan (2021-2023)</u>	DPC	Implementation plan made under the National Closing the Gap Partnership Agreement. Target 12 is to reduce the rate of overrepresentation of Aboriginal children in out of home care by 45 per cent by 2031. Commits to a set of 'priority enablers' that will drive the Closing the Gap progress.	Closing the Gap Partnership Forum. Outcomes reported in the Victorian Government Aboriginal Affairs Report.
<u>Child protection workforce strategy (2021-2024)</u>	DFFH	Outlines seven strategic focus areas for action, including advancing Aboriginal self-determination through building a culturally safe workforce, improving Aboriginal employee experience, and supporting Aboriginal-led reforms.	The three-year rolling action plan is overseen by DFFH.
<u>Aboriginal workforce strategy (2021-2026)</u>	DFFH, Department of Health (DOH)	Strategy to achieve the vision that DFFH and DOH become an employer of choice for Aboriginal people. Includes recruitment and retention activities for the Aboriginal child protection workforce. Strategy stated as being underpinned by self-determination principles.	Biannual reporting. Executive Board of DFFH and DOH will set up governance.

TABLE 2: Child protection complaints mechanisms and oversight bodies

AGENCY	ROLE
DFFH	<p>Complaints about DFFH can be made to DFFH directly or online, by phone or email to the department’s Feedback Service.</p> <p>Complaints about agencies funded by DFFH can be made directly to the agency or to DFFH.</p> <p>Complaints are first handled at a local level and escalated to a senior manager if not resolved. Where the person complaining identifies as Aboriginal, staff consult Aboriginal colleagues within DFFH for expert and independent advice.</p> <p>There is a separate internal review process for child protection investigation and case management decisions under the <i>Children, Youth and Families Act 2005</i> (Vic) (CYFA) with appeal to the Victorian Civil and Administrative Tribunal.²</p>
Victorian Civil and Administrative Tribunal	<p>Review of internal review decisions by DFFH upon application by a child or their parent under the CYFA.³</p>
Victorian Ombudsman	<p>Can investigate complaints about government agencies and child protection services funded by DFFH, including alleged breaches of human rights protected by the <i>Charter of Human Rights and Responsibilities Act 2006</i>.</p> <p>The Ombudsman will try to resolve complaints informally, including by conciliation.</p> <p>Has powers to conduct own motion enquiries and investigations and report on them.</p> <p>Governing legislation is the <i>Ombudsman Act 1973</i> (Vic).</p>
Victorian Equal Opportunity and Human Rights Commission (VEOHRC)	<p>Can receive and conciliate complaints about discrimination under the <i>Equal Opportunity Act 1995</i> (Vic). This includes discrimination complaints regarding DFFH and organisations funded or contracted by DFFH to deliver services, including out of home care services.</p>
Commission for Children and Young People (CCYP)	<p>Reports to the Minister for Child Protection and Family Services on the performance of out of home care services.</p> <p>Conducts inquiries in relation to the deaths of children who were the subject of child protection intervention in the 12 months leading up to the time of their death.</p> <p>Conducts inquiries into other children or groups of children subject to child protection intervention at the request of the Minister or at the Commissioner’s initiative.</p> <p>The Statement of Recognition Bill amended the CCYP’s governing legislation to enable the CCYP to advocate for children and young people in the child protection and out of home care systems, as well as those who were in those systems in the previous six months, to have their issues raised and resolved either directly with government agencies and non-government service providers or referred to a relevant complaints body where necessary.⁴</p> <p>Governing legislation is the <i>Commission for Children and Young People Act 2012</i> (Vic).</p>

AGENCY	ROLE
Human Services Regulator within DFFH	<p>Organisations that deliver services to children and families, including DFFH itself must be registered and comply with the Human Services standards and the Child Safe Standards. The Human Services Regulator is responsible for registration and managing compliance including engaging independent review bodies that conduct audits of registered organisations against the standards. Full audits are conducted every three years. Mid-cycle audits are undertaken at least every 18 months.⁵</p> <p>Starting in mid-2024, responsibility for the regulation of child protection services will move to a new independent Social Services Regulator.⁶</p>
Victorian Auditor General	<p>Audits the performance of government agencies.</p> <p>Governing legislation is the <i>Audit Act 1994</i> (Vic).</p>
State Coroner	<p>Investigates particular categories of deaths.</p> <p>Governing legislation is the <i>Coroners Act 2008</i> (Vic).</p>

TABLE 3: Summary of child protection related inquiries since 2012

YEAR	INQUIRY	KEY FOCUS	KEY FINDINGS AND RECOMMENDATIONS	STATUS OF RECOMMENDATIONS AS REPORTED BY THE COMMISSIONER FOR ABORIGINAL CHILDREN AND YOUNG PEOPLE (WHERE APPLICABLE)
2012	Phillip Cummins, Dorothy Scott and Bill Scales, <i>Report of the Protecting Victoria's Vulnerable Children Inquiry</i>	This inquiry investigated systemic problems in Victoria's child protection system and made recommendations to strengthen and improve the protection and support of vulnerable young Victorians.	<p>There is growing demand and pressures on the child protection system and it is siloed. Government needs to better organise its responses and resources to address this.</p> <p>The inquiry proposed a set of recommendations to deliver policy and system changes to improve the government's response to child abuse and neglect and to focus on the needs of children and young people.</p>	
2014	Victorian Auditor-General's Office, <i>Report into Residential Care Services for Children</i>	This audit examined the effectiveness of DHHS' residential care services for children and young people. It assessed whether children's needs for safety, stability and personal development are being met and whether the residential care system is subject to effective oversight and review.	DHHS fails to oversee and ensure the safety and development of children in residential care. There are significant shortcomings in the quality of oversight and staffing of residential care services.	

YEAR	INQUIRY	KEY FOCUS	KEY FINDINGS AND RECOMMENDATIONS	STATUS OF RECOMMENDATIONS AS REPORTED BY THE COMMISSIONER FOR ABORIGINAL CHILDREN AND YOUNG PEOPLE (WHERE APPLICABLE)
2015	CCYP, <i>"...as a good parent would...": Inquiry into the adequacy of the provision of residential care services to Victorian children and young people who have been subject to sexual abuse or exploitation whilst residing in residential care</i>	This inquiry examined the adequacy of the provision of residential care services to children and young people who have been subject to reports of alleged sexual abuse or sexual exploitation whilst residing in residential care.	<p>The current system creates opportunities for sexual abuse of children and young people. It does not prevent abuse or offer consistent responses when it occurs. The current system has structural problems, poor data monitoring and insufficient oversight of CSOs.</p> <p>Nine key recommendations were made. It called for an urgent redevelopment of residential care services in Victoria and the development of specialised care options for children.</p>	
2015	Victorian Auditor-General's Office, <i>Early Intervention Services for Vulnerable Children and Families</i>	This audit looked at whether vulnerable families can access Child FIRST and Intensive Family Services, and whether outcomes for families are improving.	Because of the growing demand and complexity of referrals to early intervention services, these services increasingly provide intervention to high needs families. This means that families with low to medium needs miss out.	
2016	Victorian Auditor-General's Office, <i>Follow up of Residential Care Services for Children</i>	This audit was a follow up to VAGO's 2014 report on Residential Care.	The department has initiated adequate action to address recommendations for reducing the number of children in residential care through policy focus and greater investment to support children in home-based care. Ongoing oversight is important to ensure this is effective.	

YEAR	INQUIRY	KEY FOCUS	KEY FINDINGS AND RECOMMENDATIONS	STATUS OF RECOMMENDATIONS AS REPORTED BY THE COMMISSIONER FOR ABORIGINAL CHILDREN AND YOUNG PEOPLE (WHERE APPLICABLE)
2016	CCYP, <i>In the Child's best interest: Inquiry into compliance with the Aboriginal Child Placement Principle in Victoria</i>	This inquiry was a systemic review of the Victorian child protection system's compliance with the Aboriginal Child Placement Principle.	There is widespread non-compliance with the protections put in place to prevent the removal of Aboriginal children and when children are removed, to ensure connection to culture.	<p>'The report of this systemic inquiry contained 54 recommendations, three of which have since been retired. Whilst 42 recommendations have been implemented, (e.g., recommendations relating to improved practices of Child Protection staff when working with the ACSASS), in my view, there are still nine recommendations which are still in the process of implementation.</p> <p>Many of these remaining recommendations relate to the improved implementation of all five of the Aboriginal Child Placement Principles. At the time of writing this statement, the Children and Health Legislation Amendment (Statement of Recognition, Aboriginal Self-determination and Other Matters) Bill 2023 is before the Legislative Council and will enshrine all five parts of the Aboriginal Child Placement Principle.</p> <p>Past experience suggests that significant effort will be required to bring effect to these changes. For example, it should be noted that Cultural Support Plans were made mandatory in March 2016 for all Aboriginal children and young people in out of home care, yet in my role as Commissioner I do not see full compliance with Cultural Support Plan requirements'.⁷</p>

YEAR	INQUIRY	KEY FOCUS	KEY FINDINGS AND RECOMMENDATIONS	STATUS OF RECOMMENDATIONS AS REPORTED BY THE COMMISSIONER FOR ABORIGINAL CHILDREN AND YOUNG PEOPLE (WHERE APPLICABLE)
2016	CCYP, <i>Always Was Always Will Be Koori Children: Systemic Inquiry into Services Provided to Children and Young people in out of home care</i>	This inquiry examined the circumstances of 980 Aboriginal children and young people in out-of-home care in Victoria between 2014-16 ('Taskforce 1000').	Systemic failures and inadequacies have contributed to the vast over-representation of Aboriginal children in the child protection and out of home care systems and practice deficits have led to the degradation of Aboriginal culture for children who are placed in out of home care. 77 recommendations made.	
2016	CCYP, <i>Neither Seen nor Heard: Inquiry into Issues of Family Violence in child deaths</i>	This review examined child death inquiries of 20 children, including eight Aboriginal children.	Services commonly overlooked risks and underestimated the impact of family violence on children. Child victims are not engaged and given the support they need to address their trauma.	'The report of this systemic inquiry contained 13 recommendations. These recommendations have been subsumed by subsequent inquiries, such as Lost not forgotten (2019). Recommendations were made to address cumulative harm in 2016. These recommendations remain 'in progress' and the CCYP continues to identify poor assessment of, and response to, cumulative harm in many child death inquiries'. ⁸

YEAR	INQUIRY	KEY FOCUS	KEY FINDINGS AND RECOMMENDATIONS	STATUS OF RECOMMENDATIONS AS REPORTED BY THE COMMISSIONER FOR ABORIGINAL CHILDREN AND YOUNG PEOPLE (WHERE APPLICABLE)
2017	<p>CCYP, ‘...safe and wanted...’: <i>Inquiry into the Implementation of the Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014</i></p>	<p>This inquiry examined the implementation of permanency amendments which sought to ensure that a permanent home is found for children in out of home care as soon as possible.</p>	<p>Early evidence of the impact of the permanency amendments found that the inclusion of adoption in the hierarchy of permanency objectives causes widespread concern, particularly in Victoria’s Aboriginal community, and should be removed. For the cases reviewed, there was no recorded evidence of critical case management for many children on family reunification orders, there was a decrease in the number of children reunified after the reforms started, and there was widespread and persistent non-compliance with requirements to provide cultural support to Aboriginal children in out of home care.</p>	<p>‘Based on my review of CCYP’s records for the monitoring of these recommendations, in my view:</p> <ul style="list-style-type: none"> • 10 recommendations have been implemented • Five recommendations have been retired because they have been superseded by later systemic inquiries, such as In our Own Words and Lost not Forgotten • Five have been retired to be follow up by the Aboriginal Children’s Forum • Eight recommendations are being monitored by the CCYP as they are in the process of implementation • 12 recommendations have not been progressed by the relevant government department’.⁹
2018	<p>Victorian Auditor-General’s Office, <i>Maintaining the Mental Health of Child Protection Practitioners</i></p>	<p>This audit examined whether Victoria’s child protection practitioners maintain good mental health and wellbeing.</p>	<p>Child protection workers struggle to maintain good mental health in the face of unreasonable workloads and inadequate organisational support. VAGO made seven recommendations.</p>	

YEAR	INQUIRY	KEY FOCUS	KEY FINDINGS AND RECOMMENDATIONS	STATUS OF RECOMMENDATIONS AS REPORTED BY THE COMMISSIONER FOR ABORIGINAL CHILDREN AND YOUNG PEOPLE (WHERE APPLICABLE)
2019	<i>CCYP, Lost, not forgotten, Inquiry into children who died by suicide and were known to Child Protection</i>	This inquiry examined the deaths by suicide of 35 children and young people known to child protection.	Six of the 35 children identified in the report were Aboriginal. The children and young people who died were never engaged with effective services. They were shuffled between child protection and family services. The complexity of the challenges facing them grew, as did the challenges of providing effective interventions.	<p>The report of this systemic inquiry contained six recommendations. The Victorian Government accepted three recommendations in full and three in principle.</p> <p>In the CCYP's 2021-2022 Annual Report, the CCYP assessed the status of these recommendations as:</p> <ul style="list-style-type: none"> • One recommendation was 'completed', being the Victorian Government's commitment to implement the Child Link Register, with a view to commencing its operation by December 2021 • Four recommendations were 'in progress', including the development of a child suicide prevention strategy and a mechanism for DFFH to track and report on the effectiveness of referrals by Child Protection to family services • One recommendation was 'planned for implementation', being the development, modelling and implementation of an integrated and whole-of-system investment model and strategy for the child and family system. This system is focussed on earlier intervention and prevention services to reduce risks to children and build child and family wellbeing. The aim is to reduce the rate of entry into care; meeting the distinct needs of children who need to live away from the family home.¹⁰

YEAR	INQUIRY	KEY FOCUS	KEY FINDINGS AND RECOMMENDATIONS	STATUS OF RECOMMENDATIONS AS REPORTED BY THE COMMISSIONER FOR ABORIGINAL CHILDREN AND YOUNG PEOPLE (WHERE APPLICABLE)
2019	CCYP, <i>In Our Own Words: Systemic inquiry into the lived experience of children and young people in the Victorian out-of-home care system</i>	This inquiry spoke with 204 young people currently or recently living in out of home care to examine stories of what it is like to live and grow up in the out of home care system, what works well and what needs to change.	Children and young people say state care often inflicts harm, they are moved around too much and their placements (especially in residential care) are unsafe. There are not enough supports to help them recover from trauma.	<p>‘The report of this systemic inquiry contained 17 ‘head’ recommendations, some with multiple sub-recommendations. The Victorian Government accepted six recommendations in full and 11 in principle. In my view, because there are some sub-recommendations within a head recommendation that are at differing stages of completion, I cannot say that any recommendations have been fully implemented although I acknowledge that parts of them have.</p> <p>This report contained 11 recommendations that are in progress, including the embedding of processes to allow children and young people’s voices to be heard in all stages of decision making in out-of-home care. A further six recommendations are planned for implementation, including those relating to a specialised complaint function for children and young people in care, whether about their immediate safety or their ongoing care’.¹¹</p>
2020	Victorian Ombudsman, <i>Investigation into Complaints about Assaults of Five Children Living in Child Protection Residential Care Units</i>	This investigation looked at actions and decisions of DFFH which funds and regulates the community service organisations (CSOs) delivering residential care. It also looked at the CSOs involved in caring for the children at the time of the alleged assaults and incidents.	<p>Placement decisions are dictated by the availability of beds rather than the best interests of the child. The system is not designed or resourced to deal with complex needs and behaviours of concern. Vital information may not be provided with the placement.</p> <p>The Aboriginal child included in this investigation was not supported to stay connected with culture and community.</p>	

YEAR	INQUIRY	KEY FOCUS	KEY FINDINGS AND RECOMMENDATIONS	STATUS OF RECOMMENDATIONS AS REPORTED BY THE COMMISSIONER FOR ABORIGINAL CHILDREN AND YOUNG PEOPLE (WHERE APPLICABLE)
2020	CCYP, <i>Keep Caring: Systemic inquiry into services for young people transitioning from out of home care</i>	This inquiry examined the needs and aspirations of young people leaving care and the capacity of the service system to respond to those needs and aspirations.	The out of home care system is not doing enough to help young people plan and prepare for their lives after care. Culture is not prioritised in leaving care planning. Young Aboriginal people often miss out on the support of an Aboriginal organisation when they leave care.	
2021	CCYP, <i>Our Youth Our Way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system</i>	This inquiry examined the lived experiences of Aboriginal children and young people in Victoria and the factors contributing to their over-representation in the youth justice system.	Many Aboriginal children in the youth justice system have also had involvement in child protection. The child protection system, in particular residential care, does not provide a caring home for too many Aboriginal cross-over children. In some cases, out of home care (especially residential care) contributes to offending behaviour, police contact and involvement in youth justice.	<p>‘The report of this systemic inquiry contained 15 recommendations. One recommendation has been implemented, being increased investment to Home Stretch by the Victorian Government to support young people in kinship or foster care to stay with their carers until the age of 21, if so desired.</p> <p>DFFH’s initial response to the CCYP in 2020-2021 indicated acceptance of six of the inquiry’s recommendation in full and nine in principle.</p> <p>Nine recommendations are in progress for implementation, including early supports for young people leaving care, with a focus on key living skills and other supports. Five recommendations are planned for implementation. These relate to developing a mechanism to track the life outcomes of young people leaving out of home care’.¹²</p> <p>‘The Aboriginal Youth Justice Working Group (of the Aboriginal Justice Forum) monitors the recommendations of the <i>Our youth our way</i> (2021) inquiry. The working group is a collaborative process of discussion and input from Aboriginal community organisations and representatives involved in the working group’.¹³</p>

YEAR	INQUIRY	KEY FOCUS	KEY FINDINGS AND RECOMMENDATIONS	STATUS OF RECOMMENDATIONS AS REPORTED BY THE COMMISSIONER FOR ABORIGINAL CHILDREN AND YOUNG PEOPLE (WHERE APPLICABLE)
2021	CCYP, <i>Out of sight: Systemic inquiry into children and young people who are absent or missing from residential care</i>	This inquiry examined the current model of residential care and whether it is meeting children and young people's need for human connection and safety.	Reporting of missing children is inconsistent. There are concerns that Aboriginal children going missing is under-reported. There is a lack of support to maintain Aboriginal children's connection to community and culture. This is one of the reasons they may be absent or go missing. Missing children are vulnerable to sexual exploitation and abuse.	<p>The report of this systemic inquiry contained 18 recommendations representing 34 proposed actions. The CCYP received the DFFH's first action plan to <i>Out of sight</i> (2021) in November 2021, accepting 15 recommendations in full and 19 in principle. In the CCYP's 2021-2022 Annual Report, the CCYP assessed the status of these recommendations as:</p> <ul style="list-style-type: none"> • '10 recommendations were 'in progress', including models of residential care that promote trust for children and young people • Seven recommendations were 'planned for implementation', including coordinated and collaborative trauma informed responses from a range of agencies (eg Victoria Police) to support the needs of children and young people who go missing from out of home care • One recommendation was 'not progressed', being the CCYP's recommendation for an improved understanding of child sexual exploitation and response across many agencies'¹⁴

YEAR	INQUIRY	KEY FOCUS	KEY FINDINGS AND RECOMMENDATIONS	STATUS OF RECOMMENDATIONS AS REPORTED BY THE COMMISSIONER FOR ABORIGINAL CHILDREN AND YOUNG PEOPLE (WHERE APPLICABLE)
2022	Victorian Auditor-General's Office, <i>Kinship care</i>	<p>This audit examined DFFH and three other kinship care service providers—Anglicare Victoria, Uniting Vic Tas, and the Victorian Aboriginal Child Care Agency.</p> <p>It assessed if the new kinship care model helps identify kinship networks in a timely manner for children and young people at risk and provides them with stable and quality placements.</p>	DFFH cannot be assured that it is providing timely, safe and stable placements for children and young people at risk as it does not systematically monitor or report on if it is achieving the new model's objectives. DFFH also does not ensure that staff and service providers complete mandatory assessments on how safe a home is, what support the carer needs and the child's well-being. Kinship carers are not receiving the support they need to provide stable homes for children and young people in their care.	
2022	Victorian Auditor-General's Office, <i>Quality of child protection data</i>	This audit examined whether DFFH manages child protection data in line with relevant guidelines and has appropriate controls to make sure child protection data is complete, accurate and recorded in a timely way.	DFFH does not have adequate controls to ensure its child protection data is of high quality. It may not have easy access to reliable data to help it make decisions about vulnerable children. It may also prevent DFFH from using the data to monitor children's progress in out of home care.	
2022	Victorian Auditor-General's Office, <i>Follow-up of Maintaining the Mental Health of Child Protection Practitioners</i>	This audit looked at DFFH's progress in implementing VAGOs 2018 <i>Maintaining the Mental Health of Child Protection Practitioners</i> audit recommendations.	Despite positive intent and action, the child protection workforce remains under-resourced, under-supervised, and under pressure. This creates risks for the workforce's mental health and the children and families the system supports.	

Endnotes

1. State of Victoria, *Victorian Government Aboriginal Affairs Report 2021* (Report, 2022) 18.
2. *Children, Youth and Families Act 2005* (Vic) ss 331–333 ('CYFA').
3. *Ibid* s 333. Note that VCAT may review other decisions such as recording of information about the child or parent pursuant to a report or disclosure by a community-based child and family service (s 42) and decisions made in relation to a childcare agreement (s 158).
4. Children and Health Legislation Amendment (Statement of Recognition, Aboriginal Self-Determination and Other Matters) Bill 2023 (Vic) ('Statement of Recognition Bill').
5. Department of Families, Fairness and Housing, Victorian Government, 'For Funded Agencies: Human Services Standards' (Web page, 26 May 2023) <<https://providers.dffh.vic.gov.au/human-services-standards>>.
6. Department of Families, Fairness and Housing, Victorian Government, 'Projects and Initiatives: Social Services egulation Reform' (Web page, 29 May 2023) <<https://www.dffh.vic.gov.au/social-services-regulation-reform>>.
7. Commissioner Meena Singh, Supplementary Statement to the Yoorrook Justice Commission, 10 May 2023, 42–43 [180]–[182].
8. Commissioner Meena Singh, Supplementary Statement to the Yoorrook Justice Commission, 10 May 2023, 43 [183].
9. Commissioner Meena Singh, Supplementary Statement to the Yoorrook Justice Commission, 10 May 2023, 43 [184]–[185].
10. Commissioner Meena Singh, Supplementary Statement to the Yoorrook Justice Commission, 10 May 2023, 44 [187]–[188].
11. Commissioner Meena Singh, Supplementary Statement to the Yoorrook Justice Commission, 10 May 2023, 44–45 [189]–[190].
12. Commissioner Meena Singh, Supplementary Statement to the Yoorrook Justice Commission, 10 May 2023, 45 [191]–[193].
13. Commissioner Meena Singh, Supplementary Statement to the Yoorrook Justice Commission, 10 May 2023, 46 [195]–[197].
14. Commissioner Meena Singh, Supplementary Statement to the Yoorrook Justice Commission, 10 May 2023, 45–46 [194].

APPENDIX D:

Previous reviews and inquiries into the criminal justice system

TABLE 1: Major inquiries and reviews into the adult criminal justice system 2013-2022

YEAR	INQUIRY	KEY FOCUS	KEY FINDINGS AND RECOMMENDATIONS
2013	Sentencing Advisory Council, <i>Comparing Sentencing Outcomes for Koori and Non-Koori Adult Offenders in the Magistrates' Court of Victoria</i>	This report analysed Magistrates' Court sentencing data and aimed to provide greater insight into the profile of First Peoples sentenced in Victoria. It compared sentencing outcomes for First Peoples and other people who shared similar offence and offender characteristics.	The report found that, when taking into account all the available relevant factors, Koori people are statistically significantly more likely to receive a custodial sentence in the Magistrates' Court than non-Koori people, but there is no difference in the length of the term that they receive.
2013	Victorian Equal Opportunity and Human Rights Commission, <i>Unfinished business: Koori women and the justice system</i>	This report examined the experience of Aboriginal women in contact with the criminal justice system.	This report found there were increasing numbers of Aboriginal women going to prison, and inadequate programs and interventions to support them to stay out of prison.
2015	Victorian Ombudsman <i>Investigation into the rehabilitation and reintegration of prisoners in Victoria</i>	This report highlighted the impact of the significant increase in prisoner numbers on access to rehabilitation programs, in-prison support and post-release support.	The report called for a whole-of-government approach to shift the focus to reduce offending and recidivism and to promote the rehabilitation of offenders.
2016	Royal Commission into Family Violence	This Commission was established to investigate the prevalence and impact of family violence in Victoria and to make recommendations for reform.	The Commission revealed the prevalence and impact of family violence and set out a framework for whole-of-system reform to end family violence in Victoria. The final report contained 227 recommendations, many of which related to the criminal justice system, including the need for improved training for police and lawyers, more support for victims, and greater perpetrator accountability. The government reports that it has implemented all recommendations. ¹
2016	Victorian Law Reform Commission, <i>Victims of Crime in the Criminal Trial Process</i>	This examined the experience and support needs of victims of crime involved in the criminal trial process, including the distinct needs of Aboriginal victims of crime.	The report contains 51 recommendations to give victims improved information and support, and greater protection from trauma and intimidation during criminal trials.

YEAR	INQUIRY	KEY FOCUS	KEY FINDINGS AND RECOMMENDATIONS
2017	Review of the Bail System ²	This review was conducted by former Supreme Court Justice the Hon Paul Coghlan AO following the Bourke Street tragedy and other high-profile offences committed by people while on bail. ³	The review provided advice to the Victorian Government about changing the provisions of the <i>Bail Act 1997</i> (Vic). Amendments made to the Act following the Coughlan review are discussed in Chapter 11.
2017	Victorian Ombudsman, <i>Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre (DPFC)</i>	The Ombudsman undertook a pilot inspection of DPFC in accordance with Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) principles to identify risks of mistreatment and protective safeguards that reduce those risks.	The report made 19 recommendations to reduce the risk of cruel, inhuman and degrading treatment at DPFC, and to strengthen the prison's protective safeguards.
2018	Australian Law Reform Commission, <i>Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples</i>	This reference examined the factors associated with the over-representation of Aboriginal and Torres Strait Islander peoples in Australian prisons.	The Report made 35 recommendations to reduce the disproportionate rate of imprisonment of Aboriginal and Torres Strait Islander peoples and improve community safety.
2018	Australian Government, <i>Review of the implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody</i>	This review, commissioned by the Department of Prime Minister and Cabinet and conducted by Deloitte, assessed the extent to which governments have implemented Royal Commission into Aboriginal Deaths in Custody (RCIADIC) recommendations through the actions they have taken (i.e. outputs), rather than assessing the outcomes of the actions (i.e. impacts on the overarching objectives of the RCIADIC). ⁴	This review determined that Victoria had not implemented (either fully or in part) only 13 of 326 applicable recommendations. ⁵ However, the scope, methodology and failure to engage Aboriginal people in this review was widely criticised by ACCOs, the Aboriginal Justice Caucus, Aboriginal advocacy groups, academics and policy experts. ⁶ The Aboriginal Justice Caucus is currently undertaking an Aboriginal-led review of Victoria's progress against implementation of RCIADIC recommendations. ⁷
2018	Independent Broad-based Anti-Corruption Commission (IBAC), <i>Audit of Victoria Police's oversight of serious incidents</i>	This audit examined Victoria Police's oversight of serious incidents resulting in death and serious injury following police contact.	The audit identified aspects of Victoria Police's oversight process that were deficient.
2019	IBAC, <i>Victoria Police handling of complaints made by Aboriginal people</i>	In this audit, IBAC examined Victoria Police's handling of a sample of 41 complaints made by Aboriginal people and its oversight of 13 serious incidents involving an Aboriginal person.	The report highlighted concerning patterns and deficiencies in Victoria Police's handling of police complaints by Aboriginal people, particularly children and young people.

YEAR	INQUIRY	KEY FOCUS	KEY FINDINGS AND RECOMMENDATIONS
2020	Royal Commission into the Management of Police Informants	This commission was established to inquire into Victoria Police's use of lawyer Nicola Gobbo as a human source. It examined the adequacy of current processes for the management of human sources with legal obligations of confidentiality or privilege.	This Royal Commission made 111 recommendations, including several relating to external oversight of Victoria Police's exercise of powers.
2020	Australian Human Rights Commission, <i>Implementing OPCAT in Australia</i>	The focus of this report is on implementing OPCAT through incorporating the terms of the treaty into Australian law, policy and practice.	This report made 17 recommendations to support the implementation of OPCAT in Australia, namely ensuring National Preventive Mechanisms (NPM) fulfill their mandate; ensuring transparency of OPCAT; developing national principles to guide detention inspections, and involving experts. ⁸
2021	Royal Commission into Victoria's Mental Health System	This Royal Commission examined all aspects of Victoria's mental health system.	The report made 65 recommendations, including several relating to the role of police in responding to mental health crises, and support for the mental health and wellbeing of people in contact with, or at risk of coming into contact with, the criminal and youth justice systems.
2021	Victorian Law Reform Commission <i>Improving the Response of the Justice System to Sexual Offences</i>	This inquiry examined the experience of victims of sexual assault.	The report made recommendations for improving the response of the justice system, including by establishing a specialist Aboriginal sexual assault service.
2022	Legislative Council Legal and Social Issues Committee, Parliament of Victoria, <i>Inquiry into Victoria's Criminal Justice System</i>	This inquiry analysed the factors influencing Victoria's growing remand and prison populations. It examined all aspects of the criminal justice system, including policing, bail, sentencing, prisons, rehabilitation programs and the experience of victims of crime.	This inquiry made 100 recommendations to government for wide ranging reform to the justice system to address rising rates of imprisonment and recidivism through a more modern and rehabilitation-focused approach to justice, and to better support victims of crime. ⁹
2022	Legislative Council Legal and Social Issues Committee <i>Inquiry into children affected by parental incarceration</i>	This inquiry examined the impacts on children when their parents are imprisoned.	The inquiry made 29 recommendations aimed at better supporting these children, and reducing the harms they experience.
2023	Cultural Review of the Adult Custodial Corrections System ¹⁰	This review examined the culture, experiences, systems and processes within Victoria's adult prisons and correctional centres. It looked carefully at Aboriginal cultural safety and self-determination.	The review made 86 recommendations to reform the adult corrections system including in relation to a new legislative framework, improved accountability, OPCAT, workforce, health care and conditions in prisons.

TABLE 2: Major inquiries and reviews of the youth justice system 2011-2023

DATE	INQUIRY	KEY FOCUS	KEY FINDINGS	STATUS OF RECOMMENDATIONS AS REPORTED BY THE COMMISSIONER FOR ABORIGINAL CHILDREN AND YOUNG PEOPLE (WHERE APPLICABLE)
2011	Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of the Commonwealth of Australia, <i>Doing Time—Time for Doing: Indigenous Youth in the Criminal Justice System</i>	The Standing Committee examined action to reduce the high levels of First Peoples youth contact with the criminal justice system.	The committee made 40 recommendations largely directed at the Commonwealth Government. Recommendations focused on a range of prevention and early intervention measures including targeting health and substance abuse; improving education attendance and pathways to employment; and improving service coordination.	
2012	Sentencing Advisory Council, <i>Sentencing Children and Young People in Victoria</i>	This report presents a statistical profile of offences sentenced in the Criminal Division of the Children’s Court. It identifies and analyses changes over a ten-year period (2000 to 2009 inclusive). The report also contains data on children and young people (under 18 years of age at the time of offending) who are sentenced in the higher courts, and it discusses Victoria’s ‘dual track’ system. ¹¹	One of the Council’s main findings was that the offences dealt with in the Criminal Division of the Children’s Court were mostly non-violent and many of them are minor. Cases involving serious injuries or fatalities were very infrequent. The majority of youth detention sentences were imposed on children and young people who committed offences against the person as the principal proven offence (49.9%), followed by property offences (41.0%).	
2016	Sentencing Advisory Council, <i>Reoffending by Children and Young People in Victoria</i>	This report examined offending patterns over an 11-year period for 5385 children and young people sentenced in the Children’s Court of Victoria in 2008–09 to understand the level, nature, and quantity of reoffending among children and young people in Victoria.	The report found that more than one-third of young offenders in the group had a prior record of offending and 61 per cent reoffended during a six-year follow-up period. More than 80 per cent of children and young people who served a custodial sentence reoffended. Children and young people who were younger at the time of their first offending, and those who had a greater number of prior offences, had higher recidivism rates.	

DATE	INQUIRY	KEY FOCUS	KEY FINDINGS	STATUS OF RECOMMENDATIONS AS REPORTED BY THE COMMISSIONER FOR ABORIGINAL CHILDREN AND YOUNG PEOPLE (WHERE APPLICABLE)
2017	Commission for Children and Young People, <i>The Same Four Walls: Inquiry into the use of Isolation, Separation and Lockdowns in the Victorian Youth Justice System</i>	This inquiry examined the use of isolation, separation and lockdown practices in Victorian youth justice facilities, primarily between February 2015 and July 2016. The review focused on whether DHHS had complied with legislation and policies that regulate the use of these practices.	The report made 21 recommendations aimed at reducing the use of isolation, separation and lockdowns.	<p>In the CCYP's 2021-2022 Annual Report, the CCYP assessed the status of these recommendations as: 'One recommendation was 'completed', being the Victorian Government's commitment to implemented the Child Link Register; four recommendations were 'in progress', including the development of a child suicide prevention strategy and a mechanism for DFFH to track and report on the effectiveness of referrals by child protection to family services; and one recommendation was 'planned for implementation', being the development, modelling and implementation of an integrated and whole-of-system investment model and strategy for the child and family system...</p> <p>CCYP is monitoring four recommendations in relation to amendments to legislation which will come with a new Youth Justice Act. This is yet to be introduced into the Victorian Parliament.¹¹²</p>

				STATUS OF RECOMMENDATIONS AS REPORTED BY THE COMMISSIONER FOR ABORIGINAL CHILDREN AND YOUNG PEOPLE (WHERE APPLICABLE)
DATE	INQUIRY	KEY FOCUS	KEY FINDINGS	
2017	Department of Justice and Community Safety and Penny Armytage and Professor James Ogloff, <i>Youth Justice Review and Strategy: Meeting needs and reducing offending</i>	This report analysed issues affecting the Victorian youth justice system including the legislative framework, governance and administration. ¹³	The report made wide ranging recommendations to reform the youth justice system. These included new modern and responsive stand-alone youth justice legislation, and confirming in the legislation the principle that detention is a last resort. They also included recommendations to reduce First Peoples overrepresentation including improved diversion programs. ¹⁴	
2018	Legislative Council Legal and Social Issues Committee, Parliament of Victoria, <i>Inquiry into Youth Justice Centres in Victoria (Parliamentary Paper No. 372)</i>	This report examined issues at both Parkville and Malmsbury Youth Justice Centres, including around remand, security and safety and implications for imprisoning young people with exposure to trauma, alcohol and/or other drug issues, child protection, and mental health issues.	This report made 33 findings and 39 recommendations in relation to diversion, workforce, the Children's Koori Court and oversight to prevent mistreatment. ¹⁵	
2018	Commission for Children and Young People and Victorian Equal Opportunity and Human Rights Commission, <i>Aboriginal cultural rights in youth justice centres</i>	The VEOHRC and CCYP partnered to identify practices to improve cultural connection for Aboriginal children and young people in youth justice centres, and build the awareness, understanding and use of cultural rights for those involved with youth justice centres.	Recommendations included improved training, increased Aboriginal staff roles and improved youth justice centre design.	

				STATUS OF RECOMMENDATIONS AS REPORTED BY THE COMMISSIONER FOR ABORIGINAL CHILDREN AND YOUNG PEOPLE (WHERE APPLICABLE)
DATE	INQUIRY	KEY FOCUS	KEY FINDINGS	
2019	Victorian Ombudsman, OPCAT in Victoria: <i>A thematic investigation of practices related to solitary confinement of children and young people</i>	This report considered the practical implications of implementing OPCAT in Victoria. In conducting the inquiry the Ombudsman inspected three Victorian facilities – Port Phillip prison, Malmsbury Youth Justice Precinct and Secure Welfare Services.	This investigation found that the practice of isolating children and young people is widespread in both prison and youth justice environments. It concluded that many practices are unlawful and discriminatory. The Ombudsman made 27 recommendations including that solitary confinement should be prohibited.	
2019/ 2020	Sentencing Advisory Council, <i>Crossover Kids: Vulnerable Children in the Youth Justice System</i>	This inquiry looked at the child protection backgrounds of children who received a sentence or diversion in the Children’s Court of Victoria in 2016 or 2017. It discussed the over-representation of Aboriginal and Torres Strait Islander children among children known to both the youth justice and the child protection systems. It also considered the sentence types that children received, their age at first sentence and their level of involvement with the child protection system. ¹⁶	The inquiry produced three reports. The first report documented the overrepresentation in the youth justice system of children and young people with previous child protection involvement. The second report found that the vast majority of the children (94%) were known to child protection before they committed their first sentenced or diverted offence. The third report suggested reforms including expanding the fully specialised Children’s Court to regional areas and adding a legislative sentencing factor that focuses on how particular combinations of systemic, intergenerational and background factors might be relevant to sentencing Aboriginal and Torres Strait Islander children.	
2020	Sentencing Advisory Council, <i>Children Held on Remand in Victoria: A Report on Sentencing Outcomes</i>	This report examined case outcomes for children who were held on remand in Victoria in 2017–18.	This report found that two-thirds (66%) of children held on remand in 2017–18 did not ultimately receive a custodial sentence. The report stated that being remanded increases the risk that a child will commit offences in the future.	

DATE	INQUIRY	KEY FOCUS	KEY FINDINGS	STATUS OF RECOMMENDATIONS AS REPORTED BY THE COMMISSIONER FOR ABORIGINAL CHILDREN AND YOUNG PEOPLE (WHERE APPLICABLE)
2021	Commission for Children and Young People, <i>Our Youth, Our Way: Systemic Inquiry into the over-representation of Aboriginal children and young people in the Victorian Youth Justice system</i> ¹⁷	This report presented the findings and recommendations of the Koori Justice Taskforce and CCYP's inquiry. The inquiry examined the lived experiences of Aboriginal children and young people in Victoria and the factors contributing to their over-representation in the youth justice system. 93 Aboriginal children and young people took part in the inquiry. ¹⁸	The inquiry made 41 findings and 75 recommendations to be implemented within five years. Recommendations included measures to minimise police contact; creating a presumption of diversion; reducing the unnecessary use of remand and raising the minimum age of criminal responsibility to 14 years. ¹⁹	CCYP states that 48 recommendations have planned actions that demonstrate full or part acceptance of the recommendation (many requiring the introduction into Parliament of the Youth Justice Act in order to be acquitted) and 27 recommendations have planned actions that do not demonstrate acceptance of the recommendation. This includes recommendations relating to bail reform and raising the age of criminal responsibility. ²⁰

Endnotes

1. The government reports that it has implemented all recommendations: Premier of Victoria, The Hon Daniel Andrews, 'Landmark Royal Commission Recommendations Implemented' (Media release, 23 January 2023) <<https://www.premier.vic.gov.au/landmark-royal-commission-recommendations-implemented>>.
2. The Hon Paul Coghlan QC, *Bail Review: First advice to the Victorian Government* (3 April 2017); The Hon Paul Coghlan QC, *Bail Review: Second Advice to the Victorian Government* (1 May 2017).
3. Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 31 [162]–[165], 35 [190].
4. Department of Prime Minister and Cabinet, *Review of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody* (2018) ix.
5. *Ibid* 711, Appendix B — Recommendations Concordance, Table B.1
6. Aboriginal Justice Caucus, Submission 74, 27. See also K Jordan et al, *Joint Response to the Deloitte Review of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody* (Centre for Aboriginal Economic Policy Research and ANU College of Arts & Social Sciences, 2018).
7. Department of Justice and Community Safety, 'Response to NTP-002-014 — *Agency response to the Yoorrook Justice Commission*', 57 [211], produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023. The Department of Justice and Community Safety provided funding for this review in 2022. See also Transcript of Chris Harrison, 3 March 2023, 100 [42]–[45]. The Victorian Government also provided information to Yoorrook regarding activity in response to the Royal Commission into Aboriginal Deaths in Custody (RCIADC). See Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, Appendix A — Table of activity in response to RCIADC recommendations, 1–2.
8. Australian Human Rights Commission, *Implementing OPCAT in Australia* (Report, 2020) 6.
9. Legal and Social Issues Committee, Legislative Council, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Parliamentary Paper No 326, March 2022).
10. Kirsten Hilton et al, *Safer Prisons, Safer People, Safer Communities: Final Report of the Cultural Review of the Adult Custodial Corrections System* (Final Report, December 2022).
11. Sentencing Advisory Council, *Sentencing Children and Young People in Victoria* (Report, 2012).
12. Commissioner Meena Singh, Supplementary Statement to the Yoorrook Justice Commission, 10 May 2023, 44 [186].
13. Department of Justice and Community Safety, Penny Armytage and Professor James Ogloff AM, *Youth Justice Review and Strategy: Meeting Needs and Reducing Offending* (Report, July 2017) 4, Executive Summary.
14. The Victorian Government committed to addressing the findings and recommendations of the Review through the Youth Justice Strategic Plan 2020–2030. Of the 75 recommendations, 56 will be addressed through Wirkara Kulpa: Victorian Government, 'Victorian Government Response to the "Our Youth, Our Way" Inquiry' (Web page, 18 February 2022) <<https://www.vic.gov.au/response-our-youth-our-way-inquiry>>.
15. Legal and Social Issues Committee, Legislative Council, Parliament of Victoria, *Inquiry into Youth Justice Centres in Victoria* (Parliamentary Paper No 372, March 2018) xiii, Chair's foreword.
16. Sentencing Advisory Council, *Crossover Kids: Vulnerable Children in the Youth Justice System* (Report, June 2019) vol 1.
17. Commission for Children and Young People, *Our Youth, Our Way: Inquiry into the over-Representation of Aboriginal Children and Young People in the Victorian Youth Justice System* (Report, 2021).
18. Commission for Children and Young People, 'Our Youth, Our Way: Systemic Inquiry into the over-Representation of Aboriginal Children and Young People in Victoria's Youth Justice System', *Systemic Inquiries* (Web page, Undated) <<https://ccyp.vic.gov.au/inquiries/systemic-inquiries/our-youth-our-way/>>.
19. Commission for Children and Young People, 'Report Calls for 'Re-Imagined' Youth Justice System to End over-Representation of Aboriginal Children and Young People' (Media release, 9 June 2021) <<https://ccyp.vic.gov.au/news/report-calls-for-re-imagined-youth-justice-system-to-end-over-representation-of-aboriginal-children-and-young-people/>>.
20. Commissioner Meena Singh, Supplementary Statement to the Yoorrook Justice Commission, 10 May 2023, 46 [196].

APPENDIX E:

Aboriginal led youth justice diversionary programs

TABLE 1: Examples of diversionary programs and supports overseen and delivered by DJCS and Aboriginal Community Controlled Organisations.¹

INITIATIVE	OVERVIEW
Community Based Aboriginal Youth Justice Program	The Community Based Aboriginal Youth Justice Program is currently delivered through 14 funded agencies with a total of 31 FTE staff. The program was expanded in the 2020–21 State Budget to include an additional eight workers to help meet demand and provide gender specific services to young Aboriginal girls accessing the program. Thirteen of the agencies are ACCOs and one is a mainstream community-based agency.
Aboriginal Early School Leavers Program	Delivered by ACCOs in Mildura and Northern Metro Melbourne, this program provides support to Aboriginal young people to re-engage with employment and education—addressing a key underlying driver of criminal justice contact.
Aboriginal Youth Support Service	Delivered by two ACCOs in Mildura and Northern Metro Melbourne, this service provides preventative, early intervention and prevention case management services for Aboriginal children and young people at risk of youth justice involvement, or subject to a Youth Justice Order. In addition, an ACCO delivers the Youth Support Service (YSS) in the Shepparton and Hume regions. The YSS is offered to all young people (Aboriginal and non-Aboriginal) in contact with or at risk of contact with the justice system.
Bramung Jaarn delivered by Dardi Munwurro	This program seeks to engage and empower young Aboriginal men aged 10 to 18 years through cultural connection and positive role modelling. The program aims to support young men to heal and build resilience, with the aim of diverting them from the criminal justice system.
Dungulayin Mileka Massive Murray Paddle	Auspiced through the Victorian Aboriginal Community Services Associated Limited (VACSAL), this initiative extends on the existing event by offering Aboriginal young people the opportunity to engage in coaching, leadership, and relationship-building activities. The program facilitates engagement between young people and police and provides a safe place to discuss challenges facing the community, lifestyle choices and building resilience and understanding. The program is supported by established referral pathways from the justice and ACCO sector.
Koori Court Advice Worker	Based in Northern Metro Melbourne, the Koori Court Advice worker is a specialist role that provides court advice and support to Aboriginal children and young people through a culturally based approach with a commitment to diversion, rehabilitation and re-integration into the community.
The Children’s Court Youth Diversion (CCYD) service	<p>CCYD service provides an opportunity for young people appearing before the criminal division of the Children’s Court to:</p> <ul style="list-style-type: none"> • accept responsibility for their actions and understand any harm caused • complete a diversion plan • have the charge or charges discharged, on successful completion of the diversion plan and restrict the release of their criminal history. <p>In 2020–21, 1,166 total diversions were overseen by CCYD coordinators. Aboriginal young people were slightly under-represented in this program; 12 per cent of diversions ordered were for children and young people who identified as Aboriginal whereas Aboriginal young people made up 14 per cent of the broader youth justice cohort during the same period.</p>

INITIATIVE	OVERVIEW
Youth Justice Group Conferencing (YJGC)	YJGC is a court-ordered, pre-sentence process, based on restorative justice principles. YJGC aims to increase the young person's understanding of the impact of their offending on the victim, their family and/or significant others, and the community. In 2020–21, 123 Youth Justice Group Conferences were held.
The Youth Support Service (YSS)	The YSS provides a targeted, early intervention program for young people who are at early points of contact with police and the youth justice system. The YSS aims to divert young people from further contact with the justice system through voluntary, short-term, community-based interventions. In 2020–21, 1,216 young people were supported by the YSS.
Aboriginal Liaison Officers (ALO)	ALOs are DJCS staff located in Youth Justice facilities. They work in partnership with Community Based Aboriginal Youth Justice Program workers to ensure culturally appropriate transition support is provided to Aboriginal young people exiting custody settings back into the community. With the consent of the young person, the ALO will contact their family and maintain communication with them throughout the young person's time in custody.
Aboriginal Focus Team	Based in the East Metro region, the Aboriginal Focus team provides intensive case management for Aboriginal children and young people through culturally embedded supports and ensures young people are supported to maintain and strengthen their cultural needs.
Multi Systemic Therapy (MST) and Functional Family Therapy (FFT)	MST and FFT are intensive, evidence-based programs that work with the whole household or family unit to address a young person's behaviour and reduce offending. Both programs use an assertive outreach model, in which practitioners visit the young person and their family in their home, including after hours. This program is available to Aboriginal and non-Aboriginal children and young people. In 2020–21, 55 families received intensive family support through FFT and MST.

Further initiatives under development through the Regional Aboriginal Justice Advisory Committee (RAJAC) Implementation Fund projects are included below. The RAJAC implementation funding stream is designed to support culturally appropriate place-based programs for Aboriginal children and young people to promote cultural strengthening, health and wellbeing and pro-social engagement to reduce the risk of contact with the justice system.²

TABLE 2: Further initiatives under development through the Regional Aboriginal Justice Advisory Committee Implementation Fund

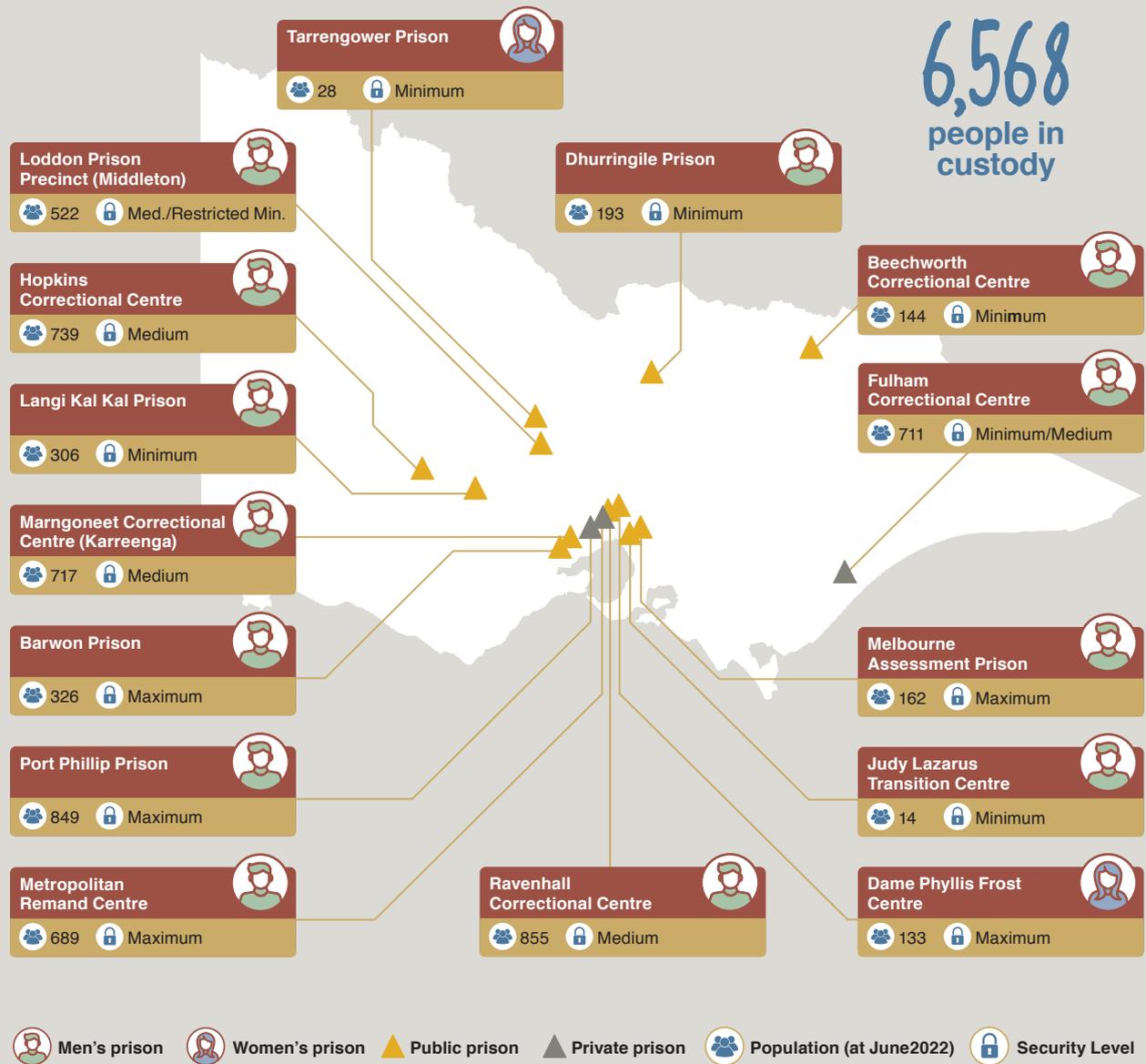
PROJECT	DESCRIPTION
Youth Group Program and Coordinator	The program works with Elders to deliver after school and holiday youth programs to support cultural and community connection. The program is based in the West Metropolitan region, supported by Kolling Wada-Ngal and Kirrip Aboriginal Corporation (working in partnership).
Youth Pathways Program and Program Worker	The program supports young people aged 16 to 25 with educational and employment pathways. The program includes capacity building and activities which promote cultural connection. The program will be delivered in the East Metropolitan region by Mullum Mullum.
Employment of Youth Community Development Officer and Youth Trainee program	The trainee program provides vocational and other training. The program will be delivered in the South Metropolitan region by Casey Gathering Place with support from City of Casey.
Aboriginal Youth Intervention Cultural Space Project (legal and holistic support)	For young people and their families in East Gippsland, this program will be delivered by the Victorian Aboriginal Legal Service.
Youth Drop-in Centre	The program provides a range of holistic supports, warm referral processes and cultural activities. The program will be delivered in Loddon Mallee by Mallee District Aboriginal Service in partnership with Sunraysia Community Health, the Salvation Army and Victoria Police.
Youth Program	The program supports youth engagement on self-determined education, justice and action committees. This program will be delivered in Barwon South West by the Koorie Youth Council in partnership with Wathaurong Aboriginal Co-Operative, Gunditjmarra Aboriginal Cooperative, and Windamara Aboriginal Cooperative.
Yalka Yakapna Woka	This program facilitates connection to Country, culture and family activities for children aged 8 to 17 and their families. It seeks to promote early identification of at-risk young people and to link them to positive programs that enhance wellness and cultural connection.
Yallum Yallum Gariwerd Council Program	This program, delivered by Goolum Goolum for the Grampians region, builds cultural connection through connecting young people with Elders. The program has established referral pathways with Victoria Police, courts, and the regional justice and health service sector.

Endnotes

1. Department of Justice and Community Safety, *Agency Response to the Yoorook Justice Commission*, 36–37 [122], produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.
2. Department of Justice and Community Safety, *Agency Response to the Yoorook Justice Commission*, 38 [123], produced by the State of Victoria in response to the Commission's Notice to Produce dated 15 March 2023.

APPENDIX F:

Victoria's adult custodial corrections system



Source: Corrections Victoria, Monthly Prisoner and Offender Statistics (June 2022)



www.yoorrookjusticecommission.org.au